2023 Post Publication Update
for

FEDERAL STANDARDS OF REVIEW*

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*Derived from HARRY T. EDWARDS & LINDA A. ELLIOTT, FEDERAL STANDARDS OF REVIEW: REVIEW OF DISTRICT COURT DECISIONS AND AGENCY ACTIONS, 3D (2018).

Preface to the *Post Publication Update*

Beginning in 2007, through three editions, Linda Elliott and I co-authored books on the standards governing judicial review of district court decisions and agency actions. The third edition was published in 2018. *See* HARRY T. EDWARDS & LINDA A. ELLIOTT, FEDERAL STANDARDS OF REVIEW: DISTRICT COURT DECISIONS AND AGENCY ACTIONS, 3D (Thomson Reuters 2018). However, due to personal circumstances and other commitments, we decided not to produce any further editions of the book. And we have no interest in publishing yearly "supplements" because, in our view, supplements are not an effective way to keep readers up to date with the materials covered in the book. However, I prefer not to squander the countless hours of work that went into producing FEDERAL STANDARDS OF REVIEW. Therefore, I have resolved to put together a yearly POST PUBLICATION UPDATE. The 2023 UPDATE is my third such effort.

As is clear in the UPDATE, the discussion of new developments in the law has been integrated with materials that were once a part of the 2018 edition of FEDERAL STANDARDS OF REVIEW. Several parts have been completely rewritten. In addition, a new Index and a new Table of Cases have been created. These materials will be updated each year in a fully integrated form. The UPDATE is not for sale. The materials are strictly for research, education, and teaching. Nothing in the UPDATE is meant to be a definitive statement of the law. The UPDATE is merely a resource for anyone with an interest in standards of review.

The 2023 UPDATE includes noteworthy developments in the law since the release of the 2022 UPDATE. This 2023 UPDATE includes a new chapter on the Major Questions Doctrine. Whenever possible, the UPDATE highlights seminal Supreme Court decisions to give meaning to the applicable standards of review. When important issues have not been addressed by the Supreme Court, the UPDATE may reference circuit decisions to identify the prevalent norms. The UPDATE does not detail every circuit split, however, because the aim is to stay focused on the "big picture." It will be up to readers to research precisely how a challenge with respect to a particular issue is reviewed in different circuits. I hope that this and future UPDATES will remain useful.

Harry T. Edwards

Acknowledgments

I am very grateful to Linda Elliott, with whom I worked to co-author the three published editions of FEDERAL STANDARDS OF REVIEW. This POST PUBLICATION UPDATE, and those that will follow it, would not be possible without Linda's sterling past contributions to this project. And Linda and I remain grateful to Thomson Reuters for their support in publishing the three editions of FEDERAL STANDARDS OF REVIEW.

I offer my most sincere thanks to Samantha Osaki and Quinn Zhang for their help with the research, drafting, cite-checking, and proofreading that was required to complete this 2023 POST PUBLICATION UPDATE. Thanks also to Anne Deng and Priyanka Menon for their help with cite-checking and proofreading.

Finally, I am most grateful to Alva Hurd, who worked very hard to pull together the pieces. The 2023 POST PUBLICATION UPDATE could not have been produced without her assistance.

Harry T. Edwards

About the Author of the Post Publication Edition

Harry T. Edwards is a Senior Circuit Judge and Chief Judge Emeritus of the United States Court of Appeals for the D.C. Circuit in Washington, DC, where he has served since 1980. He is also a Professor of Law at the NYU School of Law, where he has been a member of the faculty since 1990. Before joining the court, Judge Edwards practiced law in Chicago, Illinois; he was then a tenured professor of law at the University of Michigan Law School and Harvard Law School. He has taught part-time at a number of law schools, including the University of Michigan, Harvard, Duke, the University of Pennsylvania, Georgetown, and the University of California Irvine. He has co-authored five books and published numerous articles on judicial decision making, judicial process, federalism, legal education, legal ethics, judicial administration, forensic science and the law, labor law, equal employment opportunity, labor arbitration, higher education law, and alternative dispute resolution.

Editorial Notes

The UPDATE follows certain stylistic conventions to allow readers to digest the material presented with relative ease.

There are no footnotes—all case citations are included in the text. Many internal citations and quotations have been eliminated from quoted material, and this is not indicated in the text. When internal quotations and citations are provided, it is for the purpose of bringing seminal or otherwise informative cases to the readers' attentions. Generally, for ease of reading, all modifications of quoted material that appeared in the original texts are eliminated. In some instances, however, original italicization in quoted material has been retained where it is meant to indicate emphasis. This is indicated with a parenthetical stating "emphasis in original."

To minimize the search for full case names and citations, each alphabetical subchapter includes the full citation to a decision the first time it is presented as part of a text discussion, as well as the first time it is cited.

Because of the nature of the UPDATE, separate or concurring opinions are rarely cited or discussed; and the name of the writing justices or judges are only rarely highlighted. The UPDATE focuses instead on the principles emanating from the case law.

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REVIEW OF DISTRICT COURT DECISIONS

Part One: Review of District Court Decisions

Chapter I. The Fundamentals: Constitutional Considerations, the Four Principal Standards of Review, and the Fact/Law Paradigm

The four principal standards describing the degree of scrutiny with which federal appellate courts examine district court decisions—generally characterized as *de novo*, clearly erroneous, abuse of discretion, and plain error or exceptional circumstances review—are probably best understood as legislative and common-law allocations of decisional authority between trial and appellate judges. With respect to the first three standards, which one governs consideration of any particular appellate claim is, in the broadest sense, determined pursuant to the "fact/law" paradigm, a model of decisionmaking derived from the belief that trial judges are better positioned to decide questions of fact, while the appellate bench is better suited to resolve questions of law. The plain error and exceptional circumstances standards generally supplant the first three review standards when a party raises an issue for the first time on appeal and reflect legislative and judicial mandates giving effect to notions of fair play in litigation and economy in the use of judicial resources.

Wholly apart from these considerations, however, constitutional mandates pertaining to the decisionmaking authority vested in juries, the guarantee of due process of law, and the bar against twice being tried for the same criminal offense, significantly define appellate scrutiny of certain claims of trial-level error. Before discussing the four principal standards and the fact/law paradigm informing them, the effect of each of these constitutional provisions on appellate review is briefly summarized.

A. Constitutional Considerations

In the criminal context, appellate review of not guilty verdicts is altogether barred by the Double Jeopardy Clause. *See United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977). And when a jury renders a guilty verdict, appellate review of the underlying factual findings, as well as the jury's application of the law to those facts, is largely defined by the Trial by Jury Clauses of the Sixth Amendment and Article III, Section 2 of the Constitution, as well as by the Constitution's due process guarantee. Thus, with a few exceptions largely limited to guilty verdicts implicating First Amendment free speech issues, *see, e.g.*, *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 503–10 (1984) (citing precedent supporting independent appellate review of portions of criminal verdicts implicating First Amendment free speech principles), a jury's finding of guilt is subject to only very limited review. Assuming no procedural or evidentiary error, a jury's findings of fact and its application of the governing law to those facts are reviewed only to ensure that a defendant's due process rights have not been violated by a verdict based on evidence from which no reasonable fact-finder could infer guilt beyond a reasonable doubt. *See Jackson v. Virginia*, 443 U.S. 307, 314–21 (1979); s*ee also* Chapter III.D.1, *infra*.

In civil cases, the Seventh Amendment's Trial by Jury and Reexamination Clauses generally protect the common-law authority of a jury to find the facts and apply the law to those facts to reach a verdict. *See Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 376–78 (1996); *Balt. & Carolina Line, Inc. v. Redman*, 295 U.S. 654, 656–58 (1935). Pursuant to these constitutional strictures, judicial interference with a jury's decisionmaking authority is, with few exceptions, constrained to the legal question of whether "the facts are sufficiently clear that the law requires a particular result." *Weisgram v. Marley Co.*, 528 U.S. 440, 448 (2000). In other words, assuming no procedural or evidentiary error, challenges to a civil jury's authority to find the facts and apply the governing law to those facts generally are limited to the question of whether, giving the benefit of all reasonable inferences to the nonmoving party, any reasonable juror could find for that party on the basis of the properly-admitted evidence. *See Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 149–51 (2000).

The scope of the Seventh Amendment's protection is largely, though not exclusively, determined by English common law at the time of the Amendment's adoption. *See Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 432–36 (1996); *Balt. & Carolina Line*, 295 U.S. at 656–58. Exceptions to the Seventh Amendment's prohibition on plenary review of jury findings falling within its scope are largely, but not always, confined to verdicts implicating First Amendment free speech issues. *See, e.g.*, *Bose*, 466 U.S. at 508–09 & n.27; *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 688–89 (1989); *see also Cooper Indus., Inc. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 437 (2001) (holding that in the context of a due process challenge, a jury's punitive damage award is not a "fact" protected by the Seventh Amendment).

B. The Standards Governing Review of Preserved Claims of Error, Plain Error and Exceptional Circumstances Review of Unpreserved Claims, and Review of Jurisdictional Issues

As noted, apart from the described constitutional mandates, appellate review standards are probably most appropriately analyzed as legislative and common-law allocations of decisionmaking authority between trial and appellate judges. In determining the degree to which circuit courts will defer to the decisions of district judges, legislators and the judiciary routinely refer to four broad types of review involving different degrees of appellate scrutiny. Three—*de novo*, clearly erroneous, and abuse of discretion—apply to claims of error that were properly preserved before the trial court. The fourth type of review—encompassing the plain error and exceptional circumstances standards, as well as circuit-specific hybrids of the two—generally governs unpreserved or "forfeited" claims of error. (Appellate opinions sometimes refer to review under any of the standards comprising the fourth category of review as manifest injustice or miscarriage of justice review.)

Appellate courts review preserved challenges to conclusions of law *de novo*, affording no deference to the trial judge's decision. *See, e.g.*, *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938,

947–48 (1995). *See generally* Chapter III, *infra*. In contrast, appellate courts afford great deference to a trial judge's findings of fact and review preserved challenges to those findings only for clear error. This clear error standard also applies to unpreserved challenges to the sufficiency of evidence in civil bench trials. *See* Fed. R. Civ. P. 52(a)(5). Review of preserved challenges to a trial judge's discretionary decisions—exemplified, but not limited to, the many procedural and evidentiary decisions that trial judges must make—is variable. The actual degree of scrutiny with which any particular discretionary decision is reviewed depends upon the extent to which a trial judge's decisionmaking authority is circumscribed by the Constitution, statutes, rules, or case precedent. *See, e.g.*, *United States v. Taylor*, 487 U.S. 326, 335–43 (1988) (considering the bounds of a trial judge's discretion to choose between dismissal with or without prejudice to remedy a violation of the Speedy Trial Act). *See generally* Chapter V, *infra*.

If error is found under one of these three standards, the availability of a remedy will, with few exceptions, be determined by the harmless error doctrine. This doctrine requires that appellate judgments be made "without regard to errors or defects which do not affect the substantial rights of the parties." 28 U.S.C. § 2111. Thus, although an appellate court presented with a properly preserved issue may determine that a legal, factual, or discretionary error was committed, the error must be disregarded if it is harmless. *See generally* Chapter VII, *infra*.

In criminal proceedings, plain error review often, but not always, supplants *de novo*, clearly erroneous, and abuse of discretion review when a party forfeits an issue by failing to preserve it properly before the trial court. The rules codifying this standard allow appellate courts to consider plain errors affecting the substantial rights of a defendant though they were not brought to the trial court's attention. *See, e.g.*, Fed. R. Crim. P. 52(b); Fed. R. Evid. 103(e). The plain error standard thus "defines a single category of forfeited-but-reversible error," *United States v. Olano*, 507 U.S. 725, 732 (1993), which, while providing an avenue for the appeal of unpreserved claims, places a heavy burden on the appealing party to demonstrate not only that an error is "obvious" and "affect[ed]" his or her "substantial rights," but also that it "seriously affects the fairness, integrity, or public reputation of judicial proceedings," *Johnson v. United States*, 520 U.S. 461, 466–67 (1997). *See generally* Chapter VIII.A, *infra*.

In civil proceedings, forfeited issues and arguments may be reviewed under the plain error test articulated in *United States v. Olano*, 507 U.S. 725, 732 (1993), the exceptional circumstances framework referenced in *Singleton v. Wulff*, 428 U.S. 106, 120 (1976), or some hybrid of the two. Which standard controls depends on the issue raised and the circuit in which an appellant seeks review. If the plain error standard largely controls, a remedy for unpreserved error will generally be just as difficult to obtain as in a criminal case and, in the several circuits applying a more stringent variation of the plain error test, more difficult. *See, e.g.*, *Shcherbakovskiy v. Da Capo Al Fine, Ltd.*, 490 F.3d 130, 142 (2d Cir. 2007) (applying a "fundamental error" standard, requiring an error that is "so serious and flagrant that it goes to the very integrity of the trial," and requiring "even more than is necessary to meet the plain error standard"). If the exceptional circumstances framework controls, review may be closely akin to plain error review, or, if the forfeited issue is purely legal or review is sought based on new law (and the factual record is adequately developed), *de novo* review will often be available without regard to considerations articulated

in the four-part plain error test. Hybrid versions of the plain error and exceptional circumstances standards generally make it more difficult to obtain a remedy than would be the case under either standard alone. *See generally* Chapter VIII.B, *infra*.

There are two principal exceptions to the standards governing review of unpreserved error in civil cases. The first involves challenges to the sufficiency of the evidence supporting factual findings on which judgments in bench trials rest. A party may challenge such findings under the clearly erroneous standard regardless of whether she "requested findings, objected to them, moved to amend them, or moved for partial findings." Fed. R. Civ. P. 52(a)(5). *See* Chapter IV, *infra* (discussing review of civil bench trials). The second pertains to challenges to the sufficiency of the evidence supporting civil verdicts in jury trials. Plain error and exceptional circumstances review are irrelevant to such challenges, since absent a properly filed and renewed motion for a judgment as a matter of law, *see* Fed. R. Civ. P. 50, appellate courts are barred from considering them. *See Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc.*, 546 U.S. 394, 400–01, 404 (2006). *See generally* Chapter III.C, *infra* (discussing Rule 50 sufficiency challenges).

With one principal exception, matters that are waived before a trial court (meaning intentionally relinquished or abandoned rather than forfeited), *see Olano*, 507 U.S. at 733, are generally not subject to appellate review. The exception pertains to threshold jurisdictional issues implicating the subject matter, case-or-controversy, and standing requirements derived from Article III of the Constitution. These issues are always subject to *de novo* review, and the parties to a suit cannot forfeit them by failing to bring them to the attention of the trial court or waive them through deliberate abandonment. Indeed, because federal courts are empowered to hear only those matters falling within the judicial power defined in Article III and entrusted to them by Congress, when an issue pertaining to that power comes to the attention of an appellate court, the court is obliged to raise it on its own motion. *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986).

C. The Fact/Law Paradigm and Its Limitations

The principal paradigm determining how closely an appellate court will scrutinize a trial judge's decision is easily stated: findings of fact are subject to very limited review and conclusions of law are subject to *de novo* review. This simple, two-part model derives from the well-established belief that given "the respective institutional advantages of trial and appellate courts," legal interpretation is best performed at the appellate level and fact finding at the trial level. *Salve Regina Coll. v. Russell*, 499 U.S. 225, 231–33 (1991). To explain how this model operates in assigning *de novo* or deferential review to a particular appellate challenge, it is first necessary to define its components.

Laws are rules or modes of conduct that are prescribed or formally recognized as binding by a legislature, court, or some other controlling authority. They are the governing principles pursuant to which a judge or jury determines the relevance and significance of historical facts,

resolves subsidiary issues, and reaches the ultimate judgment in a case. Laws may be articulated in great detail, or they may consist of vaguely normative concepts like "reasonableness."

Historical facts, sometimes referred to as "basic" or "primary" facts, *Thompson v. Keohane*, 516 U.S. 99, 109–10 (1995), are proved, at least to some significant degree of probability, by inferences from evidence. For the most part, laws are not implicated in inferring such facts. Rather, subject only to certain very loose decisional constraints, historical facts are derived from the application of logic and human experience to the received physical, documentary, and testimonial evidence. *See Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 501 n.17 (1984). *See generally* RUGGERO J. ALDISERT, THE JUDICIAL PROCESS: TEXT, MATERIALS & CASES 678–79 (2d ed. 1996).

Many decisions by district judges are readily identified using these definitions and consequently fit squarely within the fact/law paradigm. Thus, for example, when a trial judge identifies the legal precepts by which a question will be decided, an appellate court will easily be able to characterize the trial judge's statement of those precepts as conclusions of "law" subject to *de novo* review. Similarly, when a judge articulates the historical facts to which he or she will apply the controlling law, those statements are readily identified as findings of "fact" subject to clearly erroneous review.

In addition, when a law is defined in significant detail, trial-level conclusions achieved pursuant to that law generally are easily characterized by the fact/law paradigm. In such instances, a trial judge reaches a decision pursuant to a straightforward comparison of the historical facts found to the specifically articulated requirements of the law. On appeal, a party may claim that the judge (1) made findings of historical fact that are not supported by the evidence, (2) applied the wrong law, (3) inaccurately characterized the correct law, or (4) incorrectly measured the historical facts against the correct law. The determination arising out of the first judicial action is easily characterized as "fact" and the determinations arising out of the last three actions as "law." The fact/law paradigm thus functions as an accurate proxy for ascertaining whether the trial or appellate court would better perform the decisionmaking task implicated on appeal.

When, however, a controlling law is defined pursuant only to abstract legal norms or principles, trial-level decisionmaking necessarily involves more than a neat comparison of fact to law. It requires, instead, a nuanced assessment or characterization of the historical facts in light of the governing legal norms. In other words, when a legal principle is only abstractly defined, it serves not as a standard against which the historical facts can be measured, but rather as something more akin to a general guide for the exercise of considered judgment. The conclusions resulting from the exercise of this sort of judgment are referred to as "mixed finding[s] of law and fact," *Bose*, 466 U.S. at 501 & n.17, and, on appeal, are commonly characterized as "mixed question[s] of law and fact," *United States v. Gaudin*, 515 U.S. 506, 512 (1995); *accord Pullman-Standard v. Swint*, 456 U.S. 273, 289 & n.19 (1982). As the labels suggest, mixed findings or mixed questions generally defy ready categorization as either law or fact. Consequently, the fact/law paradigm falters as a method for determining whether appellate review should be *de novo* or

deferential.

Some simple hypothetical examples illustrate both how the fact/law paradigm operates to assign deferential or *de novo* review to many appellate issues and the limitations of the paradigm when it comes to appellate challenges to mixed findings.

1. Hypothetical Examples: The "FMSS" Cases

Assume that the fictitious Federal Monthly Stipend Statute (the "FMSS") states:

> An indigent person will receive a monthly stipend from the Benefits Agency if he or she appears in person at the benefits office to receive the stipend no later than the tenth day of the month in which benefits are sought. This appearance requirement will be waived only in the event of compelling, extenuating circumstances.
>
> Pursuant to this title, a putative claimant will have a cause of action for any stipend the agency improperly withholds. The district courts of the United States shall have jurisdiction over any civil action under this title, so long as a claimant files a complaint in district court within 180 days after being denied a benefit. The 180-day limitation is a mandatory jurisdictional requirement. In a civil action under this title, any party may demand a jury trial.

2. Within the Paradigm: Specifically Defined Laws and Historical Facts

Mary Doe, who is indigent and otherwise qualifies for a benefit stipend under the FMSS, claims that she was denied what she was due in February. The agency rejects her claim because, according to agency officials, Ms. Doe did not appear in person at the benefits office to collect her stipend on or before February 10. Ms. Doe files a complaint in district court within the 180-day jurisdictional limitation.

Assume that Ms. Doe requests a bench trial. Assume as well that in their arguments to the district judge, both parties present their views regarding the proper interpretation of the FMSS's appearance requirement. At the conclusion of the trial, the district judge enters judgment for the agency and issues findings of fact and conclusions of law describing the FMSS's appearance requirement and stating that Ms. Doe did not appear in the benefits office to collect her stipend until February 11.

Both of the judge's determinations are easily characterized under the fact/law paradigm and, consequently, the governing standards of appellate review are readily identifiable. Given the parties' arguments, the proper interpretation of the appearance requirement was clearly

preserved. Consequently, if Ms. Doe raises the issue on appeal, the appellate court will review the judge's articulation of that requirement *de novo* as a statement of law and will, if error is found, apply the harmless error doctrine to determine whether reversal is appropriate.

With respect to the judge's conclusion regarding the date of Ms. Doe's appearance, if Ms. Doe raises the issue on appeal, the appellate court will review this factual finding pursuant to the highly deferential clearly erroneous standard of Federal Rule of Civil Procedure 52 and will apply the harmless error doctrine to any error found. (Pursuant to Rule 52(a)(5), challenges to the sufficiency of the evidence supporting factual findings on which judgments in bench trials rest need not be preserved.)

Now assume that Ms. Doe demands a jury trial. Assume as well that the district judge instructs the jury on the FMSS's appearance requirement, and the jury renders a general verdict for the agency, implicitly determining that Ms. Doe did not appear in the benefits office on or before February 10.

Again, each of the determinations that might be appealed is easily characterized. The appellate court will review *de novo* a preserved claim that the trial judge's instruction did not accurately characterize the law and will apply the harmless error doctrine to any error found. If Ms. Doe moved for a judgment as a matter of law before the case was sent to the jury and properly renewed that motion after the verdict, the appellate court would also review *de novo* an appellate challenge to the sufficiency of the evidence supporting the verdict. Such a motion effectively converts what would otherwise have been a factual question, reserved to the jury by the Seventh Amendment, into a legal question regarding the sufficiency of the evidence supporting the verdict for the agency. *See Neely v. Martin K. Eby Constr. Co.*, 386 U.S. 317, 320–23 (1967). In resolving the motion, the trial judge, giving the benefit of all reasonable inferences to the agency, would have decided only whether, as a matter of law, the properly admitted evidence would allow any reasonable juror to find for the agency. *See Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 149–51 (2000). The appellate court, giving no deference to the trial judge's legal conclusion, would review the matter *de novo*, examining the record evidence under the same standard the trial judge applied. *See id.* at 151–54.

3. Still Within the Paradigm: Abstract Laws

Looking to the same hypothetical statute, assume now that at trial Ms. Doe's son testifies, without contradiction, that on February 11 he delivered to the agency a note from Ms. Doe indicating that she was unable to pick up her stipend because she was hospitalized.

- Suppose that the judge rules in a bench trial or instructs a jury that illness cannot be a "compelling, extenuating circumstance" unless a claimant offers medical evidence to prove that she could not meet the appearance requirement. This is a statement of law.

- Suppose that the judge rules in a bench trial or instructs a jury that a claimant can preserve her right to receive a stipend if she gives the agency "timely notice" of compelling, extenuating circumstances. This is also a statement of law.

- And suppose that the judge, relying on the normative standard of fairness, rules in a bench trial or instructs a jury that "timely notice" means notice that provides "fair warning in light of all of the circumstances." This, too, is a statement of law.

Each of these determinations constitutes a judicial gloss on the FMSS that easily falls on the law side of the fact/law paradigm. In contrast to the trial judge's articulations of the FMSS's appearance requirement referred to in the first two hypotheticals, these statements do not parrot the literal text of the statute. Nevertheless, they articulate controlling legal principles defining the relevance of historical facts to the decisionmaking process by which Ms. Doe's claim will be resolved.

If challenges to these statements of law are properly preserved, they will be reviewed *de novo*. If the losing party in a jury trial failed to object before the trial court, Federal Rule of Civil Procedure 51(d)(2) would allow that party to seek plain error review of the instructions. If the losing party in a bench trial failed to preserve the issue, the judge's characterizations of the law would be reviewed under either the plain error or exceptional circumstances standards. Under all of these standards, the appellate court will assess the accuracy of the statements by reference to the FMSS's language and structure, the case law interpreting it and analogous statutes, and any compelling legislative history.

If review is *de novo* and the appellate court finds error in this case, the error is unlikely to be harmless, since each of these statements of law guides the decisionmaker in determining whether the agency acted improperly in failing to waive the appearance requirement. If, in the jury trial, the claim was not properly preserved, the multipart test for determining whether any potential error is plain and merits reversal will prove a significantly more difficult hurdle for Ms. Doe. If the claim was not preserved in the bench trial and if the circuit in which Ms. Doe brought her suit applies the exceptional circumstances framework (rather than the plain error) to forfeited challenges to statements of law, an appellate remedy may well be available if (1) the trial judge's statement of law was clearly wrong and application of the correct law would likely result in a victory for Ms. Doe, or (2) it is unclear what the law is and the question of "timely notice" in the context of the FMSS is a matter of such widespread concern that the public interest would be served by its resolution. *See* Chapter VIII.B, *infra* (discussing the plain error and exceptional circumstances standards for unpreserved claims of error in civil cases).

4. The Limits of the Paradigm: Mixed Questions of Law and Fact

The definition of "timely notice" articulated by the judge in the previous hypothetical exemplifies the sort of abstract legal norm application of which results in a mixed finding at the

trial level and a mixed question of law and fact on appeal. To illustrate, assume that during a bench trial Ms. Doe's son testifies that on February 11 he delivered a note to the agency indicating that his mother could not pick up her February stipend because she was hospitalized. But assume also that he testifies, without contradiction, that he provided the agency with a copy of medical records demonstrating that Ms. Doe had been hospitalized since before February 1. Assume as well that copies of the medical records were properly admitted into evidence.

During the trial, the judge describes his view of the FMSS and relevant common-law precedent, stating:

- Hospitalization is always a compelling, extenuating circumstance.

- A claimant can preserve her right to receive a stipend if she gives "timely notice" of hospitalization.

- "Timely notice" means notice that gives "fair warning in light of all the circumstances."

At the conclusion of the trial, the judge renders judgment for Ms. Doe and issues findings of fact and conclusions of law incorporating his originally-expressed views of the FMSS and, in addition, finds that:

- Ms. Doe was hospitalized during the first ten days of February.

- Ms. Doe's son delivered the note and medical records on February 11.

- In light of the fact that Ms. Doe's note and supporting medical records were delivered to the agency only one day after the tenth-of-the-month appearance deadline, Ms. Doe gave "fair warning" to the agency that was "timely."

The standards of review applicable to all but the last of the trial judge's six determinations are easily identified pursuant to the fact/law paradigm. The first three statements are conclusions of law describing principles governing resolution of Ms. Doe's case. Challenges to these statements will be reviewed *de novo* if properly preserved. The fourth and fifth statements are findings of historical fact based on documentary evidence, as well as the trial judge's assessment of the credibility of Ms. Doe's son. As such, they are subject to clearly erroneous review under Federal Rule of Civil Procedure 52.

The proper characterization of the last conclusion is more difficult. This is a classic mixed finding arising from the application of an abstractly-defined legal standard—timely notice—to the facts of a particular case. It is not intuitively obvious whether the trial court's conclusion that the actions of Ms. Doe's son gave fair warning to the agency, and thus amounted to timely notice, is a finding of fact or a conclusion of law. In other words, this conclusion cannot be readily characterized pursuant to the fact/law paradigm. With respect to such mixed questions of law and fact, the functional considerations from which the fact/law paradigm is derived determine

whether the question is best left largely to the trial court through deferential review or is more appropriately decided by the appellate bench pursuant to *de novo* review.

D. The Theory Informing the Paradigm: The Functional Approach

Legal principles that result in mixed findings at the trial level and mixed questions on appeal are generally broad, often fluid, sometimes common sense concepts that cannot be "reduced to a neat set of legal rules." *Ornelas v. United States*, 517 U.S. 690, 695–96 (1996); *see also Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 686 (1989). The content of these principles is rarely revealed only by reference to a literal text. Rather, these rules generally acquire meaning, over time, through judicial application to the circumstances of particular cases. *See Harte-Hanks*, 491 U.S. at 686; *see also, e.g.*, *City of Monterey v. Del Monte Dunes at Monterey*, *Ltd.*, 526 U.S. 687, 720–21 (1999) (substantial advancement of legitimate public interests as defined by regulatory takings doctrine); *Ornelas*, 517 U.S. at 697 ("reasonable suspicion" to stop and "probable cause" to conduct a warrantless car search); *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 401–02 (1990) (sanctions under Federal Rule of Civil Procedure 11); *Thornburg v. Gingles*, 478 U.S. 30, 77–79 (1986) (vote dilution under Section 2 of the Voting Rights Act); *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 501–03 (1984) (actual malice).

Such fluid principles can be more precisely defined through legislative enactment and, as noted, may gain meaning through repeated judicial interpretation. *See, e.g.*, *Pierce v. Underwood*, 487 U.S. 552, 562 (1988) (quoting Professor Rosenberg's description of how, over the years, judicial decisions may allow a "formless problem to take shape … and the contours of a guiding principle to emerge"). Thus, for example, the facts or reasoning of a series of judicial decisions might suggest that under the hypothetical FMSS, notice is almost always found to constitute fair warning (and is therefore timely) if it is given on or before the statute's tenth-of-the-month appearance deadline, but rarely constitutes fair warning if it is given after that deadline. Such a body of precedent could be viewed as creating a relatively defined, binding legal standard. Application of the timeliness norm might thereby be reduced to something akin to the same straightforward comparison of fact to law required by the FMSS's tenth-of-the-month appearance requirement.

When, however, fluid principles have not been or cannot be specifically defined, appellate courts often look to the functional considerations from which the fact/law paradigm is derived to determine the appropriate standard of review. "[T]he standard of review for a mixed question all depends … on whether answering it entails primarily legal or factual work." *Google LLC v. Oracle Am., Inc.*, 141 S. Ct. 1183, 1999 (2021). In other words, appellate courts look to which judicial actor is better suited, "as a matter of the sound administration of justice," to decide the matter. *Miller v. Fenton*, 474 U.S. 104, 114 (1985).

Pursuant to this functional analysis, deferential review is favored when "it appears that the district court is 'better positioned' than the appellate court to decide the issue in question." *Salve*

Regina Coll. v. Russell, 499 U.S. 225, 233 (1991) (quoting *Miller*, 474 U.S. at 114). "When, for example, the issue involves the credibility of witnesses and therefore turns largely on an evaluation of demeanor," deferential review is favored. *Miller*, 474 U.S. at 114; *see also id.* at 116–17. In such situations, "there are compelling … [reasons] for leaving the process of applying law to fact to the trial court and according its determinations presumptive weight." *Id.* at 114. Deferential review is also favored when "probing appellate scrutiny will not contribute to the clarity of legal doctrine," *Salve Regina Coll.*, 499 U.S. at 233, because, for example, the question at issue involves "multifarious, fleeting, special, narrow facts that utterly resist generalization—at least, for the time being," *Pierce*, 487 U.S. at 561–62.

De novo review is favored when there is a perceived need for the appellate courts "to maintain control of, and to clarify, … legal principles." *Ornelas*, 517 U.S. at 697. Such a need is often recognized when the interests at issue are deemed too important to trust to the judgment of a single district judge constrained by "the logistical burdens" of the trial process, *Salve Regina Coll.*, 499 U.S. at 231, but rather are thought better addressed through the "reflective dialogue" and "collective judgment" characteristic of appellate courts, *id.* at 232. As the Supreme Court explained in *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485 (1984):

> A finding of fact in some cases is inseparable from the principles through which it was deduced. At some point, the reasoning by which a fact is "found" crosses the line between application of those ordinary principles of logic and common experience which are ordinarily entrusted to the finder of fact into the realm of a legal rule upon which the reviewing court must exercise its own independent judgment. Where the line is drawn varies according to the nature of the substantive law at issue. *Regarding certain largely factual questions in some areas of the law, the stakes—in terms of impact on future cases and future conduct—are too great to entrust them finally to the judgment of the trier of fact.*

Id. at 501 n.17.

The issue in *Bose* was whether a district judge's finding of "actual malice" pursuant to *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), should have been reviewed for clear error, as a finding of fact, or *de novo*, as a conclusion of law. The district judge found that the testimony of the defendant's key witness regarding the truthfulness of the disparaging statement at issue was not credible and that the plaintiff, Bose Corporation, had proved by clear and convincing evidence that the defendant had published the statement with knowledge that it was false, or with reckless disregard of its falsity. *Bose*, 466 U.S. at 490–91, 497–98.

On review, the Supreme Court first stated that the court of appeals had correctly declined to second-guess the trial judge's credibility findings. *Id.* at 500. "[C]redibility determinations are reviewed under the clearly-erroneous standard because the trier of fact has had the 'opportunity to observe the demeanor of the witnesses.'" *Harte-Hanks*, 491 U.S. at 688 (quoting *Bose*, 466

U.S. at 499–500).

With respect to the determination of "actual malice," however, the Court concluded that review should be *de novo*. *See Bose*, 466 U.S. at 514. The Court pointed to the common-law heritage of the actual malice rule, which assigns judges "an especially broad role … in applying it to specific factual situations." *Id.* at 502. The Court also emphasized that the content of the rule is "not revealed simply by its literal text, but rather is given meaning through the evolutionary process of common-law adjudication." *Id.* However, the linchpin of the Court's analysis was a detailed review of the case law demonstrating that "the constitutional values protected by the rule make it imperative that judges—and in some cases judges of [the Supreme] Court—make sure that it is correctly applied." *Id.*; *see also id.* at 503–11. As the opinion explained, the "Court's role in marking out the limits of … [constitutional] standard[s] through the process of case-by-case adjudication … has been vitally important in cases involving restrictions on the freedom of speech protected by the First Amendment." *Id.* at 503.

In *Miller v. Fenton*, 474 U.S. 104 (1985), the Court, citing *Bose*, again made clear that the perceived importance of the interests at issue can be a critical factor in determining that *de novo* review of a mixed question is appropriate. *Id*. at 113. The question before the *Miller* Court was whether a state court determination that a criminal defendant's confession was voluntary was an issue of fact, and thus entitled to a presumption of correctness under the then-controlling federal habeas statute, or a question of law subject to *de novo* review. *Id.* at 105–06. In resolving the issue, the Court first stated that "an unbroken line of cases, coming to [it] both on direct appeal and on review of applications to lower federal courts for a writ of habeas corpus, forecloses the … conclusion that the 'voluntariness' of a confession merits something less than independent federal consideration." *Id.* at 112.

The Court then turned to functional considerations to explain why, contrary to the circuit court's conclusion, recent Supreme Court decisions characterizing various issues as matters of fact for purposes of habeas review had not undermined the cited precedent. *Id.* It explained:

> At least in those instances in which Congress has not spoken and in which the issue falls somewhere between a pristine legal standard and a simple historical fact, the fact/law distinction at times has turned on a determination that, as a matter of the sound administration of justice, one judicial actor is better positioned than another to decide the issue in question. Where, for example, as with proof of actual malice in First Amendment libel cases, the relevant legal principle can be given meaning only through its application to the particular circumstances of a case, the Court has been reluctant to give the trier of fact's conclusions presumptive force and, in so doing, strip a federal appellate court of its primary function as an expositor of law.

Id. at 114.

Describing how such functional considerations supported its decision not "to abandon the … longstanding position that the ultimate question of the admissibility of a confession merits treatment as a legal inquiry requiring plenary federal review," *id.* at 115, the Court emphasized that, with respect to confessions coming from the states, it had "consistently looked to the Due Process Clause of the Fourteenth Amendment to test admissibility," *id.* at 116. As the Court explained:

> The locus of the right is significant because it reflects the … consistently held view that the admissibility of a confession turns as much on whether the techniques for extracting the statements, as applied to *this* suspect, are compatible with a system that presumes innocence and assures that a conviction will not be secured by inquisitorial means as on whether the defendant's will was in fact overborne.

Id. (emphasis in original). "This hybrid quality of the voluntariness inquiry, subsuming, as it does, a complex of values, itself militates against treating the question as one of simple historical fact." *Id.* In conclusion, the Court emphasized the role that *de novo* federal review plays in protecting constitutional rights when the prosecution secures a conviction through a defendant's own confession. *Id.* at 117–18.

The Court made clear, however, that *de novo* review of a mixed question is not inevitable whenever a constitutional right is at issue. When "the issue involves the credibility of witnesses and therefore turns largely on an evaluation of demeanor, there are compelling and familiar justifications for leaving the process of applying law to fact to the trial court." *Id.* at 114. It is "[p]rincipally for that reason," the Court observed, that "juror bias merits treatment as a 'factual issue' … notwithstanding the intimate connection between such determinations and the constitutional guarantee of an impartial jury." *Id.* at 114–15.

The Court again applied functional considerations to categorize a question as one of fact or law in *Merck Sharp & Dohme Corp. v. Albrecht*, 139 S. Ct. 1668 (2019). There, the Court held that a certain question—whether federal law preempts a state failure-to-warn claim because the Food and Drug Administration would have approved of a change to a drug's label—is a question of law for the court, rather than a question of fact for the jury. The Court explained that "judges are better suited than are juries to understand and to interpret agency decisions in light of the governing statutory and regulatory context." *Id.* at 1680. Moreover, entrusting the decision to judges would "produce greater uniformity among courts," which is particularly desirable in the context of determining the effect of agency actions. *Id.* Similarly, in *Google LLC v. Oracle America, Inc.*, 141 S. Ct. 1183 (2021), the Court held that whether facts found by the trial court amount to a "fair use" under copyright law is a legal question that an appellate court must review *de novo*, because the determination "involves legal work" and the resulting legal interpretations "provide general guidance for future cases." *Id.* at 1999–2000.

One important reminder—when courts determine that a particular mixed question of law and fact should be treated as a question of law and reviewed *de novo*, subsidiary findings of fact

are properly reviewed under the clearly erroneous standard of review. Thus in *Bose*, whether actual malice was present was reviewed *de novo*, but the credibility determinations supporting the finding of actual malice were subject to clearly erroneous review. 466 U.S. at 499–500, 514. The Supreme Court has taken a similar approach with respect to the mixed question of how patent claims should be construed. In *Markman v. Westview Instruments, Inc.*, 517 U.S. 370 (1996), the Court determined that because patents are written instruments, their ultimate interpretation (like the interpretation of other legal instruments) should be reviewed as a question of law. *Id.* at 391. The Court subsequently clarified, however, that patent claim construction often rests on subsidiary factual findings—for instance, what a given term of art would mean to a person of ordinary skill in the art at the time of invention. *See Teva Pharm. USA, Inc. v. Sandoz, Inc.*, 574 U.S. 318, 325–27, 332 (2015). These subsidiary findings of fact, the Court held, must be reviewed under the clearly erroneous standard, even though they may effectively dispose of the ultimate legal question of how to interpret a patent. *Id.* at 332–33.

In sum, the label "mixed question of law and fact" does not imply a particular standard of review. It is descriptive, not normative. It simply alerts a reviewing court that the level of deference owed to a trial judge's decision cannot be readily identified pursuant to the fact/law paradigm. Thus, in addressing mixed questions that have not been typed law or fact by controlling precedent, a reviewing court will have to consider the nature of the decisional process implicated in light of the respective institutional strengths of the trial and appellate courts to determine which court is better suited to make the decision and, consequently, whether *de novo* or deferential review would better serve the fair administration of justice.

E. Discretionary Decisions: Mixed Questions of Law and Fact and the Abuse of Discretion Standard of Review

A decision committed to the district court's discretion is a decision with respect to which Congress or the courts have decided there is no single correct answer, but rather a range of acceptable choices best determined by the judicial actor most thoroughly enmeshed in the fact-finding processes of trial. *See Highmark Inc. v. Allcare Health Mgmt. Sys.*, 572 U.S. 559, 563–64 (2014). Consequently, the legal rules governing discretionary decisions are, almost by definition, broadly-defined, fluid concepts. The appeal of a discretionary decision thus can fairly be characterized as raising a mixed question that is reviewed under the variable abuse of discretion standard.

If neither a statute nor a controlling judicial precedent clearly indicates that the application of an abstract legal precept is committed to a trial court's discretion, an appellate court will be required to decide, as with many mixed questions, which court is better suited to resolve the issue. If, in applying this functional approach, a court declines to review *de novo*, it will apply either the abuse of discretion or clearly erroneous standard. Both standards are deferential, but, as explained in subsequent chapters, the degree of appellate scrutiny allowed under abuse of discretion review is more variable than that permitted under clearly erroneous review. *See*

Chapter II, *infra* (discussing clearly erroneous review); Chapter V, *infra* (discussing abuse of discretion review).

Cooter & Gell v. Hartmarx Corp., 496 U.S. 384 (1990), is a good example of an opinion in which the Supreme Court looked to the relevant statute, precedent, and the respective institutional capacities of the trial and appellate courts to determine whether *de novo* or abuse of discretion review should apply. In that case, the Court addressed several challenges to a district judge's decision to impose sanctions under the then-existing version of Rule 11 of the Federal Rules of Civil Procedure. *Id.* at 388, 390. Under the Rule, an attorney's signature on a pleading constituted a certification that she had read it and, based on "reasonable inquiry," believed it to be well-grounded in fact and legally tenable. *Id.* at 391–93. The district court found that the allegations in petitioner's complaint were "completely baseless" and imposed sanctions. The court of appeals affirmed. *Id.* at 389–90.

Addressing petitioner's claim "that the Court of Appeals did not apply a sufficiently rigorous standard in reviewing the District Court's" decision, *id.* at 399, the Supreme Court first noted that Rule 11 determinations involve three types of considerations:

> The court must consider factual questions regarding the nature of the attorney's prefiling inquiry and the factual basis of the pleading or other paper. Legal issues are raised in considering whether a pleading is warranted by existing law or a good faith argument for changing the law and whether the attorney's conduct violated Rule 11. Finally, the district court must exercise its discretion to tailor an appropriate sanction.

Id. Petitioners argued that findings of historical fact should be reviewed under "the clearly erroneous standard, the determination that counsel violated Rule 11 under a *de novo* standard, and the choice of sanction under an abuse-of-discretion standard." *Id*.

The Court initially acknowledged that "[n]o dispute exists that the appellate courts should review the district court's selection of a sanction under a deferential standard. In directing the district court to impose an 'appropriate' sanction, Rule 11 itself indicates that the district court is empowered to exercise its discretion." *Id.* at 400.

Citing the clearly erroneous standard of Federal Rule of Civil Procedure 52, the Court next explained that "the Circuits also agree that, in the absence of any language to the contrary in Rule 11, courts should adhere to their usual practice of reviewing the district court's findings of fact under a deferential standard." *Id.* The Court then clarified that "[i]n practice, the 'clearly erroneous' standard requires the appellate court to uphold any district court determination that falls within a broad range of permissible conclusions." *Id*. Consequently, "[w]hen an appellate court reviews a district court's factual findings, the abuse-of-discretion and clearly erroneous standards are indistinguishable." *Id.* at 401.

Turning to the crux of the disagreement between the parties—whether the court of appeals must defer to the district court's legal conclusions in Rule 11 proceedings—the Court noted that the majority of circuits applied the deferential abuse of discretion standard. *Id.* at 401. Functional considerations, the Court found, supported this approach.

> Rather than mandating an inquiry into purely legal questions, such as whether the attorney's legal argument was correct, the Rule requires a court to consider issues rooted in factual determinations. For example, to determine whether an attorney's prefiling inquiry was reasonable, a court must consider all the circumstances of a case. An inquiry that is unreasonable when an attorney has months to prepare a complaint may be reasonable when he has only a few days before the statute of limitations runs.

Id. at 401–02. In addition, "[i]n considering whether a complaint was supported by fact and law 'to the best of the signer's knowledge, information, and belief,' a court must make some assessment of the signer's credibility." *Id.* at 402. The trial court's greater familiarity with the issues and litigants means that it "is better situated than the court of appeals to marshal the pertinent facts and apply the fact-dependent legal standard" and make the credibility assessments "mandated by Rule 11." *Id.* The Court also observed that Rule 11's policy goals highlight the district court's unique competence to resolve Rule 11 issues: "The district court is best acquainted with the local bar's litigation practices and thus best situated to determine when a sanction is warranted to serve Rule 11's goal of specific and general deterrence." *Id.* at 404.

In contrast, the Court found that *de novo* review of such issues serves little purpose, since "[f]act-bound resolutions cannot be made uniform through appellate review, *de novo* or otherwise. An appellate court's review of whether a legal position was reasonable or plausible enough under the circumstances is unlikely to establish clear guidelines for lower courts; nor will it clarify the underlying principles of law." *Id.* at 405. Accordingly, the Court found abuse of discretion review appropriate. *Id.*; *see also McLane Co., Inc. v. EEOC*, 137 S. Ct. 1159, 1166–68 (2017) (weighing similar considerations in determining that deferential review should apply to a district court's decision to enforce or quash a subpoena issued by the Equal Employment Opportunity Commission); *Pierce v. Underwood*, 487 U.S. 552, 559–63 (1988) (same, for the appeal of attorney's fee awards).

F. The Mixed Question in the Final "FMSS" Hypothetical

Returning to the final FMSS hypothetical, it should now be easier to determine whether *de novo* or deferential review appropriately governs the trial judge's conclusion that Ms. Doe gave fair warning to the agency and that her notice was thus timely. Although a determination of what constitutes timely notice does not rest primarily on evaluations of witness demeanor or other courtroom events that a trial judge is better positioned than an appellate court to assess, it also does not involve interests or principles necessitating appellate control over the development of

the law. The impact of any particular determination of timeliness on future cases and conduct appears minimal given the nearly unlimited range of potential factual scenarios that could give rise to the question. Consequently, unless a viable constitutional claim under the Due Process Clause has been raised and preserved, deferential review, whether for clear error or abuse of discretion, seems most appropriate.

G. A Qualifying Comment on Review of Mixed Questions

Although the mixed question concept is critical to a complete understanding of the fact/law paradigm and the functional analysis underlying it, in practice there is often little debate about the standard of appellate review applicable to a particular mixed question. This is in part because review of many mixed questions is controlled by constitutional constraints that are largely independent of the fact/law paradigm. Thus, as noted in Section I.A, *supra*, appellate review of not guilty verdicts, which often result from a judge's or jury's application of only generally or abstractly defined laws to historical facts, is altogether barred by the Constitution's Double Jeopardy Clause. *See United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977). In addition, review of guilty verdicts is significantly defined by the Trial by Jury Clauses of the Sixth Amendment and Article III, Section 2 of the Constitution, as well as by the Constitution's due process guarantee. *See generally Jackson v. Virginia*, 443 U.S. 307 (1979); *see also* Chapter III.D, *infra*. And in civil cases, where the governing laws are sometimes only abstractly defined, the Seventh Amendment generally limits appellate consideration of a jury's findings of fact, and the conclusions resulting from its application of law to those facts, to the legal question of whether there was sufficient evidence to send the case to the jury in the first place. *See Weisgram v. Marley Co.*, 528 U.S. 440, 448 (2000). Moreover, mixed questions that are assigned by statute, rule, or common law to a trial judge for the exercise of her discretion are, by definition, subject to the variable, though generally deferential, abuse of discretion standard of review. *See Highmark Inc. v. Allcare Health Mgmt. Sys.*, 572 U.S. 559, 563 (2014) ("Because [the statute] commits the determination whether a case is 'exceptional' to the discretion of the district court, that decision is to be reviewed on appeal for abuse of discretion.").

Finally, with respect to many mixed findings, which court is better suited to decide the issue has often been resolved by settled precedent. *See, e.g.*, *Ornelas v. United States*, 517 U.S. 690, 697 (1996) (holding that "reasonable suspicion" to stop and "probable cause" to perform a warrantless car search, both mixed questions, are reviewed *de novo*). Note that sometimes this determination is made as a matter of statutory interpretation. *See Guerrero-Lasprilla v. Barr*, 140 S. Ct. 1062, 1068–73 (2020) (holding that, for the Immigration and Nationality Act's provision that appellate courts can review only "constitutional claims or questions of law" for certain immigration cases, the statutory phrase "questions of law" includes "mixed questions").

Of course, until a particular mixed question is characterized as a question of law, a question of fact, or a discretionary matter by Congress or the Supreme Court, different standards may apply in different circuits. *See, e.g.*, *Pierce v. Underwood*, 487 U.S. 552, 558 (1988) (describing the

predecision, inter-circuit conflict regarding the standard of review applicable to "substantial justification" determinations for purposes of awarding attorney's fees under the Equal Access to Justice Act). Consequently, circuit- and subject-specific research may prove critical when a mixed question is raised on appeal.

Chapter II. Clearly Erroneous Review of Judicial Fact-Finding

It is well settled that, as between district judges and the appellate bench, "[f]actfinding is the basic responsibility of [the] district courts." *Pullman-Standard v. Swint*, 456 U.S. 273, 291 (1982). Consequently, most findings of fact that are not reserved to civil juries (by the Seventh Amendment) or criminal juries (by the Trial by Jury Clauses of the Sixth Amendment and Article III, Section 2 of the Constitution) are subject to the deferential "clearly erroneous" standard of review. The exception of note pertains to judge-made factual findings supporting criminal verdicts in bench trials. Those supporting not guilty verdicts are shielded from review by the Double Jeopardy Clause, *see United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977), while those supporting guilty verdicts generally are reviewed pursuant to the standard articulated in *Jackson v. Virginia*, 443 U.S. 307 (1979); *see also* Chapter III.D.2, *infra*.

The clearly erroneous standard is codified in Federal Rule of Civil Procedure 52, which provides:

> Findings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility.

Fed. R. Civ. P. 52(a)(6). By its terms, this standard applies only to civil judgments issued in actions "tried on the facts without a jury or with an advisory jury" and to "findings and conclusions" issued in support of actions "granting or refusing an interlocutory injunction." Fed. R. Civ. P. 52(a)(1), (2). However, the standard is understood to apply to "any other form of fact finding" performed by judges in civil proceedings. *Maine v. Taylor*, 477 U.S. 131, 144–45 (1986). Moreover, the Supreme Court has noted that, although "[t]he Federal Rules of Criminal Procedure contain no counterpart to [Rule 52(a)(6)] … the considerations underlying [the Rule]—the demands of judicial efficiency, the expertise developed by trial judges, and the importance of first-hand observation—all apply with full force in the criminal context, at least with respect to factual questions having nothing to do with [the ultimate conclusion of] guilt. Accordingly, the 'clearly erroneous' standard of review long has been applied to non-guilt findings of fact by district courts in criminal cases." *Id.* at 145; *see also Hernandez v. New York*, 500 U.S. 352, 365–66 (1991) (plurality opinion).

Pursuant to the clearly erroneous standard, a trial judge's findings of fact are presumptively correct. *See Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 500 (1984). This presumption "recognizes and rests upon the unique opportunity afforded the trial court judge to evaluate the credibility of witnesses and to weigh the evidence." *Inwood Lab'ys, Inc. v. Ives Lab'ys, Inc.*, 456 U.S. 844, 855 (1982). But "[t]he rationale for deference to the original finder of fact is not limited to the superiority of the trial judge's position to make determinations of credibility." *Anderson v. City of Bessemer*, 470 U.S. 564, 574 (1985). The comparative expertise of district court and appellate judges, as well as the cost of duplicative decisionmaking, are also important considerations. As the Supreme Court has explained:

> The trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise. Duplication of the trial judge's efforts in the court of appeals would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources. In addition, the parties to a case on appeal have already been forced to concentrate their energies and resources on persuading the trial judge that their account of the facts is the correct one; requiring them to persuade three more judges at the appellate level is requiring too much. As the Court has stated in a different context, the trial on the merits should be the "main event" … rather than a "tryout on the road."

Id. at 574–75. The clearly erroneous standard ensures that the task of fact approximation does not become the main preoccupation of the appellate bench. *See* Roger J. Traynor, *Fact Skepticism and the Judicial Process*, 106 U. PA. L. REV. 635, 636 (1958).

"Although the meaning of the phrase 'clearly erroneous' is not immediately apparent," the Supreme Court has established certain principles governing its application. *City of Bessemer*, 470 U.S. at 573. "[F]oremost" among these is the rule, articulated in *United States v. U.S. Gypsum Co.*, 333 U.S. 364 (1948), that "a finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *City of Bessemer*, 470 U.S. at 573. In applying the *Gypsum* standard, a reviewing court is not entitled to overturn a finding "simply because [it is] convinced that [it] would have decided the case differently." *Glossip v. Gross*, 576 U.S. 863, 881 (2015) (quoting *City of Bessemer*, 470 U.S. at 573). "The reviewing court oversteps the bounds of its duty under [Rule 52(a)(6)] if it undertakes to duplicate the role of the lower court." *City of Bessemer*, 470 U.S. at 573. Consequently, "[w]here there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Id.* at 574. The finding of the trial court "must govern" so long as it is "'plausible'"—"even if another [finding] is equally or more [plausible]." *Cooper v. Harris*, 137 S. Ct. 1455, 1465 (2017) (quoting *City of Bessemer*, 470 U.S. at 573); *see also June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103, 2121 (2020) (plurality opinion).

The Supreme Court has also instructed that "the presumption of correctness that attaches to factual findings is stronger in some cases than in others." *Bose*, 466 U.S. at 500. "The conclusiveness of a finding of fact depends on the nature of the materials on which the finding is based." *Id.* at 500 n.16. Thus, as the Court describes it, the standard of review "does not change" regardless of whether a trial was long and complex or short and straightforward, "but the likelihood that the appellate court will rely on the presumption tends to increase when trial judges have lived with the controversy for weeks or months instead of just a few hours." *Id.* at 500; *see also Easley v. Cromartie*, 532 U.S. 234, 243 (2001).

Similarly, although "[t]he same 'clearly erroneous' standard applies to findings based on documentary evidence as to those based entirely on oral testimony, … the presumption [of correctness] has lesser force in the former situation than in the latter." *Bose*, 466 U.S. at 500. This is so because "only the trial judge can be aware of the variations in demeanor and tone of voice

that bear so heavily on the listener's understanding of and belief in what is said." *City of Bessemer*, 470 U.S. at 575. However, because "factors other than demeanor and inflection go into the decision whether or not to believe a witness," credibility determinations are not entirely insulated from appellate review. *Id.* Thus, for example, if "[d]ocuments or objective evidence … contradict the witness' story" or if testimony is so "internally inconsistent or implausible on its face that a reasonable factfinder would not credit it[,] … the court of appeals may well find clear error even in a finding purportedly based on a credibility determination." *Id.*; *see, e.g.*, *Snyder v. Louisiana*, 552 U.S. 472 (2008) (holding that the trial court committed clear error when it found credible the prosecutor's proffered race-neutral basis for striking a witness). Still, if "a trial judge's finding is based on his decision to credit the testimony of one of two or more witnesses, each of whom has told a coherent and facially plausible story that is not contradicted by extrinsic evidence, that finding, if not internally inconsistent, can virtually never be clear error." *City of Bessemer*, 470 U.S. at 575.

Notably, the Supreme Court recently observed that, all else being equal, a finding is more likely to be clearly erroneous "if some judges disagree with it." *Cooper*, 137 S. Ct. at 1468 (citing *Glossip*, 576 U.S. at 882). Nonetheless, absent the evidence necessary to demonstrate that claim or issue preclusion is appropriate, the Court is clear that "[w]hatever findings are under review receive the benefit of deference, without regard to whether a court in a separate suit has seen the matter differently." *Id*. "[T]he very premise of clear error review is that there are often 'two permissible'—because two 'plausible'—'views of the evidence.'" *Id*. (quoting *City of Bessemer*, 470 U.S. at 574). As the Court has previously explained: "In practice, the 'clearly erroneous' standard requires the appellate court to uphold any district court determination that falls within a broad range of permissible conclusions." *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 400–01 (1990). Assuming one court has arrived at one such plausible factual conclusion, an appellate court reviews with the understanding that another court can permissibly arrive at a different plausible finding. *See Cooper*, 137 S. Ct. at 1468.

Not surprisingly, an appellant asserting that the trial court erred in a finding of fact bears the burden of persuasion before the court of appeals. *See, e.g.*, *Bailey v. Fed. Nat'l Mortg. Ass'n*, 209 F.3d 740, 743 (D.C. Cir. 2000). And, importantly, in applying the clearly erroneous standard, a reviewing court must take account of the standard of proof informing the trial court's factual finding. *See Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Tr. for S. Cal.*, 508 U.S. 602, 622–23 (1993); *cf. Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986) (appellate review of summary judgment and directed verdict rulings incorporates controlling standard of proof). The certainty with which a trial judge must reach a conclusion based on the evidence is prescribed by various standards of proof, including, most commonly, preponderance of the evidence, clear and convincing evidence, and beyond a reasonable doubt. *See Concrete Pipe*, 508 U.S. at 622. Thus, if a district court is required to make findings under, for example, the clear and convincing evidence standard, an appellate court applying the clearly erroneous test would ask whether it is definitely and firmly convinced that the district court erred in finding that the fact was proven by clear and convincing evidence. *See, e.g.*, *Koszola v. FDIC*, 393 F.3d 1294, 1300 (D.C. Cir. 2005); *Payne v. Comm'r*, 224 F.3d 415, 423 (5th Cir. 2000); *see also, e.g.*, *Usery v. Anadarko Petroleum Corp.*, 606 F.3d 1017, 1020 (8th Cir. 2010) (preponderance of the evidence); *United States v.*

Wilson, 322 F.3d 353, 361–62 (5th Cir. 2003) (same).

Finally, the Supreme Court has repeatedly stated that the clearly erroneous standard "does not inhibit an appellate court's power to correct … a finding of fact that is predicated on a misunderstanding of the governing rule of law." *Thornburg v. Gingles*, 478 U.S. 30, 79 (1986) (quoting *Bose*, 466 U.S. at 501); *see also Pullman-Standard*, 456 U.S. at 287; *United States v. Miss. Valley Generating Co.*, 364 U.S. 520, 526 (1961). "[I]f the trial court bases its findings upon a mistaken impression of applicable legal principles, the reviewing court is not bound by the clearly erroneous standard." *Inwood Lab'ys*, 456 U.S. at 855 n.15. Rather, appellate courts exercise plenary review in determining whether a trial judge evaluated the evidence pursuant to an inapplicable or incorrectly articulated legal standard.

Given the considerations informing the clearly erroneous standard's presumption of correctness when an appellate court determines that a finding of fact is based on an incorrect legal principle or standard of proof, a remand to allow the district judge to find the facts under the correct legal standard is the typical remedy. *See Pullman-Standard*, 456 U.S. at 291–92. An appellate court will be justified in finding facts itself only when the record, viewed in light of the correct legal standard, admits of a single resolution of the factual issue. *Id*. The same considerations counsel remand when a trial court fails to make findings on a material issue. *See id.* at 291–92 & n.22.

Chapter III. *De Novo* Review of Conclusions of Law: A Sampling of Substantive Standards

In contrast to district courts, courts of appeals "are structurally suited to the collaborative juridical process that promotes decisional accuracy." *Salve Regina Coll. v. Russell*, 499 U.S. 225, 232 (1991). "District judges preside alone over fast-paced trials," *id.* at 231, whereas "courts of appeals employ multijudge panels that permit [the] reflective dialogue and collective judgment" that are critical to the thoughtful development of the law, *id.* at 232. Consequently, as the Supreme Court has explained, "[i]ndependent appellate review of legal issues best serves the dual goals of doctrinal coherence and economy of judicial administration." *Id.* at 231.

Although "an efficient and sensitive appellate court … will … consider" the trial judge's legal analysis, *id.* at 232, it is not bound by it. This is true whether the issue under review involves federal, state, or foreign law. *See id.* at 231–35 (district judge's federal and state law determinations reviewed *de novo*); Fed. R. Civ. P. 44.1 (district judge's foreign law determinations reviewed as questions of law). Plenary review allows federal appellate courts to achieve their principal functions of dispute resolution (through error correction in individual cases) and lawmaking (through declaration of legal principles). Trial judges contribute to the development of the law when appellate courts endorse the reasoning of their decisions, but appellate judges owe no deference to that reasoning.

The authority of the federal courts of appeals to decide legal issues is not absolute, however. The intermediate appellate courts are bound to follow the precedent of the Supreme Court, *see Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd.*, 460 U.S. 533, 535 (1983) (per curiam), and, with respect to matters of state law, the interpretations of the highest court of the state, *see Comm'r v. Est. of Bosch*, 387 U.S. 456, 465 (1967). Moreover, "[i]f a court, employing traditional tools of statutory construction [to interpret federal legislation], ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984). Appellate decisionmaking is also constrained by various doctrines of judicial restraint, including *stare decisis*, *see, e.g.*, *Flood v. Kuhn*, 407 U.S. 258 (1972), law-of-the-circuit and law-of-the-case, *see, e.g.*, *LaShawn A. v. Barry*, 87 F.3d 1389 (D.C. Cir. 1996) (en banc), and collateral estoppel, *see, e.g.*, *Allen v. McCurry*, 449 U.S. 90 (1980). Finally, the courts of appeals obviously are bound to decide cases within constitutional limits.

The essence of *de novo* review is easily understood. Presented with a legal issue, an appellate court decides the question anew, according no deference to the trial court's resolution of the matter. This explains little, however, about how *de novo* review works in practice. This is because *de novo* review requires nothing more of an appellate court than that it decide legal issues as would the first-level decisionmaker. In other words, as a standard, *de novo* review is without unique content. It adds nothing of its own to the appellate process, but rather, simply mandates that an appellate court apply the substantive standards governing resolution of the legal question at issue. Obviously, these substantive standards are as varied as the law itself. *De novo* review is

thus extremely plastic.

This does not mean, however, that a practical sense of the standard is impossible to convey. The discussion that follows illuminates *de novo* review by describing how appellate courts apply certain important substantive and procedural legal principles underpinning trial-level dispute resolution. Section A addresses subject matter jurisdiction and Article III standing—two critical prerequisites to federal court action. Sections B through D describe the primary procedural mechanisms—summary judgment, judgment as a matter of law, and judgment of acquittal—that facilitate judicial resolution of claims, civil and criminal, with respect to which there are no material issues of fact appropriate for resolution by a fact-finder. The discussion obviously does not cover all of the substantive principles that inform *de novo* review, and it is weighted more toward civil than criminal litigation. But the areas reviewed are important in federal jurisprudence and offer a good sense of the breadth of analysis encompassed by *de novo* review.

A. Subject Matter Jurisdiction and Constitutional Standing in Civil Cases: The Unwaivable Article III Prerequisites to Federal Judicial Review

The inferior "[f]ederal courts are not courts of general jurisdiction; they have only the power that is authorized by Article III of the Constitution and the statutes enacted by Congress pursuant thereto." *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986); *see also Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 552 (2005). Subject matter jurisdiction (which is defined by Article III and the authorizing statutes enacted by Congress) and constitutional standing (which is derived directly from the "case-or-controversy" requirement of Article III, Section 2, Clause 1) are the essential, unwaivable prerequisites to the exercise of federal judicial power. *See Ins. Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 701–02 (1982) (subject matter jurisdiction); *United States v. Hays*, 515 U.S. 737, 742–43 (1995) (standing). Unless a party seeking to bring a suit in federal court demonstrates subject matter jurisdiction and standing, the presumption is that the court lacks jurisdiction. *See DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 n.3 (2006) (subject matter jurisdiction); *Bender*, 475 U.S. at 546 (standing). The inviolate rule that these Article III prerequisites to suit be met ensures the "separation and equilibration of powers, restraining the courts from acting at certain times, and even restraining them from acting permanently regarding certain subjects." *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 101 (1998).

Article III standing is often characterized as an issue of subject matter jurisdiction. *See, e.g.*, *Bender*, 475 U.S. at 541–42; *Young Am. Corp. v. Affiliated Comput. Servs. (ACS), Inc.*, 424 F.3d 840, 843 (8th Cir. 2005); *Ctr. for Reprod. Law & Pol'y v. Bush*, 304 F.3d 183, 193 (2d Cir. 2002). But, in reality, the two doctrines generally serve different purposes and consequently involve different inquiries. Subject matter jurisdiction derives in significant part from the "[d]ue regard for the rightful independence of state governments, which … requires that [federal courts] scrupulously confine their own jurisdiction to the precise limits which (a federal) statute has defined." *Victory Carriers, Inc. v. Law*, 404 U.S. 202, 212 (1971). The law of standing is largely "built on a single

basic idea—the idea of separation of powers" among the three branches of the federal government. *Allen v. Wright*, 468 U.S. 737, 752 (1984). A party may be able to show that a federal court has subject matter jurisdiction over a claim (in other words that the claim is one that federal courts are empowered to decide by the Constitution and Congress) and nonetheless be unable to demonstrate that it satisfies the case-and-controversy requisites of Article III standing. Nevertheless, the functions that subject matter jurisdiction and Article III standing play in defining and restricting federal judicial power do give rise to several common procedural practices.

First, comity concerns underlying the constitutionally limited subject matter jurisdiction of the federal courts and the separation of powers principles underlying Article III standing generally require federal courts to resolve questions of subject matter jurisdiction and Article III standing before ruling on the merits of a claim. *See Steel Co.*, 523 U.S. at 98–101. Addressing a standing question, the Supreme Court in *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998), explained that for a "court to pronounce upon the meaning or the constitutionality of a state or federal law when it has no jurisdiction to do so is, by very definition, for [that] court to act ultra vires." *Id.* at 101–02.

This is not to say that federal courts need always resolve questions of subject matter jurisdiction or Article III standing before addressing other threshold non-merits issues. District courts do not, for example, "overstep Article III limits when they decline jurisdiction of state-law claims on discretionary grounds without determining whether those claims fall within their pendent jurisdiction or abstain under *Younger v. Harris*, 401 U.S. 37 (1971), without deciding whether the parties present a case or controversy." *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 585 (1999). Nor are courts barred from pretermitting a challenge to constitutional standing to dismiss on mootness grounds, *see Arizonans for Off. English v. Arizona*, 520 U.S. 43, 66–67 (1997), or, in certain circumstances, from resolving questions of personal jurisdiction prior to finding subject matter jurisdiction, *Ruhrgas*, 526 U.S. at 584–85, or from responding to *forum non conveniens* pleas before determining subject matter jurisdiction, *Sinochem Int'l Co. Ltd. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 425 (2007). A court that dismisses on the basis of such "non-merits grounds … before finding subject-matter jurisdiction, makes no assumption of law-declaring power that violates the separation of powers principles underlying … *Steel Company*." *Ruhrgas*, 526 U.S. at 584–85; *see also Tenet v. Doe*, 544 U.S. 1, 6 n.4 (2005) (such rules of dismissal "represent[] the sort of threshold question[s that the Court has] recognized may be resolved before addressing jurisdiction"); *Kowalski v. Tesmer*, 543 U.S. 125, 128–29 (2004) (assuming Article III standing in order to "address the alternative threshold question" of whether the plaintiffs had prudential standing to assert the rights of others).

Second, because subject matter jurisdiction and Article III standing ensure that federal courts do not exceed their constitutional authority, they cannot be forfeited or waived. *See Ins. Corp. of Ir.*, 456 U.S. at 702 (subject matter jurisdiction); *Hays*, 515 U.S. at 742 (standing). Thus, subject matter jurisdiction and Article III standing may be challenged at any point from the filing of the complaint up through an appeal to the Supreme Court. *See, e.g.*, *Ins. Corp. of Ir.*, 456 U.S. at 702 (subject matter jurisdiction); *Nat'l Org. for Women, Inc. v. Scheidler*, 510 U.S. 249, 255 (1994) (standing). Indeed, it does not matter whether a party raises a jurisdictional challenge, since the

courts are obligated to "police" the existence of subject matter jurisdiction and Article III standing on their own initiative. *Ruhrgas*, 526 U.S. at 583 (subject matter jurisdiction); *DaimlerChrysler*, 547 U.S. at 340 (standing).

Finally, because a lack of standing is considered a defect in a court's subject matter jurisdiction, *see, e.g.*, *Bender*, 475 U.S. at 541–42, Federal Rule of Civil Procedure 12(b)(1), which references only "subject-matter jurisdiction," is also the appropriate vehicle for challenging standing. *See, e.g.*, *All. for Env't Renewal, Inc. v. Pyramid Crossgates Co.*, 436 F.3d 82, 88 n.6 (2d Cir. 2006); *Haase v. Sessions*, 835 F.2d 902, 906 (D.C. Cir. 1987); *see also* 5B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 1350 & n.8 (3d ed. 2004 & Supp. 2012) (noting the abundance of cases in which Rule 12(b)(1) is used to challenge standing). However, because parties may raise jurisdictional challenges at any point during litigation and because courts are obligated to address such issues *sua sponte*, Rule 12(b)(1) provides the first, but not the only, opportunity for the courts to consider these matters. *See, e.g.*, *Ins. Corp. of Ir.*, 456 U.S. at 702 (subject matter jurisdiction); *Nat'l Org. for Women*, 510 U.S. at 255–56 (standing); *see also* Fed. R. Civ. P. 12(h)(3) ("If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.").

1. Subject Matter Jurisdiction

Subject matter jurisdiction, which is a central and defining concept in federal jurisprudence, encompasses the Article III and statutory "prescriptions delineating the classes of cases" that federal courts are authorized to hear. *Kontrick v. Ryan*, 540 U.S. 443, 455 (2004); *see also Lightfoot v. Cendant Mortg. Corp.*, 137 S. Ct. 553, 560 (2017) ("[A] court's subject-matter jurisdiction defines its power to hear cases."). As noted, the insistence that a federal court have constitutional and statutory jurisdiction over the subject of a claim before acting to resolve it serves "institutional interests[,] … keep[ing] the federal courts within the bounds the Constitution and Congress have prescribed." *Ruhrgas*, 526 U.S. at 583. Subject matter jurisdiction, therefore, cannot be waived and must be raised by a court on its own initiative if it has any question about its authorization to assert jurisdiction over a claim. *Id.*

Subject matter jurisdiction is distinct from personal jurisdiction, which delineates "the persons … falling within a court's adjudicatory authority." *Kontrick*, 540 U.S. at 455. Derived from the Due Process Clause, personal jurisdiction restricts judicial power at least partially as a matter of individual liberty, and thus, unlike subject matter jurisdiction, may be waived. *Ins. Corp. of Ir.*, 456 U.S. at 702–03; *see also* Fed. R. Civ. P. 12(h)(1).

Subject matter jurisdiction is also distinct from "the essential ingredients of a federal claim for relief"—the pleading requirements with which it is sometimes "confused or conflated." *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 503 (2006). Although a party pursuing a federal claim must plead all of the elements of the asserted cause of action, failure to do so does not deprive a court of jurisdiction. Rather, it results in a dismissal on the merits pursuant to Federal Rule of Civil

Procedure 12(b)(6).

Importantly, once a federal court determines that it has jurisdiction, "it also has a 'virtually unflagging obligation … to exercise' that authority." *Mata v. Lynch*, 576 U.S. 143, 150 (2015) (*quoting Colo. River Water Conservation Dist. v. United States,* 424 U.S. 800, 817 (1976)). There are a few exceptions to this rule involving, for example, the abstention doctrine and the limited situations in which considerations of wise judicial administration argue for dismissal of a federal suit in favor of a concurrent state suit, *see, e.g.*, *Colo. River Water Conservation Dist.*, 424 U.S. at 817–21. In addition, an appellate court may decline to review a claim because it is not ripe or, in the administrative context, because a nonjurisdictional exhaustion requirement has not been met or the issue has been waived before the agency. *See generally* Chapter XI.E, *infra*. But leaving these exceptions aside, "federal courts ordinarily should entertain and resolve on the merits an action within the scope of a jurisdictional grant." *Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 73 (2013).

Types of Subject Matter Jurisdiction

Congress may authorize the district courts to resolve claims encompassed within any of the nine categories of jurisdiction described in Article III, Section 2, Clause 1 of the Constitution. *See Ins. Corp. of Ir.*, 456 U.S. at 701–02. The "basic statutory grants of federal-court subject-matter jurisdiction," and the ones that are the focus of this section, are contained in 28 U.S.C. §§ 1331 and 1332. *Arbaugh*, 546 U.S. at 513.

Section 1331, which mirrors but is not coextensive with the "arising under" provision of Article III, *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 494–95 (1983), defines general federal question jurisdiction: "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. Pursuant to Article III's "arising under" language, Congress also authorizes the courts to exercise jurisdiction over more particularized federal question claims. The statutory provisions defining special federal question jurisdiction—some of which are contained in substantive statutes and others of which are found in the Judicial Code—restrict the authority of the courts on the basis of a wide variety of factors, including, among others, the type of claim at issue, the identity of the plaintiff or defendant, and the amount in controversy. *See Arbaugh*, 546 U.S. at 515 n.11 (citing examples).

Section 1332 implements Article III's diversity and alienage provisions, authorizing the federal district courts to resolve controversies between citizens of different states, as well as citizens of a state and subjects of a foreign country who are not permanent residents, and a plaintiff foreign country and citizens of a state or states. 28 U.S.C. § 1332(a). As a general matter, judicial authority over such controversies is restricted to suits in which the amount in controversy exceeds $75,000. *Id.* When parties to a class action assert federal diversity jurisdiction, judicial authority is restricted to suits in which the aggregated sum of all the putative class members' claims exceeds

$5,000,000. *Id.* § 1332(d)(2).

Removal and supplemental jurisdiction provide two additional and frequently used statutory mechanisms for obtaining federal jurisdiction. Both rely on the availability of an independent basis of original jurisdiction. Described in broad strokes, removal jurisdiction permits a defendant to remove to a federal district court a claim that a plaintiff has brought in state court but over which the district court has original jurisdiction. *See id.* § 1441(a).

Supplemental jurisdiction, recognized in *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 724–26 (1966), and codified at 28 U.S.C. § 1367, allows, with certain exceptions, a district court to assert jurisdiction over a state-law claim that does not otherwise provide a basis for federal jurisdiction so long as that claim is part of the same Article III "case" or "controversy" as a claim for which the federal court has original jurisdiction. *See id.* § 1367(a).

Establishing Subject Matter Jurisdiction

A party seeking federal court review bears the burden of demonstrating the existence of the statutory prerequisites to jurisdiction. *See McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936). (Or, perhaps more precisely, "bears the risk of non-persuasion" by the court. *Meridian Sec. Ins. Co. v. Sadowski*, 441 F.3d 536, 540 (7th Cir. 2006) (citing *McNutt*, 298 U.S. at 189)). That party is usually the plaintiff, although not when a defendant removes a case from state court under 28 U.S.C. § 1441.

What a party must show to demonstrate subject matter jurisdiction depends upon what is at issue: the "arising under" element of general or special federal question jurisdiction, a non-"arising under" factor restricting judicial authority over special federal question claims, or one of the jurisdictional prerequisites of Section 1332.

An initial procedural note is in order. For purposes of both Section 1331 and special federal question statutes, "[u]nder the longstanding well-pleaded complaint rule" a court may only look to "the plaintiff's statement of his own cause of action" in determining whether a claim arises under federal law. *Vaden v. Discover Bank*, 556 U.S. 49, 60 (2009) (quoting *Louisville & Nashville R.R. Co. v. Mottley*, 211 U.S. 149, 152 (1908)); *see also Holmes Grp., Inc. v. Vornado Air Circulation Sys., Inc.*, 535 U.S. 826, 830 (2002). An actual or anticipated defense cannot provide a basis for "arising under" jurisdiction, even if it is alleged in a complaint and even if all parties agree that the federal question raised by the anticipated defense presents the only genuine matter at issue. *Vaden*, 556 U.S. at 60; *Holmes*, 535 U.S. at 831. Neither can an actual or anticipated counterclaim, even when compulsory, provide the requisite basis for "arising under" jurisdiction. *Holmes*, 535 U.S. at 832. The well-pleaded complaint rule also applies to federal removal jurisdiction under 28 U.S.C. § 1441. "As a general rule, absent diversity jurisdiction, a case will not be removable if the complaint does not affirmatively allege a federal claim." *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 6 (2003).

"Arising Under" Jurisdiction

As a substantive matter, whether general or special federal question jurisdiction is asserted, a case or claim can "arise under" federal law in two ways. "Most directly, a case arises under federal law when federal law creates the cause of action asserted." *Gunn v. Minton*, 568 U.S. 251, 257 (2013) (citing *Am. Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 260 (1916)); *see also Mims v. Arrow Fin. Servs., LLC*, 565 U.S. 368, 371–72 (2012). This "rule of inclusion," which "admits of only extremely rare exceptions, *see, e.g.*, *Shoshone Mining Co. v. Rutter*, 177 U.S. 505 (1900), … accounts for the vast bulk" of arising under claims, *Gunn*, 568 U.S. at 257, and "endures unless Congress divests federal courts of their … adjudicatory authority" with respect to particular claims involving federal law, *Mims*, 565 U.S. at 379 (citing examples).

A much "small[er] category" of claims that are found to arise under federal law, *Empire Healthchoice Assurance, Inc. v. McVeigh*, 547 U.S. 677, 699 (2006), consists of state causes of action that "necessarily raise a stated federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities," *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 314 (2005). "That description typically fits cases … in which a state-law cause of action is 'brought to enforce' a duty created by [a federal law] because the [state] claim's very success depends on giving effect to a federal requirement." *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning*, 578 U.S. 374, 384 (2016) (describing this situation as one in which, for example, a state law suit is brought based on a state law making illegal any violation of a particular federal law). In such instances, federal "jurisdiction is proper because there is a serious federal interest in claiming the advantages thought to be inherent in a federal forum, which can be vindicated without disrupting Congress's intended division of labor between state and federal courts." *Gunn*, 568 U.S. at 258–59, 264 (declining to find "arising under" jurisdiction because the federal patent question at issue was insubstantial, meaning of little relevance to the federal system as a whole, and because resolution by a state court would not undermine the balance of federal and state judicial powers). The Supreme Court protects the division of labor between state and federal courts through the "practice of reading jurisdictional laws, so long as consistent with their language, to respect the traditional role of the state courts in our federal system." *Merrill Lynch*, 578 U.S. at 380.

If a claim satisfies either of the "arising under" standards described above, dismissal for want of subject matter jurisdiction will be rare. As explained in *Bell v. Hood*, 327 U.S. 678 (1946), only if the federal claim "clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or … is wholly insubstantial and frivolous," meaning "patently without merit," is dismissal on jurisdictional grounds appropriate. *Id.* at 682–83; *see also Arbaugh*, 546 U.S. at 513 & n.10; *Steel Co.*, 523 U.S. at 89. Under this standard, a good-faith assertion that a claim arises under federal law cannot be "defeated … by the possibility that the averments might fail to state a cause of action on which [plaintiffs] could actually recover." *Bell*, 327 U.S. at 682; *see also Oneida Indian Nation v. Cnty. of Oneida*, 414 U.S. 661, 666–67 (1974) ("arising under" element of both Section 1331 and Section 1362 satisfied by the Tribe's "assertion that [it] had a

federal right to possession governed wholly by federal law [which] cannot be said to be so insubstantial, implausible, foreclosed by prior decisions of [the Supreme] Court, or otherwise completely devoid of merit as not to involve a federal controversy within the jurisdiction of the District Court, whatever may be the ultimate resolution of the federal issues on the merits"). Neither can such a claim be defeated by the possibility that a plaintiff may be unable to make out the facts supporting the asserted cause of action. "The reason for this is that the court must assume jurisdiction to decide whether the allegations state a cause of action on which the court can grant relief as well as to determine issues of fact arising in the controversy." *Bell*, 327 U.S. at 682. Continued invocation of the *Bell v. Hood* standard reflects the Court's long recognized distinction between a failure "to raise a substantial federal question for jurisdictional purposes … and failing to state a claim for relief on the merits." *Shapiro v. McManus*, 577 U.S. 39, 45 (2015).

Non-"Arising Under" Restrictions and Requirements: The Facial/Factual Model

When a jurisdictional question pertains to a non-"arising under" restriction on special federal question jurisdiction, or to the requirements of Section 1332, the burden on the party seeking federal jurisdiction is different. Assuming there is no overlap between the jurisdictional restriction and the cause of action and no allegation that the party asserting federal jurisdiction is acting in bad faith, that party, if challenged by an opponent or questioned by the court, must be prepared to demonstrate not only that the complaint, on its face, meets the specified threshold jurisdictional requirement, but also that the facts asserted in support of the jurisdictional restriction are true. *See Dart Cherokee Basin Operating Co., LLC v. Owens*, 574 U.S. 81, 87–89 (2014); *Gibbs v. Buck*, 307 U.S. 66, 71–72 (1939); *McNutt,* 298 U.S. at 189; *see also Hertz Corp. v. Friend*, 559 U.S. 77, 96–97 (2010); *Land v. Dollar*, 330 U.S. 731, 735 n.4 (1947), *abrogated on other grounds by Larson v. Domestic & Foreign Com. Corp.*, 337 U.S. 682 (1949).

In resolving a question regarding the facial sufficiency of an assertion pertaining to either a non-"arising under" restriction or the requirements of Section 1332, the district court accepts as true all allegations in the complaint (and notice of removal if jurisdiction is sought under 28 U.S.C. § 1441 and the complaint does not control), as well as any uncontested facts contained in the record. And the party seeking federal jurisdiction receives the benefit of any reasonable inferences that can be drawn from the facts. *See, e.g.*, *Dart*, 574 U.S. at 87; *Valentin v. Hosp. Bella Vista*, 254 F.3d 358, 363 (1st Cir. 2001); *Herbert v. Nat'l Acad. of Scis.*, 974 F.2d 192, 197 (D.C. Cir. 1992). Consequently, the only questions on appeal are "whether the district court's application of the law [to the asserted facts] is correct and, if the decision is based on undisputed facts, whether those facts are indeed undisputed." *Harris v. P.A.M. Transp., Inc.*, 339 F.3d 635, 637 (8th Cir. 2003); *see also Herbert*, 974 F.2d at 197. The standard of review is *de novo*. *See, e.g.*, *Gabriel v. Preble*, 396 F.3d 10, 12 (1st Cir. 2005).

In contrast, when the accuracy of the allegations supporting a non-"arising under" restriction or a Section 1332 requirement is questioned, the party seeking federal jurisdiction must submit

competent evidence proving the facts supporting the alleged jurisdictional prerequisite. The standard of proof is a preponderance of the evidence. *See, e.g.*, *Dart*, 574 U.S. at 88; *Gibbs*, 307 U.S. at 72; *McNutt*, 298 U.S. at 189. In such situations, the factual allegations contained in the complaint (or notice of removal) are afforded no presumption of truthfulness, and the district court enjoys broad authority to order discovery, consider extrinsic evidence, and hold evidentiary hearings for the purpose of determining its jurisdiction. *See Land*, 330 U.S. at 735 & n.4; *McPhail v. Deere & Co.*, 529 F.3d 947, 954 (10th Cir. 2008), *abrogated in part on other grounds by Dart*, 574 U.S. 81 (2014); *Freeman v. United States*, 556 F.3d 326, 341 (5th Cir. 2009); *Valentin*, 254 F.3d at 363. Discovery rulings and decisions regarding how evidence may be submitted are reviewed for abuse of discretion only. *See, e.g.*, *Macharia v. United States*, 334 F.3d 61, 64 (D.C. Cir. 2003); *Moran v. Kingdom of Saudi Arabia*, 27 F.3d 169, 171, 172–73 (5th Cir. 1994).

On appeal, it is generally the case that the trial court's articulation of the controlling law and its ultimate legal conclusion regarding the existence of the jurisdictional prerequisite are reviewed *de novo*. Findings of fact on which the legal conclusion is based are reviewed only for clear error. *See, e.g.*, S*kwira v. United States*, 344 F.3d 64, 71–72 (1st Cir. 2003); *Herbert*, 974 F.2d at 197. This is true with respect to district court decisions and findings regarding: (1) non-"arising under" prerequisites of special federal question jurisdiction, *see, e.g.*, *Herbert*, 974 F.2d at 198 (determination whether government had authorized copyright infringement for purposes of applying the legal test for special federal jurisdiction statute reviewed for clear error); *Ohio Nat'l Life Ins. Co. v. United States*, 922 F.2d 320, 326 (6th Cir. 1990) (determination of date necessary to ascertain when period of limitation began to run reviewed for clear error); (2) the amount in controversy, whether required as part of a special federal question statute or Section 1332 (including for purposes of removal jurisdiction), *see, e.g.*, *Dudley v. Eli Lilly & Co.*, 778 F.3d 909, 911, 915–17 (11th Cir. 2014) (reviewing for clear error the district court's finding that the defendant had not established by a preponderance of the evidence that the Class Action Fairness Act's jurisdictional amount-in-controversy requirement was satisfied); *Rexford Rand Corp. v. Ancel*, 58 F.3d 1215, 1218 (7th Cir. 1995) (reviewing for clear error the district court's finding that the jurisdictional amount-in-controversy requirement was met); and (3) citizenship for purposes of diversity jurisdiction, *see, e.g.*, *Travaglio v. Am. Express Co.*, 735 F.3d 1266, 1268–69 (11th Cir. 2013) (whether diversity jurisdiction exists is a question of law reviewed *de novo* but the district court's "jurisdictional factfindings of the parties' citizenships" are reviewed for clear error); *Johnson v. SmithKline Beecham Corp.*, 724 F.3d 337, 345 (3d Cir. 2013) ("[W]e review determinations of law *de novo,* but a court's factual findings regarding domicile or citizenship are reviewed for clear error.").

It is worth noting that, in many cases, an appellate court's review of the district court's factual findings will involve review of the district court's application of identifiable legal principles to the evidence before the court. In such cases, appellate courts review the applicable legal principles *de novo*, but evaluate the district court's conclusions resulting from the application of those principles to the predicate facts for clear error. *See Padilla-Mangual v. Pavia Hosp.*, 516 F.3d 29, 31–32 (1st Cir. 2008) (noting that a district court's determination of a party's citizenship (specifically his domicile) is a "mixed question of law and fact" reviewed for clear error); *Vill. Fair Shopping Ctr. Co. v. Sam Broadhead Tr.*, 588 F.2d 431, 434 (5th Cir. 1979) (concluding that the

district court identified the appropriate legal test for determining a corporation's principle place of business for purposes of diversity jurisdiction, but clearly erred in applying the test to the facts).

When Jurisdictional Non-"Arising Under" Facts Are Intertwined with the Merits

The facial/factual model for assessing challenges to non-"arising under" prerequisites of special federal question jurisdiction does not apply when the contested prerequisite overlaps with the merits of a case. In such situations, "the District Court has jurisdiction to determine its jurisdiction by proceeding to a decision on the merits." *Land*, 330 U.S. at 739. A jurisdictional prerequisite overlaps with the merits either when the requirement at issue is also an element of the asserted cause of action, *see, e.g.*, *Brownback v. King*, 141 S. Ct. 740, 749 (2021) (explaining that "in the unique context of the [Federal Tort Claims Act], all elements of a meritorious claim are also jurisdictional"); *Garcia v. Copenhaver, Bell & Assocs.*, 104 F.3d 1256, 1261 (11th Cir. 1997); *Clark v. Tarrant Cnty.*, 798 F.2d 736, 741–43 (5th Cir. 1986), or when resolution of the question regarding the non-"arising under" requirement demands resolution of an aspect of the substantive claim, *see, e.g.*, *Land*, 330 U.S. at 738–39; *Pringle v. United States*, 208 F.3d 1220, 1222–23 (10th Cir. 2000) (per curiam); *Roberts v. Corrothers*, 812 F.2d 1173, 1177 (9th Cir. 1987).

Faced with a challenge to jurisdictional facts that are thus inextricably intertwined with facts critical to the merits of the case, most circuits first apply the *Bell v. Hood* test, finding jurisdiction unless the federal claim is "immaterial," "made solely for the purpose of obtaining federal jurisdiction," or "wholly insubstantial and frivolous." 327 U.S. at 682–83. If jurisdiction is found, the courts treat the objection regarding the prerequisite non-"arising under" jurisdictional requirements as a challenge to the merits of the plaintiff's case. *See, e.g.*, *Kerns v. United States*, 585 F.3d 187, 193 n.6 (4th Cir. 2009); *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039–40 (9th Cir. 2004). In effect, a Rule 12(b)(1) motion raising challenges to jurisdiction that are intertwined with the merits is converted to a Rule 12(b)(6) motion to dismiss for failure to state a claim or, if the parties rely on evidence outside of the complaint, to a Rule 56 motion for summary judgment. *See, e.g.*, *Paper, Allied-Indus., Chem. & Energy Workers Int'l Union v. Cont'l Carbon Co.*, 428 F.3d 1285, 1292 (10th Cir. 2005); *Morrison v. Amway Corp.*, 323 F.3d 920, 925 (11th Cir. 2003). The presumptions of truthfulness afforded the allegations and evidence of the non-moving party by Rule 12(b)(6) and Rule 56 appropriately protect plaintiffs who, in actuality, are facing challenges to the merits of their complaints. *See, e.g.*, *Kerns*, 585 F.3d at 193; *Garcia*, 104 F.3d at 1261. Moreover, when the jurisdictional question is inextricably intertwined with the merits, reliance on Rule 56 ensures that the judge does not "erroneously invade[] the province of the jury." *Morrison*, 323 F.3d at 930.

Courts faced with factual challenges to subject matter jurisdiction have sometimes struggled to discern whether a statutory condition should be viewed as a restriction on subject matter jurisdiction, ignored (at least initially) because it is properly seen as an element of the cause of action, *see Arbaugh*, 546 U.S. at 513–14, or addressed as a challenge to a jurisdictional

requirement that is intertwined with the cause of action, *see CNA v. United States*, 535 F.3d 132, 143–145 (3d Cir. 2008). In an attempt to minimize such quandaries, the Supreme Court, in *Arbaugh v. Y & H Corp.*, 546 U.S. 500 (2006), established what has since been referred to as the "clear statement rule." *See, e.g.*, *Lotes Co., Ltd. v. Hon Hai Precision Indus. Co.*, 753 F.3d 395, 405 (2d Cir. 2014). Unless Congress "clearly states that a threshold limitation on a statute's scope shall count as jurisdictional," "courts should treat the restriction as non-jurisdictional." *Arbaugh*, 546 U.S. at 515–16.

Cases following *Arbaugh* have clarified that the "clear statement rule" is often a matter of statutory interpretation. Ideally, a condition that is intended as a jurisdictional prerequisite will be explicitly identified as such in the text of the statute. And the Court remains firm that a litigant must "clear a high bar" to demonstrate that Congress has clearly identified a statutory condition as jurisdictional. *United States v. Wong*, 575 U.S. 402, 409 (2015); *see also Boechler, P.C. v. Comm'r of Internal Revenue*, 142 S. Ct. 1493, 1498–99 (2022) (finding that "[w]here multiple plausible interpretations exist—only one of which is jurisdictional—" the purported jurisdictional condition does not satisfy the clear statement rule); *cf. Lotes,* 753 F.3d at 405 ("In … [the] eight years since *Arbaugh*, the Supreme Court has repeatedly applied this clear-statement rule to find statutory requirements substantive rather than jurisdictional."); *Fort Bend Cnty. v. Davis*, 139 S. Ct. 1843, 1849-50 (2019) (listing examples).

Congress need not, however, "incant magic words" for a condition to be properly identified as jurisdictional. *Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 153 (2013). Rather, courts must ask whether "traditional tools of statutory construction … plainly show that Congress" intended the prerequisite at issue to have jurisdictional consequences. *Wong*, 575 U.S. at 410. This involves examination of a statutory provision's "text, context, and relevant historical treatment." *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 166 (2010). A requirement that "is not clearly labeled jurisdictional, is not located in a jurisdiction-granting provision, and admits of congressionally authorized exceptions" is unlikely to be jurisdictional. *Id.* at 166. Mandatory language, such as the word "shall," will not alone suffice. *See Wong*, 575 U.S. at 411; *Gonzalez v. Thaler*, 565 U.S. 134, 146 (2012); *see also Musacchio v. United States*, 577 U.S. 237, 246 (2016). Nor will location in a provision that contains language about jurisdiction, since a single section can contain both jurisdictional and non-jurisdictional requirements, *see Sebelius*, 568 U.S. at 155; *see also Santos-Zacaria v. Garland*, 143 S. Ct. 1103, 1116 (2023) ("even if some provisions in a statutory section qualify as jurisdictional, that does not suffice to establish that all others are"), or that merely cross-references a jurisdictional provision, *see Fort Bend Cnty. v. Davis*, 139 S. Ct. at 1851 n.8.

A statute's purpose also remains relevant to the post-*Arbaugh* jurisdictional inquiry. As the Court has explained, Congress is unlikely to have intended for a provision to be jurisdictional when it would thwart the statute's larger goals. *See Thaler*, 565 U.S. at 144 ("Treating § 2253(c)(3) as jurisdictional … would thwart Congress's intent … to eliminate delays in the federal habeas review process."); *Henderson v. Shinseki*, 562 U.S. 428, 439–40 (2011) (noting that a generous statute designed to protect veterans was unlikely to have jurisdictional filing deadline); *Dolan v. United States*, 560 U.S. 605, 612–14 (2010) (treating time limit in statute designed to ensure restitution for crime victims as jurisdictional would thwart purpose). Conversely, a procedural

"prescription does not become jurisdictional whenever it promotes important congressional objectives." *Fort Bend Cnty.*, 139 S. Ct. at 1851. Legislative history may also be relevant to establishing congressional intent, though the Supreme Court has expressed doubt that "legislative history alone could provide a clear statement." *See Wong,* 575 U.S. at 412. Finally, as part of the statutory construction inquiry, courts may look to how similar statutes have previously been interpreted. *See, e.g.*, *Dolan*, 560 U.S. at 614.

It is also important to note that the *Arbaugh* clear statement rule does not cast off *stare decisis*. If the Supreme Court has previously determined that a threshold limitation in a special federal question statute is or is not jurisdictional, that holding remains good law. *Wong,* 575 U.S. at 416 (discussing the holding in *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 137–39 (2008) that *stare decisis* required treating the Tucker Act's time bar as jurisdictional); *see also Fort Bend Cnty.*, 139 S. Ct. at 1849 ("The Court has stated that it would treat a requirement as 'jurisdictional' when a long line of Supreme Court decisions left undisturbed by Congress attached a jurisdictional label to the prescription."). However, not all opinions dismissing for lack of subject matter jurisdiction are equal. So-called "drive-by jurisdictional rulings" which characterize dismissals on statutory threshold grounds as jurisdictional without analysis "should be accorded no precedential effect" on this point. *Arbaugh*, 546 U.S. at 511; *see also Wilkins v. United States*, 143 S. Ct. 870, 878 (2023) (Under *Arbaugh*, 546 U.S. at 511, a "textbook drive-by jurisdictional ruling … should be accorded no precedential effect.") (cleaned up).

2. Article III Standing [*Also look at the materials in Part Two, Section XI.C*]

"Article III of the Constitution limits the jurisdiction of federal courts to 'Cases' and 'Controversies.'" *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 157 (2014) (quoting U.S. CONST. art. III, § 2). "No principle is more fundamental to the judiciary's proper role in our system of government than [this] constitutional limitation." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 337 (2016). It "restricts [the judicial power] to the traditional role of Anglo–American courts, which is to redress or prevent actual or imminently threatened injury to persons caused by private or official violation of law." *Summers v. Earth Island Inst.*, 555 U.S. 488, 492 (2009); *see also Los Angeles v. Lyons*, 461 U.S. 95, 111–12 (1983) (finding no standing "where there is no showing of any real or immediate threat that the plaintiff will be harmed again"). This "prevent[s] the judicial process from being used to usurp the powers of the political branches." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013). "If a dispute is not a proper case or controversy, the courts have no business deciding it, or expounding the law in the course of doing so." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006); *accord Already, LLC v. Nike*, *Inc.*, 568 U.S. 85, 90 (2013).

An Article III case or controversy does "not include every sort of dispute, but only those 'historically viewed as capable of resolution through the judicial process.'" *Hollingsworth v. Perry*, 570 U.S. 693, 700 (2013) (quoting *Flast v. Cohen*, 392 U.S. 83, 95 (1968)). "One element of the case-or-controversy requirement is that plaintiffs must establish that they have standing to sue." *Clapper*, 568 U.S. at 408. "The doctrine of standing gives meaning to [the case-or-controversy]

limits by 'identify[ing] those disputes which are appropriately resolved through the judicial process.'" *Susan B. Anthony List*, 573 U.S. at 157 (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)). It does so by "limit[ing] the category of litigants empowered to maintain a lawsuit in federal court to seek redress for a legal wrong." *Spokeo*, 578 U.S. at 338 (citing *Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc.*, 454 U.S. 464, 473 (1982); *Warth v. Seldin*, 422 U.S. 490 (1975)).

Standing "focuses on the party seeking to get his complaint before a federal court." *Flast*, 392 U.S. at 99. Broadly defined, it looks to "whether the plaintiff has made out a 'case or controversy' between himself and the defendant within the meaning of Art. III." *Warth*, 422 U.S. at 498. More specifically, it "requires federal courts to satisfy themselves" that a party invoking the judicial power has "such a personal stake in the outcome of the controversy as to warrant *his* invocation of federal-court jurisdiction," *Summers*, 555 U.S. at 493 (emphasis in original), "and to justify exercise of the court's remedial powers on his behalf," *Warth*, 422 U.S. at 498–99. This requisite "stake in the outcome" ensures that the suit is one that is amenable to judicial resolution in that "the legal questions presented … will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action." *Valley Forge Christian Coll.*, 454 U.S. at 472. It also ensures "that there is a real need to exercise the power of judicial review in order to protect the interests of the complaining party. Where that need does not exist, allowing courts to oversee legislative or executive action would significantly alter the allocation of power away from a democratic form of government." *Summers*, 555 U.S. at 493. The law of standing thus "ensures that [judges] act *as judges*, and do not engage in policymaking properly left to elected representatives." *Hollingsworth*, 570 U.S. at 700 (emphasis in original).

The Elements of Standing

In order to demonstrate standing, a party must allege (and ultimately prove) that it is has suffered an "injury in fact" to a judicially cognizable interest "that is concrete and particularized; the threat must be actual and imminent, not conjectural or hypothetical; it must be fairly traceable to the challenged action of the defendant; and it must be likely that a favorable judicial decision will prevent or redress the injury." *Summers*, 555 U.S. at 493 (quoting *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 180–181 (2000)); *see also Defs. of Wildlife*, 504 U.S. at 560–63. "The 'irreducible constitutional minimum of standing'" is thus often summarized as "requir[ing] that a plaintiff demonstrate three elements: (1) injury in fact; (2) causation; and (3) redressability." *Scenic Am., Inc. v. U.S. Dep't of Transp.*, 836 F.3d 42, 48 (D.C. Cir. 2016) (quoting *Defs. of Wildlife*, 504 U.S. at 560–61). And while standing "often turns on the nature and source of the claim asserted," it "in no way depends on the merits" of a claim. *Warth*, 422 U.S. at 500. Consequently, "one must not confuse weakness on the merits with absence of Article III standing." *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 800 (2015); *see also ABF Freight Sys., Inc. v. Int'l Bhd. of Teamsters*, 645 F.3d 954, 959–60 (8th Cir. 2011) (finding defendant's argument that plaintiff had to demonstrate its rights under the

contract in order to demonstrate standing conflated Article III and a potential cause of action).

In *Spokeo, Inc. v. Robins*, 578 U.S. 330 (2016), the Supreme Court reiterated prior holdings making clear that an alleged injury must be "both concrete *and* particularized." *Id.* at 340 (emphasis in original). The Court held that while the Ninth Circuit had properly assessed the plaintiff's allegations pertaining to "particularity" (the "second characteristic" of an injury-in-fact), "it [had] overlooked the first [characteristic:] concreteness." *Id.* at 334.

Quoting Black's Law Dictionary, the Court explained that in order to be "concrete," an injury "must be '*de facto*,'" meaning "it must actually exist." *Id.* at 340. The Court noted that "[w]hen we have used the adjective 'concrete,' we have meant to convey the usual meaning of the term—'real,' and not 'abstract.'" *Id.* (quoting Webster's Third New International Dictionary 472 (1971); Random House Dictionary of the English Language 305 (1967)). As *Spokeo* explained, certain harms readily qualify as concrete injuries under Article III. The most obvious are traditional tangible harms, such as physical harms and monetary harms. If a defendant has caused physical or monetary injury to the plaintiff, the plaintiff has suffered a concrete injury in fact under Article III. But the Court was also quick to point out that "'[c]oncrete' is not necessarily synonymous with 'tangible,'" because "intangible injuries … can be concrete." *Id. But see Hollingsworth*, 570 U.S. at 704 ("[F]or a federal court to have authority under the Constitution to settle a dispute, the party before it must seek a remedy for a personal and tangible harm.")

With respect to intangible harms, the *Spokeo* Court explained that because the case-or-controversy requirement is "grounded in historical practice," it is "instructive" to consider whether a claimed intangible harm "has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts." *Id.* at 341 (citing *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 775–77 (2000), which held that a *qui tam* relator has Article III standing under the False Claims Act based, in part, on the history of *qui tam* actions from 13th century England until immediately after the framing of the Constitution). "In addition," the *Spokeo* Court acknowledged that "because Congress is well positioned to identify intangible harms that meet minimum Article III requirements, its judgment is also instructive and important." *Id*. "Congress may 'elevate to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law.'" *Spokeo*, 578 U.S. at 341 (quoting *Defs. of Wildlife*, 504 U.S. at 578). By way of illustration, the Court pointed to *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), in which it had noted that Congress had, within Article III bounds, made legally cognizable for Article III purposes an "injury to an individual's personal interest in living in a racially integrated community," *id.* at 578 (citing *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 208–12 (1972)), as well as an "injury to a company's interest in marketing its product free from competition," *id.* (citing *Hardin v. Ky. Utils. Co.*, 390 U.S. 1, 6 (1968)). Note, however, that an injury can be insufficiently concrete under Article III even if Congress gives plaintiffs "a statutory right and purports to authorize [plaintiffs] to sue to vindicate that right." *Thole v. U.S. Bank N.A.*, 140 S. Ct. 1615, 1620 (2020) (quoting *Spokeo*, 578 U.S. at 341) (holding that retired participants in a defined-benefit pension plan lacked Article III standing to bring suit under ERISA, even though ERISA gave participants a general cause of action to sue for equitable relief); *see also TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2205 (2021) ("[E]ven though

'Congress may "elevate" harms that "exist" in the real world before Congress recognized them to actionable legal status, it may not simply enact an injury into existence, using its lawmaking power to transform something that is not remotely harmful into something that is.'" (quoting *Hagy v. Demers & Adams*, 882 F.3d 616, 622 (6th Cir. 2018)); *TransUnion*, 141 S. Ct. at 2214 (Kagan, J., dissenting) ("[D]espite Congress' judgment that [the defendant's] misdeeds deserve redress, the majority decides that [the defendant's] actions are so insignificant that the Constitution prohibits consumers from vindicating their rights in federal court. The Constitution does no such thing.").

In addition to being concrete, an injury recognizable for Article III purposes must also be "particularized." *Spokeo*, 578 U.S. at 334. This means that the challenged action must "affect[] the plaintiff in a personal and individual way." *Defs. of Wildlife*, 504 U.S. at 560 n.1; *see id.* at 561–64. "[T]he party seeking review [must] be himself among the injured." *Id.* at 563. This does not mean that a complainant must be the only person or entity injured or that his or her injury must be unique. Indeed, "it does not matter how many persons have been injured by [a] challenged action, [so long as] the party bringing suit … show[s] that the action injures him in a concrete and personal way." *Massachusetts v. EPA*, 549 U.S. 497, 517 (2007) (quoting *Defs. of Wildlife*, 504 U.S. at 581) (Kennedy, J., concurring in part and concurring in judgment). What the particularization requirement does prevent is a complaint based on "an injury amounting *only* to the alleged violation of a right to have the Government act in accordance with law." *Defs. of Wildlife*, 504 U.S. at 575. Such so-called generalized grievances are not judicially cognizable. *Id.* at 575–76; *see also Carney v. Adams*, 141 S. Ct. 493, 498–99 (2020). "[A]lthough a suitor may derive great comfort and joy from the fact that the United States Treasury is not cheated, that a wrongdoer gets his just deserts, or that the Nation's laws are faithfully enforced, that psychic satisfaction is not an acceptable Article III remedy because it does not redress a cognizable Article III injury." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 107 (1998). Moreover, litigants cannot establish standing by arguing that if they "have no standing to sue, no one would have standing." *Thole*, 140 S. Ct. at 1621 (quoting *Valley Forge*, 454 U.S. at 489).

Finally, to be judicially cognizable "the injury complained of [must] be, if not actual, then at least *imminent.*" *Defs. of Wildlife*, 504 U.S. at 564 n.2 (emphasis in original). Imminence, which is in play when a party requests an injunction to prohibit future harmful behavior, "creates a significantly more rigorous burden to establish[ing] standing than [when] parties seek[] redress for past injuries." *Swanson Grp. Mfg. v. Jewell*, 790 F.3d 235, 240 (D.C. Cir. 2015). Though "somewhat elastic," the imminence requirement "cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes." *Defs. of Wildlife*, 504 U.S. at 564 n.2. Nonetheless, as the Court long ago established, a party "does not have to await the consummation of threatened injury to obtain preventive relief." *Pennsylvania v. West Virginia*, 262 U.S. 553, 593 (1923). A showing that an injury is "certainly impending" is enough. *Id.*; *see also Clapper*, 568 U.S. at 409 (collecting cases applying the "repeatedly reiterated" "certainly impending" standard). Thus, for example, in the context of a threatened enforcement action, the Court holds "that a plaintiff satisfies the injury-in-fact requirement where he alleges an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder." *Susan*

B. Anthony List, 573 U.S. at 159. "[A]n actual arrest, prosecution, or other enforcement action is not a prerequisite to challenging the law." *Id.* at 158 (discussing cases). If, however, an alleged future injury will come about only as a result of a "highly attenuated chain of possibilities," it will not pass Article III muster. *Clapper*, 568 U.S. at 410. *Compare id.* at 410–14 (stating that alleged future injury that respondents' foreign contacts will be intercepted by the government is not "certainly impending" because it "rests on [a] highly speculative fear" of the occurrence of a "highly attenuated" five-part "chain of possibilities" involving multiple, independent decisionmakers), *and Trump v. New York*, 141 S. Ct. 530, 536 (2020) (holding plaintiffs lacked standing to challenge president's announced apportionment policy, because appointment was "at a preliminary stage" and the "Government's eventual action [would] reflect both legal and practical constraints, making any prediction about future injury just that—a prediction"), *with Dep't of Com. v. New York*, 139 S. Ct. 2551, 2565–66 (2019) (holding that respondents established imminent injury based on likelihood that inclusion of a citizenship question on the census "would result in noncitizen households responding to the census at lower rates than other groups, which in turn would cause them to be undercounted and lead to many of respondents' asserted injuries," even though argument "depend[ed] on the independent action of third parties choosing to violate their legal duty to respond to the census" and that choice allegedly "would be motivated by … fears that the Federal Government will itself break the law by using noncitizens' answers against them for law enforcement purposes").

A future injury will also be too conjectural to satisfy Article III if it is dependent on the "some day intentions" of the putatively injured party and the party provides no "description of concrete plans, or indeed any specification of *when* the some day will be." *Defs. of Wildlife*, 504 U.S. at 564 (emphasis in original). In other words, "when … the plaintiff alleges only an injury at some indefinite future time, and the acts necessary to make the injury happen are at least partly within the plaintiff's own control," the Court has "insisted that the injury proceed with a high degree of immediacy, so as to reduce the possibility of deciding a case in which no injury would have occurred at all." *Id.* at 564 n.2. Consequently, while the Court recognizes that various environmental, recreational, and aesthetic interests are "cognizable interests for [the] purpose of standing," *id.* at 562–63, a party cannot establish an injury to those interests merely by professing an intent to visit an area where those interests are enjoyed at some unspecified point "in this lifetime," *id.* at 564 n.2; *see also Summers*, 555 U.S. at 496 (a "vague desire" based on a statement that a party "wants to go" to an area affected by the complained-of actions does not demonstrate the "firm intention" that will support Article III standing).

The Court's decision in *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2021), appears to limit *Spokeo* in explaining the requirements of injury-in-fact, particularly regarding concreteness and imminence. Most notably, the *TransUnion* Court appears to have substantially cut back on Congress' role in determining whether an intangible harm is concrete, suggesting that it is for the courts alone to decide. 141 S. Ct. at 2200–07 ("Central to assessing concreteness is whether the asserted harm has a 'close relationship' to a *harm 'traditionally' recognized as providing a basis for a lawsuit in American courts* …. [T]he concrete-harm requirement is essential to the Constitution's separation of powers.") (citation omitted) (emphasis added).

At issue in the case was a class action suit for damages under the Fair Credit Reporting Act ("FCRA"). *Id*. at 2202. The FCRA contains a cause of action allowing consumers to seek actual damages, statutory damages, or punitive damages for violations of several FCRA provisions. *Id.* at 2201. The 8,185 plaintiffs in the case alleged, among other things, that TransUnion violated the FCRA by (1) failing to use reasonable procedures to ensure the accuracy of its credit files regarding the plaintiffs, (2) not providing the plaintiffs with all of the information in the plaintiffs' credit files upon request, and (3) failing to provide the plaintiffs with summaries of their rights accompanying each written disclosure to them. *Id.* at 2202. For 1,853 of the plaintiffs, "TransUnion [had] provided misleading credit reports to third-party businesses." *Id.* at 2200. For the other 6,332 class members, however, TransUnion's internal credit files had not been "provided to third-party businesses during the relevant time period." *Id.* After a jury had awarded the plaintiffs a sizable damage award at trial, the Ninth Circuit found, on appeal, that all 8,185 plaintiffs had standing. *Id.* at 2202.

The Supreme Court reversed and remanded, finding that the 1,853 plaintiffs whose credit reports had been "published" had suffered a concrete injury as needed to support standing to bring their reasonable-procedures claim, but that the other 6,332 plaintiffs had not demonstrated any concrete harm and therefore lacked standing to bring that claim. *Id.* at 2203–14; *see also id.* at 2210 ("The mere presence of an inaccuracy in an internal credit file, if it is not disclosed to a third party, causes no concrete harm."). The Court held that none of the class members other than the named plaintiff had standing to bring the remaining two claims. In its analysis, the Court stressed that "with respect to the concrete-harm requirement … , … courts should assess whether the alleged injury to the plaintiff has a 'close relationship' to a harm 'traditionally' recognized as providing a basis for a lawsuit in American courts." *Id.* at 2204 (quoting *Spokeo*, 578 U.S. at 341). While that analysis "does not require an exact duplicate in American history and tradition," courts must ask "whether plaintiffs have identified a close historical or common-law analogue for their asserted injury." *Id.* And while the Court noted that it had previously recognized that "Congress's views may be instructive" in determining whether a harm is sufficiently concrete to qualify as an injury in fact, it emphasized that Congress "may not simply enact an injury into existence, using its lawmaking power to transform something that is not remotely harmful into something that is." *Id.* at 2204–05 (internal quotation marks omitted). Thus, according to the Court, "an important difference exists between (i) a plaintiff's statutory cause of action to sue a defendant over the defendant's violation of federal law, and (ii) a plaintiff's suffering concrete harm because of the defendant's violation of federal law. Congress may enact legal prohibitions and obligations. And Congress may create causes of action for plaintiffs to sue defendants who violate those legal prohibitions or obligations. But under Article III, an injury in law is not an injury in fact. Only those plaintiffs who have been *concretely harmed* by a defendant's statutory violation may sue that private defendant in federal court." *Id.* at 2205.

Applying these principles, the Court held that the 1,853 plaintiffs for whom incorrect credit reports had been published had suffered a concrete injury, as their injuries bore "a 'close relationship' to the harm associated with the tort of defamation." *Id.* at 2209. However, for the other 6,332 class members, whose credit information had not been provided by TransUnion to

any potential creditors, "[t]he mere presence of an inaccuracy in an internal credit file, … not disclosed to a third party, cause[d] no concrete harm." *Id.* at 2210. In particular, according to the Court, "there [was] no historical or common-law analog where the mere existence of inaccurate information, absent dissemination, amount[ed] to concrete injury." *Id.* at 2209. Thus, without publication, any injury suffered by the 6,332 class members was insufficiently concrete for standing purposes.

The Court also rejected the argument that a "risk of future harm" was sufficient to confer standing on such plaintiffs: "[A] person exposed to a risk of future harm may pursue *forward-looking, injunctive relief* to prevent the harm from occurring … so long as the risk of harm is sufficiently imminent and substantial," but "a plaintiff's standing to seek injunctive relief does not necessarily mean that the plaintiff has standing *to seek retrospective damages*." *Id.* at 2210. Instead, "in a suit for damages, the mere risk of future harm, standing alone, cannot qualify as a concrete harm—at least unless the exposure to the risk of future harm itself causes a *separate* concrete harm." *Id.* at 2210–11 (emphasis in original). And, given the holding in *TransUnion*, that limitation would seem to apply regardless of Congress' assessment as to the risk of future harm and how best to prevent it. Compare *TransUnion* with the decision in *Jeffries v. Volume Services America, Inc.*, 928 F.3d 1059 (D.C. Cir. 2019), in which the court found that the plaintiff had standing and a cause of action to sue under the Fair and Accurate Credit Transactions Act of 2003 ("FACTA"), 15 U.S.C. § 1681c(g), which was enacted to prevent identity theft and prohibits vendors from printing "more than the last 5 digits of [a patron's credit] card number … upon any receipt provided to the cardholder at the point of the sale or transaction." *See id.* at § 1681c(g)(1).

In addition to establishing that it has suffered an injury-in-fact, a litigant must also demonstrate causation and redressability. "Causation and redressability are closely related[,] like two sides of a coin." *West v. Lynch*, 845 F.3d 1228, 1235 (D.C. Cir. 2017); *see also California v. Texas*, 141 S. Ct. 2104, 2113–20 (2021) (holding that plaintiffs had failed to demonstrate either causation or redressability when raising a constitutional challenge to an "unenforceable statutory provision," as plaintiffs' alleged injuries were not traceable to the unenforceable provision and "[t]here [was] no one, and nothing" for courts "to enjoin" to remedy those alleged injuries if the plaintiffs prevailed on the merits). Nonetheless, each has a distinct focus. Causation requires "a fairly traceable connection" between the complained-of conduct of the defendant and the injury claimed. *Steel Co.*, 523 U.S. at 103; *accord DaimlerChrysler*, 547 U.S. at 342. The Court "ha[s] made clear that an injury resulting from the application or threatened application of an unlawful enactment remains fairly traceable to such application, even if the injury could be described in some sense as willingly incurred." *Fed. Election Comm'n v. Cruz*, 142 S. Ct. 1638, 1647 (2022). Redressability requires a litigant to demonstrate "a likelihood that the requested relief will redress the alleged injury." *Steel Co.*, 523 U.S. at 103; *see also Defs. of Wildlife*, 504 U.S. 561 ("[I]t must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision."). Consequently, consideration of causation can be analytically distinct from redressability, and vice versa. For example, in *Wittman v. Personhuballah*, 578 U.S. 539 (2016), Members of Congress, who had intervened in the suit below, appealed a district court decision to strike down a state's voting plan. *Id.* at 541. As intervenors, they "[could] not step into the

shoes of the original party … unless [they could] independently fulfill[] the requirements of Article III." *Id.* at 543–44 (quoting *Arizonans for Off. English v. Arizona*, 520 U.S. 43, 65 (1997)). To demonstrate the necessary injury in fact, one of the congressmen alleged that as a result of the district court's decision he was being forced to run in a new district. *Id.* at 544. At oral argument before the Supreme Court, he asserted that if the plan were reinstated, he would abandon his election effort in the new congressional district. But shortly after oral argument, the Member informed the Court that regardless of whether the plan was reinstated, he would continue his campaign in the new district. "Given this letter," the Court could "not see how any injury that [the Member] might have suffered is likely to be redressed by a favorable judicial decision." *Id.*; *see also California*, 141 S. Ct. at 2116 (explaining that alleged injuries inflicted by "unenforceable" statutory provision could not be redressed even if the plaintiffs prevailed on the merits in claiming the provision was unconstitutional, since any injunction federal courts could enter "could amount to no more than … a declaratory judgment[,] … the very kind of relief that cannot alone supply jurisdiction otherwise absent"). However, in *Uzuegbunam v. Preczewski*, 141 S. Ct. 792 (2021), the Court held that "a request for nominal damages satisfies the redressability element of standing where a plaintiff's claim is based on a completed violation of a legal right." *Id*. at 802. The Court made it clear that a claim for compensatory damages is not a prerequisite for an award of nominal damages. In other words, "nominal damages can redress [a plaintiff's] injury even if he cannot or chooses not to quantify that harm in economic terms." *Id*.

Nonetheless, the close connection between causation and redressability is often apparent, particularly in cases in which the choices and behavior of individuals or entities not party to the suit are necessarily implicated—as is often the case when a party challenges government action or inaction. In such cases, what is required to demonstrate causation and redressability depends in large degree on whether the challenging party is the object of the government's behavior. *Defs. of Wildlife*, 504 U.S. at 561. "If he is, there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it. When, however … a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else,* much more is needed. In that circumstance, causation and redressability ordinarily hinge on the response of the regulated (or regulable) third party to the government action or inaction—and perhaps on the response of others as well." *Id.* at 561–62 (emphasis in original). As the Court has explained, in such circumstances, the existence of causation and redressability "depends on the unfettered choices made by independent actors not before the courts … whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict." *Id.* at 562. It thus "becomes the burden of the plaintiff to adduce facts showing that those choices have been or will be made in such manner as to produce causation and permit redressability of injury. Thus, when the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily 'substantially more difficult' to establish." *Id.*

Establishing Standing

The Supreme Court's "standing decisions make clear that standing is not dispensed in gross." *Town of Chester, N.Y. v. Laroe Ests., Inc.*, 137 S. Ct. 1645, 1650 (2017). When a federal suit is brought by a single litigant, that party bears the burden of demonstrating each of the elements of standing for every claim asserted and for each type of relief sought. *Id.*; *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009). "The same principle applies when there are multiple plaintiffs. At least one plaintiff must have standing to seek each form of relief requested in the complaint." *Town of Chester*, 137 S. Ct. at 1651. This is true "whether [a] litigant joins the lawsuit as a plaintiff, a coplaintiff, or an intervenor of right." *Id.*

Moreover, regardless of whether a party challenges its opponent's standing, both the district court and court of appeals are obligated to ensure the existence of standing on their own initiative. *DaimlerChrysler*, 547 U.S. at 340; *see also Ala. Legis. Black Caucus v. Alabama*, 575 U.S. 254, 256 (2015) (affirming that a "District Court ha[s] an independent obligation to confirm its jurisdiction, even in the absence of a … challenge," but making clear that "elementary principles of procedural fairness" may require that the court, "rather than acting *sua sponte* give [the litigant asserting standing] an opportunity to provide evidence" of standing); *cf*. *Wittman v. Personhuballah*, 578 U.S. 539, 542–43 (2016) (acting on its obligation to ensure that intervening litigants had standing to appeal, the Supreme Court *sua sponte* ordered supplemental briefing on standing).

"Although standing generally is a matter dealt with at the earliest stages of litigation, usually on the pleadings," *Gladstone, Realtors v. City of Bellwood*, 441 U.S. 91, 115 n.31 (1979), the elements of standing "are not mere pleading requirements[,] but rather an indispensable part of the plaintiff's case," *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992). Consequently, "each element must be supported in the same way as any other matter on which [a party] bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation." *Id.* In other words, what a litigant must offer to satisfy its burden to demonstrate standing depends on the stage of litigation when standing is raised. Importantly, while the burden of proof changes as litigation progresses, the inquiry does not. It "remains focused on whether the party invoking jurisdiction had the requisite stake in the outcome *when* the suit was filed." *Davis*, 554 U.S. at 734.

What must be demonstrated when a pretrial challenge to standing is posed depends on whether the challenge is "facial" or "factual." A facial challenge attacks standing "without disputing the facts alleged in the complaint," *Davis v. Wells Fargo*, 824 F.3d 333, 346 (3d Cir. 2016), arguing only that those facts fail to meet the elements of standing as a logical matter. *See, e.g.*, *Beck v. McDonald*, 848 F.3d 262, 270 (4th Cir. 2017); *Silha v. ACT, Inc.*, 807 F.3d 169, 173 (7th Cir. 2015); *All. for Env't Renewal, Inc. v. Pyramid Crossgates Co.*, 436 F.3d 82, 88 n.7 (2d Cir. 2006); *Haase v. Sessions*, 835 F.2d 902, 907 (D.C. Cir. 1987). "In a factual attack[,] … the challenger disputes the truth of the allegations that, by themselves, would [or might] otherwise invoke federal jurisdiction." *Wood v. City of San Diego*, 678 F.3d 1075, 1083 n.8 (9th Cir. 2012); *see also,*

e.g., *Silha*, 807 F.3d at 173; *Apex Digit., Inc., v. Sears, Roebuck & Co.*, 572 F.3d 440, 444 (7th Cir. 2009).

At the pleading stage, if a party files a motion pursuant to Federal Rule of Civil Procedure 12(b)(1) arguing that the facts alleged, on their face, do not make out the elements of standing, a court "must accept as true all material allegations of the complaint … constru[ing them] … in favor of the complaining party." *Warth*, 422 U.S. at 501. A majority of circuits hold that district courts deciding Rule 12(b)(1) standing motions should apply the 12(b)(6) plausibility pleading standard established in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). *See, e.g.*, *Hochendoner*, 823 F.3d at 730–31 (citing precedent from the First, Second, Third, Sixth, and Seventh Circuits); *Silha*, 807 F.3d at 174 (citing precedent from the First, Second, Third, Fifth, and Eighth Circuits). Under the *Twombly-Iqbal* "two-pronged approach … a court (1) first identifies the well-pleaded factual allegations by discarding the pleadings that are 'no more than conclusions' and (2) then determines whether the remaining well-pleaded factual allegations 'plausibly give rise to'" the elements of standing. *Silha*, 807 F.3d at 174 (quoting *Iqbal*, 556 U.S. at 679). Nonetheless, at this stage, even post-*Iqbal* and *Twombly*, "general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss [the court] presume[s] that general allegations embrace those specific facts that are necessary to support the claim." *Beck*, 848 F.3d at 272 (quoting *Defs. of Wildlife*, 504 U.S. at 561); *see also, e.g.*, *Swanson Grp. Mfg. v. Jewell*, 790 F.3d 235, 240 (D.C. Cir. 2015).

When standing is challenged at the summary judgment stage under Federal Rule of Civil Procedure 56, the complainant "can no longer rest on … 'mere allegations,' but must 'set forth' by affidavit or other evidence 'specific facts,'" supporting the elements of standing. *Defs. of Wildlife*, 504 U.S. at 561 (quoting the then-controlling version of Fed. R. Civ. P. 56); *see also Carney*, 141 S. Ct. at 500–01 (holding that plaintiff failed to show standing "in the context of the [summary judgment] record"). If the challenge is facial, that evidence, because proffered by the nonmoving party, will "be taken to be true." *Id.*; *see, e.g.*, *United States v. Sup. Ct. of N.M.*, 839 F.3d 888, 900 n.6 (10th Cir. 2016); *Swanson Grp. Mfg.*, 790 F.3d at 240. Moreover, as the nonmoving party, the complainant asserting standing "remains entitled to the benefit of all reasonable inferences of fact for purposes of determining whether material facts [pertaining to standing] are in dispute." *Settles v. U.S. Parole Comm'n*, 429 F.3d 1098, 1107–08 (D.C. Cir. 2005). "Statements of fact must be sufficiently specific to rise above the level of 'conclusory allegations.'" *Swanson Grp. Mfg.*, 790 F.3d at 240 (quoting *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 888 (1990)). If the party seeking standing provides affidavits or other evidence admissible under Rule 56 demonstrating that there are facts supporting each of the elements of standing, the trial court must find that standing is adequately demonstrated for the purpose of summary judgment and proceed to trial. *See, e.g.*, *Sup. Ct. of N.M.*, 839 F.3d at 900. Standing can be raised again at trial, and at that stage, the proponent of standing must be prepared to prove the facts supporting standing by a preponderance of the evidence. *See Gladstone*, 441 U.S. at 115 n.31 (stating that while the issue of standing is "generally" addressed early in litigation, "it sometimes remains to be seen whether the factual allegations of the complaint necessary for standing will be supported adequately by the evidence adduced at trial"); *Bernbeck v. Gale*, 829 F.3d 643, 646–47 (8th Cir. 2016) (on appeal from a civil bench trial, appellate court *sua sponte* assessing standing

"look[s] to see that [the proponent of standing had] proven the elements … by a preponderance of the evidence"); *Me. People's All. v. Mallinckrodt*, 471 F.3d 277, 283 (1st Cir. 2006) ("The ultimate quotient of proof is preponderance of the evidence.").

When a party launches a factual challenge to standing by pointing to or submitting evidence contradicting the evidence relied on by the complainant, or when the court on its own motion challenges the truth of the evidence supporting standing, "the trial court may proceed as it never could under Rule 12(b)(6) or Rule 56." *Apex*, 572 F.3d at 444–45 (quoting *Mortensen v. First Fed. Sav. & Loan Ass'n*, 549 F.2d 884, 891 (3d Cir. 1977)). The presumption of truth normally afforded a complaint's allegations at the pleading stage falls away. *See, e.g.*, *Wells Fargo*, 824 F.3d at 346. So too does the presumption of truth that applies to the record evidence of a non-moving complainant responding to a summary judgment motion. *See, e.g.*, *Apex*, 572 F.3d at 442; *Bischoff v. Osceola Cnty.*, 222 F.3d 874, 879 (11th Cir. 2000). And "the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims," *Apex*, 572 F.3d at 443, as would be the case in ruling on a motion for summary judgment on the merits. This is because it is the district court, not the jury, which is charged with resolving factual issues pertaining to whether a party has standing. *See Freedom from Religion Found., Inc. v. New Kensington Arnold Sch. Dist.*, 832 F.3d 469, 475 n.4 (3d Cir. 2016) (citing *Duke Power Co. v. Carolina Env't Study Grp., Inc*, 438 U.S. 59, 72 (1978)); *ACLU of Fla., Inc. v. Dixie Cnty.*, 690 F.3d 1244, 1246 (11th Cir. 2012). Thus, the presumptions which protect the jury's right to decide the facts are unnecessary. *Compare* Section B, *infra* (discussing summary judgment motions on the merits). In fact, a number of circuits are clear "that a district court *cannot* decide disputed factual questions or make findings of credibility essential to the question of standing on the paper record alone but *must* hold an evidentiary hearing." *Bischoff*, 222 F.3d at 879 (emphasis in original); *see also id*. at 880–81 (discussing precedent from the First and Fifth Circuits).

When a factual challenge is raised, whether on the motion of a party or the court, the district court is generally permitted "leeway as to the procedure it wishes to follow." *All. for Env't Renewal*, 436 F.3d at 88 (citing *Gibbs v. Buck*, 307 U.S. 66, 71–72 (1939)). "Uniquely, Rule 12(b)(1) allows a district court to make findings of fact that contradict the allegations in the complaint, at the very outset of litigation, before any discovery has taken place." *Wells Fargo*, 824 F.3d at 349 n.18. But a district court may also allow limited discovery relevant to standing, *All. For Env't Renewal*, 436 F.3d at 88 n.7, and "[t]he district court may properly … view whatever evidence has been submitted on the issue to determine whether in fact [standing] exists," *Apex*, 572 F.3d at 444 (motion on the pleadings); *United States v. 1998 BMW "I" Convertible*, 235 F.3d 397, 400 (8th Cir. 2000) (for summary judgment). *But see Haase*, 835 F.2d at 907–08 (noting that a defendant may only obtain discovery of the facts supporting standing by presenting its factual challenge in the form of a summary judgment motion, though courts remain free to initiate a factual inquiry and take additional evidence at the pleading stage). The district court's ability to consider and weigh evidence and make factual findings regarding standing "derives from the importance of limiting federal jurisdiction. Because [standing] cannot be conferred by consent of the parties, if the facts place the district court on notice that the jurisdictional allegation probably is false, the court is duty-bound to demand proof of its truth." *Apex*, 572 F.3d at 444.

Different considerations arise "where the evidence concerning standing overlaps with evidence on the merits." *All. for Env't Renewal*, 436 F.3d at 88. Given the different burdens imposed on a party asserting standing and a party defending against a motion to dismiss on the merits under Federal Rule of Civil Procedure 12(b)(6), *see Wells Fargo*, 824 F.3d at 348–49, there is concern that district courts "must take care not to reach the merits of a case when deciding a Rule 12(b)(1) motion," *id.* at 348. But district courts also face the imperative, established in *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998), preventing them from ruling on a case over which all Article III jurisdictional requirements have not been satisfied. *See All. For Env't Renewal*, 436 F.3d 85–87 (discussing the impact of *Steel Co*. on factual challenges to standing when the facts underlying the merits of the case are implicated). But "[t]he message of *Steel Co*…. does not inevitably mean that a district court must make a definitive ruling on Article III standing before giving any consideration to the merits." *Id*. at 87. On the theory that *Steel Co*. "seeks to guard only against a definitive ruling on the merits by a court that lacks jurisdiction," *All. For Env't Renewal*, 436 F.3d at 87, it is permissible when the facts supporting standing and the merits are intertwined for a district judge "to proceed to trial and make its jurisdictional ruling at the close of the evidence," *id*. at 88. "If, however, the overlap in the evidence is such that fact-finding on the jurisdictional issue will adjudicate factual issues required by the Seventh Amendment to be resolved by a jury, then the court *must* leave the jurisdictional issue for the trial." *Id*. A court "may also deem it appropriate to make a preliminary finding on jurisdictional facts, subject to revision later in the proceedings or at trial." *Id*. (citing *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 537–38 (1995)); *see also Wells Fargo*, 824 F.3d at 348–50 (applying to intertwined standing challenges something like the standard of *Bell v. Hood*, 327 U.S. 678, 682–83 (1946), governing motions challenging the "arising under" requirement of subject matter jurisdiction); Section A.1, *supra* (discussing subject matter jurisdiction and *Bell v. Hood*).

When standing is challenged by an opponent or questioned by the court during trial, the requirements are quite straightforward. The facts demonstrating standing "must be supported adequately by the evidence adduced." *Defs. of Wildlife*, 504 U.S. at 561 (quoting *Gladstone*, 441 U.S. at 115 n.31); *see also, e.g.*, *Colo. Outfitters Ass'n v. Hickenlooper*, 823 F.3d 537, 544 (10th Cir. 2016) ("[W]hen a case proceeds to trial, standing is evaluated not on the pleadings … but on the basis of all the evidence in the record."). And the standard of proof by which facts supporting standing must be demonstrated is a preponderance. *See Bernbeck*, 829 F.3d at 646–47; *Me. People's All.*, 471 F.3d at 283.

On appeal of a ruling finding or denying standing on factual grounds—whether challenged and decided pretrial or during trial—the appellate court reviews the district court's legal conclusions *de novo*, but its findings of fact for clear error. *See Dep't of Com. v. New York*, 139 S. Ct. 2551, 2556 (2019) (applying clear error review to district court's factual finding that the challenged government action would have a "predictable effect" of causing third parties to make decisions that would injure plaintiffs); *Wells Fargo*, 824 F.3d at 346; *Haase*, 835 F.2d at 907 ("The fact-finding of the court to support or deny standing is subject to review under the clearly erroneous standard." (citing *Duke Power*, 438 U.S. at 77)); *Hohlbein v. Hosp. Ventures*, 248 F. App'x 804, 805 (9th Cir. 2007).

B. Summary Judgment: Federal Rule of Civil Procedure 56

Summary judgment practice is predicated on the goal of conserving "public and private resources." *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986). A "principal purpose[] of the … rule is to isolate and dispose of factually unsupported claims or defenses." *Id.* at 323–24. In resolving motions for summary judgment, district judges "pierce the pleadings and … assess the proof in order to see whether there is a genuine need for trial." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The question is whether "there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986).

Appellate courts review decisions resolving summary judgment motions *de novo*, applying the same standards as the district courts. *See, e.g.*, *Birch v. Polaris Indus., Inc.*, 812 F.3d 1238, 1251 (10th Cir. 2015); *Bowlin v. Montanez*, 446 F.3d 817, 819 (8th Cir. 2006). Those standards are largely derived from Federal Rule of Civil Procedure 56 and the Supreme Court's seminal decisions in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), and *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

As required by Rule 56(a), "[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." In applying this rule, "the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Liberty Lobby*, 477 U.S. at 247–48.

"Materiality" is determined by the applicable substantive law. "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." *Id.* at 248.

Determining whether a dispute is "genuine" is a somewhat more complicated task. Simply stated, a dispute over a material fact is genuine if the "caliber" and "quantity" of evidence would "allow a rational finder of fact," *id.* at 254, to "return a verdict for the nonmoving party," *id.* at 248. Thus, as the Court has explained, "the 'genuine issue' summary judgment standard is very close to the 'reasonable jury' directed verdict standard" of Federal Rule of Civil Procedure 50(a). *Id.* at 251. The main difference between the two is that the former is applied to documentary evidence submitted before trial, whereas the latter is applied to the evidence admitted at trial. *Id.* "In essence, though, the inquiry … is the same: whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Id.* at 251–52; *see also* Section C, *infra* (discussing Federal Rule of Civil Procedure 50 and judgments as a matter of law).

In undertaking the "genuine issue" inquiry, a court "must view the evidence presented through the prism of the [controlling] substantive evidentiary burden." *Id.* at 254. "If the defendant in a run-of-the-mill civil case moves for summary judgment … based on the lack of proof of a material fact, the judge must ask himself not whether he thinks the evidence unmistakably favors one side or the other," but rather whether there is evidence of a quantity and quality that would allow "reasonable jurors [to] find by a preponderance of the evidence that the plaintiff is entitled to a verdict." *Id.* at 252. By the same token, if the standard of proof at trial is "clear and convincing evidence," a court must find "no genuine issue if the evidence presented in the opposing affidavits is of insufficient caliber or quantity to allow a rational finder of fact to find [the fact in dispute] by clear and convincing evidence." *Id.* at 254.

Under Rule 56(a), "[a] party may move for summary judgment" on any "claim or defense" or any "part of [a] claim or defense." When a motion for summary judgment has been properly made and supported, an opposing party may not rest on mere allegations or denials in its pleadings. *See Celotex*, 477 U.S. at 324–26. As provided in Rule 56(c), both the moving and responding parties must support their respective positions by "citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations … or other materials" or by "showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." Fed. R. Civ. P. 56(c)(1)(A), (B).

In *Celotex*, the Court made clear that the burden of proof at trial defines what a movant must show in order to require a response from the adverse party. *See* 477 U.S. at 322–24. When the nonmoving party bears the burden of proof on a dispositive issue, the moving party's burden of production "may be discharged by 'showing'—that is, pointing out to the district court—that there is an absence of evidence to support the nonmoving party's case." *Id.* at 325. "[W]hether or not accompanied by affidavits" or other record evidence, such a motion will be considered to have been properly "made and supported as provided in" Rule 56 and will thus obligate the adverse party "to go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" *Id.* at 324 (quoting the 1963 version of Rule 56(e)). In doing so, the responding party is not confined to the content of the record at the time the motion was made, but may support its position with new material so long as it adds the material to the record. Fed. R. Civ. P. 56(c)(1)(A) advisory committee's notes (2010). However, if "after adequate time for discovery," the adverse party "fails to make a showing sufficient to establish the existence of an element essential to that party's case," summary judgment must be granted. *Celotex*, 477 U.S. at 322. In such a situation, "[t]he moving party is entitled to a judgment as a matter of law because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof." *Id.* at 323.

In contrast, when the moving party bears the burden of proof with respect to a dispositive issue, it must, using the materials specified in Rule 56(c)(1)(A), point to credible record evidence that, if not controverted at trial, would entitle it to a judgment as a matter of law. *See id.* at 331, 334 (Brennan, J., dissenting) (describing the principles with respect to which he and the majority

agreed). "Such an affirmative showing shifts the burden of production to the party opposing the motion and requires that party either to produce evidentiary materials that demonstrate the existence of a 'genuine issue' for trial" or to seek additional time for discovery. *Id.* at 331 (citing the then-controlling version of Rules 56(e) and (f)); *see also Matsushita Elec. Indus. Co.*, 475 U.S. at 586–87; Fed. R. Civ. P. 56(c)(1)(A) advisory committee's note (2010) (allowing responding party to base its response on materials it adds to the record).

To avoid usurping the role of the fact-finder, a court deciding a summary judgment motion must accept as true the nonmovant's evidence and draw all reasonable inferences that can be drawn in favor of the nonmovant from all of the record evidence. *See Liberty Lobby*, 477 U.S. at 255; *see also Tolan v. Cotton*, 572 U.S. 650, 659–60 (2014) (summarily vacating a judgment of the Fifth Circuit for failing to follow this directive). In other words, the court may not weigh the evidence to determine the "truth of the matter" as a fact-finder would, *Liberty Lobby*, 477 U.S. at 249, and it may not make credibility determinations, *id.* at 255.

The rule giving the nonmovant the benefit of all reasonable inferences from the record evidence does not mean that a court may never consider evidence supporting the movant. As the Supreme Court clarified in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000), such evidence may be relied upon, provided a jury would be "required to believe" it. *Id.* at 151. "That is, the court should give credence to the … evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that [it] comes from disinterested witnesses." *Id.*; *see also id.* at 149–51 (describing the standards governing judgments as a matter of law, but noting that the summary judgment and judgment as a matter of law standards mirror each other).

Read literally, the *Reeves* test prevents courts from relying on uncontradicted and unimpeached evidence offered by a movant unless that evidence is proffered through a disinterested witness. *See id.* at 151. And opinions can be found that interpret the test this way. *See, e.g.*, *Kilgore v. Trussville Dev., LLC*, 646 F. App'x 765, 775–76 (11th Cir. 2016) (reversing summary judgment in favor of the moving defendant in part because the district court relied on evidence from defendant's employee, who was involved in the disputed termination decision and, as such, was "not a disinterested witness," *id.* at 776); *Ellerbrook v. City of Lubbock*, 465 F. App'x 324 (5th Cir. 2012) (reversing a judgment as a matter of law in favor of the moving defendant in part because the district court relied on the testimony of an interested witness, *id.* at 331, an employee of the defendant involved in the decisions to terminate the plaintiff's husband and not hire the plaintiff, *id.* at 326–27); *Hill v. City of Scranton*, 411 F.3d 118, 131 n.22 (3d Cir. 2005) (disregarding uncontested evidence supporting moving defendant because it came from a witness employed by the defendant).

But many appellate panels read the *Reeves* test less strictly, approving reliance on a moving party's evidence even when it is proffered through an interested witness. Some of these panels describe fairly specific indicia supporting their determination that a jury would be required to treat evidence from an interested witness as true. *See, e.g.*, *Kingery v. Quicken Loans, Inc.*, 629 F. App'x 509, 516 (4th Cir. 2015) ("[T]he status of [the defendant movant's witness] as an employee

of [the defendant] is insufficient by itself to create a jury question on his veracity as long as his testimony disclosed no lack of candor, he was not impeached, his credibility was not questioned, and the accuracy of his testimony was not controverted by evidence, although if it were inaccurate it readily could have been shown to be so."). Others require only that the evidence not be contradicted. *See, e.g.*, *LaFrenier v. Kinirey*, 550 F.3d 166, 168 (1st Cir. 2008) (applying circuit precedent that "testimony that is uncontradicted by the nonmovant" need not be excluded to affirm the district court's judgment in favor of the moving defendant police officers who proffered only their own testimony that they did not use excessive force).

If either party "fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c), the court may," among other things, "consider the fact undisputed for purposes of the motion." Fed. R. Civ. P. 56(e)(2). Pursuant to Rule 56(c)(4), "[a]n affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated." *Id.* at 56(c)(4). "A party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence." *Id.* at 56(c)(2). But this requirement does not mean that the evidence must be produced in an admissible form at the time of the summary judgment motion. *Celotex*, 477 U.S. at 324. Rather, Rule 56 permits a summary judgment motion to be supported or opposed by any kind of evidentiary material that can be "reduc[ed] to [an] admissible form" by the time of trial. *Figueroa v. Mazza*, 825 F.3d 89, 98 n.8 (2d Cir. 2016); *see also, e.g.*, *Am. Home Assurance Co. v. Greater Omaha Packing Co.*, 819 F.3d 417, 429–30 (8th Cir. 2016). "The burden is on the proponent to show that the material is admissible as presented or to explain the admissible form that is anticipated." Fed. R. Civ. P. 56(c)(2) advisory committee's note (2010). If a district court declines to consider proffered evidence on the grounds that it will be inadmissible at trial, that determination will be reviewed only for abuse of discretion. *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 141 (1997).

"The jurisdiction of a Court of Appeals under 28 U.S.C. § 1291 extends only to 'appeals from … final decisions of the district courts.'" *Ortiz v. Jordan*, 562 U.S. 180, 188 (2011) (quoting 28 U.S.C. § 1291). "Ordinarily, orders denying summary judgment do not qualify as 'final decisions' subject to appeal." *Id*. This is so because the denial of a summary judgment motion is often based on a district court's conclusion that there is a genuine dispute with regard to a material fact that needs to be resolved by a fact-finder. Such rulings are, "by their terms[,] interlocutory." *Id.* They are pronounced during the course of the judicial resolution of a claim and are not finally determinative of that claim. *See id.* at 184.

There are, however, denials of summary judgment over which the appellate courts can immediately assert subject matter jurisdiction under the collateral order doctrine articulated in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). To qualify for immediate appeal under *Cohen*, an order must "finally determine [1] claims of right separable from, and collateral to, rights asserted in the action," which are "[2] too important to be denied review[,] and [3] too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Id.* at 546. Importantly, the decision must also be one that is

"effectively unreviewable on appeal from the final judgment in the underlying action." *Swint v. Chambers Cnty. Comm'n*, 514 U.S. 35, 42 (1995). The order for which appeal is sought cannot be "tentative, informal or incomplete," but rather must conclusively settle the claim at issue. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 171 (1974) (quoting *Cohen*, 337 U.S. at 546, and explaining its holding). And the decision must "not constitute merely a 'step toward final disposition of the merits of the case.'" *Id*. As the Court has explained, in determining whether an order is final under the collateral order doctrine, "the requirement of finality is to be given a 'practical rather than a technical construction.'" *Id.* (quoting *Cohen*, 337 U.S. at 546). "The inquiry requires some evaluation of the competing considerations underlying all questions of finality—'the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other.'" *Id.* (quoting *Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507, 511 (1950)); *see also Swint*, 514 U.S. at 41–42 (1995) ("The collateral order doctrine is best understood not as an exception to the 'final decision' rule laid down by Congress in § 1291, but as a 'practical construction' of it.").

Applying these decisional criteria, the Supreme Court in *Mitchell v. Forsyth*, 472 U.S. 511 (1985), "held that a district court's order denying a defendant's motion for summary judgment was an immediately appealable 'collateral order' (*i.e.*, a 'final decision') under *Cohen,* where (1) the defendant was a public official asserting a defense of 'qualified immunity,' and (2) the issue appealed concerned, not which facts the parties might be able to prove, but, rather, whether or not certain given facts showed a violation of 'clearly established' law." *Johnson v. Jones*, 515 U.S. 304, 311 (1995) (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (holding that public officials are entitled to "qualified immunity" from "liability for civil damages insofar as their conduct does not violate clearly established … rights of which a reasonable person would have known")); *see also Johnson*, 515 U.S. at 311–12 (explaining how a denial of summary judgment based on a court's conclusion that the alleged facts do not "show[] a violation of 'clearly established' law" meets the three *Cohen* criteria). It is now well settled that in the qualified immunity context, the collateral order doctrine provides a basis for appellate jurisdiction when a denial of summary judgment turns on an issue of law. *See, e.g.*, *Plumhoff v. Rickard*, 572 U.S. 765, 771–73 (2014) (discussing cases and holding that the denial of summary judgment based on the legal question of whether alleged police behavior violated clearly established Fourth Amendment law is a final interlocutory order immediately appealable).

It is equally well settled that summary judgment orders resolving motions brought by public officials who are entitled to assert a qualified immunity defense, but seek summary judgment based on "'evidence sufficiency,' *i.e.*, which facts a party may, or may not, be able to prove at trial," are not immediately appealable as collateral orders. *Johnson*, 515 U.S. at 313; *see also id.* at 307. Thus, in *Johnson v. Jones*, 515 U.S. 304, 313–18 (1995), the Court held the appellate court was not authorized to assert jurisdiction over the denial of a motion for summary judgment sought by police officer defendants on the grounds that "whatever evidence [the plaintiff] might have about the *other* two officers, he could point to no evidence that [the defendants] had beaten him or had been present while others did so." *Id.* at 307 (emphasis in original).

Many circuit courts, looking to the principles supporting the collateral order doctrine, will also find jurisdiction to review the denial of an appellant's summary judgment motion when the district court's order granting the appellee's cross motion for summary judgment disposed of all issues before the district court and the record is adequate to allow meaningful review of the denied motion. *See, e.g.*, *Max Arnold & Sons, LLC v. W.L. Hailey & Co.*, 452 F.3d 494, 505 (6th Cir. 2006). "A decision otherwise would be inconvenient, a waste of judicial resources, and would create piecemeal and unduly splintered litigation, especially if there is an overlap between the cross motions for summary judgment." *Id*.; *see also id.* (identifying circuits in accord with this position).

Unrelated to the collateral order doctrine, jurisdiction over immediate review of a denial of summary judgment may, on very rare occasions, be available under "pendent party" jurisdiction if the facts of the denied summary judgment ruling are "inextricably intertwined" with the facts of an issue over which a circuit court has independent jurisdiction. *See Swint*, 514 U.S. at 51 (invoking such a possibility and finding the requirements not met); *see also Advanced Fiber Techs. (AFT) Tr. v. J & L Fiber Servs.*, 674 F.3d 1365, 1376–77 (Fed. Cir. 2012) (holding pendent appellate jurisdiction inapplicable because the defendant never alleged "that the district court's denial of summary judgment … [was] 'inextricably intertwined' with the court's grant of summary judgment" on a claim over which the court had jurisdiction, "or that review of the former decision [was] 'necessary to ensure meaningful review' of the latter," *id.* at 1377).

After a "full trial on the merits," a summary judgment motion that was denied because the district court was satisfied that there was a genuine dispute regarding a material fact cannot be reviewed on appeal. *Ortiz*, 562 U.S. at 183–84. "[T]he full record developed in court supersedes the record existing at the time of the summary-judgment motion." *Id*. at 184; *see also Feld v. Feld*, 688 F.3d 779, 782 (D.C. Cir. 2012) ("On appeal, there would be no reason to 'step back in time' to determine whether the evidence was sufficient for summary judgment. That question has been overtaken by events—the trial."). "Questions going to the sufficiency of the evidence are not preserved for appellate review by a summary judgment motion alone … ; rather, [such] challenges … must be renewed post-trial under Rule 50." *Ortiz*, 562 U.S. at 190. "A Rule 50 motion preserves for appeal a challenge to the legal sufficiency of the evidence because the denial of summary judgment is not the final word on that question, but merely a prediction that the evidence will be sufficient to support a verdict in favor of the nonmovant. The accuracy of that prediction becomes irrelevant once trial has occurred." *Feld*, 688 F.3d at 782; *see also* Section C, *infra* (discussing Rule 50 motions for judgment as a matter of law).

A post-trial motion under Rule 50 is not required to preserve for appellate review a purely legal issue resolved at summary judgment. "While factual issues addressed in summary-judgment denials are unreviewable on appeal, the same is not true of purely legal issues—that is, issues that can be resolved without reference to any disputed facts." *Dupree v. Younger*, 143 S. Ct. 1382, 1389 (2023). This is because unlike factual findings, conclusions of law are not "'supersede[d]'" by later developments in the litigation," *id.* (quoting *Ortiz*, 562 U.S. at 184); rather, they generally "merge into the final judgment, at which point they are reviewable on appeal." *Id*. "From the reviewing court's perspective, there is no benefit to having a district court reexamine a purely

legal issue after trial, because nothing at trial will have given the district court any reason to question its prior analysis." *Id*. Thus, "a post-trial motion under Rule 50 is not required to preserve for appellate review a purely legal issue resolved at summary judgment." *Id*.

C. Testing the Legal Sufficiency of the Evidence in Civil Jury Trials: Federal Rule of Civil Procedure 50

Federal Rule of Civil Procedure 50 provides:

> If a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue, the court may: (A) resolve the issue against the party; and (B) grant a motion for judgment as a matter of law against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue.

Fed. R. Civ. P. 50(a)(1). A motion for a judgment as a matter of law converts what would otherwise be a question of fact, reserved to the jury and generally protected from review by the Seventh Amendment, into a legal question. *See Galloway v. United States*, 319 U.S. 372, 388–89 (1943) (directed verdicts do not violate the Seventh Amendment); *Balt. & Carolina Line, Inc. v. Redman*, 295 U.S. 654, 656–60 (1935) (judgment notwithstanding the verdict does not violate the Seventh Amendment when the issue is submitted to the jury subject to a reserved motion for directed verdict); *see also Weisgram v. Marley Co.*, 528 U.S. 440, 454 n.10 (2000); *Neely v. Martin K. Eby Constr. Co.*, 386 U.S. 317, 322 (1967). Such motions allow trial judges and, on review, appellate courts "to remove cases or issues from [a] jury's consideration when the facts are sufficiently clear that the law requires a particular result." *Weisgram*, 528 U.S. at 448; *see also id.* at 450. A properly granted judgment as a matter of law thus serves "the purpose of Rule 50 to speed litigation and to avoid unnecessary retrials." *Neely*, 386 U.S. at 326. However, because improperly granted judgments intrude upon the province of the jury, the standard is demanding and must be applied with caution. *See, e.g.*, *EEOC v. EmCare, Inc.*, 857 F.3d 678, 682–83 (5th Cir. 2017); *Shaw Hofstra & Assocs. v. Ladco Dev.*, 673 F.3d 819, 825 (8th Cir. 2012).

Appellate courts review properly preserved sufficiency challenges *de novo*, applying the same standard as a trial judge resolving motions for judgments as a matter of law in the first instance. *See, e.g.*, *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 149–51 (2000); *see also* 9B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 2524 & n.3 (3d ed. 2008 & Supp. 2017). Giving the benefit of all reasonable inferences to the party opposing the motion, both courts ask whether the properly admitted evidence would allow any reasonable juror to find for the nonmoving party. *See Reeves*, 530 U.S. at 149–51. Stated another way, the question is whether, "under the governing law, there can be but one reasonable conclusion as to the verdict." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). "If reasonable minds could differ as to the import of the evidence," a judgment as a matter of law may not be granted. *Id.* at

250–51. As the Supreme Court has explained, this "reasonable jury" standard is "very close" to the "genuine issue" summary judgment standard. *Id.* at 251.

> The primary difference between the two motions is procedural; summary judgment motions are usually made before trial and decided on documentary evidence, while directed verdict motions are made at trial and decided on the evidence that has been admitted. In essence, though, the inquiry under each is the same: whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.

Id. at 251–52; *see also* Section B, *supra*.

While judgments as a matter of law are most often sought against the proponent of a claim, federal courts are free to grant judgment for the party bearing the burden of proof at trial. *See Slocum v. N.Y. Life Ins. Co.*, 228 U.S. 364, 369 (1913). The overarching question is largely the same: whether reasonable minds could differ with respect to what the evidence shows. *See, e.g.*, *Radtke v. Lifecare Mgmt. Partners*, 795 F.3d 159, 165 (D.C. Cir. 2015); *Marrero v. Goya of P.R., Inc.*, 304 F.3d 7, 22 (1st Cir. 2002). Nevertheless, in practice, the standard for granting judgment in favor of a party bearing the burden of proof at trial is more difficult to meet. "It is rarely appropriate to grant [judgment as a matter of law] in favor of the party having the burden of proof; such action is reserved for those extreme circumstances where the effect of the evidence is not only sufficient to meet [the movant's] burden of proof, but is overwhelming, leaving no room for the jury to draw significant inferences in favor of the other party." *Radtke*, 795 F.3d at 165–66; *see also Broadnax v. City of New Haven*, 415 F.3d 265, 270 (2d Cir. 2005); *Marrero*, 304 F.3d at 22. In other words, when the movant bears the burden of proof, judgment as a matter of law "may be granted only where the movant has established his case by evidence that the jury would not be at liberty to disbelieve." *Black v. M & W Gear Co.*, 269 F.3d 1220, 1238 (10th Cir. 2001); *accord Marrero*, 304 F.3d at 22; *see also Allen v. Zurich Ins. Co.*, 667 F.2d 1162, 1164 (4th Cir. 1982). In general, instances in which a judgment as a matter of law is proper when the movant bears the burden of proof are "rare." *Broadnax*, 415 F.3d at 270; *see also Radtke*, 795 F.3d at 165–66; *EEOC v. Massey Yardley Chrysler Plymouth, Inc.*, 117 F.3d 1244, 1250 (11th Cir. 1997) (characterizing a judgment as a matter of law in favor of the party bearing the burden of proof as an "extreme step").

Like the tests for granting summary judgment in civil cases and judgments of acquittal in criminal cases, the standard for granting judgment as a matter of law "necessarily implicates the substantive evidentiary standard of proof that would apply at the trial on the merits." *Liberty Lobby*, 477 U.S. at 252; *see also id*. at 255. Consequently, in most civil cases, when a defendant seeks a judgment as a matter of law, the court "asks whether reasonable jurors could find by a preponderance of the evidence that the plaintiff is entitled to a verdict." *Id.* at 252. However, if the governing standard of proof is "clear and convincing evidence," then the courts must apply the reasonable juror standard in light of this greater evidentiary burden. *Id.* at 252–54.

Rule 50 provides that a motion for judgment as a matter of law may be granted only if the party opposing the motion has been "fully heard on an issue." Fed. R. Civ. P. 50(a)(1). And, because "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions," a court "must disregard all evidence favorable to the moving party that the jury is not required to believe." *Reeves*, 530 U.S. at 150–51. As the Supreme Court has explained, this means that a court "should give credence to the evidence favoring the nonmovant as well as that evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that that evidence comes from disinterested witnesses." *Id.* at 151; *see* Section B, *supra* (discussing the import of the phrase "disinterested witnesses"). In addition, courts of appeals reviewing sufficiency challenges must disregard all erroneously admitted evidence. *See Weisgram*, 528 U.S. at 453–56.

Rule 50 sets forth a two-step process for challenging the sufficiency of the evidence before the trial court. *See* Fed. R. Civ. P. 50(a), (b). Rule 50(a) prescribes the first step, specifying that "[a] motion for judgment as a matter of law may be made at any time before the case is submitted to the jury." Fed. R. Civ. P. 50(a)(2). It also provides that "the court *may* … resolve the issue against" a moving party when the "court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue." Fed. R. Civ. P. 50(a)(1). Thus, while a district court may enter a pre-verdict judgment (formerly known as a directed verdict) when it concludes that the evidence is legally insufficient, "it is not required to do so." *Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc.*, 546 U.S. 394, 405 (2006) (interpreting similar language in the pre-2006 version of the rule). In fact, as the Supreme Court has noted, efficiency concerns often counsel in favor of submitting to the jury issues with respect to which a trial judge thinks judgment is appropriate:

> If the jury agrees with the [trial] court's appraisal of the evidence, and returns a verdict for the party who moved for judgment as a matter of law, the case is at an end. If the jury brings in a different verdict, the trial court can grant a renewed motion for judgment as a matter of law. Then if the appellate court holds that the trial court was in error in its appraisal of the evidence, it can reverse and order judgment on the verdict of the jury, without any need for a new trial.

Id. at 406. Rule 50 makes no provision for seeking a new trial based on the insufficiency of the evidence prior to submission of a case to the jury, and the Court has held that trial courts are without authority to order such pre-verdict relief. *Id.* at 404–05.

Rule 50(b) prescribes the second step necessary to obtain appellate review of a sufficiency challenge, providing that "[i]f the court does not grant a motion … made under Rule 50(a), the court is considered to have submitted the action to the jury subject to [it] later deciding the legal questions raised by the motion." However, Rule 50(b) does not obligate a district court to revisit the issue on its own motion, but rather provides that "[n]o later than 28 days after the entry of judgment … the movant may file a renewed motion for judgment as a matter of law." A Rule 50(b) motion to renew (formerly known as a motion for judgment notwithstanding the verdict)

can only advance grounds that were raised in a Rule 50(a) motion made prior to submission of the case to the jury. *See* Fed. R. Civ. P. 50 advisory committee's notes to 1963, 1991 & 2006 amendments; *cf.* Fed. R. Crim. P. 29(c)(3) (explicitly stating that a criminal defendant "is not required to move for a judgment of acquittal before the court submits the case to the jury as a prerequisite for making such a motion after jury discharge").

Rule 50(b) additionally provides that a party renewing a motion for judgment as a matter of law "may include an alternative or joint request for a new trial under Rule 59." In ruling on a renewed motion, a district court may allow a judgment to stand, order a new trial, or enter a judgment as a matter of law. Fed. R. Civ. P. 50(b)(1), (2), (3). Pursuant to Rule 50(c), if a court grants judgment, it must conditionally rule on any joined or alternative new trial motion filed by the movant. Fed. R. Civ. P. 50(c)(1).

In *Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc.*, 546 U.S. 394 (2006), the Supreme Court established that the procedural requirements of Rule 50 are inviolate. The defendant in *Unitherm* had filed a pre-verdict Rule 50(a) motion for judgment as a matter of law. The district court denied the motion and the jury returned a verdict for the plaintiff. *Id.* at 398. The defendant neither renewed its motion for judgment as a matter of law nor asked the trial court for a new trial based on the insufficiency of the evidence. On appeal, the Federal Circuit, interpreting Tenth Circuit law, ruled that a party who fails to file a post-verdict sufficiency-of-the-evidence challenge can nonetheless seek a new trial on appeal, so long as the party filed a Rule 50(a) motion before submission of the case to the jury. *Id.* at 398–99.

Considering a challenge to this ruling, the Supreme Court first summarized precedent establishing "that an appellate court may not order judgment [following a verdict] where the verdict loser has failed strictly to comply with the procedural requirements of Rule 50(b)." *Id.* at 402 n.4. As the Court explained, these earlier cases established that "[a] postverdict motion is necessary because determination of whether a new trial should be granted or a judgment entered under Rule 50(b) calls for the judgment in the first instance of the judge who saw and heard the witnesses and has the feel of the case which no appellate printed transcript can impart. Moreover, the requirement of a timely application for judgment after verdict is not an idle motion because it is … an essential part of the rule, firmly grounded in principles of fairness." *Id.* at 401.

The Court then noted that its "observations about the necessity of a postverdict motion under Rule 50(b), and the benefits of the district court's input at that stage, apply with equal force whether a party [claiming that the evidence is insufficient to support the verdict] is seeking judgment as a matter of law or simply a new trial." *Id.* at 402. It thus held that, because the defendant had failed to make "an appropriate postverdict motion in the district court," the court of appeals was powerless to order a new trial on the grounds that the evidence was insufficient to support the verdict. *Id.* at 404–07.

Assuming a sufficiency challenge is properly preserved, if an appellate court determines that the trial judge erroneously resolved a motion for judgment as a matter of law, the remedy is

committed to the appellate court's "informed discretion." *Neely*, 386 U.S. at 329; *see also id.* at 322–29. The Supreme Court made this clear in *Neely v. Martin K. Eby Construction Co.*, 386 U.S. 317 (1967), and, in 2007, Rule 50 was amended to describe this authority, *see* Fed. R. Civ. P. 50(e); Fed. R. Civ. P. 50 advisory committee's notes to 2007 amendment. The question in *Neely* was whether a court of appeals, "after reversing the denial of a defendant's Rule 50(b) motion for judgment [as a matter of law], may itself order dismissal or direct entry of judgment for defendant." 386 U.S. at 321–22. Citing the language of Rule 50(c), as well as the accompanying Advisory Committee Notes, the Court first explained that if a district judge has improperly *granted* a motion for judgment as a matter of law, a court of appeals is free to (1) reverse and reinstate the jury's verdict or (2) reverse and grant a new trial. *Id.* at 323 & n.4. In choosing between these alternatives, an appellate court is not bound by the district judge's conditional ruling on any new trial motion filed by the party against whom judgment as a matter of law was granted. *Id.*

Turning to Rule 50(d) (amended and renumbered in 2007 as Rule 50(e)) and the available remedies when a district judge has improperly *denied* a motion for judgment as a matter of law, the Court held that an appellate court may (1) reverse and direct the entry of a judgment for the party prevailing on appeal, (2) remand for the trial court to determine whether to grant a new trial or enter a judgment for the prevailing party, or (3) remand for a new trial. *Id.* at 323–29; *see also Weisgram*, 528 U.S. at 451–52. The Court explained that in exercising its discretion to select among these options, a court of appeals must give "due consideration [to] the rights of the verdict winner and the closeness of the trial court to the case." *Weisgram*, 528 U.S. at 451 (characterizing *Neely*). The appellate court "should be constantly alert" "to protect the rights of the party whose jury verdict has been set aside on appeal and who may have valid grounds for a new trial, some or all of which should be passed upon by the district court, rather than the court of appeals, because of the trial judge's firsthand knowledge of witnesses, testimony, and issues." *Neely*, 386 U.S. at 325; *Weisgram*, 528 U.S. at 451.

The Court concluded, however, that "these considerations do not justify an ironclad rule that the court of appeals should never order dismissal or judgment for defendant when the plaintiff's verdict has been set aside on appeal. Such a rule would not serve the purpose of Rule 50 to speed litigation and to avoid unnecessary retrials." *Neely*, 386 U.S. at 326. There are, it noted, "situations where the defendant's grounds for setting aside the jury's verdict raise questions of subject matter jurisdiction or dispositive issues of law which, if resolved in defendant's favor, must necessarily terminate the litigation." *Id.* at 327. "In such situations, and others like them, there can be no reason whatsoever to prevent the court of appeals from ordering dismissal of the action or the entry of judgment for the defendant." *Id.* Moreover, the Court reasoned that even with respect to cases in which the basis of a defendant's motion for judgment as a matter of law was the insufficiency of the plaintiff's evidence, the appellate court may be in as good a position as the trial judge to determine whether fairness dictates that the plaintiff should have an opportunity to retry the case. *Id.* Thus, for example, when a plaintiff who won the verdict argues that she is entitled to a new trial because the insufficiency of the evidence in her case was caused by the trial court's erroneous exclusion of evidence, the appellate court is as well suited as the trial court to address the issue. "[I]ssues like these are issues of law with which the courts

of appeals regularly and characteristically must deal. The district court in all likelihood has already ruled on these questions in the course of the trial and, in any event, has no special advantage or competence in dealing with them." *Id.*

In sum, *Neely* makes clear that an appellate court must decide appropriate appellate remedies on a case-by-case basis, looking to the factors argued by the parties and identified by the court, as well as to whether the trial judge or the appellate bench is better suited to weigh those factors.

D. Testing the Legal Sufficiency of Criminal Trial Evidence

1. Taking the Decision from a Jury: The *Jackson* Standard and Federal Rule of Criminal Procedure 29

In *Jackson v. Virginia*, 443 U.S. 307 (1979), the Supreme Court noted that the long-settled practice of allowing federal courts to enter judgments of acquittal when evidence is insufficient to sustain a conviction "only … highlight[s] the traditional understanding in our system that the application of the beyond-a-reasonable-doubt standard to the evidence is not irretrievably committed to jury discretion." *Id.* at 317 n.10. A judgment of acquittal enables a federal court to protect a defendant's fundamental due process rights by removing from jury consideration a charge with respect to which no rational trier of fact could find guilt beyond a reasonable doubt. *Id.* at 317–19 & n.10.

The issue presented is a "'legal' question." *Musacchio v. United States*, 577 U.S. 237, 243 (2016) (quoting *Jackson*, 443 U.S. at 319). Thus, a district judge considering a motion for acquittal in the first instance and an appellate court reviewing the district court's decision apply the same standard. *Burks v. United States*, 437 U.S. 1, 16–17 & n.10 (1978). Neither court is to weigh the evidence or assess the credibility of witnesses. And each must assume the inferences that are most favorable to the government. *Id.* at 16–17. The question, as articulated in *Jackson*, "is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." 443 U.S. at 319; *see also id.* at 319 n.12 (noting that the often-applied "substantial evidence" test of *Glasser v. United States*, 315 U.S. 60, 80 (1942), has "universally been understood" to encompass the same criterion). This is a "limited inquiry tailored to ensure that a defendant receives the minimum that due process requires: a 'meaningful opportunity to defend' against the charge against him and a jury finding of guilt 'beyond a reasonable doubt.'" *Musacchio,* 577 U.S. at 243 (quoting *Jackson*, 443 U.S. at 314–15, in holding that when an indictment properly charges a defendant with the statutory elements of a crime and instructions require a jury to find all of those elements beyond a reasonable doubt, the fact that the instructions add an element does not change the standard by which sufficiency is determined).

Entry of a judgment of acquittal is thus "confined to cases where the prosecution's failure is clear." *Burks*, 437 U.S. at 17. But this does not mean that a sufficiency challenge can be resolved "through rote incantation" of the *Jackson* standard. *United States v. Wilson*, 160 F.3d 732, 737 (D.C. Cir. 1998). Rather, a court must examine the record to determine whether a guilty verdict rests on inferences reasonably drawn from the evidence, rather than on "conjecture" or "speculation." *United States v. Aponte*, 619 F.3d 799, 804 (8th Cir. 2010); *see also United States v. Bowers*, 811 F.3d 412, 424 (11th Cir. 2016) (stating that "reasonable inferences" rather than "mere speculation" must support a verdict based on circumstantial evidence); *United States v. Long*, 905 F.2d 1572, 1576 (D.C. Cir. 1990) (same).

The *Jackson* standard "gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Jackson*, 443 U.S. at 319. "[T]he factfinder's role as weigher of the evidence is preserved through a legal conclusion that upon judicial review *all of the evidence* is to be considered in the light most favorable to the prosecution. The criterion thus impinges upon 'jury' discretion only to the extent necessary to guarantee the fundamental protection of due process of law." *Id.* (emphasis in original); *see also McDaniel v. Brown*, 558 U.S. 120, 132–34 (2010) (per curiam) (finding that because the court of appeals failed to review all of the evidence in the light most favorable to the prosecution, it usurped the role of the fact-finder).

Federal Rule of Criminal Procedure 29 and the case law interpreting it prescribe the procedures for seeking a judgment of acquittal during a jury trial and the effect on appellate review of the procedures followed. The rule permits a defendant to seek a judgment of acquittal at the close of the government's case-in-chief and after both sides rest. Fed. R. Crim. P. 29(a). In addition, the rule states that a defendant "may move for a judgment of acquittal, or renew such a motion," within fourteen days of a guilty verdict or jury discharge. Fed. R. Crim. P. 29(c)(1). If a defendant fails to seek a post-verdict acquittal within the specified time, the trial court "may nonetheless consider that untimely motion if the court determines that the failure to file it on time was the result of excusable neglect." Fed. R. Crim. P. 29 advisory committee's notes to 2005 amendments; *see also* Fed. R. Crim. P. 45(b)(1)(B). Rule 29 also specifies that a trial court may "on its own consider whether the evidence is insufficient," but it must do so before it submits the case to the jury. Fed. R. Crim. P. 29(a); *see also Carlisle v. United States*, 517 U.S. 416, 421–23 (1996).

A motion for judgment of acquittal at the close of the government's case-in-chief is said to "implement[] the requirement that the prosecution must establish a prima facie case by its own evidence before the defendant may be put to his defense." 2A CHARLES ALAN WRIGHT & PETER J. HENNING, FEDERAL PRACTICE & PROCEDURE: CRIMINAL § 462 & n.5 (4th ed. 2009 & Supp. 2017) (citing cases). In reality, however, there is no mechanism to enforce this "requirement" since, pursuant to Rule 29(b), a district judge can reserve a motion made at the close of the government's case, "proceed with the trial … and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict." Fed. R. Crim. P. 29(b).

Rule 29 does provide that when a trial court reserves decision, "it must decide the motion on the basis of the evidence at the time the ruling was reserved." *Id.* The Advisory Committee Notes state that appellate review should be similarly limited. *See* Fed. R. Crim. P. 29 advisory committee's notes to 1994 amendments. In contrast, if a district judge, following the government's case-in-chief, *denies* a motion for acquittal, any evidence subsequently submitted by the defendant will be considered on appellate review. *United States v. Calderon*, 348 U.S. 160, 164 & n.1 (1954); *see also Smith v. Massachusetts*, 543 U.S. 462, 472 (2005) (restating this principle). Thus, a defendant who believes that critical defense evidence will fill the gaps in the prosecution's case must either stand on her motion and test the sufficiency of the government's prima facie case on appeal or present a complete defense to the jury and risk bolstering the prosecutor's case.

Rule 29 explicitly states that "[a] defendant is not required to move for a judgment of acquittal before the court submits the case to the jury as a prerequisite for making such a motion after jury discharge." Fed. R. Crim. P. 29(c). *But see* Fed. R. Civ. P. 50 (in the civil context, motions for judgment as a matter of law may be "renewed" post verdict, but they may not be initiated post verdict). However, a defendant gains an undisputed advantage from a pre-verdict judgment, since "[s]ubject[ion] … to postacquittal factfinding proceedings going to guilt or innocence violates the Double Jeopardy Clause" if the court has issued a final judgment of acquittal. *Smith*, 543 U.S. at 467 (quoting *Smalis v. Pennsylvania*, 476 U.S. 140, 145 (1986)). Consequently, appeal and retrial are prohibited when a defendant secures a judgment of acquittal before a jury returns a verdict. *Id.* If a judgment of acquittal is entered after a jury has deadlocked, appeal and retrial are similarly prohibited. *See id.*; *see also United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977). If, however, a judgment of acquittal is entered after a guilty verdict is returned, "the Double Jeopardy Clause *does not* preclude a prosecution appeal to reinstate the jury verdict of guilty." *Smith*, 543 U.S. at 467 (citing *United States v. Wilson*, 420 U.S. 332, 352–53 (1975)); *see also* 18 U.S.C. § 3731 (providing for appeal by the United States except where barred by the Double Jeopardy Clause).

If a district court grants a motion for a judgment of acquittal after a guilty verdict, it must conditionally resolve any defense motion seeking a new trial pursuant to Federal Rule of Criminal Procedure 33. Fed. R. Crim. P. 29(d)(1). If a trial court conditionally grants a new trial motion and the appellate court reverses the judgment of acquittal, "the trial court must proceed with the new trial unless the appellate court orders otherwise." Fed. R. Crim. P. 29(d)(3)(A). If the district court conditionally denies a new trial motion, the defendant may, on appeal, argue that the conditional denial of the new trial motion was erroneous. Fed. R. Crim. P. 29(d)(3)(B). If the appellate court reverses the judgment of acquittal, it may direct the district court to undertake a new trial. *See id.* A defendant's request for a new trial does not waive his right to an acquittal if the evidence is insufficient to support his conviction. *Burks*, 437 U.S. at 17–18. On appeal, conditional rulings on new trial motions are reviewed for abuse of discretion. *See, e.g.*, *United States v. Truman*, 688 F.3d 129, 141 (2d Cir. 2012); *United States v. Johnson*, 639 F.3d 433, 441–42 (8th Cir. 2011).

If a defendant fails to request a judgment of acquittal or fails to follow the procedures of Rule

29, appellate review of any subsequent sufficiency challenge is for plain error. *See Clyatt v. United States*, 197 U.S. 207, 221–22 (1905) (citing *Wiborg v. United States*, 163 U.S. 632, 658 (1896)); *see also Carlisle*, 517 U.S. at 436 (Ginsburg, J., concurring) (relying on the government's concession that a defendant who files an untimely motion for acquittal is entitled to plain error review). Generally, reversal on appeal pursuant to the plain error standard is more difficult to secure than reversal based on preserved error subject to the harmless error doctrine. *See* Chapters VII-VIII, *infra* (describing review under the harmless error and plain error standards). Reversal for plain error is only possible when an appellate court finds an "error" that is "plain" (meaning clear or obvious) and that "affects" a defendant's "substantial rights." *United States v. Olano*, 507 U.S. 725, 732–34 (1993). When these three requirements are met, "an appellate court must then determine whether the forfeited error 'seriously affects the fairness, integrity or public reputation of judicial proceedings' before it may exercise its discretion to correct the error." *Johnson v. United States*, 520 U.S. 461, 469–70 (1997) (quoting *Olano*, 507 U.S. at 736); *see also* Chapter VIII.A, *infra* (discussing *Olano*'s four-part test).

In the sufficiency context, however, there is a question as to whether plain error review can really be any different than *de novo* review. Thus, the Tenth Circuit is clear that while it has "sometimes used plain-error language" when a defendant has failed to preserve a sufficiency challenge, "the standard actually applied is essentially the same as if there had been a timely motion for acquittal." *United States v. Alexander*, 817 F.3d 1205, 1209 n.3 (10th Cir. 2016) (citing cases). Consequently, a failure to preserve does not "alter [the] standard of review, which remains an independent review of the legal question of sufficiency," *id.*, involving application of the *Jackson* standard, *see id.* at 1209–10; *see also United States v. Gallegos*, 784 F.3d 1356, 1359 (10th Cir. 2015) ("[A] conviction in the absence of sufficient evidence will almost always satisfy all four plain-error requirements."); *United States v. Goode*, 483 F.3d 676, 681 n.1 (10th Cir. 2007) (en banc footnote) (explaining that because "a conviction in the absence of sufficient evidence of guilt is plainly an error, clearly prejudice[s] the defendant, and almost always creates manifest injustice," review under the four-prong plain error standard is "essentially the same as if there had been a timely motion for acquittal").

Similarly, the Ninth Circuit holds that review under the plain error standard is "only theoretically more stringent" than under the *Jackson* standard. *United States v. Gadson*, 763 F.3d 1189, 1217 (9th Cir. 2014). This is "because … it is hard to comprehend how a standard can be any more stringent in actuality than that ordinarily applied to sufficiency-of-the-evidence challenges." *United States v. Cruz*, 554 F.3d 840, 844 (9th Cir. 2009); *see also United States v. Flyer*, 633 F.3d 911, 917 (9th Cir. 2011) ("When a conviction is predicated on insufficient evidence, the last two prongs of the plain error test will necessarily be satisfied.").

Although the Supreme Court has never explicitly addressed the question, its analysis of unpreserved sufficiency challenges also suggests that there may be little difference between review of preserved and unpreserved claims. Applying a plain error standard to an unpreserved sufficiency claim in *Clyatt v. United States*, 197 U.S. 207 (1905), the Court declared it "the imperative duty of a court to see that all the elements of [the charged] crime are proved, or at least that testimony is offered which justifies a jury in finding those elements." *Id.* at 222.

Similarly, in *Wiborg v. United States*, 163 U.S. 632 (1896), the Court, assessing the record under the plain error standard, examined the evidence to determine whether the jury's inferences were "unreasonabl[e]" and whether there was "adequate proof" to sustain them. *Id.* at 658–60. With respect to one defendant, it found that the jury's verdict was not unreasonable given the record evidence. *Id.* at 659. With respect to two other defendants, the Court reversed after concluding that there was "nothing sufficiently justifying" the jury's presumption of knowledge, a necessary prerequisite to guilt in that case. *Id.* at 660. Although these cases predate *Jackson,* their analysis essentially tracks the reasonable inferences test articulated in that opinion.

However, a majority of circuits explicitly take a different view. The First, Fifth, Sixth, Seventh, Eighth, Eleventh, and D.C. Circuits are clear that a standard involving a heavier burden than *Jackson* applies to unpreserved or improperly preserved sufficiency challenges. *See*, *e.g.*, *United States v. Williams*, 784 F.3d 798, 802 (D.C. Cir. 2015); *United States v. Kennedy*, 714 F.3d 951, 957 (6th Cir. 2013); *United States v. Natale*, 719 F.3d 719, 743 (7th Cir. 2013); *United States v. Calhoun*, 721 F.3d 596, 600 (8th Cir. 2013); United *States v. Fries*, 725 F.3d 1286, 1290–91 (11th Cir. 2013); *United States v. Acosta-Colón*, 741 F.3d 179, 192–93 (1st Cir. 2013); *United States v. Delgado*, 672 F.3d 320, 330–32 (5th Cir. 2012) (en banc). Some of these circuits explicitly adopt plain error as the standard of review, while others avoid or reject that terminology. *Compare*, *e.g.*, *Delgado*, 672 F.3d at 330 (applying *Olano*'s four-part plain error standard), *and United States v. Milam*, 494 F.3d 640, 643 (8th Cir. 2007) (same), *with Fries*, 725 F.3d at 1291 n.5 (rejecting the plain error framework). And most circuits, regardless of whether they cite the four-part plain error test, invoke the "manifest miscarriage of justice" standard that predates *Olano. See, e.g.*, *United States v. McGee*, 821 F.3d 644, 646 (5th Cir. 2016); *Kennedy*, 714 F.3d at 957; *United States v. Perez*, 661 F.3d 568, 573–74 (11th Cir. 2011); *United States v. Brodie*, 524 F.3d 259, 272 (D.C. Cir. 2008). Generally, "[t]his most demanding standard of appellate review permits reversal only if the record is devoid of evidence pointing to guilt" with respect to an element of the charged offense "or if the evidence on a key element of the offense was so tenuous that a conviction would be shocking." *Natale*, 719 F.3d at 743; *see, e.g.*, *United States v. Washington*, 803 F.3d 745, 746–48 (5th Cir. 2015); *United States v. Bostick*, 791 F.3d 127, 142 (D.C. Cir. 2015); *Fries*, 725 F.3d at 1291; *see also, e.g.*, *United States v. English*, 785 F.3d 1052, 1056 (6th Cir. 2015) (defining reversal under the manifest miscarriage of justice standard as requiring a "record that is devoid of evidence pointing to guilt"). Avoiding the "manifest miscarriage of justice formulation," the First Circuit requires a showing of "clear and gross injustice" before granting an improperly preserved challenge to the sufficiency of the evidence. *See, e.g.*, *United States v. Foley*, 783 F.3d 7, 12–13 & n.4 (1st Cir. 2015) (describing this standard as "a particularly exacting variant of plain error review").

One semantic matter that sometimes causes particular confusion with respect to review of unpreserved or improperly preserved sufficiency challenges is worth noting. In many circuits, the term "waiver" is used to describe the effect of a defendant's failure to properly preserve a sufficiency challenge. Thus, for example, some opinions state that a defendant who puts on a defense after a motion to acquit has been denied at the close of the government's case-in-chief will be considered to have "waived" his right to appeal the sufficiency of the evidence unless he renews the initial motion at the close of all of the evidence or as specified in Rule 29(c). *See*, *e.g.*,

United States v. Dudley, 804 F.3d 506, 519 (1st Cir. 2015); *United States v. Sease*, 659 F.3d 519, 522 (6th Cir. 2011); *United States v. Farris*, 532 F.3d 615, 619 (7th Cir. 2008). Similarly, several courts have held that a defendant who altogether fails to seek a judgment of acquittal "waives" any sufficiency challenge on appeal. *See*, *e.g.*, *United States v. Rea*, 621 F.3d 595, 601–02 (7th Cir. 2010); *United States v. DeGeorge*, 380 F.3d 1203, 1216 (9th Cir. 2004). In addition, although a defendant seeking a judgment of acquittal need not articulate a particular basis for challenging the sufficiency of the evidence, when a defendant does cite specific grounds without making it clear that he is also challenging the sufficiency of the evidence generally, grounds that are not argued are often said to be "waived." *See*, *e.g.*, *United States v. LaVictor*, 848 F.3d 428, 457 (6th Cir. 2017); *United States v. Chong Lam*, 677 F.3d 190, 200 (4th Cir. 2012); *United States v. Moore*, 363 F.3d 631, 637 (7th Cir. 2004), *vacated on other grounds*, 543 U.S. 1100 (2005).

Given the broadly accepted meaning of the term "waiver" in the appellate context, its application in these situations is a misnomer. A waiver is generally understood to involve an "intentional relinquishment or abandonment of a known right." *Olano*, 507 U.S. at 733 (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)). When a right is waived, any "error" on the part of the district court with respect to that right is "extinguish[ed]" and appeal is prohibited. *Id.* at 733–34. Although, as noted, there may be some disagreement regarding the meaning of plain error review when a defendant raises an unpreserved sufficiency challenge in a criminal case, virtually all circuits will review unpreserved or improperly preserved sufficiency challenges if the error is "bad enough." *See* 2A CHARLES ALAN WRIGHT & PETER J. HENNING, FEDERAL PRACTICE & PROCEDURE: CRIMINAL § 469 (4th ed. 2009 & Supp. 2017); *see also id.* at § 469 nn.18–23 (citing cases). Thus, despite the frequently applied waiver label, review of unpreserved or improperly preserved sufficiency claims is more accurately described as taking place within the forfeiture framework. *See Goode*, 483 F.3d at 681 ("Although we have described the failure to raise a challenge in district court as a 'waiver,' it is more precisely termed a forfeiture when there is no suggestion of a knowing, voluntary failure to raise the matter."); *see also United States v. Beaver*, 515 F.3d 730, 741 (7th Cir. 2008) ("The government is correct that [the defendant] 'waived' his sufficiency-of-the-evidence argument … [, although] the failure to challenge the sufficiency of the evidence is perhaps more precisely characterized as forfeiture rather than 'waiver.'").

2. Reversing Guilty Verdicts in Bench Trials for Insufficient Evidence: *Jackson* Plus

The constitutional right to trial by jury does not extend to all criminal proceedings. *See* U.S. CONST., art. III, § 2; *id.* amend. VI; *Cheff v. Schnackenberg*, 384 U.S. 373, 379 (1966) (plurality opinion) (prosecution of "petty offenses" does not require a jury trial). Moreover, pursuant to Federal Rule of Criminal Procedure 23(a), a defendant may waive the right to a jury trial.

When a criminal case is tried without a jury, Rule 23(c) provides that "the court must find the defendant guilty or not guilty." The rule also states that "[i]f a party requests before the finding of guilty or not guilty, the court must state its specific findings of fact in open court or in a written decision or opinion." Fed. R. Crim. P. 23(c).

In *Jackson v. Virginia*, 443 U.S. 307 (1979), the Supreme Court held that "the critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be … to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt." *Id*. at 318. In reaching this conclusion, the Court drew no distinction between judge and jury verdicts. *See id*. at 318 n.11 (referring to the "factfinder in a criminal case"). And while circuit opinions resolving sufficiency challenges to convictions rendered in bench trials frequently cite the "substantial evidence" test of *Glasser v. United States*, 315 U.S. 60, 80 (1942), most modern decisions track the deferential version of the *de novo* standard enunciated in *Jackson*. Thus, when the sufficiency of the evidence to support a bench conviction is challenged on appeal, the governing standard is the same as if the challenged conviction had been rendered by a jury. The question is whether, "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Baldwin*, 414 F.3d 791, 796 (7th Cir. 2005) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)), *overruled on other grounds by United States v. Parker*, 508 F.3d 434 (7th Cir. 2007); *see also, e.g.*, *United States v. Richter*, 782 F.3d 498, 501 (9th Cir. 2015); *United States v. Wright*, 774 F.3d 1085, 1088 (6th Cir. 2014); *Gov't of V.I. v. Vanterpool*, 767 F.3d 157, 169 (3d Cir. 2014); *United States v. Corbett*, 750 F.3d 245, 250 (2d Cir. 2014); *United States v. Wasson*, 679 F.3d 938, 949 (7th Cir. 2012).

If a defendant fails to request special findings, as permitted by Rule 23(c), and the district judge makes none, the court of appeals may infer the findings necessary to support any theory of guilt presented to the district judge, provided the inferred findings are supported by the evidence viewed in the light most favorable to the prosecution. *See*, *e.g.*, *United States v. Farrell*, 126 F.3d 484, 491 (3d Cir. 1997); *United States v. Powell*, 973 F.2d 885, 889 (10th Cir. 1992); *United States v. Musser*, 873 F.2d 1513, 1519 (D.C. Cir. 1989); *see also United States v. Bibbins*, 637 F.3d 1087, 1093–94 (9th Cir. 2011) (reviewing the district court's denial of appellant's necessity defense for substantial evidence after defendant failed to request special findings under Rule 23(c)).

When a trial judge does state "specific findings of fact" pursuant to Rule 23(c), some courts of appeals hold that although the ultimate inference of guilt is subject to *de novo* review pursuant to *Jackson*, underlying findings of historical fact are subject to the clearly erroneous standard of Federal Rule of Civil Procedure 52. *See, e.g.*, *United States v. Brugnara*, 856 F.3d 1198, 1207 (9th Cir. 2017); *United States v. Pirela Pirela*, 809 F.3d 1195, 1199 (11th Cir. 2015); *United States v. Marshall*, 753 F.3d 341, 344 (1st Cir. 2014) (Souter, J.); *United States v. Peoples*, 698 F.3d 185, 189 (4th Cir. 2012). Although the Supreme Court has made it plain that Rule 52's clearly erroneous standard applies in the criminal context "with respect to factual questions having nothing to do with guilt," *Maine v. Taylor*, 477 U.S. 131, 145 (1986), the Court has yet to say whether clearly erroneous review is appropriate when the challenged findings support an element of the offense. In any event, it may be that there is no real difference between *de novo* review under *Jackson* and review under the clearly erroneous standard, given the highly deferential nature of the former and the fact that clearly erroneous review, when applied in the criminal context, must necessarily take account of the government's burden to prove each

element of an offense beyond a reasonable doubt. *See Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Tr. for S. Cal.*, 508 U.S. 602, 622–23 (1993) (clearly erroneous review describes the degree of certainty with which the appellate court must be able to find that the fact-finder "made a mistake in concluding that a fact had been proven under the applicable standard of proof"); *see, e.g.*, *United States v. Delerme*, 457 F.2d 156, 160 (3d Cir. 1972) (concluding that, insofar as a trial judge's findings of historical facts are subject to a sufficiency challenge, "there is no practical difference" between the *Jackson* standard and clearly erroneous review).

There is no suggestion in Rule 23(c) that a motion for a judgment of acquittal must be made before the trial court in order to preserve a sufficiency challenge to a bench conviction. And by its language, Federal Rule of Criminal Procedure 29, governing motions for judgments of acquittal, applies only to jury trials. Moreover, Rule 29 arguably "has no real application when a case is tried by the court since" the trial judge "must conduct the same analysis of the law and the evidence whether [she] evaluates a motion for acquittal under Rule 29 or adjudicates a not guilty plea." *United States v. Grace*, 367 F.3d 29, 34 (1st Cir. 2004). Consequently, most circuits that have addressed the issue hold that the failure to seek a judgment of acquittal in a bench trial does not affect review of an appellate challenge to the sufficiency of the evidence supporting a trial judge's guilty verdict. *See United States v. Hurn*, 368 F.3d 1359, 1368 n.5 (11th Cir. 2004); *Grace*, 367 F.3d at 34; *United States v. Ceballos-Torres*, 218 F.3d 409, 411 n.3 (5th Cir. 2000); *United States v. Hogan*, 89 F.3d 403, 404 (7th Cir. 1996); *United States v. Atkinson*, 990 F.2d 501, 502–03 (9th Cir. 1993) (en banc); *United States v. Besase*, 373 F.2d 120, 121 (6th Cir. 1967); *see also United States v. Khan*, 461 F.3d 477, 487–88 (4th Cir. 2006) (reviewing *de novo* without explicitly addressing the issue); *United States v. Whitlock*, 663 F.2d 1094, 1097 n.24 (D.C. Cir. 1980) (opinion of Robinson, J.). *But see United States v. Houser*, 754 F.3d 1335, 1341, 1348–49 (11th Cir. 2014) (when a defendant in a bench trial moves for a judgment of acquittal at the close of the government's case but fails to renew the motion at the close of all of the evidence, the appellate court will affirm the conviction against a sufficiency challenge unless to do so would amount to a manifest miscarriage of justice).

Chapter IV. Review of Findings and Conclusions Supporting Rule 52 Judgments in Civil Bench Trials: Clearly Erroneous Review, *De Novo* Review, and the "Mixed Question" Conundrum

The Trial by Jury and Re-examination Clauses of the Seventh Amendment protect the common-law authority of a jury to find the facts and apply the law to those facts to reach a verdict. *See generally Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 376–78 (1996); *Balt. & Carolina Line, Inc. v. Redman*, 295 U.S. 654, 656–57 (1935). Pursuant to these constitutional strictures, judicial interference with a jury's decisionmaking authority is, absent procedural or evidentiary error, generally constrained to the legal question of whether "the facts are sufficiently clear that the law requires a particular result." *Weisgram v. Marley Co.*, 528 U.S. 440, 448 (2000). Whether raised before a trial judge pursuant to a motion for judgment as a matter of law or challenged on appeal after properly preserving the issue below, the test is the same: giving the benefit of all reasonable inferences to the nonmoving party, the court asks whether any reasonable juror could find for that party on the basis of the properly admitted evidence. *See Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 149–51 (2000); *see also* Chapter III.C, *supra*.

No similar constitutional limitations constrain judicial action in cases tried without a jury or with an advisory jury. In such cases, Federal Rule of Civil Procedure 52 and the case law interpreting it largely prescribe when and how district judges may find facts and reach conclusions of law in support of judgments and, to a lesser degree, how closely appellate courts may scrutinize those findings and conclusions.

Rule 52 states:

> In an action tried on the facts without a jury or with an advisory jury, the court must find the facts specially and state its conclusions of law separately. The findings and conclusions may be stated on the record after the close of the evidence or may appear in an opinion or a memorandum of decision filed by the court.

Fed. R. Civ. P. 52(a)(1). The requirement that the facts be found specially encourages care on the part of trial judges, makes possible meaningful appellate review of those facts, and promotes the application of *res judicata* and estoppel by judgment. *See* Fed. R. Civ. P. 52 advisory committee's notes to 1946 amendment. And it applies whether a district judge issues a judgment following submission of all of the evidence or exercises her discretion to enter a judgment on partial findings. *See* Fed. R. Civ. P. 52(c). A judge may issue a judgment on partial findings with respect to a "claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue" "[i]f a party has been fully heard on an issue" and "the court finds against the party on that issue." Fed. R. Civ. P. 52(c).

Rule 52 also specifies the standard of appellate review applicable to factual findings supporting judgments and partial judgments. Subsection (a)(6), titled *Setting Aside the Findings*, provides:

> Findings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility.

Pursuant to the clearly erroneous standard, judicial findings of fact are presumptively correct. *See Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485 (1984). In particular, a reviewing court grants "singular deference to a trial court's judgments about the credibility of witnesses …. because the various cues that 'bear so heavily on the listener's understanding of and belief in what is said' are lost on an appellate court later sifting through a paper record." *Cooper v. Harris*, 137 S. Ct. 1455, 1474 (2017) (quoting *Anderson v. City of Bessemer*, 470 U.S. 564, 575 (1985)); *see also Inwood Lab'ys, Inc. v. Ives Lab'ys, Inc.*, 456 U.S. 844, 855 (1982). But the presumption also "recognizes and rests upon the unique opportunity afforded the trial court judge … to weigh the evidence," *Inwood Lab'ys*, 456 U.S. at 855, the comparative expertise of trial and appellate judges, and the cost of duplicative appellate decisionmaking, *see City of Bessemer*, 470 U.S. at 574–75.

Given this presumption of correctness, a factual finding will not be overturned as "clearly erroneous" unless, "although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Id.* at 573. Moreover, the presumption applies regardless of whether the findings under review diverge from those made in another court. *See Cooper*, 137 S. Ct. at 1468. So long as a finding is "'plausible' in light of the full record," it must stand. *Id.* at 1465 (quoting *City of Bessemer*, 470 U.S. at 574); *see also* Chapter II, *supra* (discussing precedent giving meaning to the clearly erroneous standard).

In addition, Rule 52 makes clear that, in contrast to most questions raised on appeal, a party's failure to preserve a sufficiency challenge does not affect appellate review. Rule 52(a)(5) states:

> A party may later question the sufficiency of the evidence supporting the findings, whether or not the party requested findings, objected to them, moved to amend them, or moved for partial findings.

Plain error review is consequently inapplicable to review of such challenges. However, when a district judge altogether fails to make findings or fails to make findings with respect to a material issue, appellate courts normally vacate the judgment and remand the case for the judge to make those findings. *See Pullman-Standard v. Swint*, 456 U.S. 273, 291–92 & n.22 (1982).

Rule 52 does not describe how conclusions of law are to be reviewed. It is well understood, however, that conclusions of law are not subject to clearly erroneous review. *See id.* at 287. Appellate courts are consequently free to correct a trial judge's "errors of law, including those

that may infect a so-called mixed finding of law and fact, or a finding of fact that is predicated on a misunderstanding of the governing rule of law." *Bose*, 466 U.S. at 501. Thus, just as when a jury verdict is based on an erroneous instruction, if a trial judge's finding of "ultimate" fact (so called because it determines the outcome of litigation) is the result of the application of an improper legal standard to the subsidiary facts, it may be corrected as a matter of law. *Id*. at 500 n.16, 501. Similarly, if a trial court's findings of subsidiary or historical facts are predicated "upon a mistaken impression of applicable legal principles," then "the reviewing court is not bound by the clearly erroneous standard." *Inwood Lab'ys*, 456 U.S. at 855 n.15. When faced with the latter situation, appellate courts either will state that the error committed by the trial court is legal and subject the trial court's factual finding to *de novo* review, *see, e.g.*, *Klein Indep. Sch. Dist. v. Hovem*, 690 F.3d 390, 397 (5th Cir. 2012); *Star Indus., Inc. v. Bacardi & Co.*, 412 F.3d 373, 382–83 (2d Cir. 2005), or will conclude that the findings of fact predicated on the incorrect articulation of the law are clearly erroneous, *see, e.g.*, *Kosilek v. Spencer*, 774 F.3d 63, 85 (1st Cir. 2014) (en banc); *Fisher v. Tucson Unified Sch. Dist.*, 652 F.3d 1132, 1142–43 (9th Cir. 2011).

Unlike challenges to the sufficiency of the evidence supporting factual findings, Rule 52 does not exempt challenges to a trial judge's legal rulings from the preservation requirement. If first raised on appeal, legal rulings are typically subject to either plain error or exceptional or extraordinary circumstances review. *See, e.g.*, *Delahoussaye v. Performance Energy Servs., LLC*, 734 F.3d 389, 393 (5th Cir. 2013) (plain error); *AG Acceptance Corp. v. Veigel*, 564 F.3d 695, 700 (5th Cir. 2009) (extraordinary circumstances); *see also* Chapter VIII.B, *infra* (discussing the plain error and exceptional or extraordinary circumstances standards of review in civil cases).

Although the standards of review applicable to findings of fact and conclusions of law supporting judgments in civil bench trials are rather easily stated, Rule 52 does not "furnish particular guidance with respect to distinguishing law from fact." *Bose*, 466 U.S. at 501 (quoting *Pullman-Standard*, 456 U.S. at 288). The rule "broadly requires that findings of fact not be set aside unless clearly erroneous. It does not make exceptions or purport to exclude certain categories of factual findings from the obligation of a court of appeals to accept a district court's findings unless clearly erroneous. It does not divide facts into categories; in particular, it does not divide findings of fact into those that deal with 'ultimate' and those that deal with 'subsidiary' facts." *Pullman-Standard*, 456 U.S. at 287. Rather, the clearly erroneous standard has been held to apply to all findings of fact supporting a judgment "including those described as 'ultimate facts' because they may determine the outcome of litigation." *Bose*, 466 U.S. at 501.

The broad applicability of the clearly erroneous standard to ultimate facts, as well as to subsidiary facts, can, at times, make it difficult to determine whether a particular challenge is subject to clearly erroneous or *de novo* review. Judgments either consist of, or rest on, conclusions derived from the application of law to historical or subsidiary facts. If the relevant law sets forth a specifically defined factual test—*e.g.*, "a claim must be filed within ten days"—the applicable standards of review are easy to discern. The governing law against which the facts are measured (the ten-day limitation) is reviewed *de novo*, and the historical facts (including the date when the claimant acted) are reviewed for clear error. In contrast, when the governing law admits of no specific factual test, but rather consists of more generally defined principles—*e.g.*,

whether a person acted "reasonably" or "in good faith"—the conclusion resulting from that law's application to the pertinent subsidiary or historical facts will necessarily be "inseparable from the principles through which it was deduced." *Bose*, 466 U.S. at 501 n.17. The appropriate standard of review applicable to these "mixed findings of law and fact" is not readily discernible. *See generally* Chapter I Sections C and D, *supra* (describing in greater detail the analytical framework defining mixed questions).

In determining which standard of review governs mixed findings supporting Rule 52 judgments, the Supreme Court generally applies a functional approach assessing, as a matter of the sound administration of justice, which judicial actor—the trial judge or the court of appeals—is better suited to decide a particular issue. *See, e.g.*, *Thornburg v. Gingles*, 478 U.S. 30, 77–79 (1986); *Bose*, 466 U.S. at 498–511; *Comm'r v. Duberstein*, 363 U.S. 278, 289 (1960). In contrast, practice among the courts of appeals is far less uniform. Indeed, "[t]he question of the appropriate standard of review for mixed issues of fact and law has long bedeviled appellate courts." *Reich v. Lancaster*, 55 F.3d 1034, 1044 (5th Cir. 1995).

In order to determine whether the trial judge or the appellate court is better suited to decide a particular mixed question, some appellate decisions, following the Supreme Court's functional approach, look to the nature of the inquiry that is required when a governing rule of law is applied to established facts. *See, e.g.*, *Kosilek v. Spencer*, 774 F.3d 63, 84–85 (1st Cir. 2014) (en banc); *Vento v. Dir. of V.I. Bureau of Internal Revenue*, 715 F.3d 455, 468 n.13 (3d Cir. 2013). Others assert, with little or no analysis, that the application of law to fact is reviewed *de novo*. *See, e.g.*, *Gomez v. Fuenmayor*, 812 F.3d 1005, 1007 (11th Cir. 2016); *Krist v. Kolombos Rest., Inc.*, 688 F.3d 89, 95 (2d Cir. 2012). A few appellate opinions conversely declare that applications of law to fact should, as a rule, be reviewed for clear error. *See, e.g.*, *VLM Food Trading Int'l v. Ill. Trading Co.*, 748 F.3d 780, 787 (7th Cir. 2014); *Pinkston v. Madry*, 440 F.3d 879, 888 (7th Cir. 2006); *Verhoeven v. Brunswick Sch. Comm.*, 207 F.3d 1, 5 (1st Cir. 1999). And, occasionally, a court simply avoids judgment on the issue by noting that either standard would be satisfied. *See, e.g.*, *Lincoln Provision, Inc. v. Puretz*, 775 F.3d 1011, 1014 (8th Cir. 2015); *Trentadue v. Integrity Comm.*, 501 F.3d 1215, 1231 (10th Cir. 2007).

The Supreme Court has definitively characterized as law or as fact certain mixed findings supporting Rule 52 judgments. *See, e.g.*, *Gingles*, 478 U.S. at 77–79 (vote dilution under Section 2 of the Voting Rights Act is a question of fact); *Bose*, 466 U.S. at 511 (actual malice in defamation case is a question of law); *United States v. Gen. Motors Corp.*, 384 U.S. 127, 141 n.16 (1966) ("[T]he ultimate conclusion by the trial judge, that the defendants' conduct did not constitute a combination or conspiracy in violation of the Sherman Act, is not to be shielded by the 'clearly erroneous' test."); *Duberstein*, 363 U.S. at 286–89 (meaning of "gift" in the income tax code is a question of fact). But absent such a decision, the standard of review applicable to a particular mixed question can only be reliably determined through issue-specific research in the circuit in which the appeal is being heard.

Chapter V. Decisions Committed to a District Judge's Discretion: Giving Meaning to the Variable Abuse of Discretion Standard

A. General Principles

"[E]xpress language in statutes and rules, … judicial interpretation of rules that are silent on the matter, and … decisions in common law areas that are not subject to formal rules" may indicate that a particular question admits of more than one legally correct answer and is therefore committed to the discretion of the district judge. Maurice Rosenberg, *Appellate Review of Trial Court Discretion*, 79 F.R.D. 173, 175 (1978). "As commentators have observed, abuse-of-discretion review is employed … where a decision maker has a wide range of choice as to what he decides, free from the constraints which characteristically attach whenever legal rules enter the decisionmaking process[, as well as] where the trial judge's decision is given an unusual amount of insulation from appellate revision for functional reasons." *McLane Co., Inc. v. EEOC*, 137 S. Ct. 1159, 1169 (2017); *see also* Chapter I.D, *supra* (describing how the functional approach assigns *de novo* or deferential appellate review based on whether the appellate court or the district court is institutionally better suited to make a particular decision).

In the federal court system, many decisions pertaining to a range of issues are committed largely to the trial court's discretion. *See Rosenberg*, *supra*, at 173. Many of these decisions implicate important substantive rights. *See, e.g.*, *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855, 869 (2017) (reviewing for abuse of discretion the initial determination that a juror statement suggesting racial animus provides Sixth Amendment grounds for setting aside the no-impeachment bar protecting jury deliberations). But it is "especially common for issues involving what can broadly be labeled 'supervision of litigation'" to be committed to the discretion of the trial courts. *See Pierce v. Underwood*, 487 U.S. 552, 558 n.1 (1988) (award of attorney's fees); *see also, e.g.*, *Sprint/United Mgmt. Co. v. Mendelsohn*, 552 U.S. 379, 384 (2008) (evidentiary decisions). Discretion over such trial process matters is often congressionally conferred by statute or rule. The Federal Rules of Civil and Criminal Procedure, as well as the Federal Rules of Evidence, describe many of the discretionary powers assigned to district courts. In addition, such discretion is often derived from the district courts' inherent powers. "These powers," which "are governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases," *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991), allow district courts to address any number of matters that must be resolved in moving trials forward in a fair and efficient manner. *See, e.*g., *Dietz v. Bouldin*, 579 U.S. 40, 46 (2016) (holding that a federal district judge has the power to recall a jury for further deliberations under certain circumstances). The Supreme Court has also applied the abuse of discretion standard in reviewing a circuit court's actions in supervising litigation. *See United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1578, 1581 (2020) (holding that Ninth Circuit abused its discretion by *sua sponte* ordering amici to file briefs on a constitutional issue not raised by either party at trial or on appeal and by subsequently deciding the case based on that issue, even though "[n]o extraordinary circumstances" justified the action).

Although "deference … is the hallmark of abuse of discretion review," *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 143 (1997), the variety of matters committed to the discretion of district judges means that the standard is necessarily variable. It implies no single level of scrutiny by the appellate courts. *See* Henry J. Friendly, *Indiscretion About Discretion*, 31 EMORY L.J. 747, 762–64 (1982); Maurice Rosenberg, *Judicial Discretion of the Trial Court, Viewed from Above*, 22 SYRACUSE L. REV. 635, 650–53 (1971). Rather, "abuse of discretion is a legal term of art[,] … not a wooden term but one of flexibility, dependent on the type of case in which it is to be applied and the posture of the case when it arises." *Direx Isr., Ltd. v. Breakthrough Med. Corp.*, 952 F.2d 802, 814 (4th Cir. 1991); *see also id*. at 814–15 (explaining why abuse of discretion review of the grant or denial of a preliminary injunction cannot be "a rule of perfunctory appellate review but one of careful scrutiny").

The deference afforded discretionary decisions, even those that are largely unconstrained by statutory language or judicial precedent, does not mean that such decisions are "unfettered by meaningful standards or shielded from thorough appellate review." *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 416 (1975); *see also United States v. Taylor*, 487 U.S. 326, 336 (1988). "In a system of laws discretion is rarely without limits, even when the statute [conferring it] does not specify any limits upon the district courts' discretion." *Halo Elecs., Inc. v. Pulse Elecs., Inc.*, 579 U.S. 93, 103 (2016). "Without governing standards or principles, … [statutes that seemingly grant open ended discretion] threaten to condone judicial 'whim' or predilection." *Kirtsaeng v. John Wiley & Sons, Inc.*, 579 U.S. 197, 203 (2016). So, too, would inherent powers and common law doctrines if they granted unbounded discretion. *Cf. Chambers*, 501 U.S. at 44 ("Because of their very potency, inherent powers must be exercised with restraint."). And judicial discretion based on whim is something our system does not tolerate. *See Halo*, 579 U.S. at 103. "[A] motion to a court's discretion is a motion, not to its inclination, but to its judgment; and its judgment is to be guided by sound legal principles." *Martin v. Franklin Capitol Corp.*, 546 U.S. 132, 139 (2005) (quoting *United States v. Burr*, 25 F.Cas. 30, 35 (No. 14,692d) (CC Va. 1807) (Marshall, C.J.)); *see also Halo*, 579 U.S. at 103 (quoting *Burr* for the same proposition); *Taylor*, 487 U.S. at 336 (same); *Albemarle Paper Co.*, 422 U.S. at 416 (same).

Perhaps the most basic of the legal principles guiding discretionary decisionmaking pertain to the trial judge's identification and application of the controlling law and the accuracy of his or her assessment of the evidence. "A district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence." *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990); *see also Highmark Inc. v. Allcare Health Mgmt. Sys.*, 572 U.S. 559, 563 n.2 (2014) (quoting *Cooter & Gell*, 496 U.S. at 405).

Otherwise, "[w]hether discretion has been abused depends … on the bounds of that discretion and the principles that guide its exercise." *Taylor*, 487 U.S. at 336. It is commonly said that "[a]buse of discretion review means that the [trial] court has a range of choice, and that its decision will not be disturbed *as long as it stays within that range* and is not influenced by any mistake of law." *United States v. Dockery*, 955 F.2d 50, 54 (D.C. Cir. 1992) (emphasis in original); *see also, e.g.*, *Gallego v. Northland Grp.*, 814 F.3d 123, 129 (2d Cir. 2016); *Dunn v. Nexgrill Indus.,*

Inc., 636 F.3d 1049, 1055 (8th Cir. 2011); *United States v. Frazier*, 387 F.3d 1244, 1259 (11th Cir. 2004) (en banc). But this shortchanges the inquiry.

Abuse is also assessed by the manner in which a trial court exercises its discretion. *See Taylor*, 487 U.S. at 336 ("[D]iscretionary choices are not left to a court's inclination, but to its judgment; and its judgment is to be guided by sound legal principles."). As the Eighth Circuit cogently explains, an abusive exercise of discretion occurs when a district court "(1) fails to consider a relevant factor that should have been given significant weight; (2) considers and gives significant weight to an irrelevant or improper factor; or (3) considers only proper factors but commits a clear error of judgment in weighing those factors." *Dunn*, 636 F.3d at 1055; *see also, e.g.*, *Sheppard v. River Valley Fitness One, L.P.*, 428 F.3d 1, 6 (1st Cir. 2005). In other words, when reviewing for abuse of discretion, an appellate court must not only determine whether the trial court's decision was outside the bounds of the choices permitted, but also whether, in light of the particular factual circumstances, the trial court erred in applying or weighing the factors limiting its discretion. *See, e.g.*, *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 9–10 (2008) (finding that the district court abused its discretion in failing to give proper weight to the public and the Navy's interest in conducting effective military sonar training); *see also, e.g*., *Kirtsaeng*, 579 U.S. at 208–10 (remanding for reconsideration of attorney's fee application because district court may have given improper presumptive weight to the objective reasonableness of the losing party's litigation position).

B. Identifying the Degree of Appellate Scrutiny Afforded Discretionary Decisions

When the discretion afforded a trial court is closely confined (and the available choices are therefore limited) appellate review is said to be more searching. When the discretion afforded is more broadly defined (and the range of choices therefore greater) appellate review is characterized as less searching. *See* Friendly, *supra*, at 764 n.62. When discretion is awarded by statute or rule, it will be more or less confined by the congressional objectives motivating the delegation. Appellate courts tasked with assessing whether trial courts have abused their discretion look to statutory language and structure, as well as legislative history, to ascertain those objectives. And over time, judicial precedent created in the process of discerning and giving effect to congressional objectives can have its own confining effect on trial court discretion. *See, e.g*., *Halo Elecs., Inc. v. Pulse Elecs., Inc.*, 579 U.S. 93, 110 (2016) (discretion to award treble damages under Patent Act is "guided by the sound legal principles developed over nearly two centuries of application and interpretation of the … Act"). When discretion is derived from the common law or a trial court's inherent power, it will also be subject to definition through judicial interpretation. *See, e.g., Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991) ("Prior cases have outlined the scope of the inherent power of the federal courts.").

1. Ascertaining the Bounds of Discretion Delegated by Congress

When discretion is delegated by Congress, it "'should be exercised in light of the considerations' underlying [that] grant." *Halo*, 579 U.S. at 103 (quoting *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 572 U.S. 545, 554 (2014)). As the Supreme Court explained in *United States v. Taylor*, 487 U.S. 326 (1988), although the role of an appellate court reviewing for abuse of discretion "is not to substitute its judgment for that of the trial court," appellate judges must nonetheless "ensure" that the purposes of the statute giving discretion to the trial court are given effect. *Id*. at 336. The search for the considerations informing congressional delegation is often cast as a matter of ascertaining a statute's "large objectives." *See, e.g.*, *Kirtsaeng v. John Wiley & Sons, Inc.*, 579 U.S. 197, 204 (2016) ("[W]hen applying fee-shifting laws with no explicit limit or condition, we have nonetheless found limits … by looking to the large objectives of the relevant act."); *Indep. Fed'n of Flight Attendants v. Zipes*, 491 U.S. 754, 758–59 (1989) ("In the case of § 706(k) [of the Civil Rights Act] and other federal fee-shifting statutes, just as in the case of discretion regarding appropriate remedies, we have found limits in the large objectives of the relevant Act."); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 416 (1975) ("The power to award backpay was bestowed by Congress, as part of a complex legislative design directed at a historic evil of national proportions. A court must exercise this power in light of the large objectives of the Act.").

In *United States v. Taylor*, the Court made clear that in ascertaining the purposes of a delegation of discretion, statutory language is generally where the analysis begins, though not necessarily where it ends. *See* 487 U.S. at 332–33. The question in *Taylor* was whether the district court abused its discretion when it dismissed an indictment with prejudice under the Speedy Trial Act. *Id*. at 332. In locating the bounds of the discretion afforded by the Act, the Supreme Court first considered the relevant statutory language. Three factors were specified: "[1] the seriousness of the offense; [2] the facts and circumstances of the case which led to the dismissal; and [3] the impact of a reprosecution on the administration of [the Speedy Trial Act] and on the administration of justice." *Id.* at 332–33 (quoting 18 U.S.C. § 3162(a)(2)). Congressional delineation of these factors, the Court found, made "plain" that "[district] courts are not free simply to exercise their equitable powers in fashioning an appropriate remedy." *Id.* at 333.

Because the factors described were "somewhat broad and open-ended," the Court turned to the Act's legislative history for "additional indication of how the contemplated choice of remedy should be made." *Id.* Based on that history, the Court concluded both that prejudice to the defendant should be considered in determining whether to bar reprosecution and that the trial court's discretion was not confined to the point that either a "with" or a "without prejudice" dismissal could serve as the presumptive remedy for violations of the Act. *See id*. at 333–35.

In light of the identified considerations, the Court found that the Speedy Trial Act "confines" the "great discretion" with which trial courts are inherently endowed "to make decisions concerning trial schedules and to respond to abuse and delay where appropriate." *Id*. at 343–44. Examining the trial court's decision to dismiss with prejudice within the Act's framework, the

Court held that the district court abused its discretion both because it "failed to consider all the factors relevant to the choice of a remedy under the Act" and because the "factors it did rely on were unsupported by factual findings or evidence in the record." *Id*. at 344.

In *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975), the Supreme Court, looking to congressional purpose, found that discretion may be significantly constrained (and abuse of discretion review thus rendered more searching) even when the controlling statutory language does not identify factors to be considered by the trial court. *Id.* at 417, 421–22. The Court granted *certiorari* to resolve, among other things, the standard governing backpay awards under Title VII. *Id.* at 413. The district judge found that the defendants had discriminated against the plaintiffs and consequently granted injunctive relief. *Id*. at 409. However, the court refused the plaintiffs' request for backpay, citing two factors: (1) the absence of any evidence of bad faith and (2) its conclusion that an award of backpay would substantially prejudice the defendants in light of the plaintiffs' late filing of their backpay claim. *Id*. at 413. According to the district court, "[t]he defendants might have chosen to exercise unusual zeal in having this court determine their rights at an earlier date had they known that backpay would be at issue." *Id.* at 410. The court of appeals reversed the district court, holding that "a plaintiff … who is successful in obtaining an injunction under Title VII … should ordinarily be awarded backpay unless special circumstances would render such an award unjust." *Id.* at 412.

Before the Supreme Court, the petitioning defendants argued that the district court's backpay decision should not have been overturned, since "the statutory scheme provides no guidance, beyond indicating that backpay awards are within the district court's discretion." *Id.* at 415. The relevant remedial provision stated only that a "court may … order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without backpay … or any other equitable relief as the court deems appropriate." *Id.* at 415 n.9.

Looking to the overall scheme of Title VII, its legislative history, and analogous statutes, the Supreme Court rejected the defendants' argument. It concluded that "[t]he power to award backpay was bestowed by Congress, as part of a complex legislative design directed at a historic evil of national proportions." *Id.* at 416; *see also id*. at 417–21. And the equitable nature of the remedial power did not excuse the district court from exercising it "in light of the large objectives of the Act." *Id.* at 416. "Congress' purpose in vesting a variety of [remedial] discretionary powers in the courts was not to limit appellate review of trial courts, or to invite inconsistency and caprice, but rather to make possible the fashioning of the most complete relief possible." *Id.* at 421. "It follows," the Court reasoned, "that, given a finding of unlawful discrimination, backpay should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination." *Id.*

Measuring the district court's decision against the objectives of Title VII, the Court held that the mere absence of bad faith on the part of an employer cannot justify the denial of backpay. *Id.* at 422–23. "If backpay were awardable only upon a showing of bad faith, the remedy would

become a punishment for moral turpitude, rather than a compensation for workers' injuries. This would read the 'make whole' purpose right out of Title VII." *Id.* at 422. With respect to the plaintiffs' late filing, the Court held that "[o]n these issues of procedural regularity and prejudice, the broad aims of Title VII provide no ready solution." *Id.* at 425. "Whether the [defendants] were in fact prejudiced, and whether the [plaintiffs'] trial conduct was excusable, are questions that will be open to review by the Court of Appeals, if the District Court, on remand, decides again to decline to make any award of backpay." *Id.* at 424. In such a case, the Court concluded, the court of appeals should review the district court's factual findings for clear error and its exercise of discretion for abuse in light of the circumstances peculiar to the case. *Id.* at 424–25.

Turning to how circuit courts should review backpay decisions, the Court admonished that "courts of appeals must maintain a consistent and principled application of the backpay provision, consonant with the … objectives [of the Act], while at the same time recognizing that the trial court will often have the keener appreciation of those facts and circumstances peculiar to particular cases." *Id.* at 421–22. In other words, in light of the constraints the statute placed on the district court's discretion, the Supreme Court made clear that appellate review under the abuse of discretion standard would be fairly searching.

2. Enforcing Congressional Bounds on Discretion: The Law-Declaring Power of Reviewing Courts

In addition to making clear that the bounds of discretion are significantly determined by the reasons for congressional delegation of that discretion, *Albemarle Paper Co. v. Moody* demonstrates how an appellate court can use its law-declaring powers to clarify where the bounds of discretion lie. Looking to the purpose and history of Title VII, the *Albemarle* Court held that the mere absence of bad faith on the part of an employer is never sufficient to deny backpay. *See* 422 U.S. at 422. It thus established, as a matter of law, that a decision to deny backpay based on nothing more than the absence of bad faith is outside the bounds of permissible choice. The opinion effectively placed a clear perimeter around what had appeared to be unbounded discretion under Title VII's remedial provision.

Albemarle also demonstrates how an appellate court can use its law-declaring powers to affect the weighing process critical to most discretionary decisionmaking. In finding that the objectives of Title VII justify a strong presumption in favor of backpay whenever unlawful discrimination is found, the Court placed a thumb on the scale of the trial court's decisionmaking. Although the Court did not prohibit the denial of backpay in the face of a finding of unlawful discrimination, by imposing a presumption in favor of it, the *Albemarle* Court made clear that its denial would require special justification. *See City of L.A., Dep't of Water & Power v. Manhart*, 435 U.S. 702, 719 (1978) (discussing the effect of *Albemarle*).

In addition, *Albemarle* and *United States v. Taylor* demonstrate how an appellate court can use its law-declaring power to promote appropriately searching appellate review. To facilitate

review of the trial court's exercise of its closely confined remedial discretion, the *Albemarle* Court required that a district court "carefully articulate" its reasons for denying backpay. 422 U.S. at 421 n.14. The Court imposed no such requirement on district courts awarding backpay. Likewise, in *Taylor*, after instructing that a district court applying the Speedy Trial Act "must carefully consider [the identified] factors as applied to the particular case," 487 U.S. at 336, the Court additionally held that "whatever its decision," the district court must "clearly articulate" the effect that those factors had on its decisionmaking process, *id.* "Only then," the Court explained, "can an appellate court ascertain whether a district court has ignored or slighted a factor that Congress has deemed pertinent to the choice of remedy, thereby failing to act within the limits prescribed by Congress." *Id.* at 337.

3. Discerning the Limits on Largely Unbounded Discretion

Many congressionally delegated trial process decisions, as well as those derived from the common law or the district courts' inherent powers, are only very broadly confined. In the case of statutes and rules, there may be few legislatively identified decisional criteria and the primary, or only, congressional objective may be to give district courts the flexibility necessary to resolve "case specific" matters that turn on "multifarious, fleeting, special, narrow facts that utterly resist generalization." *McLane Co, Inc. v. EEOC,* 137 S. Ct. 1159, 1167–68 (2017) (addressing the discretion of a trial court to enforce or quash a subpoena). District court decisions made pursuant to this sort of legislative delegation (or in the case of common law and inherent powers, district court decisions made pursuant to judicial recognition of their broad discretion) are often said to be committed to the "sound discretion" of the district court. *See, e.g.*, *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 257 (1981) (*forum non conveniens* determinations are left to the trial court's "sound discretion"); *Tripodi v. Welch*, 810 F.3d 761, 764 (10th Cir. 2016) (entry of default judgment "committed to sound discretion of the district court"); *Cornwell v. Electra Cent. Credit Union*, 439 F.3d 1018, 1027 (9th Cir. 2006) (denial of a motion to reopen discovery is "well within [trial court's] sound discretion").

Appellate scrutiny of decisions arising out of such broadly defined discretion is "necessarily … limited," *Taylor*, 487 U.S. at 336, with reversal generally permitted only upon a showing of a "clear abuse of discretion," a "definite and firm conviction" that the district court committed a "clear error of judgment," or some similar standard evidencing substantial appellate deference. *See, e.g.*, *United States v. Croteau*, 819 F.3d 1293, 1309–10 (11th Cir. 2016) (setting forth standards for reviewing the district court's weighing of sentencing factors supporting a sentence within the Sentencing Guidelines range); *Taucher v. Brown-Hruska*, 396 F.3d 1168, 1172–73 (D.C. Cir. 2005) (reviewing a district court's discretionary application of a fee-shifting provision that awards fees against the government unless the government's position was "substantially justified" or "special circumstances make an award unjust").

The less searching quality of this version of the abuse of discretion standard does not, however, render appellate review a mere rubber stamp or an exercise in whimsy. There are a

number of ways in which appellate courts provide guidance to district courts exercising broadly defined discretion and, in the process, give content to appellate review.

Appellate courts may, for example, identify presumptions that should be applied by the district courts in their discretionary weighing process or find that more searching appellate review is required based on the perceived importance of the right at issue. *See, e.g.*, *Daniel Int'l Corp. v. Fischbach & Moore, Inc.*, 916 F.2d 1061, 1064 (5th Cir. 1990) (although Federal Rule of Civil Procedure 39(b) grants the district court discretion to relieve a party from waiver of a jury trial, the fundamental right conferred by the Seventh Amendment "modifies the usual approach to … abuse of discretion [review]," requiring the district court to grant a jury trial in the absence of "strong and compelling reasons" not to); *Tri Cnty. Indus., Inc. v. District of Columbia*, 200 F.3d 836, 840 (D.C. Cir. 2000) (abuse of discretion review is more searching if a new trial is granted because the "nullification of the jury's verdict may encroach on the jury's important fact-finding function"). In addition, over time, courts of appeals may recognize narrowing criteria based on the consistent practice of lower courts under their supervision. *See, e.g.*, *Noonan v. Cunard S.S. Co.*, 375 F.2d 69, 70 (2d Cir. 1967) (Friendly, J.) (finding the discretion granted by Federal Rule of Civil Procedure 39(b)—allowing district courts to grant a trial after a party fails to demand one—narrowed by "the settled course" of district court decisions that "placed a gloss upon the Rule which a judge could no more disregard than if the words had appeared in the Rule itself").

Guidance may also be found in the interpretation given to similarly broad grants of discretion in analogous statutes. For example, in *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 572 U.S. 545 (2014), the Supreme Court struck down as "unduly rigid" the Federal Circuit's two-part test for determining when attorney's fees may be awarded under the Patent Act. *Id.* at 553. The relevant statutory provision stated that "[t]he court in exceptional circumstances may award reasonable attorney's fees to the prevailing party." *Id.* Federal Circuit precedent held that a case was "exceptional" only if a district court found "litigation-related misconduct of an independently sanctionable magnitude or determine[d] that the litigation was both brought in subjective bad faith and was objectively baseless." *Id*. at 554. The Supreme Court found these categories too restrictive when measured by the language of the statute. *Id.* at 555–56.

Absent a statutory definition of "exceptional," the Court, looking to the dictionary, held that "an 'exceptional' case is simply one that stands out from the others with respect to the substantive strength of the party's litigating position (considering both the governing law and the facts of the case) or the unreasonable manner in which the case was litigated." *Id*. at 554. The Court explained: "District courts may determine whether a case is 'exceptional' in the case-by-case exercise of their discretion, considering the totality of the circumstances. As in the comparable context of the Copyright Act, '[t]here is no precise rule or formula for making these determinations,' but instead equitable discretion should be exercised 'in light of the considerations we have identified'" in the context of that statute. *Id.* (quoting *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 534 (1994)). The identified considerations consisted of a "'nonexclusive' list of 'factors,' including 'frivolousness, motivation, objective unreasonableness (both in the factual and legal components of the case) and the need in particular circumstances to advance considerations of compensation and deterrence.'" *Id.* at n.6 (quoting *Fogerty*, 510 U.S. at 534

n.19).

Finally, the Supreme Court has made clear that when Congress commits a "choice … to the discretion of district courts, without specifying factors to be considered" and without any discernable "legislatively identified standards or priorities" other than decisional flexibility, district courts are "expected to consider 'all relevant public and private interest factors' and to balance those factors reasonably." *Taylor*, 487 U.S. at 336 (quoting *Piper Aircraft,* 454 U.S. at 257). The Court also applies this public and private interests balancing test to decisions made as a result of broad common law delegations of discretion, *see Piper Aircraft,* 454 U.S. at 257–61, as well as to decisions based on the broad discretion found in the district courts' inherent powers, *see Clinton v. Jones*, 520 U.S. 681, 706–07 (1997).

As the Supreme Court's opinions in *Piper Aircraft* and *Clinton v. Jones* demonstrate, the public-and-private-interests balancing test provides a meaningful measure of reasonableness against which largely unbounded discretion can be assessed. The issue in *Piper Aircraft* was whether the Third Circuit erred in holding that a motion for dismissal for *forum non conveniens* "is automatically barred where the law of the alternative forum is less favorable to the plaintiff than the law of the forum chosen by the plaintiff." 454 U.S. at 238. In rejecting the Third Circuit's approach to the *forum non conveniens* doctrine, the Court stated that "the possibility of an unfavorable change in the law should not, *by itself*, bar dismissal …." *Id*. It explained that "[t]o guide trial court discretion," it had, in its seminal *forum non conveniens* cases, "provided a list of 'private interest factors' affecting the convenience of the litigants, and a list of 'public interest factors' affecting the convenience of the forum." *Id*. at 241. District courts resolving motions for *forum non conveniens* are to "consider[]" and "reasonabl[y]" "balanc[e]" all such public and private interest factors, and when they do so, their "decision[s] deserve[] substantial deference." *Id*. at 257. "The *forum non conveniens* determination," the Court explained, "is committed to the sound discretion of the trial court. It may be reversed only when there has been a clear abuse of discretion …." *Id.*

Applying this law to the case before it, the Court held that a motion to dismiss for *forum non conveniens* cannot be defeated by giving presumptive weight to the fact that the substantive law in the alternative forum would be less favorable to the plaintiff. *Id*. at 247. As the Court reasoned, "[i]f central emphasis were placed on any one factor, the *forum non conveniens* doctrine would lose much of the very flexibility that makes it so valuable" as a mechanism intended to promote convenience. *Id*. at 249–50.

A similar public and private interests balancing test was employed by the Supreme Court in *Clinton v. Jones*, 520 U.S. 681 (1997). In that case, the discretion exercised by the district court derived not from a statute or strict common law, but from the inherent power of the district courts. *Id*. at 706–07. The question was whether the district court had abused the "broad discretion" afforded it to stay trial proceedings. *Id.* at 706. The plaintiff had sued then-President Clinton while he was in office for actions allegedly taken before his term began. *Id.* at 684. Although the district court denied a motion to dismiss on immunity grounds, it stayed the trial proceedings and ruled that "the public interest in avoiding litigation that might hamper the

President in conducting the duties of his office outweighed any demonstrated need for an immediate trial." *Id.* at 687. The district judge also relied, in part, on the fact that the plaintiff "had failed to bring her complaint until" two days before the statute of limitations ran. *Id.* On appeal, the appellate court described the discretionary stay as the functional equivalent of a temporary grant of immunity. *Id.* at 706. Because it found that the President was not entitled to such immunity, it reversed. *Id.*

Rejecting the court of appeals' characterization of the stay, the Supreme Court reviewed the district court's decision for abuse of discretion. Preliminarily, the Court explained that district courts, "as an incident to [their] power to control [their] own docket[s]," are accorded "broad discretion" in deciding motions to stay. *Id.* at 706. It cited an earlier opinion in which it had described a trial court's discretion to grant or deny a stay as "incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants. How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance." *Landis v. N. Am. Co.*, 299 U.S. 248, 254–55 (1936). The Court then noted that, "especially in cases of extraordinary public moment, a plaintiff may be required to submit to delay not immoderate in extent and not oppressive in its consequences if the public welfare or convenience will thereby be promoted." *Clinton v. Jones*, 520 U.S. at 707 (quoting *Landis*, 299 U.S. at 256).

Turning to the public and private interest factors cited by the district court, the Supreme Court determined that the district judge "may have given undue weight to the concern that a trial might generate unrelated civil actions that could conceivably hamper the President in conducting the duties of his office." *Id.* at 708. This conclusion, the Court found, was premature. At the time the stay was granted, "[o]ther than the fact that a trial may consume some of the President's time and attention, there [was] nothing in the record to enable a judge to assess the potential harm that may ensue from scheduling the trial promptly after discovery is concluded." *Id.* The Court also noted that the lengthy stay took "no account whatever of the [plaintiff's] interest in bringing the case to trial." *Id.* at 707. Although acknowledging that the suit was filed just short of the running of the statute of limitations, the Court nevertheless concluded that "delaying trial would increase the danger of prejudice resulting from the loss of evidence." *Id.* at 707–08.

Chapter VI. Preserving, Forfeiting, and Waiving Error: How a Party's Actions Before the Trial Court Can Affect or Preclude Appellate Review

The vast majority of errors committed by trial judges do not warrant remedy. Rather, as a rule, appellate courts must disregard errors that are considered harmless because they "do not affect the substantial rights" of a complaining party. 28 U.S.C. § 2111; *see also* Fed. R. Crim. P. 52(a), (b); Fed. R. Crim. P. 30(d); Fed. R. Crim. P. 11(h); Fed. R. Civ. P. 61; Fed. R. Civ. P. 51(d); Fed. R. Evid. 103(a), (e). The exceptions to this practice are limited, consisting principally of:

- jurisdictional errors, which can never be harmless, *see, e.g.*, *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 317 n.3 (1988), *superseded by statute on other grounds*, Fed. R. App. P. 3(c);

- assuming they are preserved, a handful of "structural" constitutional errors that are subject to automatic reversal because "they affect the framework within which [a criminal] trial proceeds" and therefore "defy analysis by harmless-error standards," *United States v. Gonzalez-Lopez*, 548 U.S. 140, 148 (2006);

- errors involving a very limited number of constitutional rights which, because proof of a violation of the right requires that a criminal defendant demonstrate prejudice, do not require a separate analysis of harm, *see, e.g.*, *Strickland v. Washington*, 466 U.S. 668, 686 (1984) (holding that the benchmark for Sixth Amendment ineffectiveness is "whether counsel's conduct so undermined the … adversarial process that the trial cannot be relied on as having produced a just result");

- a few nonconstitutional errors with respect to which Congress has explicitly or implicitly repealed the "affects substantial rights" prerequisite to remedy, *see, e.g.*, *Zedner v. United States*, 547 U.S. 489, 507–09 (2006) (finding in the Speedy Trial Act an implied repeal of the harmless error rule with respect to procedural errors committed in the application of the Act); and

- errors involving mandatory claim-processing rules, which, if preserved, can never be harmless, *see, e.g.*, *Nutraceutical Corp. v. Lambert*, 139 S. Ct. 710, 714 (2019) (explaining that the time limit specified in Federal Rule of Civil Procedure 23(f) is a mandatory claim-processing rule that is not subject to harmless error analysis, provided the error was preserved); *Manrique v. United States*, 137 S. Ct. 1266, 1271–74 (2017) (same, for the time limit specified in Federal Rule of Appellate Procedure 4).

These exceptions aside, an appellate court's approach to assessing whether a particular error merits remedy is, in broad outline, determined by whether the error was "preserved," "forfeited," or "waived." As the Supreme Court has recently reiterated: "An appellate court's function is to revisit matters decided in the trial court. When an appellate court reviews a matter on which a party failed to object below, its review may well be constrained by other doctrines

such as waiver, forfeiture, and estoppel, as well as by the type of challenge that it is evaluating." *Musacchio v. United States*, 577 U.S. 237, 245 (2016).

In both criminal and civil cases, if a party preserves a claim by properly bringing it to the attention of the trial court, an appellate court that concludes (under *de novo*, clearly erroneous, or abuse of discretion review) that the trial court erred will generally apply the harmless error doctrine to determine whether the error affected the party's substantial rights. If the error affected substantial rights, remedy is required. If not, remedy is prohibited.

Whether the error occurred in a criminal or civil proceeding affects the application of the harmless error doctrine. If the claimed error occurred in a criminal proceeding, the beneficiary of the error (generally the government) bears the risk of the appellate court being left in "grave doubt" as to the error's effect on the defendant's substantial rights. The standard of proof that the government must meet to satisfy an appellate court that an error is harmless depends on whether the error involves constitutional rights. If constitutional rights are not implicated, the standard defined in *Kotteakos v. United States*, 328 U.S. 750 (1946), applies. If constitutional rights are implicated, the government will likely have to demonstrate that the error was harmless beyond a reasonable doubt under *Chapman v. California*, 386 U.S. 18 (1967). Alternatively, in a small number of cases involving constitutional errors that are characterized as "structural" defects, harmfulness is presumed and remedy is automatic. *See generally* Chapter VIII.A, *infra* (discussing the application of the harmless error doctrine in criminal cases).

In contrast, if an error occurs in a civil proceeding, the party claiming error generally bears the burden of demonstrating harmfulness. *See Shinseki v. Sanders*, 556 U.S. 396, 409 (2009). This appears to be the case even when an error implicates constitutional rights. *See, e.g.*, *Al Haramain Islamic Found., Inc. v. U.S. Dep't of Treasury*, 686 F.3d 965, 989 (9th Cir. 2012). The Supreme Court has characterized the degree of proof needed to carry this burden as "not … particularly onerous." *Sanders*, 556 U.S. at 410. But from circuit to circuit (and even within circuits), there is a fair degree of variety in the tests appellate courts use to determine whether a complaining party has demonstrated the harmfulness of a trial judge's error. The Supreme Court appears not to have addressed whether constitutional errors that are typed "structural" (and are therefore subject to automatic reversal when they occur in a criminal proceeding) are also subject to automatic reversal in a civil setting. There are, however, a few circuit opinions treating constitutional errors that have been characterized as structural in the criminal context as subject to automatic reversal in the civil context. *See, e.g.*, *Alvarez v. Lopez*, 835 F.3d 1024, 1030 (9th Cir. 2016). *See generally* Chapter VII.B, *infra* (discussing the application of the harmless error doctrine in civil cases).

"No procedural principle is more familiar than that a right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it." *Puckett v. United States*, 556 U.S. 129, 134 (2009) (quoting *Yakus v. United States*, 321 U.S. 414, 444 (1944)). If a complaining party "forfeits" an alleged error by failing to preserve it, obtaining a remedy will be significantly more difficult and, in civil cases, frequently altogether prohibited. On appeal of forfeited errors in criminal cases, the *de novo*,

clearly erroneous, and abuse of discretion standards, as well as the harmless error doctrine, are replaced by or, perhaps more accurately, subsumed within the more demanding plain error standard of review articulated in *United States v. Olano*, 507 U.S. 725 (1993). Under that standard, before an appellate court may correct an unpreserved claim of error, it must be satisfied (1) that there was an "error"; (2) that the error was or is "plain"; (3) that the error "affect[ed]" the appealing party's "substantial rights"; *and* (4) that the error "seriously affects the fairness, integrity or public reputation of judicial proceedings." *Id.* at 732–37. Plain error review thus prevents appellate courts from correcting errors that affect a complaining party's substantial rights (and would have required remedy under the harmless error doctrine) unless those errors are found to have a substantial negative effect on judicial proceedings generally. This "difficult" test strikes what the Supreme Court describes as a "careful balance … between judicial efficiency and the redress of injustice." *Puckett*, 556 U.S. at 135. *See* Chapter VIII.A, *infra* (discussing the application of the plain error standard in criminal cases). Note that in a criminal case, plain error review applies regardless of whether the alleged unpreserved error is legal or factual. *See Davis v. United States*, 140 S. Ct. 1060, 1061–62 (2020).

With respect to civil appeals, forfeited issues and arguments may be reviewed under the plain error test of *Olano*, the exceptional or extraordinary circumstances framework referenced in *Singleton v. Wulff*, 428 U.S. 106, 120 (1976), or some hybrid of the two. Which standard controls depends upon the issue raised and the circuit in which an appellant is seeking review. If the plain error standard controls, a remedy for an unpreserved error will be just as difficult to obtain as in a criminal case and, in the several circuits applying a heightened standard, more difficult. *See, e.g.*, *Shcherbakovskiy v. Da Capo Al Fine, Ltd.*, 490 F.3d 130, 142 (2d Cir. 2007) (applying a "fundamental error" standard requiring an error that is "so serious and flagrant that it goes to the very integrity of the trial," requiring "even more than is necessary to meet the plain error standard"). If the exceptional circumstances framework applies, review may be closely akin to plain error review. Or, if the forfeited issue is purely legal or review is sought based on new law (and the factual record is adequately developed), *de novo* review will often be available without regard to the considerations articulated in the four-part plain error test. If a hybrid version of plain error and exceptional circumstances controls, it is generally more difficult to obtain a remedy than if either standard, alone, controlled. *See* Chapter VIII.B, *infra* (discussing application of the exceptional circumstances and plain error standards in civil cases).

To preserve an alleged error, a party typically must raise the issue before the trial court. Exactly what must be done varies depending upon the error claimed. *See, e.g.*, Fed. R. Crim. P. 51(b) ("A party may preserve a claim of error by informing the court—when the court ruling or order is made or sought—of the action the party wishes the court to take, or the party's objection to the court's action and the grounds for that objection."); Fed. R. Civ. P. 46 (virtually the same); Fed. R. Crim. P. 30(d) (describing the requirements for preserving alleged error in criminal jury instructions); Fed. R. Civ. P. 51(c), (d) (describing the requirements for preserving alleged error in civil jury instructions); Fed. R. Evid. 103(a) (describing the requirements for preserving alleged error in evidentiary rulings). Notably, however, Federal Rule of Civil Procedure 52 excepts from the preservation requirement challenges to the sufficiency of the evidence supporting findings of fact underlying judgments in civil bench trials. Fed. R. Civ. P. 52(a)(5); *see also* 9C CHARLES ALAN

WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 2581 (3d ed. 2008 & Supp. 2017). *See generally* Chapter IV, *supra*.

With only very limited exceptions, the most significant of which involves matters pertaining to a court's jurisdiction, errors may be waived. *See Torres*, 487 U.S. at 317 n.3. In the criminal context, waived errors are "extinguish[ed]" and generally may not be argued on appeal. *Olano*, 507 U.S. at 733–34; *see also Puckett*, 556 U.S. at 138 (if an error is "*waived*—that is, intentionally relinquished or abandoned…. there [is] no error at all"). With extremely rare exceptions, this rule also holds true in the civil context. *See Keepseagle v. Perdue*, 856 F.3d 1039, 1053 (D.C. Cir. 2017); *see also In re Bayer Healthcare & Merial Ltd. Flea Control Prods. Mktg. & Sales Pracs. Litig.*, 752 F.3d 1065, 1078 (6th Cir. 2014) (evaluating a waived challenge for a "miscarriage of justice"); *Smith v. Kmart Corp.*, 177 F.3d 19, 25 (1st Cir. 1999) (suggesting that review of waived claims may be possible in rare instances).

Waiver, which is "different [than] forfeiture," involves the "intentional relinquishment or abandonment of a known right." *Olano*, 507 U.S. at 733. "Whether a particular right is waivable; whether the defendant must participate personally in the waiver; whether certain procedures are required for waiver; and whether the defendant's choice must be particularly informed or voluntary, all depend on the right at stake." *Id.* at 733; *see also New York v. Hill*, 528 U.S. 110, 114–15 (2000). And any of these matters may be the subject of appellate litigation. *See, e.g.*, *Wood v. Milyard*, 566 U.S. 463, 474 (2012) (finding that a state's representation in the district court that it "will not challenge, but is not conceding" its assertion that a habeas petition was not timely filed amounted to a waiver for appellate purposes); *Zedner*, 547 U.S. at 509 (resolving an inter-circuit conflict over what constitutes a waiver under the Speedy Trial Act).

Moreover, in some situations, the mere failure to properly preserve an alleged error amounts to a waiver that forecloses appellate review. *See, e.g.*, *Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc.*, 546 U.S. 394, 404 (2006) (sufficiency challenge to civil verdicts foreclosed if party fails to preserve as prescribed by Federal Rule of Civil Procedure 50); Fed. R. Crim. P. 12(c)(3) (formerly 12(e)) (interpreted in most circuits to foreclose appellate challenges based on certain Rule 12(b)(3) defenses, objections, and requests if not raised within the prescribed deadlines, unless relief from waiver is granted for good cause); Fed. R. Civ. P. 12(h)(1) (foreclosing appellate challenges based on certain Rule 12(b) defenses if prescribed procedures are not followed). Care must be taken, however, not to confuse the actual relinquishment or abandonment of a known right with the not-infrequent misuse of the term "waiver" to describe what are, in fact, forfeitures. *See Hamer v. Neighborhood Hous. Servs. of Chi.*, 138 S. Ct. 13, 17 n.1 (2017) ("The terms waiver and forfeiture—though often used interchangeably by jurists and litigants—are not synonymous."); *Kontrick v. Ryan*, 540 U.S. 443, 458 n.13 (2004); *Brickwood Contractors, Inc. v. Datanet Eng'g, Inc.*, 369 F.3d 385, 395 n.7 (4th Cir. 2004) (en banc); *Chestnut v. City of Lowell*, 305 F.3d 18, 20 (1st Cir. 2002) (en banc) (per curiam).

In reality, most claims brought before appellate courts are reviewed under the *de novo*, abuse of discretion, or clearly erroneous standards and, if error is found, are subject to the harmless error doctrine. Good appellate advocates rarely make the mistake of raising waived claims of

error. Civil litigants are, in many instances, disinclined to undertake the often onerous burden of plain error or exceptional circumstances review unless the forfeited error is purely legal, the factual record is well developed, and *de novo* review is a real possibility in the circuit in which they are appealing. Individuals convicted of crimes are most likely to pursue unpreserved claims of error, even in the face of the plain error test, because the stakes (conviction and incarceration) are always high.

A final note of caution: "[A]ppellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them." *NASA v. Nelson*, 562 U.S. 134, 147 n.10 (2011). Consequently, a party that has properly preserved an alleged error before the trial court may nonetheless find an appellate court unwilling to consider the issue if it is not properly raised on appeal. A party may "waive" (or abandon) an issue on appeal by failing to raise it in its opening brief. *See, e.g.*, *Brown v. Rawson-Neal Psychiatric Hosp.*, 840 F.3d 1146, 1148–49 (9th Cir. 2016); *Marek v. Singletary*, 62 F.3d 1295, 1298 n.2 (11th Cir. 1995); *United States v. Albertson*, 645 F.3d 191, 195 (3d Cir. 2011). And the fact that an issue is raised by a party's opponent in an answering brief generally will not save an issue from waiver. Forcing an opponent to articulate and then argue against an issue an appellant might have raised creates unfair prejudice, as does allowing a party to initially argue an issue in a reply brief. Such tactics eliminate the opponent's opportunity for an informed response. *See Brown*, 840 F.3d at 1149. An issue presented with insufficient clarity in a party's opening brief may also constitute a waiver before an appellate court. *See, e.g.*, *Campania Mgmt. Co. v. Rooks, Pitts & Poust*, 290 F.3d 843, 852 n.6 (7th Cir. 2002) ("Perfunctory and undeveloped arguments are waived."); *Commodity Futures Trading Comm'n v. Tokheim*, 153 F.3d 474, 476 n.3 (7th Cir. 1998) (finding waiver where a party "presented [an] argument in only cursory fashion in his [opening] brief to this Court, and … did not raise the issue at oral argument until rebuttal"). As the Seventh Circuit rather colorfully put it, "[j]udges are not like pigs, hunting for truffles buried in briefs." *United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991) (per curiam). Whether to treat as waived an issue that was not properly presented to an appellate court is a matter of appellate court discretion, and will generally be reviewed only for abuse of that discretion. *See U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 447 (1993); *see also Brown*, 840 F.3d at 1148.

Chapter VII. The Harmless Error Doctrine: Limiting the Remedial Response to Preserved Legal, Factual, and Discretionary Error in Criminal and Civil Trials

Pursuant to the harmless error doctrine, appellate courts must disregard preserved trial errors that are shown not to affect the substantial rights of a complaining party. The doctrine, which applies in both criminal and civil appeals, is articulated in 28 U.S.C. § 2111:

> On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.

Federal Rule of Evidence 103(a), which applies in both district court and appellate cases, *see* Fed. R. Evid. 1101(a), likewise provides that "[a] party may claim error in a ruling to admit or exclude evidence only if the error affects a substantial right of the party."

The criminal and civil rules of procedure also incorporate the harmless error standard. Federal Rule of Criminal Procedure 52(a), which applies to both district courts and courts of appeals, *see* Fed. R. Crim. P. 1, pointedly states:

> Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.

Federal Rule of Criminal Procedure 11(h), governing guilty pleas, echoes this instruction: "A variance from the requirements of this rule is harmless error if it does not affect substantial rights." *See also* Fed. R. Crim. P. 1. Federal Rule of Civil Procedure 61, governing new trial motions, similarly provides:

> Unless justice requires otherwise, no error in admitting or excluding evidence—or any other error by the court or a party—is ground for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order. At every stage of the proceeding, the court must disregard all errors and defects that do not affect any party's substantial rights.

See also McDonough Power Equip., Inc. v. Greenwood, 464 U.S. 548, 554 (1984) (although Federal Rule of Civil Procedure 61 literally applies only to district courts, *see* Fed. R. Civ. P. 1, "appellate courts should act in accordance with the salutary policy embodied in" it).

It is important to remember that the harmless error doctrine comes into play only when a party has properly preserved a claimed error before the trial court and has raised it before the appellate court. *See* Chapter VI, *supra*. And, although the doctrine is generally applied only after error is found pursuant to the governing standard of review, courts of appeals sometimes employ a harmlessness analysis to avoid resolving difficult or close questions of error or simply for

convenience. *See, e.g.*, *United States v. Burgos-Montes*, 786 F.3d 92, 116 (1st Cir. 2015) (although "tend[ing] to agree with [the defendant] that the government did not lay out much of a case" supporting admission of certain testimony, "we need not determine whether the admission … was an abuse of discretion because … any possible error was harmless"); *United States v. Oritz*, 474 F.3d 976, 981–82 (7th Cir. 2007) (declining to decide a "close question" of whether admission of certain evidence was error because it was, in any event, harmless).

Although the harmless error rules limit the appellate courts' remedial authority to errors "affect[ing]" the "substantial rights" of a complaining party, none defines what those words mean. Yet their purpose is clear: By "[t]hat language" Congress sought "to prevent appellate courts from becoming 'impregnable citadels of technicality.'" *Shinseki v. Sanders*, 556 U.S. 396, 407–08) (quoting *Kotteakos v. United States*, 328 U.S. 750, 759 (1946)); *see also Kotteakos*, 328 U.S. at 758–62 (discussing the motivation for development of harmless error rules). But how does an appellate court determine whether a preserved error affected a party's substantial rights? The essential parameters of this case-specific inquiry are determined by whether the error at issue occurred in a criminal or civil proceeding and whether it implicated a constitutional right.

A. Application of the Harmless Error Doctrine in Criminal Cases

In the context of direct review of criminal convictions, the proper test for determining whether an error "affect[ed]" "substantial rights" is readily located in Supreme Court precedent. With respect to the vast majority of such errors, harmlessness is assessed pursuant to either *Kotteakos v. United States*, 328 U.S. 750 (1946), or *Chapman v. California*, 386 U.S. 18 (1967). If an error does not involve a defendant's constitutional rights, *Kotteakos* almost always controls. If the error is constitutional in dimension, *Chapman*'s "harmless beyond a reasonable doubt standard" usually applies.

There are, however, two notable exceptions to the application of the *Chapman* constitutional standard. The first involves a handful of "structural defects" resulting from constitutional violations that are so intrinsically harmful as to require automatic reversal, at least so long as the defendant has objected at trial and raised the issue on direct appeal. *See United States v. Gonzalez-Lopez*, 548 U.S. 140, 148–49 & n.4 (2006) (describing criteria that characterize structural defects and listing some structural defects); *see also Weaver v. Massachusetts*, 137 S. Ct. 1899, 1907–09 (2017) (same). The second consists of a very limited number of constitutional rights which, because proof of their violation requires a defendant to demonstrate harm, are, in essence, exempt from the usual two-part "error/affects substantial rights" framework. *See, e.g.*, *Gonzalez-Lopez*, 548 U.S. at 146–47 (recognizing that under *Strickland v. Washington*, 466 U.S. 668, 694 (1984), violation of the Sixth Amendment right to effective representation cannot be found unless a defendant demonstrates prejudice); *Kyles v. Whitley*, 514 U.S. 419, 433 (1995) ("[F]avorable evidence is material, and constitutional error results from its suppression by the government, if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.").

Federal habeas corpus proceedings, of course, involve review of criminal convictions within the framework of civil litigation. In these proceedings, as in federal appellate practice generally, most constitutional deprivations are subject to harmless error analysis. However, in this context, the Supreme Court holds that *Kotteakos*, not *Chapman*, provides the standard for harmlessness review of nonstructural constitutional error. *Brecht v. Abrahamson*, 507 U.S. 619, 636–37 (1993); *O'Neal v. McAninch*, 513 U.S. 432, 438–39, 445 (1995). Harmlessness review in the habeas context involves a variety of unique considerations that are beyond the scope of this book. An excellent discussion of the relevant issues, including the evolving body of precedent regarding the effect of the Antiterrorism and Effective Death Penalty Act on harmless error review, can be found in RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE & PROCEDURE §§ 31.1–.5 (7th ed. 2016).

1. The *Kotteakos* Decision: Harmlessness Review of Nonconstitutional Error

The principal decision describing what it means to "affect substantial rights" with respect to preserved claims of nonconstitutional error in criminal trials is *Kotteakos*, 328 U.S. 750. On the facts presented, it was uncontested that the trial court had erred in instructing the jury and allowing the defendants to be "convicted of a single general conspiracy by evidence which the Government admit[ted] proved not one conspiracy but some eight or more different [smaller] ones of the same sort." *Id.* at 752; *see also id.* at 771. The only question before the Supreme Court was whether that error affected the defendants' substantial rights under the harmless error rule of 28 U.S.C. § 391, the precursor to 28 U.S.C. § 2111. *Id.* at 752, 755–58; *see also O'Neal*, 513 U.S. at 441 ("In *Kotteakos*, the Court interpreted the then-existing harmless-error statute, 28 U.S.C. § 391, now codified with minor change at 28 U.S.C. § 2111.").

Although the error at issue pertained to a criminal verdict, Justice Rutledge began the Court's analysis with a description of the function of the harmless error statute in both criminal and civil cases. *Kotteakos*, 328 U.S. at 758–63. "The general object was simple, to substitute judgment for automatic application of rules," *id.* at 759–60, in particular, technical rules that had resulted in regular reversals of trial court verdicts, *id.* at 759. But "[t]he task was too big, too various in detail, for particularized treatment." *Id.* at 760. Consequently, as the Court explained, Congress chose to accomplish its goal through the simple command that reviewing courts ignore "technical errors, defects, or exceptions which do not affect the substantial rights of the parties." *Id.* at 757; *see also id.* at 760.

This broad standard, the Court emphasized, necessarily leaves much to the judgment of appellate jurists. *See id.* at 761. The "discrimination" required by harmless error review "is one of judgment transcending confinement by formula or precise rule." *Id.* Thus, the Court underscored the primary importance of examining an error in the context of the whole record. *Id.* at 762. "In the final analysis," an appellate court's assessment of the effect of an error on a party's substantial rights "must be influenced by conviction resulting from examination of the

proceedings in their entirety, tempered but not governed in any rigid sense of *stare decisis* by what has been done in similar situations." *Id.*; *see also id.* at 761 (an error that might be "minor and unimportant in one setting" may be "crucial in another"). As the Court summarized:

> Necessarily [1] the character of the proceeding, [2] what is at stake upon its outcome, and [3] *the relation of the error asserted to casting the balance for decision on the case as a whole*, are material factors in judgment.

Id. at 762. Notably, the third factor instructs reviewing courts to consider the effect of an error on the decisionmaking process.

The opinion clarifies that Congress, in enacting the harmless error statute, placed the risk of appellate uncertainty as to the harmlessness of all but "technical" errors on the beneficiary of the trial court's mistake—in criminal appeals, generally the government. *See id.* at 760–61; *see also Chapman*, 386 U.S. at 24 (noting that the common law had, at one time, similarly placed the risk of appellate uncertainty in both criminal and civil trials on the beneficiary of an error). As the Court both earlier and later explained, "technical errors" are errors "concerned with the 'mere etiquette of trials and with the formalities and minutiae of procedure.'" *O'Neal*, 513 U.S. at 440 (quoting *Bruno v. United States*, 308 U.S. 287, 294 (1939)).

Having described generally how the harmless error statute should be applied in both criminal and civil cases, the *Kotteakos* Court turned to the specifics of the statute's application to error infecting criminal verdicts:

> [I]t is not the appellate court's function to determine guilt or innocence. Nor is it to speculate upon probable reconviction and decide according to how the speculation comes out. Appellate judges cannot escape such impressions. But they may not make them sole criteria for reversal or affirmance. Those judgments are exclusively for the jury, given always the necessary minimum evidence legally sufficient to sustain the conviction unaffected by the error.
>
> But this does not mean that the appellate court can escape altogether taking account of the outcome. To weigh the error's effect against the entire setting of the record without relation to the verdict or judgment would be almost to work in a vacuum. In criminal causes that outcome is conviction. This is different, or may be, from guilt in fact. It is guilt in law, established by the judgment of laymen. And the question is, not were they right in their judgment, regardless of the error or its effect upon the verdict. *It is rather what effect the error had or reasonably may be taken to have had upon the jury's decision.* The crucial thing is the impact of the thing done wrong on the minds of other men, not on one's own, in the total setting.

> *This must take account of what the error meant to them, not singled out and standing alone, but in relation to all else that happened*. And one must judge others' reactions not by his own, but with allowance for how others might react and not be regarded generally as acting without reason. This is the important difference, but one easy to ignore when the sense of guilt comes strongly from the record.
>
> If, when all is said and done, the [reviewing court's] conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand, except perhaps where the departure is from a constitutional norm or a specific command of Congress. *But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected.*

328 U.S. at 763–65.

This formulation gives unequivocal expression to the intent of Congress that when a criminal defendant seeks an appellate remedy, the burden of demonstrating harmlessness rests on the government as the party that benefitted from the trial court's mistake. The opinion pointedly states that if an appellate court concludes that an "error itself had substantial influence … *or if [the court] is left in grave doubt*, the conviction cannot stand." *Id.* at 765; *see also O'Neal*, 513 U.S. at 438–39 (describing *Kotteakos* as "placing the risk of doubt" on the government); *United States v. Olano*, 507 U.S. 725, 741 (1993) (under harmless error analysis, the government bears the "burden of showing the absence of prejudice"); *United States v. Davila*, 569 U.S. 597, 607 (2013) ("When Rule 52(a)'s harmless-error rule governs, the prosecution bears the burden of showing harmlessness.").

The test described also reiterates the Court's general observation that the judgment required by the harmless error statute depends upon "examination of the proceedings in their entirety." *Kotteakos*, 328 U.S. at 762. Stating that "it is not the appellate court's function to determine guilt or innocence," *id.* at 763, the Court makes specific to the criminal context its earlier admonition that harmlessness review focuses on the effect of an error on the decisionmaking process, *see id*. at 760–62. It explicitly instructs: "The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error." *Id.* at 765. Rather, it must be "whether the error *itself* had substantial influence." *Id.*

Finally, this definition establishes the certainty of harmlessness necessary to sustain a conviction. Pursuant to the *Kotteakos* standard, a reviewing court must find that a defendant's substantial rights have been affected (and thus reverse) *unless* it can conclude, "with fair assurance," that the error at issue did not "substantially" influence the judgment of the decisionmaker below. *Id.* Put another way, *Kotteakos* requires reversal if the error found "may

have had 'substantial influence' on the outcome of the proceeding." *Bank of Nova Scotia v. United States*, 487 U.S. 250, 256 (1988) (quoting and describing the Court's holding in *Kotteakos*).

The *Kotteakos* Court's application of these decisional principles to the facts presented aptly illustrates how the harmless error test works in practice. As noted, the government conceded that the trial court erred in instructing the jury on, and allowing the defendants to be convicted of, a single conspiracy when the evidence proved eight or more smaller conspiracies. *Kotteakos*, 328 U.S. at 752, 771. And, significantly, the defendants did not challenge the sufficiency of the evidence to sustain their convictions "considered apart from the alleged errors relating to the proof and the instructions." *Id.* at 753. The government, relying on the circuit court's reasoning in sustaining the convictions, argued that while "the trial judge was plainly wrong in supposing that upon the evidence there could be a single conspiracy," the error was not prejudicial because "guilt was so manifest." *Id.* at 755–56, 767. The Supreme Court firmly rejected this argument.

> It may be, as the Court of Appeals found, that the evidence concerning each petitioner was so clear that conviction would have been dictated and reversal forbidden, if it had been presented in separate trials for each offense …. But whether so or not is neither our problem nor that of the Court of Appeals for this case. That conviction would, or might probably, have resulted in a properly conducted trial is not the criterion of [the harmless error statute].

Id. at 776.

The government also argued that "there was no prejudice … because the results show[ed] that the jury exercised discrimination as among the defendants whose cases were submitted to it." *Id.* at 767. The government reasoned that because "the jury acquitted some, disagreed as to others, and found still others guilty," the Court could "conclude[] that the jury was not confused and, apparently, reached the same result as [it] would have … if the convicted defendants had been … tried separately." *Id.* In other words, the government contended that the error did not substantially affect the jury's verdict.

Based on the facts of the trial and, in particular, on an instruction delivered by the trial judge, the Supreme Court also rejected this analysis. *Id*. at 769, 776. The trial court had instructed the jurors that the indictment charged one conspiracy and had admonished them not to divide the described conspiracy, but rather to determine "whether or not each of the defendants, or which of the defendants, are members of that conspiracy." *Id.* at 767. Conceding that the government's position was not wholly illogical, the Supreme Court acknowledged that, notwithstanding the instructional error, "[i]t may be that … the jury actually understood correctly the purport of the evidence, as the Government now concedes it to have been … and [consequently] came to the conclusion that the [defendants] were guilty only of the separate conspiracies in which the proof shows they respectively participated." *Id.* at 769. Nevertheless, the Court held that "in the face of [the erroneous instruction] and in the circumstances of this case, we cannot assume that the lay triers of fact were so well informed upon the law or that they disregarded the permission expressly given [in the instruction] to ignore that vital difference" between the crime charged

and the evidence submitted. *Id.* Thus, the Court concluded, "[w]e think it highly probable that the error had substantial and injurious effect or influence in determining the jury's verdict." *Id.* at 776.

2. The *Chapman* Decision: Harmlessness Review of (Most) Constitutional Error

It is well established that most federal constitutional errors committed in criminal trials can be harmless. *Arizona v. Fulminante*, 499 U.S. 279, 306 (1991). However, pursuant to *Chapman v. California*, 386 U.S. 18 (1967), a reviewing court may disregard a constitutional error only if it is "able to declare a belief that [the error] was harmless beyond a reasonable doubt." *Id*. at 24.

In establishing the "harmless beyond a reasonable doubt" standard, the *Chapman* Court rejected the argument that all constitutional errors merit automatic reversal. The Court explained that the harmless error rules, including 28 U.S.C. § 2111, "serve a very useful purpose insofar as they block setting aside convictions for small errors or defects that have little, if any, likelihood of having changed the result of [a] trial." *Id.* at 22. Pointing to the fact that neither 28 U.S.C. § 2111 nor the other harmless error rules "distinguish[] between federal constitutional errors and errors of … federal statutes and rules," the Supreme Court concluded that there are "constitutional errors which *in the setting of a particular case* are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless." *Id.* These potentially harmless constitutional errors are typically characterized as "trial errors," because "their effect may be quantitatively assessed in the context of other evidence" in the trial record "in order to determine whether they were harmless beyond a reasonable doubt." *See United States v. Gonzalez-Lopez*, 548 U.S. 140, 148 (2006) (quoting *Fulminante*, 499 U.S. at 307–08). In contrast, those few constitutional errors that merit automatic reversal, referred to as "structural errors," "'defy analysis by harmless-error standards' because they 'affect the framework within which the trial proceeds.'" *Id.* at 148–49 (quoting *Fulminante*, 499 U.S. at 309–10). *See generally* Section B.2, *infra*.

"In fashioning [the] harmless-constitutional-error rule," the *Chapman* Court "recognize[d] that harmless-error rules can work very unfair and mischievous results." 386 U.S. at 22. To minimize such results in the criminal setting, the Court described the question on review as "whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." *Id.* at 23. Situating this inquiry in the context of the common-law rule "put[ting] the burden on the beneficiary of [an] error either to prove that there was no injury or to suffer a reversal of his erroneously obtained judgment," the Court declared it the responsibility of the prosecution "to prove beyond a reasonable doubt that the error complained of did not contribute" to the conviction. *Id*. at 24 (citing 1 WIGMORE, EVIDENCE § 21 (3d ed. 1940)) (describing this rule in the context of both criminal and civil cases); *see also Fulminante*, 499 U.S. at 295–96.

Significantly, the *Chapman* test, like the *Kotteakos* test, looks to the effect of an error on the decisionmaking process. "Consistent with the jury-trial guarantee, the question [the *Chapman* decision] instructs the reviewing court to consider is not what effect the constitutional error might generally be expected to have upon a reasonable jury, but rather what effect it had upon the guilty verdict in the case at hand." *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993). Thus, constitutional "[h]armless-error review looks … to the basis on which the jury *actually rested* its verdict. The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error." *Id.* at 279.

The Court's decision in *Arizona v. Fulminante*, 499 U.S. 279 (1991), exemplifies this case-specific approach to constitutional harmlessness review. The question in *Fulminante* was whether the erroneous admission of a coerced confession was harmless beyond a reasonable doubt in light of the fact that the government had admitted into evidence a second, uncoerced confession. 499 U.S. at 283–85. Based on "the overwhelming evidence adduced from the second confession," the Arizona Supreme Court held the error harmless, finding that "if there had not been a first confession, the jury would still have had the same basic evidence to convict." *Id.* at 296–97.

In rejecting this conclusion, the *Fulminante* opinion initially emphasized that "the risk that [a coerced] confession is unreliable, coupled with the profound impact that [such a] confession has upon [a] jury, requires a reviewing court to exercise extreme caution before determining that the admission of the confession at trial was harmless." *Id.* at 296. Turning then to a detailed review of the record, including how the coerced confession affected the development of the state's case, *id.* at 297–98, the state's jury arguments regarding the coerced confession, *id.*, the likely effect of the coerced confession on the jury's assessment of the second confession, *id.* at 298–300, and the fact that the coerced confession laid the foundation for the admission of additional prejudicial evidence, *id.* at 300, the Supreme Court held that the state "ha[d] not carried its burden" to demonstrate that the error was harmless beyond a reasonable doubt, *id.* at 296.

3. Structural Defects: When Does Constitutional Error Merit Automatic Reversal?

Although "most constitutional errors can be harmless," *Fulminante*, 499 U.S. at 306, the Supreme Court recognizes "a limited class of fundamental constitutional errors that defy analysis by harmless error standards." *Neder v. United States*, 527 U.S. 1, 7 (1999); *see also Sullivan*, 508 U.S. at 278–79; *Fulminante*, 499 U.S. at 309–10. "Errors of this type are so intrinsically harmful as to require automatic reversal … without regard to their effect on the outcome." *Neder*, 527 U.S. at 7. Commonly referred to as "structural defects," these constitutional deprivations "defy" harmless error analysis "because they 'affect the framework within which the trial proceeds,' and are not 'simply an error in the trial process itself.'" *Gonzalez-Lopez*, 548 U.S. at 148 (quoting *Fulminante*, 499 U.S. at 309–10). Because the effect of these particular constitutional errors

generally cannot be assessed in the context of the facts of the proceeding below, a showing of individual prejudice is not required. *See United States v. Marcus*, 560 U.S. 258, 263–65 (2010).

The Supreme Court applies several different criteria in determining whether a constitutional error is structural. *See Gonzalez-Lopez*, 548 U.S. at 149 n.4. Whether an error "necessarily render[s] a trial fundamentally unfair" is one criterion. *Neder*, 527 U.S. at 8–9. Such "errors deprive defendants of basic protections without which a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence and no criminal punishment may be regarded as fundamentally fair." *Id.* Examples include "the complete deprivation of counsel" and "trial before a biased judge," *id.* at 9, as well as a constitutionally deficient reasonable doubt instruction, *see Weaver*, 137 S. Ct. at 1899 (characterizing the holding of *Sullivan*, 508 U.S. at 279).

Alternatively, the Court will consider "the difficulty of assessing the effect of [an] error" on the trial proceedings in determining whether that error should be typed structural. *Gonzalez-Lopez*, 548 U.S. at 149 n.4. Thus, the Court has held that a violation of the public-trial guarantee is a structural error, "because 'the benefits of a public trial are frequently intangible, difficult to prove, or a matter of chance.'" *Id.* (quoting *Waller v. Georgia*, 467 U.S. 39, 49 n.9 (1984)). Similarly, when a petit jury is selected according to certain improper criteria or "has been exposed to prejudicial publicity," automatic reversal is required "because the effect of the violation cannot be ascertained." *Id.* (quoting *Vasquez v. Hillery*, 474 U.S. 254, 263 (1986) (plurality opinion)). The "erroneous deprivation of the right to [retained] counsel of choice, with consequences that are necessarily unquantifiable and indeterminate," also "unquestionably qualifies as structural error." *Id.* at 150. Moreover, the "necessarily unquantifiable and indeterminate" consequences of deprivation of the right to trial by jury as a result of a constitutionally deficient reasonable doubt instruction also supports the conclusion that it is a structural error. *Sullivan*, 508 U.S. at 281–82.

In addition, the Court has relied "on the irrelevance of harmlessness" in concluding that an error is structural. *Gonzalez-Lopez*, 548 U.S. at 149 n.4. This can be the case when "the right at issue is not designed to protect the defendant from erroneous conviction but instead protects some other interest." *Weaver*, 137 S. Ct. at 1908. The right to self-representation, for example, "is based on the fundamental legal principle that a defendant must be allowed his own choices about the proper way to protect his own liberty." *Id*. But "[s]ince the right [of] self-representation is a right that when exercised usually increases the likelihood of a trial outcome unfavorable to the defendant, its denial is not amenable to harmless error analysis." *Gonzalez-Lopez*, 548 U.S. at 149 n.4 (quoting *McKaskle v. Wiggins*, 465 U.S. 168, 177 n.8 (1984)). The Court consequently identifies its denial as a structural error. *Id*.

To be sure, the category of preserved errors qualifying for automatic reversal is small. The Supreme Court has underscored this fact several times: "If the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other constitutional errors that may have occurred are subject to harmless-error analysis." *Neder*, 527 U.S. at 8 (quoting *Rose v. Clark*, 478 U.S. 570, 579 (1986)); *see also Marcus*, 560 U.S. at 265; *Washington*

v. Recuenco, 548 U.S. 212, 218–19 (2006).

Nevertheless, applying the above-described criteria, the Court has characterized a variety of errors as structural, including:

- the complete denial of counsel, *see Neder*, 527 U.S. at 8 (citing *Gideon v. Wainwright*, 372 U.S. 335 (1963));

- the denial of the right to retained counsel of choice, see *Gonzalez-Lopez*, 548 U.S. at 150;

- the denial of due process resulting from trial by a biased judge, see *Neder*, 527 U.S. at 8 (citing *Tumey v. Ohio*, 273 U.S. 510 (1927));

- the denial of due process resulting from the participation of a biased judge in an appellate proceeding, *see Williams v. Pennsylvania*, 579 U.S. 1, 14 (2016);

- the denial of the right of self-representation, *see McKaskle*, 465 U.S. at 177 n.8;

- the denial of the right to public trial, *see Waller*, 467 U.S. at 49 n.9;

- the denial of the right to trial by jury resulting from a defective reasonable doubt instruction, *see Sullivan*, 508 U.S. at 281–82; and

- the denial of equal protection resulting from racial discrimination in the selection of a grand jury or petit jury, *see Vasquez*, 474 U.S. at 262–64 (majority opinion); *see also Gonzalez-Lopez*, 548 U.S. at 149 n.4.

See also Johnson v. United States, 520 U.S. 461, 468–69 (1997). Additionally, the Court recently noted that it has also "granted automatic relief to defendants who prevailed on claims alleging race or gender discrimination in the selection of the petit jury, though [it] has yet to label those errors structural in express terms." *Weaver*, 137 S. Ct. at 1911 (citing *Batson v. Kentucky*, 476 U.S. 79 (1986); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994)); *see also Flowers v. Mississippi*, 139 S. Ct. 2228, 2251 (2019) (reversing, without conducting harmless error analysis, because trial court committed clear error in concluding that prosecution's peremptory strike of Black prospective juror was not motivated in substantial part by discriminatory intent).

One issue that the Supreme Court has yet to squarely address is whether a structural error automatically results in reversal when the "plain error" standard of review controls. *See Puckett v. United States*, 556 U.S. 129, 140–41 (2009) (reserving the question of whether structural error automatically satisfies the third prong of the *Olano* four-part test of plain error). However, in *United States v. Cotton*, 535 U.S. 625 (2002), and *Johnson v. United States*, 520 U.S. 461 (1997), the Court suggested that at least with respect to certain unpreserved structural errors, it is disinclined to automatically reverse. The plain error standard supplants *de novo*, clearly erroneous, and abuse of discretion review, as well as the harmless error doctrine when an alleged

error was not preserved before the trial court. In such cases, the reviewing court will reverse only if the trial court (1) made an error, (2) that was or is "plain," (3) that "affects" the complaining party's "substantial rights," and (4) that "seriously affects the fairness, integrity or public reputation of judicial proceedings." *United States v. Olano*, 507 U.S. 725, 732 (1993). *See generally* Chapter VIII.A, *infra.* In *Cotton*, the Court was faced with an unpreserved defect in the indictment. In *Johnson,* the defendant raised an unpreserved claim that the trial court failed to instruct the jury on one of the elements of the charged offense. In both cases, the Court reasoned that because the alleged errors did not satisfy the fourth prong of the plain error test, there was no need to decide whether they could be characterized as structural. *See Cotton*, 535 U.S. at 632–34; *Johnson*, 520 U.S. at 468–70.

B. Application of the Harmless Error Doctrine in Civil Cases

In the context of civil litigation, the tests for determining whether an error "affects" the "substantial rights" of a party claiming error such that remedy is appropriate, *see* 28 U.S.C. § 2111; Fed. R. Evid. 103(a); Fed. R. Civ. P. 61, are somewhat more circuit-specific than they are in criminal trials. With respect to both nonconstitutional error and constitutional error, *Shinseki v. Sanders*, 556 U.S. 396 (2009), provides the framework.

1. The *Sanders* Standard: Putting the Burden on the Party Claiming Nonconstitutional Error to Show Harm

In *Shinseki v. Sanders*, 556 U.S. 396 (2009), the Supreme Court established the standard for assessing when an error "affects" a party's "substantial rights" in non-habeas civil litigation. *Sanders* involved appellate review of an agency determination. But the Court was clear that the standard it adopted applied in ordinary civil cases: "We have no indication of any relevant distinction between the manner in which reviewing courts treat civil and administrative cases. Consequently, we assess the lawfulness of the Federal Circuit's [harmlessness] approach in light of our general case law governing application of the harmless-error standard." *See id*. at 406–07.

The standard articulated in *Sanders* builds on *Kotteakos v. United States*, 328 U.S. 750 (1946), which defined the harmless error standard on direct review of criminal convictions. *See* Section A.1, *supra* (discussing the *Kotteakos* standard). Notably, however, *Sanders* requires that the party claiming error convince the reviewing court that the error was harmful. In *Kotteakos*, the Court placed the burden on the beneficiary of the error to demonstrate harmlessness.

The issue in *Sanders* was the legality of the harmless error framework established by the Federal Circuit for assessing challenges based on the failure of the Department of Veterans Affairs to provide certain types of notice to disability claimants. *See* 556 U.S. at 399. The framework, among other things, required that the Veterans Court, which heard the claims, presume that a failure of notice was prejudicial and reverse unless the Department could make a specific

evidentiary showing. *Id.* at 403–04, 407.

Characterizing the Federal Circuit's review framework as complex and rigid, *id.* at 399, the Supreme Court found that it was inconsistent with the controlling statutory harmless-error provision requiring that the Veterans Court "take due account of the rule of prejudicial error," *id.* at 401. The Court ruled that the prejudicial error rule required application of "the same kind of harmless-error rule that courts ordinarily apply in civil cases." *Id.* at 406. In characterizing that rule, the Court invoked *Kotteakos. Id.* at 407–08. The *Sanders* Court initially noted that the Federal Circuit's reliance on "mandatory presumptions and rigid rules" was inconsistent with *Kotteakos*'s call for "case-specific application of judgment, based on examination of record." *Id.* at 407. The Court explained that "[t]he federal 'harmless-error' statute, … codified at 28 U.S.C. § 2111, tells courts to review cases for errors of law 'without regard to errors' that do not affect the parties' 'substantial rights.'" *Id*. at 407. "That language," the Court explained, "seeks to prevent appellate courts from becoming 'impregnable citadels of technicality.' And we have read it as expressing a congressional preference for determining 'harmless error' without the use of presumptions insofar as those presumptions may lead courts to find an error harmful, when, in fact, in the particular case before the court, it is not." *Id.* at 407–08 (quoting *Kotteakos*, 328 U.S. at 759, and citing *O'Neal v. McAninch*, 513 U.S. 432, 436–37 (1995)).

In rejecting the Federal Circuit's reliance on presumptions, the Supreme Court, again quoting *Kotteakos*, emphasized that it had "previously made clear that courts may sometimes make empirically based generalizations about what kinds of errors are likely, as a factual matter, to prove harmful." *Id.* at 411. Consequently, the Court declined to "decide the lawfulness of the use by the Veterans Court of what it called the 'natural effects' of certain kinds of notice errors." *Id.* The Court pointed out that given the Federal Circuit's limited review authority, it was "the wrong court to make such determinations." *Id.* Rather, it is the Veterans Court that "sees sufficient case-specific raw material in veterans' cases to enable it to make empirically based, nonbinding generalizations about" such "natural effects." *Id.* at 412. The considerations that might give rise to such nonbinding generalizations, the Court explained, are those same "various" and "case-specific" considerations that it had, in *Kotteakos*, described as "inform[ing] a reviewing court's harmless-error determination" in criminal cases. *Id.* at 411.These considerations involve, among others, "an estimation of the likelihood that the result would have been different, an awareness of what body (jury, lower court, administrative agency) has the authority to reach that result, a consideration of the error's likely effects on the perceived fairness, integrity, or public reputation of judicial proceedings, and a hesitancy to generalize too broadly about particular kinds of errors when the specific factual circumstances in which the error arises may well make all the difference." *Id.* at 411–12 (citing *Kotteakos*, 328 U.S. at 761–63).

The *Sanders* Court parted ways with the *Kotteakos* standard, however, in reversing the Federal Circuit's requirement that the Veterans Administration explain why any error was harmless. *Kotteakos* places the risk of an appellate court's "grave doubt" as to whether an error "affect[ed]" the "substantial rights" of the appealing party on the beneficiary of the error, requiring reversal unless the reviewing court is satisfied that the error did not affect those rights. 328 U.S. at 765. Relying primarily on *Palmer v. Hoffman*, 318 U.S. 109 (1943), the *Sanders* Court

first noted that with respect to civil cases, it had previously said that "the party that 'seeks to have a judgment set aside because of an erroneous ruling carries the burden of showing that prejudice resulted.'" *Sanders*, 556 U.S. at 409. Shoring up its reliance on *Palmer*, the Court stated that it had "placed … [the] burden [to demonstrate harmlessness] on the appellee only when the matter underlying review was criminal. In criminal cases," the Court reasoned, "the Government seeks to deprive an individual of his liberty, thereby providing a good reason to require the Government to explain why an error should not upset the trial court's determination. And the fact that the Government must prove its case beyond a reasonable doubt justifies a rule that makes it more difficult for the reviewing court to find that an error did *not* affect the outcome of a case." *Id.* at 410–11. In "the ordinary civil case," the Court concluded, those considerations are not in play. *Id.* at 411.

In placing the burden to prove harm squarely on the civil litigant claiming error, the Court acted in keeping with the regular practice then employed in a majority of the circuits. *See, e.g.*, *Tesser v. Bd. of Educ. of City Sch. Dist. of City of N.Y.*, 370 F.3d 314, 319 (2d Cir. 2004) (placing the burden on the appellant to demonstrate harm); *Dietz v. Consol. Oil & Gas, Inc.*, 643 F.2d 1088, 1093 (5th Cir. 1981) (same); *Farfaras v. Citizens Bank & Tr. of Chi.*, 433 F.3d 558, 564–65 (7th Cir. 2006) (same); *Gill v. Maciejewski*, 546 F.3d 557, 562 (8th Cir. 2008) (same); *Coletti v. Cudd Pressure Control*, 165 F.3d 767, 773 (10th Cir. 1999) (same); *Proctor v. Fluor Enters., Inc.*, 494 F.3d 1337, 1352 (11th Cir. 2007) (same).

Interestingly, however, the Court (without comment) also rejected its own suggestion, made in *Kotteakos* and adopted in *O'Neal v. McAninch*, 513 U.S. 432 (1995), "that civil and criminal harmless-error standards do not differ in their treatment of grave doubt as to the harmlessness of errors affecting substantial rights." *O'Neal*, 513 U.S. at 441. In *Kotteakos,* the Court had acknowledged that the absence of a distinction between civil and criminal cases in the then-controlling harmless error statute (now codified with only minor changes at 28 U.S.C. § 2111) "does not mean that the same criteria shall always be applied [in criminal and civil appeals] regardless of [the] difference." 328 U.S. at 762. Nevertheless, as the Court confirmed nearly fifty years later in *O'Neal,* with respect to who would prevail in the event that a reviewing court is left in "grave doubt" as the effect of the error, *Kotteakos* suggested that the standard in civil cases should be the same as that applied in criminal cases. *O'Neal*, 513 U.S. at 441. The *O'Neal* Court adopted this suggestion, concluding that in habeas proceedings, which are civil, the risk of appellate uncertainty as to harmlessness should rest on the beneficiary of the error. *Id*. at 441–42. In reaching this conclusion, the *O'Neal* Court relied in significant part on the fact that while "habeas is a civil proceeding, someone's custody, rather than mere civil liability, is at stake." *Id.* at 440. But the Court also rested on the "precedent" of *Kotteakos*, which it characterized as "suggest[ing] that civil and criminal harmless-error standards do not differ in their treatment of grave doubt as to the harmlessness of errors affecting substantial rights." *Id*. at 441. In doing so, the *O'Neal* Court "acknowledg[ed]" that it had in the pre-*Kotteakos* case of *Palmer v. Hoffman* stated that the party "who seeks to have a judgment set aside because of an erroneous ruling carries the burden of showing that prejudice resulted." *O'Neal*, 513 U.S. at 439. This is the same language from *Palmer* that the *Sanders* opinion relies on. But the *O'Neal* Court (unlike the *Sanders* Court) distinguished *Palmer*, acknowledging that the "pre-*Kotteakos* language, in

context, referred to what the preceding sentence in *Palmer* described as 'mere technical errors.'" *O'Neal*, 513 U.S. at 439. And "*Kotteakos* itself makes clear that 'technical errors' may be different" because the point of the harmless error rules was to ensure that reversals were not based on mere technicalities. *O'Neal*, 513 U.S. at 439. Ignoring this important qualifier, the *Sanders* Court rested on *Palmer* as its primary support for putting the burden of proving harmfulness on the party who has properly preserved an error before the trial court.

Regarding the degree of proof needed to demonstrate harm, the *Sanders* Court described it as "not … particularly onerous." 556 U.S. at 410. The Court elaborated:

> Often the circumstances of the case will make clear to the appellate judge that the ruling, if erroneous, was harmful and nothing further need be said. But, if not, then the party seeking reversal normally must explain why the erroneous ruling caused harm. If, for example, the party seeking an affirmance makes a strong argument that the evidence on the point was overwhelming regardless, it normally makes sense to ask the party seeking reversal to provide an explanation, say, by marshaling the facts and evidence showing the contrary. The party seeking to reverse the result of a civil proceeding will likely be in a position at least as good as, and often better than, the opposing party to explain how he has been hurt by an error.

Id. at 410.

Between and even within circuits, there are various formulations for assessing whether the arguments of the party claiming error have demonstrated harm. Some opinions apply the same approach as *Sanders*, focusing on the specifics of the evidence without articulating a degree of certainty of harmfulness that must be shown. *See, e.g.*, *Flythe v. District of Columbia*, 791 F.3d 13, 22 (D.C. Cir. 2015) ("[Appellant] must explain why the erroneous ruling caused harm."); *Storagecraft Tech. Corp. v. Kirby*, 744 F.3d 1183, 1190–91 (10th Cir. 2014) ("Even if this court concludes the expert's testimony was wrongly admitted, the presentation of that evidence might still qualify as harmless error if other competent evidence is 'sufficiently strong' to permit the conclusion that the improper evidence had no effect on the decision.").

Other opinions establish a measure of the degree of harm that the party claiming error must demonstrate, at least with respect to particular types of error. *See, e.g.*, *Smith v. Hunt*, 707 F.3d 803, 811 (7th Cir. 2013) (assuming error in the admission of evidence, the trial court's ruling will be disturbed only "if there [is] a significant chance that the error affected the outcome of the trial"); *Proctor*, 494 F.3d at 1352 ("To satisfy [the substantial rights] standard, [appellant] bears the burden of proving that the error 'probably had a substantial influence on the jury's verdict.'"); *Vasquez v. Colores*, 648 F.3d 648, 653 (8th Cir. 2011) (measuring harm by whether the evidence was "of such a critical nature that there is no reasonable assurance that the fact-finder would have reached the same conclusion had the evidence been admitted").

Still other formulations echo *Kotteakos* in various respects. Some panels adopt language reminiscent of the *Kotteakos* standard, but modified to reflect the placement of the burden on the party claiming error. *See, e.g.*, *Warren v. Pataki*, 823 F.3d 125, 138 (2d Cir. 2016) ("An error is harmless if we can conclude with *fair assurance* that the evidence did not *substantially influence* the jury. In civil cases, the burden falls on the appellant to show that the error was not harmless and that it is likely that in some material respect the factfinder's judgment was swayed by the error."); *James River Ins. Co. v. Rapid Funding, LLC*, 658 F.3d 1207, 1212 (10th Cir. 2011) ("An erroneous admission of evidence is harmless unless it had a *substantial influence* on the outcome or leaves one in *grave doubt* as to whether it had such an effect."); *see also Davis v. White*, 858 F.3d 1155, 1159 (8th Cir. 2017) ("Where evidence does not have a *substantial influence* on the verdict because it is cumulative, there is no prejudice."). And some opinions, because they rely on almost verbatim statements of the *Kotteakos* standard—requiring the beneficiary of an error to demonstrate harmlessness—are inconsistent with the *Sanders* harmfulness framework. *See, e.g*., *Griffin v. Finkbeiner*, 689 F.3d 584, 599 (6th Cir. 2012) ("[W]e have held that, if one cannot say, with fair assurance, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected…. This evidence may not have swayed the jury if it had been admitted, but we cannot say, with fair assurance that it could not possibly have done so.").

Given the variety of measures of the degree of harm necessary to demonstrate an effect on substantial rights and the fact that specialized factors and measures of the degree of harm can emerge over time based on the type of error being considered, *see, e.g.*, *Jordan v. Binns*, 712 F.3d 1123, 1138 (7th Cir. 2013), circuit- and error-specific research is particularly important in arguing that an error in a civil proceeding does or does not merit remedy. This is not particularly surprising given the case-specific nature of harmless error analysis.

2. The Inapplicability of the *Chapman* "Beyond a Reasonable Doubt" Standard to Constitutional Error and the Limited Availability of Automatic Reversal

When a constitutional error arises in a criminal case, whether it "affects" the "substantial rights" of the appealing party is determined pursuant to *Chapman v. California*, 386 U.S. 18 (1967). Under the *Chapman* test, a reviewing court may disregard a constitutional error only if it is "able to declare a belief that it was harmless beyond a reasonable doubt." *Id.* at 24.

Before the Supreme Court's decision in *Sanders*, circuit courts considering constitutional error in civil cases occasionally followed the *Chapman* rule, requiring that the beneficiary of the error demonstrate that the error was harmless beyond a reasonable doubt. *See, e.g.*, *Hameed v. Mann*, 57 F.3d 217, 220–24 (2d Cir. 1995); *Burnette v. Sch. Bd. of Va. Beach*, 530 F.2d 124, 125 (4th Cir. 1976); *Honeycutt v. Aetna Ins. Co.*, 510 F.2d 340, 344 (7th Cir. 1975). However, the Supreme Court appears not to have actually grappled with the question of the harmlessness of constitutional errors in civil cases outside of the habeas context.

The Supreme Court did seemingly apply the beyond a reasonable doubt standard in *Tennessee Secondary School Athletic Ass'n v. Brentwood Academy*, 551 U.S. 291 (2007). At issue was whether the sanctions imposed on a high school for violating a rule prohibiting coaches from recruiting middle school students should be reversed because of an alleged Due Process Clause violation. *Id*. at 294, 301–03. After describing the procedures employed by the state actor that imposed the sanction, the Court stated: "Even accepting the questionable holding that [the athletic association's] closed-door deliberations were unconstitutional, we can safely conclude that any due process violation was harmless beyond a reasonable doubt." *Id.* at 303.

However, as the Ninth Circuit explained, the *Brentwood Academy* opinion applied the beyond a reasonable doubt standard without "elaboration," "expla[nation]", or "cit[ation]." *Al Haramain Islamic Found., Inc. v. U.S. Dep't of Treasury*, 686 F.3d 965, 989 (9th Cir. 2012). The Ninth Circuit thus declined to "read the Court's statement as resolving the proper standard of proof" for demonstrating harm from a constitutional error in a civil case. *Id.* Rather, it "read [the Supreme Court's] use of the demanding 'beyond a reasonable doubt' standard simply as illustrating how clear it was that the purported error in that case was harmless." *Id.* The Ninth Circuit also noted that in *Sanders*, a case decided after *Brentwood Academy*, the Supreme Court explicitly placed the burden on the claimant in a civil case to prove the harmfulness of an error, thus arguably limiting the *Chapman* rule (placing the burden on the beneficiary to show harmlessness beyond a reasonable doubt) to criminal cases. *See Al Haramain*, 686 F.3d at 989 (quoting *Sanders*, 556 U.S. at 410).

There also appear to be few if any opinions identifying constitutional errors in the civil context as structural and therefore subject to automatic reversal. *See, e.g.*, *Al Haramain*, 686 F.3d at 988–89 (noting that "[t]he Supreme Court has never held that an error in the civil context is structural" and applying a harmless error analysis to a procedural due process violation due to the "significant differences between criminal and civil proceedings"); *Frappier v. Countrywide Home Loans, Inc.*, 750 F.3d 91, 98 (1st Cir. 2014) (applying harmless error test to an alleged Seventh Amendment violation). On occasion, statutory errors have been found to merit automatic reversal, but generally the error in such cases undermines the jurisdiction of the decisionmaker. *See, e.g.*, *Beazer E., Inc. v. Mead Corp.*, 412 F.3d 429, 444 (3d Cir. 2005) (harmless error analysis inapplicable where there was nothing for court of appeals to review because the decision at issue was rendered by a magistrate judge acting without jurisdiction under 28 U.S.C. § 636(c)(1)).

Chapter VIII. Judicial Review of Unpreserved Claims and Arguments

A. The Four-Part Plain Error Test Governing Review of Unpreserved Error in Criminal Cases

When a criminal defendant seeks an appellate remedy for error that was not properly preserved in the trial court, the *de novo*, abuse of discretion, and clearly erroneous standards of review, as well as the harmless error doctrine, are replaced by or, perhaps more accurately, subsumed within the plain error test. Federal Rule of Criminal Procedure 52(b) broadly provides:

> A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.

See also Fed. R. Crim. P. 30(d) (explicitly making Rule 52(b) applicable to unpreserved claims of instructional error in criminal jury trials). Federal Rule of Evidence 103(e) similarly states: "A court may take notice of a plain error affecting a substantial right, even if the claim of error was not properly preserved." As defined by the Supreme Court, the plain error test referenced in these rules requires a case-specific assessment, in the context of the whole record, of the effect of the identified error on both the defendant's rights and judicial proceedings more broadly.

"The starting point for interpreting and applying [Rule 52(b)] … is the [Supreme] Court's decision in *United States v. Olano*, 507 U.S. 725 (1993)." *See Molina-Martinez v. United States*, 578 U.S. 189, 194 (2016). In *Olano*, the Court fleshed out the plain error standard articulated in Rule 52(b). Acknowledging that the rule "was intended as 'a restatement of existing law,'" *Olano*, 507 U.S. at 731 (quoting Fed. R. Crim. P. 52 advisory committee's notes, 1944), the Court initially noted that "the authority created by Rule 52(b) is circumscribed," *id*. at 732. It then broke down the language of the rule saying: "There must be an 'error' that is 'plain' and that 'affects substantial rights.'" *Id*. "Moreover," according to the Court, "Rule 52(b) leaves the decision to correct the forfeited error within the sound discretion of the appellate court, and the court should not exercise that discretion unless the error 'seriously affects the fairness, integrity or public reputation of judicial proceedings.'" *Id*. at 732. The Court drew this fourth requirement, which was not articulated in Rule 52(b), from language that originated in a civil case, *United States v. Atkinson*, 297 U.S. 157, 160 (1936). *See Olano*, 507 U.S. at 732 (quoting *United States v. Young*, 470 U.S. 1, 15 (1985) (quoting *Atkinson*, 297 U.S. at 160)). The Court also made clear that the "burden [of] satisfy[ing] the plain error rule" rests with the defendant who forfeited an alleged error by failing to raise it below. *Olano*, 507 U.S. at 734; *see also United States v. Davila*, 569 U.S. 597, 607 (2013); *United States v. Vonn*, 535 U.S. 55, 59, 62–63 (2002).

As described in Olano, "[t]he first limitation on appellate authority under Rule 52(b) is that there indeed be an 'error.'" *Olano*, 507 U.S. at 732. Specifically, the error must be one that has not been affirmatively waived, meaning it cannot rest on the "intentional relinquishment or abandonment of a known right." *Id*. at 733; *see also Puckett v. United States*, 556 U.S. 129, 134

(2009). As the *Olano* Court noted, "[w]hether a particular right is waivable; whether the defendant must participate personally in the waiver; whether certain procedures are required for waiver; and whether the defendant's choice must be particularly informed or voluntary, all depend on the right at stake." 507 U.S. at 733. "Mere forfeiture, as opposed to waiver, does not extinguish an 'error' under Rule 52(b)." *Id.*

"The second limitation on appellate authority under Rule 52(b) is that the [identified] error be plain." *Id*. at 734. The *Olano* Court defined "plain" as "synonymous with 'clear' or, equivalently, 'obvious.'" *Id*. In *Henderson v. United States,* 568 U.S. 266 (2013), the Supreme Court held that "whether a legal question was settled or unsettled at the time of trial, it is enough that an error be 'plain' at the time of appellate consideration for the second part of the four-part *Olano* test to be satisfied." *Id.* at 279.

The third limitation on plain error review—that the error affected the defendant's substantial rights—"in the ordinary case means that [the defendant] must show a reasonable probability that, but for the error, the outcome of the proceeding would have been different." *Molina-Martinez*, 578 U.S. at 194. This definition flows from *Olano*, where the Court defined the third requirement of Rule 52(b) by reference to Rule 52(a)—the harmless error rule. The Court explained that when a timely objection has been made and "Rule 52(a) applies, a court of appeals normally engages in a specific analysis of the district court record—a so-called 'harmless error' inquiry—to determine whether the error was prejudicial." *Olano*, 507 U.S. at 734. The Court found that "Rule 52(b) normally requires the same kind of inquiry, with one important difference: It is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice." *Id*. "This burden shifting," the Court reasoned, "is dictated by a subtle but important difference in language between the two parts of Rule 52: While Rule 52(a) precludes error correction only if the error 'does *not* affect substantial rights,' Rule 52(b) authorizes no remedy unless the error *does* 'affect substantial rights.'" *Id*. at 734–35 (emphasis in original).

Citing three harmless error opinions, *Bank of Nova Scotia v. United States*, 487 U.S. 250 (1988); *United States v. Lane*, 474 U.S. 438 (1986); and *Kotteakos v. United States*, 328 U.S. 750 (1946), the *Olano* Court further explained that "[i]n most cases [the phrase 'affects substantial rights'] means that the error must have been prejudicial: It must have affected the outcome of the district court proceedings." 507 U.S. at 734. In each of the cases on which the Court relied, it concluded that substantial rights are affected if an appellate court finds that an "error *may* have had a substantial influence on the outcome of the proceeding." *Bank of Nova Scotia*, 487 U.S. at 256; *see also Lane*, 474 U.S. at 458–61 (Brennan, J., concurring in part and dissenting in part) (quoting *Kotteakos* at length and characterizing it as holding that "error is harmless unless it had 'substantial influence' on the outcome *or leaves one in 'grave doubt' as to whether it had such effect*").

In *United States v. Dominguez Benitez*, 542 U.S. 74 (2004), the Supreme Court refined *Olano*'s definition of the third prong. At issue was an unpreserved objection that the trial court had failed to follow all of the requirements of Federal Rule of Criminal Procedure 11 in accepting the defendant's guilty plea. The Court held that a defendant seeking reversal of a guilty plea on the

ground that the district court committed plain error under Rule 11 must "show a reasonable probability that, but for the error, he would not have entered the plea." *Id.* at 76.

Significantly, the *Dominguez Benitez* Court made clear that the plain error "reasonable-probability standard is not the same as, and should not be confused with, a requirement that a defendant prove by a preponderance of the evidence that but for the error things would have been different." *Id.* at 83 n.9. In other words, the Court clarified, over Justice Scalia's objection in concurrence, *id.* at 86, that plain error analysis does *not* require the defendant to show a greater than fifty percent possibility that the outcome would have been different absent the error. The Court's subsequent reliance on *Dominguez Benitez* in assessing the effect of other types of unpreserved error confirms that the "reasonable probability" standard is not limited to Rule 11 errors, but rather applies broadly to the third-prong analysis. *See Molina-Martinez*, 578 U.S. at 194 (alleging a Sentencing Guidelines violation); *United States v. Marcus*, 560 U.S. 258, 262–64 (2010) (alleging an Ex Post Facto Clause violation).

The Supreme Court has also instructed that "the particular facts and circumstances matter" in the third-prong inquiry. *Davila*, 569 U.S. at 611; *see also Molina-Martinez*, 578 U.S. at 200. The appellate court is to "engage in [a] full-record assessment." *Davila*, 569 U.S. at 612. However, in *Molina-Martinez v. United States*, 578 U.S. 189 (2016), the Court clarified that this approach does not mean that an error can never serve, on its own, to demonstrate a reasonable probability that but for that error the outcome would have been different. *Id*. at 198.

In *Molina-Martinez*, the Court held that "in the ordinary case[,] a defendant will satisfy his burden to show prejudice by pointing to the application of an incorrect, higher Sentencing Guidelines range and the sentence he received thereunder." *Id*. at 201. In this situation, "whether or not the [sentence imposed] falls within the correct range … the error itself can, and most often will, be sufficient to show a reasonable probability of a different outcome absent error." *Id*. at 198. "Absent unusual circumstances, [the defendant] will not be required to show more." *Id*. at 201. In reaching this holding, the Court relied on precedent establishing that the Guidelines are a sentencing judge's "starting point and initial benchmark" and cited data from the Sentencing Commission demonstrating "the real and pervasive effect the Guidelines have on sentencing." *Id*. at 199. And it noted that the prosecutor, in every case, "remains free to point to parts of the record" that "could make it clear that the judge based the sentence he or she selected on factors independent of the Guidelines." *Id*. at 200–01.

For certain errors, however, carrying the burden under the third prong is likely to prove exceedingly difficult. Instructive is the Court's opinion in *Greer v. United States*, 141 S. Ct. 2090 (2021). At issue were two defendants' convictions for "felon-in-possession" offenses, as they were accused of possessing firearms after previous felony convictions. *See id.* at 2095. Two years before, in *Rehaif v. United States*, 139 S. Ct. 2191 (2019), the Court had "clarified the *mens rea* requirement" for such offenses, holding that "the Government must prove not only that the defendant knew he possessed a firearm, but also that *he knew he was a felon* when he possessed the firearm." *Greer*, 141 S. Ct. at 2095 (emphasis in original) (citing *Rehaif*, 139 S. Ct. at 2199–2200). Prior to the Court's decision in *Rehaif*, one of the *Greer* defendants had been convicted at

trial, while another had pleaded guilty. *Id.* at 2096. For the former defendant, the district court had not properly instructed the jury as to the *mens rea* required for conviction, while for the latter defendant, the plea court had failed to correctly inform the defendant of the necessary *mens rea* the government would have had to prove at trial. *Id.* After the *Rehaif* decision, both defendants raised *mens rea* arguments on appeal, but neither had preserved them. *Id.*

After applying the plain error standard, the Court rejected the defendants' arguments and upheld their convictions because neither defendant had carried his burden under the third prong. *Id.* at 2096–98. The Court explained:

> [A] defendant faces an uphill climb in trying to satisfy the substantial-rights prong of the plain-error test based on an argument that he did not know he was a felon. The reason is simple: If a person is a felon, he ordinarily knows he is a felon. … [I]f a defendant was in fact a felon, it will be difficult for him to carry the burden on plain-error review of showing a "reasonable probability" that, but for the *Rehaif* error, the outcome of the district court proceedings would have been different.
>
> Of course, there may be cases in which a defendant who is a felon can make an adequate showing on appeal that he would have presented evidence in the district court that he did not in fact know he was a felon when he possessed firearms. … But if a defendant does not make such an argument or representation on appeal, the appellate court will have no reason to believe that the defendant would have presented such evidence to a jury, and thus no basis to conclude that there is a "reasonable probability" that the outcome would have been different absent the *Rehaif* error.
>
> Here, … both [defendants] had been convicted of multiple felonies. Those prior convictions are substantial evidence that they knew they were felons. Neither defendant has ever disputed the fact of their prior convictions. … Importantly, on appeal, neither [defendant] has argued or made a representation that they would have presented evidence at trial that they did not in fact know they were felons when they possessed firearms.

Id. at 2097–98.

The Court also found that its prior decisions allowed "an appellate court [to] consider the *entire* record—not just the record from the *particular proceeding* where the error occurred." *Id.* at 2098 (emphases in original); *see also id.* ("[W]hen an appellate court conducts plain-error review of a *Rehaif* instructional error, the court can examine relevant and reliable information from the entire record—including information contained in a pre-sentence report."). The Court also held that a *Rehaif* error did not require automatic reversal of a conviction, as "the omission of a single element from jury instructions is not structural." *Id.* at 2100.

The fourth prong of the plain error rule (adopted verbatim from language in a civil case, *United States v. Atkinson*, 297 U.S. 157, 160 (1936)) requires a reviewing court to look beyond the effect of an error on the defendant to its effect on judicial proceedings generally. "Once [the first] three conditions have been met, the court of appeals should exercise its discretion to correct the forfeited error if the error 'seriously affects the fairness, integrity or public reputation of judicial proceedings.'" *Molina-Martinez*, 578 U.S. at 194 (quoting *Olano*, 507 U.S. at 736); *see also Puckett*, 556 U.S. at 135 (if a court determines that the four prongs of *Olano* are met, it "ought to … exercise[]" its discretion to "remedy the error"). *Olano* stated explicitly that the fourth prong does not require a showing of actual innocence: "The court of appeals should no doubt correct a plain forfeited error that causes the conviction or sentencing of an actually innocent defendant, but we have never held that a Rule 52(b) remedy is *only* warranted in cases of actual innocence." *Olano*, 507 U.S. at 736.

The Court detailed considerations related to the fourth prong in *Rosales-Mireles v. United States*, 138 S. Ct. 1897 (2018). There, the Court held that a district court's miscalculation of a defendant's sentencing range that has been determined to be plain and to affect a defendant's substantial rights will, in the ordinary case, satisfy the fourth prong. *Id.* at 1904. It emphasized that miscalculations that result from judicial error can be easily corrected, have severe consequences for defendants, and would lead "reasonable citizen[s]" to have "a rightly diminished view of the judicial process and its integrity." *Id.* at 1907–08. The Court rejected the Fifth Circuit's standard that the error must "shock the conscience of the common man." *See id.* at 1906.

The Court has also made clear that, as with the third prong, "[t]he fourth prong is meant to be applied on a case-specific and fact-intensive basis." *Puckett*, 556 U.S. at 142. This does not mean, however, that an appellate court's discretion in applying *Olano*'s fourth prong is unbounded. Relevant precedent from a controlling source will always have some binding effect—limited though it must be by its reasoning and factual context. And at least with respect to certain types of error in certain circuits, precedent substantially confines the exercise of discretion under the fourth prong.

For example, in *United States v. Bustamante-Conchas*, 850 F.3d 1130 (10th Cir. 2017), the Tenth Circuit Court of Appeals "grant[ed] en banc rehearing in order to refine the manner in which [it] conduct[s] plain-error review" when presented with a claim that a sentencing court "fail[ed] to personally address the defendant and offer an opportunity to allocute." *Id*. at 1133. Citing persuasive precedent from other circuits, *id*. at 1142, the court remanded for resentencing. Making clear that it was not "adopt[ing] a per se rule or a formal presumption," *id*. at 1142, the court held that only "extraordinary circumstances," which it detailed, *id*. at 1142–43, would "warrant a departure from [the] general rule that the complete denial of allocution seriously affects the fairness, integrity, or public reputation of judicial proceedings," *id*. at 1144; *see id*. at 1142; *see also, e.g.*, *United States v. Paladino*, 769 F.3d 197, 201–02 (3d Cir. 2014) (stating that the fourth prong should be assessed against the "backdrop" of circuit precedent, including opinions holding "without qualification that denial of the right of allocution affects the fairness,

integrity or public reputation of judicial proceedings"); *United States v. Prouty*, 303 F.3d 1249, 1253 (11th Cir. 2002) ("Like our sister circuits, we are persuaded that failing to give a defendant the opportunity to speak to the court directly when it might affect his sentence is manifestly unjust.").

Precedent similarly confines appellate court discretion in applying the fourth prong in cases in which trial judges have, for example, impermissibly involved themselves in plea discussions, *see, e.g.*, *United States v. Braxton*, 784 F.3d 240, 243 (4th Cir. 2015) (reversal required because the "case is on all fours with" circuit precedent holding that "judicial participation in plea discussions" meets the fourth prong), or failed to provide a statement of reasons for imposing a sentence, *see, e.g.*, *United States v. Wallace*, 597 F.3d 794, 807 (6th Cir. 2010) (circuit precedent "compels a finding that failure to [provide a statement of reasons at sentencing] also affects the fairness, integrity, or public reputation of judicial proceedings").

The rationale supporting the holding of *Bustamante-Conchas* is also informative of how a court applying *Olano*'s fourth prong may conclude that an error "seriously affects the fairness, integrity, or public reputation of judicial proceedings." 850 F.3d at 1144. The court reasoned that "[b]y addressing a defendant personally before imposing sentence, district courts enhance the appearance of fairness in the criminal justice system. This legitimacy-enhancing function is based in part on the reasonable probability of prejudice" if the defendant is not invited to speak—a third prong consideration. *Id.* But, the court explained, "[e]ven in instances in which a significantly lesser sentence is unlikely, a denial of allocution subverts other public values" relevant to the fourth prong. *Id*. This is because allocution "benefits the victim, the victim's family, and the defendant's family; provides judges and the public with a better understanding of the defendant; and helps the defendant to accept responsibility." *Id*. The court concluded: "If a court imprisons a person without hearing the defendant's voice, the public may question whether the defendant received the individualized assessment of personal characteristics and circumstances that Congress has mandated." *Id*.

One final procedural note regarding application of the plain error standard of review is in order. In *Greenlaw v. United States*, 554 U.S. 237 (2008), the Supreme Court declined to read a plain error exception into the cross-appeal rule. "Under that unwritten but longstanding rule, an appellate court may not alter a judgment to benefit a nonappealing party." *Id.* at 244. As the Court, "from its earliest years, has recognized … it takes a cross-appeal to justify a remedy in favor of an appellee." *Id.* at 244–45. Thus in *Greenlaw*, the Court vacated an Eighth Circuit judgment in which the court of appeals had, on its own initiative, ordered the district court to increase the appellant's prison term. *Id.* at 255. Before the trial judge, the government objected that the sentence imposed was less than that required by law. *Id.* at 242. However, when the defendant appealed, the government, while acknowledging that the trial judge had erred, declined to seek correction of the error through a cross-appeal. *Id.* Relying on the plain error standard of Federal Rule of Criminal Procedure 52(b), the Eighth Circuit nonetheless ordered the district court to increase the appellant's sentence. *Id.* at 242–43. The Supreme Court vacated, explaining:

> Nothing in the text or history of Rule 52(b) suggests that the rulemakers, in codifying the plain-error doctrine, meant to override the cross-appeal requirement.
>
> Nor do our opinions support a plain-error exception to the cross-appeal rule. This Court has indeed noticed, and ordered correction of, plain errors not raised by defendants, but we have done so only to benefit a defendant who had himself petitioned the Court for review on other grounds. In no case have we applied plain-error doctrine to the detriment of a petitioning party. Rather, in every case in which correction of a plain error would result in modification of a judgment to the advantage of a party who did not seek this Court's review, we have invoked the cross-appeal rule to bar the correction.

Id. at 247.

B. Exceptional Circumstances and Plain Error Review: The Limited Situations in Which Appellate Review of Unpreserved Arguments is Available in Civil Cases

There is no civil counterpart to Federal Rule of Criminal Procedure 52(b) governing review of unpreserved claims and arguments in criminal cases. Instead, the availability and parameters of review of forfeited arguments in civil cases are established largely on a circuit-by-circuit basis through the application of two judicially-created doctrines. The older, and seemingly more prevalent, is referred to as "exceptional or extraordinary circumstances" review. The newer derives from the four-part plain error test amplifying Rule 52(b). Which variation of these doctrines controls depends upon the nature of the issue appealed and the circuit in which review is sought. And while panels within circuits are not always consistent in their application of the doctrines, the vast majority of circuits employ some variation on one, or the other, or both.

In *Singleton v. Wulff*, 428 U.S. 106 (1976), the Supreme Court reiterated the "general rule" that a civil litigant will not be afforded appellate review of claims or arguments not properly preserved before the trial court. *Id.* at 120. However, the Court clarified that "there are circumstances in which a federal appellate court is justified in resolving [such forfeited] issue[s], as where the proper resolution is beyond any doubt, or where injustice might otherwise result." *Id.* at 121. Noting that the examples provided were not an exhaustive list of when forfeited arguments might be considered, *id*. at 121 n.8, the Court explained that "[t]he matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases," *id*. at 121. The Court thus confirmed that responsibility for the development of the doctrine of exceptional or extraordinary circumstances lies with the circuits, setting the stage for rather circuit-centric precedent.

Seventeen years after *Wulff*, in *United States v. Olano*, 507 U.S. 725 (1993), the Supreme Court articulated the four-part test delineating when appellate remedies are available for forfeited claims of error in criminal proceedings. The basic standard was prescribed by Federal Rule of Criminal Procedure 52(b), which states: "A plain error that affects substantial rights may be considered even though it was not brought to the court's attention." Looking to precedent, the Court elaborated on Rule 52(b)'s "affects substantial rights" requirement, holding that appellate courts may remedy forfeited claims only if (1) the trial court committed an "error," (2) that is "plain," (3) that "affects [the] substantial rights" of the defendant, and (4) that "seriously affects the fairness, integrity or public reputation of judicial proceedings." *Id*. at 732. *See* Section A, *supra* (discussing *Olano*'s four-part plain error standard).

The four-part *Olano* test is clearly relevant to two types of unpreserved civil error: instructional errors, which are governed by Federal Rule of Civil Procedure 51(d)(2), and evidentiary errors, which are governed by Federal Rule of Evidence 103(e). Like Federal Rule of Criminal Procedure 52(b), these rules explicitly permit a reviewing court to take notice of a forfeited error if it is "plain" and "affects substantial rights." Indeed, the Advisory Committee notes make clear that both rules were modeled on Criminal Rule 52(b). *See* Fed. R. Evid. 103 advisory committee's notes to 1972 amendments; Fed. R. Civ. P. 51 advisory committee's notes to 2003 amendments. With respect to Federal Rule of Evidence 103, the Advisory Committee notes additionally state that plain error review of forfeited claims will be available only in "exceptional circumstances." Not surprisingly, then, it appears that all circuits considering unpreserved instructional or evidentiary error apply either the *Olano* four-part test or an *Olano*/exceptional circumstances hybrid. *See* 9C CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 2558 & n.16–16.2 (3d ed. 2008 & Supp. 2017) (instructional error); MICHAEL H. GRAHAM, *§ 103:9 Rule 103(e): plain error*, in HANDBOOK OF FEDERAL EVIDENCE (7th ed. 2016) (evidentiary error); *see, e.g.*, *Jimenez v. City of Chicago*, 732 F.3d 710, 720 (7th Cir. 2013) (citing Federal Rule of Evidence 103(c) and explaining that "[p]lain error review of a forfeited evidentiary issue in a civil case is available only under extraordinary circumstances when the party seeking review can demonstrate that (1) exceptional circumstances exist [justifying the failure to preserve]; (2) substantial rights are affected; and (3) a miscarriage of justice will occur if plain error review is not applied"); *Kenney v. Head*, 670 F.3d 354, 359 (1st Cir. 2012) (noting that "[i]n 'exceptional circumstances,' … [arguments not raised before the trial court regarding the exclusion of evidence] may be reviewed for plain error," but declining to find such error because the district court's decision not to exclude testimony did "not come close to" implicating "the fairness, integrity and public reputation of the trial"—*Olano* fourth-prong considerations).

Panels in a majority of circuits also occasionally employ *Olano*'s four-part test to determine the appropriateness of remedying forfeited issues that do not involve evidentiary or instructional error. *See, e.g.*, *Brickwood Contractors, Inc. v. Datanet Eng'g, Inc.*, 369 F.3d 385, 396–99 (4th Cir. 2004) (applying the four-part *Olano* test to reverse the district court's imposition of sanctions under Rule 11 of the Federal Rules of Civil Procedure); *McLendon v. Big Lots Stores, Inc.*, 749 F.3d 373, 375 (5th Cir. 2014) (rejecting an argument that the appellee made improper statements in closing argument because the appellant did "not show[] that any error affected its 'substantial rights'"); *Smith v. Gulf Oil Co.*, 995 F.2d 638, 646 (6th Cir. 1993) (applying "the principles and

decision enunciated in *Olano*" to reject the argument that the district court erred by permitting alternate jurors to participate in deliberations); *Wiser v. Wayne Farms*, 411 F.3d 923, 927 (8th Cir. 2005) (rejecting the argument that the district court erred in its choice of law because the error "under these circumstances surely would not 'seriously affect the fairness, integrity, or public reputation of judicial proceedings'") (quoting *Olano*, 507 U.S. at 736); *Richison v. Ernest Grp., Inc.*, 634 F.3d 1123, 1128, 1130 (10th Cir. 2011) (Gorsuch, J.) (confirming that the court will "review newly raised (but not waived) legal arguments under what substantively amounts to … the plain error standard," but rejecting a newly raised legal theory because the appellant "fail[ed] to argue for plain error … on appeal"); *Salazar v. District of Columbia*, 602 F.3d 431, 434, 436–37 (D.C. Cir. 2010) (applying the plain error test to reverse the district court's imposition of a contempt sanction).

Panels in another handful of circuits sometimes apply a test pursuant to which appellate remedy of forfeited error is more difficult to achieve than under plain error review. In two circuits, that test is described as "fundamental error" review. *See, e.g.*, *Shcherbakovskiy v. Da Capo Al Fine, Ltd.*, 490 F.3d 130, 142 (2d Cir. 2007) (obtaining review under the "fundamental error" standard requires "more than is necessary to meet the plain error standard"—the forfeited error must be "so serious and flagrant that it goes to the very integrity of the trial"); *In re Under Seal*, 749 F.3d 276, 285–86 (4th Cir. 2014) (using "the criminal, plain-error standard—articulated by *Olano*—as something of an intermediate step" because "when a party … fails to meet the plain-error standard, we can say with confidence that he has not established fundamental error," the "more limited" and demanding standard employed in civil cases). Other circuits eschew the "fundamental error" label, but make clear that remedy of unpreserved errors will happen less often in the civil context than in the criminal context. *See, e.g.*, *Fashauer v. N.J. Transit Rail Operations*, 57 F.3d 1269, 1289 (3d Cir. 1995) ("If anything, the plain error power in the civil context … should be used even more sparingly" than in the criminal context.).

Two rationales have been identified for applying a more demanding review standard to forfeited errors in civil cases:

> First, Federal Rule of Criminal Procedure 52(b) affords federal appellate courts the discretion to correct certain forfeited errors in the criminal context, but in the civil context (excepting jury instructions), such discretion is judicially created. As a judicial construction, it should be narrowly construed. Second, plain-error review arose in the criminal context to protect the defendant's substantial liberty interests, but such interests normally are not at stake in civil litigation.

In re Under Seal, 749 F.3d at 286 n.13.

Despite the not infrequent application of the plain error and fundamental error standards, nearly every circuit also employs the "exceptional or extraordinary circumstances" formulation derived from *Singleton v. Wulff* when considering forfeited issues that do not involve evidentiary and instructional error. *See, e.g.*, *Bos. Redevelopment Auth. v. Nat'l Park Serv.*, 838 F.3d 42, 49–

50 (1st Cir. 2016) (declining to consider Due Process challenges to National Park Service action, because "absent the most extraordinary circumstances, legal theories not squarely raised in the lower court cannot be broached for the first time on appeal"); *Magi XXI, Inc. v. Stato della Città del Vaticano*, 714 F.3d 714, 724 (2d Cir. 2013) (exercising discretion to consider a choice of law argument, because it "presents a question of law and there is no need for additional fact-finding"); *In re Diet Drugs (Phentermine/Fenfluramine/Defenfluramine) Prod. Liab. Litig.*, 706 F.3d 217, 227 (3d Cir. 2013) (declining to consider an argument that the settlement agreement should have been reformed, because "there are no exceptional circumstances in this case" and the factual record necessary to adequately evaluate the argument is lacking); *State Indus. Prods. Corp. v. Beta Tech. Inc.*, 575 F.3d 450, 456 (5th Cir. 2009) (declining to consider a statute of limitations argument and new legal theory, because appellant in suggesting that review was justified by exceptional circumstances "failed to argue that a miscarriage of justice" would result from failure to review); *Coach, Inc. v. Goodfellow*, 717 F.3d 498, 502 (6th Cir. 2013) (exercising discretion to consider a claim that the Lanham Act does not provide for contributory liability, because "the factual record … is clear," "the parties' appellate briefing of the legal issue is adequate," and the "case affords an opportunity to provide guidance on contributory trademark infringement"); *Dubinsky v. Mermart, LLC*, 595 F.3d 812, 819 (8th Cir. 2010) (declining to consider an argument that a contract was unconscionable, because there were "no exceptional circumstances"); *Meyer v. Christie*, 634 F.3d 1152, 1158 (10th Cir. 2011) (exercising discretion to review a jury finding of liability on a civil conspiracy claim, because the question of liability for conspiracy under Kansas law "involves a pure matter of law and the proper resolution of the issue is certain"); *OPIS Mgmt. Res., LLC v. Sec'y, Fla. Agency for Health Care Admin.*, 713 F.3d 1291, 1297 n.7 (11th Cir. 2013) (declining to consider a legal theory that it was possible to comply with both federal and state law in a preemption case, because there were no exceptional circumstances); *Mingo Logan Coal Co. v. EPA*, 829 F.3d 710, 720 (D.C. Cir. 2016) (declining to consider an argument that the EPA did not take into account certain relevant costs, because there were no exceptional circumstances).

What qualifies as an "exceptional" or "extraordinary" circumstance varies from circuit to circuit. *Cf. Richison*, 634 F.3d at 1129 n.2 ("[T]he [Supreme] Court has consistently left the job of defining the bounds of [exceptional] circumstances to the courts of appeals."). But generally speaking, in many circuits an argument for review may be viable if one of several circumstances is in play:

- *There is a change in controlling law while appeal is pending*. *See, e.g.*, *Ball v. Rodgers*, 492 F.3d 1094, 1102 (9th Cir. 2007) (exercising discretion to consider a challenge to a cause of action, because an intervening Ninth Circuit opinion changed the controlling law); *cf. Harper v. Va. Dep't of Tax'n*, 509 U.S. 86, 96 (1993) (adopting "a rule requiring the retroactive application of a civil decision"). *But see Martinez v. Tex. Dep't of Crim. Just.*, 300 F.3d 567, 573–74 (5th Cir. 2002) (agreeing with the Eleventh Circuit that "the procedural bar doctrine … is not trumped by the retroactivity doctrine").

- *The issue implicates a question of general impact or public concern, such that the public interest would be served by its resolution*. *See, e.g.*, *Dean Witter Reynolds, Inc. v.*

Fernandez, 741 F.2d 355, 360–61 (11th Cir. 1984) (exercising discretion to consider a challenge to a summary judgment decision based on Department of Treasury regulations, because Cuba's "access to American dollars which could finance acts of aggression or subversion" is "of great public concern"); *Tri-M Grp., LLC v. Sharp*, 638 F.3d 406, 417 (3d Cir. 2011) (exercising discretion to consider a dormant Commerce Clause argument, because "the instant appeal casts constitutional doubt upon a state procurement scheme adopted by a majority of the States, and presents a weighty question of public concern"); *In re Mercury Interactive Corp. Sec. Litig.*, 618 F.3d 988, 993 (9th Cir. 2010) (exercising discretion to consider a challenge to an award of attorney's fees, because it raises a "pure question of law" that is "a recurring issue in class action litigation").

- *The newly-raised issue is purely legal and proper application would result in reversal, or, as phrased in some circuits, failure to intervene would result in a miscarriage of justice*. *See, e.g.*, *Ramirez v. Sec'y, U.S. Dep't of Transp.*, 686 F.3d 1239, 1250 (11th Cir. 2012) (exercising discretion to consider a claim that appellee "waived the right to argue untimeliness" in order to "avoid a possible miscarriage of justice"); *Blue Martini Kendall, LLC v. Miami Dade Cnty.*, 816 F.3d 1343, 1350 (11th Cir. 2016) (exercising discretion to consider a Due Process challenge to the cause of action, because appellant "would suffer a miscarriage of justice if it were forced to pay [sanctions] stemming from the application of an unconstitutional statute"); *Magi XXI, Inc.*, 714 F.3d at 724 (exercising discretion to hear a choice of law claim that "presents a question of law" where "there is no need for additional fact-finding"); *In re Am. West Airlines, Inc.*, 217 F.3d 1161, 1165 (9th Cir. 2000) (exercising discretion to consider a statutory claim, because "the issue is one of law" and "the record has been fully developed").

Given the nature of the circumstances that generally qualify as exceptional, if an appellate court grants review, it will most often consider the forfeited argument or error *de novo*. *But see Scottsdale Ins. Co. v. Flowers*, 513 F.3d 546, 552 (6th Cir. 2008) (exercising discretion to review in order to clarify circuit precedent and reviewing for abuse of discretion the district court's decision to assume jurisdiction under the Declaratory Judgment Act).

It is also important to remember that because an appellate court's decision to consider issues raised for the first time on appeal is discretionary, *see Wulff*, 428 U.S. at 121, a myriad of case-specific factors may influence the decision to review. Circumstances that come up with some regularity include: whether the relevant factual record is adequate to allow review, *see, e.g.*, *SEC v. Yang*, 795 F.3d 675, 679 (7th Cir. 2015) (declining to find exceptional circumstances in part because the record regarding the forfeited issue is "undeveloped"); the degree to which remedy of a forfeited error or argument (particularly if it necessitates a remand) will strain judicial resources, *see, e.g.*, *Blue Martini Kendall*, 816 F.3d at 1349 (noting the Eleventh Circuit's greater inclination to exercise its discretion to consider a forfeited issue when appeal is from the grant of summary judgment, as opposed to after trial, "because remand from summary judgment proceedings involves less strain on judicial resources and does not impair judicial efficiency as dramatically"); and whether an appealing party had an inadequate opportunity to raise the forfeited issue before the district court, *see, e.g.*, *Lavoie v. Pac. Press & Shear Co.*, 975 F.2d 48,

56 (2d Cir. 1992) (declining to consider a challenge to inconsistent verdicts, because appellant had “abundant opportunities” to challenge them).

PART TWO

REVIEW OF AGENCY ACTIONS

Part Two. Review of Agency Actions

Chapter IX. The Fundamentals: The Principal Standards of Review, Threshold Considerations, and Administrative Agencies Defined

A. An Introduction to the Principal Standards of Review and Threshold Considerations

Part Two focuses on the standards of review governing judicial resolution of challenges to federal agency actions that allegedly exceed a constitutionally permissible congressional delegation of authority; contravene the strictures of an agency's organic, authorizing or enabling statutes; or violate applicable provisions of the Administrative Procedure Act ("APA"). The discussion begins with an introduction to the APA's review provisions, giving particular attention to Section 706. This provision sets forth the scope and standards of review governing how the courts resolve challenges to agency actions. Section 706 also defines the elements of the causes of action authorized in Sections 704, 702, and 701 of the APA.

Subsequent chapters address threshold jurisdictional and prudential limitations on judicial review of agency action, including sovereign immunity, subject matter jurisdiction, and Article III standing, as well as mootness, finality, ripeness, exhaustion, and issue waiver. These limitations necessarily set the stage for the subsequent discussion of the standards of review because they determine if, and to what degree, the judiciary can oversee administrative action.

The presumption of reviewability and its exceptions, reflected in APA Sections 704 and 701(a)(1) and (a)(2), are addressed next. This presumption describes the critical starting point for the inquiry into whether Congress has authorized the judiciary to assert subject matter jurisdiction over challenges to particular agency actions. The overview concludes with a discussion of the zone-of-interests inquiry, which the Supreme Court has clarified is not a threshold jurisdictional or prudential requirement derivative of constitutional standing, but rather a tool for ensuring that a complainant is within the class of plaintiffs authorized by Congress to invoke a particular cause of action. Although the Court has thus identified the zone-of-interests inquiry as an element of a cause of action that is properly addressed as a merits issue, its universal applicability makes it appropriate for consideration with traditional threshold matters.

The discussion then turns to the principal standards of review, some of which are sometimes denominated by a case name. They include *de novo*, major questions, *Chevron* Step One, *Chevron* Step Two, *Skidmore, Auer/Seminole Rock*, arbitrary and capricious, and substantial evidence review. These standards apply to claims that an agency has unlawfully withheld or unreasonably delayed action, or acted:

- without congressionally delegated authority (*de novo*);

- contrary to a congressional directive on the precise question at issue (*de novo* within the framework of *Chevron* Step One);

- pursuant to a purported delegation of authority, but in a manner that is impermissible under its authorizing statute (deferential within the framework of *Chevron* Step Two);

- without the force of law (*Skidmore*);

- in a plainly erroneous manner in interpreting its own regulations (*Auer/Seminole Rock*);

- in an arbitrary and capricious manner in violation of Section 706(2)(A); or

- without substantial evidentiary support in an action subject to Section 706(2)(E) or a like provision in the agency's authorizing statute.

In addressing these and other claims for which judicial review of administrative agency action is sought, the intent is to provide a framework for understanding the most frequently applied standards governing how closely the federal courts may scrutinize agency decisionmaking.

B. What are Administrative Agencies?

Federal administrative agencies exercise significant power in contemporary American life. Pursuant to congressionally delegated authority"), they administer numerous federal statutes, undertaking myriad actions addressing health, welfare, safety, security, economic, and environmental issues. Some agency actions take the form of legislative rulemakings that produce forward-looking regulations of general applicability having the force of law. Others are achieved through case-by-case adjudications resulting in trial-like records that provide the factual bases for judgments that also have the force of law. Still others involve the investigation and prosecution of entities or individuals alleged to have violated the statutes and regulations an agency is authorized to enforce. Agencies are also authorized to advance their missions through a variety of informal measures—such as policy statements, advisory letters, reports, warning notices, information sheets, websites, hearings, and surveys—which do not, in and of themselves, make law.

Administrative agencies generally are understood to include "each authority of the Government of the United States," 5 U.S.C. § 701(b)(1), excluding the President, Congress, and the courts. *See Franklin v. Massachusetts*, 505 U.S. 788, 800–01 (1992). Unlike the three constitutionally designated branches of the federal government, these authorities—which are variously referred to as agencies, commissions, boards, or departments—have no existence absent statutory authorization by Congress. Agencies normally are established by "organic"

statutes in which Congress sets forth the basic mission of an agency, its principal responsibilities, and its authority to act. Additionally, an agency's policymaking, adjudicatory, enforcement, and administrative responsibilities are frequently amplified in "authorizing" or "enabling" statutes.

"Some agencies are regulatory commissions, headed by multi-member bodies; these are usually free-standing bodies whose members can be removed from office by the President only for 'cause,' and accordingly are sometimes called 'independent' agencies." STRAUSS, RAKOFF, FARINA & METZGER, GELLHORN & BYSE'S ADMINISTRATIVE LAW: CASES AND COMMENTS 14 (11th ed. 2011); *see also Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 483 (2010) ("Congress can, under certain circumstances, create independent agencies run by principal officers appointed by the President, whom the President may not remove at will, but only for good cause."). Prominent independent agencies include the Civil Aeronautics Board, Federal Communications Commission, National Labor Relations Board, Nuclear Regulatory Commission, Federal Energy Regulatory Commission, Federal Trade Commission, and Securities and Exchange Commission.

Other agencies, sometimes denominated "executive," operate under the leadership of "a single administrator who serves at the President's pleasure, and these are often nestled within larger entities headed by members of the President's Cabinet, whom the President can also discharge." STRAUSS ET AL., *supra*, at 14. For example, the National Highway Traffic Safety Administration operates within the Department of Transportation—both are administrative agencies.

It has been suggested that the President, by virtue of his control of agency leadership, has greater influence over the work of executive agencies than over independent agencies. It is unclear whether this is an accurate assessment of the President's power. *See* Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (And Executive Agencies)*, 98 CORNELL L. REV. 769 (2012–2013). What is beyond question, however, is that administrative agencies are powerless to act absent congressionally delegated authority.

Although agencies may not act absent congressionally delegated authority, Congress may not, in the process of authorizing agency action, "interfere with the President's exercise of the 'executive power' and his constitutionally appointed duty to 'take care that the laws be faithfully executed' under Article II." *Morrison v. Olson*, 487 U.S. 654, 689–90 (1988). "[S]pecial considerations control when the Executive Branch's interests in maintaining the autonomy of its office and safeguarding the confidentiality of its communications are implicated." *Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 367, 385 (2004). Therefore, if an agency's statutorily mandated operating scheme abridges the President's Article II authority, serious separation of powers concerns arise. *See, e.g.*, *Bowsher v. Synar*, 478 U.S. 714 (1986).

Separation of powers questions also may be implicated when Congress authorizes the adjudication of private rights by a non-Article III tribunal. *See, e.g.*, *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833 (1986). Moreover, constitutional issues may arise under the Seventh Amendment when Congress empowers an agency to adjudicate disputes without a jury.

See, e.g., *Atlas Roofing Co. v. Occupational Safety & Health Rev. Comm'n*, 430 U.S. 442 (1977). And the courts are occasionally required to determine whether Congress has statutorily delegated legislative power to an agency in violation of Article I, Section 1 of the Constitution. *See, e.g.*, *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457 (2001).

Questions such as these—concerning the constitutional limits on congressional authority to confer regulatory and adjudicatory powers on administrative agencies, and presidential authority over agency heads and the direction of agency outcomes—undoubtedly are important. *See Agency Relationships with Congress & The President: The Structural Constitution*, in STRAUSS ET AL., *supra*, at 548–761. Many of these matters are beyond the scope of this book, however.

Chapter X. The Interplay Between the APA and Agency Authorizing Statutes: Standards of Review and Causes of Action

A federal agency "literally has no power to act … unless and until Congress confers power upon it." *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986). In conferring such power, Congress will sometimes prescribe whether and how closely agency actions will be reviewed by the courts. Thus, an agency's authorizing or enabling statute may prescribe the cause of action available to a party injured by a particular agency action, which court or courts will have subject matter jurisdiction over that cause of action, and standards governing judicial resolution of the claim. *See, e.g.*, 47 U.S.C. § 1442(h) (stating that "[t]he United States District Court for the District of Columbia shall have exclusive jurisdiction to review a decision of the [Federal Communications] Commission made under subsection (e)(3)(C)(iv)" (pertaining to alternative plans by a state for radio access networks) and that "[t]he court shall affirm the decision of the Commission unless (A) the decision was procured by corruption, fraud, or undue means; (B) there was actual partiality or corruption in the Commission; or (C) the Commission was guilty of misconduct in refusing to hear evidence pertinent and material to the decision or of any other misbehavior by which the rights of any party have been prejudiced").

To the degree that authorizing and enabling statutes do not preemptively prescribe the available causes of action or the scope and standards of review, they are defined by the Administrative Procedure Act ("APA"). Sections 704, 702, and 701 describe the circumstances under which a party is authorized to bring suit, while Section 706 defines both the scope and standards of review and, in effect, the elements of a cause of action of which an aggrieved party might avail itself.

The APA does not, however, provide for subject matter jurisdiction. *See Califano v. Sanders*, 430 U.S. 99, 107 (1977); *see also Air Courier Conf. v. Am. Postal Workers Union*, 498 U.S. 517, 523 n.3 (1991). Thus, if Congress does not specifically authorize a court to hear a challenge to a particular type of agency action, suits invoking an APA cause of action are typically subject to judicial review under the general federal question authority of 28 U.S.C. § 1331 and consequently must be brought initially in a district court. *See Bell v. New Jersey*, 461 U.S. 773, 777 n.3 (1983); *Chrysler Corp. v. Brown*, 441 U.S. 281, 317 n.47 (1979). *See* Chapter XI.B, *infra* (discussing subject matter jurisdiction over challenges to agency action).

A. Defining the Scope and Standards of Review

The standards of review prescribed by Section 706 of the APA and the various enabling statutes authorizing administrative action reflect congressional judgments about the degree to which courts should defer to agency decisionmaking. Judicial decisions often add their own gloss, but that gloss is generally a product of the courts' search for congressional intent.

Although the precise standard of review varies with the type of agency action at issue, significant deference is often afforded to administrative agencies' substantive judgments. Why? Because many agency actions having the force of law require expertise the courts lack and involve policy choices more appropriately overseen by a politically accountable branch of the government. As the Supreme Court explained in *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984):

> Judges are not experts in [pollution-emitting devices], and are not part of either political branch of the Government. Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges' personal policy preferences. In contrast, an agency to which Congress has delegated policymaking responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.

Id. at 865–66.

Importantly, while a court must give appropriate deference to agency decisionmaking, it may not uphold an agency action "on a basis containing any element of discretion … that is not the basis the agency used." *Interstate Com. Comm'n v. Bhd. of Locomotive Eng'rs*, 482 U.S. 270, 283 (1987). This "simple but fundamental rule of administrative law" was explained by the Supreme Court in *SEC v. Chenery Corp.*, 332 U.S. 194 (1947):

> [A] reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis. To do so would propel the court into the domain which Congress has set aside exclusively for the administrative agency.

Id. at 196.

Judicial review of the procedures pursuant to which an agency acts is also circumscribed. "Time and again," the Supreme Court has "reiterated that the APA 'sets forth the full extent of judicial authority to review executive agency action for procedural correctness.'" *Perez v. Mortg. Banker's Ass'n*, 575 U.S. 92, 101–02 (2015) (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 513 (2009)). "[G]enerally speaking," the APA "established the maximum procedural requirements which Congress was willing to have the courts impose upon agencies in conducting

rulemaking procedures. Agencies are free to grant additional procedural rights in the exercise of their discretion, but reviewing courts are generally not free to impose them if the agencies have not chosen to grant them." *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 524 (1978); *see also Perez,* 575 U.S. at 102–03. This reflects "the very basic tenet of administrative law that agencies should be free to fashion their own rules of procedure." *Vermont Yankee*, 435 U.S. at 544.

Although the courts must give appropriate deference to certain agency judgments, this does not mean that judicial review of administrative action is insignificant or meaningless. Quite the contrary—the APA and many statutes authorizing agency action impose fairly precise limits on the discretionary authority delegated to agencies and prescribe in some detail how agency authority is to be exercised. And many authorizing statutes, as well as the APA (often operating in conjunction with authorizing statutes) give the courts the power to enforce these statutory commands.

Some authorizing statutes supplement or altogether preempt the scope and standards of review set forth in Section 706 of the APA. *See Kappos v. Hyatt*, 566 U.S. 431, 438 (2012) (while judicial review under Section 706 is "typically limited to the administrative record," proceedings under the Patent Act "are not so limited, for the district court may consider new evidence"). More often than not, however, Section 706 describes the parameters for judicial review of agency action, setting forth both the applicable scope and controlling standards of review. Importantly, Section 706 also defines the causes of action available to an aggrieved party under the APA.

Section 706 provides:

> 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. The reviewing court shall—
>
> (1) compel agency action unlawfully withheld or unreasonably delayed; and
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
> (B) contrary to constitutional right, power, privilege, or immunity;
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
> (D) without observance of procedure required by law;
> (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
> (F) unwarranted by the facts to the extent that the facts are subject to trial *de novo* by the reviewing court.

5 U.S.C. § 706.

Section 706 also states that in making determinations under subsections (1) and (2), "the court shall review the whole record or those parts of it cited by a party." *Id.* In addition, Section 706 instructs that "due account shall be taken of the rule of prejudicial error," *id.*, meaning that any errors by the agency that are harmless will be disregarded. *See Shinseki v. Sanders*, 556 U.S. 396, 406 (2009) (characterizing "§ 706 as an administrative law … harmless error rule" and holding that similar "prejudicial error" language in a statute governing the Veterans Court, 38 U.S.C. § 7292, requires the Veterans Court "to apply the same kind of 'harmless-error' rule that courts ordinarily apply in civil cases").

Section 706(2) lists six distinct grounds upon which a reviewing court may "hold unlawful and set aside agency action, findings, and conclusions." 5 U.S.C. § 706(2). Four of the grounds are broadly applicable. "In all cases agency action must be set aside if the action was [1] 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,' [subsection (A)] or if the action failed to meet [2] statutory [subsection (C)], [3] procedural [subsection (D)], or [4] constitutional [subsection (B)] requirements." *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 413–14 (1971) (citing and quoting 5 U.S.C. § 706(2)(A)–(D)). *See generally* Chapter XVI, *infra* (discussing arbitrary and capricious review under Section 706(2)(A)) and Chapter XIV, *infra* (discussing review under Section 706(2)(C) and *Chevron*).

The remaining two grounds apply only "[i]n certain narrow, specifically limited situations." *Overton Park*, 401 U.S. at 414. The "substantial evidence" standard of paragraph (E) applies only to review of factual findings made in formal, on-the-record hearings necessitated either by Sections 556 and 557 of the APA or by an agency's authorizing statute. *See* 5 U.S.C. § 706(2)(E). *See generally* Chapter XVII, *infra*. Paragraph (F) applies in equally limited circumstances, authorizing a reviewing court to engage in *de novo* review of an agency's factual findings only when "the action is adjudicatory in nature and the agency factfinding procedures are inadequate" or "when issues that were not before the agency are raised in a proceeding to enforce nonadjudicatory agency action." *Overton Park*, 401 U.S. at 415.

It should also be noted that while paragraphs (B) through (F) of Section 706(2) are confined to particular types of claims, paragraph (A), the arbitrary and capricious provision, "is a catchall, picking up administrative misconduct not covered by the other more specific paragraphs." *Ass'n of Data Processing Serv. Orgs. v. Bd. of Governors of the Fed. Reserve Sys.*, 745 F.2d 677, 683 (D.C. Cir. 1984). This means, for example, that agency action that is not "in excess of statutory authority," as required by paragraph (C), and is properly supported by "substantial evidence," as required by paragraph (E), may nevertheless be struck down as arbitrary and capricious for want of reasoned decisionmaking. *See, e.g.*, *id.* at 683 ("Thus, an agency action which is supported by the required substantial evidence may in another regard be 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law'—for example, because it is an abrupt and unexplained departure from agency precedent."). Or, "in those situations where paragraph (E) has no application (informal rulemaking, for example, which is not governed by §§ 556 and 557 to which paragraph (E) refers), paragraph (A) takes up the slack, so to speak, enabling the courts

to strike down, as arbitrary, agency action that is devoid of needed factual support." *Id.*

Paragraph (A)'s admonition that agency action be set aside if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," has also been identified by the Supreme Court as the only APA provision governing "substantive review of an agency's interpretation of its regulations." *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 377 (1998); *see also Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994). *See* Chapter XVI, *infra*.

B. Defining a Cause of Action

A cause of action for a claimed injury resulting from an agency decision may be found in an agency's authorizing or enabling statute. *See, e.g.*, *Bennett v. Spear*, 520 U.S. 154, 171–74 (1997). In such instances, Sections 702 and 704 of the Administrative Procedure Act ("APA") essentially provide a companion review provision, making a cause of action available to a "person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute," 5 U.S.C. § 702, when such action is "made reviewable by statute," *id.* § 704. *See Abbott Lab'ys v. Gardner*, 387 U.S. 136, 140 (1967), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977).

Additionally, "[t]he APA by its terms independently authorizes review," *Bennett*, 520 U.S. at 162, for a party suffering "legal wrong because of … or adversely affected or aggrieved by agency action," 5 U.S.C. § 704, "only when 'there is no other adequate remedy in a court,'" *Bennett*, 520 U.S. at 162 (quoting 5 U.S.C. § 704). When there is no such adequate remedy, the independent APA cause of action "applies universally" except to the extent that an authorizing or enabling statute precludes judicial review or commits the action to agency discretion. *Id.* at 175 (citing 5 U.S.C. § 701). *See* Chapter XII.A, *infra* (discussing the presumption of reviewability and its exceptions).

The "generous review provisions" of the APA thus "provide[] specifically not only for review of '(a)gency action made reviewable by statute' but also for review of 'final agency action for which there is no other adequate remedy in a court.'" *Abbott Lab'ys*, 387 U.S. at 140 (quoting 5 U.S.C. § 704). The cause of action authorized in Section 704 of the APA, described in Sections 702 and 701, and for which the various elements are detailed in Section 706, thus provides an independent, "generic" fallback in those instances in which an authorizing or enabling statute does not provide a cause of action. *See Trudeau v. Fed. Trade Comm'n*, 456 F.3d 178, 188 & n.9 (collecting cases).

Consistent with the above described provisions, an injured party may have a cause of action under APA Section 706(1) to compel agency action that was unlawfully delayed or under Section 706(2) to challenge agency action on one of the six grounds defining when a reviewing court may "hold unlawful and set aside agency action, findings, and conclusions," 5 U.S.C. § 706(2). Notably,

then, the standards set forth in Section 706 and described in Section A above, not only prescribe how courts will review challenged agency action, but also define the elements of the causes of action available under the APA.

An important judicial gloss on the causes of action defined in Section 706 should be noted: Under Section 706(1), "the only agency action that can be compelled … is action legally *required*." *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 63 (2004) (emphasis in original). "Thus, a claim under § 706(1) can proceed only where a plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required to take*." *Id.* at 64 (emphasis in original); *see also Benzman v. Whitman*, 523 F.3d 119, 130–32 (2d Cir. 2008). But the availability of a claim under Section 706(1) does not render a claim under Section 706(2) unavailable. *See, e.g.*, *Dayton Tire v. Sec'y of Lab.*, 671 F.3d 1249 (D.C. Cir. 2012) (allowing a party to pursue a claim that an agency's delay in reaching a final decision rendered that decision arbitrary and capricious under Section 706(2), because "Section 706(1) does not state that a petition to compel is a party's only option in the face of agency delay").

C. A Note About the Distinct Roles of District and Appellate Courts

"Within constitutional bounds, Congress decides what cases the federal courts have jurisdiction to consider." *Bowles v. Russell*, 551 U.S. 205, 212 (2007). This is no less true in the agency context than in any other. *See City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 336 (1958); *see also Watts v. SEC*, 482 F.3d 501, 505 (D.C. Cir. 2007). *See* Chapter XI.B, *infra* (discussing subject matter jurisdiction). Departing from the usual mode of federal litigation, Congress frequently places original subject matter jurisdiction over challenges to agency action in the appellate rather than the district courts. Joseph W. Mead & Nicolas A. Fromherz, *Choosing a Court to Review the Executive*, 67 ADMIN. L. REV. 1, 6 (2015), *see also id.* at 2 (the U.S. Code contains "thousands of compromises dividing initial review of agency decisions between district and circuit courts"). The causes of action authorized and defined in the APA "neither confer[] nor restrict[] subject matter jurisdiction." *Trudeau v. Fed. Trade Comm'n*, 456 F.3d 178, 185 (D.C. Cir. 2006); *see also id.* at 184 (citing *Califano,* 430 U.S. at 107). Consequently, unless an agency's authorizing or enabling statute (or some other statute) explicitly or implicitly vests jurisdiction over the agency action at issue in a particular court, judicial review of an independent APA cause of action typically begins in district courts under 28 U.S.C. § 1331 (the general federal question subject matter jurisdiction statute). *See Chrysler Corp. v. Brown*, 441 U.S. 281, 317 n.47 (1979); *see also Road Sprinkler Fitters Loc. Union 669 v. Herman*, 234 F.3d 1316, 1319 (D.C. Cir. 2000).

Notably, however, the starting point of judicial review is of no moment in determining the standards of review at the appellate level. When judicial review begins in the district court, review is governed by the same standards that govern review before the courts of appeals. And when, pursuant to 28 U.S.C. § 1291, an appeal to the circuit court is taken from a final judgment issued by the district court, appellate courts "do not defer to [the] district court's review of [the] agency [action] any more than the Supreme Court defers to a court of appeals' review of such a

decision." *Novicki v. Cook*, 946 F.2d 938, 941 (D.C. Cir. 1991); *see also Mingo Logan Coal Co. v. EPA*, 829 F.3d 710, 718 (D.C. Cir. 2016) ("We review the administrative action directly, according no particular deference to the judgment of the District Court."). This is because, when an agency acts pursuant to congressionally-delegated authority and the action has the force of law, "the agency itself is typically owed deference with respect to its fact-finding, *see NLRB v. Brown*, 380 U.S. 278, 292 (1965), its application of law to facts, *see Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971), and its interpretation of the governing statute or regulation, *see Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984)." *Novicki*, 946 F.2d at 941. And if deference is owed to the agency, "it is anomalous ([and] if the agency and district court disagree, analytically impossible) to defer also to another court's review of the agency's action." *Id.*; *see also Petit v. U.S. Dep't of Educ.*, 675 F.3d 769, 777 (D.C. Cir. 2012) (appellate court reviews *de novo* a district court's review of agency action pursuant to 5 U.S.C. § 706(2)(A)).

Chapter XI. Threshold Jurisdictional and Prudential Limitations on Judicial Review

Although federal jurisdiction is not the focus of this book, it makes little sense to consider the standards controlling judicial review of administrative agency actions without providing at least a broad-brush outline of certain threshold limitations that are particularly relevant in the agency context, including sovereign immunity, subject matter jurisdiction, and Article III standing, as well as mootness, finality, ripeness, exhaustion of administrative remedies, and issue waiver. These threshold grounds for denying judicial review derive from the Constitution, statutes, and judicial precedent and involve oft-recurring issues that implicate important questions "about the appropriate role of the judiciary in the regulatory process." STRAUSS, RAKOFF, FARINA & METZGER, GELLHORN & BYSE'S ADMINISTRATIVE LAW: CASES & COMMENTS 1207 (11th ed. 2011). They consequently take on something of the character of standards of review, determining not just if and when, but, in many instances, to what extent the courts will oversee the regulatory programs created and administered by the other branches of government.

Of the threshold issues governing the availability of judicial review of agency action, subject matter jurisdiction and standing are arguably the most fundamental. Subject matter jurisdiction (which is defined by Article III and the authorizing statutes enacted by Congress) and constitutional standing (which is derived directly from the "case or controversy" requirement of Article III, Section 2, Clause 1) are the essential, unwaivable prerequisites to the exercise of federal judicial power. *See Ins. Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 701–02 (1982) (subject matter jurisdiction); *United States v. Hays*, 515 U.S. 737, 742–43 (1995) (standing). Unless the record affirmatively demonstrates subject matter jurisdiction and standing, the presumption is that a federal court lacks jurisdiction. *See DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 n.3 (2006); *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 546–47 (1986).

Together, subject matter jurisdiction and standing ensure the "separation and equilibration of powers." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101 (1998). Subject matter jurisdiction derives in significant part from the "[d]ue regard for the rightful independence of state governments, which … requires that [federal courts] scrupulously confine their own jurisdiction to the precise limits which (a federal) statute has defined." *Victory Carriers, Inc. v. Law*, 404 U.S. 202, 212 (1971). In contrast, "the law of Art. III standing is built on … the idea of separation of powers" among the three federal branches of government. *Allen v. Wright*, 468 U.S. 737, 752 (1984). The standing doctrine restricts the federal judicial power "to the traditional role of Anglo-American courts, which is to redress or prevent actual or imminently threatened injury to persons caused by private or official violation of law." *Summers v. Earth Island Inst.*, 555 U.S. 488, 492 (2009).

While subject matter jurisdiction and standing together make up the broad framework circumscribing the judiciary's ability to review administrative agency actions, standing has at times been the more consuming issue in the case law. This may be because standing not only

circumscribes the judiciary's role in the administrative process, but also determines which nongovernmental individuals and entities can use the power of the courts to influence administrative decisionmakers.

> Standing is the key to the courthouse door; those who possess the key possess the power. From the agency's perspective, the very act of being haled into court and required to defend its action involves considerable costs. Hence, parties who are capable of imposing such costs at the *end* of the regulatory process become parties whose interests must be reckoned with *during* the regulatory process. In this sense, standing represents judicially enhanced voice.

STRAUSS ET AL., *supra*, at 1207 (emphasis in original).

Mootness and ripeness, like standing, also derive from Article III's case-or-controversy requirement. The mootness doctrine ensures that values protected by the existence of a live controversy are present at all stages of litigation. *See Friends of the Earth, Inc. v. Laidlaw Env't Services (TOC), Inc.*, 528 U.S. 167, 189–91 (2000). The ripeness doctrine permits the courts to dismiss suits when a party has standing, but the claim is not yet concrete enough to make judicial review appropriate. *Abbott Lab'ys v. Gardner*, 387 U.S. 136, 148–49 (1967); *see also Texas v. United States*, 523 U.S. 296, 300–02 (1998). Both are "founded in concern about the proper—and properly limited—role of the courts in a democratic society." *Warth v. Seldin*, 422 U.S. 490, 498 (1975).

Although subject matter jurisdiction and the restrictions giving life to Article III's case-or-controversy requirement fundamentally shape federal judicial review of agency action, the other threshold limitations are no less critical to the questions of whether and to what degree the courts may become involved in the oversight of administrative agencies. Indeed, the Administrative Procedure Act ("APA") explicitly addresses sovereign immunity, 5 U.S.C. § 702, finality, *id.* § 704, and exhaustion, *id.* And countless judicial decisions address issue waiver. *See, e.g.*, *Del. v. Surface Transp. Bd.*, 859 F.3d 16, 21 (D.C. Cir. 2017) ("The hard and fast rule of administrative law, rooted in simple fairness, is that issues not raised before an agency are waived and will not be considered by a court on review."); *Wallaesa v. FAA*, 824 F.3d 1071, 1078 (D.C. Cir. 2016) ("[Issue waiver] … holds special force where … an appeal follows adversarial administrative proceedings in which parties are expected to present issues material to their case.").

In terms of the relative significance of these various threshold matters, it is worth noting that there are no "sequencing" rules with respect to those requirements that are designed "not merely to defeat the asserted claims, but to preclude judicial inquiry." *Tenet v. Doe*, 544 U.S. 1, 6 n.4 (2005). Thus, while a finding of subject matter jurisdiction and Article III standing must necessarily precede a ruling on the merits of a claim, *see Steel Co.*, 523 U.S. at 95–96, that principle does not dictate in which order non-merits threshold issues must be resolved, *see Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 584–85 (1999). This is because resolution of a case

on a non-merits threshold matter involves "no assumption of the law-declaring power" that would violate Article III's jurisdictional limits or separation of powers principles. *Id.*

A. Waiver of Sovereign Immunity

"[A]n action against the United States cannot surpass the barrier of sovereign immunity without a statutory waiver. [And 'i]t is axiomatic that the United States may not be sued without its consent and that the existence of consent is a prerequisite for jurisdiction.'" *Anderson v. Carter*, 802 F.3d 4, 8 (D.C. Cir. 2016) (quoting *United States v. Mitchell*, 463 U.S. 206, 212 (1983)); *see also Perry Cap. LLC v. Mnuchin*, 848 F.3d 1072, 1099 (D.C. Cir. 2017) (noting that a court's obligation to assure itself it has jurisdiction "extends to sovereign immunity because it is 'jurisdictional in nature'" (quoting *FDIC v. Meyer*, 510 U.S. 471, 475 (1994))). Consequently, absent an express statutory waiver of sovereign immunity by Congress, the federal government and federal administrative agencies are immune from suit. *See Lane v. Pena*, 518 U.S. 187, 192 (1996).

When Congress extends a waiver, its scope must "be strictly construed … in favor of the sovereign." *Lane*, 518 U.S. at 192. The alleged waiver must "be clearly discernable from the statutory text in light of traditional interpretive tools." *FAA v. Cooper*, 566 U.S. 284, 291 (2012). "Legislative history cannot supply a waiver that is not clearly evident from the language of the statute." *Id.* at 290. "[W]aivers of sovereign immunity may not be implied," *Lane*, 518 U.S. at 190, and courts must construe "[a]ny ambiguities in the statutory language … in favor of immunity," *Cooper*, 566 U.S. at 290. Thus, for example, if a party seeks monetary damages, the statutory waiver of sovereign immunity on which the suit rests "must extend unambiguously to such monetary claims." *Lane*, 518 U.S. at 192. "Ambiguity exists if there is a plausible interpretation of the statute that would not authorize money damages against the Government." *Cooper*, 566 U.S. at 290–91; *see also, e.g.*, *Sw. Power Admin. v. FERC*, 763 F.3d 27, 31–33 (D.C. Cir. 2014) (finding that money damages against the federal government were barred by sovereign immunity because while there was a plausible interpretation of the relevant provisions of the Federal Powers Act supporting waiver, there was also a plausible interpretation that did not).

Section 702 of the APA eliminates the defense of sovereign immunity as a bar to judicial review of federal administrative action in a broad array of suits against the federal agencies, agency officials, and agency employees, provided the relief sought is not for money damages. *See* 5 U.S.C. § 702. Notably, Congress did not limit Section 702's waiver of sovereign immunity to causes of action under the APA, but rather extended it to any action in which a party "seeking relief other than money damages … stat[es] a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority." *Id.*; *see also Schnapper v. Foley*, 667 F.2d 102, 108 (D.C. Cir. 1981). In so doing, Congress "was quite explicit about its goals of eliminating sovereign immunity as an obstacle in securing judicial review of the federal official conduct" and strengthening federal government accountability to citizens. *The Presbyterian Church (U.S.A.) v. United States*, 870 F.2d 518, 524 (9th Cir. 1989); *see id.* at 523–26

(finding waiver of sovereign immunity pursuant to 5 U.S.C. § 702 although claims arose under the First and Fourth Amendments, not the APA, and the alleged government activity at issue did not constitute "agency action" as defined in the APA). "The need to channel and restrict judicial control over administrative agencies, Congress concluded, could better be achieved through doctrines such as statutory preclusion, exhaustion, and justiciability, rather than through the … doctrine of sovereign immunity." *Id.* at 524.

Although Section 702's waiver provision extends broadly to non-APA actions, Congress restricted its reach in two important ways. First, Section 702 is explicit in stating that the waiver does not "affect[] other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground." 5 U.S.C. § 702.

Second, Section 702 contains what the Supreme Court has characterized as a "carve-out," which eliminates the waiver "if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought." *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 215 (2012) (quoting Section 702). When Congress makes clear in another statute that it "has intended a specified remedy—including its exceptions—to be exclusive, that is the end of the matter; the APA does not undo the judgment." *Id.* at 216. Consequently, the APA cannot be used to evade limitations on suits against the government or agencies contained in another statute. *Id.* But by the same token, a plaintiff's claim under the APA cannot be barred by sovereign immunity if the other statute does not address the type of grievance the plaintiff seeks to assert. *See id.* at 215–24 (because plaintiff brought suit under the APA claiming that the Secretary of the Interior's action was without legal authority and would result in economic, environmental, and aesthetic harms, and did not assert a right to the property taken into trust by the Secretary, the Quiet Title Act's immunity provision—which excepts Indian lands from its general waiver of sovereign immunity—did not bar suit pursuant to Section 702's carve-out for other statutory waivers).

B. Subject Matter Jurisdiction

It is a "bedrock principle that federal courts have no jurisdiction without statutory authorization." *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 553 (2005). "Within constitutional bounds, Congress decides what cases the federal courts have jurisdiction to consider." *Bowles v. Russell*, 551 U.S. 205, 212 (2007). This is no less true in the agency context than in any other. *See City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 336 (1958). "Congress is free to choose the court in which judicial review of agency decisions may occur." *Watts v. SEC*, 482 F.3d 501, 505 (D.C. Cir. 2007).

Alternatively, Congress may altogether preclude judicial review over challenges to agency action or protect an action from judicial review by committing it entirely to an agency's discretion. *See Patchak v. Zinke*, 138 S. Ct. 897 (2018) (affirming dismissal of ongoing federal proceeding after Congress stripped federal courts of jurisdiction to hear the case while it was on

remand following prior appeal). But given the "strong presumption" that Congress intends to make judicial review of agency action available, *Bowen v. Mich. Acad. of Fam. Physicians*, 476 U.S. 667, 670 (1986), such an intent will only be found if there is clear and convincing evidence of it in a statute's language, structure, and legislative history. *See* Chapter XII.A, *infra* (discussing the presumption of reviewability and its exceptions).

Unless Congress places jurisdiction over challenges to particular agency actions in a specified court, "persons seeking review [of those] action[s] go first to district court rather than to a court of appeals." *Delta Constr. Co., Inc. v. EPA*, 783 F.3d 1291, 1298 (D.C. Cir. 2015). This is the "normal default rule," *Int'l Bhd. of Teamsters v. Peña*, 17 F.3d 1478, 1481 (D.C. Cir. 1994) (citing 5 U.S.C. § 703), which is sometimes referred to by the "confusing misnomer" "nonstatutory review," *Five Flags Pipe Line Co. v. Dep't of Transp.*, 854 F.2d 1438, 1439 (D.C. Cir. 1988). This rule applies when an authorizing or enabling statute is "silent" with respect to jurisdiction, because "federal courts of appeals generally are courts of review, not first view." *Rodriguez v. Penrod*, 857 F.3d 902, 906 (D.C. Cir. 2017).

Put more precisely, if Congress does not explicitly place jurisdiction over a particular cause of action in a specified court using "the statute pursuant to which [the challenged] action is taken, or … another [applicable] statute," the challenging party must default to a generally available source of *district court* jurisdiction. *Five Flags,* 854 F.2d at 1439; *see also Jarkesy v. SEC*, 803 F.3d 9, 15 (D.C. Cir. 2015) ("Litigants generally may seek review of agency action in district court under any applicable jurisdictional grant."); *Moms Against Mercury v. FDA*, 483 F.3d 824, 827 (D.C. Cir. 2007) ("Agency action taken under sections silent as to judicial review are directly reviewable only in a district court under some appropriate head of its jurisdiction."). This is because the federal question jurisdiction granted the circuit courts under 28 U.S.C. § 1291 "may be invoked only after a district court has issued an appealable order." *Five Flags*, 854 F.3d at 1439–40; *see also Moms Against Mercury*, 483 F.3d at 827 (acknowledging the default rule, but recognizing the "limited exception," established in *Telecommunications Research & Action Center v. FCC*, 750 F.2d 70, 75 (D.C. Cir. 1984), permitting a circuit court to exercise direct and exclusive jurisdiction over a claim that agency action has been unreasonably delayed when Congress has authorized the circuit to assert direct and exclusive review over that action when it is final).

Title 28, Section 1331, placing "original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States" in the district courts, often provides the default jurisdictional authorization. Section 1331 plays a particularly prominent role in those many instances when a cause of action is based on the Administrative Procedure Act ("APA") and no other applicable statute grants subject matter jurisdiction. *See Bell v. New Jersey*, 461 U.S. 773, 777 n.3 (1983); *Chrysler Corp. v. Brown*, 441 U.S. 281, 317 n.47 (1979); *see also, e.g.*, *Rodriguez*, 857 F.3d at 906. This is because the APA contains no independent grant of subject matter jurisdiction, *Califano v. Sanders*, 430 U.S. 99, 105–07 (1977), but rather provides only that judicial review of agency action takes place in "a court specified by statute or, in the absence or inadequacy thereof, … in a court of competent jurisdiction." 5 U.S.C. § 703; *see also Int'l Bhd. of Teamsters*, 17 F.3d at 1481.

Section 1331 jurisdiction is also appropriately invoked when: (1) a claimed implied cause of action against an agency is derived from the Constitution, *see, e.g.*, *Hubbard v. EPA*, 949 F.2d 453, 461–62 (D.C. Cir. 1991) (citing *Bush v. Lucas*, 462 U.S. 367, 374 (1983)); (2) a nonstatutory cause of action is available because judicial review is implicitly precluded, but an agency is alleged to have acted outside its scope of congressional authority, *see, e.g.*, *Trudeau v. FTC*, 456 F.3d 178, 185 n.10, 189–90 (D.C. Cir. 2006); *see also* Chapter XII.A.1, *infra* (discussing the limited availability of such review under *Leedom v. Kyne*, 358 U.S. 184 (1958)); and (3) an agency's authorizing or enabling statute provides a cause of action but is silent with respect to subject matter jurisdiction, *see, e.g.*, *Md. Dep't of Hum. Res. v. HHS*, 763 F.2d 1441, 1445 (D.C. Cir. 1985).

While "an untold number of agency decisions are left to the default route of initial district court review," there are "more than a thousand statutory provisions sprinkled through fifty-one titles of the United States Code" that initially "direct agency cases to a particular court." *Joseph W. Mead & Nicholas A. Fromherz*, *Choosing a Court to Review the Executive*, 67 ADMIN. L. REV. 1, 15–16 (2015). "Most of these provisions direct litigants challenging a particular action to a regional circuit court, to the D.C. Circuit, or, in limited instances, to the Federal Circuit." *Id.* at 15; *see also, e.g.*, 47 U.S.C. § 923(i)(7) (placing review of specified agency decisions in the U.S. Court of Appeals for the D.C. Circuit). But a significant number explicitly place initial jurisdiction in the district courts, Mead & Fromherz, *supra*, at 16, leaving appellate jurisdiction to be invoked through 28 U.S.C. § 1291 after a district court has issued a final order. *See, e.g.*, 47 U.S.C. § 1442(h) (placing review of specified agency decisions in the U.S. District Court for the District of Columbia); 42 U.S.C. § 1395*oo*(f) (placing review of Medicare reimbursement rates "in the district court of the United States for the judicial district in which the provider is located … or in the District Court for the District of Columbia").

Given the default rule necessitated by the jurisdictional limits of 28 U.S.C. § 1291, "[i]nitial review of agency decisions occurs at the appellate level only when a direct-review statute specifically gives the court of appeals subject-matter jurisdiction to review agency action." *Nat'l Auto. Dealers Ass'n v. FTC*, 670 F.3d 268, 270 (D.C. Cir. 2012). Appellate court subject matter jurisdiction in such cases is said to be "strictly limited to the agency action(s) included [in the direct review statute]." *NetCoalition v. SEC*, 715 F.3d 342, 348 (D.C. Cir. 2013); *see also Loan Syndications and Trading Ass'n v. SEC*, 818 F.3d 716, 719 (D.C. Cir. 2016). But "when a statute does grant direct review" to the court of appeals, it will sometimes be the case that the applicability of that review provision to the "agency action in question is ambiguous." *Nat'l Auto. Dealers Ass'n*, 670 F.3d at 270. In that situation, the presumption shifts. A court assessing its jurisdiction "will 'not presume' that 'Congress intended to locate initial … review of agency action in the district courts … absent a firm indication' to that effect." *Id.* (quoting *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 737, 745 (1985)). Courts sometimes ground this shift on notions of efficiency. "'Agencies typically compile records,' rendering the district court's 'factfinding capacity … unnecessary.' And because appeals are all but guaranteed, requiring district court review may only add delay and expense." *Loan Syndications*, 818 F.3d at 719–20 (quoting *Fla. Power & Light*, 470 U.S. at 744–46). But an instinct in favor of appellate review, "however helpful, cannot overcome the commands of Congress." *Id.* at 720 (quoting *Fla. Power & Light*, 470 U.S. at 746). "Ultimately, '[w]hether initial subject-matter jurisdiction lies … in the courts of appeals

must … be governed by the intent of Congress and not by any view [an appellate court] may have about sound policy.'" *Id.* (quoting *Fla. Power & Light*, 470 U.S. at 746).

In *Kloeckner v. Solis*, 568 U.S. 41 (2012), the Supreme Court underscored the persuasive limits of functional considerations and efficiency in the face of statutory language evidencing congressional intent. The issue there was whether the district or circuit court had jurisdiction over a claim that an agency violated a federal antidiscrimination statute listed in the Civil Service Reform Act ("CSRA"). *Id.* at 49. Faced with two "interwoven statutory provisions" from the CSRA that arguably directed the plaintiff's claim to different courts, *id.* at 46, the Supreme Court explained that "even within the most intricate and complex systems, some things are plain," *id.* at 49. "Read naturally," the two provisions "direct employees like Kloeckner to district court." *Id.* In reaching this conclusion, the Court dismissed the government's flawed policy argument for placing jurisdiction in the appellate court, noting that "even the most formidable argument concerning the [CSRA's] purpose could not overcome the clarity we find in the statute's text." *Id.* at 55 n.4; *see also Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617, 634 (2018) (rejecting Government's policy arguments against district court jurisdiction, as "jurisdiction is 'governed by the intent of Congress and not by any views we may have about sound policy'" (quoting *Fla. Power & Light*, 470 U.S. at 746).

When a statute places subject matter jurisdiction in the court of appeals, a question sometimes arises as to whether that authorization precludes subject matter jurisdiction in the district court. Some statutes explicitly make appellate jurisdiction with respect to enumerated actions exclusive. *See, e.g.*, 28 U.S.C. § 2342 (giving "exclusive jurisdiction" to the "court of appeals" to review a variety of actions by a number of agencies). Others may be ambiguous, at least with respect to certain agency actions. In such cases, congressional intent to preclude district court review may be implied.

The question of implied preclusion of district court review often arises when a statute places initial judicial review in the circuit courts as part of a larger scheme providing for administrative review within the agency. In *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994), the Supreme Court set out a two-part framework for determining when initial district court review is impliedly precluded. The Court drew directly on the preclusion analysis set out in *Block v. Community Nutrition Institute*, 467 U.S. 340, 351 (1984), and *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 157 (1970), as well as its decision refining the standard for nonstatutory review of *ultra vires* agency actions in *Board of Governors, FRS v. MCorp Fin., Inc.*, 502 U.S. 32 (1991). *See* Chapter XII.A.1, *infra* (discussing implied preclusion and the *Leedom/MCorp* exception).

The Court explained: "Whether a statute is intended to preclude initial judicial review [in the district court] is determined from the statute's language, structure, and purpose, its legislative history, and whether the claims can be afforded meaningful review." *Thunder Basin*, 510 U.S. at 207. Unlike *Block* and *Data Processing* where the question was whether particular litigants were *altogether* precluded from obtaining judicial review of certain agency actions, here the question was simply whether initial judicial review in the district court was precluded in favor of an

administrative review process followed by direct appeal in the court of appeals. *Id.* at 207 & n.8. Consequently, the *Thunder Basin* Court clarified that "the strong presumption that Congress did not mean to prohibit all judicial review" was "not implicate[d]." *Id.* at 207 n.8; *see also* Chapter XII.A, *infra* (discussing the presumption of reviewability).

The statute at issue in *Thunder Basin* was the Federal Mine Safety and Health Amendments Act of 1977, which, among other things, set forth a detailed scheme for administrative review of challenges to alleged violations of the Act's health and safety standards. 510 U.S. at 207. Mine operators were directed to bring challenges to enforcement actions to a commission created by the Act and then seek review of adverse Commission decisions before a federal circuit court. *Id.* at 204. The Act explicitly gave the Commission and circuit courts exclusive jurisdiction over challenges to agency enforcement proceedings. *Id.* at 208. But it was "facially silent" with respect to whether this review scheme precluded a mine operator from filing suit in district court seeking pre-enforcement, injunctive relief from future enforcement of a rule. *Id.* In the case before the Court, a mine operator had filed suit in district court contending (1) that enforcement of a particular provision of the Act and one of the regulations issued under it would violate the operator's rights under the National Labor Relations Act and (2) that requiring a challenge to those provisions to be channeled through the administrative/circuit court scheme violated the operator's due process rights by depriving it of meaningful review. *Id.* at 205–06, 214.

Measuring the Act against the standard set out in *Block* and *Data Processing*, the Court concluded that a congressional intent to preclude pre-enforcement review in district court was "fairly discernible in the statutory scheme," "purpose," and "legislative history." *Id.* at 207, 216. The Court rested this determination on the fact that the Act's comprehensive review process did not, by its terms, distinguish between pre- and post-enforcement challenges. *Id.* at 208–09. It also noted that review within the scheme is initiated by mine operators and that district court jurisdiction could be invoked only by the Secretary of Labor and only in two situations—to enjoin habitual violators of the Act and to coerce payment of civil penalties. *Id.* at 209. The Act gave operators no ability to invoke the jurisdiction of the district court. *Id.*

The Court turned then to the second part of its analysis—"whether [the] claims are of the type Congress intended to be reviewed within [the] statutory structure." *Id.* at 212. Giving substance to this inquiry, the Court explained that it had "previously … upheld district court jurisdiction over claims considered 'wholly collateral' to a statute's review provisions and outside the agency's expertise, particularly where a finding of preclusion could foreclose all meaningful judicial review." *Id.* at 212–13.

Applying these criteria to the mine operator's pre-enforcement challenge, the Court held that while the "Commission has no particular expertise in construing statutes other than the Mine Act, … exclusive review before the Commission is appropriate since 'agency expertise [could] be brought to bear' on the statutory questions presented"—all of which "at root require interpretation of the parties' rights and duties under" a provision of the Act and its regulations. *Id.* at 214–15 (quoting *Whitney Nat'l Bank in Jefferson Par. v. Bank of New Orleans & Tr. Co.*, 379 U.S. 411, 420 (1965)). With respect to the operator's constitutional claim, the Court

acknowledged that adjudication of such matters was "generally … thought beyond the jurisdiction of administrative agencies," but stated that "the rule is not mandatory … and is perhaps of less consequence where, as here, the reviewing body is not the agency itself but an independent commission established exclusively to adjudicate Mine Act disputes." *Id.* at 215. Ultimately, citing *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 681 n.12 (1986), the Court noted that because review of a Commission decision could be sought in the circuit court, precluding district court review "does not present the 'serious constitutional question' that would arise if an agency statute were construed to preclude all judicial review of a constitutional claim." *Thunder Basin*, 510 U.S. at 215 n.20; *see also Elgin v. Department of Treasury*, 567 U.S. 1 (2012); *Free Enterprise Fund v. Public Co. Accounting Oversight Board*, 561 U.S. 477 (2010).

The Court held that In *Elgin*, the Court held that the review scheme set out in the CSRA of 1978 "provides the exclusive avenue to judicial review when a qualifying employee challenges [a covered] adverse employment action by arguing that a federal statute is unconstitutional." 567 U.S. at 5. In *Free Enterprise*, the Court held that the administrative review scheme in the Sarbanes-Oxley Act, empowering the Securities and Exchange Commission to review any rule or sanction issued by the Public Company Accounting Oversight Board and allowing a challenger to seek review of the resulting Commission decision in a court of appeals, did not implicitly preclude district court review of constitutional challenges to the limits that the Act placed on the President's ability to dismiss Board members. 561 U.S. at 489–91. The Court more recently characterized and applied the *Thunder Basin* framework in *Axon Enterprise, Inc. v. FTC*, 143 S. Ct. 890 (2023). In *Axon*, the plaintiffs claimed that the dual layer of for-cause protection for administrative law judges of the SEC and FEC was unconstitutional. The Court held that the administrative review scheme of the FTC and SEC did not implicitly preclude district court jurisdiction over these "sweeping constitutional claims." *Id.* at 902. Notwithstanding the availability of federal appellate review, precluding district court jurisdiction would "foreclose all meaningful judicial review" because the plaintiffs protest the "here-and-now" injury of being subject to an unconstitutionally structured decisionmaking process; their asserted right would be lost if they were forced to proceed through just that structure to obtain federal appellate review. *Id.* at 903-04.

Several final, but critical, procedural notes are in order. First, and most fundamentally, "subject-matter jurisdiction, because it involves a court's power to hear a case, can never be forfeited or waived," *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006) (quoting *United States v. Cotton*, 535 U.S. 625, 630 (2002)), and "courts … have an independent obligation to determine whether subject-matter jurisdiction exists, even in the absence of a challenge from any party," *id.* Second, when a party challenges an agency action in a court that turns out not to have jurisdiction, 28 U.S.C. § 1631 permits transfer to the correct court. *See, e.g.*, *Rodriguez*, 857 F.3d at 907. Finally, given the statutory ambiguity that sometimes cloaks congressional intent with respect to which court is authorized to assume subject matter jurisdiction and, when initial jurisdiction is placed in the court of appeals, whether such jurisdiction is exclusive, simultaneous filing in district court and circuit court can be "quite appropriate" to ensure that filing deadlines are not missed. *Nat'l Auto. Dealers*, 670 F.3d at 270–71.

C. Article III Standing

"Article III of the Constitution limits federal courts' jurisdiction to certain 'Cases' and 'Controversies.'" *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013). The doctrine of Article III standing ensures that federal courts "do not exceed their authority," and thus plays an important role in "confin[ing] the federal courts to a properly judicial role." *Spokeo, Inc. v. Robins*, 578 U.S. at 338 (2016). These principles are amplified in Chapter III, so that discussion need not be repeated here. Rather, this chapter will outline some of the exemplary Supreme Court decisions that have addressed standing in the context of actions seeking review of administrative agency action.

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The Court's decision in *Allen v. Wright*, 468 U.S. 737 (1984), is arguably the forerunner of the current jurisprudence on standing. In a nationwide class action against the Internal Revenue Service ("IRS"), parents of Black public school children alleged that the IRS had not adopted "sufficient standards and procedures to fulfill its obligation to deny tax-exempt status to racially discriminatory private schools." *Id.* at 739. *Allen* held that the parents lacked standing to sue for want of cognizable injuries, lack of causation between illegal conduct and injury, and absence of injuries redressable in the federal courts. The approach followed by *Allen* laid a firm foundation for the Court's subsequent decisions, which have imposed demanding requirements for standing.

The Court's most-cited decision addressing the standing of private parties to challenge administrative agency actions is *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) (*Lujan II*). In that case, the respondents—organizations dedicated to wildlife conservation—challenged a rule promulgated by the Secretary of Interior interpreting Section 7 of the Endangered Species Act of 1973 "in such fashion as to render it applicable only to actions within the United States or on the high seas." *Id.* at 557–58. The Court held that the respondents lacked standing. The Court first set forth the now oft-repeated test for standing:

> Over the years, our cases have established that the irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly … trace[able] to the challenged action of the defendant, and not … th[e] result [of] the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.
>
> The party invoking federal jurisdiction bears the burden of establishing these elements. Since they are not mere pleading requirements but rather an

> indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation. At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presum[e] that general allegations embrace those specific facts that are necessary to support the claim. In response to a summary judgment motion, however, the plaintiff can no longer rest on such mere allegations, but must "set forth" by affidavit or other evidence specific facts, which for purposes of the summary judgment motion will be taken to be true. And at the final stage, those facts (if controverted) must be supported adequately by the evidence adduced at trial.

Id. at 560–61.

The respondents in *Lujan II* claimed that the Secretary's regulation was in error and should be set aside because it did not apply to actions taken in foreign nations. *Id.* at 559. Their claim of injury was that the defective regulation would increase the extinction rate of endangered and threatened species, which were of interest to the respondents. *Id.* at 562–63. The Court assumed that the respondents had a viable interest in agency-funded projects that threatened endangered species in other countries. *Id.* at 564. This was not enough to show cognizable injury, however, because the respondents' affidavits contained no facts showing any imminent injury. Here is what the Court said:

> That the [respondents] "had visited" the areas of the projects before the projects commenced proves nothing. As we have said in a related context, past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief … if unaccompanied by any continuing, present adverse effects. And the affiants' profession of an "inten[t]" to return to the places they had visited before—where they will presumably, this time, be deprived of the opportunity to observe animals of the endangered species—is simply not enough. Such "some day" intentions—without any description of concrete plans, or indeed even any specification of *when* the some day will be—do not support a finding of the "actual or imminent" injury that our cases require.

Id. The Court had followed the same analysis in *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990) (*Lujan I*). *See id.* at 883–89 (holding that affidavits filed by members of a national wildlife group averring that members' recreational use and aesthetic enjoyment of land "in the vicinity" of land covered by a Bureau of Land Management "land withdrawal review program" were insufficient to show that the affiants would suffer any actual injury).

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As is clear from the foregoing, *Lujan II*'s standing test is demanding. The following summary offers a sample of exemplary decisions that show how the federal courts have applied standing doctrine in several contexts involving challenges to agency actions.

- *Standard of Proof*. In *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669 (1973) (*SCRAP*), there was language in the Court's opinion suggesting that "an identifiable trifle" might be enough to show injury in support of standing. *Id.* at 689 n.14. The Court's later decision in *Lujan I* completely negates this suggestion. 497 U.S. at 889 (holding that *SCRAP* "is of no relevance" because it merely involved a motion to dismiss on the pleadings).

- *The Requirement of Standing for Each Type of Relief Sought*. [Most of the ensuing discussion comes from *Cierco v. Mnuchin*, 857 F.3d 407, 416–18 (D.C. Cir. 2017) (Edwards, J.)]. "[A] plaintiff must demonstrate standing separately for each form of relief sought." *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 185 (2000) (citing *City of Los Angeles v. Lyons*, 461 U.S. 95, 109 (1983)); *see also DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006) ("[O]ur standing cases confirm that a plaintiff must demonstrate standing for each claim he seeks to press."). In *Lyons*, the plaintiff sought damages, an injunction, and declaratory relief after police officers injured him in a chokehold. 461 U.S. at 97–98. During the course of the litigation, the Los Angeles Police Department implemented a six-month moratorium on the use of chokeholds, and Los Angeles then suggested that the case may be moot. *Id.* at 100–01. The Court acknowledged that, although the plaintiff "still ha[d] a claim for damages against [Los Angeles] that appear[ed] to meet all Art. III requirements," he no longer had standing to pursue his request for injunctive relief because of the "speculative nature of his claim that he will again experience injury." *Id.* at 109. "[T]he issue here is not whether [the damages] claim has become moot but whether Lyons meets the preconditions for asserting an injunctive claim in a federal forum." *Id.*

  Lyons shows that when one of a plaintiff's requests for relief expires—either because that relief is granted, the parties have settled, or the claim has otherwise become moot—a natural issue that arises is whether the plaintiff has standing to pursue related, remaining requests for relief. *Lyons* followed the Court's approach in *DeFunis v. Odegaard*, 416 U.S. 312 (1974), and *Super Tire Engineering Co. v. McCorkle*, 416 U.S. 115 (1974), and the principles that evolved have been followed by the courts ever since.

  The Court's decision in *Summers v. Earth Island Institute*, 555 U.S. 488 (2009), is another good example. The plaintiffs in that case sued the United States Forest Service for failing to apply notice-and-comment procedures when it approved the "Burnt Ridge Project." *Id.* at 491. The plaintiffs also challenged the underlying Forest Service regulations. *Id.* During the course of litigation, the parties "settled their dispute" regarding the Burnt Ridge Project specifically, but plaintiffs continued to press their challenge to the underlying regulations. *Id.* at 491–92. The Court, citing *Lyons*, found that the plaintiffs lacked standing to bring their remaining request for relief:

> We know of no precedent for the proposition that when a plaintiff has sued to challenge the lawfulness of certain action or threatened action but has settled that suit, he retains standing to challenge the basis for that action (here, the regulation in the abstract), apart from any concrete application that threatens imminent harm to his interests.

Id. at 494. After holding that the plaintiffs' first request for relief was moot, the Court analyzed their standing to continue litigating their remaining request. As suggested in *Lyons*, the central framework was clear: when plaintiffs settled one of their requests for relief, the natural question became whether they had standing to press for the additional remedies that had been sought in the complaint.

- *A Plaintiff's Injury Must Be Both Concrete and Particularized*. To establish injury in fact, a plaintiff must show that he or she suffered "an invasion of a legally protected interest" that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Spokeo*, 578 U.S. at 339 (citing *Lujan II*, 504 U.S. at 560). *Spokeo* explained that "[f]or an injury to be 'particularized,' it must affect the plaintiff in a personal and individual way." *Id.* The Court then added: "We have made it clear time and time again that an injury in fact must be both concrete *and* particularized." *Id.* at 340. "A 'concrete' injury must be '*de facto*'; that is, it must actually exist. When we have used the adjective 'concrete,' we have meant to convey the usual meaning of the term—'real,' and not 'abstract.' Concreteness, therefore, is quite different from particularization." *Id.*

  To determine whether an injury is concrete, "courts ... assess whether the alleged injury to the plaintiff has a 'close relationship' to a harm 'traditionally' recognized as providing a basis for a lawsuit in American courts." *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2204 (2021). Traditional injuries "such as physical harms and monetary harms" will "readily qualify as concrete injuries under Article III" *Id*. Those injuries where "plaintiffs have identified a close historical or common-law analogue" may also be found concrete. *Id*. In addition, various intangible harms can be concrete. Chief among them are injuries with a close relationship to harms traditionally recognized as providing a basis for lawsuits in American courts, including, for example, reputational harms, disclosure of private information, and intrusion upon seclusion, and those traditional harms may also include harms specified by the Constitution itself. *Id*. However, as explained above in Part One, the Supreme Court appears to have substantially cut back on Congress' role in determining whether certain harms are concrete. Thus, *TransUnion* makes it clear that the courts are ultimately responsible for determining whether an injury is concrete and particularized. *Id*. at 2204–05. The Supreme Court acknowledged that "courts must afford due respect to Congress's decision to impose a statutory prohibition or obligation on a defendant, and to grant a plaintiff a cause of action to sue over the defendant's violation of that statutory prohibition or obligation .... [However, Congress] may not simply enact an injury into existence, using its lawmaking power to transform something that is not remotely harmful into something that is." *Id*. at 2205.

- *Generalized Grievances* . For an injury to be particularized, sufficient to satisfy the first prong of the test of standing, it must "affect the plaintiff in a personal and individual way." *Lujan II*, 504 U.S. at 560 n.1, 561–64. A natural consequence of this requirement is that, if a plaintiff files a lawsuit against a government agency challenging "only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large," he will have failed to allege a cognizable injury-in-fact for the purposes of Article III standing. *Id.* at 573–74. As the Court has made clear, however, "[t]he fact that an injury may be suffered by a large number of people does not of itself make that injury a nonjusticiable generalized grievance." *Spokeo*, 578 U.S. at 339 n.7 (noting that "[t]he victims' injuries from a mass tort, for example, are widely shared, to be sure, but each individual suffers a particularized harm").

- *Suits in Which the Plaintiff is Not the Object of the Challenged Action or Inaction*. In *Lujan II*, Justice Scalia's plurality opinion offers a useful summary of this issue:

  > When the suit is one challenging the legality of government action or inaction, the nature and extent of facts that must be averred (at the summary judgment stage) or proved (at the trial stage) in order to establish standing depends considerably upon whether the plaintiff is himself an object of the action (or forgone action) at issue. If he is, there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it. When, however, as in this case, a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else,* much more is needed. In that circumstance, causation and redressability ordinarily hinge on the response of the regulated (or regulable) third party to the government action or inaction—and perhaps on the response of others as well. The existence of one or more of the essential elements of standing depends on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict, and it becomes the burden of the plaintiff to adduce facts showing that those choices have been or will be made in such manner as to produce causation and permit redressability of injury. Thus, when the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily substantially more difficult to establish.

  504 U.S. at 561–62.

- *Cases Straddling Impermissible "Generalized Grievance" Claims and Permissible "Third-Party" Claims*. The Supreme Court has never been entirely clear in discussing third-party claims (i.e., suits filed by claimants based on injuries suffered by parties who are not

before the court). *See Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 127 n.3 (2014) (noting that "[t]he limitations on third-party standing are hard[] to classify"). In 2023, the Court amplified a bit on third-party standing. The Higher Education Act of 1965 ("Higher Education Act"), 20 U.S.C.A. § 1070, grants the Secretary of Education ("Secretary") the authority to award federal financial aid to eligible students for their postsecondary education. In 2003, Congress enacted the Higher Education Relief Opportunities for Students Act ("HEROES Act"), granting the Secretary the power to modify or waive any provisions related to student financial aid programs under title IV of the Higher Education Act. 20 U.S.C. § 1098bb(a)(1). On August 24, 2022, the Secretary of Education, acting at the behest of the President, adopted a student debt relief plan to mitigate the financial impact of the COVID-19 pandemic. The Secretary asserted that the authority to provide one-time debt relief to COVID-affected federal student loan borrowers came from the HEROES Act. Six states opposed the student debt relief plan and filed a lawsuit to block it. *See* ***Biden v. Nebraska***, 143 S. Ct. 2355 (2023). Missouri claimed that it had standing because the reduction in loan repayments would affect the Higher Education Loan Authority of the State of Missouri ("MOHELA"), which Missouri contended was an extension of the state. The Supreme Court held that Missouri had standing even though MOHELA was not a party to the law suit, noting that:

> By law and function, MOHELA is an instrumentality of Missouri: It was created by the State to further a public purpose, is governed by state officials and state appointees, reports to the State, and may be dissolved by the State. The Secretary's plan will cut MOHELA's revenues, impairing its efforts to aid Missouri college students. This acknowledged harm to MOHELA in the performance of its public function is necessarily a direct injury to Missouri itself.

Id. at 2366. The Court also held that because Missouri had standing to sue, it need not assess the theories of standing raised by the other five states. *Id*. at 2365. In a very strong dissent, Justice Kagan argued that:

> We do not allow plaintiffs to bring suit just because they oppose a policy. Neither do we allow plaintiffs to rely on injuries suffered by others. Those rules may sound technical, but they enforce "fundamental limits on federal judicial power." *Allen v. Wright*, 468 U.S. 737, 750 (1984). They keep courts acting like courts. Or stated the other way around, they prevent courts from acting like this Court does today. The plaintiffs in this case are six States that have no personal stake in the Secretary's loan forgiveness plan. They are classic ideological plaintiffs: They think the plan a very bad idea, but they are no worse off because the Secretary differs. In giving those States a forum—in adjudicating their complaint—the Court forgets its proper role. The Court acts

> as though it is an arbiter of political and policy disputes, rather than of cases and controversies.

Nebraska, 143 S. Ct. at 2385.

- *Standing to Enforce Procedural Rights*. *Lujan II* makes clear that a claimant can enforce procedural rights "so long as the procedures in question are designed to protect some threatened concrete interest of his that is the ultimate basis of standing." *Id.* at 573 n.8. The Court offered the following example:

> "[P]rocedural rights" are special: The person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy. Thus, … one living adjacent to the site for proposed construction of a federally licensed dam has standing to challenge the licensing agency's failure to prepare an environmental impact statement, even though he cannot establish with any certainty that the statement will cause the license to be withheld or altered, and even though the dam will not be completed for many years …. What respondents' "procedural rights" argument seeks, however, is quite different from this: standing for persons who have no concrete interests affected—persons who live (and propose to live) at the other end of the country from the dam.

Id. at n.7.

In *Massachusetts v. EPA*, 549 U.S. 497 (2007), the Supreme Court appeared to adopt a more generous test than the test enunciated in *Lujan II*. The Court held that, with respect to procedural rights, a "litigant has standing if there is some possibility that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant." *Id.* at 518. The Court's decision in *Massachusetts* may be *sui generis*, however, because it involved an issue of state sovereignty. *Id.* at 518–19. Indeed, in *Summers*, which postdates *Massachusetts*, the Court adopted a test that closely mirrors *Lujan II*.

> [D]eprivation of a procedural right without some concrete interest that is affected by the deprivation—a procedural right *in vacuo*—is insufficient to create Article III standing. Only a person who has been accorded a procedural right to protect *his concrete interests* can assert that right without meeting all the normal standards for redressability and immediacy.

555 U.S. at 496.

- *Proof of Standing in the Appellate Courts*. When a challenge to standing is raised in

conjunction with an appellate court's direct review of a final order from an administrative agency there obviously is no record from a district court. And the agency record normally will not include any findings addressing standing, because Article III standing is not a prerequisite to participation in federal agency proceedings. *See Pfizer Inc. v. Shalala*, 182 F.3d 975, 980 (D.C. Cir. 1999). In such circumstances, a petitioner in the court of appeals is comparable to "a plaintiff moving for summary judgment in the district court" because it "does not ask the court merely to assess the sufficiency of its legal theory." *Sierra Club v. EPA*, 292 F.3d 895, 899 (D.C. Cir. 2002). Instead, "the petitioner is asking the court of appeals for a final judgment on the merits, based upon the application of its legal theory to facts established by evidence in the record [before the agency]." *Id.*

A petitioner must thus support each element of its claim to standing by affidavit or other evidence. "Its burden of proof is to show a 'substantial probability' that it has been injured, that the defendant caused its injury, and that the court could redress that injury." *Sierra Club*, 292 F.3d at 899; *see also Jackson Cnty., N.C. v. Fed. Energy Regul. Comm'n*, 589 F.3d 1284, 1288 (D.C. Cir. 2009) (applying the "substantial probability" test); *GrassRoots Recycling Network, Inc. v. EPA*, 429 F.3d 1109, 1112 (D.C. Cir. 2005) (same). When applying this test courts will not "conduct separate mini-trials on injury-in-fact, causation, and redressability" but rather "do their best based on [the materials before them] to assess whether the plaintiff's assertions suffice to show the elements of standing." *Carpenters Indus. Council v. Zinke*, 854 F.3d 1, 5 (D.C. Cir. 2017).

In cases involving petitions for review of administrative agency actions, "a petitioner whose standing is not selfevident [sic] should establish its standing by the submission of its arguments and any affidavits or other evidence appurtenant thereto at the first appropriate point in the review proceeding." *Sierra Club*, 292 F.3d at 900. A court of appeals may accept evidence outside of the administrative record, as necessary, to support a petitioner's entitlement to judicial review. *See, e.g.*, *Tex. Indep. Producers & Royalty Owners Ass'n v. EPA*, 410 F.3d 964, 972–73 (7th Cir. 2005) (holding that three affidavits presented with petitioner's reply brief were inadequate to establish standing, because they merely repeated the conclusory allegations in the opening brief). And in some instances, an appellate court may consider new materials addressing standing offered with a petition for rehearing. *See, e.g.*, *Nat. Res. Def. Council v. EPA*, 464 F.3d 1, 3, 7 n.6 (D.C. Cir. 2006).

If parties reasonably believe that their standing is self-evident, but the court disagrees, the court may instruct the parties to submit affidavits and supplemental briefs addressing standing. *See, e.g.*, *Pub. Citizen, Inc. v. Nat'l Highway Traffic Safety Admin.*, 489 F.3d 1279, 1296 (D.C. Cir. 2007) (noting that a court "retains the discretion" to ask the parties for supplemental submissions regarding standing). Alternatively, it can dismiss the case. *See, e.g.*, *Int'l Bhd. of Teamsters v. TSA*, 429 F.3d 1130, 1135–36 (D.C. Cir. 2005) (declining to accept petitioner's supplemental submissions in support of standing, because, on the evidentiary record before the court, petitioner "could not have reasonably believed its representational standing was self-evident"). In other words, a

court may do what is necessary to fulfill its responsibility to determine whether it has jurisdiction to hear a claim. *See Ams. for Safe Access v. DEA*, 706 F.3d 438, 444 (D.C. Cir. 2013) ("The point here is simple: under the law of this circuit, the members of a panel retain discretion to seek supplemental submissions on standing to fulfill the obligation of the court to determine whether the requirements of Article III have been met."). In all instances, however, the burden is on the petitioner to support its claim of standing. *Am. Chemistry Council v. Dep't of Transp.*, 468 F.3d 810, 820–21 (D.C. Cir. 2006).

D. Mootness

Because the exercise of judicial power under Article III depends upon the existence of a case or controversy, a federal court may not render advisory opinions or decide questions that do not affect the rights of parties properly before it. *See North Carolina v. Rice*, 404 U.S. 244, 246 (1971) (per curiam). A court's judgment must resolve "a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." *Id.* This means that an actual controversy must exist "at all stages of review, not merely at the time the complaint is filed." *Decker v. Nw. Env't Def. Ctr.*, 568 U.S. 597, 609 (2013).

A claim is moot when "the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome." *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013). But a case will become moot "only when it is impossible for a court to grant any effectual relief whatever to the prevailing party." *Knox v. Serv. Emps.*, 567 U.S. 298, 307 (2012). "As long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot." *Chafin v. Chafin*, 568 U.S. 165, 172 (2013); *see also Collins v. Yellen*, 141 S. Ct. 1761, 1780 (2021) (holding that claim was not moot because, even though plaintiffs "no longer [had] any ground" for prospective relief, they "retain[ed] an interest in the retrospective relief they [had] requested" in their complaint). Nonetheless, certain circumstances will typically moot a claim.

If a party dies or abandons litigation, the issues presented may no longer be live or the party may be found to lack a legally cognizable interest in the resolution of its claim, and dismissal for mootness will be appropriate. *See, e.g., Keitel v. Mazurkiewicz*, 729 F.3d 278, 280 (3d Cir. 2013) (party's habeas corpus petition was rendered moot by his death); *Karcher v. May*, 484 U.S. 72, 83 (1987) (party's decision not to pursue its appeal rendered case moot). Additionally, "[t]he settlement of an individual claim typically moots any issues associated with it." *United Airlines, Inc. v. McDonald*, 432 U.S. 385, 400 (1977) (Powell, J., dissenting). A settlement of a "tentative nature" will not, however, moot a claim, *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 465 n.3 (1978), nor will an unaccepted offer to settle, *Campbell-Ewald Co. v. Gomez*, 577 U.S. 153, 162, 165 (2016). In addition, intervening events may "make it impossible to grant the prevailing party effective relief" and so moot a claim. *Lemon v. Geren*, 514 F.3d 1312, 1315 (D.C. Cir. 2008); *see also, e.g.*, *United States v. Sec'y, Fla. Dep't of Corr.*, 778 F.3d 1223, 1228–29 (11th Cir. 2015) (challenge to preliminary injunction became moot after the injunction expired); *McCullough v.*

Graber, 726 F.3d 1057, 1060 (9th Cir. 2013) (challenge to prison's failure to place inmate in elderly offender pilot program became moot after the pilot program was discontinued); *Wyoming v. U.S. Dep't of Agric.*, 414 F.3d 1207, 1212 (10th Cir. 2005) (challenge to agency rule became moot after agency replaced the targeted regulation with a new rule).

Importantly, in the mass litigation context, application of the mootness doctrine involves special considerations. Thus, in a Rule 23 class action, when the named plaintiff's personal claim becomes moot, the entire class action does not become moot if the class is certified "prior to expiration of the named plaintiff's personal claim," or if the claims "are so inherently transitory that the trial court will not have even enough time to rule on a motion for class certification before the proposed representative's individual interest expires." *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 398–99 (1980); *see also JD v. Azar*, 925 F.3d 1291, 1311 (D.C. Cir. 2019) (per curiam) (explaining that the "inherently transitory" exception to mootness "requires [the court] to determine (i) whether the individual claim might end before the district court has a reasonable amount of time to decide class certification, and (ii) whether some class members will retain a live claim at every stage of litigation. An affirmative answer to both questions ordinarily will suffice to trigger relation back [that will keep the case live]."). *But see Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 73–74 (2013) (case appropriately dismissed as moot because a collective action under the Fair Labor Standards Act is "fundamentally different from" a Rule 23 action and because collective-action allegations alone are not enough to support justiciability where the claim of the only plaintiff to the suit is moot).

There are two principal exceptions to mootness. The first pertains to cases that are both "capable of repetition" and of "evading review." *S. Pac. Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911). This exception allows for judicial review "where (1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again." *Kingdomware Techs. v. United States*, 579 U.S. 162, 170 (2016). The classic example is described in *Roe v. Wade*, 410 U.S. 113 (1973). The plaintiff, who challenged Texas criminal abortion statutes, was pregnant when she filed suit, but the pregnancy came to term during the course of the litigation. The Court recognized that finding the plaintiff's claim to be moot would mean that "pregnancy litigation seldom will survive much beyond the trial stage, and appellate review will be effectively denied." *Id.* at 125. Because "[p]regnancy often comes more than once to the same woman," the Court concluded that pregnancy was "a classic justification for a conclusion of nonmootness," because it was "capable of repetition, yet evading review." *Id.*; *see also Kingdomware Techs.*, 579 U.S. at 170 (exception applied to short-term contracts). *But see United States v. Sanchez-Gomez*, 138 S. Ct. 1532, 1540–42 (2018) (exception did not apply to claim regarding use of particular physical restraints during criminal proceedings once current proceedings terminated, as the Court "assumed that litigants w[ould] conduct their activities within the law and so avoid prosecution and conviction as well as exposure to the challenged course of conduct").

The second principal exception involves a party's "voluntary cessation" of the challenged activity. *See, e.g.*, *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953). As a general rule, a

defendant's "voluntary cessation of allegedly illegal conduct does not deprive [a court] of power to hear and determine the case." *Cnty. of L.A. v. Davis*, 440 U.S. 625, 631 (1979). If a defendant could moot a case simply by ceasing its challenged practice, "the courts would be compelled to leave the defendant … free to return to his old ways." *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000). Accordingly, "a defendant claiming that its voluntary compliance moots a case bears the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." *Id.* at 190. Thus, for instance, a defendant's "own statement that it would be uneconomical" for it to resume its voluntarily-ceased behavior "cannot suffice to satisfy the heavy burden of persuasion." *United States v. Concentrated Phosphate Exp. Ass'n*, 393 U.S. 199, 203 (1968). In addition, the defendant must show that "interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." *Davis*, 440 U.S. at 631. In the agency context, it is not enough for an agency to repeal a challenged action; the agency must also show that it will not reimpose that action should the litigation be resolved in its favor. *See West Virginia v. EPA*, 142 S. Ct. 2587, 2594 (2022).

Although the burden to demonstrate "voluntary cessation" is heavy, it is not insurmountable. In *Already, LLC v. Nike, Inc.*, 568 U.S. 85 (2013), the shoe manufacturer Nike brought a trademark action against a competitor, claiming that the competitor's product infringed and diluted Nike's trademark. The competitor countersued, claiming that Nike's trademark was invalid. Nike subsequently issued a covenant not to sue and then moved to dismiss the counterclaim on the grounds that it was moot. *Id.* at 88–89. Focusing on the language of the covenant, the Court concluded that the case was moot "because the challenged conduct cannot reasonably be expected to recur." *Id.* at 95. In particular, it relied upon the "breadth" of the covenant—the fact that it was "unconditional and irrevocable" and not only prevented Nike from filing suit, but also "from making any claim *or* any demand" of the competitor, its distributors, or customers and covered current and previous designs, as well as any colorable imitations. *Id.* at 93 (emphasis in original). The Court found that "it is hard to imagine a scenario that would potentially infringe Nike trademark and not fall under the Covenant," especially given the fact that Nike had, in court, taken the position "that there was no prospect of [an infringing] shoe." *Id.* at 94.

Although the Article III case-or-controversy limitation on federal judicial authority underpins both standing and mootness, *Friends of the Earth, Inc. v. Laidlaw Env't Services (TOC), Inc.*, 528 U.S. 167 (2000), makes clear that the two doctrines differ in important respects. In *Friends of the Earth*, the plaintiffs sued under the citizen-suit provisions of the Clean Water Act to enjoin the defendant's violation of the statute and to require the defendant to pay a civil penalty to the government. *Id.* at 177. The district court determined that injunctive relief was inappropriate because the defendant's violations of the statute had ceased after litigation commenced. *Id.* at 173. However, the court assessed a civil penalty against the defendant to forestall future violations. The court of appeals reversed the imposition of the fine, holding that the case was moot once the defendant fully complied with the terms of the statute. *Id.* It reasoned that all elements of Article III standing must exist throughout the litigation and that the only remedy available after the defendant's violations had ceased—civil penalties payable to the government—did not redress any injury to the plaintiff. The Supreme Court reversed, holding

that "the Court of Appeals confused mootness with standing." *Id.* at 189.

In *Friends of the Earth*, the Court rejected its prior statements that "[t]he requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)." *Id.* In doing so, the Court explained that "if mootness were simply 'standing set in a time frame,' the exception to mootness that arises when the defendant's allegedly unlawful activity is 'capable of repetition, yet evading review,' could not exist." *Id.* at 190. The Court looked to the distinct functions of standing and mootness to explain why "there are circumstances in which the prospect that a defendant will engage in (or resume) harmful conduct may be too speculative to support standing, but not too speculative to overcome mootness." *Id.*

> Standing doctrine functions to ensure, among other things, that the scarce resources of the federal courts are devoted to those disputes in which the parties have a concrete stake. In contrast, by the time mootness is an issue, the case has been brought and litigated, often (as here) for years. To abandon the case at an advanced stage may prove more wasteful than frugal. This argument from sunk costs does not license courts to retain jurisdiction over cases in which one or both of the parties plainly lack a continuing interest, as when the parties have settled or a plaintiff pursuing a nonsurviving claim has died. But the argument surely highlights an important difference between the two doctrines.

Id. at 191–92.

The *Friends of the Earth* opinion followed easily from earlier decisions holding that if a plaintiff challenges both a specific action and the policy that underlies that action, the challenge to the policy is not necessarily mooted merely because the challenge to the particular action is moot. For example, in *Super Tire Engineering Co. v. McCorkle*, 416 U.S. 115 (1974), employers sought declaratory and injunctive relief to prevent New Jersey from granting state welfare benefits to striking workers on the ground that the state's actions violated federal labor law. *Id.* at 117–19. The Court held that because the strike that prompted the suit ended before the case was resolved, the employer's request for an injunction preventing payment of welfare benefits during the strike was moot. *Id.* at 121–22. However, the Court also held that the employer's request for declaratory relief was not moot, because the challenged governmental action had not ceased and the employer's relationship with the union would be continually affected by the "fixed and definite" state policy of giving welfare benefits to strikers. *Id.* at 122–24. Nevertheless, when a plaintiff who has sued to challenge the lawfulness of certain action settles that suit, he does not retain Article III standing to challenge the regulation that was the basis for that action, apart from any concrete application that threatens imminent harm to his interests. *See Summers v. Earth Island Inst.*, 555 U.S. 488, 494 (2009).

E. The Overlapping Doctrines of Finality, Ripeness, Exhaustion of Administrative Remedies, and Issue Waiver

The doctrines of finality, ripeness, exhaustion of administrative remedies, and issue waiver each require a court to determine whether there has been an adequate opportunity for an agency to fully consider a matter with respect to which judicial review is sought. Given this common focus, it is sometimes difficult to discern which doctrine controls in a given case. This is particularly true with respect to finality, ripeness, and exhaustion. *See Ticor Title Ins. Co. v. FTC*, 814 F.2d 731, 732 (D.C. Cir. 1987).

1. The Finality Doctrine

There is a "strong presumption" that judicial review of administrative action is available only after a challenged action is "final." *Bell v. New Jersey*, 461 U.S. 773, 778 (1983). The finality doctrine seeks "[t]o avoid premature intervention in the administrative process," *CSI Aviation Servs., Inc. v. U.S. Dep't of Transp.*, 637 F.3d 408, 411 (D.C. Cir. 2011), which "squanders judicial resources" and can "disrupt[] the agency's processes," *CSX Transp., Inc. v. Surface Transp. Bd.*, 774 F.3d 25, 31 (D.C. Cir. 2014).

Finality is sometimes a jurisdictional requirement. Certain statutes placing subject matter jurisdiction over challenges to agency action in the federal courts explicitly limit that jurisdiction to review of "final" agency action. *See, e.g.*, 28 U.S.C. § 2342(5) (providing for review under the Hobbs Act of "all … final orders of the Surface Transportation Board made reviewable by section 2321 of this title"); 42 U.S.C. § 7607(b)(1) (providing for review under the Clean Air Act of "final action taken[] by the Administrator under this chapter"); 49 U.S.C. § 1153(a) (providing for review under the Federal Aviation Act of "final order[s] of the National Transportation Safety Board"). Courts have confirmed the obvious—that under such statutory provisions, finality is a jurisdictional requirement. *See, e.g.*, *CSX Transp., Inc.*, 774 F.3d at 28 (Hobbs Act); *Nat. Res. Def. Council v. EPA*, 559 F.3d 561, 564 (D.C. Cir. 2009) (Clean Air Act). Additionally, Congress may explicitly identify the types of agency orders and regulations that constitute final actions subject to judicial review. *See, e.g.*, 47 U.S.C. § 402(b) (describing orders and decisions of the Federal Communications Commission that are subject to review under the Communications Act of 1934); 42 U.S.C. § 7607(b)(1) (describing actions of the Administrator of the Environmental Protection Agency ("EPA") that are subject to review under the Clean Air Act). In such instances, courts need only decide whether the challenged action fits within the statutorily-prescribed category. *See, e.g.*, *Mata v. Lynch*, 576 U.S. 143, 147–51 (2015) (deciding that the challenged Board of Immigration Appeals action fit the Immigration and Nationality Act's statutory definition of "final order of removal").

When a statute fails to explicitly limit review to final agency action, courts apply the tools of statutory construction to decide whether the statutory language providing for judicial review

implies a finality requirement. This inquiry is informed by a "strong presumption … that judicial review will be available only when agency action becomes final." *Bell*, 461 U.S. at 778. The presumption in favor of finality is grounded in the belief that judicial review should not "disrupt the administrative process." *Id.* at 779. Perhaps not surprisingly, then, courts rarely interpret statutes to permit judicial review of nonfinal agency action. *See, e.g.*, *Berkshire Envt'l Action Team, Inc. v. Tenn. Gas Pipeline Co.*, 851 F.3d 105, 108–11 (1st Cir. 2017) (strong presumption not overcome in Clean Water Act); *Columbia Riverkeeper v. U.S. Coast Guard*, 761 F.3d 1084, 1091–93 (9th Cir. 2014) (strong presumption not overcome in Energy Policy Act); *Meredith v. Fed. Mine Safety & Health Rev. Comm'n*, 177 F.3d 1042, 1046–48 (D.C. Cir. 1999) (strong presumption not overcome in Federal Mine Safety and Health Act).

When finality is implied, it is often not immediately apparent whether it is a jurisdictional or non-jurisdictional requirement, though jurisdictional status is often assumed without explanation. *See, e.g.*, *Molycorp, Inc. v. EPA*, 197 F.3d 543, 545 (D.C. Cir. 1999) (Resource Conservation and Recovery Act); *Champion Int'l Corp. v. EPA*, 850 F.2d 182, 187–90 (4th Cir. 1988) (Clean Water Act). When a rationale is offered, practical considerations generally play a prominent role. *See, e.g.*, *Fed. Power Comm'n v. Metro. Edison Co.*, 304 U.S. 375, 383–84 (1938) (finding that finality in the Federal Power Act was jurisdictional because holding otherwise would "afford[] opportunity for constant delays in the course of the administrative proceeding … [and] would do violence to the manifest purpose of the provision").

The Administrative Procedure Act ("APA") contains the most notable example of a finality requirement that is *not* jurisdictional. The APA explicitly limits judicial intervention in the administrative process to review of "final agency action." 5 U.S.C. § 704. However, because the APA does not confer subject matter jurisdiction, the finality requirement has been interpreted to be non-jurisdictional. *Reliable Automatic Sprinkler Co. v. Consumer Prod. Safety Comm'n*, 324 F.3d 726, 731 (D.C. Cir. 2003); *see also Trudeau v. FTC*, 456 F.3d 178, 184 n.7 (D.C. Cir. 2006). Like any requirement that is nonjurisdictional, the objection that an action is not final will be forfeited if not timely raised. *See Marcum v. Salazar*, 694 F.3d 123, 128 (D.C. Cir. 2012). However, despite an agency's failure to seek dismissal on finality grounds, a court may, on its own motion, dismiss a claim under the ripeness doctrine. *See id.* at 129–30. And under the Supreme Court's decision in *Abbott Lab'ys v. Gardner*, 387 U.S. 136 (1967), finality is a factor to be considered in determining whether a claim is "fit," and thus ripe for review. *See id.* at 149; *see also* Section E.2, *infra* (discussing ripeness).

In *Bennett v. Spear*, 520 U.S. 154 (1997), the Supreme Court outlined two conditions that generally must be satisfied for an agency action to be final.

> First, the action must mark the consummation of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow.

Id. at 177–78 (1997); *see also U.S. Army Corps of Eng'rs v. Hawkes Co.*, 578 U.S. 590, 597 (2016).

This two-pronged test applies both when determining finality under the APA, *see, e.g.*, *Ctr. for Auto Safety v. Nat'l Highway Traffic Safety Admin.*, 452 F.3d 798, 800 (D.C. Cir. 2006), and when determining finality under other direct review provisions, *see, e.g.*, *Salinas v. R.R. Ret. Bd.*, 141 S. Ct. 691, 697 (2021) (Railroad Retirement Act and Railroad Unemployment Insurance Act); *Friedman v. FAA*, 841 F.3d 537, 541 (D.C. Cir. 2016) (Federal Aviation Act); *In re Murray Energy Corp.*, 788 F.3d 330, 334 (D.C. Cir. 2015) (Clean Air Act); *Blue Ridge Env't Def. League v. Nuclear Regul. Comm'n*, 668 F.3d 747, 753 (D.C. Cir. 2012) (Hobbs Act).

The first prong of *Bennett*—that the action mark the consummation of the agency's decisionmaking process—derives from "the procedural philosophy pertaining to the federal courts whereby, ever since the first Judiciary Act, Congress has been loath to authorize review of interim steps in a proceeding," *Rochester Tel. Corp. v. United States*, 307 U.S. 125, 131 (1939). This philosophy "is predicated upon the perception that litigants as a group are best served by a system which prohibits piecemeal appellate consideration of rulings that may fade into insignificance" by the time proceedings conclude. *CSX Transp., Inc.*, 774 F.3d at 31. The second prong—that the action determines rights or obligations or creates legal consequences—ensures that judicial review is not advisory. *See Chi. & S. Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 113 (1948).

Regarding the first prong, the Supreme Court has taken a practical approach. In *Whitman v. American Trucking Ass'ns*, 531 U.S. 457 (2001), it recognized that "the agency ha[d] not dressed its decision with the conventional procedural accoutrements of finality." *Id.* at 479. Nevertheless, relying on the agency's "refus[al] in subsequent rulemakings to reconsider" the challenged interpretation, the Court found that the agency's "own behavior … belies the claim that its interpretation is not final." *Id.* The Court has also recognized that "[t]he mere possibility that an agency might reconsider [its interpretation] … does not suffice to make an otherwise final agency action nonfinal." *Sackett v. EPA*, 566 U.S. 120, 127 (2012). The possibility of an agency reconsidering a decision "is a common characteristic of agency action, and does not make an otherwise definitive decision nonfinal." *Hawkes*, 578 U.S. at 598.

Application of *Bennett*'s second prong, requiring legal consequences, is also governed by a pragmatic approach. "The law in this area is hardly crisp [and] lacks many self-implementing, bright-line rule[s], given the pragmatic and flexible nature of the inquiry as a whole." *Rhea Lana, Inc. v. Dep't of Lab.*, 824 F.3d 1023, 1027 (D.C. Cir. 2016). Thus, courts have recognized that potential legal consequences can count for purposes of finality. In *Rhea Lana,* for example, the Department of Labor advised Rhea Lana in a letter that it was in violation of the Fair Labor Standards Act. The letter stated that the Department was "putting the company on notice and taking no further action." *Id.* at 1026. However, the letter also advised that because Rhea Lana was on notice of its violation, it would be subject to additional penalties for "repeated or willful violations." *Id.* Even though the Department had not committed to bringing an enforcement action, the court found that Rhea Lana's exposure to increased penalties was a legal consequence under *Bennett*'s second prong. *Id.* at 1030; *see also Sackett*, 566 U.S. at 126 (compliance order was final agency action because the order "exposes the Sacketts to double penalties in a future enforcement proceeding," even where the agency had not committed to bringing an

enforcement action). In these cases, courts do not scrutinize whether the regulated party would actually be subject to increased penalties in a future proceeding, but rather "assume the consequences … to be what the Government asserts." *Sackett*, 566 U.S. at 126 n.3; *see also Rhea Lana*, 824 F.3d at 1032 ("We can take the [agency] at its word to the regulated party that [the regulated party would suffer consequences]."); *Safari Club Int'l v. Jewell*, 842 F.3d 1280, 1289 (D.C. Cir. 2016).

However, not all potential consequences of agency actions will meet *Bennett*'s second prong, even under a pragmatic approach. Courts distinguish agency action that requires a change in conduct by regulated parties from agency action that simply seeks voluntary compliance. In *National Mining Association v. McCarthy*, 758 F.3d 243 (D.C. Cir. 2014), for example, the court found that the agency's "Final Guidance" did not have legal consequences because it "d[id] not tell regulated parties what they must do or may not do in order to avoid liability [and] …. may not be the basis for an enforcement action against a regulated entity." *Id.* at 252. "[W]hile regulated parties may feel pressure to voluntarily conform their behavior … there has been no order compelling the regulated entity to do anything." *Id.* at 253; *see also Holistic Candlers & Consumers Ass'n v. FDA*, 664 F.3d 940, 944 (D.C. Cir. 2012) (agency warning letter had no legal consequences because it sought to achieve "voluntary compliance"); *Reliable Automatic Sprinkler Co.*, 324 F.3d at 732 ("[T]he request for voluntary compliance clearly has no legally binding effect.").

When a party seeks pre-enforcement review of agency action —that is, when a party challenges agency action before the agency has enforced the challenged regulation—courts have made clear that the finality requirement need not bar review. *See CSI Aviation Servs.*, 637 F.3d at 411 ("*Bennett* … does not foreclose all pre-enforcement challenges."). "[S]ometimes Congress expressly authorizes preenforcement review …." *Shalala v. Ill. Council on Long Term Care, Inc.*, 529 U.S. 1, 13 (2000) (citing 15 U.S.C. § 2618(a)(1)(A) (Toxic Substances Control Act)); *see also* 29 U.S.C. § 655(f) (expressly authorizing pre-enforcement review of Occupational Safety and Health Administration standards). When pre-enforcement review is not expressly authorized, courts apply the "finality requirement in a flexible and pragmatic way." *Ciba-Geigy Corp. v. EPA*, 801 F.2d 430, 435 (D.C. Cir. 1986). The key question is "whether the agency's position is definitive and whether it has a direct and immediate effect on the day-to-day business of the parties challenging the action." *Id.* at 436.

The flexible, pragmatic approach to finality in pre-enforcement claims derives from *Abbott Lab'ys v. Gardner*, 387 U.S. 136 (1967), in which the Supreme Court held that publication of regulations by the Food and Drug Commissioner, after announcement in the Federal Register and consideration of comments by interested parties, was final agency action properly subject to declaratory and injunctive relief even though the agency had yet to institute an enforcement action against the complaining drug manufacturers. The Court relied on the fact that the regulations, which required prescription drug manufacturers to include certain information on drug labels and in advertisements, were "definitive" statements of the Commission's position "made effective upon publication." *Id.* at 151. The Court pointed to a statement of the Assistant General Counsel for Food and Drugs announcing that compliance was expected and noted that violation of the regulations, which carried the "status of law," was subject to "heavy criminal and

civil sanctions." *Id.* at 151–52. Based on these factors, the Court concluded that the regulations amounted to "final agency action within the meaning of … the Administrative Procedure Act, 5 U.S.C. § 704." *Id.* at 149.

The Court's pragmatic approach to finality in pre-enforcement claims does not mean that every agency action that has an immediate effect on a party will be considered final. In *FTC v. Standard Oil Company of California*, 449 U.S. 232 (1980), for example, an oil company challenged a Federal Trade Commission ("FTC") complaint prior to the FTC's adjudication of the charges contained therein. *Id.* at 234–35. The company alleged that the FTC had no reason to believe that the company was violating the Federal Trade Commission Act. The Court held that mere issuance of the complaint was not "final agency action" or otherwise "directly reviewable" under Section 704 of the APA, *id.* at 238, because, among other things, the FTC's averment that the company was violating the Act was "not a definitive statement of position," *id.* at 241.

The Court in *Standard Oil* contrasted the regulations at issue in that case with those in *Abbott Laboratories*. Unlike the "definitive statement" in *Abbott Laboratories*, the Court in *Standard Oil* described the agency regulation at issue as only a "threshold determination" that further inquiry was warranted through enforcement proceedings. *Id.* And unlike the regulation in *Abbott Laboratories* that carried "the status of law," the charges at issue had "no legal force … nor any comparable effect upon [the oil company's] daily business." *Id.* at 239, 242. The Court rejected the argument that the expense and disruption of protracted adjudicatory proceedings would have the same sort of legal and practical effect on the oil company that the regulation in *Abbott Laboratories* had on the complaining drug manufacturers. Because the legal force and practical effect upon the company's "daily business" was no greater "than the disruptions that accompany any major litigation," the Court found that the issuance of the complaint was "not a definitive ruling or regulation." *Id.* at 243.

Of course, a party seeking pre-enforcement review of agency action must still demonstrate that it has standing to bring the challenge. *See Sabre, Inc. v. U.S. Dep't of Transp.*, 429 F.3d 1113, 1117 (D.C. Cir. 2005). And, "[p]re-enforcement judicial review of an agency's policy is available only if the dispute is ripe." *Teva Pharm. USA, Inc. v. Sebelius*, 595 F.3d 1303, 1308 (D.C. Cir. 2010); *see also* Section E.2, *infra* (discussing ripeness).

2. The Ripeness Doctrine

Even if a litigant satisfies the Article III subject matter jurisdiction and standing requirements, and a challenged agency action is final, a court may refrain from reviewing the action if the case is not ripe for review. *See Texas v. United States*, 523 U.S. 296, 300–02 (1998); *Toilet Goods Ass'n v. Gardner*, 387 U.S. 158, 160–61 (1967); *Abbott Lab'ys v. Gardner*, 387 U.S. 136, 148–49 (1967). The ripeness doctrine is "drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction." *Reno v. Catholic Soc. Servs., Inc.*, 509 U.S. 43, 57 n.18 (1993). The Second Circuit succinctly summarizes how these two distinct rationales

inform the ripeness doctrine.

> "Ripeness" is a term that has been used to describe two overlapping threshold criteria for the exercise of a federal court's jurisdiction. Both are concerned with whether a case has been brought prematurely, but they protect against prematureness in different ways and for different reasons. The first of these ripeness requirements has as its source the Case or Controversy Clause of Article III of the Constitution, and hence goes, in a fundamental way, to the existence of jurisdiction. The second is a more flexible doctrine of judicial prudence, and constitutes an important exception to the usual rule that where jurisdiction exists a federal court must exercise it.
>
> These two forms of ripeness are not coextensive in purpose. Constitutional ripeness is a doctrine that, like standing, is a limitation on the power of the judiciary. It prevents courts from declaring the meaning of the law in a vacuum and from constructing generalized legal rules unless the resolution of an actual dispute requires it. But when a court declares that a case is not prudentially ripe, it means that the case will be *better* decided later and that the parties will not have constitutional rights undermined by the delay. It does not mean that the case is not a real or concrete dispute affecting cognizable current concerns of the parties within the meaning of Article III …. Prudential ripeness is, then, a tool that courts may use to enhance the accuracy of their decisions and to avoid becoming embroiled in adjudications that may later turn out to be unnecessary or may require premature examination of, especially, constitutional issues that time may make easier or less controversial.

Simmonds v. INS, 326 F.3d 351, 356–57 (2d Cir. 2003). Put another way, the ripeness doctrine "is designed to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Wyo. Outdoor Council v. U.S. Forest Serv.*, 165 F.3d 43, 50 (D.C. Cir. 1999) (quoting *Abbott Lab'ys*, 387 U.S. at 148–49).

Questions regarding ripeness most frequently arise when a regulated party claims to be threatened by a future agency enforcement action. *See, e.g.*, *Navegar, Inc. v. United States*, 103 F.3d 994, 998 (D.C. Cir. 1997) (citing *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298–99 (1979)). When pre-enforcement judicial review is sought under the Administrative Procedure Act ("APA"), *Abbott Lab'ys v. Gardner*, 387 U.S. 136 (1967), sets forth two factors relevant to the ripeness inquiry: "(1) the fitness of the issues for judicial decision and (2) the hardship to the parties of withholding court consideration." *Nat'l Park Hosp. Ass'n v. Dep't of Interior*, 538 U.S. 803, 808 (2003) (citing *Abbott Lab'ys*, 387 U.S. at 149). Importantly, because the "hardship" prong is "not an independent requirement divorced from the consideration of the

institutional interests of the court and agency," *Payne Enters., Inc. v. United States*, 837 F.2d 486, 493 (D.C. Cir. 1988), if there are no institutional interests favoring postponement of review, a party need not demonstrate that withholding review would create a hardship. *See, e.g.*, *Consol. Rail Corp. v. United States*, 896 F.2d 574, 577–78 (D.C. Cir. 1990).

The first prong of *Abbott Laboratories*, calling for an analysis of the fitness of the issues for judicial decision, 387 U.S. at 149, looks to (1) whether the issue is "purely legal," rather than one reliant on agency expertise, *id*.; (2) whether the challenged action is "final," *id*.; and (3) whether "the impact … upon the petitioners is sufficiently direct and immediate as to render the issue appropriate for judicial review," *id.* at 152. In other words, the "fitness" of an issue for judicial review turns on whether a court's consideration of the case "would benefit from further factual development" and "whether judicial intervention would inappropriately interfere with further administrative action." *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 733 (1998); *see also Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 479–80 (2001). Under this prong, a court may also consider whether delaying review until a later date would "present the court with a richer and more informative factual record." *Sabre, Inc. v. Dep't of Transp.*, 429 F.3d 1113, 1119 (D.C. Cir. 2005). These considerations protect "the agency's interest in crystallizing its policy before that policy is subjected to judicial review and the court's interests in avoiding unnecessary adjudication and in deciding issues in a concrete setting." *Eagle-Picher Indus. v. EPA*, 759 F.2d 905, 915 (D.C. Cir. 1985).

If there are institutional interests favoring delay of judicial review, the courts must consider *Abbott Laboratories*' second prong—the hardship to the parties of withholding review. To meet this prong, a litigant must show that "adverse effects of a strictly legal kind," *Ohio Forestry Ass'n*, 523 U.S. at 733, would "flow from requiring a later challenge to [the] regulation," *Toilet Goods Ass'n*, 387 U.S. at 164. Critically, hardship will not be found when a complaining party "is not required to engage in, or to refrain from, any conduct." *Texas v. United States*, 523 U.S. at 301; *see also Am. Tort Reform Ass'n v. Occupational Safety & Health Admin.*, 738 F.3d 387, 396–97 (D.C. Cir. 2013) (holding that an interpretive statement on a matter about which the agency lacks authority to issue binding regulations is, *a fortiori*, unripe for review because the statement has no legal consequences). And "mere uncertainty as to the validity of a legal rule" will generally not "constitute[] a hardship for purposes of the ripeness analysis." *Nat'l Park Hospitality Ass'n*, 538 U.S. at 811. *But see Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 670 n.2 (2010) (finding that an arbitration panel decision compelling class action arbitration was ripe for review, because "[s]hould petitioners refuse to proceed … they would almost certainly be subject to a petition to compel arbitration").

Because the ripeness doctrine derives in part from Article III limitations on judicial power, the hardship inquiry often mirrors the analysis for determining whether a party has suffered an injury-in-fact sufficient to satisfy Article III standing. *See Navegar, Inc.*, 103 F.3d at 998; *see also Nat'l Park Hospitality Ass'n*, 538 U.S. at 810 (noting that petitioners suffered no "practical harm" as a result of the disputed agency regulation); *Toilet Goods*, 387 U.S. at 164 (holding that the case was not ripe for judicial review because the impact of the disputed regulation could not "be said to be felt immediately by those subject to it in conducting their day-to-day affairs" and "no

irremediabl[y] adverse consequences flow[ed] from requiring a later challenge"). However, unlike the threshold, constitutional injury-in-fact requirement, "the size of the harm matters tremendously in determining whether a claim is ripe." *Airline Prof'ls Ass'n v. Airborne, Inc.*, 332 F.3d 983, 988 n.4 (6th Cir. 2003). This is because ripeness requires "balanc[ing] the institutional interests in postponing review against the hardship to the parties that will result from delay." *Nat'l Ass'n of Home Builders v. U.S. Army Corps of Eng'rs*, 440 F.3d 459, 465 (D.C. Cir. 2006).

The hardship prong also differs from the injury-in-fact requirement in that it focuses on the impact of the agency action on the complaining party's "primary conduct." *Better Gov't Ass'n v. U.S. Dep't of State*, 780 F.2d 86, 93 (D.C. Cir. 1986). The Supreme Court fleshed out this notion in *Toilet Goods Association v. Gardner*, 387 U.S. 158 (1967), a case decided the same day as *Abbott Laboratories*.

In *Toilet Goods*, an association of cosmetics manufacturers and several individual manufacturers and distributors sought declaratory and injunctive relief from certain regulations that allegedly exceeded the statutory authority of the Secretary of Health, Education, and Welfare and the Commissioner of Food and Drugs. Applying the first prong of the ripeness test, the Court noted that there could "be no question that [the] regulation—promulgated in a formal manner after notice and evaluation of submitted comments—[was] a 'final agency action' under" Section 704 of the APA. *Id.* at 162. It also found that the issue presented "a purely legal question" of the type "that courts have occasionally dealt with without requiring a specific attempt at enforcement." *Id.* at 163.

Despite the fact that these first two factors suggested that the issue was one fit for judicial review, the Court concluded that they were "outweighed by other considerations," including the fact that the regulation did no more than "serve[] notice … that the Commissioner may under certain circumstances order inspection of certain facilities and data." *Id.* The Court noted that it had "no idea whether or when such an inspection [would] be ordered and what reasons the Commissioner [might] give to justify his order." *Id.* Since the statute authorized the agencies "to promulgate regulations 'for the efficient enforcement' of the Act," the Court found that its ability to review the regulation would benefit from facts regarding the enforcement issues faced by the agency, and that review was "likely to stand on a much surer footing in the context of a specific application of [the] regulation than could be the case in the framework of the generalized challenge made here." *Id.* at 163–64.

Having found that a challenge to an application of the regulation would put the case on surer footing for purposes of judicial review, the Court next considered the regulation's effect on petitioners, noting that "the test of ripeness … depends not only on how adequately a court can deal with the legal issue presented, but also on the degree and nature of the regulation's present effect on those seeking relief." *Id.* at 164. The Court found that the impact of the cosmetics regulation could not "be said to be felt immediately by those subject to it in conducting their day-to-day affairs." *Id.* As the Court explained, the regulation did not involve "a situation in which primary conduct is affected—when contracts must be negotiated, ingredients tested or substituted, or special records compiled." *Id.* All the regulation did was allow the Commissioner

to authorize certain inspections. No change in behavior or action in advance of those inspections was required of cosmetics manufacturers, who had for many years been under a statutory duty to permit reasonable inspections. The Court concluded that none of the adverse consequences that might flow from requiring a later challenge could be considered substantial enough to support a finding of ripeness. A refusal to allow the inspections at issue would not, as the Court explained, result in a seizure of goods, heavy fines, adverse publicity, or the possibility of criminal liability. "[R]efusal to admit an inspector here would at most lead only to a suspension of certification services to the particular party, a determination that can then be promptly challenged through an administrative procedure, which in turn is reviewable by a court." *Id.* at 165.

If review of agency action is sought under a statute's direct review provision, rather than under the APA, the ripeness inquiry may differ. "Some statutes permit broad regulations to serve as the 'agency action,' and thus to be the object of judicial review directly, even before the concrete effects normally required for APA review are felt." *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 891 (1990). Under these statutes, "Congress has specifically instructed the courts to review 'pre-enforcement.'" *Ohio Forestry Ass'n,* 523 U.S. at 737; *see, e.g.*, 15 U.S.C. § 2618 (Toxic Substances Control Act); 30 U.S.C. § 1276(a) (Surface Mining Control and Reclamation Act of 1977); 42 U.S.C. § 7607(b) (Clean Air Act).

Typically, these statutes provide a set time during which parties may seek pre-enforcement review of agency action. *See, e.g.*, 29 U.S.C. § 655(f) ("Any person who may be adversely affected by a standard issued under this section may at any time prior to the sixtieth day after such standard is promulgated file a petition … for a judicial review of such standard."). Statutory time limitations for judicial review may be "jurisdictional and unalterable." *Microwave Comm'ns, Inc. v. FCC*, 515 F.2d 385, 389 (D.C. Cir. 1974). If a party fails to meet a statutory filing deadline in the mistaken belief that the case was unripe for review, a later filing will be dismissed as untimely. *See Eagle-Picher Indus.,* 759 F.2d at 912 ("[P]etitioners confound the obligations of the court with those of the petitioner. It is the duty of the court to make the prudential judgment whether a challenge to agency action is ripe; it is the responsibility of petitioners to file for review within the period set by Congress. While it is true that in extraordinary circumstances we have 'forgiven' a petitioner's failure to file a timely petition, we have never suggested that petitioners may safely substitute their own notions of timely review for those of Congress."); *JEM Broad. Co. v. FCC*, 22 F.3d 320, 325 (D.C. Cir. 1994) (holding that "challenges to the procedural lineage of agency regulations, whether raised by direct appeal, by petition for amendment or rescission of the regulation or as a defense to an agency enforcement proceeding, will not be entertained outside the [filings limitation] period provided by statute").

Finally, it should be noted that appellate courts have discretion to address ripeness even when the parties have not raised the issue. In *Reno v. Catholic Social Services, Inc.*, 509 U.S. 43 (1993), the Supreme Court explained:

> We have noted that ripeness doctrine is drawn both from Article III limitations

> on judicial power and from prudential reasons for refusing to exercise jurisdiction. *See, e.g.*, *Buckley v. Valeo,* 424 U.S. 1, 114 (1976) (per curiam); *Socialist Labor Party v. Gilligan,* 406 U.S. 583, 588 (1972). Even when a ripeness question in a particular case is prudential, we may raise it on our own motion, and "cannot be bound by the wishes of the parties." *Regional Rail Reorganization Act Cases,* 419 U.S. 102, 138 (1974).

Id. at 57 n.18. Additionally, however, in *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 559 U.S. 662 (2010), the Court suggested (without directly holding) that it was obliged to address petitioner's claim that the case was "constitutionally unripe," even though the argument was "not pressed in or considered by the courts below." *Id.* at 670 n.2. Similarly, in *Metropolitan Washington Airports Authority v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252 (1991), the Court stated that "[a]lthough petitioners do not press [ripeness] on appeal, it concerns our jurisdiction under Article III, so we must consider the question on our own initiative." *Id.* at 265 n.13. Taken together, these cases strongly suggest that, as with challenges to subject matter jurisdiction, standing, and mootness, appellate courts must address legitimate concerns that a case is constitutionally unripe, regardless of whether they are raised by the parties.

3. Exhaustion of Administrative Remedies

"The doctrine of exhaustion of administrative remedies is well established in the jurisprudence of administrative law." *Woodford v. Ngo*, 548 U.S. 81, 88 (2006) (quoting *McKart v. United States*, 395 U.S. 185, 193 (1969)). It provides, with certain exceptions, "that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." *Id.* at 88–89 (quoting *McKart*, 395 U.S. at 193). Administrative exhaustion obligates a party to avail itself of all of the "steps that [an] agency holds out, and [to] do[] so *properly* (so that the agency addresses the issues on the merits)." *Id.* at 90 (emphasis in original).

A requirement that a party exhaust available administrative remedies before seeking judicial review may be either jurisdictional or nonjurisdictional. *Avocados Plus Inc. v. Veneman*, 370 F.3d 1243, 1247 (D.C. Cir. 2004). Jurisdictional exhaustion "arises when Congress requires resort to the administrative process as a predicate to judicial review. This [type of] exhaustion is rooted, not in prudential principles, but in Congress' power to control the jurisdiction of the federal courts." *Id.* In contrast, nonjurisdictional exhaustion "is a judicially created doctrine requiring parties who seek to challenge agency action to exhaust available administrative remedies before bringing their case to court." *Id.* at 1247. If a party fails to exhaust administrative remedies that are jurisdictional, "a court cannot excuse it"—judicial review is foreclosed. *Id.* at 1247–48. If an exhaustion requirement is nonjurisdictional, a court may excuse it, even if mandatory, if good reason exists to do so. *See Munsell v. Dep't of Agric.*, 509 F.3d 572, 579 (D.C. Cir. 2007); *Avocados Plus*, 370 F.3d at 1247; *cf. Woodford*, 548 U.S. at 101 (when exhaustion is not jurisdictional, a court may "dismiss plainly meritless claims without first addressing what may be a much more

complex question, namely, whether the [party seeking judicial review] did in fact properly exhaust available administrative remedies").

"Whether a statute requires exhaustion" as a jurisdictional prerequisite to judicial review "is purely a question of statutory interpretation." *Avocados Plus*, 370 F.3d at 1247. The courts presume that exhaustion requirements are nonjurisdictional "unless Congress states in clear, unequivocal terms that the judiciary is barred from hearing an action until the administrative agency has come to a decision." *Id.* at 1248. Indeed, even a "mandatory exhaustion requirement" will not be deemed to be jurisdictional if it does not "contain the type of sweeping and direct language that would indicate a jurisdictional bar rather than a mere codification of administrative exhaustion requirements." *Munsell*, 509 F.3d at 579–80; *see Avocados Plus*, 370 F.3d at 1248 (providing examples of language courts had found to require jurisdictional exhaustion, including "[n]o proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon …. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do"). *Santos-Zacaria v. Garland*, 143 S. Ct. 1103, 1114-15 (2023) (exhaustion statute addressed to "court" and limiting "review" is not jurisdictional). Thus, "[a]bsent a clear direction from Congress, 'the exhaustion requirement is treated as an element of the underlying claim.'" *Munsell*, 509 F.3d at 580 (quoting *Avocados Plus*, 370 F.3d at 1248).

If exhaustion is jurisdictional, a party may not avoid this mandatory congressional prerequisite to review by invoking the general federal question jurisdiction of 28 U.S.C. § 1331. *See Avocados Plus*, 370 F.3d at 1248 n.3 (holding that "[g]eneral federal question jurisdiction under 28 U.S.C. § 1331 does not empower the court to proceed to the merits in a jurisdictional exhaustion case"). And "[w]here a statute provides that particular agency action is reviewable at the instance of one party, who must first exhaust administrative remedies, the inference that it is not reviewable at the instance of other parties, who are not subject to the administrative process, is strong." *Sackett v. EPA*, 566 U.S. 120, 130 (2012).

Nonjurisdictional exhaustion "serves the twin purposes of protecting administrative agency authority and promoting judicial efficiency." *McCarthy v. Madigan*, 503 U.S. 140, 145 (1992). It gives an agency a chance to correct its own errors, promotes efficiency in grievance processing, gives parties and courts the benefit of agency expertise, and allows for the creation of a record adequate for judicial review. *See Woodford*, 548 U.S. at 89; *Avocados Plus*, 370 F.3d at 1247. Nonjurisdictional "exhaustion requirements are designed to deal with parties who do not want to exhaust." *Woodford*, 548 U.S. at 90. And the doctrine allowing courts to enforce these provisions "creates an incentive for these parties to do what they would otherwise prefer not to do, namely, to give the agency a fair and full opportunity to adjudicate their claims." *Id.*

However, "judge-made exhaustion doctrines, even if flatly stated at first, remain amenable to judge-made exceptions," *Ross v. Blake*, 578 U.S. 632, 639 (2016), and administrative law contains a number of "well-established exceptions to [nonjurisdictional] exhaustion," *Woodford*, 548 U.S. at 103–04 (Breyer, J., concurring in the judgment) (citing, as examples, *Shalala v. Ill.*

Council on Long Term Care, Inc., 529 U.S. 1, 13 (2000) (futility); *McCarthy*, 503 U.S. at 147–48 (inadequate or unavailable administrative remedies); *McKart*, 395 U.S. at 197–201 (hardship)).

These exceptions exist because there are times when requiring exhaustion of administrative remedies will not fulfill the ends the doctrine is designed to serve. "There may be no facts in dispute, the disputed issue may be outside the agency's expertise, or the agency may not have the authority to change its decision in a way that would satisfy the challenger's objections." *Avocados Plus*, 370 F.3d at 1247. In addition, a party's case may be prejudiced by requiring resort to the administrative process, or the process may be otherwise unfair because of agency "bias." In these circumstances, the … court may, in its discretion, excuse [nonjurisdictional] exhaustion [requirements] if the litigant's interests in immediate judicial review outweigh the government's interests in the efficiency or administrative autonomy that the exhaustion doctrine is designed to further." *Id.* If in the face of a nonjurisdictional exhaustion provision, a court elects not to require exhaustion, the case "may proceed under § 1331." *Id.* at 1248 n.3. If, however, a "court rules that a plaintiff must exhaust, and the plaintiff proceeds to do so, judicial review of the agency's decision will be under the relevant provision for review of that agency's action." *Id*.

Claimants seeking judicial review of administrative action under the Administrative Procedure Act ("APA") face slightly different considerations with respect to exhaustion. The Supreme Court has held that Section 704 of the APA bars courts from imposing "additional exhaustion requirements beyond those provided by Congress or an agency." *Darby v. Cisneros*, 509 U.S. 137, 146–47 (1993). In other words, "in cases in which the APA applies, requiring a party to exhaust administrative remedies is not a matter of judicial discretion." *Marine Mammal Conservancy, Inc. v. Dep't of Agric.*, 134 F.3d 409, 411 (D.C. Cir. 1998). No exhaustion, beyond what is prescribed by statute or regulation, may be required by a reviewing court. *Darby*, 509 U.S. at 146–47; *see also CSX Transp., Inc. v. Surface Transp. Bd.*, 584 F.3d 1076, 1079 (D.C. Cir. 2009) ("*Darby* stands for the proposition that absent a statutory or regulatory requirement to the contrary, courts have no authority to require petitioners seeking judicial review of a final agency action to further exhaust administrative procedures.").

The last sentence of Section 704 allows an agency to prescribe, by rule, that there will be no operative agency action until the matter in dispute has been addressed by a "superior agency authority." 5 U.S.C. § 704. When an agency has availed itself of this option, there is no "final agency action" sufficient to secure judicial review pursuant to Section 704 until an appeal has been taken to the designated superior agency authority and that authority has rendered judgment on the matter. The last sentence in Section 704 accordingly pertains to both "finality" and "exhaustion." When agency rules require aggrieved parties to seek review from a "superior agency authority," this is a matter of exhaustion. However, action must be taken by the superior agency authority in order for there to be final agency action that is subject to judicial review. In other words, a party can exhaust administrative remedies without there being final agency action. The former does not necessarily determine the latter. Exhaustion focuses on a party's actions in pursuit of final agency action on a disputed matter. Finality focuses on the agency's disposition of a claim. *See, e.g.*, *Bennett v. Spear*, 520 U.S. 154, 177 (1997) (explaining that, in order to be final, the agency action must be one by which "rights or obligations have been

determined, or from which legal consequences will flow").

4. Issue Waiver

In *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33 (1952), the Supreme Court held that "[s]imple fairness to those who are engaged in the tasks of administration, and to litigants, requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice." *Id.* at 37. This means that, "[a]s a general matter, it is inappropriate for courts reviewing appeals of agency decisions to consider arguments not raised before the administrative agency involved." *1000 Friends of Md. v. Browner*, 265 F.3d 216, 227 (4th Cir. 2001); *accord Wallaesa v. FAA*, 824 F.3d 1071, 1078 (D.C. Cir. 2016) ("It is a hard and fast rule of administrative law, rooted in simple fairness, that issues not raised before an agency are waived and will not be considered by a court on review." (quoting *Nuclear Energy Inst., Inc. v. EPA*, 373 F.3d 1251, 1297 (D.C. Cir. 2004))).

L.A. Tucker Truck Lines involved an agency adjudication, but the principle followed by the Court is routinely applied in cases involving agency rulemaking proceedings. *See Appalachian Power Co. v. EPA*, 251 F.3d 1026, 1036 (D.C. Cir. 2001) ("It is black-letter administrative law that absent special circumstances, a party must initially present its comments to the agency during the rulemaking in order for the court to consider the issue."); *Mich. Dep't of Env't Quality v. Browner*, 230 F.3d 181, 183 n.1 (6th Cir. 2000) (concluding that issues not raised during notice-and-comment period were waived for purposes of appellate review).

Determining whether an issue was adequately raised before the agency is not always straightforward. "The question … is not simply whether it was raised in some fashion, but whether it was raised with sufficient precision, clarity, and emphasis to give the agency a fair opportunity to address it." *Ctr. for Sustainable Econ. v. Jewell*, 779 F.3d 588, 602 (D.C. Cir. 2015). An agency cannot be expected to glean a party's argument from "snippets" in its objections. *Id.*

In *Koretoff v. Vilsack*, 707 F.3d 394 (D.C. Cir. 2013), the court pointed out that, "[w]hile there are surely limits on the level of congruity required between a party's arguments before an administrative agency and the court, respect for agencies' proper role in the *Chevron* framework requires that the court be particularly careful to ensure that challenges to an agency's interpretation of its governing statute are first raised in the administrative forum." *Id.* at 398; *see also* Chapter XIV, *infra* (discussing judicial review of an agency's interpretation of its authorizing statute under the *Chevron* framework). The court acknowledged that "[i]t is certainly true that agencies are required to ensure that they have authority to issue a particular regulation," but added that "agencies have no obligation to anticipate every conceivable argument about why they might lack such statutory authority." *Koretoff*, 707 F.3d at 398. The burden is on the party who seeks to challenge an agency action to be sure that the disputed issue is properly raised with the agency and preserved for review.

The scope of the rule that parties cannot urge arguments and objections before a court that were not presented to the agency was clarified by the Supreme Court's decision in *Carr v. Saul*, 141 S. Ct. 1352 (2021). Therein, the Supreme Court described the theoretical underpinnings of the "issue-exhaustion" requirement—a requirement that is often treated as synonymous with issue waiver. *See Advocs. for Highway and Auto Safety v. Fed. Motor Carrier Safety Admin.*, 429 F.3d 1136, 1149 (D.C. Cir. 2005). The Commissioner for Social Security had, under the facts presented in *Carr*, asked for the Court "to impose a judicially created issue-exhaustion requirement" in order to foreclose review of the petitioners' arguments on the merits. *See* 141 S. Ct. at 1358. In rejecting the Commissioner's request, the Court elaborated upon the test for determining whether to impose an issue exhaustion requirement within a particular context:

> "The desirability of a court imposing a requirement of issue exhaustion depends on the degree to which the analogy to normal adversarial litigation applies in a particular administrative proceeding." *Sims* [*v. Apfel*, 530 U.S. 103, 109 (2000)]. In conducting this inquiry, courts must take care not to "reflexively assimilate the relation of ... administrative bodies and the courts to the relationship between lower and upper courts." *Id.* at 110. Instead, "the inquiry requires careful examination of the characteristics of the particular administrative procedure provided." 530 U.S. at 113 (O'Connor, J., concurring in part and concurring in judgment). The critical feature that distinguishes adversarial proceedings from inquisitorial ones is whether claimants bear the responsibility to develop issues for adjudicators' consideration.
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> … "[T]he rationale for requiring issue exhaustion is at its greatest" when "the parties are expected to develop the issues in an adversarial administrative proceeding," but "the reasons for a court to require issue exhaustion are much weaker" when "an administrative proceeding is not adversarial." [*Sims*,] 530 U.S. at 110.

Id. at 1358–59 (internal quotations and citations omitted). Because the Court found that the proceedings at issue in the case "were [not] adversarial enough to support the 'analogy to judicial proceedings' that undergirds judicially created issue-exhaustion requirements," *see id.* at 1360 (quoting *Sims*, 530 U.S. at 112 (plurality opinion)), it held that imposition of an issue-exhaustion requirement by several courts of appeals had been inappropriate, *id.* at 1362; *see also Sims*, 530 U.S. at 110–12 (plurality opinion) (declining to impose an issue exhaustion requirement because the Social Security proceedings at issue were highly informal, "inquisitorial rather than adversarial," and typically involved claimants who were not represented by attorneys).

There is an important exception to the waiver doctrine enunciated in *L.A. Tucker Truck Lines*. Generally, before an agency promulgates a legislative rule, it must provide the public with adequate notice followed by an opportunity to comment on the proposed rule. *See* 5 U.S.C. § 553(b), (c). If a final rule is not a "logical outgrowth" of a proposed rule, a court will hear

arguments not raised before the agency, because the contesting party did not have fair notice of the issue and thus could not be expected to comment during the agency's rulemaking procedure. "[A] final rule fails the logical outgrowth test … where interested parties would have had to divine the agency's unspoken thoughts, because the final rule was surprisingly distant from the proposed rule." *CSX Transp., Inc. v. Surface Transp. Bd.*, 584 F.3d 1076, 1080 (D.C. Cir. 2009); *see Int'l Union, United Mine Workers of Am. v. Mine Safety & Health Admin.*, 407 F.3d 1250, 1259 (D.C. Cir. 2005) ("[A] final rule is a 'logical outgrowth' of a proposed rule only if interested parties should have anticipated that the change was possible, and thus reasonably should have filed their comments on the subject during the notice-and-comment period.").

There are also several nuances relevant to the *L.A. Tucker Truck Lines* doctrine. First, it is not always necessary "that the party seeking judicial review of an issue be the party that provided the [agency] with the opportunity to pass on the issue." *Bartholdi Cable Co. v. FCC*, 114 F.3d 274, 280 (D.C. Cir. 1997); *see, e.g.*, *Off. of Commc'n of the United Church of Christ v. FCC*, 779 F.2d 702, 707 (D.C. Cir. 1985). Moreover, "where issues by their nature could not have been raised before the agency (*e.g.*, a material change in circumstances or a serious impropriety in the administrative process), a remand to the agency may be appropriate." *Wash. Ass'n for Television & Children v. FCC*, 712 F.2d 677, 682 (D.C. Cir. 1983). And in some cases, courts consider "arguments that … would have been futile to raise before the agency," for example, when the agency's views are already well-known. *Id.* at 682 & n.9. Finally, it should be noted that if an agency does not argue that an issue was waived, the objection may be lost. *See, e.g.*, *Colo. Wild v. Forest Serv.*, 435 F.3d 1204, 1216 n.3 (10th Cir. 2006).

Chapter XII. The Parameters of Judicial Review of Agency Actions

If a party challenging agency action satisfies the requirements of Article III standing and the challenged agency action is final and has the force of law, there is a "strong presumption" that Congress intends that judicial review be available, *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670 (1986), assuming review is not barred by sovereign immunity or foreclosed by the mootness, ripeness, exhaustion, or waiver doctrines. This presumption of reviewability will control in all but those rare instances when an authorizing or enabling statute provides clear and convincing evidence of a congressional intent to (1) preclude review of the action at issue or (2) commit the action solely to agency discretion by providing no standard against which the action can be judged. Sections 701(a)(1) and (a)(2) of the Administrative Procedure Act ("APA") reflect these exceptions to the presumption of reviewability, foreclosing an APA cause of action when an agency's authorizing or enabling statute demonstrates that Congress intended to bar review. *See* 5 U.S.C. § 701(a)(1), (2). A congressional intent to foreclose review raises a "jurisdictional" issue which cannot be waived or forfeited and must be addressed on the court's own motion if it possesses any doubt as to its power to resolve the particular issue. *See, e.g.*, *Briscoe v. Bell*, 432 U.S. 404, 407–09 (1977); *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 353 n.4 (1984) ("[C]ongressional preclusion of judicial review is in effect jurisdictional …."). *But see Sierra Club v. Jackson*, 648 F.3d 848, 854 (D.C. Cir. 2011) (relying in part on precedent pertaining to Section 704, defining a cause of action under the APA, to hold that a complaint seeking review of agency action committed to agency discretion under Section 702(a)(2) implicates the ability of a party to state a claim, not the court's subject matter jurisdiction).

There are also non-jurisdictional bases that serve to foreclose judicial review of agency actions. When an agency action is not final or lacks the force of law, the action normally is not reviewable. Thus, for example, judicial review is generally unavailable for policy statements and interpretive rules—the terms most frequently used to characterize a variety of non-final, informal agency actions. However, if an agency acts to enforce the terms of a policy statement or an interpretive rule, the affected party may challenge the legality of the policy or rule. In addition, a purported policy statement or interpretive rule is subject to review if it is determined that it is meant to bind the agency in its regulatory actions. In such instances, the purported policy statements and interpretive rules are recognized for what they are—final agency actions that effectively have the force of law and consequently are subject to judicial review.

A. Challenges to Final Actions Having the Force of Law: The Presumption of Reviewability and Its Exceptions

An agency action normally is final and has the force of law if it is achieved through the informal rulemaking or formal hearing procedures prescribed by Sections 553, 556, and 557 of the APA. *See United States v. Mead Corp.*, 533 U.S. 218, 230 (2001); *Pac. Gas & Elec. Co. v. Fed. Power Comm'n*, 506 F.2d 33, 38 (D.C. Cir. 1974). These provisions produce forward-looking,

generally applicable substantive rules—commonly referred to as legislative rules or regulations. Case-by-case adjudications resulting in trial-like records that provide the factual basis for agency judgments and orders also create binding precedent that carries the force of law. *See Pac. Gas & Elec. Co.*, 506 F.2d at 38. So, too, do agency prosecutions of parties alleged to have violated the statutes and regulations an agency is authorized to enforce. *Mead*, 533 U.S. at 226–27. Judicial review of these sorts of administrative actions "is the norm in our legal system." *Mach Mining, LLC v. EEOC*, 575 U.S. 480, 495 (2015).

"From the beginning," the Supreme Court has recognized that "judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress." *Bowen v. Mich. Acad. of Fam. Physicians*, 476 U.S. 667, 670 (1986). The "generous review provisions" of the APA, which provide a cause of action "not only for review of 'agency action made reviewable by statute' but also for review of 'final agency action for which there is no other adequate remedy in a court,'" "embod[y this] basic presumption." *Abbott Lab'ys v. Gardner*, 387 U.S. 136, 140–41 (1967) (quoting 5 U.S.C. § 704), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977); *see also City of Rochester v. Bond*, 603 F.2d 927, 931 (D.C. Cir. 1979) (noting that the presumption of reviewability is "codified" in APA Section 702). And, "[b]ecause the presumption favoring interpretations of statutes to allow judicial review of administrative action is well-settled," Congress is assumed to "legislate[] with knowledge of [it]." *Kucana v. Holder*, 558 U.S. 233, 251–52 (2010). Consequently, whether a party challenging agency action claims jurisdiction and a cause of action based on (1) provisions in an agency's authorizing or enabling statute, (2) 28 U.S.C. § 1331 and the APA, (3) 28 U.S.C. § 1331 and an implied cause of action derived from the Constitution, or (4) some combination of these and other special federal question jurisdictional statutes, a reviewing court begins with the "strong presumption" that Congress intends judicial review. *See, e.g.*, *Cuozzo Speed Techs. v. Lee*, 579 U.S. 261, 273 (2016) (acknowledging the "strong presumption" favoring judicial review that applies in interpreting statutory review provisions, including those that may limit or preclude review); *Bowen*, 476 U.S. at 670, 679–81 (starting with the "strong presumption" in favor of judicial review in concluding that a provision of the Social Security Act did not bar resort to the jurisdictional grant of 28 U.S.C. § 1331); *Guerrero-Lasprilla v. Barr*, 140 S. Ct. 1062, 1069–70 (2020) (applying the presumption to a statutory provision specifically designed to limit judicial review of immigration removal orders, but which preserved review of "questions of law," in holding that the provision could be "reasonably interpret[ed]" to permit review of "the application of law to undisputed facts"); *but see Patel v. Garland*, --- S. Ct. ---, 2022 WL 1528346, at *11 (May 16, 2022) (declining to apply the presumption "[b]ecause the statute is clear" and holding that judicial review of factual findings by the Attorney General in immigration removal proceedings was barred by statute).

Although "Congress rarely intends to prevent courts from enforcing its directives to federal agencies," the presumption of judicial review is rebuttable. *Mach Mining*, 575 U.S. at 486. "Since different congressional enactments have distinct purposes and use diverse means to achieve them, each case raising an administrative reviewability question must be analyzed on the basis of the specific statutory provisions involved." *Briscoe v. Bell*, 432 U.S. 404, 413–14 (1977).

The presumption may be overcome "when [the] language or structure [of an authorizing or enabling statute] demonstrates that Congress wanted an agency to police its own conduct." *Mach Mining*, 575 U.S. at 486. However, given the strength of the presumption of reviewability, statutory claims will be rebutted "only upon a showing of clear and convincing evidence" of congressional intent to bar review. *Abbott Lab'ys*, 387 U.S. at 141; *accord Cuozzo*, 579 U.S. at 273. In the case of "mine-run" statutory claims, *Cuozzo,* 579 U.S. at 266, the necessary clear and convincing evidence may be "drawn from 'specific language,' 'specific legislative history,' and 'inferences of intent drawn from the statutory scheme as a whole.'" *Id.* at 273 (quoting *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 349–50 (1984)); *see also Sackett v. EPA*, 566 U.S. 120, 128–31 (2012); *Webster v. Doe*, 486 U.S. 592, 600–01 (1988). "[W]here substantial doubt about the congressional intent exists," the presumption favoring review controls. *Bowen*, 476 U.S. at 672 n.3. But, "[i]f the intent of Congress [to preclude review of agency action] is unmistakable[,] … the only remaining issue is whether prohibiting judicial review is constitutionally permissible." *Briscoe*, 432 U.S. at 414.

When a constitutional challenge to a final agency action is brought, an even more specific showing of a congressional intent to preclude review is necessary. There must be clear and convincing evidence that Congress intended to bar not simply judicial review, but judicial review of constitutional challenges in particular. *See Webster*, 486 U.S. at 603–04 (the language and structure of the authorizing statute making clear that a statutory claim was precluded under APA Section 701(a)(2) because there was no law to apply, did not provide requisite evidence of intent to bar constitutional claims); *Ralls Corp. v. Comm. on Foreign Inv. in U.S.*, 758 F.3d 296, 308 (D.C. Cir. 2014) (a "particularly rigorous clear-and-convincing standard" applies in determining Congressional intent to bar judicial review of constitutional claims); *see also Johnson v. Robison*, 415 U.S. 361, 367–74 (1974) (finding that nothing in the text or legislative history of the relevant authorizing statute provided the requisite clear and convincing evidence of congressional intent to bar review of constitutional claims); *Weinberger v. Salfi*, 422 U.S. 749, 762 (1975) (*Robison* established that if a claim is made that a statute bars all review of constitutional claims, such a restriction would be "extraordinary, such that clear and convincing evidence would be required before [the Court] would ascribe such intent to Congress").

This "heightened showing" is required "in part to avoid the 'serious constitutional question' that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim." *Webster*, 486 U.S. at 603 (citing *Bowen*, 476 U.S. at 681 & n.12). It consequently applies only when Congress purports to deny all judicial forums to the proponent of a colorable constitutional claim. *Elgin v. Dep't of Treasury*, 567 U.S. 1, 9 (2012); *see also Weinberger*, 422 U.S. at 762. It "does not apply where Congress simply channels judicial review of a constitutional claim to a particular court." *Elgin*, 567 U.S. at 9. In such instances, if the specified court is "capable of providing meaningful review," the constitutional issue is avoided, and the only question is whether it is "fairly discernable" from the relevant statute that Congress intended to limit the venue for such claims to the identified court. *Id.* at 10.

1. Statutory Preclusion of Judicial Review

In assessing whether Congress has expressed an intent to preclude judicial review (the exception codified in Section 701(a)(1) of the APA) courts look first to the language of the relevant authorizing or enabling statute. *See, e.g.*, *Cuozzo*, 579 U.S. at 271 (finding review of a decision of the Patent Office precluded because "[f]or one thing, that is what [the authorizing statute] says[:] … the 'determination by the Patent Office whether to institute an inter partes review under this section shall be final and nonappealable'"). But given the "heavy burden" of overcoming the "strong presumption" of reviewability, *Mach Mining, LLC v. EEOC*, 575 U.S. 480, 486 (2015), the analysis generally does not stop there even when statutory language rebutting the presumption is clear on its face. In *Briscoe v. Bell*, 432 U.S. 404 (1977), for example, the Court began its jurisdictional analysis with the relevant language of the then-controlling provision of the Voting Rights Act. That provision stated: "a 'determination or certification of the Attorney General or of the Director of the Census under this section … shall not be reviewable in any court and shall be effective upon publication in the Federal Register.'" *Id.* at 409–10 (quoting Section 4(b) of the Voting Rights Act). The Court found the language "absolute on its face," noting that it "would appear to admit of no exceptions" permitting judicial review. *Id.* at 410. Nonetheless, the Court also looked to the purposes and legislative history of the Act, *see id.* at 410–11, concluding that they "strongly support this straightforward interpretation," *id.* at 410. Finally, the Court consulted prior precedent "indicat[ing] that the words of the statute mean what they say." *Id.* at 411; *see also id.* at 411–12.

Although clearly important, explicit language is not an absolute prerequisite to a finding that judicial review is unavailable. As the Court made clear in *Block v. Community Nutrition Institute*, 467 U.S. 340 (1984), statutory detail and complexity may, by implication, provide the necessary indication of congressional intent to preclude review, especially when preclusion does not pose a threat to the realization of statutory objectives. *See id.* at 349–53.

The question in *Block* was whether consumers of dairy products could obtain judicial review of milk market orders issued by the Secretary of Agriculture under the Agricultural Marketing Agreement Act. The Act provided, among other things, for agreements among the Secretary, milk producers, and milk handlers; for hearings involving these parties; for votes by producers and handlers; and for administrative appeals by handlers. But the Act did not provide for participation by consumers in any of these proceedings.

The Court reasoned that "when a statute provides a detailed mechanism for judicial consideration of particular issues at the behest of particular persons, judicial review of those issues at the behest of other persons may be found to be impliedly precluded." *Id.* at 349. Moreover, because the claimed cause of action "would severely disrupt [a] complex and delicate administrative scheme" and permit parties to evade statutory requirements, *id.* at 348, the Court found that judicial review sought by consumers was precluded. It explained: "In a complex scheme of this type, the omission of [a provision for participation by consumers] is sufficient reason to believe that Congress intended to foreclose consumer participation in the regulatory

process." *Id.* at 347. "Had Congress intended to allow consumers to attack provisions of marketing orders [via judicial review], it surely would have required them to pursue the administrative remedies [required of handlers]. The restriction of the administrative remedy to handlers strongly suggests that Congress intended a similar restriction of judicial review of market orders." *Id.*

Importantly, the Court has also warned against a reductionist reading of the implied preclusion analysis of *Block*. "[T]he mere fact that some acts are made reviewable should not suffice to support an implication of exclusion as to others. The right to review is too important to be excluded on such slender and indeterminate evidence of legislative intent." *Bowen*, 476 U.S. at 674 (quoting *Abbott Lab'ys*, 387 U.S. at 141).

In *Sackett v. EPA*, 566 U.S. 120 (2012), the Court rejected reliance by the Environmental Protection Agency ("EPA") on just such slender evidence of a congressional intent to preclude review. Citing *Block*, the EPA argued that because the Clean Water Act provides for prompt judicial review of penalties imposed after an administrative hearing, judicial review of agency compliance orders—for which the Act provided no review—was precluded. *See id.* at 128. The petitioners had received a compliance order instructing them to remove dirt and rocks with which they had filled a portion of their property. The in-fill allegedly violated the Clean Water Act. Petitioners sought review of the order before the EPA, claiming that their property was not subject to the Act. The EPA denied a hearing, and petitioners brought a civil action seeking injunctive and declaratory relief.

The Court rejected the EPA's argument that judicial review was precluded by omission, explaining: "[I]f the express provision of judicial review in one section of a long and complicated statute were alone enough to overcome the APA's presumption of reviewability for all final agency action, it would not be much of a presumption at all." *Id.* at 129. Distinguishing *Block*, the *Sackett* Court said: "Where a statute provides that particular agency action is reviewable at the instance of one party, who must first exhaust administrative remedies, the inference that it is not reviewable at the instance of other parties, who are not *subject* to the administrative process, is strong." *Id.* at 130 (emphasis in original). In contrast, the Court found that with respect to the Sacketts, "there is no suggestion that Congress has sought to exclude compliance-order recipients from the Act's review scheme; quite to the contrary, the Government's case is premised on the notion that the Act's primary review mechanisms are open to the Sacketts." *Id.* Notably, in response to the government's warning that the EPA would be less likely to use compliance orders if they were subject to judicial review, the Court stated: "That may be true—but it will be true for all agency actions subjected to judicial review. The APA's presumption of judicial review is a repudiation of the principle that efficiency of regulation conquers all." *Id.*

Perhaps more obviously, if a statutory scheme explicitly precludes judicial review of some actions by an agency, those bars cannot be read to imply that Congress intended to prohibit review of other actions by the agency. In *Bowen*, the Court analyzed a statute that explicitly barred judicial review of a particular form of agency action. 476 U.S. at 678. The Court concluded that this express prohibition did "not impliedly insulate[] from judicial review" the remaining

forms of agency action. *Id.*; *see also El Paso Nat. Gas. Co. v. United States*, 750 F.3d 863, 888 (D.C. Cir. 2014) (that "Congress did explicitly bar review as to *some* [agency] action …. implies that it did not intend judicial review to be foreclosed as to other [agency] actions"). *See generally Collins v. Yellen*, 141 S. Ct. 1761, 1776 (2021) (in evaluating applicability of statutory provision that explicitly precluded judicial review of actions for which agency acted as conservator, Court was required to determine whether plaintiffs' statutory claim challenged actions taken while agency was "exercising its powers or functions as a conservator").

Notably, when the requisite clear and convincing showing of congressional intent to preclude review is implied, rather than resting on explicitly preclusive statutory language, "judicial review of agency action for alleged statutory violations" may nonetheless be available "in certain limited circumstances." *Nyunt v. Chairman, Broad. Bd. of Governors*, 589 F.3d 445, 449 (D.C. Cir. 2009). This limited review authority, which derives from pre-APA precedent permitting review of *ultra vires* executive action "unauthorized by the statute under which [the executive] assumes to act," *Am. Sch. of Magnetic Healing v. McAnnulty*, 187 U.S. 94, 108 (1902), was articulated in *Leedom v. Kyne*, 358 U.S. 184 (1958), and refined in *Board of Governors of Federal Reserve System v. MCorp Financial, Inc.*, 502 U.S. 32 (1991). *See also Dart v. United States*, 848 F.2d 217, 221–22 (D.C. Cir. 1988) (discussing the doctrine of *Leedom*).

Under the *Leedom/MCorp* formulation of this very limited exception to implied preclusion, review and remedy are possible only if two prerequisites are met. First, as characterized in *Leedom*, the agency action must be challenged as "contrary to a specific prohibition" in the agency's authorizing act that is "clear and mandatory." 358 U.S. at 188. Put more broadly, review under *Leedom* will be available only if the action is challenged as a "patent[] … misconstruction" of an agency's authorizing or enabling statute or as having been taken without regard to "a specific and unambiguous statutory directive" or in violation of a "specific command" in the statute. *Griffith v. Fed. Lab. Rels. Auth.*, 842 F.2d 487, 493 (D.C. Cir. 1988). A "contention [that] amounts to an alleged 'garden-variety' error by the [agency], one in the nature of a factual dispute or a mixed question of law and fact, rather than [a] claim of a statutory violation that is plain on its face," is not enough. *Lepre v. Dep't of Lab.*, 275 F.3d 59, 74 (D.C. Cir. 2001); *see also Boire v. Greyhound Corp.*, 376 U.S. 473, 481 (1964) (*Leedom* exception does not extend to "Board orders in certification proceedings whenever it can be said that an erroneous assessment of the particular facts before the Board has led it to a conclusion which does not comport with the law").

Second, it must be the case that precluding review "would wholly deprive [the complaining party] of a meaningful and adequate means of vindicating its statutory rights." *MCorp*, 502 U.S. at 43; *see also Nat'l Air Traffic Controllers Ass'n v. Fed. Serv. Impasses Panel*, 437 F.3d 1256, 1264–66 (D.C. Cir. 2006). In other words, if the party seeking review has a "meaningful and adequate opportunity for judicial review" of the challenged agency action through another means, review will not be available under *Leedom*. *See MCorp*, 502 U.S. at 43.

It is also important to note that *Leedom/MCorp* review is only available when the challenged agency action carries the force of law. *See Bowler v. Hawke*, 320 F.3d 59, 60 (1st Cir. 2003) (declining to resolve whether the agency determination was *ultra vires* because it "was set forth

in an informal opinion letter which does not appear to carry the force of law); *Am. Tort Reform Ass'n v. Occupational Safety & Health Admin.*, 738 F.3d 387, 394–95 (D.C. Cir. 2013) (although the agency "lack[ed] legal authority" for its interpretation, judicial review was unavailable because the challenged action was "not a legislative rule").

2. Actions Committed to Agency Discretion by Law

The bar against judicial review of agency action "committed to agency discretion by law," codified in Section 701(a)(2) of the APA, encompasses a second, "very narrow exception" to the presumption of reviewability. *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971), *abrogated on other grounds by Califano*, 430 U.S. 99. This exception applies only "in those rare instances where statutes are drawn in such broad terms that in a given case there is no law to apply." *Id.* Under it, "even when Congress has not affirmatively precluded judicial oversight, 'review is not to be had if the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion.'" *Webster*, 486 U.S. at 599–600 (quoting *Heckler v. Chaney*, 470 U.S. 821, 830 (1985)). The absence of any such standard is generally understood to provide the "clear and convincing evidence" necessary to find that Congress intended to bar review of statutory claims. *See Abbott Lab'ys*, 387 U.S. at 140–41.

The no-law-to-apply test sets a high bar, and courts will generally find meaning even in vague statutory terms. In *Overton Park*, a statute prohibited the Secretary of Transportation from funding highway construction through public parks if a "feasible and prudent" alternative route existed. 401 U.S. at 405. Recognizing the narrowness of the exception, the Court held that "feasible" and "prudent" were sufficient "law to apply" to avoid preclusion of review. *Id.* at 410, 413–14. In reaching this conclusion, the Court considered the purpose and legislative history of the statute, as well as its language. *See id.* at 411–14; *see also Dep't of Com. v. New York*, 139 S. Ct. 2551, 2568–69 (2019) (holding that the Secretary of Commerce's decision to add a citizenship question to the census was reviewable under the APA because the Census Act "constrain[ed] the Secretary's authority" in several respects that rendered his decisions "amenable to review …, according to the general requirements of reasoned decisionmaking").

The Court further elaborated on the "no meaningful standard" test in *Weyerhaeuser v. Fish and Wildlife Service*, 139 S. Ct. 361 (2018). It noted the inherent tension between APA § 706(2)(A) and § 701(a)(2) since "[a] court could never determine that an agency abused its discretion if all matters committed to agency discretion were unreviewable." *Id.* at 370. As a result, the Court noted that it has read § 701(a)(2) quite narrowly, applying it in limited areas such as "the allocation of funds from a lump-sum appropriation" or "a decision not to reconsider a final action." *Id.* The instant case, on the other hand, involved a "routine dispute that federal courts regularly review: An agency issue[d] an order affecting the rights of a private party, and the private party object[ed] that the agency did not properly justify its determination under a standard set forth in the statute." *Id.*

The rarity of reliance on the no-law-to-apply exception does not mean that it is never recognized. The Supreme Court's opinion in *Webster v. Doe*, 486 U.S. 592 (1988), usefully illustrates both the exception's application and the limits circumscribing it. The plaintiff in *Webster* was dismissed from the CIA because of his sexual orientation. He challenged the dismissal under the APA and on various constitutional grounds. The CIA argued that judicial review of the plaintiff's suit was barred by the National Security Act. Turning first to Section 102(c) of that Act, the Court concluded that because it "allow[ed] termination of an Agency employee whenever the Director 'shall *deem* such termination necessary or advisable in the interests of the United States,' not simply when the dismissal *is* necessary or advisable to those interests," it supported the conclusion that Section 701(a)(2)'s no-law-to-apply exception barred suit. *Id.* at 600 (emphasis in original). The statutory language, which the Court characterized as "fairly exud[ing] deference to the Director," provided "no basis on which a reviewing court could properly assess an Agency termination decision" and "thus strongly suggest[ed] that its implementation was 'committed to agency discretion by law.'" *Id.* The Court also pointed to the structure and legislative history of the statute in support of its conclusion that review of Doe's statutory claim was prohibited. *Id.* at 600–01. However, applying the particularized standard applicable to constitutional challenges, the court concluded that "[n]othing in § 102(c) persuades us that Congress meant to preclude consideration of colorable constitutional claims arising out of the actions of the Director pursuant to that section." *Id.* at 603.

A variation of the no-law-to-apply test controls when an agency decides not to undertake an individual enforcement action. In *Heckler v. Chaney*, 470 U.S. 821 (1985), the Supreme Court reasoned that an "agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities" regarding enforcement actions. *Id.* at 831–32. Looking to the common-law tradition predating the APA, the Court concluded that an agency's decision not to take an enforcement action should be presumed to be immune from judicial review. It emphasized, however, that such a "decision is only presumptively unreviewable; the presumption may be rebutted where the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers." *Id.* at 832–33. Consistent with this approach, "an agency's statement of a general enforcement policy may be reviewable for legal sufficiency where the agency has expressed the policy as a formal regulation after the full rulemaking process … or has otherwise articulated it in some form of universal policy statement." *Crowley Caribbean Transp., Inc. v. Peña*, 37 F.3d 671, 676 (D.C. Cir. 1994). The cases supporting this view "do not involve an agency's decision to decline enforcement in the context of an individual case." *Id.*

Along similar lines, in *Department of Homeland Security v. Regents of the University of California*, 140 S. Ct. 1891 (2020), the Court elaborated upon the distinction between a general nonenforcement policy and other types of agency action. At issue in the case was the Department of Homeland Security's decision to rescind the Deferred Action for Childhood Arrivals ("DACA") program. DACA, adopted in 2012, included two main parts: first, it allowed certain unauthorized immigrants who entered the country as children to apply for a two-year forbearance of removal; second, it provided that individuals granted forbearance would also become eligible for work authorization and other benefits. *Id.* at 1901. More than 700,000 people took advantage of the

program. *Id.*

The Government had argued that DACA's issuance and its rescission had amounted to general nonenforcement policies, and that such policies were "equivalent to the individual non-enforcement decision at issue in" *Heckler v. Chaney*. *Id.* at 1906. The Court declined to pass on the validity of this argument, concluding that it "need not test this chain of reasoning because DACA is not simply a non-enforcement policy." *Id.* Instead, the Court explained that DACA "created a program for conferring affirmative immigration relief" through a standardized review process, and the "creation of that program—and its rescission—[wa]s an 'action that provide[d] a focus for judicial review.'" *Id.* The Court further reasoned that the benefits DHS attached to deferred action confirmed that DACA was "more than simply a non-enforcement policy." *Id.* Accordingly, the Court held that recission of DACA was reviewable under the APA. *Id.* at 1907.

"[R]efusals to institute rulemaking proceedings remain outside *Chaney*'s core and are subject to a judicial check." *Nat'l Customs Brokers & Forwarders Ass'n of Am., Inc. v. United States*, 883 F.2d 93, 96 (D.C. Cir. 1989). However, such review is "extremely limited" and "highly deferential." *Id.* A court "will overturn an agency's decision not to initiate a rulemaking only for compelling cause, such as plain error of law or a fundamental change in the factual premises previously considered by the agency." *Id.* at 96–97; *see also Massachusetts v. EPA*, 549 U.S. 497, 527–28 (2007). When permitted, judicial review of an agency's refusal to reopen proceedings generally is highly deferential as well. *See Salinas v. R.R. Ret. Bd.*, 141 S. Ct. 691, 701 (2021).

B. Challenges to Informal, Non-Final Actions Lacking the Force of Law: The Presumptive Non-Reviewability of Policy Statements and Interpretive Rules

1. Policy Statements and Interpretive Rules: What They Are and Why They Are (Generally) Not Reviewable

Unless an authorizing or enabling statute requires their application, neither the notice and comment provisions of Section 553 of the APA nor the formal hearing requirements of Sections 556 and 557 apply when agencies issue or amend policy statements and interpretive rules. *See* 5 U.S.C. § 553(b), (c); *see also Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 95–97 (2015) (overturning, as contrary to "the clear text of the APA," *id.* at 1206, circuit precedent requiring agencies to use notice-and-comment procedures when adopting a new interpretive rule that significantly deviates from an existing one); *Syncor Int'l Corp. v. Shalala*, 127 F.3d 90, 93–94 (D.C. Cir. 1997) (policy statements are not subject to APA notice-and-comment rulemaking and may be "abruptly" changed). Because policy statements and interpretive rules are not promulgated pursuant to the APA's lawmaking procedures, they generally cannot bind the issuing agency or the parties they concern. *See Nat'l Mining Ass'n v. McCarthy*, 758 F.3d 243, 252 (D.C. Cir. 2014) (interpretive rules); *Ctr. for Auto Safety v. Nat'l Highway Traffic Safety Admin.*, 452 F.3d 798, 800 (D.C. Cir. 2006) (policy statements). This is true regardless of whether an agency has the legal

authority to decide the matter addressed—though when the agency does not have such authority, the nonbinding nature of agency action is doubly apparent, since an agency can only create binding law with respect to matters for which it has been delegated lawmaking power by Congress. *See United States v. Mead Corp.*, 533 U.S. 218, 231–32 (2001). In general, then, policy statements and interpretive rules are properly characterized as informal, non-binding agency communications that serve similar, though distinct advisory (rather than lawmaking) functions. *See Syncor*, 127 F.3d at 93–95.

Policy statements—which may be variously labeled directives, guidance, opinion letters, press releases, advisories, warnings, or manuals—are "issued by an agency to advise the public prospectively of the manner in which the agency *proposes* to exercise a discretionary power." *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 n.31 (1979). A policy statement "does not seek to impose or elaborate or interpret a legal norm. It merely represents an agency position with respect to how it will treat—typically enforce—the governing legal norm …. The agency retains the discretion and the authority to change its position—even abruptly—in any specific case because a change in its policy does not affect the legal norm." *Syncor*, 127 F.3d at 94; *see also Nat'l Mining Ass'n*, 758 F.3d at 252 (a policy statement "explains how [an] agency … will exercise its broad enforcement … or permitting discretion under some extant statute or rule"). In other words, whatever form it takes, a true policy statement is an "informational device" that "announces [an] agency's *tentative* intentions for the future" and ensures that those "*initial* views do not remain secret[,] but are disclosed well in advance of their actual application." *Pac. Gas & Elec. Co. v. Fed. Power Comm'n*, 506 F.2d 33, 38 (D.C. Cir. 1974).

Interpretive rules perform a somewhat different function. As a general matter, they "advise the public of the agency's construction of the statutes and rules which it administers." *Perez*, 575 U.S. at 97. Sometimes referred to as "guideline[s]," *Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 97, 99 (1995), they "describe[] [an] agency's view of the meaning of an existing statute or regulation," *Mendoza v. Perez*, 754 F.3d 1002, 1021 (D.C. Cir. 2014). *See also Chrysler Corp.*, 441 U.S. at 302 n.31 (discussing interpretive rules and quoting the Attorney General's Manual on the Administrative Procedure Act (1947)). Notably, "[t]o be interpretative, a rule must derive a proposition from an existing [statute or regulation] whose meaning compels or logically justifies the proposition." *Mendoza*, 754 F.3d at 1021. In other words, interpretive rules do not add new content to a statute or regulation. And in propounding an interpretive rule, an "agency does not purport … to engage in lawmaking." *Syncor*, 127 F.3d at 94. Rather, it seeks to "clarify a statutory or regulatory term, remind parties of existing statutory or regulatory duties, or merely track preexisting requirements and explain something the statute or regulation already required." *Mendoza*, 754 F.3d at 1021.

Given their tentative character, true policy statements and interpretive rules cannot establish substantive, binding norms, even when they pertain to matters with respect to which an agency has congressionally delegated authority to make law. They are, in other words, non-final agency actions and as such are generally not subject to judicial review. *See, e.g.*, *Ass'n of Flight Attendants v. Huerta*, 785 F.3d 710, 716–17 (D.C. Cir. 2015) (regardless of whether the challenged action was a policy statement or an interpretive rule, it was unreviewable under the relevant

direct review provision because it was not a final agency action); *Ctr. for Auto Safety*, 452 F.3d at 807–11 (challenged agency action was a policy guideline, not final agency action, and thus not reviewable under the APA). This is a result of the "strong presumption … that judicial review [is] available only when agency action becomes final." *Bell v. New Jersey*, 461 U.S. 773, 778 (1983) (citing *Fed. Power Comm'n v. Metro. Edison Co.*, 304 U.S. 375, 383–85 (1938)). To be final, an agency action must satisfy two requirements. First, it must "mark the consummation of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow." *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 578 U.S. 590, 597 (2016) (quoting *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997)); s*ee also* Chapter XI.E.1, *supra* (discussing the finality doctrine).

Finality is a necessary prerequisite to judicial review whether jurisdiction and a cause of action for a challenge to a purported policy statement or interpretive rule derives from an agency's authorizing or enabling statute, *see, e.g.*, *Bell*, 304 U.S. at 778, or from the general federal question statute, 28 U.S.C. § 1331 (or one of the other general jurisdictional provisions in the Judiciary Code) and Section 702 of the APA, *see* 5 U.S.C. § 704 (limiting judicial review under the APA to "final agency action").

When subject matter jurisdiction is available "under a specific [authorizing or enabling] statute prescribing finality as a prerequisite of judicial review, [finality] is [jurisdictional]." *John Doe, Inc. v. DEA*, 484 F.3d 561, 565 (D.C. Cir. 2007). In such instances, the finality requirement may not be waived by the parties and must be resolved, if necessary, on the court's own motion. *See id.*; *see also Molycorp, Inc. v. EPA*, 197 F.3d 543, 545 (D.C. Cir. 1999) (finality is jurisdictional even when it is an implied rather than an explicit requirement of a statute providing subject matter jurisdiction). However, because finality is not a jurisdictional requirement under the APA, but rather is simply a limitation on a cause of action under Section 702, *see Perry Cap. LLC v. Mnuchin*, 848 F.3d 1072, 1101–02 (D.C. Cir. 2017), an agency may waive the requirement or forfeit it if it fails to raise it with the court, *see, e.g.*, *Marcum v. Salazar*, 694 F.3d 123, 128 (D.C. Cir. 2012). But even in such instances, a court may have good grounds for considering whether the claim is also unripe (a prudential consideration which a court can raise *sua sponte*) and dismissing on that alternative basis. *See id.* at 129; *see also* Chapter XI.E.2, *supra* (discussing the ripeness doctrine).

Although genuine policy statements and interpretive rules are not final actions and do not themselves establish binding norms, if an agency relies on such a statement or rule to support an agency action in a particular case it will be subject to judicial review. *See, e.g.*, *Am. Hosp. Ass'n v. Bowen*, 834 F.2d 1037, 1057 n.4 (D.C. Cir. 1987) ("A policy initially classed as a general statement [of policy] is not immunized from subsequent judicial review for conformity with the APA if later developments show the agency to be using it as binding policy."); *Citizens Commc'ns Ctr. v. FCC*, 447 F.2d 1201, 1205 (D.C. Cir. 1971) (FCC policy statement giving preference to incumbent license holders was reviewable where the FCC relied on the policy to deprive competing applicant for a license of a hearing); *see also Public Citizen, Inc. v. Nuclear Regul. Comm'n*, 940 F.2d 679, 683 (D.C. Cir. 1991) (finding agency policy statement unreviewable, but recognizing that "Commission

practice under the policy can make the issue determinable and thus fit for review"); *Am. Tort Reform Ass'n v. Occupational Safety & Health Admin.*, 738 F.3d 387, 395 (D.C. Cir. 2013) (interpretive rule was not subject to judicial review because the agency "has not offered [the rule] in support of its position in any pending actions").

When judicial review is permissible because an "agency applies [its] policy in a particular situation, [the agency] must be prepared to support the policy just as if the policy statement had never been issued. An agency cannot escape its responsibility to present evidence and reasoning supporting its substantive rules by announcing binding precedent in the form of a general statement of policy." *Pac. Gas & Elec. Co.*, 506 F.2d at 38–39; *see also Bechtel v. FCC*, 10 F.3d 875, 887 (D.C. Cir. 1993) (finding that because the FCC denied a license based on a policy statement that it was unable to defend, it was required to reconsider the license application under standards free of that policy); *United States v. F/V Alice Amanda*, 987 F.2d 1078, 1084–85 (4th Cir. 1993) (reversing forfeiture order because penalty was based on a general policy that was arbitrary and capricious and not supported by substantial evidence); *Perez*, 575 U.S. at 105 (recognizing that an agency cannot "skirt notice-and-comment" requirements by "issu[ing] an interpretive rule, rather than a legislative rule").

2. The Tests for Determining When a Purported Policy Statement or Interpretive Rule Is a Final, Substantive Action to Which the Presumption of Reviewability Applies

In reality, not much turns on the distinction between genuine policy statements and genuine interpretive rules. *See Am. Tort Reform Ass'n*, 738 F.3d at 393. The more important question is whether a disputed action is merely informative or interpretive (meaning a true policy statement or interpretive rule) or, instead establishes a binding, substantive norm that is not tentative, but rather marks the consummation of the agency's decisionmaking process about a matter with respect to which the agency has the authority to act and from which legal consequences will flow. *See id.* at 393–94; *see also Ass'n of Flight Attendants*, 785 F.3d at 713 (FAA policy statement was unreviewable because it was "nothing more than an internal guidance document that does not carry the 'force and effect of law'" (quoting *Perez*, 575 U.S. at 97)); *Perez*, 575 U.S. at 103 (explaining "the longstanding recognition that interpretive rules do not have the force and effect of law"). This latter distinction is important because it differentiates those agency actions that are presumptively reviewable from those that are presumptively unreviewable.

In assessing whether an agency has announced a binding norm in the form of what appears to be an unreviewable policy statement, courts engage in one of two lines of inquiry. *See Wilderness Soc'y v. Norton*, 434 F.3d 584, 595 (D.C. Cir. 2006). Under both, the critical question is the effect of the so-called policy statement—whether it "imposed any rights and obligations" on the challenging party or, instead, "genuinely left the agency and its decisionmakers free to exercise discretion." *Id.*; *see also Nat'l Mining Ass'n*, 758 F.3d at 252; *CropLife Am. v. EPA*, 329 F.3d 876, 883 (D.C. Cir. 2003). Although this inquiry is pragmatic, flexible, and takes into account

"practical" considerations, *Gen. Elec. Co. v. EPA*, 290 F.3d 377, 383 (D.C. Cir. 2002), it is not without bounds. Courts will not recognize consequences that flow solely from a party's voluntary compliance. *See, e.g.*, *Ctr. for Auto Safety*, 452 F.3d at 811 (holding that "*de facto* compliance is not enough to establish that the guidelines have had *legal* consequences"); *Nat'l Ass'n of Home Builders v. Norton*, 415 F.3d 8, 14–16 (D.C. Cir. 2005) (rejecting the argument that practical consequences establish final agency action absent a showing of legal coercion). "[I]f the practical effect of the agency action is not a certain change in the legal obligations of a party, the action is non-final for the purpose of judicial review." *Nat'l Ass'n of Home Builders*, 415 F.3d at 15.

"[C]entral" to the effects analysis is "[t]he language actually used by the agency." *Wilderness Soc'y*, 434 F.3d at 595; *see also Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533, 538 (D.C. Cir. 1986) (noting the "decisive weight [given] to the agency's choice between the words 'may' and 'will'"). *Western Ill. Home Health Care, Inc. v. Herman*, 150 F.3d 659 (7th Cir. 1998), provides an instructive example. In that case, the plaintiff companies contended that an agency statement of their status vis-a-vis the Fair Labor Standards Act was final agency action subject to review. The statement was contained in a letter closing an agency investigation. The investigation resulted from employee claims that the companies were not paying required overtime rates. The agency determined that under the Act, the companies were to be treated as joint employers. With respect to whether this conclusion marked the consummation of the agency's decisionmaking process, the court found that the language of the letter was "not at all tentative or interlocutory in nature. [The Assistant District Director] uses a simple, declarative sentence: 'At a minimum, a joint employment relationship exists in this case.'" *Id.* at 663. In finding that legal consequences flowed from this conclusion, the court noted that the Assistant District Director, who was in the chain of delegated powers within the agency, "threatened a follow-up investigation to confirm that [the companies] were aggregating hours. More than that, he warned [the companies] … [that] if they failed in the future to comply with the legal ruling contained in the letter," they would be subject to penalties under the relevant statute. *Id.*; *see also Rhea Lana, Inc. v. DOL*, 824 F.3d 1023, 1029 (D.C. Cir. 2016) (legal consequences flowed from an agency letter because "as a direct result of the notice provided to [the party] by the Letter, the [agency] may treat [the party's] continued nonpayment of consignor-volunteers as a willful violation of [the agency]'s regulations, thereby subjecting the [party] to civil penalties").

Courts applying the second line of inquiry build on the first, adding two additional considerations: "the agency's own characterization of the action" and "whether the action was published in the Federal Register or the Code of Federal Regulations." *Wilderness Soc'y*, 434 F.3d at 595. When considering an agency's characterization of its action, courts look to the whole of the purported policy statement. *See Nat'l Mining Ass'n*, 758 F.3d at 252–53. For instance, in *Wilderness Society*, the court heard a challenge to policies contained in what the Park Service characterized as an internal guidance document. 434 F.3d at 596. Examining the document's introduction, as well as the Park Service's characterization of the document contained in a separate but related notice, the court concluded that the Service did not "limit its discretion and create enforceable rights" and that the challenged policies were not reviewable. *Id.* However, an "agency's characterization of its own action is not controlling if it self-servingly disclaims any intention to create a rule with the 'force of law,' but the record indicates otherwise." *CropLife*

Am., 329 F.3d at 883. For example, if a statement contains a caveat that it is not compulsory, it will nonetheless be found to be reviewable if, read as a whole, it commands, requires, orders, or dictates described action. *See, e.g.*, *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1023 (D.C. Cir. 2003). On the other hand, if a document "repeatedly states that it does not impose legally binding requirements" and "[o]n its face … disclaims any intent to require anyone to do anything or to prohibit anyone from doing anything," it will not be subject to review. *Nat'l Mining Ass'n*, 758 F.3d at 252. Such a document will also not be one that the agency can rely on in defending its actions, though it may signal what the agency is likely to do in the future. *Id.*

When considering how an agency publicized its action, courts look to the Code of Federal Regulations, since it is only authorized to include documents "having general applicability and legal effect," 44 U.S.C. § 1510(a), the very definition of a regulation, *Wilderness Soc'y*, 434 F.3d at 595–96 (agency document was a policy statement in part because it was not published in the Code of Federal Regulations). In contrast, publication in the Federal Register is of little moment, since it includes both general statements of policy and regulations having the force of law. *See* 5 U.S.C. § 552(a)(1)(D); *see also Brock*, 796 F.2d at 539.

Interpretive rules also pose challenges, because absent notice and comment rulemaking, 5 U.S.C. § 553, or a formal rulemaking hearing, 5 U.S.C. § 556, it can be difficult to determine whether what appears to be an informal interpretation that merely "advise[s] the public of the agency's construction of the statutes and rules which it administers" is actually a substantive legislative rule. *Perez*, 575 U.S. at 97; *see also id.* (stating that the phrase "'interpretive rule' is not … defined by the APA, and its precise meaning is the source of much scholarly and judicial debate"). Generally speaking, a legislative rule "add[s] substantive content[,] … grant[s] rights, impose[s] obligations, or produce[s] other significant effects on private interests." *Am. Hosp. Ass'n*, 834 F.2d at 1045. Factors weighing in favor of finding that an agency interpretation should be treated as a legislative rule include "the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time." *Barnhart v. Walton*, 535 U.S. 212, 222 (2002).

Of particular use in ascertaining whether an apparently interpretive rule in fact adds substance is a four-part test which asks:

> (1) whether in the absence of the rule there would not be an adequate legislative basis for enforcement action or other agency action to confer benefits or ensure the performance of duties, (2) whether the agency has published the rule in the Code of Federal Regulations, (3) whether the agency has explicitly invoked its general legislative authority, or (4) whether the rule effectively amends a prior legislative rule.

Am. Mining Cong. v. Mine Safety & Health Admin., 995 F.2d 1106, 1112 (D.C. Cir. 1993). When the answer to any of these questions is yes, it is likely that the rule at issue has a legal effect (or establishes a binding norm) which makes it a legislative rather than an interpretive rule. *See id.*

The decision in *Truckers United for Safety v. Federal Highway Administration*, 139 F.3d 934 (D.C. Cir. 1998), offers an illustrative example of the application of the four-part test distinguishing interpretive rules from legislative rules. In that case, the Federal Highway Administration published a series of "frequently asked questions" (and answers) in the Federal Register in order to assist parties interested in the agency's Federal Motor Carrier Safety Regulations. The parties challenged the FAQs (which explained that strict liability applied to violations of the regulations), claiming, *inter alia*, that the FAQs were legislative rules that should have been submitted for notice and comment. *Id.* at 938–39. The court disagreed.

First, the court noted that the three FAQs did "not appear to impose a new strict liability standard on motor carriers," and, in any event, "if the regulatory guidance did not exist, the Administration could rely upon prior authority to apply the rules embodied in the three challenged questions and answers." *Id.* at 939. Second, the court observed that the FAQs were "not published in the Code of Federal Regulations." *Id.* Third, the court relied on the agency's explanation that the FAQs were "interpretive guidance" meant to "provide the motor carrier industry with a clearer understanding of the applicability of" the regulations. *Id.* Fourth, the court found that the FAQs did not amend a prior legislative rule, and thus "[n]o substantive change in prior law is apparent." *Id.* Consequently, the court held that the FAQs were interpretive, not legislative, rules. *See also McLouth Steel Prods. Corp. v. Thomas*, 838 F.2d 1317, 1319, 1321–22 (D.C. Cir. 1988) (finding that the "vertical and horizontal spread" model used to predict "leachate" levels of hazardous components of waste was a legislative rule rather than a general statement of policy, because the model constrained the agency's discretion and was applied as a binding norm).

It is also important to note that if a purported policy statement or interpretive rule is, in fact, a legislative rule, a challenging party may argue that the disputed action is arbitrary and capricious for want of either notice and comment rulemaking under Section 553 of the APA or a formal hearing under Section 556 of the APA. *See, e.g.*, *Elec. Priv. Info. Ctr. v. U.S. Dep't of Homeland Sec.*, 653 F.3d 1, 5–8 (D.C. Cir. 2011) (rejecting agency's effort to categorize its action as an interpretive rule or a policy statement and remanding to the agency to conduct notice and comment rulemaking). In the face of such arguments, an agency that believes its action may not withstand substantive review may seek to retain the widest possible discretion by preemptively seeking a remand so that it can promulgate the rule through proper procedures. *See, e.g.*, *Sprint Corp. v. FCC*, 315 F.3d 369, 377 (D.C. Cir. 2003) (remanding to the FCC because the agency failed to use notice and comment procedures and noting that "[i]n light of the remand, we do not reach [the challenger's] contention that the rule is arbitrary and capricious").

Chapter XIII. The Zone-of-Interests Inquiry: Is the Complainant Within the Class of Plaintiffs Authorized to Invoke the Cause of Action Asserted?

As with any federal civil suit based on a statutory cause of action, dismissal of a claim challenging agency action may be sought on the grounds that the complainant is not within "the class of plaintiffs whom Congress has authorized to sue" under the cause of action asserted. *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 128 (2014); *see id.* at 134 n.6. Resolution of such a challenge requires a court "to determine the meaning of the congressionally enacted provision creating [the] cause of action" relied on. *Id.* at 128. "In doing so," a court "appl[ies] traditional principles of statutory interpretation," *id.*, beginning with the "presum[ption] that a statutory cause of action extends only to plaintiffs whose interests 'fall within the zone of interests protected by the law invoked,'" *id.* at 129 (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)). In other words, in assessing whether a particular cause of action protects the interests that a plaintiff claims were injured, the courts presume that Congress "legislate[s] against the background of the zone-of-interest limitation" and understands that the limitation applies unless expressly negated. *Id.*

Explained differently, the zone-of-interests test is a "tool for determining who may invoke [a particular] cause of action." *Id.* at 130. It is also properly described as "an element of the cause of action," *id.* at 134 n.6, or a "cause of action … requirement," *Bank of Am. Corp. v. City of Miami*, 137 S. Ct. 1296, 1303 (2017). The zone-of-interests inquiry is thus a merits issue (not a jurisdictional one, *i.e.*, not one a court must address regardless of whether the litigants raise it), and it can be forfeited if not properly preserved. *See, e.g.*, *Am. Inst. of Certified Pub. Accts. v. IRS*, 804 F.3d 1193, 1199 (D.C. Cir. 2015) (refusing to consider a zone-of-interests challenge because "the IRS never presented th[e] argument to the district court" and there were no "exceptional circumstances"); *Crossroads Grassroots Pol'y Strategies v. FEC*, 788 F.3d 312, 319 (D.C. Cir. 2015) ("[T]he Supreme Court's decision in *Lexmark Int'l, Inc. v. Static Control* makes plain [that] … the zone of interest test is now a merits issue.").

Absent congressional direction to the contrary, the zone-of-interests limitation is presumed to apply to "all statutorily created causes of action." *Lexmark*, 572 U.S. at 129; *see also Bennett v. Spear*, 520 U.S. 154, 163 (1997). This reflects the "roots" of the test, which "lie in the common-law rule that a plaintiff may not recover … for injuries caused by violation of a statute unless the statute is interpreted as designed to protect the class of persons in which the plaintiff is included, against the risk of the type of harm which has in fact occurred as a result of its violation." *Lexmark*, 572 U.S. at 130 n.5.

However, as described in *Clarke v. Securities Industry Ass'n*, 479 U.S. 388 (1987), the modern formulation of the zone-of-interests limitation originated as a "gloss" on Section 702 of the Administrative Procedure Act ("APA"). *Id.* at 394–96. Section 702, together with Sections 704, 701, and 706, define when an APA cause of action is available. Section 702, titled Right of Review, broadly states: "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial

review thereof." 5 U.S.C. § 702. Following enactment of the APA, lower courts sometimes narrowly construed the language of Section 702 to require one of two alternative showings from a party invoking an APA cause of action. A party could demonstrate that it suffered a harm to a "legal interest" as that term had been construed in pre-APA cases, *see Clark*, 479 U.S. at 394, meaning that "the right invaded [had to be] … one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege," *Tenn. Elec. Power Co. v. TVA*, 306 U.S. 118, 137 (1939). Or, a party was required to cite to "an explicit provision in the relevant [authorizing] statute" that mirrored the language of the APA by "permitting suit by any party 'adversely affected or aggrieved,'" *Clarke*, 479 U.S. at 394, "as some pre-APA statutes … [provided] when conferring rights of judicial review," *Lujan v. Nat'l Wildlife Fed.*, 497 U.S. 871, 883 (1990).

Recognizing the "broad[] remedial purpose" that the APA was intended to serve, the Supreme Court was unwilling to "take so narrow a view of the APA's generous review provisions." *Clarke*, 479 U.S. at 395; *see also Lujan*, 497 U.S. at 883 ("We have long since rejected that interpretation, … which would have made the judicial review provision of the APA no more than a restatement of pre-existing law."). However, the Court was also cognizant of the fact that Congress "in enacting § 702 had not intended to allow suit by every person suffering an injury in fact" in the manner satisfying Article III's standing doctrine. *Clarke*, 479 U.S. at 395; *see also id.* at 393 n.5, 394 & n.7.

The solution "was a gloss on the meaning of § 702," which "add[ed] to the requirement that the complainant be 'adversely affected or aggrieved,' *i.e.*, injured in fact [as required by Article III], the additional requirement that the interest sought to be protected by the complainant be arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Id.* at 395–96.

When the APA provides the cause of action, the zone-of-interests test is not "especially demanding." *Lexmark*, 572 U.S. at 130 (quoting *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 225 (2012)). It is "appl[ied] … in keeping with Congress's evident intent when enacting the APA to make agency action presumptively reviewable," "foreclos[ing] suit only when a plaintiff's interests are so marginally related to or inconsistent with the purposes *implicit* in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." *Match-E-Be-Nash-She-Wish*, 567 U.S. at 225 (quoting *Clarke*, 479 U.S. at 399). This "lenient approach," the Court has made clear, "is an appropriate means of preserving the flexibility of the APA's omnibus judicial-review provision." *Lexmark*, 572 U.S. at 130.

Consequently, when applying the test to cases in which an APA cause of action is invoked, the Court has "consistently held that for a plaintiff's interests to be arguably within the 'zone of interests' to be protected by a statute, there does not have to be an indication of congressional purpose to benefit the would-be plaintiff." *Nat'l Credit Union Admin. v. First Nat'l Bank & Trust Co.*, 522 U.S. 479, 492 (1998); *see also Match-E-Be-Nash-She-Wish*, 567 U.S. at 224; *Clarke*, 479 U.S. at 399–400. Synthesizing the holdings of various Section 702 opinions, the Supreme Court in *National Credit Union Administration v. First National Bank & Trust*, 522 U.S. 479, 493 (1998),

described the proper inquiry: "[W]e do not ask whether, in enacting the statutory provision at issue, Congress specifically intended to benefit the plaintiff. Instead, we first discern the interests 'arguably … to be protected' by the statutory provision at issue; we then inquire whether the plaintiff's interests affected by the agency action in question are among them." *Id.* at 492. Summarizing two seminal opinions exemplifying this approach, the Court explained:

> Though in enacting the National Bank Act and the Bank Service Corporation Act, Congress did not intend specifically to benefit travel agents and data processors and may have been concerned only with the safety and soundness of national banks, one of the interests "arguably to be protected" by the statutes was an interest in preventing national banks from entering other businesses' product markets. As competitors of national banks, [the plaintiff] travel agents and data processors had that interest, and that interest had been affected by the [defendant agency's] interpretations opening [the] markets [of the travel agents and data processors] to national banks.

Id. at 495 (describing the rationale for the holdings in *Ass'n of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150 (1970), and *Arnold Tours, Inc. v. Camp*, 400 U.S. 45 (1970) (*per curiam*)). So too, the Court in *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990), explained:

> [T]he failure of an agency to comply with a statutory provision requiring 'on the record' hearings would assuredly have an adverse effect upon the company that has the contract to record and transcribe the agency's proceedings; but since the provision was obviously enacted to protect the interests of the parties to the proceedings and not those of the reporters, [the transcription] company would not be 'adversely affected within the meaning' of the statute [and therefore would not be within the zone of interests].

Id. at 883.

In some cases, of course, identifying the interests protected by a statute is quite simple. Statutory language and legislative history may make clear that the interests asserted by a plaintiff are within the zone protected or regulated by the law that an agency is alleged to have violated, because the plaintiff is, in fact, the intended beneficiary of that law. For example, in *Barlow v. Collins*, 397 U.S. 159 (1970), one of two companion cases in which the modern zone-of-interests formulation was announced, the Court concluded that the interests of the tenant-farmer plaintiffs who claimed a cause of action under the APA were "clearly" within the zone protected by the two laws under which the Secretary of Agriculture had promulgated the regulation at issue, *id.* at 164–65. "Both of the relevant statutes expressly enjoin[ed] the Secretary" to protect the tenant farmers' interests. *Id.* at 164. One "state[d] that 'the Secretary shall provide adequate safeguards to protect the interests of tenants.'" *Id.* The other "provide[d] that 'the Secretary shall, as far as practicable, protect the interests of tenants.'" *Id.* The legislative history, though less explicit, "similarly indicate[d] a congressional intent to benefit the tenant[]" farmers. *Id.* at

164–65; *see also id.* at 164 n.7.

Significantly, the Supreme Court "ha[s] made clear … that the breadth of the zone of interests varies according to the provisions of the law at issue." *Lexmark*, 572 U.S. at 130 (quoting *Bennett*, 520 U.S. at 163). Consequently, "'what comes within the zone of interests of a statute for purposes of obtaining judicial review of administrative action under the generous review provisions of the APA may not do so'" when the cause of action is provided by another statute. *Id.* (quoting *Bennett*, 520 U.S. at 163); *see also Clarke*, 479 U.S. at 400 n.16 (noting that while "the [zone-of-interests] test is most usefully understood as a gloss on the meaning of § 702" and "[w]hile inquiries into reviewability … in some other contexts may bear some resemblance to a 'zone of interests' inquiry under the APA," "[w]e doubt … that it is possible to formulate a single inquiry that governs all statutory and constitutional claims"). But whether the inquiry takes place in an APA or non-APA context, the question remains one of congressional intent. *Cf. Lexmark*, 572 U.S. at 131 (noting in a nonagency context that "identifying the interests protected by the Lanham Act … requires no guesswork, since the Act includes an unusual, and extraordinarily helpful, detailed statement of the statute's purpose").

It is also important to understand that Congress may "negate[] the zone-of-interests test (or, perhaps more accurately, expand the zone of interests)" by enacting a review provision that allows any aggrieved person to challenge identified behavior or actions. *Bennett*, 520 U.S. at 164; *cf. Bank of Am.*, 137 S. Ct. at 1303 (noting that the original version of the statute at issue "showed a congressional intention to define standing as broadly as is permitted by Article III of the Constitution"). In such a situation, who may invoke a particular cause of action is limited only by the requirements of Article III standing. But unless Congress expressly dispenses with the zone-of-interests limitation by expanding the interests covered by the statute to the limits of Article III, it is presumed to legislate with the understanding that the zone-of-interests limitation will be enforced by the courts. *See Lexmark*, 572 U.S. at 129. And "principles of statutory interpretation" require that courts "respect Congress' decision to ratify [judicial interpretation of the scope of a statutory cause of action] when it reenact[s] the relevant statutory text." *Bank of Am. Corp.*, 137 S. Ct. at 1305.

Several final notes regarding terminology are in order. "Although [the Supreme Court] admittedly ha[s] placed the 'zone of interests' test under the 'prudential' rubric in the past, it does not belong there." *Lexmark*, 572 U.S. at 127. "Just as a court cannot apply its independent policy judgment to recognize a cause of action that Congress has denied, it cannot limit a cause of action that Congress has created merely because 'prudence' dictates." *Id.* at 128. The Court thus rejected as "inapt" the "prudential standing" label that it had previously attached to the zone-of-interests test. *Id.* at 127 n.3; *see also Bank of Am. Corp.*, 137 S. Ct. at 1302.

The Court has also rejected its past use of the phrase "statutory standing" to refer to the cause of action inquiry that the zone-of-interests test serves. *Lexmark,* 572 U.S. at 128 n.4. As the Court had previously explained, the inquiry into whether a "plaintiff [comes] within the zone of interests for which [a] cause of action [is] available …. has nothing to do with" the immutable constitutional standing requirements necessary to demonstrate the existence of a "case or

controversy"—injury, causation, and redressability. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 97 (1998). Use of the label is further "misleading, since 'the absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction, *i.e.*, the court's statutory or constitutional *power* to adjudicate the case.'" *Lexmark*, 572 U.S. at 128 n.4 (emphasis in original) (quoting *Verizon Md. Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 642–43 (2002)); s*ee also* Chapters III.A.2 and XI.C, *supra* (discussing standing).

Chapter XIV. The Major Questions Doctrine

In 2022, the Supreme Court definitively adopted a "major questions" doctrine covering judicial review of agency actions. The Court proclaimed that:

> [P]recedent teaches 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.

West Virginia v. EPA, 142 S. Ct. 2587, 2608 (2022). The Court cited its opinions in *Nat'l Federation of Independent Business v. OSHA*, 142 S. Ct. 661 (2022), *Alabama Assn. of Realtors v. Department of Health and Human Servs*., 141 S. Ct. 2485 (2021), *King v. Burwell*, 576 U.S. 473 (2015), *Utility Air Regulatory Group v. EPA*, 573 U.S. 302 (2014), *Gonzales v. Oregon*, 546 U.S. 243 (2006), and *FDA v. Brown & Williamson Tobacco Corp*., 529 U.S. 120, 159–160 (2000), to show that precedent supports the major questions doctrine announced in *West Virginia v. EPA*. *West Virginia*, 142 S. Ct. at 2595, 2609; *see also Biden v. Nebraska*, 143 S. Ct. 2355, 2374-75 (2023).

It now appears that in cases involving *major questions*: (1) the court will not defer to an agency's interpretation of the disputed statute; and (2) absent clear congressional authorization, agency regulators will be foreclosed from taking consequential actions in situations involving matters of great economic and political significance.

The Court has noted that the "major questions" label "took hold because it refers to an identifiable body of law that has developed over a series of significant cases all addressing a particular and recurring problem: agencies asserting highly consequential power beyond what Congress could reasonably be understood to have granted." *West Virginia*, 142 S. Ct. at 2609. To address this concern, the Court has made it clear that, going forward, it will

> [p]resume that Congress intends to make major policy decisions itself, not leave those decisions to agencies.
>
> Thus, in certain extraordinary cases, both separation of powers principles and a practical understanding of legislative intent make [the Court] reluctant to read into ambiguous statutory text the delegation claimed to be lurking there. To convince [the Court] otherwise, something more than a merely plausible textual basis for the agency action is necessary. The agency instead must point to clear congressional authorization for the power it claims.

Id. at 2609.

The Court's decisions in *Alabama Association of Realtors v. Dep't of Health & Hum. Servs.*, 141 S. Ct. 2485, 2486 (2021) (per curiam), and *Nat'l Federation of Independent Business v. Department of Labor*, 142 S. Ct. 661 (2022) ("*NFIB*") were clear preludes to the judgment in *West Virginia v. EPA*. In *Alabama Association of Realtors,* the Court addressed whether the Centers for Disease Control and Prevention ("CDC") had delegated authority to promulgate a nationwide moratorium on evicting tenants. The CDC claimed authority to act under a statutory provision

permitting it to "make and enforce such regulations as in [the agency's] judgment are necessary to prevent the introduction, transmission, or spread of communicable diseases." *Id*. at 2487 (quoting 42 U.S.C. § 264(a)). The provision went on to specify that the CDC could use measures like inspection, fumigation, sanitation, and pest extermination to "carry[] out and enforc[e] such regulations." *Id.* The Court rejected the CDC's claim that the provision allowed it to adopt any regulation "necessary" to stop the spread of disease, finding that "the sheer scope of the CDC's claimed authority ... would counsel against the Government's interpretation." *Id*. at 2489. It explained that "[w]e expect Congress to speak clearly when authorizing an agency to exercise powers of 'vast economic and political significance.'" *Id.* The Court said nothing to suggest that the agency's interpretation of the statute was entitled to any deference pursuant to *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), and its progeny. *See* Chapter XV, *infra*.

In *NFIB*, the Court confronted whether the Occupational Safety and Health Administration ("OSHA") had validly issued a COVID-19 vaccine mandate for employees of large companies. OSHA argued that a statutory provision authorizing it "to impose emergency temporary standards necessary to protect 'employees' from grave danger in the workplace" gave it the authority to issue the mandate. *Id*. at 665. Framing "[t]he question" as "whether the Act plainly authorizes the [vaccine] mandate," the Court disagreed. *Id*. The agency's authority, it found, was limited "to set[ting] *workplace* safety standards, not broad public health measures." *Id*. Rejecting the agency's determination that COVID-19 was a "work-related danger," the Court determined that COVID-19 was not a "work-related danger[]" because it "can and does spread at home, in schools, ... and everywhere else that people gather." *Id*. It concluded that "[p]ermitting OSHA to regulate the hazards of daily life—simply because most Americans have jobs and face those same risks while on the clock—would significantly expand OSHA's regulatory authority without clear congressional authorization." *Id.* Because Congress had not "sp[oken] clearly" in granting OSHA the authority to issue the vaccine mandate, the Court held it was in excess of the agency's authority. *Id.* Again, there is nothing in the Court's opinion to suggest that the agency's interpretation of the statute was entitled to any deference under *Chevron.*

If *Alabama Association of Realtors* and *NFIB* offered a prelude to the decoupling of the major questions doctrine from *Chevron*, *West Virginia v. EPA*, 142 S. Ct. 2587 (2022), heralded an official arrival of the major questions doctrine as a standalone doctrine. The case involved challenges to EPA's Clean Power Plan ("CPP"), which addressed carbon dioxide emissions from existing coal- and natural-gas-fired power plants. In adopting the CPP, the EPA acted pursuant to the Clean Air Act, which gives the agency authority to establish the "best system of emission reduction" for stationary sources of pollution like power plants. 42 U.S.C. § 7411(a)(1). The CPP required states to submit plans to reduce greenhouse gas emissions through a combination of burning coal more cleanly, shifting from coal to natural gas, and shifting power generation from fossil fuels like coal and natural gas to renewable sources like wind and solar. The agency relied on Section 111 of the Clean Air Act, which authorizes regulation of certain pollutants from existing sources under Section 111(d). 42 U.S.C. §7411(d). Despite the textual authority in the statute, the Supreme

Court determined that, in adopting the CPP, EPA had exercised a "power beyond what Congress could reasonably be understood to have granted." 142 S. Ct. at 2609. The Court found that the regulatory action was a "major question" because it implicated vast questions of social and economic policy. *Id*. The Court thus held that because EPA had failed to point to *clear congressional authorization* allowing it to establish emission caps pursuant to the system embodied in the CPP, the challenges to EPA's action must be sustained. It did not matter whether the statute was arguably ambiguous on the matters at issue; nor did it matter whether EPA's regulatory approach was reasonable. What mattered to the Court was that EPA's action involved "major questions" and the action was taken without an express grant of authority from Congress.

In *West Virginia v. EPA,* the Court accepts that "[a]s a matter of 'definitional possibilities,'" the EPA's generation shifting rule "can be described as a 'system.'" *Id.* at 2614. However, the Court declined to use the ordinary tools of statutory interpretation to figure out whether generation shifting is in fact a "system" as required by the phrase "best system of emission reduction." *See id.* at 2615. Rather, it was enough to declare the rule impermissible because (1) agency action was major, and (2) there was no clear congressional authorization, given the ambiguity of "best system of emissions reduction."

There are a host of issues that may arise by virtue of the Court's decision in *West Virginia v. EPA*. Pursuant to what standards are the courts to define "major questions"? What does the Court mean when it says there must be an "express grant of authority" or a "clear congressional authorization" to justify an agency action involving major questions? Does the Court's decision improperly encroach on Congress' authority to determine how best to delegate authority to agencies, and the agencies' assessments of how best to exercise that authority? As Justice Kagan pointed out in her dissent,

> It is not surprising that Congress has always delegated, and continues to do so—including on important policy issues. As this Court has recognized, it is often "unreasonable and impracticable" for Congress to do anything else. *American Power & Light Co. v. SEC*, 329 U. S. 90, 105 (1946). In all times, but ever more in "our increasingly complex society," the Legislature "simply cannot do its job absent an ability to delegate power under broad general directives."
>
> . . . .
>
> First, Members of Congress often don't know enough—and know they don't know enough—to regulate sensibly on an issue. Of course, Members can and do provide overall direction. But then they rely, as all of us rely in our daily lives, on people with greater expertise and experience. Those people are found in agencies. Congress looks to them to make specific judgments about how to achieve its more general objectives. And it does so especially, though by no means exclusively, when an issue has a scientific or technical dimension. Why wouldn't Congress instruct EPA to select "the best system of emission reduction," rather than try to choose that system itself?

. . . .

> Second and relatedly, Members of Congress often can't know enough—and again, know they can't—to keep regulatory schemes working across time. Congress usually can't predict the future—can't anticipate changing circumstances and the way they will affect varied regulatory techniques. Nor can Congress (realistically) keep track of and respond to fast-flowing developments as they occur. Once again, that is most obviously true when it comes to scientific and technical matters. The "best system of emission reduction" is not today what it was yesterday, and will surely be something different tomorrow. So for this reason too, a rational Congress delegates.
>
> . . . .
>
> In short, when it comes to delegations, there are good reasons for Congress (within extremely broad limits) to get to call the shots. Congress knows about how government works in ways courts don't. More specifically, Congress knows what mix of legislative and administrative action conduces to good policy. Courts should be modest.

West Virginia, 142 S. Ct. at 2627-43 (Kagan, J., dissenting).

Professor Kristin E. Hickman published a thoughtful critique of *West Virginia v. EPA* in Notice & Comment, a blog from the *Yale Journal on Regulation* and ABA Section of Administrative Law & Regulatory Practice. With her permission, excerpts from the blog are reprinted below:

*** * * ***

Excerpts from Kristin E. Hickman's *Thoughts on* West Virginia v. EPA

July 5, 2022

https://www.yalejreg.com/nc/thoughts-on-west-virginia-v-epa/

> First, I think it's important to appreciate what the Court did not do in this case. Specifically, . . . the Court did not approach the case as a matter of constitutional interpretation. The Court did not replace the intelligible principle standard that it has used in applying (or not applying) the nondelegation doctrine for the last 100 years or otherwise try to reinvigorate the nondelegation doctrine as such. . . .
>
> Second, in applying the major questions doctrine as it did, the Court said that Congress didn't give the EPA the necessary authority to adopt the regulations at issue, not that Congress couldn't give the EPA that authority. Congress just needs to speak more clearly if it wants the EPA to be able to adopt the Clean Power Plan regulations. As I see it, this is an important distinction. To be sure, the Court in *WV v.*

EPA is not entirely clear about just how much more detail it expects of Congress, and getting our sharply divided and gridlocked Congress to amend the Clean Air Act or any other statute is a heavy lift. For those who want more regulation of carbon dioxide emissions immediately, this outcome is dissatisfying, to say the least. But thinking more systemically and in the long term, getting Congress to amend a statute remains an easier proposition than navigating the constitutional amendment process. And amending a statute to more clearly delegate to an agency the requisite rulemaking power to address a particular contemporary problem is much easier than amending the same statute with the specificity that would have been necessary if the Court required Congress to resolve all major policy questions itself[.] . . .

Third, in my view, the major questions doctrine as described by the Court in *WV v. EPA* is not so limitless as some detractors suggest. Many passages in Chief Justice Roberts's opinion for the majority were dedicated to offering guideposts and guardrails for the applicability of the major questions doctrine as a canon of statutory interpretation. If I had to pull a standard out the Court's opinion today, I would say that whether the major questions doctrine applies depends upon (1) "the 'history and the breadth of the authority that [the agency] has asserted,'" (2) "the 'economic and political significance' of that assertion," and (3) the extent to which the agency is relying on "'modest words,' 'vague terms,' or 'subtle device[s]'" rather than more direct delegations from Congress. To put it more colloquially, the major questions doctrine applies to curtail agency discretion when an agency stretches the boundaries of statutory interpretation to claim new authority to address big problems that weren't obviously under the agency's jurisdiction previously.

To be sure, this is a mushy standard rather than a bright line rule, which makes its application more subjective and uncertain than admirers of the administrative state would prefer. Mushy standards have their drawbacks, including but not limited to a lack of certainty ex ante and a potential for inconsistency of application. Bright line rules have their problems, too. . . .

Although I continue to defend the application of *Chevron* deference in the context of agency rulemaking, I will concede that the availability of *Chevron* deference has emboldened agency officials to push the interpretive envelope on some occasions. Meanwhile, congressional gridlock means more pressure on the executive branch to adopt regulations where the statutory authority to do so is shakier.

Finally, the court's decision in *WV v. EPA*, and its embrace of a more robust major questions doctrine, are not the massive blows to the administrative state that some commenters claim. The reality on the ground is that most delegations are clearer and most regulations are narrower and more "interstitial" (to use a favorite word of Justice Breyer's) than the Clean Power Plan regulations at issue here. Most of those

> regulations never see the inside of a courtroom, and more aggressive application of the major questions doctrine seems unlikely to change that. . . .
>
> None of this is to say that the decision in *WV v. EPA* is no big deal. It's an important decision with serious implications for agency decisionmaking and judicial review thereof, especially with respect to controversial rulemaking projects that rely on strained (and perhaps some not-so-strained) interpretations of old statutes to tackle big contemporary problems. . . . Nevertheless, doctrinally at least, the major questions doctrine has been and is a lot more incremental in both its evolution and its application than what some people feared the Court might do. Suggestions otherwise strike me as premature.

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Professor Hickman's piece was written before the Supreme Court issued its decision in *Biden v. Nebraska*, 143 S. Ct. 2355 (2023), further explicating the major questions doctrine. Under the Higher Education Relief Opportunities for Students Act of 2003 (HEROES Act), the Secretary of Education "may waive or modify any statutory or regulatory provision applicable to the student financial assistance programs under title IV of the [Education Act] as the Secretary deems necessary in connection with a war or other military operation or national emergency." 20 U.S.C. § 1098bb(a)(1). In 2022, as the COVID–19 pandemic came to its end, the Secretary invoked the HEROES Act to issue "waivers and modifications" reducing or eliminating the federal student debt of most borrowers. *Id.* § 1098bb(a). Borrowers with eligible federal student loans who had incomes below $125,000 in either 2020 or 2021 qualified for a loan balance discharge of up to $10,000. Those who previously received Pell Grants—a specific type of federal student loan based on financial need—qualified for a discharge of up to $20,000. Six States challenged the plan as exceeding the Secretary's statutory authority. The Court held that the Secretary did not have the authority under the Act to depart from the existing provisions of the Education Act, 20 U.S.C. § 1070(a), and establish a student loan forgiveness program that cancelled about $430 billion in debt principal and affected nearly all borrowers.

The Court made it clear that, in its view, "the statutory text alone precludes the Secretary's program." *Nebraska*, 143 S. Ct. at 2375 n. 9. The Court explained that:

> The Secretary's comprehensive debt cancellation plan cannot fairly be called a waiver—it not only nullifies existing provisions, but augments and expands them dramatically. It cannot be mere modification, because it constitutes "effectively the introduction of a whole new regime." And it cannot be some combination of the two, because when the Secretary seeks to add to existing law, the fact that he has "waived" certain provisions does not give him a free pass to avoid the limits inherent in the power to "modify." However broad the meaning of "waive or modify," that language cannot authorize the kind of exhaustive rewriting of the statute that has taken place here.

Id. at 2371. The Court went beyond the statutory text, however, and invoked the major questions doctrine to fortify its interpretation of the statute. Citing *West Virginia v. EPA*, the Court said:

> [T]he Secretary of Education claims the authority, on his own, to release 43 million borrowers from their obligations to repay $430 billion in student loans. The Secretary has never previously claimed powers of this magnitude under the HEROES Act. [Statistics omitted.]. . .
>
> Under the Government's reading of the HEROES Act, the Secretary would enjoy virtually unlimited power to rewrite the Education Act. This would "effec[t] a 'fundamental revision of the statute, changing it from [one sort of] scheme of ... regulation' into an entirely different kind," one in which the Secretary may unilaterally define every aspect of federal student financial aid, provided he determines that recipients have "suffered direct economic hardship as a direct result of a ... national emergency."
>
> The "'economic and political significance'" of the Secretary's action is staggering by any measure. . . .
>
> All this leads us to conclude that "[t]he basic and consequential tradeoffs" inherent in a mass debt cancellation program "are ones that Congress would likely have intended for itself." *West Virginia*, 597 U.S. at ____. In such circumstances, we have required the Secretary to "point to 'clear congressional authorization'" to justify the challenged program. . . . [T]he HEROES Act provides no authorization for the Secretary's plan even when examined using the ordinary tools of statutory interpretation—let alone "clear congressional authorization" for such a program.

Id. at 2372-73, 2375. Justice Kagan issued a strong dissent, contending that:

> the Court reads statutes unnaturally, seeking to cabin their evident scope. And the Court applies heightened-specificity requirements, thwarting Congress's efforts to ensure adequate responses to unforeseen events. The result here is that the Court substitutes itself for Congress and the Executive Branch in making national policy about student-loan forgiveness. Congress authorized the forgiveness plan (among many other actions); the Secretary put it in place; and the President would have been accountable for its success or failure. But this Court today decides that some 40 million Americans will not receive the benefits the plan provides, because (so says the Court) that assistance is too "significan[t]."

Id. at 2385 (Kagan, J. dissenting). Justice Barrett, in turn, issued a concurring opinion in which she seeks to cabin the major questions doctrine. She says that the doctrine is not a "substantive

canon." *Id*. at 2376. She also says that the doctrine does not require "an unequivocal declaration from Congress authorizing the precise agency action under review, as our clear-statement cases do in their respective domains." *Id*. at 2378. Rather, according to Justice Barrett:

> The doctrine serves as an interpretive tool reflecting common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency. . . . [And] context is also relevant to interpreting the scope of a delegation. . . . In my view, the major questions doctrine grows out of [well understood and] commonsense principles of communication. . . . We . . . expect Congress to speak clearly if it wishes to assign to an agency decisions of vast economic and political significance. That clarity may come from specific words in the statute, but context can also do the trick. Surrounding circumstances, whether contained within the statutory scheme or external to it, can narrow or broaden the scope of a delegation to an agency. . . . This expectation of clarity is rooted in the basic premise that Congress normally intends to make major policy decisions itself, not leave those decisions to agencies. . . . My point is simply that in a system of separated powers, a reasonably informed interpreter would expect Congress to legislate on important subjects while delegating away only the details. . . . Still, this skepticism does not mean that courts have an obligation (or even permission) to choose an inferior-but-tenable alternative that curbs the agency's authority—and that marks a key difference between my view and the "clear statement" view of the major questions doctrine. In some cases, the court's initial skepticism might be overcome by text directly authorizing the agency action or context demonstrating that the agency's interpretation is convincing. (And because context can suffice, I disagree with Justice Kagan's critique that "[t]he doctrine forces Congress to delegate in highly specific terms.")

Id. at 2378-81. No other member of the Court signed onto Justice Barrett's concurring opinion. However, it appears that a majority of the Court does not endorse the position that the major questions doctrine is a "clear statement rule."

> For starters, *West Virginia*'s analysis reveals that the need for "clear congressional authorization" is different from the need for a "clear statement." After the Court determined that the CPP triggered the major questions doctrine and said that EPA had to show "clear congressional authorization" for the CPP, the Court determined that the statutory text EPA relied on was "vague." But it did not stop there. The Court then looked to other provisions of the Clean Air Act and statutory history to search for clear

> congressional authorization and ultimately determined that it was "not plausible that Congress gave EPA the authority to adopt" the CPP, not that Congress failed to use the appropriate "clear statement" to confer this authority.
>
> The key takeaway is that the Justices in the majority [in *West Virginia*] who did not join Justice Gorsuch's concurring opinion (Chief Justice Roberts and Justices Thomas, Kavanaugh, and Barrett) appear to have been unwilling to call the major questions doctrine a clear-statement rule, indicating that they do not view the major questions doctrine as allowing courts to depart from the most natural reading of a statute to avoid potential constitutional problems.

Natasha Brunstein & Donald L.R. Goodson, *To Be Clear, the Major Questions Doctrine Is Not a Clear-Statement Rule*, https://www.yalejreg.com/nc/mqd-not-clear-statement-rule/. Time will tell whether this assessment is correct.

Chapter XV. The Deference Due an Agency's Construction of Its Authorizing Statute

Under the Administrative Procedure Act framework for judicial review of administrative agency actions, a court shall "hold unlawful and set aside agency action, findings, and conclusions found to be … in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2)(C). In applying Section 706(2)(C), the courts have developed a body of case law defining the applicable standards of review, including the amount of deference due an agency's construction of its authorizing statute. This chapter reviews that case law.

With its adoption of the *major questions* doctrine discussed in Chapter XIV, *supra*, it is now important to consider whether and how the Supreme Court's interpretive philosophy on judicial review of agency action will evolve further.

Excerpts from Kristin E. Hickman's *The Roberts Court's Structural Incrementalism*

December 5, 2022

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4283154

> [T]he Roberts Court is more structurally formalist, more inclined to originalist and textualist methods of interpretation, and more skeptical of federal agency action than its predecessors, prompting some amount of evolution in legal doctrines governing the federal administrative state. The essay argues, however, that the recent major questions cases align with a broader pattern in Roberts Court's jurisprudence regarding separation of powers principles, *Chevron* deference, and agency design. Notwithstanding lofty flights of rhetoric about the Framers, liberty, and other constitutional values, when pared down to essentials, the Roberts Court's decisions in these areas are drawn quite narrowly, calibrated to tweak actual administrative governance only incrementally, with plenty of carve outs and caveats, and with a preference for subconstitutional solutions rather than sweeping constitutional pronouncements. For all the hype and hoopla about doctrinal change, the nondelegation doctrine is still dead, *Chevron* still lives, and federal government agencies soldier on with little alteration in their day-to-day functionality -- at least for now.

Thus, while *Chevron*'s vitality may wane, it is still good law, and the sections below discuss the *Chevron* framework as it has been traditionally applied.

A. The *Chevron* Framework

In 1985, just after the Supreme Court issued its seminal decision in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), Professor Colin Diver published a

thoughtful article describing the dominant modes of statutory interpretation in American administrative law. *See* Colin S. Diver, *Statutory Interpretation in the Administrative State*, 133 U. PA. L. REV. 549 (1985). The article says very little about *Chevron*, probably because the decision was handed down just before the article was published and neither Professor Diver nor anyone else had reason to know that *Chevron* would become "one of the most important decisions in the history of administrative law." RICHARD J. PIERCE, ADMINISTRATIVE LAW TREATISE 158 (5th ed. 2010); *see also* Nicholas R. Bednar & Kristin E. Hickman, Chevron*'s Inevitability*, 85 GEO. WASH. L. REV. 1392, 1393 (2017) ("[*Chevron*] has dominated discussions of American administrative law for a generation and continues to do so."); Kent Barnett & Christopher J. Walker, Chevron *in the Circuit Courts*, 116 MICH. L. REV. 1, 1 (2017).

Nonetheless, in reflecting on judicial review of administrative action, Professor Diver offered some useful insights that give context to the many judicial decisions, like *Chevron* and its progeny, which address the deference due an agency's construction of its authorizing statute.

> Two competing traditions in American jurisprudence address the issue of the appropriate allocation of interpretive authority between agencies and courts. One … views matters of statutory interpretation as questions of 'law' reserved for independent determination by the judiciary …. Under this conception, a court must independently examine an administrative agency's claimed authority to inflict harm upon a plaintiff, just as it would assess the legal authority of a private entity to do so.
>
> The alternative view of the judicial function … views agencies as delegates, empowered by the legislature to exercise legislative power to articulate and implement public goals. Legislation, so conceived, is as much a mandate as a constraint. Under this conception, courts involved in statutory interpretation must provide enough leeway for agencies to give shape to that legislative mandate.
>
> These two traditions have coexisted uneasily throughout the modern era of administrative law.

Diver, *supra*, at 551. These observations set the stage for a discussion of the case law that addresses the deference that courts afford to agency constructions of their authorizing statutes.

———

Chevron is truly seminal because so many of the most important decisions that address the question of the appropriate deference due an agency's interpretation of its authorizing statute emanate from *Chevron*. It is therefore important to understand what was at stake and the precise terms of the Supreme Court's holding in that case. The Court described the controversy as follows:

> In the Clean Air Act Amendments of 1977, Congress enacted certain requirements applicable to States that had not achieved the national air quality standards established by the Environmental Protection Agency (["]EPA["]) pursuant to earlier legislation. The amended Clean Air Act required these "nonattainment" States to establish a permit program regulating "new or modified major stationary sources" of air pollution. Generally, a permit may not be issued for a new or modified major stationary source unless several stringent conditions are met. The EPA regulation promulgated to implement this permit requirement allows a State to adopt a plantwide definition of the term "stationary source." Under this definition, an existing plant that contains several pollution-emitting devices may install or modify one piece of equipment without meeting the permit conditions if the alteration will not increase the total emissions from the plant. The question presented … is whether EPA's decision to allow States to treat all of the pollution-emitting devices within the same industrial grouping as though they were encased within a single "bubble" is based on a reasonable construction of the statutory term "stationary source."

Chevron, 467 U.S. at 839–40. Before EPA adopted the regulations embodying the bubble concept, individual pieces of process equipment within a plant were considered to be a source. In other words, EPA changed its interpretation of the authorizing statute when it adopted the bubble concept. And it was undisputed that EPA changed the regulatory definition of "source" expressly to cut back on the coverage of nonattainment area new source review. The court of appeals set aside EPA's new regulations as contrary to legislative intent, on the ground that the bubble concept was "inappropriate" in programs enacted to improve air quality. *Nat. Res. Def. Council, Inc. v. Gorsuch*, 685 F.2d 718, 726 (D.C. Cir. 1982). The Supreme Court reversed.

With the benefit of hindsight, it is easy to recite the important legal principles that *Chevron* established:

> "The basic legal error of the Court of Appeals was to adopt a static judicial definition of the term 'stationary source' when it had decided that Congress itself had not commanded that definition." 467 U.S. at 842.
>
> ———
>
> "[T]he Court of Appeals misconceived the nature of its role in reviewing the regulations at issue. Once it determined, after its own examination of the legislation, that Congress did not actually have an intent regarding the applicability of the bubble concept to the permit program, the question before it was not whether in its view the concept is 'inappropriate' in the general context of a program designed to improve air quality, but whether

the Administrator's view that it is appropriate in the context of this particular program is a reasonable one." *Id.* at 845.

Chevron "Step One"

"When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842–43.

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"The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent. If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." *Id.* at 843 n.9 (citations omitted).

Chevron "Step Two"

"If … [a] court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843.

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"The power of an administrative agency to administer a congressionally created program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." *Id.*

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"If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." *Id.* at 843–44.

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"Sometimes the legislative delegation to an agency on a particular question

> is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." *Id.* at 844.

The *Chevron* doctrine has evolved extensively over the years since the decision was issued. The Court's important decision in *United States v. Mead Corp.*, 533 U.S. 218 (2001), restricts *Chevron*'s application to agency actions carrying the "force of law" pursuant to congressionally delegated authority. The Court has thus relegated other agency actions like opinion letters and enforcement guidelines to the less deferential standard of review enunciated in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). *See, e.g.*, *Christensen v. Harris Cnty.*, 529 U.S. 576, 586–88 (2000). In addition, in applying *Chevron* Step Two, the courts have tended to focus on whether an agency's position is within the compass of its delegated authority and whether its statutory interpretation is "reasonable" and not whether the interpretation is "manifestly contrary to the statute."

For a time, judges and commentators debated whether *Chevron* Step One requires a separate analysis from Step Two, or if the broad single question of whether an agency action was reasonable encompasses the *Chevron* inquiry as a whole. *Compare* Matthew C. Stephenson & Adrian Vermeule, Chevron *Has Only One Step*, 95 VA. L. REV. 597, 598–99 (2009), *with* Kenneth A. Bamberger & Peter L. Strauss, Chevron*'s Two Steps*, 95 VA. L. REV. 611, 616 (2009). Recently, however, the Supreme Court has seemed to make it clear that *Chevron* Step One is meaningful and indeed requires judges to first exhaust the traditional tools of statutory interpretation to ascertain whether Congress had an intention on the precise question at issue. If traditional tools of statutory interpretation – such as textual analysis and examination of congressional intent – produce a clear statutory meaning, no deference is due and a court need not examine whether the agency interpretation is reasonable under Step Two. *See, e.g.*, *Johnson v. Guzman Chavez*, 141 S. Ct. 2271, 2291 n.9 (2021) ("*Chevron* deference does not apply where the statute is clear.").

The Court's recent decision in *American Hospital Association v. Becerra*, 142 S. Ct. 1896 (2022) ("*AHA*") may illustrate an emerging consensus on the application of *Chevron*. Under the Medicare statute, the Department of Health and Human Services must reimburse hospitals for certain outpatient prescription drugs that the hospitals provide to Medicare patients. *Id*. at 1899. The question before the Court was whether the Medicare statute afforded HHS discretion to vary the reimbursement rates for one group of hospitals when HHS had not conducted a required survey of hospitals' acquisition costs. *Id.* The Government strongly argued that, under *Chevron*, the Court must defer to the agency's reasonable construction of the statute. The D.C. Circuit agreed, declaring that because "the statute does not directly foreclose [Health and Human Services'] understanding, we defer to the agency's reasonable interpretation." *Am. Hosp. Ass'n v. Azar*, 967 F.3d 818, 828 (D.C. Cir. 2020). The Supreme Court unanimously reversed. *AHA*, 142 S. Ct. at 1899.

Making no mention of *Chevron*, the Supreme Court simply interpreted the statutory text. It held that, "after employing the traditional tools of statutory interpretation, we do not agree with [Health and Human Services'] interpretation of the statute." *Id.* at 1906. The Court tellingly found that "the statute [reflected] a careful congressional focus not only on the goal of proper reimbursement rates, but also on the appropriate means to that end." *Id.* at 1903. The Court held that HHS had no authority to vary reimbursement rates without the required acquisition cost survey data from the hospitals. *Id.*

at 1899. Therefore, the Court had no cause to inquire whether the agency's interpretation of the statute was reasonable.

Similarly, in *Sackett v. EPA*, 143 S. Ct. 1322 (2023), the EPA expressly argued that its interpretation of the scope of "waters of the United States" in the Clean Water Act is entitled to deference. Indeed, the Court had previously acknowledged that the EPA is entitled to deference in its interpretation of the scope of the Clean Water Act. *See United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 132-35 (1985). However, the Court in *Sackett* simply engaged in ordinary statutory interpretation to conclude that the EPA's expansive interpretation of the scope of its jurisdiction did not comport with the statute. *See Sackett*, 143 S. Ct. at 1336-41. Notably, the Court did not purport to operate within the *Chevron* framework at all. And although the Court did not invoke the major questions doctrine, it summarily disposed of EPA's request for deference by noting that "the EPA must provide clear evidence that it is authorized to regulate in the manner it proposes" before the Court endorses an interpretation that would "significantly alter the balance between federal and state power and the power of the Government over private property" and that would give "rise to serious vagueness concerns in light of the [Clean Water Act's] criminal penalties." *Id.* at 1341-44.

The Court's emerging message on the applicability of *Chevron* deference is plain: if the traditional tools of statutory interpretation produce a statutory meaning that is clear, judges are not free to invoke *Chevron* Step Two and ask whether the agency's interpretation is reasonable, nor should they defer to an agency construction that is at odds with the statute. *See also, e.g.*, *Babb v. Wilkie*, 140 S. Ct. 1168, 1177 (2020) ("[W]here, as here, the words of [a] statute are unambiguous, the judicial inquiry is complete.").

This approach does not resolve the difficult interpretive question of *how clear* a statute must be to be considered "unambiguous." The Court's decision in *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019), concerning when a court should defer to an agency's interpretation of its own regulations, is instructive. In *Kisor*, the Court said an agency's construction of a regulation is not entitled to deference unless the regulation is "*genuinely ambiguous*." *Id*. at 2415 (emphasis added). And the Court cited *Chevron* in support of its holding that a court must exhaust all the "traditional tools" of construction in interpreting a contested regulation. *Id*.

Even as Justices, judges, scholars, and legislators have debated the efficacy, propriety, and contours of *Chevron*, the Supreme Court has largely continued to endorse *Chevron*'s two-step framework. *See, e.g.*, *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 219–21 (2016); *City of Arlington v. FCC*, 569 U.S. 290, 296 (2013); *Mayo Found. for Med. Educ. & Rsch. v. United States*, 562 U.S. 44, 57–58 (2011). However, there have been recent indications that at least some Justices may be willing to reconsider *Chevron* moving forward. In *SAS Institute, Inc. v. Iancu*, 138 S. Ct. 1348 (2018), Justice Gorsuch raised questions about the doctrine's vitality in his majority opinion, stating—in response to a request in the alternative that *Chevron* should be overruled—that "whether *Chevron* should remain is a question we may leave for another day." *Id.* at 1358. Moreover, in recent terms, the Court has avoided applying *Chevron* in some of its rulings. *See, e.g.*, *AHA*, 2022 WL 2135490 at *8; *Johnson v. Guzman Chavez*, 141 S. Ct. 2271, 2291 n.9 (2021) (finding that "*Chevron* deference does not apply where the statute is clear"); *Salinas v. U.S. R.R. Ret. Bd.*, 141 S. Ct. 691, 700 (2021) ("No [*Chevron*] deference is due here because the scope of

judicial review is 'hardly the kind of question that the Court presumes that Congress implicitly delegated to an agency.'" (quoting *Smith v. Berryhill*, 139 S. Ct. 1765, 1778 (2019))); *HollyFrontier Cheyenne Ref., LLC v. Renewable Fuels Ass'n*, 141 S. Ct. 2172, 2180 (2021) ("declin[ing] to consider whether any [*Chevron*] deference might be due" because the Government did not invoke *Chevron* deference).

The following pages aim to unsort some of *Chevron*'s doctrinal complexity and explain the important principles governing the scope and standards of review that control judicial review of agency constructions of their authorizing statutes.

B. *Chevron* Step One: Has Congress Directly Spoken to the Precise Question?

Under *Chevron* Step One, judicial review involves a search for plain meaning in a statute. "When a court reviews an agency's construction of the statute which it administers," it first considers "whether Congress has directly spoken to the precise question at issue." *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984). "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* "The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent." *Id.* at 843 n.9. Therefore, "[i]f a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." *Id.*

Chevron Step One is routinely applied to overturn action taken by an agency that exceeds its authority under an authorizing statute or to compel action by an agency that has failed to adhere to its obligations under the statute. Before a court may invoke *Chevron* Step One, it must find that "the intent of Congress is clear," meaning that the statutory provision at issue is "unambiguous[]" with respect to the question presented. *Id.* at 841. As explained by the Supreme Court, this requires that the governing statute, read "as a whole," reveal a clear congressional intent regarding the relevant question, *see, e.g.*, *Dole v. United Steelworkers of Am.*, 494 U.S. 26, 41 (1990), or that "the text [of the statute] and reasonable inferences from it give a clear answer," *Brown v. Gardner*, 513 U.S. 115, 120 (1994). And the Court has made it plain that "[a]mbiguity [in a statute] is a creature not of definitional possibilities but of statutory context." *Id.* at 118. Simply stated, statutory text must be read in context in order to derive the meaning of words. *See Petit v. U.S. Dep't. of Educ.*, 675 F.3d 769, 781–82 (D.C. Cir. 2012). It is sometimes argued that, in construing a statute, a court should give "dispositive weight to the expectations that the enacting Congress had formed in light of the contemporary legal context." *Alexander v. Sandoval*, 532 U.S. 275, 287–88 (2001). The Court has rejected this view, however, holding: "We have never accorded dispositive weight to context shorn of text. In … interpreting statutes generally, legal context matters only to the extent it clarifies text." *Id.* at 288.

In framing the standard governing the Step One search for a statute's plain meaning, the

Chevron opinion directs courts to "employ[] traditional tools of statutory construction." *Chevron*, 467 U.S. at 843 n.9; *see Regions Hosp. v. Shalala*, 522 U.S. 448, 457 (1998) ("If, by employing traditional tools of statutory construction we determine that Congress' intent is clear, that is the end of the matter.") These "traditional tools" normally include consideration of the "words, structure, and history" of the agency's authorizing statute. *NLRB v. United Food & Com. Workers Union, Loc. 23*, 484 U.S. 112, 123–24 (1987). A reviewing court may additionally consider a statutory provision's "relationship to other federal statutes." *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 600 (2004); *see also Gardner*, 513 U.S. at 118–20 (relying on statutory scheme, meaning of the same term in other statutes, and the canon of construction that a statutory term should be accorded a consistent meaning, in holding that a regulation was inconsistent with the controlling statute).

It is well understood that legislative history is the least reliable tool of statutory construction. Sometimes "extremely murky," it can be "a slender reed on which to place reliance." *Nat'l Credit Union Admin. v. First Nat'l Bank & Trust Co*., 522 U.S. 479, 503 n.10 (1998). And the Court has said that "[p]ost-enactment legislative history is not only oxymoronic but inherently entitled to little weight." *Massachusetts v. EPA*, 549 U.S. 497, 530 n.27 (2007) (quoting *Cobell v. Norton*, 428 F.3d 1070, 1075 (D.C. Cir. 2005)). However, a court may use the absence of inconsistent legislative history to confirm the plain meaning of a statute. *See, e.g.*, *Cal. Dental Ass'n v. FTC*, 526 U.S. 756 (1999) (relying on plain meaning, structure, and purpose of the statute, as well as the absence of contrary legislative history, in finding that the Federal Trade Commission's "jurisdiction under the Federal Trade Commission Act … extends to an association that … provides substantial economic benefit to its for-profit members"); *Mexichem Fluor, Inc. v. EPA*, 866 F.3d 451, 459 (D.C. Cir. 2017) ("Because the text is sufficiently clear, we need not consider the legislative history. In any event, the legislative history strongly supports our conclusion that [the statutory provision] does not grant [the agency] continuing authority to require replacement of non-ozone-depleting substitutes."); *Lawrence + Mem'l Hosp. v. Burwell*, 812 F.3d 257, 266 (2d Cir. 2016) (stating that "[w]hile our view of the statute's plain meaning trumps any resort to legislative history, we further note that the legislative history of [the statutory provision] strongly supports our interpretation, not the [agency's]" and discussing a congressional conference committee report, "the highest form of legislative history").

In some cases, the application of Step One is straightforward. *See, e.g.*, *Kingdomware Techs., Inc. v. United States*, 579 U.S. 162, 171 (2016) ("[W]e begin with the language of the statute[;] … [i]f the … language is unambiguous and the statutory scheme is coherent and consistent—as is the case here—the inquiry ceases."); *Friends of the Earth, Inc. v. EPA*, 446 F.3d 140, 144–45 (D.C. Cir. 2006); *Holly Sugar Corp. v. Johanns*, 437 F.3d 1210, 1213–14 (D.C. Cir. 2006); *Cal. Indep. Sys. Operator Corp. v. FERC*, 372 F.3d 395, 401–03 (D.C. Cir. 2004). In other cases, however, the search for a statute's plain meaning is not so easy. Indeed, the Supreme Court has issued many decisions resting on *Chevron* Step One that have been opposed by dissenting opinions. Dissenters in such cases often find that the authorizing statute at issue was ambiguous and that the agency's interpretation was therefore owed *Chevron* Step Two deference. *See, e.g.*, *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302 (2014) (holding an Environmental Protection Agency rule invalid because it was inconsistent with the unambiguous direction of a controlling permitting provision of the Clean

Air Act); *Rapanos v. United States*, 547 U.S. 715 (2006) (plurality opinion) (holding that certain Michigan wetlands are not "waters of the United States" under unambiguous provision of the Clean Water Act). And in some *Chevron* Step One cases, a majority of the Court has found that a statute unambiguously points to one intent on the part of Congress, while dissenting Justices have found that the same statute points unambiguously to another intent. In such cases, both majority and dissenters reject a claim of ambiguity even though it would appear that the statute plausibly admits of more than one construction. *See, e.g.*, *Carcieri v. Salazar*, 555 U.S. 379 (2009).

There are a number of viable theories of statutory interpretation that might explain judicial applications of the *Chevron* two-step framework. *See generally* ROBERT A. KATZMANN, JUDGING STATUTES (2016) (discussing various theories of statutory construction); Richard H. Fallon, Jr., *The Meaning of Legal "Meaning" and Its Implications for Theories of Legal Interpretation*, 82 U. CHI. L. REV. 1235 (2015). And there are many decisions indicating that the courts routinely follow certain common principles in invoking *Chevron* Step One. For example:

- "[T]he lack of a statutory definition does not render a term ambiguous." *Am. Fed'n of Gov't Emps. v. Glickman*, 215 F.3d 7, 10 (D.C. Cir. 2000). The lack of a statutory definition "simply leads [courts] to give the term its ordinary, common meaning." *Id.*

- An agency's interpretation of statutory terms that goes beyond the ordinary meaning of the words will not be credited. *See, e.g.*, *Mexichem Fluor*, 866 F.3d at 458–59 (holding that because "EPA's current reading stretches the word 'replace' beyond its ordinary meaning," the agency's interpretation "fails at *Chevron* step 1"); *District of Columbia v. Dep't of Lab.* 819 F.3d 444, 451–53 (D.C. Cir. 2016) (considering dictionary and statutory definitions of the term "public works" and determining that the agency's interpretation of the term contravened such definitions); *CalPortland Co., Inc. v. Fed. Mine Safety & Health Rev. Comm'n ex rel. Pappas*, 839 F.3d 1153, 1163 (D.C. Cir. 2016) (finding, on the basis of the plain meaning, that "Congress's use of the word 'reinstatement' in [the relevant statutory provision] provides a clear sense of congressional intent on this issue" and vacating the agency's decision and order).

- An agency may not write statutory text out of the statute. *See, e.g.*, *Lawrence + Mem'l Hosp.*, 812 F.3d at 265 (holding that the governing statute "unequivocally directs the [agency]" to consider certain applications from hospitals and that "[t]o write the phrase 'for the purposes of this subsection' out of the text would be at odds with one of the most basic interpretive canons, that a statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant").

- The courts reject agency attempts to create ambiguity in statutory language where there is none to be found. *See, e.g.*, *W. Minn. Mun. Power Agency v. FERC*, 806 F.3d 588, 592 (D.C. Cir. 2015) ("In concluding that [the statutory provision] is ambiguous because it provided no guidance on its scope, the Commission has manufactured ambiguity, ignoring *Chevron* step one altogether by failing to articulate how the plain text of [the provision] was unclear."); *Prestol Espinal v. Att'y Gen. of U.S.*, 653 F.3d 213, 220 (3d Cir. 2011)

(rejecting the government's argument that "nothing in the text of the statute explicitly precludes the agency from imposing" an exception to a right provided in the applicable immigration statute for non-citizens who are no longer in the United States).

- Agency action will fail under *Chevron* Step One if it creates a regulatory scheme different than the one created by Congress. *See, e.g.*, *New Mexico v. Dep't of Interior*, 854 F.3d 1207, 1225 (10th Cir. 2017) (noting that "[t]he remedial scheme adopted by [the agency] differs from that created by Congress in fundamental ways," including that the governing statute "requires a finding by a federal court that a state failed to negotiate in good faith" but that the challenged regulation "has no such requirement").

- Agency action likewise fails under Step One when the agency attempts to alter or add additional criteria beyond those provided in the governing statute. *See, e.g.*, *Cent. United Life Ins. Co. v. Burwell*, 827 F.3d 70, 72–73 (D.C. Cir. 2016) (declining to provide *Chevron* deference to an agency rule "amend[ing] the criteria for fixed indemnity insurance" in the health insurance market because "[n]othing in the [relevant statute] suggests Congress left any leeway for [the agency] to tack on additional criteria" for fixed indemnity insurance, beyond the criteria outlined in the statute).

- And when statutory language is unambiguous in requiring certain regulatory action, a reviewing court will not defer to an agency's "judgment" to ignore the statute. *See, e.g.*, *Massachusetts v. EPA*, 549 U.S. at 533. In other words, a statutory directive, if unambiguous, can serve as a mandate for agency action. Thus, for example, in *Union Pacific Railroad v. Brotherhood of Locomotive Engineers*, 558 U.S. 67 (2009), the Supreme Court concluded that the National Railroad Adjustment Board ("NRAB") did not have authority to establish procedural rules limiting the exercise of its jurisdiction over grievance claims filed against railroads by employees. The Railway Labor Act ("RLA") directs the NRAB to conduct mandatory arbitration of "minor [labor] disputes" between railways and their employees. *Id.* at 72. The NRAB declined to consider five such claims, dismissing them for lack of jurisdiction on the grounds that there was no record evidence that the employees and the railroad had conferenced in an attempt to settle their grievances, as directed by the RLA. The Supreme Court found that the conferencing requirement was not jurisdictional. It rejected the NRAB's procedural decisions to the contrary, finding instead that "Congress alone controls the Board's jurisdiction" and that the Board's statutory grant of authority under the RLA precluded it from creating new jurisdictional requirements. *Id.* at 71. The Court noted that "there is surely a starting presumption that when jurisdiction is conferred, a court may not decline to exercise it," and that "[t]he general rule applicable to courts also holds for administrative agencies directed by Congress to adjudicate particular controversies." *Id.*

Finally, as noted in part A *supra* ("The *Chevron* Framework"), judges and commentators have debated whether *Chevron* Step One requires a separate analysis from Step Two, or if the broad single question of whether an agency action was reasonable encompasses the *Chevron* inquiry

as a whole. Judges who have opposed conflating the *Chevron* Step One and Two inquiries have pointed out that:

> [S]ome advocates of a one-step reasonableness approach appeal to the judiciary's fear of commitment—promising that courts can avoid "ascertain[ing] whether the statute has a single, clear meaning before deciding whether the agency's interpretation is reasonable." . . . Congress is out of the picture altogether. When all that matters is aligning judicial and administrative views of reasonableness, and reasonableness at Step Two need not be primarily or solely determined by the "traditional tools" of statutory interpretation, there is no incentive to petition the legislature for statutory clarity. Agencies are free to experiment with various interpretations, and courts are free to avoid determining the meaning of statutes.

Waterkeeper All. v. EPA, 853 F.3d 527, 539 (D.C. Cir. 2017) (citations omitted) (Brown, J., concurring).

The Supreme Court seemed to have put this issue to rest in *American Hospital Association v. Becerra*, 142 S. Ct. 1896 (2022) ("*AHA*"). The D.C. Circuit had ruled that because "the statute does not directly foreclose [Health and Human Services'] understanding [of its delegated authority], we defer to the agency's reasonable interpretation." *Am. Hosp. Ass'n v. Azar*, 967 F.3d 818, 828 (D.C. Cir. 2020). The Supreme Court unanimously reversed. *AHA*, 2022 WL 2135490 at *2. Making no mention of *Chevron*, the Supreme Court simply interpreted the statutory text. It held that, "after employing the traditional tools of statutory interpretation, we do not agree with [Health and Human Services'] interpretation of the statute." *Id*. at *8. The Court had no occasion to inquire whether the agency's interpretation of the statute was reasonable.

In sum, under established case law, a court reviewing agency action must first determine whether the agency had delegated authority to act and whether the plain meaning of the statute is controlling. An agency's regulatory action cannot survive judicial review if it is beyond the authority granted by Congress or contrary to the clear terms of the statute. In these situations, *Chevron* Step Two is not in play.

C. *Chevron* Step Two: Judicial Deference to Agency Lawmaking Choices that are within the Scope of an Agency's Congressionally Delegated Authority

If a challenge to an agency's interpretation of its authorizing statute cannot be resolved pursuant to *Chevron* Step One—in other words, if Congress has not addressed the precise question at issue—then *Chevron* Step Two deference may apply. Under Step Two, if "Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative

interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984). As the Court explained in *City of Arlington v. FCC*, 569 U.S. 290 (2013):

> *Chevron* is rooted in a background presumption of congressional intent: namely, that Congress, when it left ambiguity in a statute administered 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. *Chevron* thus provides a stable background rule against which Congress can legislate: Statutory ambiguities will be resolved, within the bounds of reasonable interpretation, not by the courts but by the administering agency. Congress knows to speak in plain terms when it wishes to circumscribe, and in capacious terms when it wishes to enlarge, agency discretion.

Id. at 296. If Congress, by explicit or implicit direction, has delegated authority to an agency to fill a gap in its authorizing statute, then the court must defer to the agency's construction of the statute so long as it is reasonable. However, as the following discussion indicates, "the existence of statutory ambiguity is sometimes not enough to warrant the conclusion that Congress has left a deference-warranting gap for the agency to fill." *Id.* at 308–09 (Breyer, J., concurring). And, as the cases have indicated, the most difficult questions under *Chevron* Step Two are those involving alleged *implied* delegations of authority to an agency. Indeed, issues concerning purported implied delegations of authority contributed to the Supreme Court's adoption of the "major questions" doctrine. *See*, Chapter XIV.A, *supra* and Chapter XIV.D.2, *infra*.

It is also important to understand that a disputed agency action may appear to fit within the broad compass of an agency's delegated authority and yet fail review under *Chevron* Step Two because the particular statutory construction is deemed unreasonable. *See, e.g.*, *Michigan v. EPA*, 576 U.S. 743, 753, 760 (2015) (holding that the EPA interpreted the statute at issue "unreasonably when it deemed cost irrelevant to the decision to regulate power plants" in part because the "[s]tatutory context reinforces the relevance of cost"); *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 321 (2014) (stating that, under *Chevron*, "reasonable statutory interpretation must account for both the specific context in which … language is used and the broader context of the statute as a whole," and holding that "[the agency's] interpretation is not permissible" because it "would be inconsistent with—in fact, would overthrow—the [statute's] structure and design").

One area of confusion in the case law has to do with the relationship between judicial review under *Chevron* Step Two and arbitrary and capricious review under *Motor Vehicle Manufacturers Ass'n of the United States v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 43 (1983). *See* part XVIII.A, *infra*. The Supreme Court sometimes seems to merge *Chevron* Step Two and arbitrary and capricious review. *See, e.g.*, *Encino Motorcars, LLC v. Navarro,* 579 U.S. 211, 222–24 (2016); *Michigan v. EPA*, 576 U.S. 743, 753–54, 760 (2015); *Judulang v. Holder*, 565 U.S. 42, 54 n.7 (2011). But consider *Catskill Mountains Chapter of Trout Unlimited, Inc. v. EPA*, 846 F.3d 496,

521–24 (2d Cir. 2017), and *Southwest Power Pool, Inc. v. FERC*, 736 F.3d 994, 997 (D.C. Cir. 2013), which, along with a number of other decisions in the Courts of Appeals, treat *Chevron* Step Two and arbitrary and capricious review as distinct.

1. An Agency Must Act Pursuant to Congressionally Delegated Authority

A federal agency "literally has no power to act … unless and until Congress confers power upon it." *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986). Therefore, whenever a court considers whether an agency's interpretation of its authorizing statute should be accorded deference under *Chevron*, the court must determine whether the agency has acted pursuant to properly delegated authority. As the Court made clear in *City of Arlington*, "[w]hether framed as going to the scope of [an agency's] delegated authority or [an agency's] application of its delegated authority, the underlying question [for the court is whether an agency] exceed[ed] the bounds of its statutory authority to regulate." 569 U.S. at 300.

"Deciding just what those statutory bounds are, however, is not always an easy matter." *Id.* at 308 (Breyer, J., concurring). If a statute is ambiguous because it does not include an explicit delegation of authority, "then that ambiguity is a sign—but not always a conclusive sign—that Congress intends a reviewing court to pay particular attention to (*i.e.*, to give a degree of deference to) the agency's interpretation." *Id.* (citing G*onzales v. Oregon*, 546 U.S. 243, 258–269 (2006); *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001)); *see, e.g.*, *Am. Bar Ass'n v. FTC*, 430 F.3d 457 (D.C. Cir. 2005) (holding that the Federal Trade Commission exceeded its statutory authority when it adopted rules purporting to regulate attorneys in the practice of law).

Agencies sometimes contend that regulations promulgated pursuant to a statutory grant of broad rulemaking authority should be deemed permissible under *Chevron* Step Two so long as they are reasonably related to the purposes of the agency's authorizing statute. This view comes from the Court's pre-*Chevron* decision in *Mourning v. Family Publications Service, Inc.*, 411 U.S. 356 (1973). The Court has, however, made it clear that *Mourning* has only limited precedential value in the *Chevron* regime. *See Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 92 (2002) ("Our previous decisions, *Mourning* included, do not authorize agencies to contravene Congress' will in this manner."). In short, "[a]n agency's general rulemaking authority does not mean that the specific rule the agency promulgates is a valid exercise of that authority." *Colo. River Indian Tribes v. Nat'l Indian Gaming Comm'n*, 466 F.3d 134, 139 (D.C. Cir. 2006). Nor does a statute's "general declaration of policy" determine the legality of regulations promulgated to implement specific provisions of an authorizing statute. *Id.* "Agencies are … bound, not only by the ultimate purposes Congress has selected, but by the means it has deemed appropriate, and prescribed, for the pursuit of those purposes." *Id.*

The important point here is that, in considering the permissibility of an agency's construction of a statute, a court must determine not just whether the agency's interpretation is founded on reasonable policy goals, but also whether the agency has acted within the realm of its authority

under the statute. In other words, an agency action cannot be "permissible" under *Chevron* Step Two if the agency acts in excess of its authority under the applicable statute. *See, e.g.*, *Am. Bar Ass'n*, 430 F.3d at 468 (For an agency to suggest "that *Chevron* step two is implicated any time a statute does not expressly negate the existence of a claimed administrative power is both flatly unfaithful to the principles of administrative law and refuted by precedent."); *Motion Picture Ass'n of Am. v. FCC*, 309 F.3d 796, 805 (D.C. Cir. 2002) (finding "entirely untenable" "[t]he FCC's position … that the adoption of rules mandating video description is permissible because Congress did not expressly foreclose the possibility"). *Chevron* deference "comes into play … only as a consequence of statutory ambiguity, and then only if the reviewing court finds a[] … delegation of authority to the agency." *Sea-Land Serv., Inc. v. Dep't of Transp.*, 137 F.3d 640, 645 (D.C. Cir. 1998); *see also Michigan v. EPA*, 268 F.3d 1075, 1082 (D.C. Cir. 2001) ("Mere ambiguity in a statute is not evidence of congressional delegation of authority."); *Nat. Res. Def. Council v. Reilly*, 983 F.2d 259, 266 (D.C. Cir. 1993); *City of Kansas City v. HUD*, 923 F.2d 188, 191–92 (D.C. Cir. 1991) (holding that "delegation of interpretive authority," as well as ambiguity, are required before *Chevron* deference is appropriate); *id.* ("It is only legislative intent to delegate such authority that entitles an agency to advance its own statutory construction for review under the deferential second prong of *Chevron*.").

2. An Agency Must Act with the Force of Law

The Supreme Court has explained that Step Two deference only comes into play when an agency has acted within the area in which Congress has authorized it to act, and the action at issue was taken pursuant to congressionally delegated authority to make law and with the intent on the part of the agency to act with the force of law. *Mead*, 533 U.S. at 226–27; *see also Mayo Found. for Med. Educ. & Rsch. v. United States*, 562 U.S. 44, 57 (2011) (holding "that *Chevron* deference is appropriate 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"); *Christensen v. Harris Cnty.*, 529 U.S. 576, 587 (2000) (holding that agency interpretations of a statute which are contained in opinion letters, policy statements, agency manuals, or enforcement guidelines, all of which "lack the force of law," do not warrant *Chevron* deference). This inquiry, which has been dubbed by some commentators as *Chevron* "Step Zero," determines "whether courts should turn to the *Chevron* framework at all." Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 GEO. L.J. 833, 836 (2001).

In considering whether an agency has acted with the "force of law," a court must of course determine whether the agency has acted pursuant to delegated authority. A court's inquiry in this regard "does not turn on whether Congress' delegation of authority was general or specific." *Mayo*, 562 U.S. at 57. For example, in *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967 (2005), the Court ruled that the FCC was given "the authority to promulgate binding legal rules" entitled to *Chevron* deference pursuant to statutory provisions that delegated to the Commission the authority to "execute and enforce," and to "prescribe such

rules and regulations as may be necessary in the public interest to carry out the provisions" of the Communications Act. *Id.* at 980–81; *see also Sullivan v. Everhart*, 494 U.S. 83, 87 (1990) (applying *Chevron* deference to a rule promulgated under a statute giving the agency the general authority to "make rules and regulations and to establish procedures" that were not inconsistent with the agency's authorizing statute). However, the mere existence of "general rulemaking authority does not mean that [every] rule the agency promulgates is a valid exercise of that authority." *Colo. River Indian Tribes v. Nat'l Indian Gaming Comm'n*, 466 F.3d 134, 139 (D.C. Cir. 2006) (holding that the Indian Gaming Regulatory Act did not give the National Indian Gaming Commission authority to promulgate regulations establishing mandatory operating procedures for class III gaming). And in some cases, a court may nullify an agency action pursuant to the "major questions" doctrine. *See* part XIV.A, *supra* and XIV.D.2, *infra*.

Courts may look to "the face of the statute" to see whether "the terms of the congressional delegation" give any indication that Congress meant to delegate authority to the agency to issue rulings with the force of law. *Mead*, 533 U.S. at 231–32; *see also Gonzales v. Oregon*, 546 U.S. 243, 259 (2006) (indicating that "[t]he starting point for this inquiry is, of course, the language of the delegation provision itself"). A reviewing court must consider whether the enabling statute bespeaks a congressional intention to authorize the agency to undertake a "legislative type of activity that would naturally bind more than the parties" to a particular action; whether the agency's action is subject to review by a higher authority; whether the agency had "a lawmaking pretense in mind"; and whether the challenged agency ruling is of a type that routinely emanates from a central agency authority rather than from "scattered offices" in a vast administrative bureaucracy. *Mead*, 533 U.S. at 232–33.

United States v. Mead, 533 U.S. 218 (2001), and *Christensen v. Harris County*, 529 U.S. 576 (2000), make it clear that the process that an agency follows and the form of its final action must be considered in any judicial determination regarding whether *Chevron* deference should apply. As *Mead* explains, "[i]t is fair to assume generally that Congress contemplates administrative action with the effect of law when it provides for a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force." 533 U.S. at 230. The absence of "relatively formal" rulemaking or adjudicatory procedures is not dispositive, however, for the Court has "sometimes found reasons for *Chevron* deference even when no such administrative formality was required and none was afforded." *Id.* at 231. Thus, in *Barnhart v. Walton*, 535 U.S. 212 (2002), the Court held that "the fact that the Agency … reached its interpretation through means less formal than 'notice and comment' rulemaking does not automatically deprive that interpretation of the judicial deference otherwise its due." *Id.* at 221. Rather, "the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time [may] indicate that *Chevron* provides the appropriate legal lens through which to view the legality of [a disputed] Agency interpretation" of its authorizing statute. *Id.* at 222.

Chevron deference also may be given to an agency judgment rendered in an adjudication rather than in a rulemaking procedure, *see, e.g.*, *Menkes v. U.S. Dep't of Homeland Sec.*, 637 F.3d

319 (D.C. Cir. 2011), even if the procedures followed by the agency do not satisfy the APA's requirements under 5 U.S.C. § 554(a) and 5 U.S.C. § 706(2)(e) governing "formal" adjudications, *see, e.g.*, *Mylan Labs., Inc. v. Thompson*, 389 F.3d 1272, 1279–81 (D.C. Cir. 2004).

There are some situations, however, in which no *Chevron* deference is given to an agency action even though it purports to carry the force of law, because the agency decision is not adequately explained. *See, e.g.*, *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 220–22 (2016); *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

In sum, the important point here is that when there is no persuasive evidence that Congress delegated authority to an agency to take a particular action with the force of law, or when the agency action for which deference is claimed was not taken in the exercise of such authority, then the action is "beyond the *Chevron* pale." *Mead*, 533 U.S. at 234.

3. Judicial Assessments of Agency Constructions of Authorizing Statutes to Determine Reasonableness

An agency's interpretation of its authorizing statute is entitled to deference only when the agency has acted pursuant to delegated authority to fill a gap in its authorizing statute and its construction is reasonable. A substantial majority of contested agency interpretations that are reviewed under *Chevron* Step Two survive judicial scrutiny. In their study of circuit court decisions from 2003 to 2013 reviewing agency statutory interpretations, Professors Barnett and Walker found that "the vast majority of agency interpretations (817 interpretations, or 70.0%) made it to step two" and "an even greater percentage of interpretations that made it to step two (766 interpretations, or 93.8%) were upheld." Kent Barnett & Christopher J. Walker, Chevron *in the Circuit Courts*, 116 MICH. L. REV. 1, 5, 33 (2017). "[A]gency interpretations were significantly more likely to prevail under *Chevron* deference (77.4%) than *Skidmore* deference (56.0%) or, especially, *de novo* review (38.5%). In other words, agencies won significantly more in the circuit courts when *Chevron* deference applied, at least when the court expressly considered whether to apply *Chevron*. Indeed, there was nearly a twenty-five-percentage-point difference in agency-win rates with *Chevron* deference (77.4%) than without (53.6%)." *Id.* at 6.

It is not really surprising that most agency constructions of authorizing statutes survive review under *Chevron* Step Two. After all, in most such cases the agencies are acting pursuant to delegated authority to achieve congressionally mandated policy objectives within their areas of expertise. The courts therefore properly defer to agency actions in such cases because deference is required under *Chevron*. There is another side to the story, however. A careful review of the case law shows that the courts also understand that "*Chevron*'s second step can and should be a meaningful limitation on the ability of administrative agencies to exploit statutory ambiguities, assert farfetched interpretations, and usurp undelegated policymaking discretion." *Glob. Tel*Link v. FCC*, 866 F.3d 397, 418 (D.C. Cir. 2017) (Silberman, J., concurring). As a result, the courts do not hesitate to overturn such agency interpretations. *See generally id.* (majority

opinion); *see also Goldstein v. SEC*, 451 F.3d 873, 880–81 (D.C. Cir. 2006); *Am. Bar Ass'n v. FTC*, 430 F.3d 457, 471 (D.C. Cir. 2005); *Am. Libr. Ass'n v. FCC*, 406 F.3d 689, 699 (D.C. Cir. 2005).

Agency action taken pursuant to an express delegation of authority can be measured pursuant to the terms of the delegation and thus rarely poses serious difficulties for a reviewing court. *See, e.g.*, *Mayo*, 562 U.S. at 57. Explicit delegations of authority are typically found when "Congress has expressly delegated to [an agency] the authority to prescribe regulations containing such classifications, differentiations, or other provisions as, in the judgment of the [agency], are necessary or proper to effectuate the purposes of [the authorizing statute], to prevent circumvention or evasion thereof, or to facilitate compliance therewith," *Household Credit Servs., Inc. v. Pfennig*, 541 U.S. 232, 238 (2004), or when "Congress confer[s] on [an agency] exceptionally broad authority to prescribe standards for applying certain sections of [its authorizing statute]," *Atkins v. Rivera*, 477 U.S. 154, 162 (1986). "[W]henever Congress has explicitly left [such] gap[s] for the agency to fill, the agency's regulation is given controlling weight unless it is arbitrary, capricious, or manifestly contrary to the statute." *Household Credit Servs*., 541 U.S. at 239. If the agency action is not contrary to the terms of the delegation, it will survive Step Two review. *See, e.g.*, *id.*; *Astrue v. Capato ex rel. B.N.C.*, 566 U.S. 541 (2012).

Under *Chevron* Step Two, an agency's interpretation may be deemed unreasonable in light of the "plain language of the statute, its origin, and purpose." *Si Min Cen v. Att'y Gen. of U.S.*, 825 F.3d 177, 186 (3d Cir. 2016). Courts consider factors such as the "broader structure of the [statute], as informed by canons of statutory construction"; the "regulatory and statutory context" of the statute; the "congressional purpose behind" the statute in question; and courts' precedent interpreting the agency's regulatory authority under the governing statute. *Id.* at 190; *see Nat'l Pork Producers Council v. EPA*, 635 F.3d 738, 751 (5th Cir. 2011) ("[A] *Chevron* step two analysis depends on a number of factors. These include: the consistency of the interpretation and the length of adherence to it, undisturbed by Congress; the explicitness of the congressional grant of authority to the agency, with greater deference in cases of more specific delegation; and the degree of agency expertise necessarily drawn upon in reaching its interpretation.").

There is also some case law that says that a court should review an agency construction of its authorizing statute "for reasonableness," "which … means (within its domain) that a reasonable agency interpretation prevails." *Waterkeeper All. v. EPA*, 853 F.3d 527, 534 (D.C. Cir. 2017). This formulation of the *Chevron* framework comes from *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 218 & n.4 (2009), and it might be read to conflate Steps One and Two of *Chevron*. *See Waterkeeper All.*, 853 F.3d at 538–39 (Brown, J., concurring). However, the decision in *Entergy* makes it clear that "if Congress has directly spoken to an issue then any agency interpretation contradicting what Congress has said would be unreasonable." 556 U.S. at 218 n.4. *See* Barnett & Walker, *supra*, at 33–34 (finding that "it is not true that *Chevron*, at least as an empirical matter, has collapsed into just one step of statutory ambiguity. In particular, fifty-one agency statutory interpretations in our dataset—6.2% of those cases that made it to step two—were deemed unreasonable even though the court found the statute to be ambiguous as to the question at issue.").

An agency interpretation that "exceeds the permissible scope of [its] regulatory authority" may be struck down under *Chevron* Step Two. *Si Min Cen*, 825 F.3d at 179. A number of decisions amplify this point.

- Agencies' interpretations will be deemed unreasonable if they are inconsistent with the statutory context. *See, e.g.*, *Michigan v. EPA*, 576 U.S. at 753, 760 (holding that the EPA interpreted the statute at issue "unreasonably when it deemed cost irrelevant to the decision to regulate power plants" in part because the "[s]tatutory context reinforces the relevance of cost"); *Util. Air Regul. Grp.*, 573 U.S. at 321 (stating that, under *Chevron*, "reasonable statutory interpretation must account for both the specific context in which language is used and the broader context of the statute as a whole," and holding that "[the agency's] interpretation is not permissible" because it "would be inconsistent with—in fact, would overthrow—the [statute's] structure and design").

- An agency's action or interpretation may fail at *Chevron* Step Two if it is based on an unreasonable interpretation of legislative history. *See, e.g.*, *Council for Urological Interests v. Burwell*, 790 F.3d 212, 223 (D.C. Cir. 2015) (holding that the agency regulation in question "fails at *Chevron* step two" because the agency's understanding of the legislative history was unreasonable).

- "[D]eference to an agency's interpretation of a statute is not appropriate when the agency wrongly 'believes that interpretation is compelled by Congress.'" *PDK Lab'ys Inc. v. DEA*, 362 F.3d 786, 798 (D.C. Cir. 2004) (quoting *Arizona v. Lab'ys Thompson*, 281 F.3d 248, 254 (D.C. Cir. 2002)); *accord Negusie v. Holder*, 555 U.S. 511, 523 (2009); *Gila River Indian Cmty. v. United States*, 729 F.3d 1139, 1149 (9th Cir. 2013) ("Here, we must move to step two because Congress's intent is not clear. At this stage, normally we would defer as a matter of course to the agency's expertise and discretion in interpreting the statute. However, because the agency misapprehended the clarity of the statute, such deference is not in order."); *see id.* ("*Chevron* deference does not apply where an agency mistakenly determines that its interpretation is mandated by plain meaning …."). In such circumstances, remand to the agency may be appropriate. *See, e.g.*, *Gila River Indian Cmty*., 729 F.3d at 1151 ("Because the Secretary relied on the text alone, we remand to require the agency to consider the question afresh in light of the ambiguity we see.").

In sum, although a majority of contested agency interpretations that are reviewed under *Chevron* Step Two survive judicial scrutiny, it is also clear that judicial review under Step Two provides a meaningful limitation on administrative agency actions that seek to exploit statutory ambiguities.

4. An Agency May Permissibly Change Its Construction of an Authorizing Statute

Under *Chevron*, deference to an agency's interpretation of an ambiguous statute does not turn on whether the agency has been consistent in its interpretation over time, whether its interpretation was promulgated years after the relevant statute was enacted, or the way in which the regulation evolved. These points were made clear in *Mayo Foundation for Medical Education & Research v. United States*, 562 U.S. 44 (2011), where the Court noted that it has "repeatedly held that agency inconsistency is not a basis for declining to analyze the agency's interpretation under the *Chevron* framework"; that "neither antiquity nor contemporaneity with a statute is a condition of a regulation's validity"; and that it is "immaterial to our analysis [under *Chevron*] that a regulation was prompted by litigation." *Id.* at 55.

Once a court determines that Congress either explicitly or implicitly delegated to an agency the authority to fill a gap in its authorizing statute, and the agency has done so properly, the court must accept the agency's position if it is based on a "permissible" interpretation of the statute. *Chevron*, 467 U.S. at 843. As the Supreme Court made clear in *Brand X*, 545 U.S. 967, this deference is due without regard to whether the agency's interpretation of its authorizing statute differs from what a court believes is the best interpretation of the statute.

In *Brand X*, the Court reviewed an FCC ruling that cable companies providing broadband Internet access were not telecommunications carriers and thus were exempt from regulation under Title II of the Communications Act. The court of appeals had held that the FCC's construction of the statute was foreclosed by a conflicting interpretation that the court had adopted in an earlier decision. The Supreme Court reversed, holding that the appellate court erred in failing to follow the dictates of *Chevron*.

> A court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion. This principle follows from *Chevron* itself. *Chevron* established 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. Yet allowing a judicial precedent to foreclose an agency from interpreting an ambiguous statute, as the Court of Appeals assumed it could, would allow a court's interpretation to override an agency's. *Chevron*'s premise is that it is for agencies, not courts, to fill statutory gaps. The better rule is to hold judicial interpretations contained in precedents to the same demanding *Chevron* step one standard that applies if the court is reviewing the agency's construction on a blank slate: 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.

Brand X, 545 U.S. at 982–83.

The decision in *Brand X* plainly reaffirms *Chevron*'s holding that when an agency acts within the compass of its delegated authority to fill "gaps" in its authorizing statute, it is not bound by its own earlier interpretations of the statute. In other words, over time, an agency may lawfully change its construction of the authorizing statute, so long as the new interpretation carries the force of law, does not flout the statute's plain meaning, remains within the range of the agency's delegated authority, is permissible under *Chevron* Step Two, and is not otherwise arbitrary and capricious. Under *Chevron*, "[a]gencies are free to change their existing policies as long as they provide a reasoned explanation for the change." *Encino Motorcars*, 579 U.S. at 221; *see also Brand X*, 545 U.S. at 981–982; *Chevron*, 467 U.S. at 863–864. And when an agency adopts a new position, it "need not always provide a more detailed justification than what would suffice for a new policy created on a blank slate." *Fox Television Stations*, *Inc.*, 556 U.S. at 515. However, the agency must "display awareness that it is changing position" and "show that there are good reasons for the new policy." *Id.* An "[u]nexplained inconsistency" in agency policy is "a reason for holding an interpretation to be an arbitrary and capricious change from agency practice." *Brand X*, 545 U.S. at 981. And "[a]n arbitrary and capricious regulation of this sort is itself unlawful and receives no *Chevron* deference." *Encino Motorcars*, 579 U.S. at 222.

There are situations, however, when an agency's change in its interpretation of its authorizing statute will fail judicial review. Most notable are cases in which a disputed regulatory action "would bring about an enormous and transformative expansion in [an agency's] regulatory authority without clear congressional authorization." *Util. Air Regul. Grp. v. E.P.A.*, 573 U.S. 302, 324, (2014). The Supreme Court has made it plain that "[w]hen an agency claims to discover in a long-extant statute an unheralded power to regulate a significant portion of the American economy, *Brown & Williamson*, 529 U.S., at 159, we typically greet its announcement with a measure of skepticism. We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast economic and political significance." *Id*.; *see also West Virginia*, 142 S. Ct. at 2609. This matter is covered further under the discussions of the "major questions" doctrine in Chapter XIV.A, *supra* and Chapter XIV.D.2, *infra*.

5. Agency Interpretations Resting on Implied Delegations of Authority

The hard cases for the courts in applying *Chevron* Step Two involve petitions to review the reasonableness of an agency interpretation that rests on an implied delegation of authority. There are two reasons for this: first, it is not always easy to determine whether an agency has acted pursuant to an implicit delegation; and, second, reasonableness is a diffuse concept, especially when shorn of any explicit delegation of authority from Congress. In contrast, when an agency acts pursuant to an express delegation, the reasonableness inquiry is obviously confined and thus easily supports a highly deferential standard of review. *See, e.g.*, *Mayo*, 562 U.S. at 57

(explaining that "express congressional authorizations to engage in the process of rulemaking" can be "a very good indicator of delegation meriting *Chevron* treatment").

In *Mead*, the Court attempted to explain what is meant by an implicit delegation of authority:

> Congress … may not have expressly delegated authority or responsibility to implement a particular provision or fill a particular gap. Yet it can still be apparent from the agency's generally conferred authority and other statutory circumstances that Congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in the statute or fills a space in the enacted law, even one about which Congress did not actually have an intent as to a particular result.

533 U.S. at 229. A year later in *Barnhart*, the Supreme Court lent some clarity to *Mead*'s definition of an implicit delegation. 535 U.S. 212. The claimant in *Barnhart* sought judicial review after his application for disability benefits and supplemental income was denied. At issue was the Social Security Administration's interpretation of the statutory definition of "inability." *Id.* at 214–17. The Supreme Court held that the Social Security Administration's interpretation—requiring that a claimant's "inability to engage in any substantial gainful activity" last, or be expected to last, for at least twelve months—was based on a permissible construction of the statute. *Id.* at 214, 221–22. In reaching this conclusion, the Court stated: "In this case, the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time all indicate that *Chevron* provides the appropriate legal lens through which to view the legality of the Agency interpretation here at issue." *Id.* at 222 (citing *Mead*, 533 U.S. 218); *see also Nat'l Cable & Telecomms. Ass'n v. Gulf Power Co.*, 534 U.S. 327, 339 (2002) (noting that, "as a general rule, agencies have authority to fill gaps" where their authorizing statutes are silent and the subject matter is "technical, complex, and dynamic").

But the premise "that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps" is not inviolate. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000). In some cases, a court will have good "reason to hesitate before concluding that Congress has intended such an implicit delegation." *Id.* Thus, for example, a court may "ask whether the legal question is an important one. Congress is more likely to have focused upon, and answered, major questions, while leaving interstitial matters to answer themselves in the course of the statute's daily administration." *Id.* (quoting Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 370 (1986)). In addition, it must be remembered that "[a]mbiguity is a creature not of definitional possibilities but of statutory context." *Brown v. Gardner*, 513 U.S. 115, 118 (1994). This means that an agency may not offer an implausible interpretation of its authorizing statute in order to create an "ambiguity" justifying deference under *Chevron* Step Two. Finally, it cannot be assumed that congressional silence, without more, equals a congressional delegation of authority. Thus, the argument that "disputed regulations are permissible because the statute [did] not expressly foreclose the construction

advanced by the agency" has been rejected as "entirely untenable under well-established case law." *Aid Ass'n for Lutherans v. U.S. Postal Serv.*, 321 F.3d 1166, 1174 (D.C. Cir. 2003). This makes sense, for if courts "[w]ere … to presume a delegation of power absent an express withholding of such power, agencies would enjoy virtually limitless hegemony, a result plainly out of keeping with *Chevron* and quite likely with the Constitution as well." *Ry. Labor Execs. Ass'n v. Nat'l Mediation Bd.*, 29 F.3d 655, 671 (D.C. Cir. 1994) (en banc).

The inquiry as to whether there is an implicit delegation of authority sometimes overlaps with the inquiry as to whether the agency's interpretation is reasonable. An example of this is seen in *Entergy*, 556 U.S. 208, where the Court appears to collapse the analysis of *Chevron* Step One and Step Two. In *Entergy*, the Court assessed regulations adopted by the EPA pursuant to the Clean Water Act. The Act, which regulates the cooling water intake structures used by industrial power plants, provides that the EPA "shall require" that such structures "reflect the best technology available for minimizing adverse environmental impact." 33 U.S.C. § 1326(b). The EPA promulgated regulations that rely on cost-benefit analysis in setting standards for cooling water intake structures. The question before the Court was whether Section 1326(b) authorizes the EPA to compare costs and benefits in determining the "best technology available." *Entergy*, 556 U.S. at 217. The Court held that though Section 1326(b) was silent on the issue of cost-benefit analysis, the agency reasonably interpreted the "best technology available" language to permit consideration of the technology's costs. Emphasizing that under *Chevron*, an agency is "not necessarily [bound to employ] the only possible interpretation, nor even the interpretation deemed most reasonable by the courts," *id.* at 218, the Court went on to explain that it was "eminently reasonable to conclude that § 1326(b)'s silence is meant to convey nothing more than a refusal to tie the agency's hands as to whether cost-benefit analysis should be used, and if so to what degree," *id.* at 222. The dissenting Justices argued that the majority's failure to conduct a *Chevron* Step One inquiry before assessing the reasonableness of the agency's position "reflects [a] reluctance to consider the possibility … that Congress' silence may have meant to foreclose cost-benefit analysis." *Id.* at 241 n.5 (Stevens, J., dissenting). In response, the opinion for the Court simply states: "surely if Congress has directly spoken to an issue then any agency interpretation contradicting what Congress has said would be unreasonable." *Id.* at 218 n.4 (majority opinion).

The Court's decision in *Cuomo v. Clearing House Ass'n*, *LLC,* 557 U.S. 519 (2009), also appears to collapse the analysis of *Chevron* Step One and Step Two, but to a lesser degree than the decision in *Entergy*. Cuomo, who was then the Attorney General for the State of New York, sent letters to several national banks requesting, "in lieu of subpoena," that they provide certain nonpublic information about their lending practices. The Attorney General sought this information to determine whether the banks had violated the State's fair-lending laws. The federal Office of the Comptroller of the Currency and the Clearing House Association, a banking trade group, brought suit to enjoin the information request, claiming that the Comptroller's regulation promulgated under the National Bank Act prohibited state law enforcement against national banks. The question presented to the Supreme Court was whether the Comptroller's regulation purporting to preempt state law enforcement could be upheld as a reasonable interpretation of the National Bank Act. The National Bank Act states that "[n]o national bank

shall be subject to any visitorial powers except as authorized by Federal law, vested in the courts of justice or such as shall be, or have been exercised or directed by Congress or by either House thereof or by any committee of Congress or of either House duly authorized." 12 U.S.C. § 484(a). Pursuant to this statutory mandate, the Comptroller issued a regulation prohibiting the States from "prosecuting enforcement actions, except in limited circumstances authorized by federal law." 12 C.F.R. § 7.4000(a)(1). The Supreme Court rejected the agency's interpretation of the statute: "[T]he unmistakable and utterly consistent teaching of our jurisprudence, both before and after enactment of the National Bank Act, is that a sovereign's 'visitorial powers' and its power to enforce the law are two different things. There is not a credible argument to the contrary. And contrary to what the Comptroller's regulation says, the National Bank Act pre-empts only the former." *Clearing House Ass'n*, 557 U.S. at 529.

Clearing House Ass'n makes it clear that deference under *Chevron* has limits:

> There is necessarily some ambiguity in the [National Bank Act]'s term "visitorial powers," … [and the] Comptroller can give authoritative meaning to the statute within the bounds of that uncertainty. But the presence of some uncertainty does not expand *Chevron* deference to cover virtually any interpretation of the National Bank Act. We can discern the outer limits of the term "visitorial powers" even through the clouded lens of history. They do not include, as the Comptroller's expansive regulation would provide, ordinary enforcement of the law. Evidence from the time of the statute's enactment, a long line of our own cases, and application of normal principles of construction to the National Bank Act make that clear.

Id. at 525. If nothing else, the decision proves the point that mere ambiguity in an agency's enabling statute is no guarantee that the agency's interpretation will gain deference under *Chevron* Step Two.

Although the "reasonableness" test governing judicial review of agency interpretations resting on implicit delegations of authority can be elusive, agency actions taken pursuant to *Chevron* Step Two are nonetheless subject to meaningful judicial scrutiny. In the absence of plain meaning, common sense often guides judicial judgment. The decision in *Goldstein v. SEC*, 451 F.3d 873 (D.C. Cir. 2006), is an example. In that case, an investment advisory firm and a hedge fund petitioned for review of an order of the SEC regulating "hedge funds" under the Investment Advisers Act. The Act exempts advisers with fewer than fifteen clients from registering with the SEC. The court held that an SEC rule requiring that hedge fund investors be counted as clients of the fund's adviser was invalid as conflicting with purposes underlying the statute. The decision indicates that the agency's interpretation both exceeded congressionally delegated authority and fell outside the bounds of reasonableness:

> The Act does not define "client." Relying on *Chevron*, the Commission believes this renders the statute ambiguous as to a method for counting clients. There

> is no such rule of law. The lack of a statutory definition of a word does not necessarily render the meaning of a word ambiguous, just as the presence of a definition does not necessarily make the meaning clear. A definition only pushes the problem back to the meaning of the defining terms.
>
> If Congress employs a term susceptible of several meanings, as many terms are, it scarcely follows that Congress has authorized an agency to choose any one of those meanings. As always, the words of the statute should be read in context, the statute's place in the overall statutory scheme should be considered, and the problem Congress sought to solve should be taken into account to determine whether Congress has foreclosed the agency's interpretation ….
>
> [I]t may be that … the strict dichotomy between clarity and ambiguity is artificial, that what we have is a continuum, a probability of meaning. Here, even if the [statute] does not foreclose the Commission's interpretation, the interpretation falls outside the bounds of reasonableness ….
>
> The "reasonableness" of an agency's construction depends, in part, on the construction's fit with the statutory language, as well as its conformity to statutory purposes. As described above, the Commission's interpretation of the word "client" comes close to violating the plain language of the statute. At best it is counterintuitive to characterize the investors in a hedge fund as the "clients" of the adviser.

Id. at 878, 880–81; *see also Am. Library Ass'n,* 406 F.3d at 705 (agency construction of its authorizing statute rejected under *Chevron* Step Two because it was both in excess of congressionally delegated authority and unreasonable); *Aid Ass'n for Lutherans*, 321 F.3d at 1178 (same). In *American Bar Ass'n v. FTC*, 430 F.3d 457 (D.C. Cir. 2005), the court held that the FTC exceeded its statutory authority when it determined "that attorneys engaged in the practice of law are covered by the federal Gramm-Leach-Bliley Act." *Id.* at 458. After examining a statutory "scheme of the length, detail, and intricacy of the one before [it]," the court found it "difficult to believe that Congress, by any remaining ambiguity, intended to undertake the regulation of the profession of law—a profession never before regulated by federal functional regulators—and never mentioned in the statute." *Id.* at 469. Because the FTC's claim for deference made no sense in light of the statute's words and purpose, it did not survive judicial scrutiny.

In sum, in assessing whether an agency's construction of its authorizing statute based on an implied delegation of authority will earn deference under *Chevron* Step Two, the Court's words in *Gonzales* and *City of Arlington* continue to ring true: "*Chevron* deference … is not accorded merely because the statute is ambiguous and an administrative official is involved." *Gonzales*, 546 U.S. at 258. "[T]he question in every case is, simply, whether the statutory text forecloses the agency's assertion of authority, or not." *City of Arlington,* 569 U.S. at 301. Justice Breyer's concurring opinion in *City of Arlington* is especially helpful in summarizing the applicable case law. *Id.* at 1875–76 (Breyer, J., concurring).

D. The *Chevron* "Carve Outs"

Under *Chevron v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the courts "presume that when an agency-administered statute is ambiguous with respect to what it prescribes, Congress has empowered the agency to resolve the ambiguity." *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 315 (2014). And "for *Chevron* deference to apply, the agency must have received congressional authority to determine the particular matter at issue in the particular manner adopted." *City of Arlington v. FCC*, 569 U.S. 290, 306 (2013). "[T]he question in every case is, simply, whether the statutory text forecloses the agency's assertion of authority, or not." *Id.* at 301.

There are several situations, however, when *Chevron* deference will not be accorded to an agency's construction of an ambiguous statute that it has been authorized to administer. First, *Chevron* deference only comes into play when an agency has taken action that has the force of law. Second, courts may sometimes decline to defer to an agency's interpretation of a statute that it administers if the disputed action rests solely on an implied delegation of authority from Congress and implicates major questions concerning social and economic policy. Third, no *Chevron* deference is due when an agency acts but fails to use its delegated authority. Fourth, a litigation position advanced by agency counsel that is not based on an agency action carrying the force of law is not entitled to *Chevron* deference. Finally, an agency's interpretation of a statute that it is not solely responsible for administering may not be entitled to *Chevron* deference. These situations are discussed below.

1. Situations in Which an Agency Has Failed to Act with the Force of Law

As noted above in part XIV.C.1, *Chevron* deference is appropriate only "when it appears that Congress [has] 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." *Mayo Found. for Med. Educ. & Rsch. v. United States*, 562 U.S. 44, 57 (2011) (quoting *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001)); *see also Christensen v. Harris Cnty.*, 529 U.S. 576, 587 (2000) (holding that agency interpretations of a statute which are contained in opinion letters, policy statements, agency manuals, or enforcement guidelines, all of which "lack the force of law," do not warrant *Chevron* deference). This inquiry, which has been dubbed by some commentators as *Chevron* "Step Zero," determines "whether courts should turn to the *Chevron* framework at all." Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 GEO. L.J. 833, 836 (2001).

2. Situations in Which an Agency Fails to Use Its Delegated Authority

An agency is not entitled to *Chevron* deference if it failed to apply its expertise and exercise its discretion in adopting a construction of its enabling statute. For example, if an agency acts on the mistaken assumption that it is bound by a prior judicial decision, then it has taken no action to which a court must defer under *Chevron*. The agency cannot claim deference on behalf of expertise and discretion that it has not yet brought to bear. *See, e.g.*, *Negusie v. Holder*, 555 U.S. 511, 523 (2009). In such situations, "the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation." *Id.*

Similarly, an agency is not entitled to deference if it declines to apply its expertise and discretion due to the mistaken belief that the only acceptable course of action is dictated by its authorizing statute: "Deference to an agency's statutory interpretation is only appropriate when the agency has exercised its *own* judgment, not when it believes that interpretation is compelled by 575 U.S. 92 Congress." *Arizona v. Thompson*, 281 F.3d 248, 254 (D.C. Cir. 2002). Moreover,

> Chevron step 2 deference is reserved for those instances when an agency recognizes that the Congress's intent is not plain from the statute's face. In precisely those kinds of cases, it is incumbent upon the agency not to rest simply on its parsing of the statutory language—it must bring its experience and expertise to bear in light of competing interests at stake. When it does … it is entitled to deference, so long as its reading of the statute is reasonable. But [where] the [a]gency has not done so … it is not for the court to choose between competing meanings. We must therefore remand for the [agency] to interpret the statutory language anew.

Peter Pan Bus Lines, Inc. v. Fed. Motor Carrier Safety Admin., 471 F.3d 1350, 1354 (D.C. Cir. 2006).

It is not always easy for a court to determine whether an agency has adopted a course of action based on its view that a statute compels it or pursuant to an exercise of discretion to which deference is due. When a court denies deference to an agency's construction of a statute on the ground that the agency did not exercise its congressionally delegated authority, the court typically identifies specific statements from the agency that are telling. *See, e.g.*, *id.* at 1353–55 (declining to give deference when an agency stated that a different interpretation was "not consistent with the plain language of the statute and the legislative history"); *Thompson*, 281 F.3d at 253–56 (declining to give deference where the agency stated that its interpretation was "the intent of Congress, rather than of [the agency]"); *Transitional Hosps. Corp. of La., Inc. v. Shalala*, 222 F.3d 1019, 1029 (D.C. Cir. 2000) (declining to give deference when an agency stated that it "do[es] not believe that the statute permits" a certain interpretation).

When an agency action fails review under *Chevron* because the agency declined to exercise the authority delegated to it by Congress, the proper remedy usually will be for the court to remand the case for further consideration. For example, in *Negusie v. Holder*, 555 U.S. 511 (2009),

the Court considered an interpretation of the so-called "persecutor bar" in 8 U.S.C. § 1101(a)(42) by the Board of Immigration Appeals ("BIA"). Section 1101(a)(42) disqualifies an alien from asylum or withholding of removal if the alien has "ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1101(a)(42). The BIA ruled that the persecutor bar applies even if an alien's role in the persecution was coerced, believing this reading to be compelled by the Court's decision in *Fedorenko v. United States*, 449 U.S. 490 (1981). The Supreme Court rejected the agency's position, holding that the BIA had misapplied *Fedorenko*. Because the Court concluded that the statute was ambiguous, it declined to analyze whether the BIA's interpretation of the statute was reasonable under *Chevron* Step Two. Rather, the Court concluded that, because the BIA had mistakenly determined that *Fedorenko* controlled the disposition of the case, the agency had failed to exercise its interpretative authority. "Having concluded that the BIA ha[d] not yet exercised its *Chevron* discretion to interpret the statute in question," the Court held that "the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation." *Negusie*, 555 U.S. at 523 (quoting *Gonzales v. Thomas*, 547 U.S. 183, 186 (2006) (holding that it is for the agency, not the court, to resolve ambiguities in statutes that are within the agency's jurisdiction to administer)); *see also Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005) (holding that ambiguities in statutes within an agency's jurisdiction to administer are delegations of authority to the agency to fill the statutory gap in reasonable fashion).

Likewise, when "an agency erroneously contends that Congress' intent has been clearly expressed and has rested on that ground, [the court will] remand to require the agency to consider the question afresh in light of the ambiguity" in the statute. *Cajun Elec. Power Coop., Inc. v. FERC*, 924 F.2d 1132, 1136 (D.C. Cir. 1991). A court will do this because, under *Chevron* Step Two, the court is examining whether the agency has reasonably exercised its discretion. When the agency's decision "was not based on [its] own judgment but rather on the unjustified assumption that it was Congress' judgment that [an outcome is] desirable or required," the agency has not exercised that discretion at all. *Transitional Hospitals Corp.,* 222 F.3d at 1029.

There may be occasions when remanding a case to the agency is not a viable option. This is seen in *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211 (2016). In that case, the respondents, who were service advisors working for an auto dealership, filed a suit under the Fair Labor Standards Act ("FLSA") against their employer claiming that the dealership had violated the FLSA by failing to pay them overtime compensation when they worked more than 40 hours in a week. In support of their claim, the respondents relied on a regulation that had been issued by the Department of Labor. But the Supreme Court declined to defer to the Department's interpretation of the statute because the agency had not followed the correct procedures when it adopted its rule. The Court said: "When Congress authorizes an agency to proceed through notice-and-comment rulemaking, that relatively formal administrative procedure is a very good indicator that Congress intended the regulation to carry the force of law, so *Chevron* should apply. But *Chevron* deference is 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." *Id.* at 2125. Although the

case clearly addressed whether *Chevron* deference was due to the Department's interpretation of the FLSA, the Supreme Court did not have the option of remanding the matter to the agency because the case involved a law suit between two private parties. The Court therefore remanded the case to the Court of Appeals to "interpret the statute in the first instance." *Id.* at 2127.

3. No *Chevron* Deference Is Due to an Agency's Litigation Position

Chevron deference is accorded only when a court finds a permissible construction "*made by the administrator of an agency*." *Chevron*, 467 U.S. at 844. In other words, deference under *Chevron* Step Two is due to an agency's interpretation of its authorizing statute, not to agency counsel's litigation position. This point was made clear by the Supreme Court in *Bowen v. Georgetown University Hospital*, 488 U.S. 204 (1988):

> We have never applied [*Chevron* deference] to agency litigating positions that are wholly unsupported by regulations, rulings, or administrative practice. To the contrary, we have declined to give deference to an agency counsel's interpretation of a statute where the agency itself has articulated no position on the question, on the ground that Congress has delegated to the administrative official and not to appellate counsel the responsibility for elaborating and enforcing statutory commands.

Id. at 212; *see also City of Kansas City v. HUD*, 923 F.2d 188, 192 (D.C. Cir. 1991) ("That counsel advances a particular statutory interpretation during the course of trial does not confer upon that interpretation any special legitimacy. Deference under *Chevron*, even in the context of informal adjudication, can be accorded only to a judgment of the agency itself.").

Upon remand, however, if an agency adopts a permissible construction of the statute, say, for example, through notice and comment rulemaking, a reviewing court will not reject that interpretation merely because it was first articulated by agency counsel during litigation. *See, e.g.*, *Prime Time Int'l Co. v. U.S. Dep't of Agric.*, 753 F.3d 1339, 1341 (D.C. Cir. 2014).

4. Situations in Which an Agency Fails to Invoke, Arguably Forfeits, or Seeks to Waive *Chevron* Deference

In recent years, the Supreme Court has made clear that courts need not afford *Chevron* deference to an agency's interpretation if the agency fails to invoke *Chevron* in litigation. In *HollyFrontier Cheyenne Ref., LLC v. Renewable Fuels Ass'n*, 141 S. Ct. 2172 (2021), the Court was confronted with a situation in which an agency had sought deference for its interpretation when the case was heard by the court of appeals, but explicitly chose not to "invok[e] *Chevron*" before the Supreme Court. *Id*. at 2180. The Court ultimately upheld the agency's interpretation of the statute, but "decline[d] to consider whether any [*Chevron*] deference [was] due." *Id*.; *see also*

Cnty. of Maui v. Haw. Wildlife Fund, 140 S. Ct. 1462, 1474 (2020) (declining to apply *Chevron* deference because "(n)either the Solicitor General nor any party has asked us to give what the Court has referred to as *Chevron* deference to EPA's interpretation of the statute.").

It is still unclear, however, whether an agency, during litigation, may forfeit, waive, or disclaim *Chevron* deference for an agency interpretation otherwise entitled to such deference. In *Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 920 F.3d 1 (D.C. Cir. 2019) (per curiam), *decided on other grounds* in --- F.3d --- (D.C. Cir. 2022), the D.C. Circuit concluded that agency lawyers could not "waive" *Chevron* deference in litigation when "the underlying agency action 'manifests [the agency's] engagement in the kind of interpretive exercise to which review under *Chevron* generally applies.'" 920 F.3d at 23 (quoting *SoundExchange, Inc. v. Copyright Royalty Bd.*, 904 F.3d 41, 54 (D.C. Cir. 2018)). This built on the court's earlier decision that neither can *Chevron* deference be forfeited under such conditions. *See SoundExchange, Inc.*, 904 F.3d at 54. In *Guedes,* the court reasoned that "*Chevron* is not a 'right' or 'privilege' belonging to a litigant," but "instead a doctrine about statutory meaning—specifically, about how courts should construe a statute." 920 F.3d at 22. As a result, according to the court, *Chevron* is "an awkward conceptual fit for the doctrines of forfeiture and waiver." *Id.* In addition, the court observed that "[a]llowing an agency to freely" – and perhaps opportunistically – "waive *Chevron* treatment in litigation would … stand considerably in tension with basic precepts of administrative law," including that "the proper subject of [a court's] review is what the agency actually did, not what the agency's lawyers later say the agency did." *Id.* However, in a statement accompanying a denial of writ of certiorari in *Guedes*, Justice Gorsuch embraced the idea of waiver, contending that it was inappropriate for the court to apply *Chevron* deference and "place[] an uninvited thumb on the scale in favor of the government" where "the government expressly waived reliance on *Chevron.*" *Guedes v. Bureau of Alcohol Tobacco, Firearms & Explosives*, 140 S. Ct. 789, 789–90 (2020) (statement of Gorsuch, J., respecting denial of certiorari).

It is not clear how waiver or even discretionary application of *Chevron* deference can be squared with the Court's reasoning in *Encino* and other decisions explaining when and why *Chevron* applies. "A premise of *Chevron* is that when Congress grants an agency the authority to administer a statute by issuing regulations with the force of law, it presumes the agency will use that authority to resolve ambiguities in the statutory scheme." *Encino*, 579 U.S. at 220. The legal landscape may be muddled if, as in *HollyFrontier,* a court determines that an agency's regulatory action should be upheld because, in the court's view, the agency's interpretation of an ambiguous statute is based on the best construction of the law. The agency may later wish to change its statutory interpretation to one that is also "reasonable" under *Chevron* Step Two, and thereby institute a change in regulatory policy. But, if the court has already declined to apply *Chevron* deference in the first case and pronounced what it believes to be the "best" interpretation of the statutory language at issue, it may create tension with the principle – embodied in decisions such as *Encino* and others – that "[a]gencies are free to change their existing policies as long as they provide a reasoned explanation for the change." *Encino*, 579 U.S. at 221.

5. Situations in Which an Agency Does Not Have Sole Responsibility for Administering a Statute

As a general matter, a court will not defer to an agency's interpretation of a statute that it is not charged with administering. *Metro. Stevedore Co. v. Rambo*, 521 U.S. 121, 138 n.9 (1997); *see also King v. Burwell*, 576 U.S. at 486; *Adams Fruit Co., Inc. v. Barrett*, 494 U.S. 638, 649–50 (1990). Courts have, however, embraced a slightly more nuanced—and forgiving—approach when determining whether an agency's interpretation of a statute that is administered by several different agencies is entitled to *Chevron* deference.

An agency's interpretation of "generic statutes that apply to dozens of agencies [such as the APA and FOIA], and for which no agency can claim any particular expertise," will be accorded no deference and reviewed *de novo*. *Collins v. Nat'l Transp. Safety Bd.*, 351 F.3d 1246, 1252 (D.C. Cir. 2003); *see also* Thomas W. Merrill, *Step Zero After* City of Arlington, 83 FORDHAM L. REV. 753, 759 (2014) (noting that "the Court has never suggested that trans-substantive statutes like the … [APA] or the Religious Freedom Restoration Act … should be interpreted by giving deference to agency interpretations"). This is so because "[w]here a statute is generic, two bases for the *Chevron* presumption of implied delegation are lacking: specialized agency expertise and the greater likelihood of achieving a unified view through the agency than through review in multiple courts." *Collins*, 351 F.3d at 1252–53. Similarly, for "statutes … where the agencies have specialized enforcement responsibilities but their authority potentially overlaps—thus creating risks of inconsistency or uncertainty—*de novo* review may also be necessary." *Id.* at 1253. For statutes "where expert enforcement agencies have mutually exclusive authority over separate sets of regulated persons," however, *Chevron* deference may be accorded to an agency when it acts in its area of authority. *Id.*

One additional shared-enforcement category is suggested by the Supreme Court's decision in *Martin v. Occupational Safety & Health Rev. Comm'n*, 499 U.S. 144 (1991). In that case, the Court addressed the enforcement regime under the Occupational Safety and Health Act and held that regulatory deference was owed only to interpretations of the Secretary of Labor, the primary Executive Branch enforcer under the statute, and not to the Occupational Safety and Health Review Commission, an independent review board. The Court concluded that Congress intended "to make a single administrative actor accountable for the overall implementation of the Act's policy objectives by combining legislative and enforcement powers in the Secretary." *Id.* at 156. In the Court's view, that goal would be frustrated if the Commission could substitute its own interpretations of the Act for those of the Secretary. The Commission's function was to exercise "the type of nonpolicymaking adjudicatory powers typically exercised by a *court* in the agency-review context," reviewing "the Secretary's interpretations only for consistency with the regulatory language and for reasonableness." *Id.* at 145 (emphasis in original).

E. *Skidmore* Deference: The Power to Persuade

If an agency has been "delegated authority [from Congress] to … make rules carrying the force of law" and acts "in the exercise of that authority," a reviewing court applies the deferential *Chevron* review framework. *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001). However, if the challenged action is one of the many "sorts of interpretive choices" that an agency "charged with applying a statute necessarily" must make, but the action, although subject to review, was not taken in the exercise of that agency's lawmaking authority, reviewing courts will apply the significantly less deferential standard enunciated in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). *Mead*, 533 U.S. at 219. Under the "*Skidmore*" standard of review, agency views that are within its area of expertise are entitled to a level of deference commensurate with their inherent power to persuade, but no more. *See id.* at 228; *see also Kasten v. Saint-Gobain Performance Plastics Corp.*, 563 U.S. 1, 14–15 (2011).

Nearly sixty years after *Skidmore*, in *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001), and *Christensen v. Harris County*, 529 U.S. 576 (2000), the Supreme Court reaffirmed that agency interpretations contained in "opinion letters[,] … policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law[,] … do not warrant *Chevron*-style deference." *Christensen*, 529 U.S. at 587; *see also Mead*, 533 U.S. at 231–34. Nonetheless, the Court held that such interpretations may merit some respect (and therefore some deference) in light of the "specialized experience and broader investigations and information available to the agency" and the uniformity that agency interpretations can bring to the enforcement of law. *Mead*, 533 U.S. at 234–35. As the *Skidmore* opinion characterizes it, such interpretations, "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." 323 U.S. at 140.

Under *Skidmore*, the measure of deference due an agency's "judgment in a particular case will depend upon [1] the thoroughness evident in its consideration, [2] the validity of its reasoning, [3] its consistency with earlier and later pronouncements, and [4] all those factors which give it power to persuade, if lacking power to control." *Id.*; *see also Young v. United Parcel Serv., Inc.*, 575 U.S. 206, 225 (2015).

An illustrative example of the Court's application of these criteria which resulted in deference to an agency interpretation can be seen in *Federal Express Corporation v. Holowecki*, 552 U.S. 389 (2008). There the Court accorded *Skidmore* deference to and adopted the definition of the word "charge" used by the Equal Employment Opportunity Commission ("EEOC") for purposes of interpreting the Age Discrimination in Employment Act. *Id.* at 401–02. In doing so, the Court relied not only on the fact that the definition had been binding on agency staff for at least five years, *id.* at 399, but also that the definition allowed the agency to fulfill two distinct statutory functions with which it was charged: enforcement of antidiscrimination laws and dissemination of information about those laws to the public, *id.* at 400. Consequently, the Court concluded, the definition was reasonable and consistent with the statutory framework, and so deference under

Skidmore was appropriate. *Id.* at 401–02; *see also Saint-Gobain Performance Plastics Corp.*, 563 U.S. at 15–16 (2011) (affording *Skidmore* deference to certain interpretations of the Fair Labor Standards Act by the Secretary of Labor and EEOC because the interpretations were "reasonable" and "consistent with the Act" and "[t]he length of time the agencies have held them" (nearly 40 years for the Labor Department), as well as the number of times the agencies had reaffirmed those views, "suggests that they reflect careful consideration, not *post hoc* rationalization").

In contrast, in *Young v. United Parcel Service, Inc.*, 575 U.S. 206 (2015), the Court held that the *Skidmore* criteria "severely limit[ed] the … special power to persuade" that an EEOC guideline addressing an ambiguity in the Pregnancy Discrimination Act might have been accorded. *Id.* at 225. As the Court explained, it reached this conclusion "not because … [the] agency lack[ed] … 'experience' or 'informed judgment.' Rather, the difficulties [were] those of timing, 'consistency,' and 'thoroughness' of 'consideration.'" *Id.* In that case, the EEOC promulgated its guidance after the Supreme Court had granted certiorari to review, and it "[took] a position about which the … previous guidelines were silent." *Id.* Moreover, the position taken was "inconsistent with positions for which the Government has long advocated." *Id.* Most significantly, the EEOC provided no explanation for its guidance. It did not indicate how the guidance fit with the statute or why it had taken a position contrary to its earlier positions. *Id.*; *see also Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 360–62 (2013) (guidance adopting a "motivating-factor," rather than "but-for-causation," standard for proving causation for retaliation claims "lack[s] the persuasive force that is a necessary precondition" to *Skidmore* deference because the agency failed to address the interplay between several different provisions of the antidiscrimination statute at issue, the discussion of the causation standards was of a "generic nature," and the reasoning supporting at least one portion of the guidance was "circular," as it "assume[d] the answer to the central question at issue").

Relying on *Skidmore*'s catch-all nature, the Court will occasionally seemingly ignore the thoroughness evident in an agency's interpretation, the validity of the reasoning supporting its position, and the consistency with which an agency has applied its interpretation in determining whether deference is due. Thus, for example, in *Vance v. Ball State University*, 570 U.S. 421 (2013), over the strong objection of four dissenters, the Court declined to afford *Skidmore* deference to the agency's definition of a "supervisor" who may be held liable for an employee's sexual harassment because the EEOC Enforcement Guidance, "a study in ambiguity," *id.* at 442, was so "vague" as to "present daunting problems for the lower federal courts and for juries" having to apply it, *id.* at 443. According to the majority, the guidance made "the determination of supervisor status depend on a highly case-specific evaluation of numerous factors," which it concluded would unacceptably "frustrate judges and confound jurors." *Id.* at 432. The four dissenters, who would have granted the guidance *Skidmore* deference, emphasized that the EEOC had "firmly adhered to its definition" through fourteen years of "enforcement actions and litigation." *Id.* at 462 (Ginsburg, J., dissenting). The dissenting opinion also found that "[i]n developing its definition of supervisor, the EEOC" created a definition responsive to the applicable Supreme Court precedent. *Id.* Moreover, the guidance definition reflected the fact that "in assessing an employee's qualification as a supervisor, context is often key." *Id.* at 463. The result, the dissenters concluded, was a guidance definition that "has the ring of truth and,

therefore, powerfully persuasive force." *Id.*

When the *Skidmore* standard controls, the final judgment on the legality of any contested administrative action rests with the court. *See Gonzales v. Oregon*, 546 U.S. 243, 268–69 (2006). *Cf. Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005) (explaining that "*Chevron* requires a federal court to accept the agency's construction of the statute, even if the agency's reading differs from what the court believes is the best statutory interpretation"). Consequently, in some cases, a court's interpretation of the statutory provisions at issue may determine the final outcome of the dispute. *See, e.g.*, *Pub. Citizen, Inc. v. Dep't of Health & Hum. Servs.*, 332 F.3d 654, 661–72 (D.C. Cir. 2003) (applying *Skidmore* deference to an agency manual preventing detailed disclosures of the results of peer review of Medicare beneficiary complaints, but nonetheless finding the agency's interpretation of the statute to be contrary to law). However, in other cases, when an agency's interpretation of a statute fails to merit deference under *Skidmore*, courts may find it appropriate to vacate the action and remand to allow the agency to reconsider its interpretation. *See, e.g.*, *Fox v. Clinton*, 684 F.3d 67 (D.C. Cir. 2012) (declining to afford *Chevron* or *Skidmore* deference to Department of State letter resolving appeal of an expatriation request, *id.* at 76–80, but remanding to allow the agency to reconsider its application of the relevant statutory provisions because "there may be sensitive issues lurking that are beyond the ken of the court," *id.* at 80).

Chapter XVI. The Deference Due an Agency's Interpretation of Its Own Regulations: *Auer, Seminole Rock,* and *Kisor*

Judicial review of an agency's interpretation of its own regulations is governed by Section 706(2)(A) of the Administrative Procedure Act ("APA"), which requires courts to set aside agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 377 (1998); *see also Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504 (1994). When conducting this inquiry, courts will accord "substantial deference" to an agency's interpretation, giving it "controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Thomas Jefferson Univ.*, 512 U.S. at 512; *see also Stinson v. United States*, 508 U.S. 36, 45 (1993); *Comcast Cable Commc'ns, LLC v. FCC*, 717 F.3d 982, 1003 (D.C. Cir. 2013) (noting that "[a] court [will] not defer to an agency's interpretation of a disputed regulation when an alternative reading is compelled by 'indications of the agency's intent at the time of the regulation's promulgation'" (quoting *Thomas Jefferson Univ.*, 512 U.S. at 512)). In other words, to uphold an agency's construction, a court need not conclude that it was the only one possible, or even the one that the court would adopt were it reviewing *de novo*. *See Decker v. Nw. Env't Def. Ctr.*, 568 U.S. 597, 613 (2013). Rather, when "the meaning of regulatory language is not free from doubt, the reviewing court should give effect to the agency's interpretation so long as it is reasonable, that is, so long as the interpretation sensibly conforms to the purpose and wording of the regulations." *Martin v. Occupational Safety & Health Rev. Comm'n*, 499 U.S. 144, 150–51 (1991).

This variant of deference traces its roots to the Supreme Court's decisions in *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), and *Auer v. Robbins*, 519 U.S. 452 (1997), although it is frequently referred to simply as "*Auer* deference." *See Tilden Mining Co., Inc. v. Sec'y of Labor*, 832 F.3d 317, 322 (D.C. Cir. 2016).

It has been suggested that the deference due an agency's interpretation of its own regulations is similar to the *Chevron* Step Two deference afforded an agency's interpretation of its authorizing statute. *See Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579, 584 (D.C. Cir. 1997) ("*Chevron* requires a reviewing court to affirm a permissible (or reasonable) interpretation of an ambiguous statute, and we very much doubt that we would defer to an unreasonable agency interpretation of an ambiguous regulation."), *overruled on other grounds by Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92 (2015). This is not surprising since, in each situation, the governing standard of review is shaped by similar concerns regarding the proper role of the courts. *Compare Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 696 (1991) ("Judicial deference to an agency's interpretation of ambiguous provisions of the statutes it is authorized to implement reflects a sensitivity to the proper roles of the political and judicial branches."), *with Martin*, 499 U.S. at 151 ("Because applying an agency's regulation to complex or changing circumstances calls upon the agency's unique expertise and policymaking prerogatives, we presume that the power authoritatively to interpret its own regulations is a component of the agency's delegated lawmaking powers.").

Chevron deference and the deference due an agency's interpretation of its regulations are not identical, however. While courts review with "near indifference" an agency interpretation of an ambiguous statute that is "advanced for the first time in a litigation brief," *see United States v. Mead Corp.*, 533 U.S. 218, 228 (2001), they have "not entirely foreclosed [the] practice" of "giv[ing] deference to agency interpretations advanced for the first time in legal briefs," *see Kisor v. Wilkie*, 139 S. Ct. 2400, 2417 n.6 (2019) (citing *Auer*, 519 U.S. at 462 (holding that an agency's interpretation of its regulation was not "unworthy of deference" even though it was advanced "in the form of a legal brief," in part because there was "no reason to suspect that the interpretation [did] not reflect the agency's fair and considered judgment on the matter in question")).

Nonetheless, while the deference afforded an agency's interpretation of its own regulations is significant, it is not without limits. In *Kisor v. Wilkie*, 139 S. Ct. 2400, in response to a request that *Auer* and *Seminole Rock* be overruled, the Supreme Court clarified these limits. It is worth quoting Justice Kagan's opinion for the court in that case, joined by four other Justices, at length:

> First and foremost, a court should not afford *Auer* deference unless the regulation is genuinely ambiguous. *See Christensen v. Harris County*, 529 U.S. 576, 588 (2000); *Seminole Rock*, 325 U.S. at 414 (deferring only "if the meaning of the words used is in doubt"). 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. … [I]f 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….
>
> And before concluding that a rule is genuinely ambiguous, a court must exhaust all the "traditional tools" of construction. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843, n. 9 (1984) (adopting the same approach for ambiguous statutes). For again, only when that legal toolkit is empty and the interpretive question still has no single right answer can a judge conclude that it is more one of policy than of law. That means a court cannot wave the ambiguity flag just because it found the regulation impenetrable on first read. Agency regulations can sometimes make the eyes glaze over. But hard interpretive conundrums, even relating to complex rules, can often be solved. To make that effort, a court must carefully consider the text, structure, history, and purpose of a regulation, in all the ways it would if it had no agency to fall back on….
>
> If genuine ambiguity remains, moreover, the agency's reading must still be "reasonable." *Thomas Jefferson*, 512 U.S. at 515. In other words, it must come within the zone of ambiguity the court has identified after employing all its interpretive tools. (Note that serious application of those tools

therefore has use even when a regulation turns out to be truly ambiguous. The text, structure, history, and so forth at least establish the outer bounds of permissible interpretation.) Some courts have thought (perhaps because of *Seminole Rock*'s "plainly erroneous" formulation) that at this stage of the analysis, agency constructions of rules receive greater deference than agency constructions of statutes. But that is not so. Under *Auer*, as under *Chevron*, the agency's reading must fall "within the bounds of reasonable interpretation." *Arlington v. FCC*, 569 U.S. 290, 296 (2013). And let there be no mistake: That is a requirement an agency can fail.

Still, we are not done—for 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. See *Christopher* [*v. SmithKline Beecham Corp.*, 567 U.S. 142, 155 (2012)]; *see also Mead*, 533 U.S. at 229–231, 236–237 (requiring an analogous though not identical inquiry for *Chevron* deference). … [W]e give *Auer* deference because we presume, for a set of reasons relating to the comparative attributes of courts and agencies, that Congress would have wanted us to. But the administrative realm is vast and varied, and we have understood that such a presumption cannot always hold. *Cf. Mead*, 533 U.S. at 236 ("tailoring deference to the variety" of administrative action); *Arlington*, 569 U.S. at 309–310 (BREYER, J., concurring in part and concurring in judgment) (noting that "context-specific factors" may show that "Congress would not have intended the agency to resolve some ambiguity"). The inquiry on this dimension does not reduce to any exhaustive test. But we have laid out some especially important markers for identifying when *Auer* deference is and is not appropriate.

To begin with, 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. *Mead*, 533 U.S. at 257–259, and n. 6 (SCALIA, J., dissenting). … 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. … But there are limits. The interpretation must at the least emanate from those actors, using those vehicles, understood to make authoritative policy in the relevant context. If the interpretation does not do so, a court may not defer.

Next, the agency's interpretation must in some way implicate its substantive expertise. … [T]he basis for deference ebbs when "the subject matter of the dispute is distant from the agency's ordinary" duties or "falls

within the scope of another agency's authority." *Arlington*, 569 U.S. at 309 (opinion of BREYER, J.). This Court indicated as much when it analyzed a "split enforcement" scheme, in which Congress divided regulatory power between two entities. *Martin*, 499 U.S. at 151. To decide "*whose* reasonable interpretation" of a rule controlled, we "presumed Congress intended to invest interpretive power" in whichever actor was "best positioned to develop" expertise about the given problem. *Id.*, at 149, 153. The same idea holds good as between agencies and courts. Generally, agencies have a nuanced understanding of the regulations they administer. That point is most obvious when a rule is technical …. But more prosaic-seeming questions also commonly implicate policy expertise …. Once again, though, there are limits. Some interpretive issues may fall more naturally into a judge's bailiwick. … When the agency has no comparative expertise in resolving a regulatory ambiguity, Congress presumably would not grant it that authority.

Finally, an agency's reading of a rule must reflect "fair and considered judgment" to receive *Auer* deference. *Christopher*, 567 U.S. at 155 (quoting *Auer*, 519 U.S. at 462). That means, we have stated, that a court should decline to defer to a merely "convenient litigating position" or "*post hoc* rationalization advanced" to "defend past agency action against attack." *Christopher*, 567 U.S. at 155 (quoting *Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 213 (1988) and *Auer*, 519 U.S. at 462). And a court may not defer to a new interpretation, whether or not introduced in litigation, that creates "unfair surprise" to regulated parties. *Long Island Care* [*at Home, Ltd. v. Coke*, 551 U.S. 158, 170 (2007)]. That disruption of expectations may occur when an agency substitutes one view of a rule for another. We have therefore only rarely given *Auer* deference to an agency construction "conflict[ing] with a prior" one. *Thomas Jefferson*, 512 U.S. at 515. Or the upending of reliance may happen without such an explicit interpretive change. This Court, for example, recently refused to defer to an interpretation that would have imposed retroactive liability on parties for longstanding conduct that the agency had never before addressed. See *Christopher*, 567 U.S. at 155–156. Here too the lack of "fair warning" outweighed the reasons to apply *Auer. Id.* at 156 (internal quotation marks omitted).

* * *

The upshot of all this goes something as follows. 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. But that phrase "when it applies" is important—because it often doesn't. As described above,

> this Court has cabined *Auer*'s scope in varied and critical ways—and in exactly that measure, has maintained a strong judicial role in interpreting rules.

Kisor, 139 S. Ct. at 2415–18.

Additionally, the court reaffirmed in *Kisor* its prior holding that no deference is due an agency's interpretation of its regulations when "the underlying regulation does little more than restate the terms of the statute itself." *Gonzales v. Oregon*, 546 U.S. 243, 257 (2006); *see Kisor v. Wilkie*, 139 S. Ct. 2400, 2417 n.5. In such a situation, the "language the [interpretation] addresses comes from Congress, not the [agency], and the near-equivalence of the statute and regulation belies the Government's argument for *Auer* deference." *Gonzales*, 546 U.S. at 257.

Before *Kisor,* several Justices of the Supreme Court had indicated that they were prepared to reconsider the *Auer* doctrine. *See, e.g.*, *Decker v. Nw. Env't Def. Ctr.*, 568 U.S. 597, 616–18 (2013) (Scalia, J., concurring in part, dissenting in part); *id.* at 615–16 (Roberts, C.J., concurring); *Perez*, 575 U.S. 92, 112–33 (Thomas, J., concurring in the judgment); *id.* at 107– 08 (Alito, J., concurring in part and concurring in the judgment). And over the years, a number of scholars have also questioned the wisdom of the holdings in *Auer* and *Seminole Rock*. *See* Richard J. Pierce, Jr., *The Future of Deference*, 84 GEO. WASH. L. REV. 1293 (2016); Matthew Mezger, *Using Interpretive Methodology to Get Out from* Seminole Rock *and A Hard Place*, 84 GEO. WASH. L. REV. 1335 (2016); Sanne H. Knudsen & Amy J. Wildermuth, *Lessons from the Lost History of* Seminole Rock, 22 GEO. MASON L. REV. 647 (2015); John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612 (1996). In the wake of *Kisor*, however, the application of *Auer* deference—in appropriate situations—remains required.

Chapter XVII. The Requirement of Reasoned Decisionmaking: Arbitrary and Capricious Review

Section 706(2)(A) of the Administrative Procedure Act ("APA") provides that a reviewing court shall "hold unlawful and set aside agency action, findings, and conclusions found to be … arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). This is the APA's "catch-all" provision governing the scope and standards of review. Courts rarely draw any meaningful distinctions between acts that are "arbitrary, capricious, or an abuse of discretion," *Block v. Pitney Bowes Inc.*, 952 F.2d 1450, 1454 (D.C. Cir. 1992), but rather routinely apply them as a single standard. *See, e.g.*, *Shieldalloy Metallurgical Corp. v. Nuclear Regul. Comm'n*, 768 F.3d 1205, 1208 (D.C. Cir. 2014).

The arbitrary and capricious standard encompasses both review of the factual basis of an agency's action, *see Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971), and review of an agency's reasoning as distinguished from its fact-finding, *see Bowman Transp., Inc. v. Ark.-Best Freight Sys., Inc.*, 419 U.S. 281, 285–86 (1974). It governs review of *all* proceedings that are subject to challenge under the APA. *See ASSE Int'l., Inc. v. Kerry*, 803 F.3d 1059, 1972 (9th Cir. 2015); *Ass'n of Data Processing Serv. Orgs. v. Bd. of Govs. of Fed. Rsrv. Sys.*, 745 F.2d 677, 684–85 (D.C. Cir. 1984). Thus, if an action is subject to review under the APA, it does not matter whether the challenged action is a formal or informal adjudication or a formal or informal rulemaking proceeding—all are subject to arbitrary and capricious review under Section 706(2)(A).

A. The *State Farm* Framework

As the Supreme Court made plain in its seminal decision in *Motor Vehicle Manufacturers Ass'n of the United States v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29 (1983), the touchstone of arbitrary and capricious review is reasoned decisionmaking:

> Normally, an agency rule would be arbitrary and capricious if the agency has [1] relied on factors which Congress has not intended it to consider, [2] entirely failed to consider an important aspect of the problem, [3] offered an explanation for its decision that runs counter to the evidence before the agency, or [4] is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Id. at 43.

State Farm involved a challenge to agency action taken pursuant to informal rulemaking procedures. In *Allentown Mack Sales & Service, Inc. v. NLRB*, 522 U.S. 359 (1998), the Supreme Court made clear that the requirement of reasoned decisionmaking also applies to judicial review

of agency adjudicatory actions:

> The Administrative Procedure Act, which governs the proceedings of administrative agencies and related judicial review, establishes a scheme of "reasoned decisionmaking." Not only must an agency's decreed result be within the scope of its lawful authority, but the process by which it reaches that result must be logical and rational. Courts enforce this principle with regularity when they set aside agency regulations which, though well within the agencies' scope of authority, are not supported by the reasons that the agencies adduce.

Id. at 374. "Reasoned decisionmaking … promotes sound results, and unreasoned decisionmaking the opposite." *Id.* at 375.

As *Allentown Mack* demonstrates, the application of the arbitrary and capricious standard applies somewhat differently in situations involving judicial review of agency adjudications rather than informal rulemakings. In the informal notice-and-comment rulemaking context, agencies often render legislative-type policy judgments. *See Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 557–58 (1978). In this context, judicial review focuses primarily on the reasons the agency provides for its decision. *See Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221 (2016). In contrast, review of adjudications tends to focus on the adequacy of the record evidence supporting the agency's judgment, the agency's adherence to precedent, and the agency's application of the controlling standard of proof. *See, e.g.*, *Allentown Mack*, 522 U.S. at 374 ("It is hard to imagine a more violent breach of [the reasoned decisionmaking] requirement than [when an agency] appl[ies] a rule of primary conduct or a standard of proof which is in fact different from the rule or standard formally announced."); *Ramaprakash v. FAA*, 346 F.3d 1121, 1124–25 (D.C. Cir. 2003) ("An agency's failure to come to grips with conflicting precedent constitutes an inexcusable departure from the essential requirement of reasoned decisionmaking.").

Arbitrary and capricious review is applied most frequently in cases involving judicial challenges to informal rulemakings. In this context, "[t]he function of the court is to assure that the agency has given reasoned consideration to all the material facts and issues." *Greater Bos. Television Corp. v. FCC*, 444 F.2d 841, 851 (D.C. Cir. 1970). Although the arbitrary and capricious standard does not allow for *de novo* review, it does permit a court to take what has been characterized as a "hard look" at agency actions emanating from informal rulemaking proceedings and other agency actions based on less than full trial-type records. *Nat'l Lime Ass'n v. EPA*, 627 F.2d 416, 451 n.126 (D.C. Cir. 1980).

The *State Farm* opinion enunciates in detail the principles governing arbitrary and capricious review. *State Farm* involved a challenge by insurance companies to an order of the National Highway Traffic Safety Administration rescinding a regulation requiring that new motor vehicles be equipped with passive restraints designed to protect vehicle occupants. 463 U.S. at 35–38. The Supreme Court held that the agency's revocation of the regulation was arbitrary and

capricious, because the agency failed to present an adequate factual basis and reasoned explanation for rescinding the passive restraint requirement and altogether failed to consider the efficacy of airbag technology. *Id.* at 46–56. In reaching this result, the Court explained:

> [Under the "arbitrary and capricious" standard,] a reviewing court may not set aside an agency rule that is rational, based on consideration of the relevant factors, and within the scope of the authority delegated to the agency by the statute …. The scope of review under the "arbitrary and capricious" standard is narrow and a court is not to substitute its judgment for that of the agency. Nevertheless, 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. In reviewing that explanation, we must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment …. The reviewing court … may not supply a reasoned basis for the agency's action that the agency itself has not given. We will, however, uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned …. Nor [may a court] broadly require an agency to consider all policy alternatives in reaching [a] decision …. [A] rulemaking cannot be found wanting simply because the agency failed to include every alternative [policy option] and thought conceivable by the mind of man regardless of how uncommon or unknown that alternative may have been.

Id. at 42–43, 51.

State Farm importantly clarified certain issues regarding arbitrary and capricious review. First, the decision made clear that the standard is not inconsistent with the dictates of *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978). *See State Farm*, 463 U.S. at 50–51. *Vermont Yankee* prohibits courts from imposing any procedural requirements upon an agency beyond those required by the APA, the agency's authorizing statute, and the agency's properly adopted rules. 435 U.S. at 523–25. In *State Farm*, the Court rebuked the government for invoking *Vermont Yankee* "as though it were a talisman under which any agency decision is by definition unimpeachable." 463 U.S. at 50. In concluding that the agency acted arbitrarily and capriciously when it failed to consider a regulation requiring airbags in new cars, the Court noted that it did "not require … any specific procedures which [the agency] must follow." *Id.* at 50–51. Rather, the Court "h[e]ld only that given the judgment made [by the agency] in 1977 that airbags are an effective and cost-beneficial life-saving technology, the mandatory passive restraint rule may not be abandoned without any consideration whatsoever of an airbags-only requirement." *Id.* at 51; *see also Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1912–13 (2020) (explaining that the government had "repeated the error" identified in *State Farm* when it rescinded in full an immigration policy with two distinct parts without giving consideration to the possibility of a partial rescission).

Second, *State Farm* roundly rejected the government's suggestion "that the arbitrary-and-capricious standard requires no more than the minimum rationality a statute must bear in order to withstand analysis under the Due Process Clause." *Id.* at 43 n.9. Referred to as "rational basis" review, this minimal rationality is well explained in *FCC v. Beach Communications, Inc.*, 508 U.S. 307 (1993). Addressing an equal protection challenge to a distinction drawn by Congress in the Cable Communications Policy Act, the Court explained that the constitutional requirement of "equal protection is not a license for courts to judge the wisdom, fairness, or logic of legislative choices. In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against an equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *Id.* at 313. In other words, on rational basis review, a statutory classification is presumed valid, and those challenging its rationality must negate "every conceivable basis [that] might support it." *Id.* at 314–15. Accordingly, under the rational basis test, congressional social and economic policy is not subject to the same degree of appellate scrutiny as courtroom fact-finding, but rather may be upheld on the basis of rational speculation, even when that speculation is unsupported by evidence or empirical data. The *State Farm* Court was clear that it did "not view as equivalent the presumption of constitutionality afforded legislation drafted by Congress and the presumption of regularity afforded an agency in fulfilling its statutory mandate." *State Farm*, 463 U.S. at 43 n.9.

That said, as illustrated in *Fed. Communications Commission v. Prometheus Radio Project*, 141 S. Ct. 1150 (2021), an agency still has significant leeway in making predictive or speculative judgments even in the absence of compelling data. At issue in the case were the Federal Communications Commission's ("FCC's") rules governing ownership of radio stations, television stations, and newspapers. In 2017, the FCC, while engaging in a statutorily mandated periodic review of its ownership rules, concluded that three such rules in their current form no longer served the public interest and sought to either repeal or modify them. *See id.* at 1155–56. In reaching that decision, the FCC specifically "concluded that repealing or modifying the three ownership rules was not likely to harm minority and female ownership." *Id.* at 1157. However, the Commission "acknowledged the gaps in the data" it relied upon to reach that conclusion. *Id.* at 1159–60. The Third Circuit vacated the FCC's order and the Supreme Court reversed. *See id.* at 1155, 1161. In reaching that decision, the Court elaborated on the empirical and statistical analysis required for agency decisionmaking to pass muster under the APA:

> The Commission … explained that its best estimate, based on the sparse record evidence, was that repealing or modifying the three rules at issue here was not likely to harm minority and female ownership. The APA requires no more.
>
> To be sure, in assessing the effects on minority and female ownership, the FCC did not have perfect empirical or statistical data. Far from it. But that is not unusual in day-to-day agency decisionmaking within the Executive Branch. The APA imposes no general obligation on agencies to conduct or

> commission their own empirical or statistical studies. … Here, the FCC repeatedly asked commenters to submit empirical or statistical studies on the relationship between the ownership rules and minority and female ownership. Despite those requests, no commenter produced such evidence indicating that changing the rules was likely to harm minority and female ownership. In the absence of additional data from commenters, the FCC made a reasonable predictive judgment based on the evidence it had.
>
> In light of the sparse record on minority and female ownership and the FCC's findings with respect to competition, localism, and viewpoint diversity, we cannot say that the agency's decision to repeal or modify the ownership rules fell outside the zone of reasonableness for purposes of the APA.

Id. at 1160. Thus, while *State Farm* mandates that agency decisions receive higher scrutiny than the rational basis test, *Prometheus Radio* reinforces that arbitrary and capricious review is, at base, deferential.

Third, *State Farm* held that "the rescission or modification" of a regulation "is subject to the same [arbitrary and capricious] test" pursuant to which an agency's promulgation of a regulation is reviewed. *State Farm*, 463 U.S. at 41. The Court explained:

> Revocation [of a regulation] constitutes a reversal of the agency's former views as to the proper course. A settled course of behavior embodies the agency's informed judgment that, by pursuing that course, it will carry out the policies committed to it by Congress. There is, then, at least a presumption that those policies will be carried out best if the settled rule is adhered to. Accordingly, an agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance.

Id. at 41–42.

In *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009), the Court clarified the scope of arbitrary and capricious review in cases in which an agency changes its policy. *Fox Television Stations* involved several isolated utterances of expletives by celebrities during performance award shows. *Id.* at 510–11. The Federal Communications Commission ("FCC") deemed the broadcasts indecent, abandoning its longstanding policy that a single "fleeting use" of an expletive was not proscribed. *Id.* at 508–09. The Court upheld the FCC's order against an arbitrary and capricious challenge, holding that "the agency's reasons for expanding the scope of its enforcement activity were entirely rational." *Id.* at 517. The Court rejected the argument that the agency action should be subject to a heightened standard of review simply because it represented a change in administrative policy:

> To be sure, the requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it *is* changing position. An agency may not, for example, depart from a prior policy *sub silentio* or simply disregard rules that are still on the books. And of course the agency must show that there are good reasons for the new policy. But it need not demonstrate to a court's satisfaction that the reasons for the new policy are *better* than the reasons for the old one; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better, which the conscious change of course adequately indicates. This means that the agency need not always provide a more detailed justification than what would suffice for a new policy created on a blank slate. Sometimes it must—when, for example, its new policy rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interests that must be taken into account. It would be arbitrary or capricious to ignore such matters. In such cases it is not that further justification is demanded by the mere fact of policy change; but that a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy.

Id. at 515–16 (emphasis in original); *see also Mary V. Harris Found. v. FCC*, 776 F.3d 21, 24–25 (D.C. Cir. 2015). Responding to the majority opinion, Justice Breyer characterized his view of what the law requires when an agency changes position, not as a heightened standard of review, but rather an "application of the *same standard* of review to different circumstances, namely, circumstances characterized by the fact that *change* is at issue. It requires the agency to focus upon the fact of change where change is relevant, just as it must focus upon any other relevant circumstance." *Fox Television Stations*, 556 U.S. at 550 (Breyer, J., dissenting) (emphasis in original).

Finally, *State Farm* suggested that the "standard a court would use to judge an agency's refusal to promulgate a rule in the first place" may be "considerably narrower than the traditional arbitrary-and-capricious test." 463 U.S. at 41. In *Massachusetts v. EPA*, 549 U.S. 497 (2007), the Court confirmed that review of an agency's denial of a petition for rulemaking is very narrow:

> There are key differences between a denial of a petition for rulemaking and an agency's decision not to initiate an enforcement action. In contrast to nonenforcement decisions, agency refusals to initiate rulemaking are less frequent, more apt to involve legal as opposed to factual analysis, and subject to special formalities, including a public explanation. They moreover arise out of denials of petitions for rulemaking which (at least in the circumstances here) the affected party had an undoubted procedural right to file in the first instance. Refusals to promulgate rules are thus susceptible to judicial review, though such review is extremely limited and highly deferential.

Id. at 527 (quoting *Nat'l Customs Brokers & Forwarders Ass'n of Am. v. United States*, *Inc.*, 883 F.2d 93, 96 (D.C. Cir. 1989)). The issue in *Massachusetts v. EPA* was whether the agency had authority to regulate greenhouse gas emissions from new motor vehicles under the Clean Air Act. The Environmental Protection Agency ("EPA") denied the petition for rulemaking on the grounds that it lacked authority to regulate because greenhouse gases are not "air pollutants" as that term is defined in the statute. *Id.* at 510–13. The Court rejected the agency's statutory interpretation and held that EPA had erred in assuming that it lacked authority to regulate. *Id.* at 528–32. Because EPA had authority to grant the relief sought in the petition for rulemaking, and had offered no good reason for its refusal to regulate, the Court held that the agency's denial of the petition could not survive arbitrary and capricious review. *Id.* at 534–35.

Since *Massachusetts v. EPA*, the courts have continued to emphasize the narrowness of their review of an agency's decision not to promulgate a rule. For example, in *WildEarth Guardians v. EPA*, 751 F.3d 649 (D.C. Cir. 2014), the agency declined to initiate the requested rulemaking because it "must prioritize its actions in light of limited resources and ongoing budget uncertainties." *Id.* at 651. The court accepted the EPA's rationale, without in-depth discussion of its articulated priorities, noting that the rationale "easily passes muster" under the narrow test enunciated in *Massachusetts v. EPA*. *Id.* At least when "an agency has broad discretion to choose how best to marshal its limited resources and personnel to carry out its delegated responsibilities," *Massachusetts v. EPA*, 549 U.S. at 527, a reasonable use of that discretion to determine how to spend those resources may be enough to sustain a denial of a petition for rulemaking, *WildEarth*, 751 F.3d at 651. Notably, the court's conclusion rested, at least in part, on the fact that the EPA was clear that its decision not to initiate the requested rulemaking was not a determination as to whether the regulation could be issued. *See id.* at 654. Unlike in *Massachusetts v. EPA*, therefore, the agency had not made an error in interpreting its own jurisdiction that could render its denial of the petition for rulemaking arbitrary and capricious. *Id.* The agency merely made no finding about its jurisdiction or the merits of the rule, but rather relied solely on its discretion to prioritize its actions. *Id.* at 655; *see also, e.g.*, *New York v. Nuclear Regul. Comm'n*, 589 F.3d 551, 554 (2d Cir. 2009) (citing *Massachusetts v. EPA* and noting that review of a denial of rulemaking has been said to be "akin to non-reviewability" and falls "at the high end of the range of deference and an agency refusal is overturned only in the rarest and most compelling of circumstances," "typically involv[ing] plain errors of law").

The Supreme Court also has made clear that, in assessing whether an agency action is arbitrary and capricious, a reviewing court should ignore agency errors that have no real bearing on the final agency action and are thus harmless. *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 659–60 (2007) (citing 5 U.S.C. § 706, which provides that "due account shall be taken of the rule of prejudicial error" in agency actions reviewed under the APA).

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It is important to understand that, even though the decisions in *State Farm*, *Overton Park*, and their progeny indicate that, under the arbitrary and capricious standard, a court must "engage in a substantial inquiry" that involves "a thorough, probing, in-depth review," *Overton*

Park, 401 U.S. at 415, the standard is, nonetheless, fundamentally deferential. This is particularly true in administrative actions involving legislative-type policy judgments, *see, e.g.*, *Vermont Yankee*, 435 U.S. at 557–58, matters on the cutting edge of scientific knowledge, *see, e.g.*, *Balt. Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 103 (1983), and judgments regarding agency enforcement priorities, *see, e.g.*, *City of Bedford v. FERC*, 718 F.2d 1164, 1169–70 (D.C. Cir. 1983). *See also, e.g.*, *SoundExchange, Inc. v. Libr. of Cong.*, 571 F.3d 1220, 1223–24 (D.C. Cir. 2009) (finding an "increase[d level of] deference" when a statute delegates significant policy discretion and implicates special expertise by requiring an agency to "forecast … the future public interest," achieve an "equitable division" of profits, and reconcile "statutory factors [that] pull in opposing directions"); Jacob Gersen & Adrian Vermeule, *Thin Rationality Review*, 114 MICH. L. REV. 1355 (2016) (arguing that "[t]he Court's precedent embodies an approach to rationality review that is highly tolerant of the inescapable limits of agency rationality when making decisions under uncertainty").

B. The Importance of the Agency Record

Under the arbitrary and capricious standard, judicial review of agency action normally must be based on the existing administrative record, "not some new record made initially in the reviewing court." *Camp v. Pitts*, 411 U.S. 138, 142 (1973) (per curiam). There can be no reasoned decision-making when an agency relies on findings that are not supported by the record. *See Dep't of Com. v. New York*, 139 S. Ct. 2551, 2575-76 (2019) (affirming "remand[] to the agency" where "the evidence tells a story that does not match the explanation" given by the agency); *FERC v. Elec. Power Supply Ass'n*, 577 U.S. 260, 295 (2016) (a reasoned decision is one that rests on "adequate support in the record"). A reviewing court must confine itself to the grounds upon which the record discloses that the agency's action was based. *SEC v. Chenery Corp.*, 318 U.S. 80, 87–88 (1943). "If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis." *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947). In other words, the court may not enter "the domain which Congress has set aside exclusively for the administrative agency." *Id.* This means that a reviewing court may not supply a reasoned basis for the agency action that the agency itself did not give in the record under review. *Chenery Corp.*, 318 U.S. at 88. Nor may a court consider "*post hoc* rationalizations" by either agency decisionmakers or agency counsel. *See Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1909 (2020); *see also Calcutt v. Fed. Deposit Ins. Corp.*, 143 S. Ct. 1317, 1318 (2023) (per curiam).

There is a close connection between judicial review of the adequacy of the record created during rulemaking procedures and review of the substance of rules promulgated by administrative agencies. The decision in *United States v. Nova Scotia Food Products Corp.*, 568 F.2d 240 (2d Cir. 1977), is one of the leading cases amplifying this point. In that case, the Food and Drug Administration ("FDA") established rules governing the processing of smoked fish. *Id.* at 244–45. Several years after the rulemaking, the agency brought action in district court to enforce its rules against Nova Scotia Food Products, a whitefish processor. The district court

enjoined the company from processing hot smoked whitefish except in accordance with the agency's regulations. *Id.* at 245. On review, the company contended that the administrative record upon which the FDA's rules were predicated was inadequate for judicial review, and that the FDA's "failure to disclose to interested persons the factual material upon which the agency was relying vitiates the element of fairness which is essential to any kind of administrative action." *Id.* at 248.

In sustaining the challenge to the FDA rule, the *Nova Scotia* opinion first noted that, "when the pertinent research material is readily available and the agency has no special expertise on the precise parameters involved, there is [no] reason to conceal the scientific data relied upon from the interested parties." *Id.* at 251. The decision added that "[i]f the failure to notify interested persons of the scientific research upon which the agency was relying actually prevented the presentation of relevant comment, the agency may be held not to have considered all the relevant factors." *Id.* For an agency "[t]o suppress meaningful comment by failure to disclose the basic data relied upon is akin to rejecting comment altogether …. The inadequacy of comment in turn leads in the direction of arbitrary decision-making." *Id.* at 252; *see also Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 237 (D.C. Cir. 2008) ("[S]tudies upon which an agency relies in promulgating a rule must be made available during the rulemaking in order to afford interested persons meaningful notice and an opportunity for comment.").

In *Department of Commerce v. New York*, 139 S. Ct. 2551 (2019), the Supreme Court addressed what was, in certain ways, a mirror image of the facts presented in *Nova Scotia*: a situation in which extra-record evidence called into question the agency's asserted explanation for its actions. The case concerned the Department of Commerce's effort to add a citizenship question to the 2020 Census. In 2018, the Secretary of Commerce announced in a memo that he was reinstating a citizenship question on the 2020 Census at the request of the Department of Justice ("DOJ"), which sought data to use in enforcing the Voting Rights Act. *Id.* at 2562. The Government submitted the administrative record to the district court. *Id.* at 2564. Soon after, the Government supplemented the record, after which the district court granted a request to compel the Government to add additional documents. *Id.* The district court then ordered extra-record discovery, including the deposition of DOJ officials and the Secretary of Commerce (which the Court stayed). *Id.* After a bench trial, the district court held, *inter alia*, that the Secretary's action was arbitrary and capricious and based on pretextual rationale. *See id.*

After holding that the Secretary's decision was adequately supported by the evidence before him, *see id.* at 2569–71, the Court turned to the district court's "determination that the Secretary's decision must be set aside because it rested on a pretextual basis," *id.* at 2573. The Court cited several "settled propositions" that would guide its analysis. "First, in order to permit meaningful judicial review, an agency must 'disclose the basis' of its action …. Second, in reviewing agency action, the court is ordinarily limited to evaluating the agency's contemporaneous explanation in light of the existing administrative record …. Third, a court may not reject an agency's stated reasons for acting simply because the agency might also have had other unstated reasons …. Finally, we have recognized a narrow exception to the general rule against inquiring into 'the mental processes of administrative decisionmakers' … [o]n a 'strong

showing of bad faith or improper behavior,'" in which case "an inquiry may be warranted and may justify extra-record discovery." *Id.* at 2573-74.

Although the Court found that the district court should not have ordered extra-record discovery when it did, it allowed that later additions to the record "largely justified such extra-record discovery as occurred," *id.* at 2574, and thus the Court considered all the evidence in the record on appeal. Viewing that record on appeal as a whole, the Court held that "the decision to reinstate a citizenship question cannot be adequately explained in terms of DOJ's request for improved citizenship data." *Id.* at 2575. At bottom, there was a "mismatch between the decision the Secretary made and the rationale he provided." *Id.* And "unlike a typical case in which an agency may have both stated and unstated reasons for a decision, here the [Voting Rights Act] enforcement rationale—the sole stated reason—seems to have been contrived." *Id.*

The Court concluded that, although its "review is deferential, [it is] 'not required to exhibit a naiveté from which ordinary citizens are free.' The reasoned explanation requirement of administrative law … is meant to ensure that agencies offer genuine justifications for important decisions, reasons that can be scrutinized by courts and the interested public. Accepting contrived reasons would defeat the purpose of the enterprise." *Id.* at 2575–76 (quoting *United States v. Stanchich*, 550 F.2d 1294, 1300 (2d Cir. 1977) (Friendly, J.)). Thus, the Court affirmed the district court's decision to remand the case to the agency for a proper explanation. *Id.* at 2576.

Chapter XVIII. Factual Determinations Made in On-the-Record Proceedings: Substantial Evidence Review

Whenever an agency is required to act "on the record after opportunity for an agency hearing," *see* 5 U.S.C. §§ 553(c), 554(a), *i.e.*, pursuant to formal rulemaking or adjudicatory procedures, the Administrative Procedure Act ("APA") requires that agency findings and conclusions be supported by "substantial evidence," *id.* § 706(2)(E). Some authorizing statutes also require that an agency's factual findings and conclusions be supported by substantial evidence. *See, e.g.*, National Labor Relations Act, 29 U.S.C. § 160(e)–(f).

In *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951), the Supreme Court described the framework for substantial evidence review in broad outline, acknowledging that the more precise contours of this context-specific standard would be identified by the appellate courts. *See id.* at 488, 490–91. Looking to the language and legislative history of Section 706(2)(E), the Court held that substantial evidence review requires consideration of the *whole* record upon which an agency's factual findings are based, including "whatever in the record fairly detracts" from the evidence supporting the agency's decision. *Id.* at 487–88. In reaching this conclusion, the Court rejected the approach of lower courts that had looked only to the evidence supporting an agency decision "without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn." *Id.*; *see also id.* at 478.

Under the whole-record review standard, "evidence that is substantial viewed in isolation may become insubstantial when contradictory evidence is taken into account." *Landry v. Fed. Deposit Ins. Corp.*, 204 F.3d 1125, 1140 (D.C. Cir. 2000). This means that an agency cannot ignore evidence that undercuts its judgment or discount such evidence without adequate explanation. *See Morall v. DEA*, 412 F.3d 165, 179–80 (D.C. Cir. 2005); *see also, e.g.*, *Bellagio, LLC v. NLRB*, 863 F.3d 839, 850–52 (D.C. Cir. 2017) (vacating agency decision where the agency ignored or otherwise did not adequately weigh contradictory record evidence); *Miller v. Dep't of Justice*, 842 F.3d 1252, 1259–64 (Fed. Cir. 2016) (reversing agency decision that failed to adequately consider contradictory evidence); *Lakeland Bus Lines, Inc. v. NLRB*, 347 F.3d 955, 963 (D.C. Cir. 2003) (holding that the Board's "clipped view of the record" did not support the conclusion that the employer had committed unfair labor practices).

The *Universal Camera* opinion also clarified how the findings of agency hearing examiners, sometimes referred to as "presiding employees" or "administrative law judges," *see* 5 U.S.C. § 556(b), should be accounted for under whole-record substantial evidence review. Hearing examiners preside over formal agency adjudications, making "initial," "recommended," or "tentative" decisions. *See* 5 U.S.C. § 557(b), (c). When an agency expressly approves or adopts the reasonable credibility determination of a hearing examiner, such determinations are generally subject to great respect by a reviewing court. *See, e.g.*, *Inova Health Sys. v. NLRB*, 795 F.3d 68, 80 (D.C. Cir. 2015) (courts accept all reasonable credibility determinations adopted by an agency unless they are "patently insupportable"). But when an agency rests on credibility determinations that a hearing examiner did not actually make or findings not supported by

substantial evidence, they will not survive review. *Id.* at 838–39.

It is sometimes the case, however, that an agency will modify or reject a hearing examiner's recommendation. In such situations, *Universal Camera* instructs that the hearing officer's findings "are to be considered along with the consistency and inherent probability of [the] testimony" and should be afforded no "more weight than in reason and in the light of judicial experience they deserve." 340 U.S. at 496. The ultimate significance of the findings depends "largely on the importance of credibility in the particular case." *Id.* But the Supreme Court is clear that even if an officer's decision is based on witness testimony, if the agency disagrees with that decision, the substantial evidence review standard applies without modification. *Id.*; *see also Loc. 702, Int'l Bhd. of Elec. Workers v. NLRB*, 215 F.3d 11, 15 (D.C. Cir. 2000). Nonetheless, an "agency's decision is vulnerable when it does not take the [hearing officer's] findings into consideration." *Morall*, 412 F.3d at 179. Consequently, when an agency disagrees with a hearing officer's conclusions, it must "make clear the basis of its disagreement." *Bally's Park Place, Inc. v. NLRB*, 646 F.3d 929, 935 n.4 (D.C. Cir. 2011). But "in the end[,] it is the [agency] that is entrusted by Congress with the responsibility for making findings under the statute." *Id.* Consequently, the agency "is not precluded from reaching a result contrary to that of the [hearing officer] when there is substantial evidence in support of each result." *Id.*

Summarizing whole-record substantial evidence review, the *Universal Camera* Court emphasized that the standard does not negate the "respect" with which courts must review decisions based on agency expertise. 340 U.S. at 488. The Court also made clear that the standard "does not furnish a calculus of value by which a reviewing court can assess the evidence." *Id.*; *see also Biestek v. Berryhill*, 139 S. Ct. 1148, 1154–57 (2019) (declining to adopt a categorical rule that expert testimony in the absence of the underlying, supporting data cannot constitute "substantial evidence" in Social Security Administration proceedings). Rather, agency findings may only "be set aside when the record … clearly precludes [an agency's] decision from being justified by a fair estimate of the worth of the testimony of witnesses or [the agency's] informed judgment on matters within its special competence or both." 340 U.S. at 490. Thus, a reviewing court may not "supplant the agency's findings merely by identifying alternative findings that could be supported by substantial evidence." *Arkansas v. Oklahoma*, 503 U.S. 91, 113 (1992); *see also Robinson v. Nat'l Transp. Safety Bd.*, 28 F.3d 210, 215 (D.C. Cir. 1994) (stating that an agency decision "may be supported by substantial evidence even though a plausible alternative interpretation of the evidence would support a contrary view"). Put another way, a court cannot displace an agency's "choice between two fairly conflicting views, even though the [reviewing] court would justifiably have made a different choice had the matter been before it *de novo*." *Universal Camera*, 340 U.S. at 488.

An agency's failure to survive whole-record substantial evidence review will also, in certain situations, support the conclusion that the action at issue is arbitrary and capricious. The arbitrary and capricious standard of Section 706(2)(A) governs review of "*all*" proceedings subject to challenge under the APA. *See Consumers Union of U.S., Inc. v. FTC*, 801 F.2d 417, 422 (D.C. Cir. 1986) (emphasis in original). Thus, when an agency is required to hold a formal hearing or make formal on-the-record findings, its final action will be subject to both substantial evidence and

arbitrary and capricious review, assuming a party raises both challenges. *See Camp v. Pitts*, 411 U.S. 138, 140–42 (1973). "[I]n the context of the APA, the substantial evidence test … and the arbitrary and capricious test … are one and the same insofar as the requisite degree of evidentiary support is concerned." *Consumers Union*, 801 F.2d at 422. It is thus "impossible to conceive of a 'nonarbitrary' factual judgment supported only by evidence that is not substantial in the APA sense." *Safe Extensions, Inc. v. FAA*, 509 F.3d 593, 604 (D.C. Cir. 2007).

In addition, an agency's failure to employ reasoned decisionmaking (as required to survive arbitrary and capricious review) can make application of the substantial evidence standard difficult. This point was highlighted in *Allentown Mack Sales and Service, Inc. v. NLRB*, 522 U.S. 359 (1998). There, the Supreme Court explained that reasoned decisionmaking requires that the decisional process be "logical and rational." *Id.* at 374. Thus, for example, an agency may not announce that one standard of proof controls in an adjudicatory hearing, but then actually apply another in making factual determinations and reaching substantive conclusions. If an agency announces one rule and applies another, "it becomes a much more complicated enterprise for a court of appeals to determine whether substantial evidence supports the conclusion that the required standard has or has not been met." *Id.* at 376. "Reviewing courts are entitled to take [the legal standards an agency enunciates in principle] to mean what they say, and to conduct substantial-evidence review on that basis." *Id.* at 376–77. Courts owe no deference to "an agency's eccentric view of what a reasonable factfinder *ought* to demand." *Id.* at 377 (emphasis in original).

Finally, it is worth noting that the whole-record substantial evidence standard is occasionally equated to the clearly erroneous standard governing appellate court review of trial court findings of fact. *See, e.g.*, *Dickinson v. Zurko*, 527 U.S. 150 (1999); *see also* Chapter II, *supra* (discussing clearly erroneous review). Describing the clearly erroneous standard as "somewhat stricter (*i.e.*, allowing somewhat closer judicial review)" than substantial evidence review, the Supreme Court has concluded that "[t]he upshot in terms of judicial review is some practical difference in outcome depending upon which standard is used …. But the difference is a subtle one—so fine that (apart from the present case) we have failed to uncover a single instance in which a reviewing court conceded that use of one standard rather than the other would in fact have produced a different outcome." *Zurko*, 527 U.S. at 153, 162–63.

Chapter XIX. Comparing and Contrasting the Principal Standards of Review

A. The Interplay of *Chevron* Step Two and Arbitrary and Capricious Review

The analysis of disputed agency action under *Chevron* Step Two and arbitrary and capricious review is often "the same, because under *Chevron* step two, [the court asks] whether an agency interpretation is 'arbitrary or capricious in substance.'" *Judulang v. Holder*, 565 U.S. 42, 52 n.7 (2011) (quoting *Mayo Found. for Med. Educ. & Rsch. v. United States*, 562 U.S. 44, 53 (2011)). However, when an agency action does not involve the interpretation of any statutory language, "the more apt analytic framework … is standard 'arbitrary or capricious' review under the [Administrative Procedure Act]." *Id.*

In some circumstances, there is an overlap in the analysis required pursuant to the *Chevron* Step Two test, *see Chevron, U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843–44 (1984), and that required under the arbitrary and capricious standard defined in *Motor Vehicle Manufacturers Association of the United States v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 42–44 (1983). This overlap is exemplified in *Rust v. Sullivan*, 500 U.S. 173 (1991), where the Court sustained regulations of the Department of Health and Human Services that evidenced a change in the agency's interpretation of its authorizing statute. The Court upheld the change both because the new regulations espoused a permissible interpretation under *Chevron* Step Two *and* because the agency's decision to change its position was supported by the reasoned decisionmaking required by *State Farm*. *Id.* at 186–87; *see also Nat'l Ass'n of Regul. Util. Comm'rs v. ICC*, 41 F.3d 721, 728 (D.C. Cir. 1994) ("The Commission has, in our view, acted unreasonably whether one considers the case as one involving a question of *Chevron* Step II statutory interpretation or a garden variety arbitrary and capricious review or, as we do, a case that overlaps both administrative law concepts."). "In such situations, what is 'permissible' under *Chevron* is also reasonable under *State Farm*." *Arent v. Shalala*, 70 F.3d 610, 616 n.6 (D.C. Cir. 1995); *see also id.* at 620 (Wald, J., concurring in the judgment) ("Because both standards require the reviewing court to ask whether the agency has considered all of the factors made relevant by the statute, this court has often found the *State Farm* line of cases relevant to a *Chevron* step two analysis."); *Confederated Tribes of the Grand Ronde Cmty. of Or. v. Jewell*, 830 F.3d 552, 558–59, 561–62 (D.C. Cir. 2016).

A good example of a case in which the Court assessed an agency's action under both the *Chevron* and arbitrary and capricious standards is *Michigan v. EPA*, 576 U.S. 743 (2015). In that case, the Court remanded the mercury standards set by the Environmental Protection Agency ("EPA") because the agency had failed to consider their costs. *Id.* at 760. "The Clean Air Act directs the [EPA] to regulate emissions of hazardous air pollutants from power plants if the Agency finds regulation 'appropriate and necessary.'" *Id.* at 747. In particular, "Congress directed the Agency to 'perform a study of the hazards to public health reasonably anticipated to occur as a result of emissions by [power plants] of [hazardous air pollutants] after imposition of the requirements of this chapter.' [42 U.S.C.] § 7412(n)(1)(A). If the Agency 'finds … regulation is appropriate and

necessary after considering the results of the study,' it 'shall regulate [power plants] under [§ 7412].'" *Id.* at 748. The Agency found regulation "appropriate" and "necessary" because, *inter alia*, "the imposition of the Act's other requirements did not eliminate [the] risks" to human health and the environment. *Id.* at 749. However, "EPA concluded that 'costs should not be considered' when deciding whether power plants should be regulated under § 7412." *Id.* The Court reversed the court of appeals' decision upholding the regulations and remanded the case for further review. *Id.* at 760.

In reaching its decision, the Supreme Court assessed EPA's conclusion under *Allentown Mack Sales & Service, Inc. v. NLRB*, 522 U.S. 359 (1998), *State Farm*, 463 U.S. 29, and *Chevron*, 467 U.S. 837. *See Michigan*, 576 U.S. at 750–51. The Court found that EPA's interpretation of the statute was unreasonable, and thus due no deference under *Chevron* Step Two, and that the agency's regulatory action was not based on reasoned decisionmaking, and was therefore arbitrary and capricious. The Court said:

> EPA's disregard of cost rested on its interpretation of § 7412(n)(1)(A), which, to repeat, directs the Agency to regulate power plants if it "finds such regulation is appropriate and necessary." The Agency accepts that it *could* have interpreted this provision to mean that cost is relevant to the decision to add power plants to the program. But it chose to read the statute to mean that cost makes no difference to the initial decision to regulate.
>
> … *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 § 7412(n)(1) to mean that it could ignore cost when deciding whether to regulate power plants.
>
> **…**
>
> [I]t 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.

Id. at 751, 759 (emphasis in original).

It is hardly surprising that the Court assessed EPA's action under both the *Chevron* and arbitrary and capricious standards. If an agency action cannot pass muster under *Chevron* Step

Two, it is necessarily arbitrary and capricious under the APA. Section 706(2)(A) provides that a reviewing court shall "hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). And Section 706(2)(C) provides that a reviewing court shall "hold unlawful and set aside agency action, findings, and conclusions found to be … in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." *Id.* § 706(2)(C). Indeed, the courts not infrequently analyze challenges to agency action under both *Chevron* and *State Farm*. *See, e.g.*, *Pharm. Rsch. & Mfrs. of Am. v. FTC*, 790 F.3d 198, 207–12 (D.C. Cir. 2016).

Overlapping analyses of agency action under *Chevron* Step Two and *State Farm* are not inevitable, however. There are many situations in which an agency action may be based on a permissible and reasonable interpretation of its enabling statute, but nonetheless fail review under *State Farm* because of a lack of reasoned decisionmaking or some procedural infirmity. For example, a court may conclude that an agency action is based on a permissible interpretation of its enabling statute, yet nevertheless find the action an invalid exercise of decisionmaking authority under 5 U.S.C. § 706(2)(A) because the agency "entirely failed to consider an important aspect of the problem" or otherwise failed to engage in reasoned decisionmaking. *State Farm*, 463 U.S. at 43; *see also, e.g.*, *Humane Soc'y of the U.S. v. Zinke*, 865 F.3d 585, 605 (D.C. Cir. 2017) ("While analysis of the reasonableness of agency action under *Chevron* Step Two and arbitrary and capricious review is often the same, the Venn diagram of the two is not a circle."). In other words, although review under *Chevron* and *State Farm* may occasionally overlap, the standards of review emanating from these cases are distinct and serve different functions.

The occasional analytical overlap between *Chevron* Step Two and arbitrary and capricious review can sometimes make it difficult to determine under which standard a case should be decided. The opinions in *Arent v. Shalala*, 70 F.3d 610 (D.C. Cir. 1995), demonstrate the problem. In that case, public interest groups challenged labeling regulations promulgated by the Food and Drug Administration ("FDA") under the Nutrition Labeling and Education Act. *Id.* at 612. The Act established voluntary guidelines pursuant to which retail stores were to provide certain nutritional information to consumers. The Act also required that if retail stores were not in "substantial compliance" with the guidelines, the FDA was to issue mandatory guidelines. *Id.* The petitioning public interest groups alleged that the FDA's regulations set a standard for "substantial compliance" that was so low as to be arbitrary and capricious and a violation of the statute. *Id.*

Although the court unanimously upheld the regulations, there was a difference of opinion as to whether petitioners' challenges implicated *State Farm*'s arbitrary and capricious test or *Chevron* Step Two. The majority opinion held that the case was controlled by *State Farm*. *Id.* at 614–15. Characterizing *Chevron* review as "principally concerned with whether an agency has authority to act under a statute," *id.* at 615, the majority concluded that "there is no question that the FDA had authority to define the circumstances constituting food retailers' substantial compliance with the [statute's] voluntary labeling guidelines," *id.* at 616. According to the majority, "[t]he only issue [was] whether the FDA's discharge of that authority was reasonable … [and] [s]uch a question falls within the province of traditional arbitrary and capricious review

under 5 U.S.C. § 706(2)(A)." *Id.*

The concurring judge in *Arent* acknowledged that the reasonableness inquiry governing review of the regulations "arguably falls within [the] area of overlap" between *Chevron* Step Two and *State Farm*. *Id.* at 620 (Wald, J., concurring in the judgment). However, she concluded that because, "[i]n reviewing the FDA's regulations, [the court's] task was to determine whether the agency rationally considered the factors set forth in the [statute] when it defined 'substantial compliance,'" the court was obliged to apply the *Chevron* Step Two standard of review. *Id.* Accordingly, the concurring judge argued that she could not find "*State Farm* applicable to the *exclusion* of *Chevron*." *Id.* (emphasis in original).

It may matter whether a case is decided under *Chevron* or *State Farm*, or both. When a court finds that an agency action is arbitrary and capricious, it will normally remand the case to the agency for further consideration. *See* Kristina Daugirdas, Note, *Evaluating Remand Without Vacatur: A New Judicial Remedy for Defective Agency Rulemakings*, 80 N.Y.U. L. REV. 278 (2005); *see also, e.g.*, *U.S. Sugar Corp. v. EPA*, 830 F.3d 579, 630 (D.C. Cir. 2016). Thus, when an administrative action is found to be arbitrary and capricious, an agency has an opportunity to revisit its decision and provide an adequate justification or reach a different conclusion.

In contrast, when a court concludes that an agency interpretation fails *Chevron*, it has found that the agency acted outside of the compass of its delegated authority or that the agency's action rests on an impermissible construction of its authorizing statute. In such circumstances, the agency's action is effectively vacated. *See, e.g.*, *Michigan v. EPA*, 576 U.S. 743, 759–60 (2015); *Am. Libr. Ass'n v. FCC*, 406 F.3d 689, 708 (D.C. Cir. 2005).

However, there are some circumstances in which courts will remand an agency action even when it is invalidated under *Chevron*. For example, when an agency has delegated authority to interpret and enforce a statute, but fails to exercise its discretion under *Chevron* Step Two, the proper remedy usually will be for the court to remand the case for further consideration. *See, e.g.*, *Negusie v. Holder*, 555 U.S. 511, 523 (2009); *Gonzales v. Thomas*, 547 U.S. 183, 185–86 (2006) (per curiam). And when an agency's interpretation is rejected under *Chevron* in part for want of reasoned decisionmaking, the case may be remanded to allow the agency to reconsider the issue. *See, e.g.*, *Fox v. Clinton*, 684 F.3d 67, 80 (D.C. Cir. 2012).

Finally, it should be noted that when an agency's interpretation of its authorizing statute is inconsistent with its past practice, the standards of review pursuant to *Chevron* Step Two and *State Farm* appear to merge. In *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967 (2005), the Court stated:

> Unexplained inconsistency is, at most, a reason for holding an interpretation to be an arbitrary and capricious change from agency practice under the Administrative Procedure Act. *State Farm*, 463 U.S. at 46–57. For if the agency adequately explains the reasons for a reversal of policy, change is not

> invalidating, since the whole point of *Chevron* is to leave the discretion provided by the ambiguities of a statute with the implementing agency. An initial agency interpretation is not instantly carved in stone. On the contrary, the agency must consider varying interpretations and the wisdom of its policy on a continuing basis, *Chevron*, 467 U.S. at 863–64, for example, in response to changed factual circumstances, or a change in administrations, *see State Farm*, 463 U.S. at 59. That is no doubt why in *Chevron* itself, [the] Court deferred to an agency interpretation that was a recent reversal of agency policy.

Id. at 981–82. Likewise, in *Rust v. Sullivan*, the Court held that an agency's revised interpretation of its enabling statute "deserves deference" so long as it is supported by "reasoned analysis." 500 U.S. at 186–87 (quoting *State Farm*, 463 U.S. at 42). And, of course, any agency interpretation of its enabling statute, whether an initial construction or a change, must "be within the scope of its lawful authority." *Michigan v. EPA*, 576 U.S. at 750. In other words, the arbitrary and capricious standard is effectively incorporated as a part of a court's review under *Chevron* Step Two. *See, e.g.*, *Ala. Educ. Ass'n v. Chao*, 455 F.3d 386, 396–97 (D.C. Cir. 2006) (reversing an agency statutory interpretation under Step Two, because the agency "failed to supply a reasoned analysis supporting its change of position"); *see also AFL-CIO v. Brock*, 835 F.2d 912, 919–20 (D.C. Cir. 1987).

One final point is worth mentioning regarding the overlap between Section 706(2)(A) arbitrary and capricious review and review under *Chevron*. The courts often conflate the four parts of Section 706(2)(A)—arbitrary, capricious, abuse of discretion, and not in accordance with law—into a single standard constituting "arbitrary and capricious" review. *See, e.g.*, *Tourus Records, Inc. v. DEA*, 259 F.3d 731, 736 (D.C. Cir. 2001) (holding that a reviewing court must set aside agency action it finds to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," and stating that this Section 706(2)(A) "standard requires the agency to examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made"). There are times, however, when the "not in accordance with law" standard of Section 706(2)(A) is applied apart from arbitrary and capricious review. Thus, for example, in *Holland v. National Mining Ass'n*, 309 F.3d 808 (D.C. Cir. 2002), the court undertook a *Chevron* analysis within the framework of Section 706(2)(A)'s "not in accordance with law" provision. *See id.* at 815. Examples of this type are rare, however, as issues relating to *Chevron* and *United States v. Mead Corp.*, 533 U.S. 218 (2001), are normally raised under Section 706(2)(C), which provides that a reviewing court shall "hold unlawful and set aside agency action, findings, and conclusions found to be … in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2)(C).

B. The Substantial Evidence Test and Arbitrary and Capricious Review

In *Association of Data Processing Service Organizations, Inc. v. Board of Governors of the Federal Reserve System*, 745 F.2d 677 (D.C. Cir. 1984), then-Judge Scalia suggested that "the distinction between the substantial evidence test and the arbitrary or capricious test is largely semantic." *Id.* at 684. He explained that "[w]hen the arbitrary or capricious standard is performing [the] function of assuring factual support, there is no *substantive* difference between what it requires and what would be required by the substantial evidence test, since it is impossible to conceive of a 'nonarbitrary' factual judgment supported only by evidence that is not substantial in the APA sense." *Id.* at 683–84 (emphasis in original). The Supreme Court's decision in *Dickinson v. Zurko*, 527 U.S. 150 (1999), noted *Data Processing Service Organizations* without indicating whether it agreed with the proposition that there is "no difference between the APA's 'arbitrary, capricious' standard and its 'substantial evidence' standard as applied to court review of agency factfinding." *Id.* at 158.

The point made in *Data Processing Service Organizations* is not inaccurate, but it is an incomplete comparison of the arbitrary and capricious and substantial evidence standards of review. The arbitrary and capricious standard under Section 706(2)(A) is a catchall provision. *See Block v. Pitney Bowes Inc.*, 952 F.2d 1450, 1454 (D.C. Cir. 1992). Thus, there is no doubt that when the formal decisionmaking mandates of Sections 556 and 557 or an agency's authorizing statute require that agency action be predicated on substantial evidence, that action can be found arbitrary and capricious under Section 706(2)(A) simply by virtue of the fact that it is not supported by substantial evidence. However, when administrative action results from an informal rulemaking and permissibly rests on a policy judgment or a prediction, it will be upheld if it is supported by reasoned decisionmaking, albeit without substantial evidence. *See, e.g.*, *FCC v. Nat'l Citizens Comm. for Broad.*, 436 U.S. 775, 797 (1978) (holding that, because "evidence of specific abuses by common owners is difficult to compile" and "the possible benefits of competition do not lend themselves to detailed forecast," "the Commission was entitled to rely on its judgment, based on experience," in adopting rules prohibiting common ownership of co-located newspapers and broadcast stations). Conversely, an agency action may be arbitrary and capricious even when there is substantial evidence to support it, if, for example, the agency fails to follow required procedures, in violation of Section 706(2)(D), or takes an action that is "not in accordance with law," in violation of Section 706(2)(A).

It is also worth noting that the substantial evidence standard of review under Section 706(2)(E) is sometimes applied in conjunction with the arbitrary and capricious standard of review under Section 706(2)(A). For example, in *Morall v. DEA*, 412 F.3d 165 (D.C. Cir. 2005), a case in which a physician sought review of a Drug Enforcement Administration ("DEA") decision to revoke her license to dispense controlled substances, the court granted the petition for review for two independent reasons. The court found no substantial evidence to support the agency's decision to revoke the physician's license based on her drug record-keeping failures and her alleged lying to DEA investigators. But the court also found that, because the revocation constituted an unprecedented and unexplained departure from agency policy and practice, the

agency's sanction could not withstand arbitrary and capricious review even if the decision had been supported by substantial evidence.

The differences between arbitrary and capricious and substantial evidence review are not great, but they are more than semantic.

Chapter XX. The Requirement of Fair Notice

"A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required." *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012). An agency cannot enforce a rule against a party if it is unduly vague or if the party did not otherwise have fair notice of the rule. It does not matter whether an agency has delegated authority to regulate in a particular area, nor does it matter whether the agency has good reasons for regulating as it did. Agency action will not survive judicial review absent fair notice.

The fair notice requirement is commonly applied in several different situations in connection with challenges to administrative agency regulations and enforcement actions. First, the "requirement of clarity in regulation is essential to the protections provided by the Due Process Clause of the Fifth Amendment." *Id.* A government regulation "which either forbids or requires the doing of an act in terms so vague that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law." *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926); *see Fox Television Stations*, 567 U.S. at 253 (noting that "[a] conviction or punishment fails to comply with due process if the statute or regulation under which it is obtained fails to provide" such notice).

Following this principle, the Court in *FCC v. Fox Television Stations*, Inc., 567 U.S. 239 (2012), held that the indecency enforcement regime of the Federal Communication Commission ("FCC") was unconstitutional, because the agency failed to give broadcasters fair notice that fleeting expletives and momentary nudity could be found actionably indecent under the Public Telecommunications Act of 1992 and FCC regulations enforcing the Act. *Id.* at 258. The Court thus invalidated the agency's regulations because they were impermissibly vague. In reaching this conclusion, the Court noted that "a regulation is not vague because it may at times be difficult to prove an incriminating fact but rather because it is unclear as to what fact must be proved." 567 U.S. at 253. Amplifying this point, the Court added: "[T]he void for vagueness doctrine addresses at least two connected but discrete due process concerns: first, that regulated parties should know what is required of them so they may act accordingly; second, precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way." *Id.*

Fair notice is also required in connection with informal rulemaking covered by Section 553 of the Administrative Procedure Act ("APA"). Generally, before an agency promulgates a legislative rule pursuant to congressionally delegated authority, it must provide the public with adequate notice of the proposed rule followed by an opportunity to comment on the rule's content. Section 553(b)(3) requires agencies to provide notice of a proposed rulemaking ("NPRM") that includes "either the terms or substance of the proposed rule or a description of the subjects and issues involved." 5 U.S.C. § 553(b)(3); *see also Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2384–85 (2020) (holding that an agency need not title the document it publishes in the Federal Register a "notice of proposed rulemaking" in order to provide the required notice, so long as the document provides the substantive information

required under 5 U.S.C. § 553(b)). An agency's NPRM and its final rule need not be identical. Rather, "[a]n agency's final rule need only be a logical outgrowth" of the notice provided. *Covad Commc'ns Co. v. FCC*, 450 F.3d 528, 548 (D.C. Cir. 2006). An agency's final rule qualifies as the logical outgrowth of its NPRM "if interested parties should have anticipated that the change was possible, and thus reasonably should have filed their comments on the subject during the notice-and-comment period." *CSX Transp., Inc. v. Surface Transp. Bd.*, 584 F.3d 1076, 1079–80 (D.C. Cir. 2009). "By contrast, a final rule fails the logical outgrowth test and thus violates the APA's notice requirement where interested parties would have had to divine the agency's unspoken thoughts, because the final rule was surprisingly distant from the proposed rule." *Id.* at 1080.

In other words, the "logical outgrowth" doctrine does not insulate a final rule that finds no clear roots in the agency's NPRM, because "[s]omething is not a logical outgrowth of nothing." *Kooritzky v. Reich*, 17 F.3d 1509, 1513 (D.C. Cir. 1994). For example, in *International Union, United Mine Workers of America v. Mine Safety & Health Administration*, 407 F.3d 1250 (D.C. Cir. 2005), the court found that a final rule setting a maximum mine belt air velocity of 500 feet per minute was not a logical outgrowth of a proposed rule providing that minimum air velocity of 300 feet per minute must be maintained. *Id.* at 1259. The court explained that "the Secretary could not have expected interested parties to realize that she would consider abandoning her proposed regulatory approach … simply because she invited commentary on a proposed rule that included a *minimum* air velocity." *Id.* at 1260; *see also Ass'n of Priv. Sector Colls. & Univs. v. Duncan*, 681 F.3d 427, 462 (D.C. Cir. 2012) (holding that if the agency fails to give fair notice in the NPRM, the fact that some parties submitted comments addressing the final rule "is of little significance," because "the agency must itself provide notice of a regulatory proposal").

A similar result was reached in *Environmental Integrity Project v. EPA*, 425 F.3d 992 (D.C. Cir. 2005). In that case, the Environmental Protection Agency ("EPA") published a NPRM clarifying that a set of regulations operated independently of one another. In the final rule, however, EPA adopted just the opposite position, declaring that the regulations were not in fact separate regulatory standards. *Id.* at 994–95. The court rejected the agency's contention that it had satisfied its notice-and-comment obligations by "repudiat[ing] its proposed interpretation and adopt[ing] its inverse" in the final rule. *Id.* at 998. "If the APA's notice requirements mean anything, they require that a reasonable commenter must be able to trust an agency's representations about *which particular* aspects of its proposal are open for consideration. A contrary rule would allow an agency to reject innumerable alternatives in its Notice of Proposed Rulemaking only to justify *any* final rule it might be able to devise by whimsically picking and choosing within the four corners of a lengthy 'notice.' Such an exercise in looking over a crowd and picking out your friends[] does not advise interested parties how to direct their comments and does not comprise adequate notice under APA § 553(c)." *Id.* (emphasis in original).

Another aspect of "fair notice" is seen in agency judgments that defy reasoned decisionmaking. "Not only must an agency's decreed result be within the scope of its lawful authority, but the process by which it reaches that result must be logical and rational." *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 374 (1998). Thus, in *Allentown Mack*, 522 U.S. 359 (1998), the Court held that an agency may not decree that one standard of proof controls in an

adjudicatory hearing, and then apply a different standard in making factual determinations and reaching substantive conclusions. *See id.* at 374–75. "Reasoned decisionmaking, in which the rule announced is the rule applied, promotes sound results, and unreasoned decisionmaking the opposite. The evil of a decision that applies a standard other than the one it enunciates spreads in both directions, preventing both consistent application of the law by subordinate agency personnel … and effective review of the law by the courts." *Id.* at 375. In other words, regulated parties are entitled to fair notice of how their actions will be judged by the agency.

An agency judgment that lacks reasoned decisionmaking may deny the losing party fair notice of the grounds underlying the agency's action; it may muddle agency precedent and thus deny fair notice to other regulated parties of what the law requires of them; and it may make judicial review of the agency's action difficult, if not impossible. On this last point, the courts have consistently insisted that an agency must provide an explanation that will enable the court to evaluate the agency's rationale at the time of decision. *See, e.g.*, *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977). An agency may also flout this requirement by failing to attend to the issues the parties raised and issuing a judgment based on issues to which the parties had no notice. *See Greenlaw v. United States*, 554 U.S. 237, 243-44 (2008) ("[W]e rely on the parties to frame the issues for decision" because "[o]ur adversary system is designed around the premise that the parties know what is best for them[.]" (citation and internal quotation marks omitted)); *Trident Seafoods, Inc. v. NLRB*, 101 F.3d 111, 116 (D.C. Cir. 1996) ("It is a basic tenet of administrative law that each party to a formal adjudication must have a full and fair opportunity to litigate the issues to be decided by the agency.").

In addition, an agency may not decline to disclose to interested persons the factual material upon which it has relied in deciding a case. *See United States v. Nova Scotia Food Prods. Corp.*, 568 F.2d 240, 249 (2d Cir. 1977) ("Even when the standard of review is whether the promulgation of [a] rule was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,' as specified in 5 U.S.C. § 706(2)(A), judicial review must nevertheless be based on the whole record. Adequate review of a determination requires an adequate record if the review is to be meaningful."). And when an agency's "explanation for its determination … lacks any coherence," a court owes "no deference to [the agency's] purported expertise." *Tripoli Rocketry Ass'n, Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 437 F.3d 75, 77 (D.C. Cir. 2006); *see also Haselwander v. McHugh*, 774 F.3d 990, 999–1000 (D.C. Cir. 2014) (holding that because an agency's decision "runs in circles," is "largely incomprehensible," "is a non sequitur," and is "stunningly myopic and devoid of reasoned decisionmaking," the court owes no deference); *Fox v. Clinton*, 684 F.3d 67, 80 (D.C. Cir. 2012) (holding that because the agency failed to offer any coherent explanation for its judgment denying the plaintiff's application for a Certificate of Loss of Nationality, the action was arbitrary and capricious for want of reasoned decisionmaking); *Coburn v. McHugh*, 679 F.3d 924, 926 (D.C. Cir. 2012) (holding that because the agency decisions were "largely incomprehensible," they were "unworthy of any deference"). The point is that the party who loses before an agency must be able to understand the basis of the agency's decision to allow for meaningful review.

Relatedly, "it is routine in federal judicial and administrative decisionmaking both to disclose a hearing officer's initial report, and to make that report part of the record available to an appellate forum." *Ballard v. C.I.R.*, 544 U.S. 40, 46 (2005) (holding that the Tax Court could not exclude special trial judge reports from the record on appeal). Indeed, the APA specifically provides that "[a]ll decisions, including initial, recommended, and tentative decisions, are a part of the record" on appeal. 5 U.S.C. § 557(c); *see also id.* § 706 (the reviewing court shall evaluate the "whole record"). This ensures that the losing party has the entire record that was before the agency, which in turn facilitates meaningful judicial review. For example, in some agency adjudication matters, the agency and the administrative law judge ("ALJ") may disagree on the credibility of certain witnesses. An agency is not required to adopt the credibility determinations of an ALJ. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 492 (1951) (rejecting the idea that an agency must accept an ALJ's findings unless those findings are clearly erroneous). However, although the agency is the ultimate fact-finder, the ALJ's "decision is part of the record, and the record must be considered as a whole in order to see whether the result is supported by substantial evidence. The agency's departures from the [ALJ's] findings are vulnerable if they fail to reflect attentive consideration to the [ALJ's] decision." *Greater Bos. Television Corp. v. FCC*, 444 F.2d 841, 853 (D.C. Cir. 1970); *see also Morall v. DEA*, 412 F.3d 165, 179 (D.C. Cir. 2005) (holding that "[t]he Deputy Administrator's failure to consider findings of the ALJ, which get at the heart of [the claimant's] credibility, fortifies our conclusion that [the agency's] decision does not survive substantial evidence review"). Obviously, then, in pursuing judicial review, it matters that claimants have access to the entire record that was before the agency. *See Ballard*, 544 U.S. at 62 (discussing "the nearly universal practice of transparency in forums in which one official conducts the trial (and thus sees and hears the witnesses), and another official subsequently renders the final decision"); *see also* Chapter XVII, *supra* (discussing substantial evidence review).

Finally, an aspect of "fair notice" is evident in cases in which deference is sought for an agency's interpretation of its own regulations. Normally, such deference is warranted if the regulations are "genuinely ambiguous," the agency's interpretation is "reasonable," and the "character and context of the agency interpretation entitles it to controlling weight." *See Kisor v. Wilkie*, 139 S. Ct. 2400, 2415–16 (2019). In undertaking this inquiry, however, the Supreme Court has warned that an agency's interpretation of an ambiguous regulation will not be upheld if it results in "unfair surprise" to regulated parties. *See Kisor*, 139 S. Ct. at 2418. This is so because, while the "practice of deferring to an agency's interpretation of its own ambiguous regulations undoubtedly has important advantages, [it] … also creates a risk that agencies will promulgate vague and open-ended regulations that they can later interpret as they see fit, thereby frustrating the notice and predictability purposes of rulemaking." *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 158 (2012). In *SmithKline Beecham*, the Court thus declined to defer to an agency interpretation of its regulations that would have imposed "potentially massive liability" on employers for overtime payments to employees who for years had been treated as exempt. *Id.* at 155–56. The agency had never initiated any enforcement actions with respect to these employees or otherwise suggested that it thought the employers were acting unlawfully. *See id.* at 157. The Court therefore held that "[t]o defer to the agency's interpretation in this circumstance would seriously undermine the principle that agencies should provide regulated parties fair warning of the conduct a regulation prohibits or requires." *Id.* at 156.

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