GOVERNING FOR IMPACT

Remedies

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Issue Brief

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I. INTRODUCTION

> *The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.*[1]

Bringing a successful lawsuit against the federal government is not always as simple as prevailing on the merits of the case. Indeed, litigation against governmental defendants often involves significant and thorny questions of the appropriate remedy to which the plaintiff is entitled.

This Issue Brief outlines several remedies available to those challenging executive action, flagging issues litigants might consider as they decide which to seek. It begins by laying out important categories of equitable relief — with a particular focus on preliminary injunctions and temporary restraining orders (TRO), which have proven essential in reining in the Trump administration's unlawful conduct. This Issue Brief then discusses the remedies provided by the Administrative Procedure Act, the principal vehicle for challenging agency action.[2] Finally, it explores two strategic issues litigants might bear in mind: recent controversies over the permissible scope of remedies against executive action[3] and the extent to which unlawful provisions of rules may be severable from other unchallenged provisions.[4]

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[1] *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

[2] This Issue Brief focuses on remedies by which courts may generally declare executive action unlawful or require executive branch officials or agencies to take or refrain from particular actions. It does not discuss other remedial issues like (1) the availability of damages against federal officials, (2) attorneys' fees and costs, (3) statutes that limit the power of federal courts to issue equitable relief in certain circumstances, *see* 11A Fed. Prac. & Proc. Civ. § 2942 (3d ed. Apr. 2025 update), or (4) the availability of contempt when federal officials defy court orders, *see* Nicholas R. Parrillo, *The Endgame of Administrative Law: Governmental Disobedience and the Judicial Contempt Power*, 131 Harv. L. Rev. 685 (2018).

[3] *See generally* Samuel Bray, *The Universal Injunction Cases, Part I: The Origins Debate*, Divided Argument (May 7, 2025), https://substack.com/home/post/p-162811018.

[4] *See generally* Charles W. Tyler & E. Donald Elliot, *Administrative Severability Clauses*, 124 Yale L.J. 2286, 2349–52 (2015).

II. EQUITABLE REMEDIES

Litigants challenging executive action frequently seek equitable relief—a term that generally refers to a nonmonetary remedy "obtained when available legal remedies, [usually] monetary damages, cannot adequately redress the injury" alleged.[5] This section discusses two remedies common in such cases: injunctions and declaratory judgments.[6] It also discusses some of the considerations applicable to seeking such relief against the President, as opposed to subordinate officials or agencies.

A. Injunctions

An injunction is "[a] court order commanding or preventing an action."[7] Courts may issue two forms of injunctive relief over the course of a lawsuit: preliminarily, to prevent irreparable harm pending the disposition of the matter, or permanently, in the event the plaintiff prevails on the merits and damages are inadequate to remedy their harm.

General Principles Governing Preliminary Injunctions. Federal courts are empowered to grant two forms of interim injunctive relief: temporary restraining orders and preliminary injunctions.[8] The Supreme Court has cautioned that "[a] preliminary injunction is an extraordinary remedy never awarded as of right."[9] In practice, federal courts' "sound discretion" to grant preliminary injunctions is guided by four factors: "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that

[5] *Equitable Remedy*, Black's Law Dictionary (12th ed. 2024). Many challenges to executive action are brought under the APA. The remedies unique to those cases are discussed in the next section. Equitable relief might therefore be particularly relevant to *non*-APA challenges to executive action. *See Nonstatutory Review*, Governing for Impact (May 2025), https://governingforimpact.org/apa-library/.

[6] This Issue Brief groups declaratory judgments as equitable relief. For a discussion of whether declaratory relief is "neither strictly equitable nor legal" or "quintessential equitable relief," see *Simon v. Cooperative Educ. Serv. Agency #5*, 46 F.4th 602, 607–11 (7th Cir. 2022).

[7] *Injunction*, Black's Law Dictionary (12th ed. 2024).

[8] Fed. R. Civ. P. 65.

[9] *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 24 (2008).

an injunction is in the public interest."[10] Notably for those challenging executive action, "[t]he balance of harms and the public interest factors merge when the government is the opposing party."[11]

The weight and importance of each preliminary injunction factor will vary in a particular case, but generally "the first two factors, likelihood of success and of irreparable harm, [are] 'the most important' in the calculus."[12] As between these two, courts are inconsistent about which matters more. Often, "'the single most important prerequisite for the issuance of a preliminary injunction is a demonstration that if it is not granted the applicant is likely to suffer irreparable harm before a decision on the merits can be rendered.'"[13] Consequently, preliminary injunction movants must generally demonstrate harm that is "both certain and great."[14] But in some cases, courts treat "whether a movant has established a likelihood of success on the merits" as "the most important" preliminary injunction factor.[15] For instance, when a court determines that a government action likely infringes a plaintiff's constitutional rights, it may presume irreparable harm; "violations of plaintiff's constitutional rights constitute irreparable harm, even if the violations occur only for short periods of time."[16]

The third factor—the balance of the equities—is less likely to be independently determinative. It is commonly said in "balanc[ing] the parties' relative hardships," that "the government 'cannot suffer harm from an injunction that merely ends an unlawful practice,'"[17] but also, on the other hand, that "there is inherent harm to an agency in preventing it from enforcing regulations that Congress found it in the public interest

[10] *Id.* at 20, 24.

[11] *Trump v. Thompson*, 20 F.4th 10, 31 (D.C. Cir. 2021). The terms "balance of equities" and "balance of harms" refer to a court's assessment of the "hardship on plaintiff if relief is denied as compared to the hardship to defendant if it is granted." 11A Fed. Prac. & Proc. Civ. § 2492 (3d ed. Apr. 2025 update).

[12] *Bruns v. Mayhew*, 750 F.3d 61, 65 (1st Cir. 2014) (quoting *Gonzalez-Droz v. Gonzalez-Colon*, 573 F.3d 75, 79 (1st Cir. 2009)).

[13] *Sierra Club v. U.S. Army Corps of Engineers*, 990 F. Supp. 2d 9, 38 (D.D.C. 2013) (Jackson, J.) (quoting 11A Fed. Prac. & Proc. § 2948.1 (2d ed. 2013)).

[14] *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985).

[15] *Am. Foreign Serv. Ass'n v. Trump*, — F. Supp. 3d —, 2025 WL 1387331, at *7 (May 14, 2025).

[16] *Wilmer Cutler Pickering Hale and Dorr LLP v. Executive Office of the President*, — F. Supp. 3d —, 2025 WL 946979, at *1 (D.D.C. Mar. 28, 2025).

[17] *Massachusetts v. NIH*, — F. Supp. 3d —, 2025 WL 702163, at *31–32 (D. Mass. Mar. 5, 2025).

to direct that agency to develop and enforce."[18] Which of these formulations applies in a particular case, of course, depends on a court's assessment of the merits.

Preliminary Injunctions Involving Economic Harms. For those seeking a preliminary injunction against the government, monetary harms can qualify as irreparable. In the private litigation context, "financial injuries are rarely irreparable because they are presumptively remediable through monetary damages."[19] But damages are frequently unrecoverable from the government.[20] So, while courts do not regard trivial economic losses caused by government action as irreparable injuries, "[e]conomic harm may constitute irreparable injury … when 'the loss threatens the very existence of the movant's business'" or would otherwise "'cause extreme hardship.'"[21] That is consistent with the ordinary rule that an injury "'must be both certain and great'" to count as irreparable for preliminary injunction purposes.[22]

Climate United Fund v. Citibank illustrates this principle. There, "nonprofit financial institutes who, in April 2024, were awarded grant funding by the U.S. Environmental Protection Agency … to finance clean technology projects nationwide," had their federal funding "frozen" by the Trump administration.[23] The district court found that because "[t]he very purpose of Plaintiffs' existence and their business operations, including the financing for their projects, depends on their grant money," the loss of federal funding "would be an irreparable loss — one that threatens the very existence of Plaintiffs' businesses."[24]

Required Showing on the Merits. Some circuits apply a "sliding scale" approach to preliminary injunctions, according to which a strong showing of harm can counterbalance a weaker showing of likelihood of success. For instance, in the

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[18] *Cornish v. Dudas*, 540 F. Supp. 2d 61, 65 (D.C.C. 2008).

[19] *Clevinger v. Advocacy Holdings, Inc.*, 134 F.4th 1230, 1234 (D.C. Cir. 2025).

[20] *Perkins Coie LLP*, 2025 WL 1276857, at *48 (quoting *Xiaomi Corp v. Dep't of Def.*, 2021 WL 950144, at *10 (D.D.C. Mar. 12, 2021)) (collecting cases).

[21] *Air Transp. Ass'n of Am. v. Export-Import Bank of the U.S.*, 840 F. Supp. 2d 327, 335 (D.D.C. 2012) (quoting *Wisconsin Gas Co.*, 758 F.2d at 674, and *Gulf Oil Corp. v. Dep't of Energy*, 514 F. Supp. 1019, 1025 (D.C. Cir. 1981), and collecting cases).

[22] *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006) (quoting *Wisconsin Gas Co.*, 758 F.2d at 674).

[23] *Climate United Fund v. Citibank, N.A.*, — F. Supp. 3d —, 2025 WL 1131412, at *1 (D.D.C. Apr. 16, 2025), *administratively stayed in part*, 2025 WL 1123856 (D.C. Cir. Apr. 16, 2025).

[24] *Id.* at *17.

Second Circuit, a movant "must establish …'either (a) likelihood of success on the merits, or (b) sufficiently serious questions going to the merits of its claims to make them fair ground for litigation, plus a balance of the hardships tipping decidedly in favor of the moving party.'"[25] To be sure, a line of Second Circuit cases holds that "the serious-questions standard cannot be used to preliminarily enjoin government action," a rule that "'reflects the idea that governmental policies … are entitled to a higher degree of deference and should not be enjoined lightly.'"[26] But the Second Circuit has also "affirmed preliminary injunctions against government action using the less rigorous serious-questions standard," and it has not clearly explained these divergent results.[27]

Other circuits, including the Ninth Circuit, have employed the sliding scale approach in challenges to executive action.[28] The D.C. Circuit has expressly "reserved the question whether the sliding-scale approach remains valid" in light of the Supreme Court's statements that "a party seeking a preliminary injunction must demonstrate, among other things, a likelihood of success on the merits."[29] Litigants might be mindful of regional differences in the formulation of the preliminary injunction standard.

Evidentiary Record. While a preliminary injunction — almost by definition — issues before the development of a summary judgment or trial record, "a plaintiff seeking a preliminary injunction generally cannot rely on mere allegations in the complaint but must come forward with some evidence showing a likelihood of success on the merits."[30] And plaintiffs seeking to establish an economic injury as irreparable harm

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[25] *Conn. State Police Union v. Rovella*, 36 F.4th 54, 62 (2d Cir. 2022) (quoting *Green Haven Preparative Meeting of Religious Soc'y of Friends v. N.Y. State Dep't of Corr. & Cmty. Supervision*, 16 F.4th 67, 78 (2d Cir. 2021)).

[26] *Trump v. Deutsche Bank AG*, 943 F.3d 627, 637–38 (2d Cir. 2019) (quoting *Able v. United States*, 44 F.3d 128, 131 (2d Cir. 1995)), *overruled on other grounds*, *Trump v. Mazars USA, LLP*, 5911 U.S. 848 (2020).

[27] *Id.* at 638.

[28] *See, e.g.*, *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011); *Tennessee v. Becerra*, 131 F.4th 350, 370 (6th Cir. 2025) ("[W]hen the likelihood of success on the merits is low, plaintiffs must inversely show a higher degree of harm to warrant an injunction.").

[29] *Changji Esquel Textile Co. Ltd. v. Raimondo*, 40 F.4th 716, 726 (D.C. Cir. 2022) (internal quotation marks omitted) (quoting *Munaf v. Geren*, 553 U.S. 674, 690 (2008)). For other discussions of whether the sliding scale approach to preliminary injunctions is still permissible, see *All. for the Wild Rockies*, 632 F.3d at 1131–35, and *Trump v. Deutsche Bank AG*, 943 F.3d at 641–42.

[30] *Mahmoud v. McKnight*, 102 F.4th 191, 203 (4th Cir. 2024).

"must 'adequately describe and quantify the level of harm.'"[31] That said, "'a preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits.'"[32] For instance, courts deciding preliminary injunction motions may consider hearsay affidavits.[33] Notably, though, "[w]hile an evidentiary hearing is not always required before resolving a preliminary injunction," "it 'may be improper to resolve a preliminary injunction motion on a paper record alone; [and] where the motion turns on a disputed factual issue, an evidentiary hearing is ordinarily required.'"[34]

Temporary Restraining Orders. Entitlement to "[a] TRO is analyzed using the same 'factors applicable to preliminary injunctive relief.'"[35] In practice, the key difference between a TRO and a preliminary injunction in a case against the federal government is that TROs are intended to issue quickly in emergencies. Federal Rule of Civil Procedure 65 provides that "[t]he court may issue a temporary restraining order without written or oral notice to the adverse party" if "specific facts in an affidavit or a verified complaint show that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition" and "the movant's attorney certifies in writing any efforts made to give notice and the reasons why it should not be required."[36] TROs generally expire after, at most, fourteen days, unless the court "for good cause" issues an extension.[37]

Security Requirement. Plaintiffs who obtain a preliminary injunction may be required to post a bond. Rule 65 provides that "[t]he court may issue a preliminary injunction or a temporary restraining order only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party

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[31] *Air Transp. Ass'n*, 840 F. Supp. 2d at 335 (quoting *Nat'l Ass'n of Mortg. Brokers v. Bd. of Governors of the Fed. Res. Sys.*, 773 F. Supp. 2d 151, 181 (D.D.C. 2011)).

[32] *Kos Pharms., Inc. v. Andrx Corp.*, 369 F.3d 700, 718 (3d Cir. 2004) (quoting *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981)).

[33] *See Arrowpoint Capital Corp. v. Arrowpoint Asset Mgmt., LLC*, 793 F.3d 313, 325 (3d Cir. 2015).

[34] *Id.* (citing *Bradley v. Pittsburgh Bd. of Educ.*, 910 F.2d 1172, 1175–76 (3d Cir. 1990), and quoting *Kos*, 369 F.3d at 719 n.16); *accord State Farm Mut. Auto. Ins. Co. v. Tri-Borough NY Med. Prac. P.C.*, 120 F.4th 59, 83 (2d Cir. 2024) ("[T]here should generally be an evidentiary hearing when essential facts are in dispute.").

[35] *Univ. of Cal. Student Ass'n v. Carter*, — F. Supp. 3d —, 2025 WL 542586, at *4 (D.D.C. Feb. 7, 2025) (quoting *Banks v. Booth*, 459 F. Supp. 3d 143, 149 (D.D.C. 2020)).

[36] Fed. R. Civ. P. 65(b)(1).

[37] *Id.* 65(b)(2).

found to have been wrongfully enjoined or restrained."[38] Courts nevertheless "have 'broad discretion' in determining 'the appropriate amount of an injunction bond, including the discretion to require no bond.'"[39] Recently, several courts granting preliminary injunctions against Trump administration actions have required nominal security or none at all, notwithstanding the President's direction that agencies facing preliminary injunctions demand that courts impose bonds.[40] Courts' reasons include that "preliminary injunctive relief will not materially damage the Government,"[41] that plaintiffs lack the means to post bond,[42] that plaintiffs' strong showing on the merits obviates the risk of the government being wrongfully enjoined,[43] and that "requiring a bond as a condition of obtaining an injunction against unlawful executive action … would risk deterring other litigants from pursuing their right to judicial review of unlawful executive action."[44] As of this writing, we are not aware of any court that has required a substantial bond from a plaintiff challenging Trump administration action.

Mandatory v. Prohibitory Injunctions. Those challenging executive action frequently seek so-called "prohibitory" injunctions, which "typically requir[e] the non-movant to refrain from taking some action" like enforcing a regulation or implementing a policy.[45] When a plaintiff instead seeks a "mandatory" injunction, "requir[ing] the nonmovant to take some action," some courts hold that "the likelihood-of-success and irreparable-harm requirements become more demanding still, requiring that the plaintiff 'show a *clear or substantial* likelihood of success and make a *strong showing*

[38] *Id.* 65(c).

[39] *Am. Foreign Serv. Ass'n*, 2025 WL 1387331, at *15 (quoting *Simms v. District of Columbia*, 872 F. Supp. 2d 90, 107 (D.D.C. 2012)).

[40] *See Ensuring the Enforcement of Federal Rule of Civil Procedure 65(c)*, White House (Mar. 11, 2025), https://www.whitehouse.gov/presidential-actions/2025/03/ensuring-the-enforcement-of-federal-rule-of-civil-procedure-65c/.

[41] *Associated Press v. Budovich*, — F. Supp. 3d —, 2025 WL 1039572, at *19 (D.D.C. Apr. 8, 2025).

[42] *Climate United Fund*, 2025 WL 1131412, at *21.

[43] *Nat'l Treasury Emps. Union v. Trump*, — F. Supp. 3d —, 2025 WL 1218044, at *21 (D.D.C. Apr. 28, 2025).

[44] *League of United Latin American Citizens v. Executive Off. of the President*, — F. Supp. 3d —, 2025 WL 1187730, at *62 (D.D.C. Apr. 24, 2025); *see generally id.* (collecting recent cases regarding injunction bonds).

[45] *Daileader v. Certain Underwriters at Lloyds London Syndicate 1861*, 96 F.4th 351, 356 (2d Cir. 2024).

of irreparable harm.'"[46] But other courts "'ha[ve] rejected any distinction between a mandatory and prohibitory injunction,' observing that 'the "mandatory" injunction has not yet been devised that could not be stated in "prohibitory" terms.'"[47] Here, too, litigants might be mindful of differences in circuit law. Some situations in which litigants might seek a court order requiring an agency to take an affirmative act are listed further below.

Permanent Relief. In APA challenges, plaintiffs frequently seek the permanent remedy of vacatur of the challenged agency action, which is discussed in the next section. In cases where vacatur is unavailable, plaintiffs may also seek a permanent injunction. "Where a plaintiff seeks permanent injunctive relief, the test is the same" as for a preliminary injunction, "except that 'the movant must show actual success on the merits of the claim, rather than a mere likelihood of such success.'"[48]

B. Declaratory Relief

Litigants may also seek declaratory judgments against government action. "In a case of actual controversy within its jurisdiction, ... any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought."[49] The declaratory judgment "gives a means by which rights and obligations may be adjudicated in cases involving an actual controversy that has not reached the stage at which either party may seek a coercive remedy and in cases in which a party who could sue for coercive relief has not done so."[50] Notably, a declaratory judgment is just a remedy. It is neither the source of subject matter

[46] *Id.* (emphasis in original) (quoting *New York ex rel. Schneiderman v. Actavis PLC*, 787 F.3d 638, 650 (2d Cir. 2015)).

[47] *League of Women Voters of U.S. v. Newby*, 838 F.3d 1, 7 (D.C. Cir. 2016) (quoting *United States v. W. Elec. Co.*, 46 F.3d 1198, 1206 (D.C. Cir. 1995)).

[48] *Caroline T. v. Hudson Sch. Dist.*, 915 F.2d 752, 755 (1st Cir. 1990) (quoting *K-Mart Corp. v. Oriental Plaza, Inc.*, 875 F.2d 907, 914–15 (1st Cir. 1989)).

[49] 28 U.S.C. § 2201(a).

[50] 10B Fed. Prac. & Proc. Civ. § 2751 (4th ed. Apr. 2025 update).

jurisdiction[51] nor a cause of action,[52] and, as the statute makes clear, it can only issue "[i]n a case of actual controversy."[53]

In many challenges to executive action, plaintiffs seek either or both an injunction or vacatur under the APA.[54] In those cases, a request for declaratory relief might do little independent work.[55] After all, the court deciding the merits—"declar[ing] the rights and other legal relations" of the parties—is a condition precedent to both of those remedies.[56] Declaratory relief, however, may have a role to play where a plaintiff faces a concrete *threat* of adverse government action. In that situation, a justiciable controversy may exist—that is, a plaintiff might have standing and the legal dispute might be ripe for resolution—but the coercive remedy of an injunction may be premature.[57]

That was the dynamic in *Braidwood Management, Inc. v. Equal Employment Opportunity Commission.* There, employers sought, among other things, a declaration that they were entitled to a religious exception from the rule articulated in *Bostock v. Clayton County*, 590 U.S. 644 (2020), that Title VII prohibits employment discrimination on the basis of sexual orientation and gender identity.[58] The Fifth Circuit found the case justiciable: "Despite the EEOC's protestations that no one has brought a Title VII enforcement action against these plaintiffs, the plaintiffs have established a credible fear of such an action sufficient to establish standing. The case is ripe because no further facts are required to adjudicate plaintiffs' specific claims, and there is a hardship to them in withholding judgment. Finally, plaintiffs have a valid cause of action."[59] Then, on the merits, the court "decide[d] that [the

[51] *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671 (1950).

[52] *E.g., City of Reno v. Netflix, Inc.*, 52 F.4th 874, 878 (9th Cir. 2022).

[53] 28 U.S.C. § 2201(a).

[54] Vacatur under the APA is discussed further below.

[55] *See United Aeronautical Corp. v. U.S. Air Force*, 80 F.4th 1017, 1031 (9th Cir. 2023) ("[T]here is little practical difference between injunctive and declaratory relief. The primary difference is that declaratory relief is a much milder form of relief because it is not backed by the power of contempt. But in suits against government officials and departments, we generally assume that they will comply with declaratory judgments." (internal quotation marks and citations omitted)).

[56] 28 U.S.C. § 2201.

[57] *Cf. Steffel v. Thompson*, 415 U.S. 452, 458–71 (1974) (discussing the availability of declaratory relief in the context of a threatened prosecution).

[58] *Braidwood Mgmt., Inc. v. EEOC*, 70 F.4th 914, 920–21 (5th Cir. 2023).

[59] *Id.* at 923.

Religious Freedom Restoration Act] requires that Braidwood, on an individual level, be exempted from Title VII because compliance with Title VII post-*Bostock* would substantially burden its ability to operate per its religious beliefs" and affirmed the district court's entry of declaratory judgment.[60]

C. Equitable Relief Against the President

In the early days of the second Trump administration, numerous lawsuits have challenged President Trump's orders directly, often naming him as a defendant. In response, the Department of Justice has repeatedly argued that injunctive relief cannot run against the President himself.[61] There is force to that contention. In *Mississippi v. Johnson*, the Supreme Court held that "this court has no jurisdiction of a bill to enjoin the President in the performance of his official duties."[62] And in *Franklin v. Massachusetts*—in which the district court had enjoined both the Secretary of Commerce and the President after finding that a decision by the Secretary to change an aspect of the methodology underlying the Census was insufficiently supported—five justices agreed that "in general" a court could not enjoin the President.[63]

But the Supreme Court has arguably "not absolutely slam[med] the door shut on presidential injunctions."[64] For one thing, it has "left open the question whether the President might be subject to a judicial injunction requiring the performance of a

[60] *Id.* at 937.

[61] *See, e.g.*, Resp.-Defs.' Opp. to Pls.' and Pet.-Pls.' Mot. for Prelim. Inj. at 26, *J.G.G. v. Trump*, No. 25-cv-766 (D.D.C. May 1, 2025), ECF No. 108, https://storage.courtlistener.com/recap/gov.uscourts.dcd.278436/gov.uscourts.dcd.278436.108.0_1.pdf; Mem. of L. in Support of Defs.' Mot. to Dismiss at 35–36, *New Mexico v. Musk*, No. 25-cv-429 (D.D.C. Mar. 7, 2025), ECF No. 58, https://storage.courtlistener.com/recap/gov.uscourts.dcd.277463/gov.uscourts.dcd.277463.58.0.pdf; Defs.' Reply in Support of Cross-Mot. for Summ. J. at 7, No. 25-cv-334 (D.D.C. Feb. 28, 2025), ECF No. 30, https://storage.courtlistener.com/recap/gov.uscourts.dcd.277129/gov.uscourts.dcd.277129.30.0.pdf.

[62] 71 U.S. (4 Wall.) 475, 500–01 (1867).

[63] 505 U.S. 788, 802–03 (1992) (plurality op.) ("[I]n general, this court has no jurisdiction of a bill to enjoin the President in the performance of his official duties." (internal quotation marks omitted); *see also id.* at 826 (Scalia, J., concurring in part and concurring in the judgment) ("I think it is clear that no court has the authority to direct the President to take an official act.").

[64] *McCray v. Biden*, 574 F. Supp. 3d 1, 9 (D.D.C. 2021).

purely 'ministerial' duty."[65] And *Franklin* ultimately did "not decide whether injunctive relief against the President was appropriate, because [it] conclude[d] that the injury alleged is likely to be redressed by declaratory relief against the Secretary [of Commerce] alone."[66] One district court has read those caveats to "leave[] open the possibility that an injunction against the President might be appropriate where a ministerial duty is at issue or as a last resort where relief is not available against any other executive official."[67]

Nevertheless, litigants will face challenges in seeking an injunction against the President. And there is similar doubt about a court's power to issue declaratory relief against the President.[68]

Luckily, the availability of equitable relief against the President himself should be an issue in very few cases. That is because "[r]eview of the legality of Presidential action can ordinarily be obtained in a suit seeking to enjoin the officers who attempt to enforce the President's directive."[69] "[C]ourts have power to compel subordinate executive officials to disobey illegal Presidential commands."[70] Because cases in which "the President has final constitutional or statutory responsibility for the final step necessary for the agency action to directly affect the parties"[71] are likely very rare, "injunctive relief against [subordinate] officials could substantially redress [a challenger's] injury" in most challenges to executive action.[72]

[65] *Franklin*, 505 U.S. at 827 n.2 (Scalia, J., concurring in part and concurring the judgment).

[66] *Id.* at 803 (plurality op.).

[67] *McCray*, 574 F. Supp. 3d at 9.

[68] *Newdow v. Roberts*, 603 F.3d 1002, 1012 (D.C. Cir. 2010) ("A court—whether via injunctive or declaratory relief—does not sit in judgment of a President's executive decisions."); *see also McCray*, 574 F. Supp. 3d at 10.

[69] *Franklin*, 505 U.S. at 815 (Scalia, J., concurring in part and in the judgment).

[70] *Soucie v. David*, 448 F.2d 1067, 1072 n.12 (D.C. Cir. 1971).

[71] *Public Citizen v. U.S. Trade Representative*, 5 F.3d 549, 552 (D.C. Cir. 1993).

[72] *Swan v. Clinton*, 100 F.3d 973, 979 (D.C. Cir. 1996).

III. REMEDIES UNDER THE APA

Litigants challenging Trump administration action frequently do so through the APA, which permits judicial review of "final agency action."[73] This section discusses several remedies the APA expressly allows, as well as other remedies that sometimes prove relevant in APA litigation.

A. Vacatur

The APA's provision on the scope of judicial review, 5 U.S.C. § 706, provides that "the reviewing court" "shall …hold unlawful and set aside" agency "action, findings, and conclusions" found to be substantively or procedurally unlawful.[74] The act of "set[ting] aside" an agency action is commonly referred to as "vacatur," which has long been understood to mean "to annul; to cancel or rescind; to declare, to make, or to render, void."[75] "Once the rule is vacated, there is no rule to enforce; vacatur obliterates the agency decision."[76] (See below, though, on the debate concerning the permissible scope of vacatur.)

Lower courts have long held that vacatur is "the default remedy under the APA"[77]: "'when a reviewing court determines that agency regulations are unlawful, the

[73] 5 U.S.C. § 704; *see also Final Agency Action*, Governing for Impact (May 2025), https://governingforimpact.org/apa-library/.

[74] 5 U.S.C. § 706. Elsewhere, the APA provides that the "form of proceeding for judicial review" of final agency action can include "actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus." *Id.* § 703. And it allows courts under certain circumstances to "issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings"—a provision discussed more below. *Id.* § 705.

[75] *Action on Smoking & Health v. C.A.B.*, 713 F.2d 794, 797 (D.C. Cir. 1983).

[76] Mila Sohoni, *The Power to Vacate a Rule*, 88 Geo. Wash. L. Rev. 1121, 1131 (2020) (internal quotation marks and alteration omitted). An emerging criticism of the potentially universal scope of this view of vacatur is discussed briefly below.

[77] *Montana Wildlife Ass'n v. Haaland*, 127 F.4th 1, 50 (9th Cir. 2025); *Cboe Futures Exch., LLC v. SEC*, 77 F.4th 971, 982 (D.C. Cir. 2023) ("'[V]acatur is the normal remedy.'" (quoting *Allina Health Servs. v. Sebelius*, 746 F.3d 1102, 1110 (D.C. Cir. 2014))). The Department of Justice has asserted that "the Administrative Procedure Act may not authorize vacatur at all," on the theory that the APA's "set aside" language does not create an independent remedy, but courts have generally rejected that assertion. *See, e.g.*, *Texas Med. Ass'n v. U.S. Dep't of Health & Hum. Servs.*, 110 F.4th 762, 779 (5th Cir. 2024).

ordinary result is that the rules are vacated.'"[78] Vacatur is thus generally called for when an agency exceeds its statutory authority or acts contrary to law.[79] Vacatur can also be an appropriate remedy for other APA violations, such as failing to observe notice-and-comment rulemaking procedures[80] or adhere to the requirements of reasoned decisionmaking.[81]

Vacatur, however, is not necessarily mandatory. A "court retains equitable discretion in 'limited circumstances' to remand" a defective action to the agency "without vacatur"—that is, to leave the defective action in effect "while the agency corrects its errors."[82] In *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Commission*, the D.C. Circuit explained that "[t]he decision whether to vacate depends on the seriousness of the order's deficiencies (and thus the extent of doubt whether the agency chose correctly) and the disruptive consequences of an interim change that may itself be changed."[83] Consequently, courts may remand without vacatur where "'an agency's error is curable.'"[84] Likewise, courts have held that vacatur could prove unduly disruptive where "[t]he egg has been scrambled and there is no apparent way"—or, at least, no easy way—"to restore the status quo ante."[85] "[A] quintessential disruptive consequence arises when an agency cannot easily unravel a past transaction in order to impose a new outcome"[86] or where vacatur would upset significant reliance interests.[87]

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[78] *Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1409 (D.C. Cir. 1998) (quoting *Harmon v. Thornburgh*, 878 F.2d 484, 495 n.21 (D.C. Cir. 1989)).

[79] *E.g.*, *United Steel v. Mine Safety & Health Admin.*, 925 F.3d 1279, 1286 (D.C. Cir. 2019).

[80] *Nat. Res. Def. Council v. Wheeler*, 955 F.3d 68, 85 (D.C. Cir. 2020).

[81] *See, e.g.*, *Eagle Cnty. v. Surface Transportation Bd.*, 82 F.4th 1196 (D.C. Cir. 2023); *Cboe Futures Exch, LLC*, 77 F.4th at 982; *SecurityPoint Holdings, Inc. v. TSA*, 867 F.3d 180, 185 (D.C. Cir. 2017). *But see Int'l Union, Mine Workers of Am. v. Fed. Mine Safety and Health Admin.*, 920 F.2d 960, 966 (D.C. Cir. 1990) ("We have commonly remanded without vacating an agency's rule or order where the failure lay in lack of reasoned decisionmaking.").

[82] *Montana Wildlife Federation*, 127 F.4th at 50 (quoting *Pollinator Stewardship Council v. EPA*, 806 F.3d 520, 532 (9th Cir. 2015)).

[83] 988 F.2d 146, 150–51 (D.C. Cir. 1993) (internal quotation marks omitted).

[84] *Cigar Ass'n of Am. v. FDA*, 132 F.4th 535, 541 (D.C. Cir. 2025) (quoting *Bridgeport Hosp. v. Becerra*, 108 F.4th 882, 890 (D.C. Cir. 2024)). Though, as discussed, curable errors—such as notice and comment violations and errors in reasoning—frequently still lead to vacatur.

[85] *Sugar Cane Growers Co-op. of Fla. v. Veneman*, 289 F.3d 89, 97 (D.C. Cir. 2002).

[86] *Am. Great Lakes Port Ass'n v. Schultz*, 962 F.3d 510, 519 (D.C. Cir. 2020).

[87] *See MCI Telecomms. Corp. v. FCC*, 143 F.3d 606, 609 (D.C. Cir. 1998) ("Here, vacating the order would leave payphone service providers all but uncompensated for coinless calls made from their

While some judges have read the APA's direction that courts "shall … set aside" unlawful agency actions to mandate vacatur in all cases,[88] remand without vacatur is well established in the law.[89] Litigants challenging executive action might prepare for the government to argue that executive action ought to remain in effect even if found unlawful.

B. Stays Under Section 705

The APA also makes specific provision for courts to issue interim relief while a case proceeds. 5 U.S.C. § 705 provides that "to the extent necessary to prevent irreparable injury, the reviewing court … may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings."[90] Lower courts have held that "[t]he standard for a" court-issued "stay under 5 U.S.C. § 705 is the same as the standard for a preliminary injunction."[91]

Section 705 also provides that "[w]hen an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review."[92] Lower courts have held that agencies' section 705 stays are subject to judicial review[93] and that, "to justify a stay under § 705, an agency must do more than pay lip service to … pending litigation … or merely assert, without any specificity, that the litigation raises serious questions concerning the validity of certain provisions of the rule."[94] "Although the agency need not adhere to the specific contours of the four-factor preliminary injunction test, it must weigh the same kinds of equitable considerations

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payphones, and disrupt the business plans they have made on the basis of their expectation of compensation."); *Allied-Signal*, 988 F.2d at 151 (vacatur "disruptive" where it would require agency to refund user fees it could not later recover).

[88] *See Chekowsky v. SEC*, 23 F.3d 452, 490 (D.C. Cir. 1994) (Randolph, J., dissenting).

[89] For more on remand without vacatur, see Stephanie J. Tatham, *The Unusual Remedy of Remand Without Vacatur*, Administrative Conference of the United States (Jan. 3, 2014), https://www.acus.gov/sites/default/files/documents/Remand Without Vacatur Final Report.pdf.

[90] 5 U.S.C. § 705.

[91] *New York v. Dep't of Educ.*, 477 F. Supp. 3d 279, 294 (S.D.N.Y. 2020); *accord Pennsylvania v. DeVos*, 480 F. Supp. 3d 47, 58 (D.D.C. 2020).

[92] 5 U.S.C. § 705.

[93] *See, e.g.*, *Bauer v. DeVos*, 325 F. Supp. 3d 74, 101–04 (D.D.C. 2018).

[94] *Id.* at 107 (quotations omitted).

that courts have long applied and must explain why, in light of the pending litigation, a stay is 'required' to ensure the parties will ultimately obtain an adequate and just judicial remedy."[95]

Finally, courts have held that agencies may not issue a section 705 stay of a rule after the rule's effective date has passed.[96] The government has argued that courts, too, are barred from granting section 705 stays once a rule has taken effect, but courts have rejected that position, reasoning that section 705's text imposes no temporal limitation on a court's power to issue a stay,[97] and that courts have traditionally been understood to have inherent authority to stay agency orders.[98]

C. Compelling Agency Action

In limited circumstances, a court may "compel agency action unlawfully withheld or unreasonably delayed."[99] A court may also issue a writ of mandamus to an agency where a litigant demonstrates "(1) a clear and indisputable right to relief, (2) that the government agency or official is violating a clear duty to act, and (3) that no adequate alternative remedy exists."[100] And if "a less drastic remedy (such as partial or complete vacatur …)" is insufficient to redress a plaintiff's injury, a court may enjoin an agency to take a particular action.[101] However, it is ordinarily very difficult to obtain these kinds of relief.[102]

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[95] *Id.* (brackets omitted).

[96] *See, e.g.*, *Center for Biological Diversity v. Regan*, 597 F. Supp. 3d 173, 204 (D.D.C. 2022); *Safety-Kleen Corp. v. EPA*, 1996 U.S. App. LEXIS 2324, at *2-*3 (D.C. Cir. Jan. 19, 1996) (non-precedential order).

[97] *See Nat'l TPS All. v. Noem*, — F. Supp. 3d —, 2025 WL 957677, at *19 (N.D. Cal. Mar. 31, 2025); *see also Center for Biological Diversity*, 597 F. Supp. 3d at 205.

[98] *Texas v. Biden*, 646 F. Supp. 3d 753, 770 (N.D. Tex. 2022) (citing *Nken v. Holder*, 556 U.S. 418, 426 (2009)).

[99] 5 U.S.C. § 706(1); *see Telecomms. Rsch. & Action Ctr. v. FCC*, 750 F.2d 70, 80 (D.C. Cir. 1984) (setting forth the so-called "*TRAC*" factors that guide courts' review in evaluating unreasonable-delay claims).

[100] *Am. Hosp. Ass'n v. Burwell*, 812 F.3d 183, 189 (D.C. Cir. 2016).

[101] *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165–66 (2010).

[102] *See Challenging Non-Enforcement*, Governing for Impact (May 2025), https://governingforimpact.org/apa-library/.

IV. SCOPE OF RELIEF

A traditional principle of equity is that "injunctive relief should be no more burdensome than necessary to provide complete relief to the plaintiffs."[103] Injunctions are therefore generally "limited to the inadequacy that produced the injury in fact that the plaintiff has established."[104] Over the last decade or so, however, so-called "universal" or "nationwide" injunctions, which require or prohibit government action as to *anyone*, not just the plaintiffs, have grown in prevalence.[105] The lawfulness of universal injunctions is currently a subject of great academic and judicial dispute.[106] The Supreme Court is likely to weigh in soon, having recently heard argument on three emergency applications raising the issue in the context of President Trump's executive order concerning birthright citizenship.[107]

APA vacatur has long been understood to be a form of universal relief that nullifies, and thereby precludes the government from enforcing, an unlawful regulation or decision as to anyone.[108] But the recent controversy surrounding universal injunctions has bled into the APA context, with the federal government and some judges suggesting that APA relief must also be party-specific.[109] At least one member of the Supreme Court's conservative majority, however, has recently defended universal vacatur, suggesting the practice may be at marginally less risk.[110]

Litigants might keep these dynamics in mind as they craft their claims and prayers for relief. The Fifth Circuit's decision in *Braidwood Management v. Becerra* is an

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[103] *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979).

[104] *Gill v. Whitford*, 585 U.S. 48, 66 (2018) (quoting *Lewis v. Casey*, 518 U.S. 343, 357 (1996)).

[105] *Developments in the Law—District Court Reform: Nationwide Injunctions*, 137 Harv. L. Rev. 1701 (2024).

[106] *See, e.g.*, *Dep't of Homeland Sec. v. New York*, 140 S. Ct. 599, 599–601 (2020) (Gorsuch, J., concurring); *Trump v. Hawaii*, 585 U.S. 667, 714–21 (2018) (Thomas, J., concurring); Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 Harv. L. Rev. 417 (2017).

[107] *See Trump v. Washington*, No. 24A885; *Trump v. Casa, Inc.*, No. 24A884; *Trump v. New Jersey*, 24A886.

[108] *See Corner Post, Inc. v. Bd. of Govs. of the Fed. Res. Sys.*, 603 U.S. 799, 826–32 (2024) (Kavanaugh, J., concurring).

[109] Br. for United States 40–44, *United States v. Texas*, 599 U.S. 670 (2023) (No. 22-58); *Texas*, 599 U.S. at 693–704 (Gorsuch, J., concurring); *Arizona v. Biden*, 40 F.4th 375, 396–97 (6th Cir. 2022) (Sutton, C.J., concurring).

[110] *See Corner Post, Inc.*, 603 U.S. at 826–32 (Kavanaugh, J., concurring).

illustration of how use of the APA, when possible, might prove particularly advantageous.[111] The Affordable Care Act charges certain administrative bodies to identify preventive health services that insurance carriers must cover at no cost to patients.[112] A group of plaintiffs challenged the structure of these bodies under the Appointments Clause and achieved partial victories both in the district court and on appeal.[113] Notably, though, they did not bring their constitutional challenge under the APA; instead, they brought a freestanding constitutional claim.[114] On appeal, the Fifth Circuit reinforced that the APA "empowers courts to set aside—*i.e.*, formally nullify and revoke—an unlawful agency action" with "nationwide," "not party-restricted," "effect."[115] But it held that because the plaintiffs had not brought an APA claim, the court could not "award relief never pleaded."[116] Consequently, the only relief available to the plaintiffs was a traditional injunction. And because the case "d[id] not fall into one of the narrow categories …previously identified as particularly appropriate for universal injunctive relief," the court limited the relief to an "ordinary, party-specific" injunction.[117]

V. SEVERABILITY

When a court concludes that a particular provision of a rule is unlawful—for example, because it exceeds the agency's statutory authority or the agency's explanation for it was insufficiently reasoned—the court must determine whether to invalidate just that provision, severing it from other provisions of the rule of which it is a part, or to also invalidate those other provisions.[118] In some circumstances, litigants might

[111] 104 F.4th 930 (5th Cir. 2024).

[112] *Id.* at 936–38.

[113] *Id.* at 938–39.

[114] *Id.* at 953.

[115] *Id.* at 951.

[116] *Id.* at 953.

[117] *Id.* at 954–55.

[118] In this context, "rule" or "rulemaking" refers to the document that the agency publishes in the *Federal Register* to promulgate regulatory provisions that are ultimately codified in the Code of Federal Regulations. *See, e.g.*, 89 Fed. Reg. 33,474 (Apr. 29, 2024) (Biden administration's final rule implementing Title IX of the Education Amendments of 1972, promulgating regulatory provisions

prefer that a court sever the unlawful provision, leaving the rest of the rule intact—for example, where other regulatory provisions continue to advance litigants' interests. We focus here on circumstances where litigants instead seek invalidation of an entire rule.

At least where agencies have addressed severability in their rulemakings, courts' severability analyses have traditionally been guided by the agencies' views and the structure of the regulations at issue. But even in those instances—and especially where agencies have not addressed severability—litigants might argue for wholesale invalidation. Such arguments may be aided by two recent Supreme Court decisions arising from its shadow docket: *Ohio v. Environmental Protection Agency*, concerning inter-state pollution controls,[119] and *Department of Education v. Louisiana*, concerning the Biden administration's Title IX regulations.[120]

General Severability Principles. Generally, courts have articulated "a two-prong" severability inquiry: "Whether the offending portions of a regulation are severable depends upon the intent of the agency and upon whether the remainder of the regulation could function sensibly without the stricken provision."[121] In practice, though, courts have typically focused on the agency's intent,[122] and the two prongs overlap—for example, the D.C. Circuit has looked to whether a rule's provisions are "intertwined" under both the intent[123] and workability[124] prongs.

Standard remedial principles suggest that courts should do as little damage as possible—that "judicial remedies should be 'no more burdensome to the defendant

throughout title 34 of the CFR). The question addressed is whether, on finding certain provisions invalid, all provisions promulgated by the rule should be invalidated.

[119] 603 U.S. 279 (2024).

[120] 603 U.S. 866 (2024) (per curiam).

[121] *Texas*, 126 F.4th at 419 (emphasis and quotation omitted) (citing, *inter alia*, *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 294 (1988)); *see Weld Cnty.*, 72 F.4th at 296 ("If parts of a regulation are invalid and other parts are not, we set aside only the invalid parts unless the remaining ones cannot operate by themselves or unless the agency manifests an intent for the entire package to rise or fall together." (collecting cases)).

[122] *See, e.g.*, *Belmont Mun. Light Dep't v. FERC*, 38 F.4th 173, 187 (D.C. Cir. 2022) ("whether an agency order is severable turns on the agency's intent"); *Nasdaq Stock Mkt. LLC v. Sec. & Exch. Comm'n*, 38 F.4th 1126, 1144 (D.C. Cir. 2022) (similar).

[123] *Belmont Mun. Light Dep't*, 38 F.4th at 188.

[124] *Nasdaq Stock Mkt. LLC*, 38 F.4th at 1144.

than necessary to provide complete relief' to the plaintiffs."[125] So, consistent with the Supreme Court's contemporary approach to determining whether an unconstitutional provision of a statute is severable,[126] at least where an agency states in the rulemaking that a rule is severable, courts have traditionally stated that they presume that it is.[127] And some courts, including the D.C. Circuit, state that severability is presumed even where an agency has not addressed it in the rulemaking.[128]

But courts' broad statements in favor of severability as a general matter belie that in individual cases they often conclude that a rule is inseverable. Below, we identify five circumstances where litigants seeking invalidation of the entirety of a rule may find success, including over agencies' objections in their rulemakings.

Where Severability Is Not Addressed at All. It is a "fundamental principle" of administrative law "that agency policy is to be made, in the first instance, by the agency itself—not by courts, and not by agency counsel."[129] Where an agency's rulemaking is silent with respect to severability, the D.C. Circuit has said that "courts

[125] *Bd. of Cnty. Commissioners of Weld Cnty., Colorado v. Env't Prot. Agency*, 72 F.4th 284, 296 (D.C. Cir. 2023) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979)).

[126] *See Barr v. Am. Ass'n of Pol. Consultants, Inc.*, 591 U.S. 610, 624 (2020) (Kavanaugh, J., writing for three justices).

[127] *See, e.g.*, *Texas v. United States*, 126 F.4th 392, 419 (5th Cir. 2025) ("We adhere to the text of a severability clause in the absence of extraordinary circumstances." (quotation omitted)); *Mayor of Baltimore v. Azar*, 973 F.3d 258, 292 (4th Cir. 2020) (requiring "strong evidence" or "substantial doubt" to overcome a severability clause (quotations omitted)); *see also Flores v. Rosen*, 984 F.3d 720, 736 (9th Cir. 2020) (applying a severability clause).

[128] *See, e.g.*, *Weld Cnty*, 72 F.4th at 296 ("regulations—like statutes—are presumptively severable"); *New York Legal Assistance Grp. v. Cardona*, No. 21-888-CV, 2024 WL 64220, at *2 (2d Cir. Jan. 5, 2024) (summary order quoting *Weld County*); *Associated Builders & Contractors of Se. Texas, Inc. v. Su*, No. 1:23-cv-396, 2025 WL 900682, at *10 n.17 (E.D. Tex. Mar. 19, 2025) (quoting *Weld County*); *cf. Am. Ass'n of Pol. Consultants, Inc.*, 591 U.S. at 625 (where Congress has not included "either a severability clause or a nonseverability clause" in a statute, the Supreme "Court's cases have …developed a strong presumption of severability").

[129] *Nat'l Treasury Emps. Union v. Chertoff*, 452 F.3d 839, 867 (D.C. Cir. 2006) (quotation omitted); *see Sec. & Exch. Comm'n v. Chenery Corp.*, 318 U.S. 80, 87 (1943).

generally 'do not attempt, even with the assistance of agency counsel, to fashion a valid regulation from the remnants of the old rule.'"[130] (Generally[131] but not always.[132])

Where Severability Is Not Addressed in the Notice of Proposed Rulemaking. If an agency addresses severability in its final rule but not in its proposed rule, litigants have argued that courts should ignore the final rule's discussion because it was not subjected to notice and comment—going so far as to argue that "the severability provision was issued 'without observance of procedure required by law' in violation of 5 U.S.C. § 706(2)(D)."[133] The court did not address the litigants' argument.

Where Severability Is Not Addressed in Regulatory Text. Litigants might argue that severability discussions appearing in a rule's preamble but not in its regulatory text should be discounted. "[W]hile preamble statements may in some unique cases constitute binding, final agency action susceptible to judicial review, … this is not the norm," as in general "[a]gency statements having general applicability and legal effect are to be published in the Code of Federal Regulations."[134]

Where Benefit-Cost Analyses Do Not Contemplate Severability. Significant agency rules generally contain analyses demonstrating that their benefits outweigh their costs, particularly given that "reasonable regulation ordinarily requires paying

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[130] *Nat'l Treasury Emps. Union*, 452 F.3d at 867 (quoting *Harmon v. Thornburgh*, 878 F.2d 484, 494 (D.C. Cir. 1989)).

[131] *See, e.g.*, *Sierra Club v. FERC*, 867 F.3d 1357, 1366–67 (D.C. Cir. 2017); *Nat'l Ass'n of Mfrs. v. NLRB*, 717 F.3d 947, 963–64 & n.28 (D.C. Cir. 2013), *overruled on other grounds by Am. Meat Inst. v. USDA*, 760 F.3d 18, n.28 (D.C. Cir. 2014) (en banc); *Epsilon Elecs., Inc. v. United States Dep't of Treasury, Off. of Foreign Assets Control*, 857 F.3d 913, 929–30 (D.C. Cir. 2017).

[132] *See, e.g.*, *Belmont Mun. Light Dep't*, 38 F.4th at 188 (finding severability even though the agency "did not explicitly address" it in the rule).

[133] *See* Bus. Pls.' Mot. for Summ. J. at 3, 27, *Texas v. EPA*, No. 3:23-cv-17 (S.D. Tex. filed June 28, 2023), https://perma.cc/2DNH-W8HD. Those litigants cited a report and recommendation from the Administrative Conference of the United States explaining that "[g]eneral principles of administrative law suggest that the agency's views on severability should be most persuasive when," among other things, "the agency includes its severability proposal in the text of the proposed rule and the agency's initial rationale for severability is explained in the preamble to the proposed rule" such that the agency's "initial positions are made available for comment by interested parties." Admin. Conf. of the United States, Recommendation 2018-2, *Severability in Agency Rulemaking* at 2 (June 15, 2018), https://www.acus.gov/sites/default/files/documents/recommendation-2018-2-severability%20in%20agency%20rulemaking.pdf.

[134] *Nat. Res. Def. Council v. EPA*, 559 F.3d 561, 564–65 (D.C. Cir. 2009) (quotation and citations omitted).

attention to the advantages and the disadvantages of agency decisions."[135] If an agency's benefit-cost analysis does not address whether the math would come out the same way if significant provisions of a rule were deleted, litigants might argue that the rule is not severable.

In doing so, they might rely on *Ohio*, where the Supreme Court stayed an Environmental Protection Agency rule that had imposed certain emissions-control measures in 23 states.[136] As a result of litigation challenging the rule, EPA was unable to apply it to 12 of those states.[137] Although something like that prospect was raised by commenters on the proposed rule, the "cost-effectiveness analysis" in the final rule did not address such a scenario—it was "performed collectively" across the original 23 states—and "at argument the government acknowledged that it could not represent with certainty whether" that analysis would still "yield the same results and command the same emissions-control measures" with 12 states excluded.[138] The Court therefore concluded that EPA's "rule was not reasonably explained" notwithstanding the rule's "severability provision," which announced that the rule "would continue to be implemented without regard to the number of" states covered.[139] Nothing "EPA said in support of its severability provision[] addresse[d] whether and how measures found to maximize cost effectiveness" with 23 states covered would remain cost effective "when many fewer [s]tates, responsible for a much smaller amount of the originally targeted emissions, might be subject to the agency's plan."[140]

Similarly, in the litigation over the Biden administration's Title IX rule addressed further below, the Sixth Circuit refused the administration's request to stay the district court's injunction with respect to provisions of the rule that the plaintiffs did not challenge in part because there was no "suggestion that the cost-benefit

[135] *Michigan v. EPA*, 576 U.S. 743, 752–53 (2015) (emphasis omitted); *see id.* at 769 (Kagan, J., dissenting) ("Cost is almost always a relevant—and usually, a highly important—factor in regulation."); *see also* E.O. 12866, *Regulatory Planning and Review*, § 6(a)(3)(C), 58 Fed. Reg. 51,735, 51,741 (Oct. 4, 1993).

[136] 603 U.S. at 289–90.

[137] *Id.*

[138] *Id.* at 293–94.

[139] *Id.* at 294 (quotations omitted).

[140] *Id.* at 295.

analyses underlying" the rule "contemplated the idea of allowing" unchallenged provisions "to go into effect" without the invalid provisions.[141]

Where Agencies' Statements Concerning Severability Are Insufficient. As the D.C. Circuit has repeatedly observed, "the ultimate determination of severability will rarely turn on the presence or absence of a severability clause."[142] Even where an agency ticks all the boxes — addressing severability at both the proposed and final rule stages, in the preamble and in regulatory text — and a court concludes that only a certain part of the agency's rule is invalid, litigants might still argue for wholesale invalidation.

Challengers to the Biden administration's Title IX rule found success before courts of appeals and the Supreme Court in this respect. The Title IX rule addressed a range of topics — from interpreting Title IX's prohibition on sex discrimination to include discrimination on the basis of sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity, to clarifying the meaning of Title IX's harassment provisions and required school grievance procedures — and its regulatory text alone spanned nearly 15 three-column *Federal Register* pages.[143] The rule also included a detailed explanation in the rule's preamble as to why each of its provisions were severable, with reference to the proposed rule's discussion of severability and existing severability clauses in the regulatory text.[144] Nonetheless, on concluding that three of the rule's dozens of provisions were likely invalid, including its definition of sex discrimination, district courts preliminarily enjoined the rule as a whole.[145] The government asked the relevant courts of appeals, and ultimately the Supreme Court, to stay the district courts' preliminary injunctions only with respect to provisions of the rule that the courts had not found invalid and, indeed, that the plaintiffs had not challenged at all.[146]

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[141] *See Tennessee v. Cardona*, No. 24-5588, 2024 WL 3453880, at *4 (6th Cir. July 17, 2024).

[142] *Nasdaq Stock Mkt. LLC*, 38 F.4th at 1145 (quotation omitted).

[143] 89 Fed. Reg. at 33474, 33882–96.

[144] 89 Fed. Reg. at 33848.

[145] *See Louisiana*, 603 U.S. at 867; *id.* at 868–69 (Sotomayor, dissenting).

[146] *See id.* at 867; *id.* at 872–73 (Sotomayor, dissenting).

The courts denied the government's request.[147] The Fifth Circuit expressed concern that the government's request put the "court in an untenable position" because "granting a partial stay … would involve this court in making predictions without record support from the [Department] about the interrelated effects of the remainder of the [r]ule on thousands of covered educational entities"[148]—again, notwithstanding the rule's detailed severability discussion. For its part, the Sixth Circuit—in addition to offering the benefit-cost analysis rationale described above—opined that the three challenged provisions of the rule "appear[ed] to touch every substantive provision of the [r]ule" as a whole, and rejected the government's argument that schools could enforce the other provisions of the rule "by relying on the prior definition of sex discrimination."[149]

The Supreme Court similarly concluded that the government, on the limited record associated with its stay applications, had "not provided this Court a sufficient basis to disturb the lower courts' interim conclusions that the three provisions found likely to be unlawful are intertwined with and affect other provisions of the rule."[150] "Nor," the Court continued, had the government "adequately identified which particular provisions, if any, are sufficiently independent of the enjoined definitional provision and thus might be able to remain in effect"[151]—again, notwithstanding the rule's severability discussion. Although issued in response to stay applications, these decisions—along with *Ohio*, addressed above, and others collected below the line—may prove helpful for litigants arguing for inseverability notwithstanding courts' recognition that severability should be the default and over an agency's stated intent in favor of severability in its rule.[152]

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[147] *Id.* at 866; *see Tennessee*, 2024 WL 3453880; *Louisiana v. Dep't of Educ.*, No. 24-30399, 2024 WL 3452887 (5th Cir. July 17, 2024).

[148] *Louisiana*, 2024 WL 3452887, at *2 (also describing as "problematic" and "not this court's job" a "judicial rewriting of the [r]ule on what [might] only be a temporary basis" (citing *Ohio*, 603 U.S. 279)).

[149] *Tennessee*, 2024 WL 3453880, at *3–4.

[150] *Louisiana*, 603 U.S. at 868.

[151] *Id.*

[152] *See, e.g.*, *Alabama v. U.S. Sec'y of Educ.*, No. 24-12444, 2024 WL 3981994, at *8 (11th Cir. Aug. 22, 2024) (also refusing to stay a preliminary injunction of the entire Title IX rule, including because the rule's severability clauses, applicable to each subpart of the rule, "say nothing about [a] situation…where provisions in multiple different subparts may well be invalidated simultaneously"); *Mayor of Baltimore v. Azar*, 973 F.3d 258, 292–93 (4th Cir. 2020) ("Despite the severability clause, the Final Rule is not severable because it is clear HHS intended the Final Rule to stand or fall as a whole, and the agency desired a single, coherent policy … ." (quotation omitted)); *Nasdaq Stock Mkt. LLC*, 38

VI. CONCLUSION

In challenges to executive action, there are several remedies litigants might pursue. Indeed, their choice of which remedy to seek—and when to seek it—might have implications for how litigants present the merits of their claims. Litigants might keep these issues in mind as they craft their cases.

F.4th at 1145 ("Instead" of deferring to an agency's severability clause, "we look to agency intent and whether the valid portions can function absent the invalid portions, … ; doing so, we conclude that the" agency's rule, "as currently constructed, would be unworkable if we simply severed the" invalid provision.).