

*Dodging Chevron's Redux: The Proper Place for State Farm Arbitrary and  
Capricious Review*

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**Abstract**

*Loper Bright instructed courts to rework how they review challenges to agency decision making and no longer defer to agency construction of statutes. But one critical question remains—how and when courts should engage in a different type of review: the deferential “arbitrary and capricious” standard. In applying this standard post-Loper Bright, courts face a dual risk. First, they may be too hard on government agencies and end up substituting the policy judgments of the court for those of agency experts; State Farm arbitrariness review should be highly deferential. But second, if they engage in this deferential review too early in the process—merging it together with de novo legal review—they may be committing the sin of Chevron and deferring to agencies on legal questions of statutory construction. To avoid this pitfall, this paper lays out a simple formula for courts, combining a decades-long review of statutory and judicial history with an application of the Supreme Court’s most recent decisions.*

*This article makes two arguments. First, leaning on cases from before the enactment of the Administrative Procedure Act to the present, this paper argues that State Farm arbitrariness review should be extremely deferential to agency decision making. So long as the agency’s action is “reasonable and reasonably explained,” then courts have no role in substituting their own judgment for that of the agency’s. Second, the Supreme Court was clear in both Loper Bright Enterprises v. Raimondo and an even-more recent case, Seven County Infrastructure v. Eagle County, that de novo legal review and deferential arbitrariness review are two distinct and different steps. If a court conflates the two steps—and some have—it will smuggle deference into legal review and risk a Chevron redux.*

*Using hypotheticals and real-life cases, including Loper Bright and its sister case Relentless on remand, this paper establishes a clear path for courts to follow. This paper’s recommendation might seem paradoxical: courts should both go easier on agencies when reviewing discretionary decision making for arbitrariness, while being stricter when analyzing whether an agency is behaving lawfully. But this is consistent with the Supreme Court’s guidance—courts must sharply distinguish these two steps and their differing standards of review.*

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## Article

### I. Introduction

In the year following the Supreme Court's landmark decision in *Loper Bright Enterprises v. Raimondo*, the landscape of administrative law has seismically shifted. Instead of deferring to agency interpretations of statutes, all judges must now conduct de novo review and have the final word on the meaning of statutory text. Judges need to avoid two errors. First, they cannot conflate de novo legal review with the more deferential arbitrary and capricious standard. To do so would resurrect *Chevron* under a different name. Second, once courts have moved onto arbitrariness analysis, they must be highly deferential to agency decision making. This paper looks at both and proposes the standard for *how* and *when* courts should engage in *State Farm* arbitrary and capricious review.

The Administrative Procedure Act ("APA") requires courts to strike down any agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law[.]"<sup>2</sup> In *State Farm*, the Supreme Court explained courts are supposed to conduct this analysis by: evaluating whether the agency relied on extra-statutory factors, failed to analyze a critical part of the issue, offered an irrational explanation for its decision, offered no explanation for its decision, or the decision is so unreasonable that it cannot possibly be based on agency expertise.<sup>3</sup> A look at the history of arbitrary and capricious review, from the era just before the APA to the present, shows that judges should engage in a light-touch review, highly deferential to the agency's decision making. Only if the agency has failed to make a "reasonable decision" that is "reasonably explained," should courts strike it down.<sup>4</sup> For a court to construe an agency action as arbitrary, it must be as if the agency is acting on a "whim"<sup>5</sup> or with no reasoning at all. It cannot and has never been that courts should substitute their judgment for the agency.<sup>6</sup> Even if the agency action seems unwise, so long as the agency has explained it and drawn a rational connection to the statute's purpose, courts should not get in the way.<sup>7</sup>

But what courts cannot do is shortcut de novo legal review of agency action and skip right to an arbitrary and capricious analysis. Before a court can even

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<sup>2</sup> Administrative Procedure Act, 5 U.S.C. § 706(2)(a).

<sup>3</sup> *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co. (State Farm)*, 463 U.S. 29 (1983).

<sup>4</sup> *Id.* at 51–52.

<sup>5</sup> *Am. Tel. & Tel. Co. v. United States*, 299 U.S. 232, 236 (1936).

<sup>6</sup> *Id.* at 43.

<sup>7</sup> *Id.*

consider whether an agency action violates the principles of *State Farm*, it must determine if the agency was acting lawfully. Courts need to identify a statutory grant of authority, define the breadth of that authority, and decide if the agency is properly within that scope. Judges must then determine that Congress’s grant of authority to the agency is constitutionally permissible and not a violation of the nondelegation doctrine.<sup>8</sup> Only then can the reviewing court flip the switch to move to the far more deferential standard of arbitrary and capricious review.

Using a historical and textual analysis, this paper argues that the above formula is engrained not only in the history of the APA, but the history of arbitrary and capricious review that predates the APA. The Supreme Court reaffirmed this in recent opinions like *Loper Bright* and *Seven County Infrastructure Coalition*. Despite that, some courts may shortcut their legal analysis and leap too quickly into *State Farm* review. So far this has been limited, and this paper presents examples of courts doing the analysis the right way. But if this temptation grows, it will resurrect *Chevron* deference under a different name.

## II. The Current State of Judicial Review of Agency Action

So, what is the current state of court review of action in the year following *Loper Bright*?<sup>9</sup> As I have written elsewhere, de novo review of agency statutory authority post-*Loper Bright* fits neatly into a three-step approach.<sup>10</sup> Courts should first identify whether an agency has any power to act at all.<sup>11</sup> If it doesn’t, then the analysis stops there—agencies are creatures of statute.<sup>12</sup> Second, courts must determine the breadth of the agency’s lawful authority, including if the statute expressly granted the agency latitude.<sup>13</sup> And when agencies exercise that discretionary authority, courts identify whether they are acting within the proper statutory bounds.<sup>14</sup> Finally, courts must determine if Congress granted the agency discretion so wide (or so ill-defined) that it violates constitutional nondelegation principles.<sup>15</sup>

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<sup>8</sup> See, e.g., *Gundy v. United States*, 588 U.S. 128, 173 (2019) (Gorsuch, J., dissenting); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 551 (1935).

<sup>9</sup> *Loper Bright Enters. v. Raimondo*, 603 U.S. 369 (2024).

<sup>10</sup> Eric Bolinder, *Litigating Loper Bright: Interpretive Challenges and Solutions for the Post-Chevron Era*, 128 W. VA. L. REV. (forthcoming 2025).

<sup>11</sup> *Id.* at 3.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 3, 4.

<sup>14</sup> *Id.* at 4.

<sup>15</sup> *Id.* at 3, 4.

As Judge Thapar wrote, the case that overturned *Chevron* really did overturn it.<sup>16</sup> Some have argued it did no such thing—that it merely invented *Loper Bright* “discretion,” which is practically no different than *Chevron*.<sup>17</sup> And recent Supreme Court cases from this term have allegedly added fuel to that fire.<sup>18</sup> But for reasons I lay out below, this isn’t the case.

### III. Background of *State Farm* Hard Look Review

To understand the meaning of “arbitrary and capricious” in the APA, it is necessary to look back at the context of arbitrariness review in the decades before the passage of the APA. The idea of a largely deferential arbitrariness review—which this paper will argue is all the APA calls for—was already in practice before the APA codified it in 1946.

#### a. The Pre-APA History of “Arbitrary or Capricious” Review

##### i. 1920s.

The Supreme Court regularly used the term “arbitrary or capricious” in the early-20th Century in several contexts—constitutional challenges, statutory review. In a 1920s case reviewing a compensation claim under the War Risk Insurance Act, the Court determined that the decision of a federal administrator was judicially unreviewable unless the decision was “wholly unsupported by the evidence, or is wholly dependent upon a question of law or is seen to be clearly arbitrary or capricious.”<sup>19</sup> This is because the “statute which creates the asserted right, commits to the [administrator] the duty and authority of administering its provisions and deciding all questions arising under it[.]”<sup>20</sup> The Court found this did not make the administrator’s decision entirely unreviewable, but merely that this language hoisted a large degree of discretion on the administrator. But the Court could still review the decision if it implicated a question of law or was done on a “whim,” as Justice Cardozo will later put it.<sup>21</sup>

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<sup>16</sup> *Id.* at 13.

<sup>17</sup> *Id.* at 7.

<sup>18</sup> *See, e.g.,* Seven Cnty. Infrastructure Coal. v. Eagle County, 145 S. Ct. 1497 (2025).

<sup>19</sup> *Silberschien v. United States*, 226 U.S. 221, 225 (1924).

<sup>20</sup> *Id.*

<sup>21</sup> *Am. Tel. & Tel. Co. v. United States*, 299 U.S. 232, 236 (1936) (“What has been ordered must appear to be ‘so entirely at odds with fundamental principles of correct accounting’ as to be the expression of a whim rather than an exercise of judgment.”) (citation modified).

ii. 1930s.

In the next decade, the Court reviewed a petitioner's claim with the Administrative of Veterans' affairs for an annuity.<sup>22</sup> Justice Stone wrote that while the federal government "is not, by the creation of claims against itself, bound to provide a remedy in the courts" and could substitute with an administrative remedy or withhold a remedy altogether, there is an assumption of reviewability absent "compelling language" from Congress stating otherwise.<sup>23</sup> The Court's right to review is "curtailed only so far as authority to decide is given to the administrative officer."<sup>24</sup> Thus, if the administrator has sole discretion to allow a benefit, "the courts will not substitute their discretion for his."<sup>25</sup> And if he is determining "questions of fact, his decision must be accepted unless he exceeds his authority by making a determination which is arbitrary or capricious or unsupported by evidence."<sup>26</sup> While the case ultimately turned on a question of law,<sup>27</sup> the Court's standard is an important onramp to passage of the APA.

In a different case from 1936, Justice Cardozo wrote about a statute which states the Federal Communications Commission "may, in its discretion, prescribe the forms of any and all accounts, records, and memoranda' to be kept by carriers subject to the act."<sup>28</sup> The statutory language here, in what is essentially a bookkeeping requirement, is obviously deferential. The FCC "may" do something "in its discretion."<sup>29</sup> Justice Cardozo explains that the Supreme Court was "not at liberty to substitute its own discretion for that of administrative officers who have kept within the bounds of their administrative powers."<sup>30</sup> Translated this means, of course, that judges are not to become policymakers—they should stay in their lane.

But when it comes to arbitrary and capricious review, what is that lane? According to Justice Cardozo, to hold an agency has acted arbitrarily, "it is not enough that the prescribed system of accounts shall appear . . . unwise or burdensome or inferior[.]"<sup>31</sup> That is because "[e]rror or unwisdom is not equivalent

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<sup>22</sup> *Dismuke v. United States*, 297 U.S. 167 (1936).

<sup>23</sup> *Id.* at 171.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 173.

<sup>28</sup> *Am. Tel. & Tel. Co. v. United States*, 299 U.S. 232, 236 (1936) (citing and quoting 47 U.S.C. § 220).

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

to abuse.”<sup>32</sup> So a mere error in judgment—making a decision that is unwise or different than what the court would choose—is not enough to imperil the agency action. Instead, the agency decision “must appear to be ‘so entirely at odds with fundamental principles . . . as to be the expression of a whim rather than an exercise of judgment.’”<sup>33</sup> Put differently: the agency decision cannot be arbitrary or capricious.

Judge Cardozo also noted that “in gauging rationality,” the court need also look to the “ends” that the statute is “intended to promote.”<sup>34</sup> He then analyzed each objection of the private-company challenger to see if the agency’s decision was arbitrary. For example, the challenger objected to the agency proscribing “the padding of the accounts by charges knowingly and willfully entered in excess of what is just and reasonable.”<sup>35</sup> Justice Cardozo wrote that there “is surely nothing arbitrary in establishing a standard of behavior so consistent with good morals.”<sup>36</sup> Throughout the opinion, he goes into detail on the rationality behind the agency decision making.<sup>37</sup> So here we see a largely deferential standard, but not a lazy review—he still ticked through each objection, assessed the action against statutory standards, and ensured the agency was not behaving on a “whim.”

iii. 1940s.

In the 1940s, the Supreme Court noted—though in a decision not grappling with it—Congress’s use of the term “arbitrary or capricious.” In 1942, Congress passed the Emergency Price Control Act,<sup>38</sup> which created and delegated authority to the “Price Administrator” to regulate prices within the United States.<sup>39</sup> The statute created an Emergency Court of Appeals that had sole “jurisdiction to determine the validity of any regulation or order” from the Price Administrator.<sup>40</sup> That court, and the Supreme Court upon review, could only enter a temporary restraining order if

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<sup>32</sup> *Id.* (alteration in original).

<sup>33</sup> *Id.* at 237 (citing and quoting *Kan. City S. Ry. Co. v. United States*, 231 U.S. 423 (1913)).

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 246.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> Emergency Price Control Act of 1942. Pub. L. No. 77-421, 56 Stat. 23 (1942) (codified as amended at 50 U.S.C. § 901). This author seriously doubts the constitutionality of this Act but will not delve into here. There was a nondelegation challenge in *Yakus v. United States*, but the Court turned it away. *Yakus v. United States*, 321 U.S. 414, 418 (1944).

<sup>39</sup> *Yakus*, 321 U.S. at 418.

<sup>40</sup> *Id.* at 429.

the Administrator's action was not "in accordance with law, or is arbitrary or capricious."<sup>41</sup>

For example, the Emergency Court of Appeals heard a petition from "manufacturers of coke and coke oven gas"<sup>42</sup> challenging a "General Maximum Price Regulation" from the Price Administrator, which froze the price of commodities, including coke oven gas.<sup>43</sup> Among other claims, the coke companies argued it was "unreasonable and arbitrary" to freeze the price of their gas, while simultaneously "permitting large increases in the price of bituminous coal from which their gas is manufactured."<sup>44</sup> Essentially, the government capped the price of the companies' outputs, while permitting increases in the price of their inputs. The coke producers said this was "unfair and unreasonable" and thus arbitrary or capricious.<sup>45</sup> Much like Justice Cardozo, the Emergency Court of Appeals found that the Administrator's discretion is broad "to simulate the production of some commodities in the quantities required by the nation" and to ensure that "price regulations applicable to other commodities may continue to be fair and equitable in light of changing costs and profits."<sup>46</sup> If instead, the regulation had resulted "in an unreasonable decrease or in a complete wiping out of the profits realized by the industry," that could certainly lead to a challenge.<sup>47</sup> But here, the mere prevention of "passing on to their customers a part of their increases" costs falls short.<sup>48</sup> In essence, the court conducted a results-based analysis of whether the regulation would completely cripple or destroy the industry before even considering an arbitrary or capricious challenge. To succeed, the industry complainants would have to show that "they do not have in their industry a margin of profit sufficient to absorb the increase cost of coal" and "in the absence of any such showing" the Administrator's action is not "arbitrary or unreasonable."<sup>49</sup>

Also important is the "*Chenery Principle*" from *Securities and Exchange Commission v. Chenery Corp.*<sup>50</sup> *Chenery I* held that the SEC's "reading of fiduciary

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<sup>41</sup> *Id.* at 428.

<sup>42</sup> "Coke Oven Gas" is fuel that "is produced during the manufacture of metallurgical coke by heating bituminous coal[.]" J.A. Lacey, *Coke-Oven Gas*, THERMOPEDIA (Feb. 8, 2011), <https://www.sciencedirect.com/topics/chemistry/coke-oven-gas>.

<sup>43</sup> *Phila. Coke Co. v. Bowles*, 139 F.2d 349, 351 (Emer. Ct. App. 1943).

<sup>44</sup> *Id.* at 355.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 356.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> Kevin M. Stack, *The Constitutional Foundations of Chenery*, 116 YALE L. J. 952, 960 (2007) (citing *Sec. Exch. Comm'n v. Chenery Corp. (Chenery I)*, 318 U.S. 80 (1943)).

law was incorrect” but “suggested that the SEC had the power to prohibit these sales as an exercise of its administrative powers[.]”<sup>51</sup> So the core “principle [was] that the courts could not uphold an agency order on grounds other than those invoked by an agency[.]”<sup>52</sup> After the case made its way back up in *Chenery II*, the agency now claimed its actions were “an exercise of its administrative powers . . . and the Supreme Court upheld the order.”<sup>53</sup> These cases “make clear that it matters both *who* articulates the legally sufficient basis to sustain the agency’s ultimate decision and *when* that justification comes.”<sup>54</sup> While the purpose of this paper is to look at arbitrary and capricious review, not underlying legal justifications for an exercise of statutory authority, the *Chenery* cases illustrate what an agency needs to say in any rulemaking—and that courts cannot supply rationale for the agency.<sup>55</sup>

We take three lessons from these cases. First, review was largely deferential—courts did not substitute their own judgment for that of agencies. Second, courts still looked at (and demanded) the reasons behind the agency action to find a thread of rationality. And third, to overturn an agency action, courts needed to find agencies essentially acting on a “whim.”

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<sup>51</sup> *Id.* (citing *Chenery I*, 318 U.S. at 93).

<sup>52</sup> *Id.* (citing *Chenery I*, 318 U.S. at 95).

<sup>53</sup> *Id.* at 961 (citing *Sec. Exch. Comm’n v. Chenery Corp.* (*Chenery II*), 332 U.S. 194, 199 (1947)).

<sup>54</sup> *Id.*

<sup>55</sup> Scholars have called to curtail the metastasized *Chenery II* “doctrine,” which “is frequently understood to establish the principle that agencies may make law or policy through either rulemaking or adjudication, as long as their governing statutes do not explicitly state otherwise.” Gary Lawson & Joseph Postell, *Against the Chenery II “Doctrine”*, 99 NOTRE DAME L. REV. 47, 48 (2023). Professors Lawson and Postell argue “this conventional account is a serious overreading of the Court’s decision in *Chenery II*” and, if it were accurate, “that decision would be so constitutionally problematic that it must be overturned or at least cabined. *Id.* at 49. And Professor Jonathan Adler, recounting the Court’s 2023 decision in *Calcutt v. Federal Deposit Insurance Corporation*, lauded the Supreme Court for reaffirming the doctrine of *Chenery I* as a “simple but fundamental rule of administrative law.” Jonathan Adler, *Summary Reversal of Sixth Circuit in Calcutt v. Federal Deposit Insurance Corporation Reaffirms the Importance of Chenery I*, VOLOKH CONSPIRACY (May 22, 2023, at 12:22 PM), <https://reason.com/volokh/2023/05/22/summary-reversal-of-sixth-circuit-in-calcutt-v-fdic-reaffirms-the-importance-of-chenery-i/>. For more discussion of this topic, see generally Daniel T. Deacon, *Chenery II Revisited*, 92 GEO. WASH. L. REV. 1050, 1053 (2024) (“worries about agency policymaking by adjudication have been expressed more forcefully and opposition to *Chenery II* itself has intensified.”).

## **b. Passage of the APA**

The Bremer-Kovacs Collection, a HeinOnline database that chronicles the history of the Administrative Procedure Act, shows that final passage of the APA took decades, with distinct statutory proposals from multiple legislators, until Congress finally settled on a final version of the bill.<sup>56</sup> These bills percolated through Congress while the Supreme Court was conducting the “arbitrary or capricious” analysis cataloged above.

For judicial review, the APA states 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.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.<sup>57</sup>

## **c. The Run up to *State Farm***

While *State Farm* fully explained APA arbitrariness review, it was not the first case to do so. For example, in *Overton Park*, the Court laid out a three-step

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<sup>56</sup> Emily Bremer & Kathryn Kovacs, *Introduction to The Bremer-Kovacs Collection: Historic Documents Related to the Administrative Procedure Act of 1946* (HeinOnline 2021), 106 MINN. L. REV.: HEADNOTES 218 (2021); *Bremer-Kovacs Collection: Historic Documents Related to the Administrative Procedure Act of 1946*, HEINONLINE, <https://heinonline.org/HOL/Index?collection=bremer> (last visited Aug. 10, 2025).

<sup>57</sup> Administrative Procedure Act, 5 U.S.C. § 706.

process for determining the validity of agency action.<sup>58</sup> First, on the law, the court must determine that “the Secretary has acted within the scope of his statutory authority.”<sup>59</sup> But it does not end there. The Court must make a second finding “that the actual choice was not ‘arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.’”<sup>60</sup> And third, which this paper will not examine, the agency must have “followed the necessary procedural requirements.”<sup>61</sup>

For arbitrary and capricious review, *Overton Park* says courts need to analyze “whether the [agency] decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.”<sup>62</sup> And while “this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. *The court is not empowered to substitute its judgment for that of the agency.*”<sup>63</sup> However, in this case the “administrative record [was] not” before the court, and thus it remanded the case back down for “plenary review of the Secretary’s decision.”<sup>64</sup> That review must “be based on the full administrative record[.]”<sup>65</sup>

Later in the 1970s, the Court decided *Bowman Transportation*, holding that the “arbitrary and capricious” standard was “a narrow one.”<sup>66</sup> Quoting *Overton*, it re-affirmed that a reviewing judge must “consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment[.]”<sup>67</sup> Echoing case law from the APA on, *Bowman* explained that “[t]he agency must articulate a ‘rational connection between the facts found and the choice made.’”<sup>68</sup> And while the court will not “supply a reasoned basis for the agency’s action that the agency itself has not given . . . [it] will uphold a decision of less than ideal clarity if the agency’s path may reasonably be discerned.”<sup>69</sup>

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<sup>58</sup> *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416–417 (1971).

<sup>59</sup> *Id.* at 416.

<sup>60</sup> *Id.* (quoting 5 U.S.C. § 706(2)(A)).

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* (emphasis added)

<sup>64</sup> *Id.* at 419–20.

<sup>65</sup> *Id.* at 420.

<sup>66</sup> *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 442 (1974).

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 285 (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)).

<sup>69</sup> *Id.* (citing *Chenery II*, 332 U.S. 194, 196 (1947) and *Colo. Interstate Gas Co. v. Firearms Pol’y Coal’n*, 324 U.S. 581, 595 (1941)).

After that came *Vermont Yankee*, which held that courts may not hoist extra requirements on agencies from outside the APA.<sup>70</sup> Thus, the court should “not stray beyond the judicial province to explore the procedural format or to impose upon the agency its own notion of which procedures are ‘best’ or most likely to further some vague, undefined public good.”<sup>71</sup> *Vermont Yankee* also re-affirmed that “arbitrary or capricious” review of agency decision making must be on the record before the agency at the time the record is closed, not at some future point like when the rule is promulgated.<sup>72</sup> Otherwise, “there would be little hope that the administrative process could ever be consummated in an order that would not be subject to reopening.”<sup>73</sup> And, of course, “the role of a court in reviewing the sufficiency of an agency’s consideration . . . is a limited one, limited both by the time at which the decision was made and by the statute mandating review.”<sup>74</sup> Again, the Court repeats that reviewing courts may not “substitute [their] judgment for that of the agency[.]”<sup>75</sup> While *Vermont Yankee* concerned the National Environment Policy Act (“NEPA”), its principles still stand the test of time: administrative decisions should “be set aside . . . only for substantial procedural or substantive reasons as mandated by statute . . . not simply because the court is unhappy with the result reached.”<sup>76</sup>

#### IV. The *State Farm* Decision

It is difficult to imagine a time when most people didn’t wear seatbelts. But it wasn’t all that long ago. In 1966, Congress passed the National Traffic and Motor Vehicle Safety Act, which directed “the Secretary of Transportation or his delegate to issue motor vehicle safety standards that ‘shall be practicable, shall meet the need for motor vehicle safety, and shall be stated in objective terms.’”<sup>77</sup> To promulgate these regulations, the Secretary needed to “consider ‘relevant available motor vehicle safety data,’” reasonability, practicality, and appropriateness, and the effectiveness of any proposed standards.<sup>78</sup> The regulation’s procedural history is “complex and convoluted” as it was “imposed, amended, rescinded, reimposed, and

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<sup>70</sup> *Vt. Yankee Nuclear Power Corp. (Vermont Yankee) v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 549 (1978).

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 554–55.

<sup>73</sup> *Id.* at 555.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 558 (citation modified).

<sup>77</sup> *State Farm*, 463 U.S. 29, 33 (1983) (citing and quoting 15 U.S.C. § 1392(a)).

<sup>78</sup> *Id.* (citing and quoting 15 U.S.C. § 1392(f)(1), (3), (4)).

now rescinded again.”<sup>79</sup> To simplify: in 1967, the government required car manufacturers to install seatbelts in vehicles.<sup>80</sup> But people weren’t using them. So the government considered how to effectuate “passive occupant restraint systems” that do not require any user input. Regulators came up with two solutions: airbags and automatic seatbelts.<sup>81</sup> Through the years, the Department considered and enacted regulations mandating some form of passive restraint, including a pilot program on passive restraints.<sup>82</sup> Finally, one Secretary made the passive restraint regulations mandatory and permanent.<sup>83</sup>

But after a change in administrations, and following complaints from automakers, another Secretary paused and ultimately rescinded the regulations.<sup>84</sup> The agency claimed that it could “no longer” find “that the automatic restraint requirement would produce significant safety benefits.”<sup>85</sup> One of the reasons is that manufacturers had decided to install automatic seatbelts, rather than airbags, in 99% of new cars and thus “the life-saving potential of airbags would not be realized.”<sup>86</sup> On top of that, “the overwhelming majority of passive belts . . . could be detached easily and left that way permanently.”<sup>87</sup> As a result, they didn’t provide a significant safety benefit, were “no longer . . . reasonable or practicable” and would come with a cost of one billion dollars, which the agency thought was too big for manufacturers to handle.<sup>88</sup> Finally, the agency believed the intrusive nature of the regulation would upset the public and “poison[ ] popular sentiment toward efforts to improve” car safety in the future.<sup>89</sup>

State Farm and other insurance companies filed petitions to review the rescission, which ultimately ended up at the Supreme Court.<sup>90</sup> The Court first declared that an agency’s rescission of a prior rule is subject to the same judicial-

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<sup>79</sup> *Id.* at 34.

<sup>80</sup> *Id.*

<sup>81</sup> This author’s first car, an early 1990s Toyota Camry passed down from his grandfather, had an automatic seatbelt system. It was frustrating to use, seemed inherently dangerous if an emergency exit was ever needed, and only the belt that crossed your chest was automatic. It is no surprise that this technology has not stood the test of time.

<sup>82</sup> *Id.* at 34–37.

<sup>83</sup> *Id.* at 38.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 38–39.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 39 (quoting 46 Fed. Reg. 53419, 53424 (Oct. 29, 1981) (alteration in original)).

<sup>90</sup> *Id.* at 40.

review standard, arbitrary and capricious, as an initial promulgation.<sup>91</sup> In rescinding a regulation, agencies are “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.”<sup>92</sup> So when Congress grants an agency discretion to take an action, and the agency declines to take that action, it does not need to give as elaborate an explanation as when the agency decides to *rescind* a prior action. That said, “agencies do not establish rules of conduct to last forever” and agencies must have “ample latitude to adapt their rules and policies to the demands of changing circumstances.”<sup>93</sup> The court counseled, though, that “the forces of change do not always or necessarily point in the direction of deregulation” and presumptions from which judicial review starts are “*against* changes in current policy that are not justified by the rulemaking record.”<sup>94</sup> But the Court does concede that because deregulatory actions “may not entail the monetary expenditures and other costs of enacting a new standard, it may be easier for an agency to justify a deregulatory action[.]”<sup>95</sup> Citing many of the cases and standards we already saw above, the Court wrote the now-familiar *State Farm* test:

Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.<sup>96</sup>

Applying this standard, the Court found that the passive restraint rescission was arbitrary and capricious.<sup>97</sup> First, according to the Court, the agency “apparently gave no consideration whatever to modifying the Standard to require that airbag technology be utilized.”<sup>98</sup> This is because the initial standard called for one of two passive restraints, airbags or seatbelts, and rescinding it because only one of them was infeasible did not make much sense.<sup>99</sup> Looking back to the congressional purpose in the statute, the Court reasoned that even if detachability rendered passive

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<sup>91</sup> *Id.* at 41.

<sup>92</sup> *Id.* at 42.

<sup>93</sup> *Id.* (citation modified).

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 43.

<sup>97</sup> *Id.* at 46.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

seatbelts ineffective, “the effectiveness ascribed to airbag technology by the agency” would fulfill the “mandate of the Safety Act to achieve traffic safety[.]”<sup>100</sup> Here we see the Court using statutory language to inform its arbitrariness analysis—is there a rational connection between the decision the agency made and fulfilling the purpose of the legislation?

The Court then peered into the automobile industry side of the equation, holding that “surely it is not enough that the regulated industry has eschewed a given safety device.”<sup>101</sup> It recounted that the “automobile industry waged the regulatory equivalent of war against the airbag and lost[.]”<sup>102</sup> So now because the industry opted for a restraint system that does “not meet the safety objectives of Section 208 . . . [t]his hardly constitutes cause to revoke the standard itself.”<sup>103</sup> Again appealing to the statute, the Court reasoned “the agency should not defer to the industry’s failure to develop safer cars . . . it may not revoke a safety standard which can be satisfied by current technology simply because” the industry chose something less effective.<sup>104</sup> In sum, the agency rejected the airbag alternative for no noted “reasons at all.”<sup>105</sup> On this, the four-judge dissent authored by future-Chief Justice Rehnquist agreed.<sup>106</sup>

On the second issue, whether “the agency was too quick to dismiss the safety benefits of automatic seatbelts[.]” the court also found the action arbitrary and capricious—though it conceded this “issue is closer[.]”<sup>107</sup> While the Court would not “upset the agency’s view of the facts,” it keyed on the “limitations of this record in supporting the agency’s decision.”<sup>108</sup> The “safety benefits” of seatbelts is “not in doubt” and nothing in the agency’s science supports “the agency’s finding

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<sup>100</sup> *Id.* at 48.

<sup>101</sup> *Id.* at 49.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 50. The Court also distinguished *Vermont Yankee*, finding it applicable here. *Id.* (citing *Vermont Yankee*, 435 U.S. 519 (1978)). It explained that *Vermont Yankee* applied to procedural requirements, which the Court was not ruling on here, but, even so, the Court also is not requiring the agency to “consider all policy alternatives[.]” *Id.* at 51. However, the Court held that “the airbag is more than a policy alternative . . . ; it is a technology alternative within the ambit of the existing standard.” *Id.*

<sup>106</sup> *Id.* at 58 (Rehnquist, J., concurring in part and dissenting in part) (“[T]he agency should explain why it declined to leave those requirements intact. In this case, the agency gave no explanation at all.”).

<sup>107</sup> *Id.* at 51.

<sup>108</sup> *Id.*

that detachable belts” will not lead to an increase in passive restraint usage.<sup>109</sup> In essence, an agency cannot simply gesture towards statistical uncertainty or absent data, and then make *no* effort to study the problem and find additional data.<sup>110</sup> For example, the agency failed “to analyze the [alternative of] continuous seatbelts in its own right” and thus “failed to offer a rational connection between facts and judgment required to pass muster under the arbitrary and capricious standard.”<sup>111</sup> The agency cannot merely speculate on potential outcomes, like a public backlash, but instead must offer concrete evidence to support its ultimate decision making.<sup>112</sup>

On this conclusion, the dissent disagreed. Justice Rehnquist, responding to the majority’s criticism that the agency failed to use an available study, argued that it “is reasonable for the agency to decide that this study does not support any conclusion concerning the effect of automatic seatbelts[.]”<sup>113</sup> He found that the agency’s explanation—while the passive seatbelt would result in some increased usage, the increase is not worth the cost—was “adequate[.]”<sup>114</sup> It met the low standard of “rational connection between the facts found and the choice made.”<sup>115</sup> Justice Rehnquist also made the obvious observation that the change in agency position came with a change in presidential administration.<sup>116</sup> One administration “may consider public and uncertainties to be more important” than a prior administration. And such a political leadership change, brought on by voters, “is a perfectly reasonable basis for an executive agency’s reappraisal of the costs and benefits of its programs and regulations.”<sup>117</sup> The key is that the agency “remains within the bounds established by Congress[.]”<sup>118</sup>

The rest of this paper will focus on three things: 1) is *State Farm*’s original formulation textually correct; 2) are courts correctly sticking to that formulation; and 3) what role does *State Farm* play (and what role does it not play) in the post-*Chevron* era.

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<sup>109</sup> *Id.* at 52–53.

<sup>110</sup> *Id.* at 52 (alteration in original).

<sup>111</sup> *Id.* at 57.

<sup>112</sup> *Id.* at 55–57.

<sup>113</sup> *Id.* at 58 (Rehnquist, J., concurring in part and dissenting in part).

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 59 (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)).

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

## V. *State Farm*'s Reasoning Comports with the APA

The methodological approach of *State Farm*—the familiar formula we talked about above—is sound and congruent with the APA. Recall our trip through the decades on cases pre-APA dealing with allegedly arbitrary agency action. For the regulation to fall, the agency needed to act on a whim, with no reasoning, inconsistent with the statute's mandates, or with no underlying support. The Supreme Court's *State Farm* formula simply takes this and expands it to an enumerated, broad multi-factor test lower courts can use to gauge agency action. Did it rely on factors Congress didn't want the agency to consider? Did the agency completely fail to address an important part of the problem? Did its explanation make absolutely no sense? Is it so implausible it must be for some other—and perhaps malicious—reason than agency expertise or differing viewpoints?<sup>119</sup>

But the Court's application of it on the second issue was lacking. The agency's reasoning, weak as it may have been, for rescinding the seatbelt rule likely met the minimum threshold of not deciding on a “whim.” It was a policy change from one administration to another. Agency officials were still pursuing some safety rules, while operating within the statutory commands and discretion granted to the agency by Congress. Arbitrary and capricious review should never do anything more than strike down irrational, unexplained, or malicious agency behavior. Webster's Dictionary defines arbitrary as “existing or coming about seemingly at random or by chance or as a capricious and unreasonable act of will[.]”<sup>120</sup> It defines capricious as “governed or characterized by caprice: impulsive, unpredictable.”<sup>121</sup> And for caprice: “a sudden, impulsive, and seemingly unmotivated notion or action.”<sup>122</sup> The agency's action in *State Farm* had a clear motivation (the costs were high, the prior regulation was not working, and there were new political circumstances) and did not come by at random (it certainly looked at the issue, but came to a different conclusion than the court would, and was explained adequately enough, though just barely). In essence, the partial dissent got it right: right test; wrong result.

*State Farm* correctly established arbitrary and capricious review as a light-touch, deferential standard. Unless the agency has completely failed in its duty or

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<sup>119</sup> *Id.* at 43.

<sup>120</sup> *Arbitrary*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/arbitrary> (last visited Aug. 9, 2025).

<sup>121</sup> *Capricious*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/capricious> (last visited Aug. 9, 2025).

<sup>122</sup> *Caprice*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/caprice> (Last visited Aug. 9, 2025).

done something that has no rational basis, the Court should not disturb agency decisions. This goes for both regulatory *and* deregulatory actions—the APA makes no such distinction.<sup>123</sup> Was the agency’s decision in *State Farm* wise? Perhaps not. Was it within the lawful ambit of its statutory grant? Yes. Was the decision motivated by political realities facing the President? Absolutely. But given the agency’s full explanation, even touching on the potential for public backlash, the court should have let it go. If Congress wanted the agency to consider, require, or prohibit different things, it was (and still is) free to do so with legislation.

## VI. Supreme Court Developments Since *State Farm*

We next look at the *Supreme Court’s*<sup>124</sup> modern-era approach to *State Farm* to adduce what, exactly, is the test and context it expects courts to apply *State Farm* in. While *State Farm* review did not metastasize into an unforeseen “dizzying breakdance”<sup>125</sup> like *Chevron*, the Court has fine-tuned the doctrine over the years.

### a. 2002–2016

In *Federal Communications Commission v. Fox Television Stations, Inc.*, Justice Scalia wrote for the Court that there is no “requirement that all agency change be subject to a more searching review. The Act mentions no heightened standard.”<sup>126</sup> Justice Scalia reaffirmed that all is required is a “reasoned analysis for the change[.]” and that the agency must “display awareness that it *is* changing position.”<sup>127</sup> So the agency cannot simply “depart from a policy *sub silentio* or simply disregard rules that are still on the books.”<sup>128</sup> And, of course, the agency needs to give “good reasons” for the policy change.<sup>129</sup> But what it need not do is convince the court that “the reasons for the new policy are *better* than the reasons for the old one[.]”<sup>130</sup> Justice Scalia gives a couple examples of when agencies must explain and examine details, such as when they are using new, contradictory factual findings or when there are significant reliance interests.<sup>131</sup> And *FCC* makes an important distinction from *State Farm*. If data is readily available, and an agency

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<sup>123</sup> Unless, of course, an organic agency statute calls for a differing standard of review based on what action the agency is taking or not taking.

<sup>124</sup> Not to be confused with *State Farm* in the lower courts. *See generally* Gersen & Vermuele, *Thin Rationality Review*, 114 MICH. L. REV. 1355 (2016).

<sup>125</sup> *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 409 (2024).

<sup>126</sup> *Fed. Comms. Comm’n v. Fox Tel. Stations, Inc.*, 556 U.S. 502, 514 (2009).

<sup>127</sup> *Id.* at 514–15 (citing *State Farm*, 463 U.S. 29, 42 (1983)).

<sup>128</sup> *Id.* at 515.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

failures to acquire or analyze it, then that can be arbitrary and capricious.<sup>132</sup> But if the data is “unobtainable[,]” courts cannot demand that the agency work a miracle.<sup>133</sup> And, like the many cases before it, Justice Scalia warns that courts must not “quibble with” agency policy decisions, and instead engage the “explanation it has given.”<sup>134</sup>

Next came *Michigan v. Environmental Protection Agency*.<sup>135</sup> This is one of the rare<sup>136</sup> cases where the Supreme Court held an agency action was arbitrary and capricious. But the legal posture of this case is worth focusing on. Here, Justice Scalia, again writing for the Court, found that the agency failed to consider the issue of “cost.”<sup>137</sup> The organic statute contained a capacious phrase: the agency could regulate in a certain area if it found the regulations “appropriate and necessary.”<sup>138</sup> This sort of phrase “leaves agencies with flexibility[, but] an agency may not ‘entirely fail[] to consider an important aspect of the problem.’”<sup>139</sup> While there are “undoubtedly settings” where “appropriate and necessary” does not mandate consideration of cost, “this is not one of them.”<sup>140</sup> First, Justice Scalia noted the background principle that agencies have considered cost “centrally relevant” in regulatory decisions.<sup>141</sup> But more than that, “statutory context reinforces the relevance of cost.”<sup>142</sup> In the same section that granted the agency regulatory authority, Congress also mandated that the agency study “the costs of such technologies.”<sup>143</sup> This, of course, makes textually clear that Congress had cost considerations in mind when delegating rulemaking authority to the agency.<sup>144</sup> The Court thus held that the EPA’s total avoidance of cost rendered the agency action arbitrary and capricious.<sup>145</sup>

In what is an important concurrence for this article, Justice Thomas questioned the constitutionality and viability of the *Chevron* doctrine.<sup>146</sup> Justice

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<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* at 530.

<sup>135</sup> *Michigan v. Env’t Prot. Agency*, 576 U.S. 743 (2015).

<sup>136</sup> *See Gersen & Vermuele, supra* note 124 at 1382.

<sup>137</sup> *Michigan*, 576 U.S. at 760.

<sup>138</sup> *Id.* at 752.

<sup>139</sup> *Id.* (quoting *State Farm*, 463 U.S. 29, 43 (1983) (alteration in original)).

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* at 753.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* at 759.

<sup>146</sup> *Id.* at 760 (Thomas, J., concurring).

Thomas wondered whether the EPA had the *lawful* authority to make these decisions at all, which would stop short of an arbitrary and capricious analysis. He argued that what the EPA claims here “is the power to decide—without any particular fidelity to the text—which policy goals EPA wishes to pursue.”<sup>147</sup> Though he does not say so in the opinion, it might be fair to read Justice Thomas as arguing this never should have gotten to an arbitrary and capricious analysis: the Court should have just struck down the EPA’s exercise of authority as beyond its statutory grant.

In the year following, the Court wrote in *Encino Motorcars, LLC v. Navarro* that an agency should get no *Chevron* deference if its regulation contains a procedural defect.<sup>148</sup> And in *Encino Motorcars*, the agency had not provided “adequate reasons for its decisions” and thus the regulation was arbitrary and capricious.<sup>149</sup> As a result, there was no need to defer to the agency’s interpretation of statute at all. Again dissenting, Justice Thomas—now joined by Justice Alito—wrote to question the wisdom of *Chevron*.<sup>150</sup> And he said there was more than enough clarity in the statutory text to answer the question before the Court.<sup>151</sup> There is no need to send the decision back.<sup>152</sup> Again, it appears Justice Thomas is saying: let’s just look at the text and say what the agency is supposed to do, rather than reaching forward to arbitrary and capricious review.<sup>153</sup>

**b. 2016–June 27, 2024 (the day before *Loper Bright*)**

A few more pre-*Loper Bright* cases warrant attention. In *Department of Commerce v. New York*, the Supreme Court struck down a change to the census that would have included a citizenship question.<sup>154</sup> First, the majority held that the agency “justifiably” overruled certain analysis of a subagency and its decision was “reasonable and reasonably explained.”<sup>155</sup> But then the Court did something strange<sup>156</sup> and held that the agency’s decision, while adequately and reasonably explained, was made in pursuit of pretextual, political aims.<sup>157</sup> Basically, the agency’s head had made up his mind before the agency even delved into the data,

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<sup>147</sup> *Id.* at 763.

<sup>148</sup> *Encino Motorcars, LLC v. Navarro*, 579 U.S. 111, 221 (2016).

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* at 227 (Thomas, J., dissenting).

<sup>151</sup> *Id.*

<sup>152</sup> *Id.* at 227–28.

<sup>153</sup> *Id.*

<sup>154</sup> *Dep’t of Com. v. New York*, 588 U.S. 752, 785 (2019).

<sup>155</sup> *Id.* at 776.

<sup>156</sup> At least this author thinks so.

<sup>157</sup> *Id.* at 783.

and thus there was a “mismatch” between the agency’s stated explanation and the *actual* reason for the decision.<sup>158</sup> What the Court seems to be saying is but for this extrarecord evidence of a political motivation, we should have upheld the rule. Nothing in the APA counsels this, and flies in the face of the highly deferential review *State Farm* calls for. It appears to be substituting the Court’s judgment for the agency’s. As this article cataloged above, agencies are free to exercise judgment for political or other means so long as the underlying decision is otherwise supported and explained by the agency record.

Justice Thomas, writing a partial dissent, though so too: “The Court engages in an unauthorized inquiry into evidence not properly before us to reach an unsupported conclusion.”<sup>159</sup> He writes that the majority “conceptualize[s] pretext as a subset of ‘arbitrary and capricious’ review.”<sup>160</sup> While it is unclear that the majority is correct about that, Justice Thomas writes that “even if they were, an agency action is not arbitrary and capricious merely because the decisionmaker has other, unstated reasons for the decision.”<sup>161</sup> But this author is left to wonder, as did Justice Thomas, whether this decision will ultimately prove to be “an aberration—a ticket good for this day and this train only.”<sup>162</sup> Thus far, it has been.

### c. How Lower Courts Apply *State Farm*

So how has arbitrary and capricious review fared since *State Farm*? Several different academics have surveyed its progeny, using both empirical and substantive analysis, and found that the approach to *State Farm* review has possibly led to politically motivated court decisions. Though it dates to 2007, Cass Sunstein and Thomas Miles contributed an important empirical look at *State Farm*, which gauges to what extent *political origin* plays on judge’s *State Farm* cases.<sup>163</sup> What the authors found was quite revealing: “When agency decisions are liberal, Democratic appointees are far more likely to uphold them than when they are conservative. By contrast, Republican appointees are far more likely to uphold conservative agency decisions than liberal agencies decisions.”<sup>164</sup> And judges nominated by both parties are *more likely* to bend towards conservative or liberal ideologies if they are on a panel with other judges who were nominated by the same

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<sup>158</sup> *Id.*

<sup>159</sup> *Id.* at 790 (Thomas, J., concurring)

<sup>160</sup> *Id.* at 791.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.* at 799.

<sup>163</sup> Cass R. Sunstein & Thomas J. Miles, *The Real World of Arbitrariness Review* (John M. Olin Program in Law and Economics Working Paper No. 368, 2007).

<sup>164</sup> *Id.* at 45

party as they were.<sup>165</sup> As a result, “political party of the appointing president is a fairly good predictor of how a judge will vote in cases involving arbitrariness review[.]”<sup>166</sup> While the authors stop short of calling this political judging, they do say it bolsters the argument for “soften[ing] arbitrariness review.”<sup>167</sup> This is the key risk of anything less than a deferential arbitrary and capricious review, unlike *de novo* review where courts are moored to the text itself.

In a 2016 survey of both Supreme Court and appellate court decisions invoking *State Farm*, Professors Jacob Gersen and Adrian Vermeule found that “in the Supreme Court at least, agencies almost always win” and thus “the message is to apply a thin form of rationality review.”<sup>168</sup> They note that “[s]ince the 1982–1983 Term, when *State Farm* was decided, the Court has passed on the merits of arbitrariness challenges sixty-four times.”<sup>169</sup> Of the cases it took, the agency lost on arbitrary and capricious 13% of the time, or 8% of the time if you take out cases where the agency lost on statutory grounds too.<sup>170</sup> On cases where the Court *did* rule against the agency, such as *Massachusetts v. EPA* or *Morgan Stanley Capital Group, Inc. v. Public Utility District No. 1*, the Court there confronted “agency decisions not to act at all.”<sup>171</sup> These are not “run-of-the-mill hard look case[s]” but instead an agency’s “near-complete failure to carry out its *statutory obligations*[.]”<sup>172</sup> This is an important point: the court is not necessarily reviewing an agency deciding between different policy options, but instead is looking at the organic statute itself and finding the agency out of step with Congress’s legislative edict. This is the thread Justice Thomas was pulling on in his earlier, pre-*Loper Bright* dissents. Look at the statute and evaluate whether the agency is complying with the statutory command. But a key question we answer below is: where does legal, *de novo* review of whether an agency is behaving lawfully end and where does arbitrary and capricious review begin? Up until publication in 2016, Professors Vermeule and Gersen note that the “few cases” where an agency lost at the Supreme Court “feature either refusals to act altogether, or the adoption of a decision rule that is entirely unrelated to any statutorily relevant factor, and in that sense genuinely capricious.”<sup>173</sup> So according to these authors, agencies only hit the rocks when they completely fail to act or ignore the statute. And though with some

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<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> Gersen & Vermuele, *supra* note 124, at 1362.

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *Id.* at 1362.

<sup>172</sup> *Id.* at 1363.

<sup>173</sup> *Id.*

outliers, the authors also found that lower courts mostly follow the Supreme Court’s lead in avoiding “systematically aggressive hard look review.”<sup>174</sup>

## VII. The Supreme Court at or Around *Loper Bright*

On June 28, 2024, the Supreme Court decided *Loper Bright Enterprises v. Raimondo*, overturning the *Chevron* doctrine.<sup>175</sup> A day earlier, obviously with the knowledge that *Chevron* was going down, the Supreme Court released *Ohio v. Environmental Protection Agency*.<sup>176</sup> The Clean Air Act mandates that states and the federal government work “together to improve air quality” and that “States bear ‘primary responsibility’ for developing plans to achieve air-quality goals.”<sup>177</sup> And if a State’s plan falls short, “the federal government may sometimes step in and assume that authority for itself.”<sup>178</sup> And that is what happened in this case, when the government “reject[ed] over 20 state’s plans for controlling ozone pollution” implementing instead “a single, uniform federal plan.”<sup>179</sup> States sued, and a number of courts stayed the EPA’s action.<sup>180</sup> While the case found the Supreme Court on review of the stay, the Court engaged with the merits of the EPA’s decision.<sup>181</sup>

The Court pulls its *State Farm* rubric from a recent case, *Federal Communications Commission v. Prometheus Radio Project*.<sup>182</sup> There, the Court reaffirmed that agency actions must be “reasonable and reasonably explained.”<sup>183</sup> And, as you may be tired of reading at this point, the court reaffirms that it cannot “substitute its judgment for that of the agency.”<sup>184</sup> In *Ohio*, the Court noted that commenters raised a problem with the agency—specifically, that an EPA factual assumption that all involved states would adopt a uniform system of costs “to the point of diminishing returns.”<sup>185</sup> The EPA did not consider, as commenters pushed them to, what happens if states *don’t* do that, which is what occurred here.<sup>186</sup> So, the EPA did not provide any response, thus falling short of the “reasoned

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<sup>174</sup> *Id.* at 1367.

<sup>175</sup> *Loper Bright Enters. v. Raimondo*, 603 U.S. 369 (2024).

<sup>176</sup> *Ohio v. Env’t Prot. Agency*, 603 U.S. 279 (2024).

<sup>177</sup> *Id.* at 283 (citing 42 U.S.C. § 7401(a)(3)).

<sup>178</sup> *Id.* (citing 42 U.S.C. § 7410(c)(1)).

<sup>179</sup> *Id.*

<sup>180</sup> *Id.* at 290.

<sup>181</sup> *Id.*

<sup>182</sup> *Id.* at 292 (citing *Fed. Comms. Comm’n v. Prometheus Radio Proj.*, 592 U.S. 414, 423 (2021)).

<sup>183</sup> *Id.* (citing *Prometheus*, 592 U.S. at 423).

<sup>184</sup> *Id.* (citation modified).

<sup>185</sup> *Id.* at 293.

<sup>186</sup> *Id.*

explanation” standard.<sup>187</sup> The Court mused that “[p]erhaps there is some explanation . . . . But if there is an explanation, it does not appear in the final rule.”<sup>188</sup>

The EPA made three objections to the Court’s conclusion, two of which are relevant to this paper. First, it argued that it noted it was “aware” of this problem and included a severability clause in the rulemaking as a result.<sup>189</sup> But “awareness is not itself an explanation[,]” and it failed to address “whether and how” certain measures remain in the rule when the underlying record counsels otherwise.<sup>190</sup> It certainly seems the Court is open to an EPA explanation for why it made this decision, but it finds here the *absence of any explanation* at all. An agency simply noting “yes, this is an important comment” without delving into the details necessarily self-defeats any arbitrary and capricious analysis. The next objection was procedural—that commenters failed to raise this exact issue with the agency during the rulemaking.<sup>191</sup> But parties do not need to repeat in litigation an “identical argument made before the agency[;]” they must merely “confirm that the government had notice of the challenge during the public comment period and a chance to consider” it.<sup>192</sup>

The dissent, authored by Justice Barrett, would take a different approach.<sup>193</sup> First, she takes issue with how the court analyzed the procedural bars in the case, finding that one statutory provision should prevent review.<sup>194</sup> More important to our discussion here, she also says that there is an “uphill battle on the merits.”<sup>195</sup> She stresses that *State Farm* says a rule is arbitrary and capricious only if an agency “*entirely failed to consider an important aspect of the problem.*”<sup>196</sup> She critiques the majority for holding that the agency both utterly failed to consider something and that something was actually critical to the issue.<sup>197</sup> For example, she argues that

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<sup>187</sup> *Id.*

<sup>188</sup> *Id.* at 293–94.

<sup>189</sup> *Id.* at 295.

<sup>190</sup> *Id.*

<sup>191</sup> *Id.* at 296.

<sup>192</sup> *Id.* (citation modified). The third objection was also procedural—that the applicant needed to file a motion at the EPA to reconsider the rule before going to Court. *Id.* at 297.

<sup>193</sup> *Id.* at 301 (Barrett, J., dissenting).

<sup>194</sup> *Id.* at 310 (“In sum, [42 U.S.C.] § 7607(d)(7)(B)’s procedural bar likely forecloses both the failure-to-explain objection that the Court credits and any substantive challenge to the reasonableness of applying the FIP to a subset of the originally covered States.”) (alteration in original).

<sup>195</sup> *Id.* at 311.

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

the cost-effectiveness standards, which the majority keyed on, did not depend on how many states participated.<sup>198</sup> She found that the EPA’s logical trail reasonably explained the decision it ultimately came to.<sup>199</sup> She says that courts should not hold the EPA’s failure to respond to certain comments against them here, as it received thousands of comments and, given that the number of states likely didn’t matter, the comments relevant to this case were relatively unimportant.<sup>200</sup> In sum, she accuses the court of “seizing on a barely briefed failure-to-explain theory” and that, especially given the procedural posture, it should have stayed out of the dispute altogether.<sup>201</sup>

So, what should lower courts and litigants make of this decision? Despite its nascent procedural posture, it certainly carries strong precedential force, given the length and intensity of the majority and dissent’s reasoning. Does this fit within Professor Vermeule’s formulary of the rare times that the Supreme Court finds an agency action arbitrary and capricious—either the agency had a complete failure to do something or ignored an important statutory command, rendering it arbitrary by default? It fits the former well, at least by the majority’s reasoning. It is not that the Supreme Court found the agency’s explanation unpersuasive. The Court found the explanation entirely absent. The dissent disagrees, and takes a different view of the facts, but on the majority’s reasoning, nothing here tips *State Farm* review to being *less* deferential than before.

On the next day, *Loper Bright* arrived.<sup>202</sup> There, the Court overturned *Chevron* and held that courts must engage in de novo review on questions of law.<sup>203</sup> And the Court is quite clear about where *State Farm* slots in: *after* the court has ruled on the question of law. There are three steps: fix “the boundaries of “delegated authority[;]” then “recogniz[e] constitutional delegations;” and finally ensure that “the agency has engaged in ‘reasoned decision making’ within those boundaries.”<sup>204</sup> This last step is the only time, absent a footnote by the dissent, that the Court cited *State Farm* in the decision.

Our final case, before we fully unpack what this all means for judicial review going forward, is from just this past term: *Seven County Infrastructure*

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<sup>198</sup> *Id.*

<sup>199</sup> *Id.* at 316.

<sup>200</sup> *Id.*

<sup>201</sup> *Id.* at 322.

<sup>202</sup> *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 413 (2024).

<sup>203</sup> *Id.*

<sup>204</sup> *Id.* at 395.

*Coalition v. Eagle County, Colorado*.<sup>205</sup> This case dealt with challenge to a U.S. Transportation Safety Board (“TSB”) approval of new Utah railroad track.<sup>206</sup> As the National Environmental Policy Act (“NEPA”) requires, the TSB “prepared an extraordinarily lengthy [Environmental Impact Statement (“EIS”)], spanning more than 3,600 pages[,]” which “addressed the environmental effects of the railroad line.”<sup>207</sup>

The Supreme Court first noted that “NEPA is purely procedural” and “does not mandate particular results, but simply prescribes the necessary process for an agency’s environmental review of a project.”<sup>208</sup> The D.C. Circuit found the EIS to be lacking and vacated the TSB’s railroad approval.<sup>209</sup> It held that “the EIS did not sufficiently address the reasonably foreseeable environmental impacts” of certain drilling and oil refining activities.<sup>210</sup> The Supreme Court disagreed and reversed for two reasons: the D.C. Circuit was not appropriately deferential to the TSB, and the Circuit improperly required the TSB to analyze projects from a different “time or place” than the railroad project’s location.<sup>211</sup>

The standard of review is just what this paper laid out above. First, citing *Loper Bright*, the Court notes that legal review is “*de novo*” but if “an agency exercises discretion granted by a statute,” then we move to the APA’s “deferential arbitrary-and-capricious standard.”<sup>212</sup> Of course, again, this means under *State Farm* that it must be “reasonable and reasonably explained.”<sup>213</sup> So, first, did the statute grant the agency power to do what it’s doing? Did that statute give discretion to the agency? And if the agency is lawfully within that discretion, was its choice of action arbitrary and capricious?

All NEPA does is require the agency “to prepare an adequate report.”<sup>214</sup> Nothing more. And this EIS is “only one input into an agency’s decision” and thus “the adequacy of an EIS is relevant only to the question of whether an agency’s final decision (here, to approve the railroad) was reasonably explained.”<sup>215</sup> Given that the statutory requirement is merely to prepare report, that NEPA is purely

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<sup>205</sup> *Seven Cnty. Infrastructure Coal. v. Eagle County*, 145 S. Ct. 1497 (2025).

<sup>206</sup> *Id.* at 1058.

<sup>207</sup> *Id.* at 1057–58.

<sup>208</sup> *Id.* at 1510 (citation modified).

<sup>209</sup> *Id.*

<sup>210</sup> *Id.*

<sup>211</sup> *Id.* at 1511.

<sup>212</sup> *Id.*

<sup>213</sup> *Id.*

<sup>214</sup> *Id.*

<sup>215</sup> *Id.*

procedural, and the already-deferential nature of arbitrary and capricious review, “when determining whether an agency’s EIS complied with NEPA, a court should afford substantial deference to the agency.”<sup>216</sup>

But much like we did with Justice Cardozo in the pre-APA cases, we ask the same question: what does this deference look like? Well, first, NEPA requires that an EIS is “detailed.”<sup>217</sup> So does the court defer to the agency on the meaning of detailed? Absolutely not—it is a “question of law to be decided by a court.”<sup>218</sup> But for a *particular* EIS, what details need to be included? Well, that “involves primarily issues of fact.”<sup>219</sup> The *agency* has discretion, afforded explicitly by the statute, to “assess what facts are relevant to *the agency’s own decision*[.]”<sup>220</sup> It is important to differentiate what the agency can do—exercise discretion on where to “draw the line” on environmental impact—and what the Court can do: ensure that the agency is obeying the commands of the statute and not acting arbitrarily.<sup>221</sup> NEPA is just “a modest procedural requirement” but courts have turned it into “a blunt and haphazard tool” that objectors can use to delay or end new infrastructure projects.<sup>222</sup> A court requiring anything more runs afoul of *Vermont Yankee*.<sup>223</sup> So the “bedrock principle of judicial review in NEPA cases can be stated in a word: Deference.”<sup>224</sup> The Court then went on to analyze the merits of the D.C. Circuit’s opinion, now exercising the appropriate deference, and found them lacking.<sup>225</sup>

Some have heralded this case as another example of *Loper Bright* being merely a slight course correction in the Court’s deference jurisprudence.<sup>226</sup> I disagree. This opinion is perfectly congruent with what the Court held in *Loper Bright*, and Justice Kavanaugh goes out of his way to emphasize that any statutory review, even the meaning of the word “detailed,” sits squarely with the Court. But as I wrote elsewhere, when a statute explicitly grants deference to an agency, and that agency deference does not exceed constitutional bounds, then the court merely presses a *State Farm* analysis—showing large deference to the agency. And where does the Court find the contours for that deference? In the statute. NEPA is a

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<sup>216</sup> *Id.*

<sup>217</sup> *Id.* at 1512 (quoting 42 U.S.C. § 4332(2)(C)).

<sup>218</sup> *Id.* (quoting *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 391–92 (2024)).

<sup>219</sup> *Id.* (quoting *Marsh v. Oregon Nat. Res. Council*, 490 U.S. 360, 377 (1989)).

<sup>220</sup> *Id.* (emphasis added).

<sup>221</sup> *Id.* at 1513.

<sup>222</sup> *Id.*

<sup>223</sup> *Id.* at 1514 (citing *Vermont Yankee*, 435 U.S. 519, 558 (1978)).

<sup>224</sup> *Id.* at 1514–15.

<sup>225</sup> *Id.* at 1518.

<sup>226</sup> See e.g., Adrian Vermeule, *Yes, There Will Be No Loper Bright “Revolution,”* THE NEWS DIGEST (May 30, 2025), <https://thenewdigest.substack.com/p/yes-there-will-be-no-loper-bright>.

procedural statute that requires a procedural checkbox. Its language is flexible, affording the agency tremendous deference. Taking that cue from Congress, the Court likewise commands all lower courts to be deferential too.

Would the result be different if the statute was substantive, not procedural, and used stricter language cabining agency deference? Absolutely. In that way, the statutory text not only creates the legal “sandbox” within which the agency can make rules, it also sets the rules of the game once the agency is in that sandbox.

### **VIII. The Appropriate Role of State Farm**

This brings us to the question of the day: post *Loper Bright*, and given the wisdom of *Seven County Infrastructure*, when and how should courts conduct *State Farm* review? Courts must resist the urge to merge their *de novo* analysis of lawfulness with their deferential analysis of arbitrariness. These are two different steps, happen at two different points in the analysis, and have two wildly different standards.

Critics may argue that I am the one merging the two standards: I both want *de novo* review of agency lawfulness, and then I want the statute to *later* influence the arbitrariness analysis. But the Court is clear that that these are two different steps. Consider the following hypothetical statute:

Within 180 days of enactment of this statute, the EPA shall promulgate regulations mandating clean air standards for coal producing power plants. The agency may, in its discretion, dictate a reasonable number of environmental cleaning devices on a smoke stack, while trying to minimize cost as much as practicable to industry participants.

Let’s break down all the things this hypothetical statute requires. First, the EPA “shall promulgate regulations.” Not much legal analysis is needed there. If the EPA fails to promulgate the regulations within 180 days, it is liable to suit under the APA and an injunction mandating it enter the rulemaking process.

Next, the regulations need to mandate “clean air standards” for coal producing power plants. Absent any other definitions in the statute, a court must *de novo* decide what “clean air standards” and “coal producing power plants” means. The latter seems easy; the former might be more difficult. But the Court needs to do it. If the agency were, for example, to promulgate regulations on coal producing power plants, but instead mandate clean *water* standards—there would be no need to do a *State Farm* arbitrary and capricious analysis. The case would end much

sooner than that, as the agency action would be outside the contours of the statute and thus entirely *ultra vires*.<sup>227</sup>

Assuming the agency properly promulgated regulations on clean air standards affecting coal producing power plants, it then has a large, discretionary array of powers available to it. The statute says it quite explicitly: “in its discretion.” And the agency can require “environmental cleaning devices” as long as they are “reasonable” and the agency is “minimizing cost.” Here is where *State Farm* would kick in.

#### **a. Industry Challenge Scenario**

Presume the agency decides to require five bespoke carbon capture devices for each coal plant smokestack. These carbon capture devices will cost upwards of \$50 million each. In its rulemaking, the agency details pages of scientific research on why only these devices are necessary to maintain any sort of “clean air standard” as required by the statute. Industry commenters note that there are numerous alternatives all for a fraction of a cost, and that a \$250 million per smokestack cost will put the entire industry out of business. The industry participants sue.

How the court rules depends on how fully the agency explained its decision to go with the \$50 million bespoke carbon capture devices. If the agency said nothing, completely ignoring the industry comments, then that is a straightforward “failure to explain” case. If it merely acknowledged them but gave a conclusory answer as to why they are not proper alternatives—not engaging with the science in any way—then that looks a lot like *Ohio* and is, again, a failure to explain case.

But if the agency does engage with the commenter, presents science and data, and then reaffirms its decision to go forward, what should the court do? Think back to the multi-factor test from *State Farm*:

Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.<sup>228</sup>

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<sup>227</sup> See, e.g., *La. Pub. Serv. Comm’n v. Fed. Comms. Comm’n*, 476 U.S. 355, 374 (1986) (“an agency literally has no power to act . . . unless and until Congress confers power upon it.”).

<sup>228</sup> *Id.* at 43.

The court will need to first see if anything in the agency explanation is outside the bounds of what Congress told it to consider. If, for example, the agency considered the impact on water quality rather than air quality, that could be enough to render the decision arbitrary. Next, did the agency fail to consider any important aspects of the problem? Well, if the agency didn't consider cost, that would be an important aspect of the problem. Even in the absence of a direct command to consider cost like we have here, *Michigan v. EPA* holds that cost consideration may still be required depending on statutory context. Or perhaps the agency failed to assess something commenters raised in science—like future changes in technology or air quality—which, again, brings us back to a scenario very similar to *Ohio*.

Perhaps the agency weighed two different alternatives: the difference in air quality between the two is marginal, but the distinction in cost is tremendous. This one is harder than it looks on the surface. A court can delve into this agency decision making, but it must do so with a highly deferential mind. If the agency reasonably and fully explained its decision, the court is left to determine if the decision is reasonable. The burden on the challenger here is high—harkening back to Justice Cardozo, it needs to appear that the agency has acted on a “whim” and that its decision, thoroughly explained it might be, had no rational connection to the problem at hand. Only in the face of that overwhelming evidence could the court dislodge the agency's decision.

But even if the agency has made a compelling case that its bespoke carbon capture devices are necessary, the cost is so prohibitive that it will put the entire coal industry at risk. Well, what does the statute say? It says the agency must “minimize cost as much as practicable.” The question for the court is whether the agency did that, plain and simple. It does not say the agency must preserve the industry nor does it say that there is a cap on cost. Here, more statutory context might be helpful. If Congress, for example, passed the entire statute with a clear, textual eye towards regulating, not destroying, the coal industry, then a court can clearly infer Congress did not intend to *ban* coal entirely. But a court can only do that if and only if the text supports it.

I wrote elsewhere on a tweaked version of this hypothetical: the agency requires the coal plants to put one million scrubbers—assume industry standard to this point has been 5–10 scrubbers—costing a billion dollars each on its smokestack.<sup>229</sup> Is that arbitrary and capricious? Almost certainly, for all the reasons we discussed earlier. But do we get to that step? No. And we don't get to the constitutionality step either. By requiring a cost-prohibitive and ridiculous number

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<sup>229</sup> See *Bolinder* supra note 10, at 44.

of scrubbers, the agency has exceeded its *lawful authority*. The statute explicitly limited the agency to a “reasonable” amount of scrubbers. But no measure of reasonability is going from 5–10 scrubbers to a one million. That’s an easy case. But what if it’s an edge case, say going to 20 scrubbers? There, the court will need to do textual analysis of the word “reasonable” and set boundaries. The key word is *textual* analysis: what does the statute, using all the tools available to the court, mean by reasonable? Is this difficult? Yes. Does the court need to be the one to do it? Also, yes. It cannot defer to the agency on the definition of this word, just like Justice Kavanaugh said courts cannot defer on the definition of the word “detailed.” But once the court has determined the contours of that “reasonability” limitation, the agency’s choices *within those boundaries* are subject to an arbitrary and capricious analysis.<sup>230</sup>

This buttresses a crucial point: the agency can be acting within the lawful discretionary scope of the statute in a way that is not arbitrary and capricious—and a court can still strike down the agency action. An important part of the post-*Loper Bright* analysis is whether the statute and thus the agency’s action crosses *constitutional* bounds. If Congress, whether intentionally or accidentally, gave the agency the ability to *end* the entire coal industry through this regulation, then that is very likely an improper delegation of authority. The court need not strike down the statute, but it can find that, as applied, the action is unconstitutional.<sup>231</sup> Thus in our hypothetical, the agency action to shut down the entire coal industry could still fall *even if* a court could not rule on arbitrary and capricious grounds.

#### **b. Environmental Challenge Scenario**

Assume instead that the agency now promulgates a regulation requiring one filtration device per smokestack. Science shows it filters a minimal amount of pollution and is only marginally better than putting a common car air filter over the top of the smokestack. The cost to industry is minimal—about \$45,000 per smokestack. Environmental commenters submitted both science and cost analyses that show this will have no impact on pollution emissions and that there are better,

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<sup>230</sup> And the textual boundaries themselves, if they are too broad, could fail the nondelegation doctrine.

<sup>231</sup> Of course, this seems like an obvious place for the Major Questions Doctrine, which counsels courts to “hesitate before concluding that Congress” meant to delegate an authority of “economic and political significance.” *West Virginia v. Env’t Prot. Agency*, 597 U.S. 697, 721 (2022) (citation modified). While this is the likely outcome of any such case, this author believes the major questions doctrine does not go far enough—it is simply a half-step towards the nondelegation doctrine. Bolinder, *supra* note 10, at 42. And in this hypothetical, there would be nothing stopping a court from simply invoking nondelegation—no major questions doctrine needed. But that is for another paper at another time.

cost-effective alternatives, such as a heavier duty filter for \$500,000 per smokestack. In promulgating the final rule, the agency acknowledges the environmental comments and notes that its determination to “minimize” costs overrode them. The agency also said that it believes the “air pollution problem is overstated by the environmental commenters” and “this is the only policy necessary from the federal government.”

The temptation for the court may be to go straight to an arbitrary and capricious analysis. After all, this is what it seems like: the agency made a decision, put forth some explanation, and there’s contrary science. And that may very well be where many of these cases end up. But it’s not the starting point.

The judge must first question: is the agency acting unlawfully? We often think of these challenges in the context of an agency *exceeding* its statutorily mandated powers, but it also comes when an agency does *less* than what Congress commanded it. So, we start with the text: what is the “shall” that Congress gave to the agency? It “shall promulgate regulations mandating clean air standards for coal producing power plants.” Did the agency do that? Yes it did. “Clean air standards” is a capacious term, but using plain text and canons of construction, a court can and should come to some definition of what that means. Obviously, for this hypothetical we are limited to just this provision but normally courts would have the whole statutory context, including other uses of the term in the same title and statute. For the sake of argument, let’s assume the court’s analysis is quite simple: clean air standards means standards for clean air. The agency presumably did that in its underlying rulemaking.

Next comes the agency choice for enforcing those standards. Congress delegates the agency a potent and specific tool: “The agency may, in its discretion, dictate a reasonable number of environmental cleaning devices.” To tackle the question, let’s first tweak the hypothetical a bit—assume the agency required *no scrubbers or carbon capture* devices. First, would that be per se unlawful? No. The statute says the agency *may*, not shall, require environmental cleaning devices.<sup>232</sup> Would it be arbitrary and capricious? Quite possibly, depending on the agency’s explanation. Much like NEPA, this is where the statute lends a lot of help. It explicitly mandates that the agency acts within its own discretion. This is a broad grant of authority that brings with it a vast amount of judicial deference to agency

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<sup>232</sup> See, e.g., *Sierra Club v. Fed. Energy Reg. Comm’n*, No. 24-1199, 2025 WL 2178519, at \*4 (D.C. Cir. Aug. 1, 2025) (when parsing a statute that says an agency “may” act: “The upshot is that even though FERC has the power to regulate the Connector Pipeline, FERC also has the power *not* to regulate it.”).

decision making. The agency is free to make up its mind and when it does, it can choose the best policy path.<sup>233</sup>

But once an agency decides to require pollution emitting devices, does this discretion shield it from any arbitrary and capricious review? I don't think so, because of the requirement that its decision making process be "reasonable and reasonably explained."<sup>234</sup> If the agency decides *to act* and then fails to back that action up with a thorough, rational explanation tied to the goals of the statute—and the underlying motivation for the agency action—then that could be arbitrary and capricious, even if the agency does enjoy broad discretion. The review here should be light touch, but there would be a burden.

## **IX. The State Farm Temptation Courts Must Resist**

But an error courts may make—and that some are already making—is conflating the *de novo* analysis on questions of law with the deferential analysis on questions of arbitrariness. Below I provide two examples: one of a government attorney attempting to lure the D.C. Circuit into this error, and another of a district court committing this very error. I chose these two examples because what better way to exemplify the post-*Loper Bright* application of *State Farm* than *Loper Bright* itself on remand,<sup>235</sup> as well as its sister case, *Relentless*.<sup>236</sup>

### **a. The Government's 28(j) Letter in *Loper Bright***

Earlier this year, in *Loper Bright*<sup>237</sup> on remand, the government filed a Rule 28(j) Notice of Supplemental Authority noting the Supreme Court's decision in *Seven County*.<sup>238</sup> The letter discussed the case's "framework for statutory interpretation[.]" which is "consistent with the government's approach" in *Loper Bright*.<sup>239</sup> The government argued that the "Court illustrated [the] distinction between legal interpretation and policy determination" through NEPA's EIS

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<sup>233</sup> But this still must be "reasonable and reasonably explained." *See id.*, at \*4 ("FERC's decision to exercise or decline to exercise § 3 jurisdiction must be "reasonable and reasonably explained[.]" (citation modified).

<sup>234</sup> *Id.*

<sup>235</sup> *Loper Bright Enters. v. Raimondo*, 603 U.S. 369 (2024), remanded *sub nom.* *Loper Bright Enters., Inc. v. Lutnick*, No. 5-2166 (D.C. Cir. filed July 19, 2021).

<sup>236</sup> *Relentless v. U.S. Dep't of Com.*, No. 20-108, 2025 WL1939025 at \*1, (D.R.I. July 15, 2025).

<sup>237</sup> This author argued *Loper Bright* the first time it was at the D.C. Circuit, when the case was on its way to the Supreme Court. Shortly after the Supreme Court's decision, he left practice to become a law professor and has no involvement in the case on remand.

<sup>238</sup> Rule 28(j) Notice of Supplemental Authority, *Loper Bright Enters. Inc., v. Lutnick*, No. 5-2166 (D.C. Cir. June 10, 2025).

<sup>239</sup> *Id.*

requirement.<sup>240</sup> The letter correctly articulated how the Court differentiated between interpreting a statutory term, “detailed,” and flyspecking agency policymaking decisions.<sup>241</sup>

But the government makes a puzzling claim in the last part of the letter: *Seven County* applies to the meaning and reach of the “necessary and appropriate” clause in the Magnuson-Stevens Act: “Although the Court determines the best reading of the terms ‘necessary’ and ‘appropriate,’ the factual determination of what measures are necessary and appropriate in the context of a particular program “requires the exercise of agency discretion.”<sup>242</sup> This is a strange argument that would turn *Loper Bright* (and arbitrary and capricious review, for that matter) on its head—and it is precisely the type of holding this Article counsels courts against. The government rightly concedes that the meaning of necessary and appropriate is something the court needs to determine. But then in the very same sentence, it says the opposite: only the agency gets to decide what is necessary and appropriate.

What makes this argument even more bizarre is that *this case is Loper Bright itself*. This is the case the Supreme Court used to overturn *Chevron*, saying *questions of law like the ones in this case* are to be determined by courts with no deference to agencies. Whether the agency has the legal authority to require fishermen to pay for at-sea monitors turns on the question of if that authority is impliedly behind another provision of the statute or lawfully present in the bounds of the necessary and appropriate clause. The government’s suggested reading of that clause means that any statute that contains any necessary and appropriate clause must, necessarily, allow the agency to exercise whatever authority it wants. This would render the Magnuson-Stevens Act, and several other statutes, unconstitutionally broad.

In response, counsel for *Loper Bright* aptly recognized that *Seven County* deals with a “purely procedural” statute, in “contrast” to the Magnuson-Stevens Act, which “is a substantive statute with robust review.”<sup>243</sup> The response letter correctly argued, as this paper does, that there is a distinction between the *de novo* legal review of necessary and appropriate, and the later, second-step review of whether an agency’s *lawfully-chosen* action within the bounds of those terms is

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<sup>240</sup> *Id.*

<sup>241</sup> *Id.* at 1–2.

<sup>242</sup> *Id.* at 2.

<sup>243</sup> Response to Defendant-Appellees’ Rule 28(j) Notice, *Loper Bright Enters. Inc., v. Lutnick*, No. 21-5166 (D.C. Cir. June 10, 2025).

arbitrary and capricious.<sup>244</sup> While at the time of this writing, the D.C. Circuit has not yet ruled on the case, the parties did submit a joint motion to hold the case in abeyance pending settlement negotiations.<sup>245</sup> But if the D.C. Circuit follows the guidance of this government letter and conflates arbitrary and capricious review with de novo legal review, it will have rendered the Supreme Court’s decision in *Loper Bright* meaningless—in *Loper Bright* itself!<sup>246</sup>

### **b. The Rhode Island District Court’s Opinion in *Relentless***

*Loper Bright* was not alone at the Supreme Court. Weeks after the Supreme Court granted review, it added a companion case, *Relentless*, presumably to allow Justice Jackson to participate in oral argument and the decision.<sup>247</sup> So it too was remanded back after *Loper Bright*, though unlike the D.C. Circuit—which kept the case—the First Circuit sent it back down to the district court, which had previously ruled against those fishermen on *Chevron* Step Two.

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<sup>244</sup> *Id.* (“The latter question would be subject to a more ‘deferential arbitrary-and-capricious standard’ as it ‘does not turn on the meaning’ of the law and ‘involves primarily issues of fact.’”) (citing and quoting *Seven Cnty. Infrastructure Coal. v. Eagle County*, 145 S. Ct. 1497, 1511, 1512 (2025) (citation modified)).

<sup>245</sup> Joint Motion for Abeyance, *Loper Bright Enters., Inc. v. Lutnick*, No. 21-5166 (D.C. Cir. July 16, 2025); The eagle-eyed spectator might be even more confused by what DOJ issued this letter: the Trump Administration. *See, e.g.*, Dan McLaughlin, *Why is Pam Bondi’s Justice Department Still Fighting Loper Bright*, NAT’L REV. (June 18, 2025, at 6:42 AM), <https://www.nationalreview.com/corner/why-is-pam-bondis-justice-department-still-fighting-loper-bright/>. While yes, it is true that the regulation at dispute in *Loper Bright* was finalized by the first Trump Administration, it was a regulation that had long been pushed by internal agency bureaucracy, initiated in prior administrations. And the Administration issued an Executive Order earlier in 2025 calling for the “repeal of unlawful regulations” including those that have questionable “lawfulness under . . . *Loper Bright*[.]”. Exec. Order No. 14219, 90 F.R. 10583 (2025).

<sup>246</sup> Dan McLaughlin, *Supreme Court on Loper Bright: Yeah, We Meant It*, NAT’L REV. (June 20, 2025, at 5:04 PM), <https://www.nationalreview.com/corner/supreme-court-on-loper-bright-yeah-we-meant-it/>.

<sup>247</sup> Justice Jackson heard oral argument at the D.C. Circuit when *Loper Bright* was on its way to the Supreme Court. She was elevated to the Court before the case was decided and did not participate in the decision. She recused in *Loper Bright* at the Supreme Court but did join the opinion to the extent it applied to *Relentless*. Both cases had identical questions presented. In this author’s view and based on oral argument, Justice Jackson would have joined the opinion for the government at the D.C. Circuit had she not been elevated. Instead, Chief Judge Srinivasan was drawn to replace her, and he joined the per curiam decision upholding the regulation.

Unfortunately, the district court again ruled against the fishermen. Neither the plaintiffs’ nor the defendants’ supplemental briefing ever cites *State Farm*.<sup>248</sup> The opinion only cites it once when explaining APA review. But its specter and misapplication loom large in the surprisingly short opinion. The *Relentless* court makes two findings. First, citing the prior First Circuit opinion in the case (which was, of course, vacated by the Supreme Court), the district court cites a “default norm . . . that the government does not reimburse regulated entities for the cost of complying with properly enacted regulations[.]”<sup>249</sup> This ignores that in the rest of the statute, there actually *are* three different provisions permitting cost-shifting of industry funding.<sup>250</sup> Even if a default norm did properly exist, the plain text defeats it—Congress both thought it needed to and knew how to delegate this authority when it wanted.<sup>251</sup>

The Court’s next holding, and where it makes its most serious error, is that the “necessary and appropriate” clause grants the agency “a large degree of discretionary authority.”<sup>252</sup> True. But this discretion must be in the exercise of policymaking decisions, must not run contrary to the text, and cannot be unbounded (or it would be unconstitutional). Then the Court does something quite surprising, writing: “This Court and the *Relentless I* court have already reviewed the Final Rule and found it reflects *reasoned decision making*<sup>253</sup> and does not cross the boundaries specified by the MSA (namely, the National Standards), the RFA, or the Constitution.”<sup>254</sup> If this were true, and the First Circuit had simply ruled soundly on

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<sup>248</sup> For a look at the cases that are cited, *see generally* Plaintiffs’ Supplemental Brief in Support of Motion for Summary Judgment, *Loper Bright Enters., Inc. v. U.S. Dep’t of Com.*, No. 1:20-cv-00108-WES-PAS (D.R.I. Sept. 26, 2024); Defendants’ Supplemental Brief, *Loper Bright Enters., Inc. v. U.S. Dep’t of Com.*, No. 1:20-cv-00108-WES-PAS (D.R.I. Oct. 25, 2024); Plaintiffs’ Supplemental Reply Brief in Support of Motion for Summary Judgment and Response to Defendants’ Supplemental Brief, *Loper Bright Enters., Inc. v. U.S. Dep’t of Com.*, No. 1:20-cv-00108-WES-PAS (D.R.I. Nov. 12, 2025); Defendants’ Supplemental Response Brief, *Loper Bright Enters., Inc. v. U.S. Dep’t of Com.*, No. 1:20-cv-00108-WES-PAS (D.R.I. Nov. 26, 2025) (no citation to *State Farm* in any of the supplemental briefings).

<sup>249</sup> *Relentless Inc. v. U.S. Dep’t of Com.*, No. 20-108, 2025 WL1939025 at \*1, \*4 (D.R.I. July 15, 2025). (citing and quoting *Relentless, Inc. v. U.S. Dep’t of Com.*, 62 F.4th 621, 629 (1st Cir. 2023) (citation modified). And for that quote, the First Circuit is itself citing a *conurrence* from a prior case that was decided purely on statute of limitations grounds and did not reach the merits. *Relentless, Inc.*, 62 F.4th at 629 (citing and quoting *Goethel v. U.S. Dep’t of Com.*, 854 F.3d 106, 117–18 (1st Cir. 2017)). This author was counsel on the Goethel case.

<sup>250</sup> Eric Bolinder, *Fishing for Justice: The Legal and Moral Case for Loper Bright*, 19 LIBERTY UNIV. L. REV. 357, 364–365 (2024).

<sup>251</sup> *Id.*

<sup>252</sup> *Relentless*, 2025 WL1939025 at \*4.

<sup>253</sup> That sounds a lot like *State Farm*.

<sup>254</sup> *Id.* (emphasis added).

the statute, then why did the Supreme Court vacate the First Circuit’s opinion? Surely, the lower courts must engage in *some sort* of reexamination on remand.

But instead, the Court rehashes a variety of statutory arguments—ignoring others—to arrive at this conclusion: “Here, Congress explicitly delegated discretionary authority to NMFS, cabined by the National Standards (and, as Plaintiff previously argued, the RFA and the Constitution). As noted above, this Court and the *Relentless I* court have already explained that the Final Rule sits within those boundaries.”<sup>255</sup> The Court never cites *State Farm* (aside from its rule statement), but it is committing the precise error this paper warns against: conflating discretion in policymaking decisions with the court’s own *de novo* review of legal authority. And if the court really did believe what it was writing, where is the review of the administrative record? Where is the analysis of reasoned decision making? The answer may be: well, it wasn’t briefed. In that case, why is the court ruling on that at all—hasn’t the government waived this argument?

What the district court did here is apply *Chevron* Step Two. It made no effort to hide this—by simply adopting, wholesale, the First Circuit’s previously-vacated opinion, it created an end-around to *Loper Bright*. This is difficult to swallow as *Relentless* was remanded *along with Loper Bright*. While it remains to be seen how this case will pend on appeal—to date, the fishermen have not yet appealed—if the parties at the D.C. Circuit in *Loper Bright* reach a settlement that leads to vacatur of the rule, it will moot this case.<sup>256</sup>

### c. A Good Example—the Eighth Circuit

In contrast, a recent Eighth Circuit decision properly demonstrates *where* and *how* courts should slot in arbitrary and capricious analysis.

In *Zimmer Radio of Mid-Missouri, Inc. v. Federal Communications Commission*, Judge Shepherd wrote for the court and analyzed a detailed petition for review of FCC decision making.<sup>257</sup> Petitioners challenged the FCC’s decision to retain some rules and tighten others in response to its statutory duty to review the necessity of “media ownership regulations.”<sup>258</sup> While petitioners made *many*

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<sup>255</sup> *Id.* at \*5.

<sup>256</sup> If the government vacates the rule in a *Loper Bright* settlement, that should have global effect—it is hard to imagine them vacating it as-applied to a certain jurisdiction (nor could such a result, in this author’s view, be legally sustained). That would deprive *Relentless* of a live case-and-controversy and end the case.

<sup>257</sup> *Zimmer Radio of Mid-Missouri, Inc. v. Fed. Comms. Comm’n*, Nos. 24-1380, 24-1480, 24-1516, 2025 WL 2056854 at \*1 (8th Cir. July 23, 2025).

<sup>258</sup> *Id.*

arguments, we will focus on just two, as both turned on important steps of the de novo legality and *State Farm* analysis. First, the Court upheld a portion of the rule by *first* analyzing the legal definition of the words and *then* progressing to an arbitrary-and-capricious analysis. In doing the legal analysis, the court first engaged in plain-text review of the word “competition,” holding that the dictionary supports how both sides define the term. But, again looking at the text, the Court found that Congress had expressly delegated discretion to the agency to define “how *much* competition must be considered in analyzing the ownership rules[.]” This is thus *not* a “dispute that deals with the *meaning* of competition.” If it were, of course, the court would be the de novo arbiter of the term. Instead, we are gauging first whether an agency is properly within the statutorily-mandated bounds of its discretion. The Court held it was.<sup>259</sup>

But the analysis does not end there. Consistent with this paper, the court *then* moved to a distinct *State Farm* analysis, holding that under “the deferential arbitrary-and-capricious standard, we decline to second-guess the FCC’s market definitions.”<sup>260</sup> Later on, the Court noted that even when “it may feel counterintuitive . . . the FCC articulated valid reasons for [its decision making] for purposes of this review.”<sup>261</sup> Importantly, the Court found that the agency’s explanation “properly considered all three of its public interest goals[.]”<sup>262</sup>

Later in the opinion, the Court ends the analysis after looking at the agency’s statutory backing and finding it lacking.<sup>263</sup> The statute prescribed a specific, two-step analysis.<sup>264</sup> Once the agency made a certain determination, “its authority

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<sup>259</sup> Some may see this as unhelpful to my thesis—after all, it is a court seeming to defer to an agency definition of a statutory term, while citing the dissent in *Loper Bright* to boot—but this is one of those close, edge cases of agency factfinding informing *what fits under* a statutory definition, rather than deference to the agency on the statutory definition itself. And the Supreme Court impliedly blessed this in *Loper Bright*: “Occasionally during this period, the Court applied deferential review after concluding that a particular statute empowered an agency to decide how a broad statutory term applied to specific facts found by the agency . . . . But such deferential review, which the Court was far from consistent in applying, was cabined to *factbound determinations*.” *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 370 (2024) (citing *Gray v. Powell*, 314 U.S. 402 (1941); *Nat’l Lab. Rel. Bd. v. Hearst Publ’ns, Inc.*, 322 U.S. 111 (1944)). See generally Matthew Stephenson, *The Gray Area: Finding Implicit Delegation to Agencies after Loper Bright* (June 28, 2025), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=5328964](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5328964).

<sup>260</sup> *Zimmer*, 2025 WL 2056854 at \*8.

<sup>261</sup> *Id.* at \*10.

<sup>262</sup> *Id.*

<sup>263</sup> *Id.* at \*17.

<sup>264</sup> *Id.* at \*16.

expired. It could not repeal or modify the rule at all.”<sup>265</sup> The court further held that even if the agency had not shortcut its authority with the preliminary finding, the court still *did not agree* with the agency’s definition of the word “modify.”<sup>266</sup> Using plain text analysis, including dictionaries and statutory context, the court came to a different conclusion than the agency on the term—and, of course, the court showed no deference.<sup>267</sup> Judges have the final say on de novo review of statutory text.

This case is a great example of a court painstakingly differentiating between the two steps. The first review is de novo—what does the statute mean? And is the agency playing in that statute? For our first example, it was. And then the court continued to an arbitrary and capricious analysis. For our second example, the agency was out of step with the statutory text, and the analysis ends there. It was acting unlawfully.

## **X. Conclusion**

When courts confront a challenge to agency decision making, they must apply the correct standard of review at each step. On the first step, de novo legal review, the courts must never defer to the agency. But if the analysis moves beyond that step to arbitrary and capricious review, the court should show significant deference to the agency when applying the factors from *State Farm*. Courts must fix a gulf between these two steps—one cannot blend into the other. If judges fail to do this, they risk smuggling *Chevron* Step Two in the back door, completely contrary to the Supreme Court’s holding in *Loper Bright*.

Thankfully, the steps to analyzing an agency’s exercise of authority are simple, even if the analysis itself may prove challenging to the courts. First, the court must decide whether the agency has any power to act at all—what is the statutory mandate? Then, relying on the statutory text, the judge should outline the breadth of the agency’s power and determine whether the agency’s action is properly within those boundaries. So long as the breadth itself does not raise constitutional issues, the court *then* moves to the deferential arbitrary and capricious analysis.

The Eighth Circuit’s opinion in *Zimmer Radio* exemplifies this approach. It is painstaking work. It takes a lot of effort to go through all those steps. Textual analysis requires the use of plain text canons, dictionaries, and the whole statutory

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<sup>265</sup> *Id.* at \*17.

<sup>266</sup> *Id.*

<sup>267</sup> *Id.*

interpretation “tool kit.”<sup>268</sup> Arbitrary and capricious analysis itself is laborious, requiring the court to parse the agency record, consider comments, and determine whether the agency’s is “reasoned and reasonable.”<sup>269</sup> But this analysis is highly deferential. The agency has to fully explain itself, and the court cannot supplement or substitute its own reasoning. Then the reviewing tribunal needs to find a thread of the agency’s logic and, so long as it is consistent with Congress’s commands in the statute, follow it to the agency’s ultimate conclusion. If courts can do so, then they must allow the agency decision to stand—even if a court thinks the agency’s action is unwise.

What courts must resist is the temptation to smash the two steps together, like *Relentless* did. If other courts follow suit, they will abdicate their statutory responsibility to conduct de novo review of statutes. On the same vein, if courts treat the arbitrary and capricious review too harshly, they risk substituting their judgment for that of the agency’s. Courts decide the meaning of statutory terms, and they decide whether agencies are properly within their statutory ambit. If they are, the court’s *only* role is to determine if the agency’s decision-making process is whimsical, irrational, and so disconnected with the underlying problem that it could only be viewed as arbitrary and capricious.

From Justice Cardozo to *Loper Bright*, the case law is clear: de novo first, then deferential arbitrariness review. Anything else risks a *Chevron* redux.

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<sup>268</sup> See *Kisor v. Wilkie*, 588 U.S. 558 (2019).

<sup>269</sup> *Dep’t of Com. v. New York*, 588 U.S. 776 (2019).