GOVERNING FOR IMPACT

The "Committed to Agency Discretion" Exception

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Issue Brief

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I. INTRODUCTION

The Supreme Court has "long applied a strong presumption favoring judicial review of administrative action" under the Administrative Procedure Act, which "may be rebutted only if" another statute precludes review under 5 U.S.C. § 701(a)(1) "or if the action is 'committed to agency discretion by law'" under 5 U.S.C. § 701(a)(2).[1] This Issue Brief addresses the latter exception.[2] During its first and current terms, the Trump administration has argued that its actions are committed to agency discretion by law to shield them from review.[3] But litigants have successfully overcome this argument, and courts have consistently held that the § 701(a)(2) exception is narrow. This Issue Brief describes the committed to agency discretion exception and the doctrine animating it, addresses arguments raised in challenges to Trump administration actions, and overall, identifies general factors litigants might consider when rebutting an agency's assertion that § 701(a)(2) shields its action from judicial review.

II. "COMMITTED TO AGENCY DISCRETION"

Given the well-established presumption of reviewability under the APA, the Supreme Court has "read the exception in § 701(a)(2) quite narrowly, restricting it to 'those rare circumstances where the relevant statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion.'"[4] The Court's seminal cases on § 701(a)(2) highlight why. In 1971's *Citizens to Preserve*

[1] *Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, 586 U.S. 9, 23 (2018) (initial quotation omitted).

[2] For more on a separate prerequisite to reviewability under the APA, final agency action, see Governing for Impact, *Final Agency Action* (May 2025), https://governingforimpact.org/wp-content/uploads/2025/05/Final-Agency-Action.pdf.

[3] *See, e.g.*, *Am. Fed'n of Gov't Emps., AFL-CIO v. U.S. Off. of Pers. Mgmt.*, No. 25CV1237 (DLC), 2025 WL 996542, at *17–18 (S.D.N.Y. Apr. 3, 2025).

[4] *Weyerhaeuser*, 586 U.S. at 23 (*quoting Lincoln v. Vigil*, 508 U.S. 182, 191 (1993)); *see Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 410 (1971) ("very narrow").

Overton Park v. Volpe, the Court set forth the general standard that judicial review is available notwithstanding § 701(a)(2) unless there is "no law to apply."[5] Later, in *Heckler v. Chaney* (1985) and *Lincoln v. Vigil* (1993), the Court recognized specific categories of agency action where § 701(a)(2) presumptively applies.[6] The Court has also suggested that the exception applies to certain areas of law, like national security.[7] More recently, however, including in *Department of Homeland Security v. Regents of the University of California* (2020), the Court has reaffirmed section § 701(a)(2)'s narrow scope, highlighting factors that weigh in favor of reviewability.[8]

A. *Overton Park*: "No Law to Apply" Test

In *Overton Park*, citizens and conservation groups challenged the Department of Transportation's approval of federal funds to build an interstate highway through a public park under a statute prohibiting the use of federal funding to do so unless no other "feasible and prudent" alternative routes existed.[9] At the outset, the Court dismissed the government's argument that the action was unreviewable under § 701(a)(1) since there was no evidence that Congress intended to prohibit review and "there [was] most certainly no 'showing of "clear and convincing evidence" of a legislative intent' to restrict access to judicial review."[10] *Overton Park* thus separated § 701(a)(1) and (a)(2) by determining that subsection (a)(1) applies where Congress has expressed an intent to preclude judicial review.[11] In contrast, subsection (a)(2) applies only where a court has "no meaningful standard against which to judge the agency's exercise of discretion."[12]

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[5] 401 U.S. at 410.

[6] *See generally Heckler v. Chaney*, 470 U.S. 821, 828–33 (1985); *Lincoln*, 508 U.S. at 90–92.

[7] *Webster v. Doe*, 486 U.S. 592, 599–601 (1988).

[8] *See generally* 140 S. Ct. 1891, 1905–07. The D.C. Circuit has interpreted § 701(a)(2)'s exception to be jurisdictional, finding that nonreviewability is "not simply a question of deference to agency discretion, but of the absence of jurisdiction" over acts that Congress has entrusted to the agency. *Baltimore Gas & Elec. Co. v. FERC*, 252 F.3d 456, 458–59 (D.C. Cir. 2001) (quoting *Fort Sumter Tours, Inc. v. Babbitt*, 202 F.3d 349, 357 (D.C. Cir. 2000)).

[9] 401 U.S. at 404–06 (citing 49 U.S.C. § 1653(f) (1964 ed., Supp. V); 23 U.S.C. § 138 (1964 ed., Supp. V).

[10] *Id.* at 410 (citing *Abbott Lab'ys v. Gardner*, 387 U.S. 136, 141 (1967)).

[11] *Id.*; *see also Heckler*, 470 U.S. at 830.

[12] *Id.* At least one justice has viewed the distinctions between § 701(a)(1) and (a)(2) differently. Dissenting in *Webster v. Doe*, addressed below, Justice Scalia found that *Overton Park* relied on there being no law to apply because it was the only available basis for nonreviewability. *See* 486 U.S at 607–08. In his view, the textual difference between § 701(a)(1) (excepted by statute) and (a)(2) (excepted

Next, in assessing the agency's action under § 701(a)(2), the Court emphasized that subsection (a)(2) sets forth a "very narrow exception."[13] The Court concluded that the government's assertion that § 701(a)(2) applied was "easily answered"—and rejected—since the exception only applies "in those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply.'"[14] The Court found "law to apply" in the statute's "plain and explicit bar to use federal funds for construction of highways through parks" unless certain conditions were present.[15] The underlying statutes provided that the Secretary could not approve a project which required the use of public parkland unless "(1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park."[16] The statute further provided standards governing the Secretary's approval of projects, requiring the Secretary, for example, to find that alternative routes presented unique problems. Since the statutes embodied a congressional mandate to give the preservation of parklands "paramount importance" in the agency's determinations, a court had standards by which to review the agency action, giving the Court "law to apply."[17]

Although the Supreme Court's decisions have generally focused on whether a statute provides justiciable standards, lower courts have suggested that such standards can also be found in agency regulations and policies. For example, both the D.C. and Ninth Circuits have found that courts can consider both statutory and regulatory standards, including informal policy statements.[18] And the Fourth Circuit has found that at least regulations promulgated under the authorizing statute can provide justiciable standards.[19] The Second Circuit has likewise relied on the agency's regulations and guidance at least in cases in which individuals' rights are affected

by law) implies that (a)(2)'s "law" refers to broader common law principles governing judicial review of agency action, excluding from review a wider range of actions. *Id.*

[13] *Overton Park*, 401 U.S. at 410.

[14] *Id.* (citing S. Rep. No. 79-752, at 26 (1945)).

[15] *Id.* at 411.

[16] *Id.* (quoting 23 U.S.C. § 138 (1964 ed., Supp. V))

[17] *Id.* at 412–13.

[18] *See Johnson Tr. of Charley E. Johnson Revocable Living Tr. v. United States*, 145 F.4th 1158, 1164 (9th Cir. 2025); *Physicians for Soc. Resp. v. Wheeler*, 956 F.3d 634, 643 (D.C. Cir. 2020).

[19] *Inova Alexandria Hosp. v. Shalala*, 244 F.3d 342, 346 (4th Cir. 2001).

and the agency has created a general policy by which it typically exercises its discretion.[20]

B. *Heckler*, *Lincoln*, and *Webster*: Categories of Actions Presumptively Committed to Agency Discretion

In subsequent cases, the Court wrestled with *Overton Park*'s "no law to apply" test and identified particular agency actions that are presumptively unreviewable.

First, in *Heckler v. Chaney* (1985), the Court held that an agency's decision whether to take enforcement action is presumptively committed to agency discretion by law. There, prisoners who had been sentenced to death challenged the Food and Drug Administration's failure to bring an enforcement action against the use of capital punishment drugs, claiming the use violated the Federal Food, Drug, and Cosmetics Act (FDCA).[21]

In its analysis of reviewability under § 701(a)(2), the Court began by addressing an apparent tension between (a)(2)'s exception for actions committed to agency discretion and the scope of review under § 706(2)(A), which includes review for agency abuse of discretion.[22] Expounding upon *Overton Park*'s "no law to apply" test, the Court in *Heckler* found that review is unavailable if the statute does not provide a court any "meaningful standard against which to judge the agency's exercise of discretion."[23] In such cases, "the statute ("law") [has] "committed" the decisionmaking to the agency's judgment absolutely."[24] That reading resolves any tension with the review required by § 706, the Court reasoned, because if no manageable standards are available, then it is impossible to review the agency's action for abuse of discretion.[25]

[20] *Salazar v. King*, 822 F.3d 61, 76 (2d Cir. 2016).
[21] 470 U.S. at 823 (citing 21 U.S.C. § 301 *et seq.*).
[22] *Id.* at 829.
[23] *Id.* at 830.
[24] *Id.*
[25] *Id.*

Next, the Court concluded that *Overton Park*'s "narrow construction" of (a)(2) did not require courts to apply a presumption of reviewability to all agency action.[26] Specifically, the Court determined that refusals to take enforcement action give rise to a "presumption … that judicial review is not available."[27] The Court rooted that presumption in several factors, including that: (1) agencies' decisions not to engage in enforcement involve "a complicated balancing … of factors which are peculiarly within its expertise"; (2) when an agency refuses to act it does not exercise its coercive power over an individual's liberty or property rights; (3) nonenforcement decisions do not provide an adequate "focus" for judicial review; and (4) nonenforcement is analogous to the broad prosecutorial discretion traditionally afforded to the Executive Branch.[28] However, the Court noted that the presumption of unreviewability can be rebutted when the statute provides specific guidelines for the agency's enforcement powers.[29]

Applying this test to the FDA's nonenforcement decision, the Court concluded that no such guidelines existed in the FDCA.[30] The Act's enforcement provision authorized the Secretary to conduct examinations and investigations without otherwise providing standards for the Secretary's decisions or mandating enforcement in any particular case or cases. In rejecting the plaintiffs' claims that the FDCA provided law to apply, the Court assessed various provisions and found no meaningful standards for review. For example, the Act's enforcement provision stated that the "Secretary is *authorized* to conduct examinations and investigations," creating a permissive authority for the agency to initiate investigations and recommend prosecution to the Attorney General.[31] Further, the agency's "policy statement," in which the agency stated that it was "obligated" to pursue certain investigative actions, did not override a separate rule in which the agency asserted unreviewable enforcement discretion.[32] Finally, the court rejected plaintiffs' argument that a provision of the FDCA stating that the Secretary was not required to "report for prosecution … minor violations" under the Act carried the negative implication that the Secretary was required to

[26] *Id.* at 831.

[27] *Id*.

[28] *Id*. at 831–32.

[29] *Id*. at 832–32.

[30] *Id*. at 835.

[31] *See id* (quoting 21 U.S.C. § 372(a)(1)(A)) (emphasis added).

[32] *Id*. at 836. (citing 21 C.F.R. § 10.45(d)(2) (1984)).

report all "major" violations.[33] Thus, the Court held, the statute "commit[s] complete discretion to the Secretary to decide how and when [the Act's enforcement provisions] should be exercised."[34] For more on the presumption of nonreviewability of agencies' nonenforcement decisions, see Governing for Impact's Issue Brief on Challenging Nonenforcement.[35]

Second, in *Lincoln v. Vigil* (1993), the Court held that an agency's allocation of general funds from a lump-sum appropriation is presumptively unreviewable so long as the allocation meets permissible statutory objectives.[36] *Lincoln* concerned a challenge to the Indian Health Service's decision to discontinue its Indian Children's Program, which provided clinical services to American Indian children in the Southwest, and to instead reallocate funding to a nationwide treatment program out of its general appropriations.[37] In determining whether the IHS's reallocation was reviewable, the Court highlighted that it had previously read § 701(a)(2) to preclude review of certain categories of administrative decisions that courts have traditionally regarded as committed to agency discretion, especially in areas of agency action "in which courts have long been hesitant to intrude."[38]

The Court concluded that an agency's allocation of funds from a lump-sum appropriation is another such category of agency decision.[39] The Court reasoned that when Congress grants a lump-sum appropriation, it does not provide restrictions on how those funds need to be allocated, and, therefore, does not provide courts justiciable standards by which to review an agency's allocation. The Court likened such agency action to an agency's decision not to initiate enforcement proceedings in *Heckler*: as there, "so here, the 'agency is far better equipped than the courts to

[33] *Id.* at 837.

[34] *Id.* at 835.

[35] Governing for Impact, *Challenging Nonenforcement* (May 2025), https://governingforimpact.org/wp-content/uploads/2025/05/Challenging-Non-Enforcement.pdf.

[36] 508 U.S. at 193.

[37] *Id.* at 184.

[38] *Id.* at 190 (quoting *Franklin v. Massachusetts*, 505 U.S. 788, 818 (1992) (Stevens, J., concurring)); *see also Webster*, 486 U.S. at 599–601 (concluding that CIA's decision to terminate an employee in the interests of national security was unreviewable); *ICC v. Locomotive Engineers*, 482 U.S. 270, 280 (1987) (concluding that an agency's refusal to grant reconsideration of action because of a material error was unreviewable).

[39] *Lincoln*, 508 U.S. at 192.

deal with the many variables involved in the proper ordering of its priorities.'"[40] However, the Court cautioned, this presumption only applies "[t]o [the] extent" that agencies allocate general funds "to meet permissible statutory objectives."[41]

Having determined that the particular reallocation at issue in *Lincoln* stemmed from a lump-sum appropriation, the Court then turned to the question of statutory permissibility. The Court reasoned that the reallocation to a national treatment program accorded with the statute's objective of providing health care to American Indians. The Court therefore concluded that the reallocation was committed to the agency's discretion.[42]

In sum, *Heckler* and *Lincoln* reinforced § 701(a)(2)'s narrow application but recognized a presumption of unreviewability for agency action that is of a sort traditionally regarded as being committed to agency discretion. In circumstances where that presumption is applicable, litigants might take special care to identify statutory text imposing justiciable standards for a court to apply.

In another statutory context, the Court concluded that both the statutory text and the overall statutory purpose supported the government's argument that the challenged action was unreviewable. *Webster v. Doe* (1988) rejected a challenge to the Director of the Central Intelligence Agency's decision to terminate an employee who claimed that his firing violated the APA, among other provisions of law.[43] Differentiating the National Security Act from the statutes at issue in *Overton Park* and *Heckler*, the Court concluded that § 701(a)(2) applied since the Act permitted the Director to terminate agency employees whenever the Director "deem[ed] such termination necessary or advisable in the interests of the United States."[44] The Court described this provision as "exud[ing] discretion to the Director" and found that it "foreclose[d] the application of any meaningful judicial standard of review" "[s]hort of permitting cross-examination of the Director concerning his views of the Nation's security and whether the discharged employee was inimical to those interests."[45] In his concurrence in a separate case, Justice Stevens argued that the specific context

[40] *Id*. at 193 (quoting *Heckler,* 470 U.S. at 831–32).

[41] *Id*.

[42] *Id*. at 194.

[43] *See* 486 U.S. at 595.

[44] *Id*. at 600. (quoting 50 U.S.C. § 403(c))

[45] *Id*.

of the statute in *Webster*—national security (an arena "in which courts have long been hesitant to intrude[]")—bolstered the Court's determination that the agency's action was unreviewable.[46] Indeed, the Court in *Webster* alluded to that context when it described the National Security Act's "overall structure[,]" which "exhibits…extraordinary deference" to the Director to protect intelligence information.[47] The Act's purpose and history, the Court concluded, indicated that Congress meant to commit decisions to terminate individual employees to the Director's discretion, foreclosing review under the APA.[48]

C. *Weyerhaeuser* and *Regents*: Rebutting a Presumption of Unreviewability

More recent Supreme Court decisions have identified limitations on *Heckler*'s and *Lincoln*'s holdings that certain agency actions are presumptively unreviewable. While agencies continued to argue that actions were akin to those traditionally regarded as being committed to agency discretion, the Court instead determined the challenged actions were disputes of the type that courts regularly review.

For example, in *Weyerhaeuser Co. v. U.S. Fish & Wildlife Services* (2018), the Supreme Court unanimously held that the Fish & Wildlife Service's designation of land as a critical habitat under the Endangered Species Act was not committed to agency discretion.[49] The Act authorized the Service to designate critical habitats of endangered species once the Secretary of the Interior determined that the area is essential for the conservation of the species,[50] and required the Secretary to consider economic and other relevant effects of the designation.[51]

At the outset, the Court reiterated the presumption of judicial review under the APA, and explained that the "narrow[]" committed to agency discretion exception is "restrict[ed]" to "rare statutory provisions" involving "agency decisions that courts

[46] *Franklin*, 505 U.S. at 819. (Stevens, J., concurring in part and concurring in the judgment)

[47] *Webster*, 486 U.S. at 600–01.

[48] *Id.*

[49] 586 U.S. at 26.

[50] *Id.* at 14 (citing 16 U.S.C. § 1532(5)(A)).

[51] 16 U.S.C. § 1533(b)(2).

have traditionally regarded as unreviewable."[52] The Court distinguished the Service's designation of critical habitat from those actions, reasoning that the discretionary language in the statute did not obviate the Act's requirement that the Secretary consider economic and other impacts. Since the statute imposed a "'categorical requirement'" that the Secretary take into consideration certain impacts before determining whether an area should be excluded, the Court held the statute was not "drawn so that a court would have no meaningful standard against which to judge the [Secretary's] exercise of [his] discretion."[53]

Similarly, in *Department of Homeland Security v. Regents of the University of California* (2020), the Court again reiterated the exception's narrow scope in rejecting the government's argument that rescinding the Deferred Action for Childhood Arrivals (DACA) program was committed to agency discretion. The government argued that DACA's non-enforcement policy mirrored the non-enforcement decision at issue in *Heckler*, making the agency's decision to rescind DACA unreviewable.[54] However, the Court concluded that the DACA program was "not simply a non-enforcement policy."[55] Instead, the DACA program established a process by which individuals would be identified for eligibility, apply for, and receive deferred action.[56] Based on this process, applicants would receive government benefits, including access to work authorization and Medicare. These deferred-action adjudication, the Court reasoned, culminated in "an 'affirmative act of approval,' the very opposite of a 'refus[al] to act[.]'"[57] Since the DACA program created affirmative immigration relief, it was not merely a non-enforcement policy, and was therefore an "action [that] provides a focus for judicial review."[58] Unlike an agency's refusal to bring enforcement actions, the Court emphasized, rescinding access to government benefits is exactly the type of interest "courts often are called upon to protect."[59]

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[52] *Weyerhaeuser*, 586 U.S. at 23.

[53] *Id.* at 24–25 (quoting *Bennett v. Spear*, 520 U.S. 154, 172 (1997), and *Lincoln*, 508 U.S. at 191).

[54] *Dep't of Homeland Sec. v. Regents of the Univ. of California*, 591 U.S. 1, 17–18 (2020).

[55] *Id.* at 18.

[56] *Id.*

[57] *Id.* (*quoting Heckler*, 470 U.S. at 831–32).

[58] *Id.* (*quoting Heckler*, 470 U.S. at 832) (internal quotations omitted).

[59] *Id.* at 19 (*quoting Heckler*, 470 U.S. at 832); *see also Barnhart v. Thomas*, 540 U.S. 20 (2003) (reviewing eligibility determinations for Social Security benefits).

In sum, the Supreme Court's most recent decisions highlight the narrow applicability of § 701(a)(2)'s exception. While previous cases have established categories of agency action that are presumptively unreviewable, both *Weyerhaeuser* and *Regents* point to the Court's receptiveness to finding "law to apply," even when the statutory language grants the agency considerable discretion.

III. TRUMP ADMINISTRATION LITIGATION

Recently, lower courts have applied the general presumption of reviewability to more specific cases—including those involving funding terminations or conditions, internal agency administration and staffing decisions, and immigration or other government benefits. These cases are still making their way through the courts, and the law will inevitably evolve. However, some challengers' arguments have at least persuaded lower courts and can inform future challenges to agency actions.

Specifically, litigants have successfully refuted the Trump administration's invocations of the committed to agency discretion exception by arguing that the challenged action is not one that has been traditionally regarded as fitting within the exception. Indeed, lower courts have found the APA's presumption of reviewability difficult to overcome without "clear and convincing" evidence that Congress intended a particular type of agency action to be exempted from judicial review.[60] Even if the agency's action falls within a category that has been traditionally regarded as committed to agency discretion, litigants have still been successful by demonstrating that the statute in question provides the reviewing court with law to apply. In some cases, litigants have even relied on prior agency policy or practice to craft judicially manageable standards.

[60] *See, e.g.*, *Doe v. Noem*, 778 F. Supp. 3d 311, 332 (D. Mass. 2025) (quoting *Abbott Lab'ys*, 387 U.S at 141).

A. Funding Terminations and Conditions

As discussed above, in *Lincoln* the Supreme Court held that an agency's decision to reallocate funding from a lump-sum appropriation is presumptively unreviewable. However, litigants have successfully argued that *Lincoln* does not bar challenges to agencies' decisions to terminate programs or place new conditions on existing grants by demonstrating that statutory language directs how the funding should be spent and therefore limits the agency's discretion.

Lower courts have interpreted *Lincoln*'s holding narrowly, highlighting the Court's insistence that internal funding allocations are unreviewable only to the extent that they conform with the appropriating statute's mandates.[61] For example, in *Community Legal Services v. HHS* (2025), the Ninth Circuit concluded that HHS's decision to discontinue funding that provided unaccompanied children with legal representation was not committed to the agency's discretion since the program that the agency cut was established by statute.[62] Under the statute, HHS "*shall ensure*, to the greatest extent practicable … that all unaccompanied alien children…have counsel to represent them in legal proceedings."[63] That language, the court found, "plainly impose[d] a mandatory duty on HHS to take steps to ensure 'all' such children have counsel[,]" by using language like "shall ensure," instead of, for example, "may."[64] While the statute provided the agency some discretion in allocating the provision of counsel ("to the greatest extent practicable"), that discretion did not make HHS's decision not to fund legal counsel *at all* unreviewable.[65] The court compared the statute's language to the far less determinate language in *Overton Park* ("no feasible and prudent alternative") and other Ninth Circuit precedent (*e.g.*, "consistent with

[61] *See Lincoln*, 508 U.S. at 193.

[62] *Cmty. Legal Servs. in E. Palo Alto v. Dep't of Health & Hum. Servs.*, 137 F.4th 932, 940 (9th Cir. 2025); *see also Maryland v. Corp. for Nat'l & Cmty. Serv.,* No. CV DLB-25-1363, 2025 WL 1585051, at *17 (D. Md. June 5, 2025) (concluding that AmeriCorps' decision to remove all National Civilian Community Corps members from service was reviewable because the authorizing statute created the Corps and established standards for its operation and organization).

[63] *Cmty. Legal Servs.*, 137 F.4th at 941 (citing 8 U.S.C. § 1232(c)(5)) (emphasis original).

[64] *Id.* at 941.

[65] *Id.* at 941–42.

sound business principles"), where courts nonetheless found sufficient law to apply.[66]

Similarly, courts have concluded that agency decisions imposing new conditions on existing programs or grants are reviewable notwithstanding § 701(a)(2) where the relevant statute includes standards or program objectives for the appropriated funds. In *Martin Luther King, Jr. County v. Turner* (2025), for example, a district court determined that unlike in *Lincoln*, where the funding was appropriated in "an undifferentiated 'lump sum'" that did not mention the program being targeted, the challenged awards stemmed from statutes that "set[] forth directives that specify the types of programs that are eligible for funding" and allocated funds for specific programs or improvements.[67] Because the underlying statutes provided the court with "substantial guidance as to how the agencies' discretion should be exercised in implementing these programs[,]" the agencies' decisions to implement new conditions on awards were not unreviewable under § 701(a)(2).[68]

Similarly, in *Rhode Island Coalition Against Domestic Violence v. Bondi* (2025), a district court concluded that the Department of Justice's decision to expand the list of out-of-scope activities for Violence Against Women Act funding was judicially reviewable notwithstanding § 701(a)(2).[69] The court reasoned that while the government had "far-reaching" authority over VAWA grants, the statute also provided specific purposes for which grants may or must be used, providing the court with "meaningful internal standards by which to judge" the government's actions.[70] The court also noted that the determination of grant conditions is not a category of agency decisions traditionally committed to exclusive agency discretion.[71] Thus, the

[66] *Id.* (*quoting Overton Park*, 401 U.S. at 411, and *Pac. Nw. Generating Coop. v. Bonneville Power Admin.*, 596 F.3d 1065, 1075 (9th Cir. 2010)).

[67] No. 2:25-CV-814, 2025 WL 1582368, at *13 (W.D. Wash. June 3, 2025). For example, the grant-authorizing statutes directed the agencies to establish programs which "assist individuals … and families experiencing homelessness" through providing services which "help such individuals move into transitional and permanent housing[,]" including directives that detail the types of programs eligible for funding and criteria in selecting grant recipients. *Id.* at *4, *13 (citing 42 U.S.C. § 11301(b)(2)–(3)).

[68] *Id.* at *13.

[69] No. CV 25-279 WES, 2025 WL 2271867, *6 (D.R.I. Aug. 8, 2025).

[70] *Id.* at *7.

[71] *Id.*

challenge to the VAWA conditions was not one of those rare cases where there is no law to apply, and the court could review the government's actions.[72]

B. Personnel and Internal Agency Administration

While courts often conclude that agencies' staffing and other administrative decisions are committed to agency discretion,[73] there are notable exceptions. Recently, litigants challenging an agency's assertion that § 701(a)(2) shields internal administrative decisions from review have been successful in distinguishing the challenged action from more typical employee-agency policies, like individual terminations, and where the challenged action affects the agency's ability to carry out its statutory mandates.

In *New York v. McMahon* (2025), for example, a district court rejected the government's argument that a massive reduction-in-force (RIF) policy was unreviewable under § 701(a)(2), holding that the RIFs could not "be fairly categorized as mere managerial or staffing decisions[,]" which would otherwise be "afforded discretion."[74] The agency's assertion that the RIFs were merely a "reorganization" did not square with the RIFs' magnitude and harm to essential agency functions.[75] Yet the government sought, and the Supreme Court granted, an emergency stay of the district court's preliminary injunction pending further review.[76] Characteristic of its orders on stay applications, the Court did not explain its reasoning, but the government did not raise the district court's analysis under § 701(a)(2) in its stay application,[77] leaving the effect of the Court's interim ruling on the district court's reviewability analysis unclear.

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[72] *Id.*

[73] *See, e.g.*, *New York v. McMahon*, CV 25-10601-MJJ, 2025 WL 1463009, at *24 (D. Mass. May 22, 2025) (suggesting that "mere managerial or staffing decisions" "are typically afforded discretion").

[74] *Id.* at *24.

[75] *Id.* at *1.

[76] *McMahon v. New York*, 145 S. Ct. 2643 (2025).

[77] *McMahon v. New York*, No. 24AA1203 (June 6, 2025) (application to stay the injunction), https://www.supremecourt.gov/DocketPDF/24/24A1203/362486/20250606104613590_McMahon%20Stay%20Application.pdf.

Similarly, courts have found that when agencies contract for the performance of agency functions, agencies do not have "unbounded and unreviewable" discretion in the hiring and management of contractors if the contractors "are incapable of carrying out their mandatory responsibilities."[78] Likewise, internal agency administrative decisions concerning employee records may also be reviewable if they have an effect beyond the agency's typical day-to-day decisions. For example, in *American Federation of Government Employees v. OPM* (2025), a district court dismissed the government's assertion that its decision to grant DOGE access to employee records — violating the Privacy Act — was unreviewable because it involved an "'informal' action reflecting OPM's day-to-day operations."[79] The court found that the plaintiffs' complaint was not seeking review of OPM's "customary" discretion, but instead "the decision to depart radically from its established safeguards and to give access to DOGE agents in violation of the law."[80]

C. Immigration

While the Trump administration has asserted that § 701(a)(2) precludes review of its immigration policies, the Supreme Court has held that sweeping revocations of prior policies or programs are reviewable, specifically where, per *Regents*, they implicate previous "affirmative acts of approval," or the statute creates meaningful standards of review. Lower courts have also considered agencies' prior policies or regulations as providing a standard for review.

For example, in *Doe v. Noem* (2025), a district court held that DHS's decision to categorically deny parole status to the plaintiffs was not unreviewable because the statute established standards to limit the Secretary's discretion: it required case-by-case determinations based on stated factors.[81] Relying on *Regents*, the court explained that the parole program created a process for affirmative immigration relief and benefits, creating a "focal point for judicial review."[82] Once again, though,

[78] *Nat'l Fed'n' of the Blind v. U.S. AbilityOne Comm'n*, 421 F. Supp. 3d 102, 119 (D. Md. 2019).

[79] *Am. Fed'n of Gov't Emps., AFL-CIO v. U.S. Off. of Pers. Mgmt.*, No. 25CV1237 (DLC), 2025 WL 996542, at *18 (S.D.N.Y. Apr. 3, 2025).

[80] *Id.*; *see also* 5 U.S.C. § 552a(e)(10) (relevant provision of the Privacy Act).

[81] 778 F. Supp. 3d 311, 333. (D. Mass. 2025)

[82] *Id.*

the government sought, and the Supreme Court granted, an emergency stay pending further review, with no majority opinion to explain the Court's reasoning.[83]

D. Government Benefits and Like Cases

Similar to immigration benefits cases, courts have found that decisions concerning government benefits are not committed to agency discretion if the statute contains discernible standards, even where agencies possess some discretion in their conferral or denial.

For example, in *Orr v. Trump* (2025), a district court rejected the government's argument that its new passport policy was committed to agency discretion because the Passport Act sets meaningful standards even though it affords the agency "substantial discretion" to issue such policies.[84] The challenged policy would have required passport applicants to use their sex assigned at birth as their sex marker, removing the option to use "X" for non-binary, intersex, and gender non-conforming applicants.[85] The district court described previous Supreme Court cases rejecting the State Department's refusal to issue passports based on political beliefs or associations and measuring the agency's actions against the authority that Congress had conferred, which did not "give [the Secretary] unbridled discretion to grant or withhold a passport from a citizen for any substantive reason he may choose."[86] Relying on both Supreme Court and lower courts' interpretation of the Passport Act, the court found that passport determinations are "not one of those areas traditionally committed to agency discretion," and rejected the government's reliance on the exception.[87] As of this writing, the government's motion for a stay pending appeal is pending with the First Circuit.[88]

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[83] 145 S. Ct. 1524 (2025). This time, the government did argue the lower courts' analysis under § 701(a)(1) and (2) was mistaken in its application for a stay. *See* App. to Stay, *Noem v. Doe*, No. 24A1079 (May 8, 2025), https://www.supremecourt.gov/DocketPDF/24/24A1079/358354/20250508121118618_Kristi_Noem_v_Svitlana_Doe_et_al_%20application_stay.pdf.

[84] 778 F. Supp. 3d 394, 420 (D. Mass. 2025).

[85] *Id.* at 404.

[86] *Id.* at 421 (quoting *Haig v. Agee*, 453 U.S. 280, 306 (1981) (internal quotations omitted).

[87] *Id.* (quoting *Dep't of Commerce v. New York*, 588 U.S. 752 (2019)).

[88] *See* Mot. for Stay Pending Appeal, *Orr v. Trump*, No. 25-1579 (1st Cir. July 18, 2025), https://storage.courtlistener.com/recap/gov.uscourts.ca1.52963/gov.uscourts.ca1.52963.00108315000.0.pdf.

IV. CONCLUSION

Litigants have succeeded in overcoming the government's frequent invocation of § 701(a)(2)'s narrow exception to shield agencies' decisions from challenge where they have identified law to apply — meaningful standards to guide judicial review — and where they have demonstrated that the challenged action differs from those typically understood as committed to agency discretion. The exception should not, and does not, exempt all discretionary government action from review.