GOVERNING FOR IMPACT

Arbitrary-and-Capricious Challenges

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Issue Brief

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I. INTRODUCTION

The Administrative Procedure Act requires a court to "hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[1] Two of those words—"arbitrary" and "capricious"—name a robust, decades-old doctrine by which courts will invalidate unreasoned agency decisions. Arbitrariness review (referred to sometimes as "hard look" review) is fundamental to judicial review of agency action. It applies regardless of whether the agency engaged in general rulemaking or case-by-case adjudication;[2] whether or not the agency engaged in notice-and-comment procedures;[3] and even where an agency plainly has the statutory authority to take the action that it took.[4]

The conventional wisdom is that arbitrariness review is highly deferential to the agency. One study published in 2016 found that agencies won before the Supreme Court roughly 90% of the time.[5] But that understanding is, at minimum, somewhat out-of-date. Over the last ten years, the Supreme Court has issued multiple landmark decisions striking down prominent agency policies as arbitrary and capricious—decisions that have given teeth to, and perhaps even originated new forms of, arbitrariness review. And more recently, lower courts have invoked arbitrariness review in enjoining Trump administration actions, including efforts to impound federal funds[6] and dismantle the civil service.[7]

This Issue Brief begins by charting the evolution of arbitrariness review, focusing on how the stringency of review has varied over time since the Supreme Court's seminal decision in *Motor Vehicle Manufacturers' Association v. State Farm Mutual Automobile*

[1] 5 U.S.C. § 706(2)(A).

[2] *See Camp v. Pitts*, 411 U.S. 138, 142 (1973).

[3] *See Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 105–06 (2015).

[4] *See Animal Legal Def. Fund, Inc. v. Perdue*, 872 F.3d 602, 619 (D.C. Cir. 2017).

[5] *See* Jacob Gersen & Adrian Vermeule, *Thin Rationality Review*, 114 Mich. L. Rev. 1355, 1355 (2016). The record was considerably more mixed before the courts of appeals. *See id.* at 1364–65.

[6] *See, e.g.*, *Nat'l Council of Nonprofits v. OMB*, — F. Supp. 3d —, 2025 WL 597959, at *14 (D.D.C. Feb. 25, 2025).

[7] *See, e.g.*, *Am. Fed'n of Gov't Emps., AFL-CIO v. U.S. Off. of Pers. Mgmt.*, 2025 WL 660053, at *5 (N.D. Cal. Feb. 28, 2025).

Insurance Co., 463 U.S. 29 (1983). This Issue Brief then lists nine categories of grounds upon which courts set aside agency actions as arbitrary and capricious: (1) failures of explanation; (2) considering the wrong factors; (3) logical errors; (4) factual errors; (5) legal errors; (6) failures to consider alternatives; (7) failures to respond to comments; (8) unjustified changes of policy; and (9) decisions that are "so implausible" as to be unreasonable. Finally, this Issue Brief explains how arbitrary-and-capricious challenges typically proceed, from seeding the record during the notice-and-comment process, to asserting such issues in litigation, to the unique remedial questions that courts face after holding an action to be arbitrary.

II. THE EVOLUTION OF ARBITRARINESS REVIEW

After the APA's enactment in 1946, it took nearly forty years for the Supreme Court to state its now-canonical formulation of the arbitrary-and-capricious test in *State Farm*. *State Farm*'s analysis has been cited thousands of times in the forty years since, although the scope and rigor of arbitrariness review has been subject to considerable debate. In particular, the Supreme Court's recent arbitrary-and-capricious cases highlight how it can be a powerful tool for litigants.

A. The Supreme Court's decision in *State Farm*

In *State Farm*, the Supreme Court considered whether the National Highway Traffic Safety Administration "acted arbitrarily and capriciously in revoking" a motor vehicle safety standard that required new motor vehicles to "be equipped with passive restraints" to protect occupant safety (i.e., either automatic seatbelts or airbags).[8] As a threshold matter, the Court determined that "the rescission or modification" of a standard is "subject to the same test" for arbitrariness as the initial promulgation of a standard, rather than the more lenient standard that typically applies to "an agency's refusal to promulgate a rule in the first place."[9] Because "[r]evocation

[8] 463 U.S. at 34.

[9] *Id.* at 41–42.

constitutes a reversal of the agency's former views as to the proper course," "an agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance."[10]

The Court then set forth some of the core precepts of arbitrariness review. "The scope of review under the 'arbitrary and capricious' standard is narrow," the Court explained, and "a court is not to substitute its judgment for that of the agency. Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'"[11] In particular,

> 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, [or] offered an explanation for its decision that runs counter to the evidence before the agency, or [the agency rule] is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.[12]

The Court also reiterated the so-called *Chenery* rule,[13] noting that a court "'may not supply a reasoned basis for the agency's action that the agency itself has not given.'"[14] Yet a court must "'uphold a decision of less-than-ideal clarity if the agency's path may reasonably be discerned.'"[15]

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[10] *Id.* The Court also noted that "[w]hile the removal of a regulation may not entail the monetary expenditures and other costs of enacting a new standard, and accordingly, it may be easier for an agency to justify a deregulatory action, the direction in which an agency chooses to move does not alter the standard of judicial review established by law." *Id.* at 42.

[11] *Id.* at 43 (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)).

[12] *Id.*

[13] *See, e.g.*, *SEC v. Chenery Corp.*, 318 U.S. 80, 95 (1943) (*Chenery I*) ("We merely hold that an administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained"); *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947) (*Chenery II*) (reiterating the "simple but fundamental rule of administrative law … that a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency").

[14] *State Farm*, 463 U.S. at 43 (quoting *Chenery II*, 332 U.S. at 196).

[15] *Id.* (quoting *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 285 (1974)).

The Court concluded that NHTSA's decision to rescind the passive-restraint requirement failed to meet these standards. Although the specific policy considerations the Court assessed are relatively idiosyncratic, the manner in which the Court addressed them planted the seeds for certain types of arbitrary-and-capricious arguments that litigants now make frequently.

First, in recognizing that consumers might simply detach automatic seatbelts, "NHTSA apparently gave no consideration whatever to modifying the Standard to require that airbag technology be utilized," notwithstanding "the effectiveness ascribed to airbag technology by the agency."[16] "At the very least this alternative way of achieving the objectives of the Act should have been addressed and adequate reasons given for its abandonment."[17] Although an agency need not "consider *all* policy alternatives in reaching decision," NHTSA was required to consider this "technological alternative within the ambit of the existing standard."[18]

Second, NHTSA "was too quick to dismiss the safety benefits of automatic seatbelts."[19] Although the Court deferred to the agency's view that the existing evidence was insufficient to demonstrate that requiring cars to have automatic seatbelts would increase seatbelt usage, the agency nonetheless failed to "take … account of the critical difference between detachable automatic belts and current manual belts," which provided some "grounds to believe that seatbelt use by occasional users will be substantially increased."[20] The Court instructed the agency to "bear in mind that Congress intended safety to be the preeminent factor under the Motor Vehicle Safety Act," rather than cost and feasibility concerns.[21] Finally, NHTSA "failed to articulate a basis for not requiring *non*detachable belts," aside from generalized concerns about public opposition.[22]

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[16] *Id.* at 46, 48.

[17] *Id.* at 48.

[18] *Id.* at 51 (emphasis added).

[19] *Id.* Then-Justice Rehnquist, writing for four, dissented from this aspect of the Court's decision on the grounds that "the agency's explanation, while by no means a model, is adequate." *Id.* at 58. He also noted that the agency's change "seems to be related to the election of a new President of a different political party," which entitled the agency "to assess administrative records and evaluate priorities in light of the philosophy of the administration." *Id.* at 59.

[20] *Id.* at 54 (majority opinion).

[21] *Id.* at 55.

[22] *Id.* at 55 (emphasis added).

The Court therefore remanded the matter to NHTSA, directing the agency to "either consider the matter further or adhere to or amend" the standard "along lines which its analysis supports."[23] In other words, "if the agency [could] provide a rational explanation" on remand, the Court's opinion would not necessarily preclude the agency from "adher[ing] to its decision to rescind the entire standard."[24]

B. *State Farm*'s Legacy

State Farm provides the closest thing one can find to a black-letter statement of the contours of arbitrariness review. And yet one can extract from *State Farm* language supporting whatever standard of review one prefers.[25]

On the one hand, as noted above, *State Farm* instructs that "[t]he scope of review under the 'arbitrary and capricious' standard is narrow, and a court is not to substitute its judgment for that of the agency."[26] Under this "deferential" standard, a court "simply ensures that the agency has acted within a zone of reasonableness and, in particular, has reasonably considered the relevant issues and reasonably explained the decision."[27] The standard is "particularly deferential in matters … which implicate competing policy choices, technical expertise, and predictive market judgments,"[28] which one would think covers many areas of agency policymaking.

On the other hand, *State Farm* also requires the agency to "examine the relevant data and articulate a satisfactory explanation for its action."[29] That language is "widely taken to have ratified the hard look doctrine"[30] — the idea that "a reviewing court's task is not merely to rubber-stamp an agency decision," but "to ensure that the

[23] *Id.* at 34.

[24] *Id.* at 58 (Rehnquist, J., concurring in part and dissenting in part).

[25] The standard also depends on the nature of the agency action at issue. *See Am. Horse Prot. Ass'n, Inc. v. Lyng*, 812 F.2d 1, 4–5 (D.C. Cir. 1987) ("Review under the 'arbitrary and capricious' tag line, however, encompasses a range of levels of deference to the agency, and … an agency's refusal to institute rulemaking proceedings is at the high end of the range.") (quotations omitted). For the most part, this Issue Brief focuses on arbitrary-and-capricious review of informal agency rulemaking.

[26] *State Farm*, 463 U.S. at 43.

[27] *FCC v. Prometheus Radio Project*, 592 U.S. 414, 423 (2021).

[28] *AD HOC Telecom. Users Comm. v. FCC*, 572 F.3d 903, 908 (D.C. Cir. 2009).

[29] *State Farm*, 463 U.S. at 43.

[30] Thomas J. Miles & Cass R. Sunstein, *The Real World of Arbitrariness Review*, 75 U. Chi. L. Rev. 761, 772 (2008).

agency took a 'hard look' at all relevant issues and considered reasonable alternatives to its decided course of action."[31] The court must therefore "engage in a 'searching and careful' inquiry of the record" to ensure that the agency performed its task.[32] As the Fifth Circuit has put it, that standard is not "toothless";[33] to the contrary, it has "serious bite."[34]

Indeed, several recent cases have given arbitrariness review even greater potency for litigants seeking to challenge agency action.[35]

First, under the "change-in-position doctrine," the Supreme Court has scrutinized agency changes in position more rigorously.[36] Although one could see a preview in *State Farm*, the doctrine is commonly (and somewhat ironically) understood to have premiered in *FCC v. Fox Television Stations*. *Fox* held that an agency changing its policy "must show that there are good reasons for the new policy," but that it "need not demonstrate to a court's satisfaction that the reasons for the new policy are *better* than the reasons for the old one."[37] However, *Fox* went on to note that an agency "must" provide a "more detailed justification" for changing policy when "its new policy rests upon factual findings that contradict those which underlay its prior policy[] or when its prior policy has engendered serious reliance interests that must be taken into account."[38] The change-in-position doctrine played a pivotal role in *DHS v. Regents*, which set aside the Trump administration's rescission of the Deferred Action for Childhood Arrivals program because the administration had, among other

[31] *Neighborhood TV Co. v. FCC*, 742 F.2d 629, 639 (D.C. Cir. 1984); *see also Greater Bos. Television Corp. v. FCC*, 444 F.2d 841, 851 (D.C. Cir. 1970) (explaining that a court must intervene if it "becomes aware, especially from a combination of danger signals, that the agency has not really taken a 'hard look' at the salient problem").

[32] *Ohio Valley Envtl. Coal. v. Aracoma Coal Co.*, 556 F.3d 177, 192 (4th Cir. 2009) (quoting *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971)).

[33] *Sw. Elec. Power Co. v. EPA*, 920 F.3d 999, 1013 (5th Cir. 2019).

[34] *Texas v. United States*, 40 F.4th 205, 226 (5th Cir. 2022).

[35] However, *Loper Bright Enterprises v. Raimondo* is not one of them. *Loper Bright* eliminated *Chevron* deference, under which courts would defer to an agency's interpretation of ambiguous statutory text, but left the "deferential" arbitrary-and-capricious standard intact. *See* 603 U.S. 369, 392 (2024) ("Section 706 *does* mandate that judicial review of agency policymaking and factfinding be deferential.").

[36] *FDA v. Wages & White Lion Invs., LLC*, 145 S. Ct. 898, 916 (2025).

[37] 556 U.S. 502, 515 (2009).

[38] *Id.*; *see also Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 222 (2016) (setting aside change of position where there had been "decades of industry reliance").

things, failed to consider the reliance interests of DACA recipients, their families, and their communities.[39]

Second, the Supreme Court has rejected agency action based on pretextual reasoning. In *Department of Commerce v. New York*, the Court held that the Department of Commerce behaved arbitrarily when it articulated a basis for adding a citizenship question to the 2020 Census — the Department of Justice's purported need for citizenship data to aid Voting Rights Act enforcement — that "seems to have been contrived."[40] "The reasoned explanation requirement of administrative law, after all, is meant to ensure that agencies offer genuine justifications for important decisions, reasons that can be scrutinized by courts and the interested public."[41] Given the Trump administration's propensity to take action for ulterior motives,[42] the newly coined pretext doctrine may provide a fruitful avenue for challenges.

Third, the Supreme Court has held agencies to an increasingly high bar for responding to objections presented in comments on proposed rules. In *Ohio v. EPA*, the Court stayed a plan that imposed emissions requirements for 23 states because EPA allegedly failed to consider whether the analysis supporting the plan would remain valid if some states dropped out.[43] When EPA pointed to a severability provision indicating that the agency was aware of that possibility, the Court responded that "awareness is not itself an explanation," and that "EPA's response did not address the applicants' concern so much as sidestep it."[44] Justice Barrett, joined in dissent by the three liberal justices, noted that the Court's decision was predicated on a "dresse[d]-up" reading of a single comment — one of "hundreds" to which EPA responded in "nearly 1,100 pages."[45] Taken at face value, the Court's approach in *EPA* could make it difficult for agencies to craft rules that survive review.

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[39] 591 U.S. 1, 30–31 (2020).

[40] 588 U.S. 752, 784 (2019).

[41] *Id.* at 785; *see also Challenging Agency Action Based on Pretextual Reasons*, Governing for Impact (May 2025), https://governingforimpact.org/apa-library/.

[42] *See, e.g.*, Erich Wagner, *Judge: Trump's National Security Reasoning for Anti-Union EO Was 'Pretext for Retaliation,'* Gov. Exec. (Apr. 29, 2025), https://www.govexec.com/workforce/2025/04/judge-trumps-national-security-reasoning-anti-union-eo-was-pretext-retaliation/404930/.

[43] 603 U.S. 279, 293–93 (2024).

[44] *Id.* at 295; *see also Remedies*, Governing for Impact (May 2025), https://governingforimpact.org/apa-library/.

[45] *Ohio*, 603 U.S. at 318 (Barrett, J., dissenting).

III. NINE WAYS TO CHALLENGE AN ACTION AS ARBITRARY

The breadth and malleability of arbitrariness review is reflected in the multitude of grounds upon which courts have set aside arbitrary-and-capricious agency action. These grounds can be grouped into nine categories, as detailed below, but they are not exclusive and, as illustrated below, may often overlap. Nor do they constitute a set of "rules" that courts will invariably follow in assessing agency action—indeed, some are in tension with one another (like when and how an agency is supposed to consider costs).

In all circumstances, a court's analysis will likely focus on whether the agency's failure to explain or address a particular point rendered its decision so unreasoned as to be arbitrary. From a strategic perspective, litigants might want to strike a careful balance between identifying all of an agency's errors (to create the impression that its decision is riddled with mistakes) and focusing on the errors that are most egregious (to avoid seeming to throw things at the wall to see what sticks). Note, however, that if an agency provides multiple independent justifications for a decision, challenging only one may not suffice: "[w]hen an agency relies on multiple grounds for its decision, some of which are invalid, [a court] may nonetheless sustain the decision as long as one is valid and the agency would clearly have acted on that ground even if the other were unavailable."[46] Yet the latter requirement has bite: "when an agency relies on two theories, one of them unsound, [courts] usually remand unless [they] are quite sure that the agency regards the remaining reason as sufficient."[47] Litigants therefore might note where an agency has not clearly stated that it is relying on independently adequate grounds.

[46] *Fontem US, LLC v. FDA*, 82 F.4th 1207, 1217 (D.C. Cir. 2023).

[47] *Williston Basin Interstate Pipeline Co. v. FERC*, 519 F.3d 497, 504 (D.C. Cir. 2008); *see Int'l Union, United Mine Workers of Am. v. U.S. Dep't of Lab.*, 358 F.3d 40, 44 (D.C. Cir. 2004).

A. Failures of Explanation

As *State Farm* made clear, the most basic mistake an agency can make is failing to "articulate a satisfactory explanation for its action."[48] Because "[o]ne of the basic procedural requirements of administrative rulemaking is that an agency must give adequate reasons for its decisions,"[49] "[t]he APA's arbitrary-and-capricious standard requires that agency action be reasonable and reasonably explained."[50] Of course, the degree of explanation required will depend upon the relative formality and significance of the agency's action. For substantial rules, an explanation typically involves a preamble that may extend hundreds of pages in the *Federal Register*.

An agency's explanation also needs to reflect its contemporaneous grounds for the decision, rather than a *post hoc* rationalization (forbidden under *Chenery*). That explanation must be detailed enough to "enable the court to evaluate the agency's rationale at the time of decision."[51] The Fifth Circuit has even indicated that "the fact that an agency provided a *post hoc* rationalization is relevant evidence that the action is arbitrary and capricious,"[52] although it does not appear that other courts have adopted that approach. Finally, as mentioned above, the grounds provided by the agency must reflect the agency's *actual* reasons for decision, rather than a mere pretext—"accepting contrived reasons would defeat the purpose of the enterprise."[53]

B. Considering the Wrong Factors

Even where an agency has explained its decision, that explanation may suffer from various deficiencies in reasoning. Chief among those are circumstances where, as *State Farm* described, an agency "relied on factors which Congress has not intended

[48] 463 U.S. at 43.

[49] *Encino*, 579 U.S. at 221.

[50] *Prometheus Radio Project*, 592 U.S. at 423.

[51] *Physicians for Soc. Resp. v. Wheeler*, 956 F.3d 634, 648 (D.C. Cir. 2020) (quoting *Pension Benefit Guaranty Corp. v. LTV Corp.*, 496 U.S. 633, 654 (1990)).

[52] *Data Mktg. P'ship, LP v. U.S. Dep't of Lab.*, 45 F.4th 846, 856 (5th Cir. 2022).

[53] *New York*, 588 U.S. at 785; *see also Challenging Agency Action Based on Pretextual Reasons*, Governing for Impact (May 2025), https://governingforimpact.org/apa-library/.

it to consider" or "entirely failed to consider an important aspect of the problem."[54] Much arbitrary-and-capricious litigation turns over which factors the agency was required to consider, as well as related questions like which values the agency was required to prioritize and which objectives it was required to pursue. An agency must also show that it actually considered the relevant factor—simply "[s]tating that a factor was considered … is not a substitute for considering it."[55]

The most straightforward scenario is where Congress has specifically instructed an agency to prioritize certain factors, like safety, economic effects, or environmental protection. "A statutorily mandated factor, by definition, is an important aspect of any issue before an administrative agency, as it is for Congress in the first instance to define the appropriate scope of an agency's mission."[56] Congress may sometimes even require an agency to make specific findings, which courts review by asking "whether the agency has reached an 'express and considered conclusion' pursuant to the statutory mandate."[57] Even where a statute does not expressly require an agency to consider any particular factors, the agency's actions still cannot be "unmoored from the purposes and concerns" of the statute as a whole.[58]

Agencies are also required to consider other "important aspects" of a problem, which will necessarily depend on the specific issue before the agency. "Important aspects" can include everything from other overarching values or objectives,[59] to the potential consequences of agency decisions,[60] to flaws in an agency's method or analysis.[61] It is difficult to define "important" in an all-encompassing or trans-substantive way, other than to say it describes anything that a reasonable decisionmaker would consider in reaching a decision about an issue. Among other things, cost is frequently deemed to be an "important aspect" even if not specifically identified by statute

[54] 463 U.S. at 43.

[55] *Getty v. Fed. Sav. & Loan Ins. Corp.*, 805 F.2d 1050, 1055 (D.C. Cir. 1986).

[56] *Pub. Citizen v. Fed. Motor Carrier Safety Admin.*, 374 F.3d 1209, 1216 (D.C. Cir. 2004); *see also Bus. Roundtable v. SEC*, 647 F.3d 1144, 1148 (D.C. Cir. 2011) (SEC behaved arbitrarily by failing "adequately to assess the economic effects of a new rule," as mandated by statute); *BNSF Ry. Co. v. Fed. R.R. Admin.*, 62 F.4th 905, 911 (5th Cir. 2023) ("The paucity of reasoning is especially glaring in the face of the agency's statutory mandate to prioritize safety.").

[57] *Cigar Ass'n of Am. v. FDA*, 964 F.3d 56, 61 (D.C. Cir. 2020).

[58] *Judulang v. Holder*, 565 U.S. 42, 64 (2011).

[59] *Spirit Airlines, Inc. v. U.S. Dep't of Transp.*, 997 F.3d 1247, 1255 (D.C. Cir. 2021).

[60] *SecurityPoint Holdings, Inc. v. Transportation Sec. Admin.*, 769 F.3d 1184, 1188 (D.C. Cir. 2014).

[61] *Am. Clinical Lab'y Ass'n v. Becerra*, 40 F.4th 616, 624 (D.C. Cir. 2022).

"because reasonable regulation ordinarily requires paying attention to the advantages *and* the disadvantages of agency decisions."[62] But note that even where cost is an "important factor," "cheapness alone cannot save an arbitrary agency policy."[63]

Congress may also specifically instruct the agency *not* to consider certain factors. Indeed, some statutes, "such as the Endangered Species Act and the Clean Air Act, actually prohibit agencies from considering economic costs when setting policy in certain areas."[64] Other factors are simply understood not to represent a permissible aspect of administrative decisionmaking, like racial or religious animus.[65] To that list, one might add other impermissible objectives, like the desire to retaliate against disfavored groups or to sabotage a statute or program. However, "a court may not set aside an agency's policymaking decision solely because it might have been influenced by political considerations or prompted by an Administration's priorities"[66] — after all, most agency decisions of consequence are.

When it comes to weighing different permissible factors, agencies generally possess "considerable discretion."[67] However, statutory factors must take precedence over non-statutory factors: "[w]hile [the Supreme Court] ha[s] held that it is not arbitrary or capricious to prioritize one statutorily identified objective over another, it is an entirely different matter to prioritize non-statutory objectives to the exclusion of the statutory purpose."[68]

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[62] *Michigan v. EPA*, 576 U.S. 743, 753 (2015); *see also Mexican Gulf Fishing Co. v. U.S. Dep't of Com.*, 60 F.4th 956, 973 (5th Cir. 2023) (explaining that complying with *State Farm* requires "of course, considering the costs and benefits associated with the regulation").

[63] *Judulang*, 565 U.S. at 63–64; *see also Pub. Citizen, Inc. v. Mineta*, 340 F.3d 39, 58 (2d Cir. 2003) ("The notion that 'cheapest is best' is contrary to *State Farm*.").

[64] Reeve Bull & Jerry Ellig, *Judicial Review of Regulatory Impact Analysis: Why Not the Best?*, 69 Admin. L. Rev. 725, 760 (2017); *see also Nat. Res. Def. Council, Inc. v. EPA*, 824 F.2d 1146, 1165 (D.C. Cir. 1987) ("This determination must be based solely upon the risk to health. The Administrator cannot under any circumstances consider cost and technological feasibility at this stage of the analysis.").

[65] *Harris v. City of Wichita*, 74 F.3d 1249, at *4 (10th Cir. 1996) (tbl.); *see also Alshrafi v. Am. Airlines, Inc.*, 321 F. Supp. 2d 150, 162 (D. Mass. 2004) ("[A]ctions motivated by racial or religious animus are necessarily arbitrary and capricious.").

[66] *New York*, 588 U.S. at 781.

[67] *Sinclair Wyoming Ref. Co. LLC v. EPA*, 101 F.4th 871, 887 (D.C. Cir. 2024).

[68] *Gresham v. Azar*, 950 F.3d 93, 104 (D.C. Cir. 2020), *vacated & remanded sub nom. Becerra v. Gresham*, 142 S. Ct. 1665, 212 L. Ed. 2d 576 (2022).

C. Logical Errors

Once an agency has identified the proper factor or factors, it must also analyze them in a reasonable manner. In general, "[t]he agency must articulate a rational connection between the facts found and the choice made."[69] An agency must explain, for example, *how* its chosen policy will achieve a given objective, or *why* it chose to draw a line in one place rather than another.

Among other things, an agency cannot fail to substantiate core parts of its reasoning. "An unjustified leap of logic or unwarranted assumption … can erode any pillar underpinning an agency action, whether constructed from the what-is or the what-may-be."[70] Thus, "where an agency has articulated no reasoned basis for its decision—where its action is founded on unsupported assertions or unstated inferences—[courts] will not abdicate the judicial duty carefully to review the record to ascertain that the agency has made a reasoned decision based on reasonable extrapolations from some reliable evidence."[71]

Moreover, an agency's "reasoning cannot be internally inconsistent"[72]—for example, by adopting a premise for one part of its argument that the agency denies for another. "Such self-contradictory, wandering logic does not constitute an adequate explanation" of agency action.[73] Courts have therefore routinely struck down agency action where an agency's reasoning was inconsistent or contradictory.[74] By the same token, "an agency must treat similar cases in a similar manner unless it can provide

[69] *Bowman Transp., Inc.*, 419 U.S. at 285.

[70] *Friends of Back Bay v. U.S. Army Corps of Eng'rs*, 681 F.3d 581, 588 (4th Cir. 2012).

[71] *Tripoli Rocketry Ass'n, Inc. v. ATF*, 437 F.3d 75, 83 (D.C. Cir. 2006) (quotations omitted).

[72] *ANR Storage Co. v. FERC*, 904 F.3d 1020, 1024 (D.C. Cir. 2018).

[73] *Farmers Union Cent. Exch., Inc. v. FERC,* 734 F.2d 1486, 1520 (D.C. Cir. 1984).

[74] *See, e.g.*, *Evergreen Shipping Agency (Am.) Corp. v. Fed. Mar. Comm'n*, 106 F.4th 1113, 1117–18 (D.C. Cir. 2024) ("This logical inconsistency alone renders the Commission's Order arbitrary and capricious."); *Am. Fed'n of Gov't Emps., AFL-CIO v. FLRA*, 25 F.4th 1, 5–6 (D.C. Cir. 2022) ("To start, the policy statement's description of the problem it seeks to solve is inconsistent.").

a legitimate reason for failing to do so,"[75] given the "bedrock principle of administrative law that an agency must 'treat like cases alike.'"[76]

D. Factual Errors

Courts have also invalidated agency actions lacking adequate factual support.[77] Naturally, "[r]eliance on facts that an agency knows are false at the time it relies on them is the essence of arbitrary and capricious decisionmaking."[78] But an agency's action may also be invalid if "it rests upon a factual premise that is unsupported by substantial evidence,"[79] or on nothing more than "speculation."[80] In reviewing agency action, a court cannot "defer to the agency's conclusory or unsupported suppositions."[81] Thus, an agency's appeal to its "expert judgment" is unavailing if it does not "point … to any data of the sort it would have considered if it had considered [the issue] in any meaningful way."[82]

To the extent the agency relies upon empirical or statistical studies, the manner in which it does so may be subject to challenge. In one prominent case, for example, the Fifth Circuit faulted an agency for relying "exclusively and heavily upon two

[75] *Indep. Petroleum Ass'n of Am. v. Babbitt*, 92 F.3d 1248, 1258 (D.C. Cir. 1996).

[76] *Univ. of Tex. M.D. Anderson Cancer Ctr. v. U.S. Dep't of Health & Hum. Servs.*, 985 F.3d 472, 479 (5th Cir. 2021) (quoting 32 Charles Alan Wright & Charles H. Koch, Federal Practice & Procedure § 8248, at 431 (2006)).

[77] Separately, Section 706(2)(E) requires the court to set aside action "unsupported by substantial evidence" in certain so-called "formal" proceedings (those involving trial-type procedures, which are rarely required). "The distinction between the substantial evidence test and the arbitrary or capricious test is largely semantic"; "[t]he distinctive function" of the substantial evidence prong is "is to require substantial evidence to be found *within the record of closed-record proceedings* to which it exclusively applies." *Ass'n of Data Processing Serv. Organizations, Inc. v. Bd. of Govs. of Fed. Rsrv. Sys.*, 745 F.2d 677, 684 (D.C. Cir. 1984) (quotation omitted).

[78] *Missouri Pub. Serv. Comm'n v. FERC*, 337 F.3d 1066, 1075 (D.C. Cir. 2003); *see also Envt'l Def. Fund v. EPA*, 922 F.3d 446, 454 (D.C. Cir. 2019) ("An agency acts arbitrarily and capriciously when it offers inaccurate or unreasoned justifications for a decision.").

[79] *Genuine Parts Co. v. EPA*, 890 F.3d 304, 346 (D.C. Cir. 2018).

[80] *Delaware Dep't of Nat. Res. & Env't Control v. EPA*, 785 F.3d 1, 11 (D.C. Cir. 2015).

[81] *United Techs. Corp. v. U.S. Dep't of Def.*, 601 F.3d 557, 562 (D.C. Cir. 2010) (quoting *McDonnell Douglas Corp. v. Dep't of the Air Force*, 375 F.3d 1182, 1187 (D.C. Cir. 2004)).

[82] *Nat'l Treasury Emps. Union v. Horner*, 854 F.2d 490, 499 (D.C. Cir. 1988).

relatively unpersuasive studies."[83] Similarly, "[p]roperly analyzing the risks of an action requires an agency to use updated information or data."[84] Courts have also flagged excess reliance upon data provided by private parties, which may be biased or otherwise unreliable, as potentially arbitrary. "An agency abdicates its role as a rational decision-maker if it does not exercise its own judgment, and instead cedes near-total deference to private parties' estimates."[85]

Agency analyses may also be flawed to the extent they are predicated on unwarranted assumptions. Agencies always bear the "affirmative burden" of "examining a key assumption" when "promulgating and explaining a non-arbitrary, non-capricious rule."[86] An agency's decision has been held to be arbitrary where, for example, it "rel[ies] on an economic assumption, which contradicted basic economic principles."[87] Moreover, an agency "may not tolerate needless uncertainties in its central assumptions when the evidence fairly allows investigation and solution of those uncertainties."[88] Similarly, an agency will sometimes need to assess the status quo — the so-called "baseline" — to determine whether its action is likely to yield an improvement. In such cases, "[a] material misapprehension of the baseline conditions existing in advance of an agency action can lay the groundwork for an arbitrary and capricious decision."[89] Finally, "[a]n agency's use of a model is arbitrary if that model bears no rational relationship to the reality it purports to represent."[90]

Finally, agencies must explain how they dealt with contrary evidence. Courts "have not hesitated to vacate a rule when the agency has not responded to empirical data or to an argument inconsistent with its conclusion."[91] An agency must explain how it balanced the evidence before it, and why it decided to utilize some pieces of evidence

[83] *Bus. Roundtable*, 647 F.3d at 1151; *see also Bedford Cnty. Mem'l Hosp. v. Health & Hum. Servs.*, 769 F.2d 1017, 1022 (4th Cir. 1985).

[84] *City of Dallas, Tex. v. Hall*, 562 F.3d 712, 720 (5th Cir. 2009).

[85] *Texas Off. of Pub. Util. Couns. v. FCC*, 265 F.3d 313, 328 (5th Cir. 2001).

[86] *Hisp. Affs. Project v. Acosta*, 901 F.3d 378, 389 (D.C. Cir. 2018) (quotations and alterations omitted).

[87] *WildEarth Guardians v. United States Bureau of Land Mgmt.*, 870 F.3d 1222, 1237 (10th Cir. 2017); *see also MISO Transmission Owners v. FERC*, 45 F.4th 248, 264 (D.C. Cir. 2022).

[88] *Nat. Res. Def. Council, Inc. v. Herrington,* 768 F.2d 1355, 1391 (D.C. Cir. 1985).

[89] *Friends of Back Bay*, 681 F.3d at 588.

[90] *Columbia Falls Aluminum Co. v. EPA*, 139 F.3d 914, 923 (D.C. Cir. 1998) (quotation omitted).

[91] *Comcast Corp. v. FCC*, 579 F.3d 1, 8 (D.C. Cir. 2009).

but not others.[92] The agency also has "an obligation to deal with newly acquired evidence in some reasonable fashion,"[93] or to "reexamine" its approach "if a significant factual predicate" changes.[94]

Several words of caution are in order, however. "A reviewing court must generally be at its most deferential" when an agency is regulating on highly technical or scientific subjects, including when the agency "is making predictions, within its area of special expertise, at the frontiers of science."[95] Moreover, "[t]he APA imposes no general obligation on agencies to conduct or commission their own empirical or statistical studies," as opposed to relying upon existing studies and data.[96] And courts have recognized that "an agency need not—indeed cannot—base its every action upon empirical data."[97] To circumvent these barriers, litigants might focus on identifying flaws in an agency's studies, or presenting additional studies that the agency will then be required to grapple with, or identifying how an agency could easily have obtained additional data, but chose not to.

E. Legal Errors

An agency may also make legal errors in articulating its chosen course of action.[98] For example, it may erroneously conclude that certain options are legally required or prohibited, or that Congress intended for the agency to prioritize certain factors over others. "[A]n order may not stand if the agency has misconceived the law,"[99] which

[92] *See, e.g.*, *City of Port Isabel v. FERC*, 111 F.4th 1198, 1214 (D.C. Cir. 2024) (FERC order arbitrary for failing to use closer air quality monitor); *Env't Health Tr. v. FCC*, 9 F.4th 893 (D.C. Cir. 2021) (FCC order arbitrary for "failure to respond to record evidence" of harms of radiation exposure).

[93] *Catawba Cnty. v. EPA,* 571 F.3d 20, 45 (D.C. Cir. 2009).

[94] *Bechtel v. FCC,* 957 F.2d 873, 881 (D.C. Cir. 1992).

[95] *Baltimore Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 103 (1983).

[96] *Prometheus Radio Project*, 592 U.S. at 427.

[97] *Chamber of Com. of U.S. v. SEC*, 412 F.3d 133, 142 (D.C. Cir. 2005).

[98] In addition to prohibiting "arbitrary" and "capricious" agency action, Section 706(2)(A) also prohibits agency action "not in accordance with law" (or "contrary to law," as it is sometimes called). One way of framing the distinction between action that is arbitrary and capricious because it is based on erroneous legal reasoning and action that is not in accordance with law is that action in the former category might be permissible, if the agency had not made errors in its reasoning, while action in the latter category is impermissible because it violates or is inconsistent with some statutory or constitutional requirement.

[99] *Chenery I*, 318 U.S. at 94.

means that "[a]n agency decision cannot be sustained … where it is based not on the agency's own judgment but on an erroneous view of the law."[100] Put differently, "an agency regulation must be declared invalid, even though the agency might be able to adopt the regulation in the exercise of its discretion, if it 'was not based on the [agency's] own judgment but rather on the unjustified assumption that it was Congress' judgment that such [a regulation is] desirable.'"[101] In this respect, arbitrary-and-capricious review may serve the function of forcing agencies to own their policy choices, rather than hiding behind incorrect legal theories.[102]

F. Failures to Consider Alternatives

Even where an agency is able to articulate why it decided to take a certain action, it may have failed to compare that action against other available approaches. In holding that NHTSA unreasonably failed to consider mandatory airbags because it was a "technological alternative within the ambit of the [agency's] existing standard," *State Farm* provided the basic framework for evaluating whether an agency sufficiently considered alternatives.[103] To be sure, an agency is not required to address "every alternative device and thought conceivable by the mind of man … regardless of how uncommon or unknown that alternative may have been."[104] But "[a]n agency *is* required to consider responsible alternatives to its chosen policy and to give a reasoned explanation for its rejection of such alternatives," so long as they are both "significant and viable."[105]

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[100] *Prill v. NLRB*, 755 F.2d 941, 947 (D.C. Cir. 1985); *see, e.g.*, *United States v. Ross*, 848 F.3d 1129, 1134 (D.C. Cir. 2017); *Safe Air for Everyone v. EPA*, 488 F.3d 1088, 1101 (9th Cir. 2007).

[101] *Planned Parenthood Fed'n of Am., Inc. v. Heckler*, 712 F.2d 650, 666 (D.C. Cir. 1983) (Bork, J., concurring) (quoting *FCC v. RCA Communications, Inc.*, 346 U.S. 86, 96 (1953)). To the extent an agency premises its decision to rescind a policy on the perceived risk of litigation, courts have also called those justifications into question. *See, e.g.*, *Regents*, 591 U.S. at 24 n.4 ("[G]iven the Attorney General's conclusion that the policy was unlawful … it is difficult to see how the risk of litigation carried any independent weight."); *NAACP v. Trump*, 298 F. Supp. 3d 209, 234–35 (D.D.C. 2018) ("[T]his concern does not withstand review under the familiar arbitrary and capricious standard.").

[102] *See* Benjamin Eidelson, *Reasoned Explanation and Political Accountability in the Roberts Court*, 130 Yale L.J. 1748, 1753 (2021).

[103] 463 U.S. at 51 (emphasis added).

[104] *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council,* 435 U.S. 519, 551 (1978).

[105] *Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 242 (D.C. Cir. 2008) (quotations omitted) (emphasis added); *see also* Daniel T. Deacon, *Responding to Alternatives*, 122 Mich. L. Rev. 671 (2024).

This obligation applies even when an agency believes that its decision is in some way legally compelled, as when an agency rescinds a rule that it believes to be unlawful. "[D]eciding how best to address a finding of illegality moving forward can involve important policy choices," including whether to retain other lawful parts of a program.[106] Thus, "even when an agency determines that its previous decision was illegal, it *still* must go on to consider alternatives to simply revoking the prior action."[107] This principle may be particularly relevant given the Trump administration's stated intent to quickly repeal what it believes to be "unlawful" regulations.[108]

G. Failures to Respond to Comments

Where an agency engages in notice-and-comment rulemaking, it must also demonstrate that it reasonably considered the comments that were submitted, although it "need not address every comment."[109] "An agency must … demonstrate the rationality of its decision-making process by responding to those comments that are relevant and significant."[110] Courts have framed the pertinent standard in a variety of ways, some perhaps more favorable to litigants than others—e.g., as a requirement that "an agency must respond to comments 'that can be thought to challenge a fundamental premise' underlying the proposed agency decision,"[111] or to respond to "comments which, if true, … would require a change in an agency's proposed rule.'"[112]

Moreover, an agency cannot simply identify issues in comments without substantively addressing them. "Nodding to concerns raised by commenters only to

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[106] *Regents*, 591 U.S. at 25.

[107] *Louisiana v. U.S. Dep't of Energy*, 90 F.4th 461, 476 (5th Cir. 2024).

[108] *See Directing the Repeal of Unlawful Regulations*, Presidential Mem. (Apr. 9, 2025), https://perma.cc/YJF4-LT5X; *Rapid Response: Presidential Memorandum on "Directing the Repeal of Unlawful Regulations,"* Governing for Impact (Apr. 2025), https://governingforimpact.org/wp-content/uploads/2025/04/Rapid-Response-re-Directing-the-Repeal-of-Unlawful-Regulations-final.pdf.

[109] *City of Waukesha v. EPA*, 320 F.3d 228, 257 (D.C. Cir. 2003).

[110] *Grand Canyon Air Tour Coal. v. FAA*, 154 F.3d 455, 468 (D.C. Cir. 1998).

[111] *Carlson v. Postal Regul. Comm'n*, 938 F.3d 337, 344 (D.C. Cir. 2019) (quoting *MCI WorldCom, Inc. v. FCC*, 209 F.3d 760, 765 (D.C. Cir. 2000)).

[112] *ACLU v. FCC*, 823 F.2d 1554, 1581 (D.C. Cir. 1987).

dismiss them in a conclusory manner is not a hallmark of reasoned decisionmaking."[113] Thus, "[a]n agency's response to public comments … must be sufficient to enable the courts to see what major issues of policy were ventilated … and why the agency reacted to them as it did."[114] Otherwise, an agency could simply "sidestep" any significant concerns — the issue that troubled the Court in *Ohio*.[115]

H. Unjustified Changes of Policy

As explained above, an agency's decision to change an existing policy is often held to a more rigorous standard, notwithstanding what the Supreme Court actually said in *Fox*. As the Court recently reiterated in *Wages & White Lion Investments*, the first question in applying the "change-in-position doctrine" is "whether an agency changed existing policy."[116] That may have occurred where, for example, an agency acts "inconsistent with an earlier position, performs a reversal of its former views as to the proper course, or disavows prior inconsistent agency action as no longer good law."[117] Even where an agency is not reversing a settled or crystallized position, it may be required to explain how it reconciles its decision with its prior actions.[118]

"Once a change in agency position is identified, the doctrine poses a second question: Did the agency display awareness that it *is* changing position and offer good reasons for the new policy?"[119] "An agency may not, for example, depart from a prior policy *sub silentio* or simply disregard rules that are still on the books,"[120] and "an agency changing its course must supply a reasoned analysis indicating that prior policies and

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[113] *Gresham*, 950 F.3d at 103; *see also* Ronald M. Levin, *The Duty to Respond to Rulemaking Comments*, 134 Yale L.J. Forum 821 (2025).

[114] *Bloomberg L.P. v. SEC*, 45 F.4th 462, 476–77 (D.C. Cir. 2022).

[115] 603 U.S. at 295.

[116] 145 S. Ct. at 918.

[117] *Id.* (quotations omitted and alterations adopted).

[118] *Physicians for Soc. Resp.*, 956 F.3d at 644 ("Reasoned decision-making requires that when departing from precedents or practices, an agency must 'offer a reason to distinguish them or explain its apparent rejection of their approach.'") (quoting *Southwest Airlines Co. v. FERC*, 926 F.3d 851, 856 (D.C. Cir. 2019); *see also Am. Wild Horse Pres. Campaign v. Perdue*, 873 F.3d 914, 927 (D.C. Cir. 2017) ("The Service's failure even to acknowledge its past practice and formal policies regarding the Middle Section, let alone to explain its reversal of course in the 2013 decision, was arbitrary and capricious.").

[119] *Wages & White Lion Invs.*, 145 S. Ct. at 918.

[120] *Fox*, 556 U.S. at 515.

standards are being deliberately changed, not casually ignored."[121] In addition to noting the change in course, *Fox* instructs that an agency changing position must also provide a "more detailed justification" when "its new policy rests upon factual findings that contradict those which underlay its prior policy[] or when its prior policy has engendered serious reliance interests that must be taken into account."[122] Both prongs might be fruitful for litigants seeking to challenge agency reversals, particularly given the Trump administration's stated intent to rescind regulations with great speed.[123]

As to factual findings, courts have required agencies to reconcile their policy change with findings or statements made in prior decisions or rulemaking proceedings.[124] That may be particularly difficult for the agency to do where its change in course rests on an "identical factual record," rather than some new set of facts.[125] Litigants might therefore review prior rulemakings and agency statements carefully to look for instances where the agency, perhaps under a prior administration, took a diametrically opposed view of the issue. What constitutes a "factual finding" may also be open to debate. The Fifth Circuit, for instance, has treated the "quantum of risk assessed by an agency" — i.e., the agency's assessment of the likely harms that will occur because of or in the absence of the agency's action — as a factual finding.[126]

As to reliance interests, agencies are "required to assess whether there were reliance interests, determine whether they were significant, and weigh any such interests against competing policy concerns."[127] In *Regents*, for example, DHS was required to consider the reliance interests of immigrants, their families, and their

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[121] *Lone Mountain Processing, Inc. v. Sec'y of Lab.*, 709 F.3d 1161, 1164 (D.C. Cir. 2013); *see also Encino*, 579 U.S. at 222 ("It follows that an '[u]nexplained inconsistency' in agency policy is 'a reason for holding an interpretation to be an arbitrary and capricious change from agency practice.'") (quoting *Nat'l Cable & Telecomms. Assn. v. Brand X Internet Servs.*, 545 U.S. 967, 981–82 (2005)).

[122] *Fox*, 556 U.S. at 515.

[123] *See* Coral Davenport, *Inside Trump's Plan to Halt Hundreds of Regulations*, N.Y. Times (Apr. 15, 2025), https://www.nytimes.com/2025/04/15/us/politics/trump-doge-regulations.html.

[124] *See, e.g.*, *R.J. Reynolds Vapor Co. v. FDA*, 65 F.4th 182, 192 (5th Cir. 2023) ("When rejecting RJRV's evidence in the Denial Order, the FDA brushed over its prior statements about the low popularity of menthol-flavored e-cigarettes among youth and substantial benefits for cigarette smokers who make the switch.").

[125] *Organized Vill. of Kake v. U.S. Dep't of Agric.*, 795 F.3d 956, 959 (9th Cir. 2015) (en banc).

[126] *Nat'l Ass'n of Manufacturers v. SEC*, 105 F.4th 802, 811 (5th Cir. 2024).

[127] *Regents*, 591 U.S. at 33.

communities upon DACA.[128] The Court squarely rejected the government's assertion that it did not need to consider any such interests on the theory DACA did not confer any "substantive rights" and "provided benefits only in two-year increments, noting the lack of "any legal authority establishing that such features automatically preclude reliance interests."[129] More broadly, courts have invalidated agency actions for failures to consider reliance interests where parties have made decisions or structured relationships based on an agency's prior course of action.[130] Note, however, that "the fact that a regulated entity has relied on an agency decision does not bar the agency from reconsidering that decision" — it simply requires the agency to provide a more robust explanation.[131]

I. Decisions that Are "So Implausible"

This category of challenges is the most amorphous — whether, as *State Farm* put it, the agency's decision "is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."[132] There appear to be very few cases relying upon this aspect of *State Farm*, and it is difficult to conceive of an agency decision that could be sufficiently implausible without also committing some of the errors described above. However, at least one case invoked that language in holding that a Medicare reimbursement policy was "so implausible that it does not represent reasonable administration of the Medicare program."[133] To the extent this prong has any real utility, it may just reflect the *State Farm* Court's awareness that some agency decisions may be so clearly wrong as to warrant invalidation.

[128] *Id.* at 31–32.

[129] *Id.* at 30–31.

[130] *See, e.g.*, *Kentucky v. EPA*, 123 F.4th 447, 470 (6th Cir. 2024) (EPA failed to consider how Kentucky relied upon prior modeling in crafting air-quality plan); *Cook Cnty., Illinois v. Wolf*, 962 F.3d 208, 233 (7th Cir. 2020) (DHS failed to consider "reliance interests of state and local governments" in prior policy regarding when immigrants are public charges); *Nat'l Lifeline Ass'n v. Fed. Commc'ns Comm'n*, 921 F.3d 1102, 1114 (D.C. Cir. 2019) (FCC failed to consider how telecommunications providers had "crafted business models and invested significant resources"); *see also* Haiyun Damon-Feng, *Administrative Reliance*, 73 Duke L.J. 1743 (2024).

[131] *Breeze Smoke, LLC v. FDA*, 18 F.4th 499, 504 (6th Cir. 2021)

[132] *State Farm*, 463 U.S. at 43.

[133] *Bedford Cnty. Mem'l Hosp.*, 769 F.2d at 1023.

IV. THE LIFECYCLE OF AN ARBITRARY-AND-CAPRICIOUS CHALLENGE

The categories described above cover the merits issues that are likely to arise in an arbitrary-and-capricious challenge. However, there are some unique aspects to bringing and litigating an arbitrary-and-capricious challenge that litigants might wish to note.

With respect to rulemaking, the groundwork for a successful arbitrary-and-capricious challenge is often laid during the notice-and-comment process, before the agency has issued a final rule. "To preserve an objection to agency rulemaking for judicial review, courts generally require the argument petitioner advances to have been raised before the agency; it is not enough to have just asserted the same general legal issue."[134] That requirement, however, is "prudential and must be applied flexibly."[135] "Still, it is one thing to preserve a point for judicial review and quite another to raise the issue with sufficient force to require an agency to formally respond."[136] Prospective litigants might strive to make their comments as detailed and substantive as possible to increase the likelihood that a reviewing court will require a thorough response.[137]

Any eventual litigation will focus on "evaluating the agency's contemporaneous explanation in light of the existing administrative record."[138] As mentioned above, the length and rigor of such an explanation will depend upon the nature of the agency

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[134] *Hisp. Affs. Project*, 901 F.3d at 388–89; *see also Nat'l Wildlife Fed'n v. EPA*, 286 F.3d 554, 562 (D.C. Cir. 2002) ("It is well established that issues not raised in comments before the agency are waived and this Court will not consider them.").

[135] *Fertilizer Inst. v. EPA*, 935 F.2d 1303, 1312 (D.C. Cir. 1991).

[136] *MCI WorldCom*, 209 F.3d at 765.

[137] *See Writing Adverse Comments*, Governing for Impact (May 2025), https://governingforimpact.org/apa-library/.

[138] *New York*, 588 U.S. at 781; *see also Regents*, 591 U.S. at 20 ("It is a 'foundational principle of administrative law' that judicial review of agency action is limited to 'the grounds that the agency invoked when it took the action.'") (quoting *Michigan*, 576 U.S. at 758).

action at issue. To enable the court to evaluate that explanation, an agency will generally compile the "administrative record," which "includes all materials compiled by the agency that were before the agency at the time the decision was made."[139] "An agency is entitled to a strong presumption of regularity that it properly designated the administrative record," but "may not skew the record by excluding unfavorable information."[140] For particularly complex rulemakings, the administrative record may consist of all of the comments submitted to the agency, as well as studies, data, past agency documents, and other materials—potentially as much as hundreds of thousands of pages.

There are, however, two exceptions to the principle that an arbitrary-and-capricious challenge is evaluated based on the existing record. First, a party may seek to "complete" the administrative record "by show[ing] that materials exist that were actually considered by the agency decision-makers but are not in the record as filed."[141] Second, a party may seek to "supplement" the administrative record by making a "strong showing of bad faith or improper behavior[,] or when the record is so bare that it prevents effective judicial review."[142] (Courts sometimes refer to both approaches as "supplementation," or speak in terms of when "extra-record evidence" may be introduced). In some cases, the agency will need to introduce additional materials, like declarations or testimony from agency officials, when "the record fails to adequately explain the challenged action."[143]

Once the administrative record has been prepared, the typical method for adjudicating an arbitrary-and-capricious challenge in district court is cross-motions for summary judgment.[144] Indeed, courts have frequently held that they cannot

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[139] *James Madison Ltd. by Hecht v. Ludwig*, 82 F.3d 1085, 1095 (D.C. Cir. 1996).

[140] *Dist. Hosp. Partners, L.P. v. Sebelius*, 971 F. Supp. 2d 15, 20 (D.D.C. 2013) (quotations omitted), *aff'd sub nom. Dist. Hosp. Partners, L.P. v. Burwell*, 786 F.3d 46 (D.C. Cir. 2015).

[141] *Comprehensive Cmty. Dev. Corp. v. Sebelius*, 890 F. Supp. 2d 305, 309 (S.D.N.Y. 2012).

[142] *Com. Drapery Contractors, Inc. v. United States*, 133 F.3d 1, 7 (D.C. Cir. 1998); *see also Challenging Agency Action Based on Pretextual Reasons*, Governing for Impact (May 2025), https://governingforimpact.org/apa-library/; *Challenging DOGE*, Governing for Impact (Feb. 2025), https://governingforimpact.org/wp-content/uploads/2025/02/Challenging-DOGE-Primer-final.pdf.

[143] *Empresa Cubana Exportadora de Alimentos y Productos Varios v. U.S. Dep't of Treasury*, 606 F. Supp. 2d 59, 68 (D.D.C. 2009) (collecting cases), *aff'd*, 638 F.3d 794 (D.C. Cir. 2011).

[144] Some statutes channel petitions for review of agency action to the courts of appeals, usually the D.C. Circuit or wherever the petitioner is located. *See, e.g.*, 42 U.S.C. § 7607. In those circumstances, arbitrary-and-capricious challenges typically unfold like appeals, although the substantive differences may be less than one would think.

resolve arbitrary-and-capricious claims at the motion-to-dismiss stage, before an administrative record has been prepared.[145] "When a plaintiff invokes the APA to seek review of an administrative agency's decision, however, she ordinarily presents a pure question of law, and thus, the standard articulated in Federal Rule of Civil Procedure 56 is inapplicable."[146] Instead, "[s]ummary judgment … serves as the mechanism for deciding, as a matter of law, whether the agency action is supported by the administrative record and otherwise consistent with the APA standard of review."[147]

For successful plaintiffs, there are also some unique remedial issues worth noting, including with respect to whether the court remands the rule to the agency with or without vacating it.[148] "Remand with vacatur is the ordinary remedy for unlawful agency action."[149] Yet the D.C. Circuit has "commonly remanded without vacating an agency's rule or order where the failure lay in lack of reasoned decisionmaking."[150] Whether to remand without vacatur will, as it often does, turn on the familiar *Allied-Signal* factors: (1) "the seriousness of the order's deficiencies (and thus the extent of doubt whether the agency chose correctly)" and (2) "the disruptive consequences of an interim change that may itself be changed."[151] Litigants might therefore take care to explain why the agency's errors are so fundamental as to make its order incapable of rehabilitation.

Either way, because an arbitrary-and-capricious challenge pertains to the manner in which the agency justified its choices rather than the agency's constitutional or statutory authority, the court's order will often leave open the possibility that the agency could reach the same decision after taking another look at the record.[152] Litigants should therefore recognize that a successful arbitrary-and-capricious challenge is not necessarily the end of the story. Nevertheless, requiring agencies to

[145] *See, e.g.*, *Farrell v. Tillerson*, 315 F. Supp. 3d 47, 69 (D.D.C. 2018) (collecting cases).

[146] *Las Americas Immigrant Advoc. Ctr. v. Wolf*, 507 F. Supp. 3d 1, 18 (D.D.C. 2020).

[147] *Id.* (quotation omitted).

[148] *See Remedies*, Governing for Impact (May 2025), https://governingforimpact.org/apa-library/.

[149] *Sierra Club v. U.S. Dep't of Transp.*, 125 F.4th 1170, 1186 (D.C. Cir. 2025).

[150] *Int'l Union, United Mine Workers of Am. v. Fed. Mine Safety & Health Admin.*, 920 F.2d 960, 966 (D.C. Cir. 1990).

[151] *Allied-Signal, Inc. v. U.S. Nuclear Regul. Comm'n*, 988 F.2d 146, 150 (D.C. Cir. 1993).

[152] *See Regents*, 591 U.S. at 20–21 (elaborating on the different ways in which an agency might choose to respond to a defeat in court); *State Farm*, 463 U.S. at 57 (recognizing that NHTSA could adhere to the same standard on remand).

adequately justify their decisions promotes accountability and may disrupt harmful policies. And agencies are frequently strapped for time and resources—meaning that the possibility of rehabilitation may often be more theoretical than real.

V. CONCLUSION

The fact that arbitrariness review is commonly understood to be deferential to the agency should not deter litigants from asserting arbitrary-and-capricious challenges in appropriate cases. To the contrary, the fact that arbitrariness review generally applies to all forms of agency action—and the seemingly infinite array of ways in which agencies can make mistakes, particularly in light of recent Supreme Court decisions—makes it an invaluable tool in the toolbox of administrative litigation.