Agency Amici

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Administrative law is largely concerned with two issues. The first is how agencies exercise their power using traditional forms like rulemaking and adjudication. The second is their legitimacy in doing so, which is increasingly under attack in the courts. However, agencies engage in numerous other activities that offer important insights into both these issues. To that end, this Article considers an under-appreciated agency activity: the practice of appearing as amicus curiae in the federal courts. Agencies file scores of amicus briefs each year, all seeking to influence the development of the law outside of the traditional means of rulemaking and adjudication. This Article's primary objectives are to build a positive account of agency amicus behavior, including a typology of such behaviors, and to evaluate those behaviors through the normative dimensions of administrative law. As developed herein, this exploration offers deep engagement with some of the most pressing issues of administrative law today, including the scope of agencies' interpretive authority, implications of a strong view of the unitary executive, and access to justice. As the Article concludes, agency amici fill important roles both in ordinary administrative law and in supporting the constitutional framework.

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INTRODUCTION

For a brief moment, it seemed that the Consumer Product Safety Commission ("CPSC") was planning to take away our gas stoves.[1] The collective worry that we could no longer "cook with gas"[2] because of federal government overreach quickly became heated,[3] prompting the Biden Administration to reassure the public that CPSC was never planning to do such a thing[4] even as Republican legislators dared the White House to "pry it from my cold dead hands."[5] Indeed, the episode spurred a flurry of legislative proposals carrying such vivid titles as the Stop Trying to Obsessively Vilify Energy ("STOVE") Act[6] and the Gas Stove Protection and Freedom Act.[7]

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[1] In an interview with Bloomberg News, CPSC Commissioner Richard Trumka, Jr. noted the health hazards associated with gas cooking and stated that "[p]roducts that can't be made safe can be banned." Ari Natter, *US Safety Agency to Consider Ban on Gas Stoves amid Health Fears*, BLOOMBERG, https://www.bloomberg.com/news/articles/2023-01-09/us-safety-agency-to-consider-ban-on-gas-stoves-amid-health-fears (last updated Jan. 9, 2023, 10:01 PM) [https://perma.cc/MBF6-UFTJ].

[2] The phrase "cooking with gas" was coined by the natural gas industry in the 1930s as part of an advertising campaign to encourage consumers to switch from wood-fueled stoves to gas stoves, rather than to electric stoves. Martha Barnette & Grant Barrett, *A Way with Words: Now You're Cooking with Gas*, WAYWORD, INC. (June 20, 2014), https://www.waywordradio.org/now-youre-cooking-with-gas/ [https://perma.cc/6HDM-P5MP].

[3] *See, e.g.*, Byron Donalds (@RepDonaldsPress), X (Jan. 10, 2023, 12:33 PM), https://x.com/RepDonaldsPress/status/1612865214483140608 [https://perma.cc/4TNF-96JH] ("@JoeBiden, get your hands off our gas stoves!!!!"); Zoë Richards, *Safety Official's Remarks About Possible Gas Stove Ban Fuel Hot GOP Takes About Biden*, NBC NEWS (Jan. 10, 2023, 7:42 PM), https://www.nbcnews.com/politics/congress/safety-officials-remarks-possible-gas-stove-ban-fuel-hot-gop-takes-bid-rcna65206 [https://perma.cc/PC8K-4WLE].

[4] Matt Egan, *We're Not Taking Away Your Gas Stove, Regulator Tells CNN*, CNN, https://www.cnn.com/2023/01/11/business/gas-stoves-trumka/index.html (last updated Jan. 12, 2023, 6:28 AM) [https://perma.cc/Y2VW-WMQ9] (quoting White House spokesperson as stating, "The President does not support banning gas stoves — and the Consumer Product Safety Commission, which is independent, is not banning gas stoves").

[5] Ronny Jackson (@RonnyJacksonTX), X (Jan. 10. 2023, 7:52 AM), https://x.com/RonnyJacksonTX/status/1612839703018934274 [https://perma.cc/6L7J-X778].

[6] H.R. 263, 118th Cong. (2023).

[7] H.R. 1615, 118th Cong. (2023); *see also* Guarding America's Stoves ("GAS") Act, H.R. 337, 118th Cong. (2023).

Initial coverage of this flare-up missed a much bigger picture: across the country, states and localities had been working to ban new natural gas hookups as part of a climate-centered movement toward building electrification.[8] And another federal agency — one that has far more authority over energy policy[9] — had put its weight behind such an effort. A little-noticed case pending in the U.S. Circuit Court of Appeals for the Ninth Circuit, *California Restaurant Ass'n v. City of Berkeley*,[10] involved a challenge to the City of Berkeley, California's ban on new natural gas hookups.[11] Backed by the natural gas industry, the challengers argued that the ban was preempted by a federal law: the Energy Policy Conservation Act ("EPCA").[12] And the Department of Energy ("DOE"), which under EPCA has authority to set efficiency standards for consumer appliances like cooking stoves, had filed an amicus brief arguing that the Berkeley ordinance was not preempted.[13]

DOE's position would not have been surprising to close observers of the agency. Earlier, it had proposed efficiency standards for new

[8] The connection made its way into the popular press later. *See* Kelsey Tamborrino, *House Passes Bill to Block Federal Gas Stove Ban*, POLITICO (June 13, 2023, 6:31 PM), https://www.politico.com/news/2023/06/13/house-passes-bill-block-gas-stove-ban-00100492.

[9] The Department of Energy ("DOE") does not plan to take away anyone's gas stove, despite rhetoric to the contrary. *See Addressing Misinformation on DOE Appliance Standards*, DEP'T OF ENERGY (May 5, 2023), https://www.energy.gov/articles/addressing-misinformation-doe-appliance-standards [https://perma.cc/FP5N-ZSRK] ("MYTH: The federal government wants to ban gas stoves."); *cf.* Press Release, H. Comm. on Oversight and Accountability, *Hearing Wrap Up: Dep't of Energy's Proposed Rule Regulates Gas Stoves Out of Existence, Further Strangles U.S. Consumer Choice* (May 24, 2023), https://oversight.house.gov/release/hearing-wrap-up-department-of-energys-proposed-rule-regulates-gas-stoves-out-of-existence-further-strangles-u-s-consumer-choice/ [https://perma.cc/AAY8-87QP] (recounting testimony that argued DOE's efficiency standards amounted to a "de facto ban").

[10] Cal. Rest. Ass'n v. City of Berkeley 65 F.4th 1045 (9th Cir. 2023), *amended and superseded on denial of reh'g en banc*, 89 F.4th 1094 (9th Cir. 2024).

[11] *Id.*

[12] *See* 42 U.S.C. § 6297(b) (2018) (general rule of preemption for state energy conservation standards for appliances).

[13] Brief for the United States in Support of Appellee at 6-7, 17, Cal. Rest. Ass'n v. City of Berkeley, 89 F.4th 1094 (9th Cir. 2024) (No. 21-16278) (ECF No. 12364199).

residential gas furnaces.[14] The proposed standards, which would require ninety-five percent efficiency, save consumers billions annually in energy bills, avoid millions of tons of greenhouse gas emissions, and — because of retrofit requirements — would likely shift a portion of new purchases away from gas, toward electric heat pumps, and thus toward increased building electrification.[15] Indeed, the American Gas Association publicly decried this impact just as it did the CPSC incident, arguing that the proposed rule would harm consumers and amounted to an illegal fuel-switching ploy.[16]

DOE develops the furnace efficiency standards using a familiar process: notice-and-comment rulemaking under the Administrative Procedure Act ("APA").[17] This process, which requires agencies to accept public comments on proposed rules, respond to significant comments raised, offer reasonable explanations for their final rules, and possibly face judicial review, serves a variety of legitimizing functions. Numerous scholars have documented, for example, how the rulemaking

[14] Press Release, Dep't of Energy, Biden Admin. Proposes New Cost-Saving Energy Efficiency Standards for Home Furnaces (June 13, 2022), https://www.energy.gov/articles/biden-administration-proposes-new-cost-saving-energy-efficiency-standards-home-furnaces [https://perma.cc/T4WN-97KZ].

[15] *See* Energy Conservation Program: Energy Conservation Standards for Consumer Furnaces, 87 Fed. Reg. 40590 (July 7, 2022) (to be codified at 10 C.F.R. pt. 430) (initiating notice-and-comment process). Just after the CPSC kerfuffle, DOE proposed new efficiency rules for gas stoves. *See* Notice of Data Availability, Energy Conservation Program: Energy Conservation Standards for Consumer Conventional Cooking Products, 88 Fed. Reg. 12603, 12605 (Feb. 28, 2023) (to be codified at 10 C.F.R. pts. 429, 430) (noting that "nearly half" of gas stoves already on the market comply with the proposed standards).

[16] In its comments on the proposed rule, the American Gas Association advanced a litany of arguments and contended the rule was, among other things, procedurally flawed, not economically justified, and violative of EPCA. *See* AM. GAS ASS'N, COMMENTS ON PROPOSED RULE REGARDING ENERGY CONSERVATION STANDARDS FOR CONSUMER FURNACES 1-5 (Oct. 6, 2022), https://www.aga.org/wp-content/uploads/2022/10/aga-comments-doe-furnace-rule-10.6.22-final-1.pdf [https://perma.cc/Y8K7-8WPG].

[17] *See* 5 U.S.C. § 553 (2018) (governing rulemaking).

process supports norms of democracy,[18] public acceptance,[19] and internal development of expertise and constraint.[20] What is more, executive agencies' significant rules must undergo coordinated White House review, including cost-benefit analysis, legal review, and interagency review under Executive Order 12,866 and its subsequent amendments.[21] This review attends to further values stemming from the Take Care Clause.[22]

But what of an amicus brief filed far away from Washington, D.C.? At first glance, one might identify a host of objections. There is no notice-and-comment period for an amicus brief, and though federal court dockets are public, the constraints of appellate litigation are such that there is little dialog among interested parties and the agency. A government amicus brief may surprise the parties to the litigation and possibly undermine their ability to frame the case. Yet the very purpose

[18] *E.g.*, Lisa Schultz Bressman, *Disciplining Delegation After* Whitman v. American Trucking Ass'ns, 87 CORNELL L. REV. 452, 460 (2002) (connecting accountability, fairness, rationality, and regularity values of administrative law to democratic legitimacy); Emily Hammond & David L. Markell, *Administrative Proxies for Judicial Review: Building Legitimacy from the Inside-Out*, 37 HARV. ENV'T L. REV. 313, 320-27 (2013) (linking features of notice-and-comment rulemaking to democratic norms).

[19] *E.g.*, EDWARD STIGLITZ, THE REASONING STATE 189 (2022) ("[P]rocedures such as reason-giving plausibly increase the trustworthiness of the state.").

[20] *E.g.*, Elizabeth Fisher, Pasky Pascual & Wendy Wagner, *Rethinking Judicial Review of Expert Agencies*, 93 TEX. L. REV. 1681, 1715 (2015) (describing symbiotic relationship between courts and agencies furthering improved administration of National Ambient Air Quality Standards program under the Clean Air Act); *cf.* ELIZABETH FISHER & SIDNEY A. SHAPIRO, ADMINISTRATIVE COMPETENCE: REIMAGINING ADMINISTRATIVE LAW (2020) (describing robust vision of expert administrative capacity that moves beyond binaries of discretion and constraint).

[21] *See, e.g.*, Exec. Order No. 12,866, 58 Fed. Reg. 51735 (Sept. 30, 1993) (establishing modern Office of Information and Regulatory Affairs ("OIRA") review process); Exec. Order No. 13,422, 72 Fed. Reg. 2763 (Jan. 18, 2007) (amending provisions of E.O. 12,866).

[22] U.S. CONST. art. II, § 3; *see also* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001) (defining and defending presidential control of the executive branch). This process has both critics and adherents. *Compare* Lisa Heinzerling, *Inside EPA: A Former Insider's Reflections on the Relationship Between the Obama EPA and the Obama White House*, 31 PACE ENV'T L. REV. 325, 326 (2014) (offering strong critique, especially for lack of transparency and arbitrariness in OIRA review process), *with* Cass R. Sunstein, *The Office of Information and Regulatory Affairs: Myths and Realities*, 126 HARV. L. REV. 1838, 1838 (2013) (calling OIRA the "guardian of a well-functioning administrative process").

of such briefs is to influence the development of the law, and agencies file scores of them annually.[23] Compared to rulemaking at least, traditional legitimacy markers of agency deliberation and transparency are hard to identify in this context.

Nor do amicus briefs undergo the same kind of formal White House scrutiny as significant rules. As a result, agency amicus briefs can evade presidential oversight and even conflict with presidential policy, posing concerns for adherents of unitary executive theory.[24] It is true that some amicus briefs in "any appellate court" require approval of the Solicitor General ("SG").[25] This arrangement offers at least some internal accountability for the agency, though the practical independence of the

[23] For example, in the ten-year period beginning in 2013 and ending in 2022, the Equal Employment Opportunity Commission ("EEOC") filed as many as thirty-one amicus briefs in a single year; the Department of Labor ("DOL") filed as many as twenty-eight, and the Consumer Financial Protection Bureau ("CFPB") filed as many as nine. *See Commission Appellate and Amicus Briefs*, EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/commission-appellate-and-amicus-briefs (last visited Dec. 7, 2023) [https://perma.cc/F52A-ZHZE]; *Office of the Solicitor Brief Bank*, DEP'T OF LAB., https://www.dol.gov/agencies/sol/briefs (last visited Dec. 7, 2023) [https://perma.cc/8NPW-X37K]; *Filed Briefs*, CFPB, https://www.consumerfinance.gov/compliance/amicus/briefs/?page=1 (last visited Dec. 7, 2023) [https://perma.cc/HWK3-6D8G]. Significant numbers of additional briefs for many more agencies may be found on the Department of Justice's Divisions websites. *E.g.*, *Appellate Briefs and Opinions*, C.R. DIV., DEP'T OF JUST., https://www.justice.gov/crt/appellate-briefs-and-opinions-20 (last visited Nov. 25, 2024) [https://perma.cc/V94W-4WLA] (providing access to merits briefs, including amicus briefs, filed since 1999).

[24] *See* Kent H. Barnett, *Avoiding Independent Agency Armageddon*, 87 NOTRE DAME L. REV. 1349, 1355 (2012) (noting that Court's composition and stance toward the unitary executive model has become increasingly formalistic); Neal Devins, *Unitariness and Independence: Solicitor General Control over Independent Agency Litigation*, 82 CAL. L. REV. 255, 327 (1994) (raising concerns about unitary theory with respect to independent agency litigation); Peter M. Shane, *Independent Policymaking and Presidential Power: A Constitutional Analysis*, 57 GEO. WASH. L. REV. 596, 596 (1989) (tracing the rise of presidential administration to Ronald Reagan and his deregulatory agenda).

[25] 28 C.F.R. § 0.20(c) (2023). By contrast, the SG has authority to decide whether an amicus brief will be filed by nearly all agencies in cases before the Supreme Court. *Id.* at § 0.20(a); *see* Devins, *supra* note 24, at 275 (identifying only a few exceptions to this principle, notably the Federal Trade Commission). For examples of criteria that may be relevant to the SG's decision, see Patricia A. Millett, *"We're Your Government and We're Here to Help": Obtaining Amicus Support from the Federal Government in Supreme Court Cases*, 10 J. APP. PRAC. & PROCESS 209, 219-21 (2009).

SG means that full executive oversight may still be lacking.[26] And many agencies — even executive agencies — have independent litigating authority and need not consult with the SG.[27] Finally, there is no judicial screen for agency amici. The Federal Rules of Appellate Procedure provide that the "United States or its officer or agency . . . may file an amicus brief without the consent of the parties or leave of court."[28]

Even so, there may be strong reasons for a federal agency to file an amicus brief, both practical and structural. For example, when the government weighs in on pending litigation, it may seek to advance a policy position or resolve a legal issue that otherwise lacks an obvious outlet in the traditional forms of administrative law. In *City of Berkeley*, DOE's views on preemption would not fit comfortably in an appliance efficiency standard's rulemaking or an administrative action to enforce those standards.[29] An interpretive rule might provide a vehicle for establishing such a policy, but those are vulnerable to changing administrative policies.[30] By contrast, a court's ruling on preemption would have considerably more staying power and could have nationwide impact, promoting uniformity, regulatory certainty, and durable climate-oriented policies.[31]

Further, the usefulness of amicus briefs goes beyond the practicalities of an individual filing; these briefs bear independent and legitimate structural considerations. In the civil rights context, for example,

[26] *See* Memorandum Opinion for the Attorney General: Role of the Solicitor General, 1 Op. O.L.C. 228, 229-30 (1977) (noting that in practice, the SG has enjoyed "a marked degree of independence," including from the rest of the executive branch).

[27] *See infra* Part II.A.

[28] FED. R. APP. P. 29(a)(2).

[29] *See* 42 U.S.C. § 6295(o)(B)(i) (2018) (listing analytical requirements for consumer appliance efficiency standards); *id.* § 6303 (setting forth enforcement authority).

[30] *See* Perez v. Mortg. Bankers Ass'n, 575 U.S. 92, 92 (2015) (holding that changes to interpretive rules do not require notice-and-comment rulemaking).

[31] On the benefits and drawbacks of nationwide injunctions, including the importance of uniform application of federal law in some contexts, see Robert L. Glicksman & Emily Hammond, *The Administrative Law of Regulatory Slop and Strategy*, 68 DUKE L.J. 1651, 1701-07 (2019). On the nationwide impacts of the Ninth Circuit's ultimate decision striking down the ban (discussed *infra* text accompanying notes 304-311), see Brad Plumer, *Berkeley Will Repeal Its Landmark Ban on Natural Gas in New Homes*, NY TIMES (Mar. 27, 2024), https://www.nytimes.com/2024/03/27/climate/berkeley-gas-ban-climate.html.

former SG Seth P. Waxman has noted that the SG's amicus approach in cases like *Brown v. Board of Education* offered crucial ways forward both on principle and for purposes of signaling to the Court how legal transitions could be managed with more ease and stability.[32] And in the early days of the Securities and Exchange Commission ("SEC"), that agency's active amicus presence helped shaped and build the institution itself.[33] Today's "frequent filers" in private enforcement actions like the Equal Employment Opportunity Commission ("EEOC"), National Labor Relations Board ("NLRB"), and Department of Labor ("DOL") — which are considerably underfunded for their own enforcement activities[34] — can conserve resources while still supporting statutory policies through amicus efforts. Further, to the extent one sees constitutional tensions between Article II and private enforcement suits,[35] agency amici supporting such suits can alleviate some of those

[32] *See Mortg. Bankers Ass'n*, 575 U.S. at 92 (holding changes to interpretive rules do not require notice-and-comment rulemaking); Lynda G. Dodd, *Presidential Leadership and Civil Rights Lawyering in the Era Before* Brown, 85 IND. L.J. 1599, 1651-52 (2010) (elaborating government's amicus strategy in civil rights cases).

[33] I am indebted to Bob Thompson, Peter P. Weidenbruch, Jr. Professor of Business Law at Georgetown Law, for this point, which is likely also true for other New-Deal agencies like the Department of Labor. *See* Deborah Thompson Eisenberg, *Regulation by Amicus: The Department of Labor's Policy Making in the Courts*, 65 FLA. L. REV. 1223, 1244-45 (2013) (empirically observing that DOL amicus activity in FLSA cases peaked during the New Deal when the Roosevelt and Truman Administrations relied heavily on amicus briefs in the early days of the hard-won FLSA to establish important broad constructions of the statute's protections). Note that the CFPB, an agency newcomer, has also been an active amicus. *See* Barbara S. Mishkin, *U.S. Supreme Court Labor Law Decision Carries Message for CFPB Amicus Filings*, 66 CONSUMER FIN. L. Q. REP. 35, 90 (2012) (describing CFPB's active amicus participation as of 2012); *see also* FISHER & SHAPIRO, *supra* note 20, at 90 (describing expansive understanding of agency expertise that includes coordination among mission-oriented activities).

[34] *See, e.g.*, Ihna Mangundayao, Celine McNicholas & Margaret Poydock, *Worker Protection Agencies Need More Funding to Enforce Labor Laws and Protect Workers*, ECON. POL'Y INST. (July 29, 2021, 12:29 PM), https://www.epi.org/blog/worker-protection-agencies-need-more-funding-to-enforce-labor-laws-and-protect-workers/ [https://perma.cc/4657-9GTC] (presenting data consistent with underfunding).

[35] *See* Jim Rossi, *Participation Run Amok: The Costs of Mass Participation for Deliberative Agency Decisionmaking*, 92 NW. U. L. REV. 173, 218-24 (1997) (offering numerous criticisms of citizen suits from administrative-law and constitutional perspectives); Matthew C. Stephenson, *Public Regulation of Private Enforcement: The Case for Expanding the Role of Administrative Agencies*, 91 VA. L. REV. 93, 119 (2005) (describing

concerns. Finally, agency amici can serve an important role in promoting access to justice in multiple dimensions, including procedural access, representational access, and substantive access.[36]

These competing considerations call for a closer look. Although there are substantial bodies of literature with respect to the SG's amicus role at the Supreme Court[37] and amicus curiae briefs more generally,[38] there

Article II concerns). *See generally* Charles S. Abell, Note, *Ignoring the Trees for the Forests: How the Citizen Suit Provision of the Clean Water Act Violates the Constitution's Separation of Powers Principle*, 81 VA. L. REV. 1957, 1967-68 (1995) (arguing citizen suit provisions undermine Article II authority).

[36] *E.g.*, McPherson v. United States, 392 F. App'x 938, 942 (3d Cir. 2010) (noting that the court had appointed an amicus for an *in forma pauperis* litigant after the United States filed an amicus brief opposing his claim for relief); *see* Matthew A. Shapiro, *Distributing Civil Justice*, 109 GEO. L.J. 1473, 1485-1502 (2021) (presenting typology of civil access to justice considerations); *see also* Bijal Shah, *Toward a Critical Theory of Administrative Law*, 45 ADMIN. & REG. L. NEWS 10, 10 (2020) ("[A]dministrative law lacks a fundamental examination of its own contribution to subordination and marginalization."). *See generally* Amy Widman, *Inclusive Agency Design*, 74 ADMIN. L. REV. 23 (2022) (applying access-to-justice framework to system of administrative law). Of course, courts also appoint non-governmental amici to serve access-to-justice values.

[37] *See, e.g.*, James L. Cooper, Note, *The Solicitor General and the Evolution of Activism*, 65 IND. L.J. 675, 689 (1990) (empirically tracing amicus activity during the Reagan years); Darcy Covert & Annie J. Wang, *The Loudest Voice at the Supreme Court: The Solicitor General's Dominance of Amicus Oral Argument*, 74 VAND. L. REV. 681, 698-705 (2022) (focusing on oral arguments); Brian P. Goldman, Note, *Should the Supreme Court Stop Inviting Amici Curiae to Defend Abandoned Lower Court Decisions?*, 63 STAN. L. REV. 907, 918-19 (2011) (developing taxonomy of Supreme Court's practice of appointing amici to defend judgments that litigants no longer support); *see also* Henry Paul Monaghan, *On Avoiding Avoidance, Agenda Control, and Related Matters*, 112 COLUM. L. REV. 665, 691-93 (2012) (criticizing instances of Court appointing amici to defend judgments where one or both parties are no longer interested in litigating).

[38] Whatever one's view of amici, they are part of the legal landscape, especially in high-profile cases. *See* Katie Buehler, *Amici Flood Justices With Advice on Trump Colorado Ballot DQ*, LAW360 (Feb. 6, 2024, 8:15 PM), https://www.law360.com/articles/1792144/amici-flood-justices-with-advice-on-trump-colo-ballot-dq [https://perma.cc/QAR7-PHE4] (describing key points raised by about seventy-five amici in high-profile case); *see also* Omari Scott Simmons, *Picking Friends from the Crowd: Amicus Participation as Political Symbolism*, 42 CONN. L. REV. 185, 202 (2009) (contending that increased amicus participation at the Supreme Court has furthered participatory and legitimizing values, particularly for vulnerable groups). *See generally* Samuel Krislov, *The Amicus Curiae Brief: From Friendship to Advocacy*, 72 YALE L.J. 694 (1963) (setting forth a history that traces to Roman law); Allison Orr Larsen & Neal Devins, *The Amicus Machine*, 102 VA. L. REV.

is no broad treatment of agency amici through the critical lens of administrative law.[39] This Article takes up that task by putting a spotlight on this underappreciated type of agency action, focusing on the rich phenomenon of agency amicus participation in the federal courts of appeal.[40] As developed herein, this exploration offers deep engagement with some of the most pressing issues of administrative law today, including the scope of agencies' interpretive authority[41] and the

1901 (2016) (describing elite and regularized process of coordinated high-stakes amicus briefs).

[39] For a notable contribution specific to DOL, see generally Eisenberg, *supra* note 33 (presenting empirical evaluation of DOL amicus participation).

[40] The circuit courts have a particularly influential role in defining administrative law. *See* William N. Eskridge & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from* Chevron *to* Hamdan, 96 GEO. L.J. 1083, 1096 (2008) ("[T]he courts of appeals are the primary venue for judicial review of agency interpretations . . . agency-interpretation cases that come before the Supreme Court are not representative of the cases that come before the courts of appeals."); Gillian E. Metzger, *The Roberts Court and Administrative Law*, 2019 SUP. CT. REV. 1, 66 (2020) (regarding lower courts: "That is the level where most administrative law decisions are issued"); Jim Rossi, *Does the Solicitor General Advantage Thwart the Rule of Law in the Administrative State?*, 28 FLA. ST. L. REV. 459, 461 (2000) ("[T]he D.C. Circuit, to a greater extent than the Supreme Court, makes the relevant body of law for administrative practice."). Agencies are more likely to file amicus briefs before appeals courts than district courts, and most do not have final say whether an amicus is filed in the Supreme Court. *See, e.g.*, *Amicus Program, Frequently Asked Questions*, CFPB, https://www.consumerfinance.gov/compliance/amicus/suggest/ (last visited Dec. 7, 2023) [https://perma.cc/F59W-UL7S] ("We typically get involved only if a case is on appeal."); *Amicus Curiae Program*, EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/amicus-curiae-program (last visited Dec. 7, 2023) [https://perma.cc/ZXE2-QAGB] ("EEOC's program is focused on cases in the U.S. Courts of Appeals . . . ."); *Request for Commission* Amicus *Participation in a Pending Case*, SEC, (June 26, 2024), https://www.sec.gov/ogc/request-for-commission-amicus-participation-in-a-pending-case ("[T]he staff usually recommends *amicus* participation only after a case has reached an appellate court."). *But see* Seema Nanda, *How We Use Amicus Briefs to Shape the Law that Impacts Workers*, DEP'T OF LAB.: U.S. DEP'T OF LAB. BLOG (Feb. 9, 2023), https://blog.dol.gov/2023/02/09/how-we-use-amicus-briefs-to-shape-the-law-that-impacts-workers [https://perma.cc/8ZRW-ACFD] (noting that DOL has filed more than three dozen amicus briefs during the Biden Administration in "a variety of forums, including . . . almost every court of appeals, federal district courts, administrative tribunals and the National Labor Relations Board").

[41] *See generally* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244 (2024) (overruling Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984)).

implications of a strong view of the unitary executive.[42] It also directs a new lens on some of the most enduring issues of administrative law, which tend to coalesce around the legitimacy of the administrative state and the balance of powers among the three branches.[43]

This Article's primary objectives are to build a positive account of agency amicus behavior, including a typology of such behaviors, and to evaluate those behaviors through the normative dimensions of administrative law. While not itself a quantitative empirical project, this Article develops the exegetic and theoretical prerequisites for such projects and generates a variety of testable hypotheses.[44] And an existing body of empirical work, mostly focused on Supreme Court decision-making, has already offered insights into matters like the frequency of amicus participation and the above-average correlations between agency amicus positions and outcomes aligned with those positions.[45] From this work, one can take as a starting point the commonsense and

[42] *See generally* Secs. & Exch. Comm'n v. Jarkesy, 144 S. Ct. 2117 (2024) (holding Seventh Amendment required jury trial for agency's enforcement of civil penalties for fraud and declining to reach removal issue); Jarkesy v. Secs. & Exch. Comm'n, 34 F.4th 446, 465-66 (5th Cir. 2022), *cert. granted*, 143 S. Ct. 2688 (2023) (considering, *inter alia*, constitutionality of removal protections for Administrative Law Judges).

[43] *See Jarkesy*, 144 S. Ct. at 2175 (Sotomayor, J., dissenting) ("Make no mistake: Today's decision is a [judicial] power grab. . . . [It tells] Congress that it cannot entrust certain public-rights matters to the Executive . . . ."); *Loper Bright*, 144 S. Ct. at 2294 (Kagan, J., dissenting) ("A rule of judicial humility gives way to a rule of judicial hubris."). I use the term legitimacy broadly. *See infra* Part II.D (providing details).

[44] To be clear, this project is supported by review of hundreds of agency amicus briefs and related judicial opinions in the federal circuit courts of appeal. There is no single dataset of agency amicus briefs in the lower courts. Westlaw's filings datasets are incomplete but yield some agency amicus briefs; some agencies including DOJ maintain websites providing access to at least some amicus briefs; and Boolean searches by circuit in Westlaw revealed additional agency amicus briefs that were available elsewhere. Citations to briefs herein include Westlaw citations only if available.

[45] *See, e.g.*, Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. PA. L. REV. 743, 749-50 (2000) (so documenting); *see also infra* Part I. Some agencies invite members of the public to file amicus briefs in matters of significance to the government. Though this phenomenon may offer further nuance to the account set forth in this Article, it is regrettably beyond the project's scope. *See, e.g.*, *Agency Invitations to File Amicus Briefs*, EXEC. OFFC. IMM. REV., DEP'T OF JUST., https://www.justice.gov/eoir/amicus-briefs (last updated Aug. 1, 2024) [https://perma.cc/D2HD-ZE8J] (describing one such approach).

empirically driven conclusions of social scientists and legal scholars that agencies' amicus briefs can have real impact on the development of the law. That raises the question: how do they fit into administrative law?

To develop answers to that question, this Article proceeds as follows. Part I begins by situating agency amicus activities within the existing literature just referenced. Much of this work is empirical and documents relatively high win rates for agencies. It also reveals scholars grappling with the attitudinal model of judicial review, unitary executive theory, and how the executive branch should wield amicus power. This background sets the stage for Part II, which provides a critical framework for the administrative law of agency amici.

Part II begins with an orientation to the statutory authorities that empower agencies to file amicus briefs. Given the near uniformity of the SG's representation of the views of the United States before the Supreme Court, readers may be surprised to learn that there is considerable variation among the agencies' authorities and behavior with respect to the lower courts. In addition to telling a counter-intuitive story about agency authorities in the lower courts, this overview reveals pathways for tensions among government agencies that implicate presidential control and the unitary executive. Relatedly, Article II dimensions of private enforcement suits and, potentially, standing doctrine implicate similar concerns about executive prerogatives, and Part II suggests that agency amici can ameliorate these concerns. Next, Part II explores how access-to-justice values fit within administrative law and suggest a role for agency amici.

Thereafter, Part II turns toward administrative law's emphasis on procedure as a legitimizing force for agencies' exercises of power and investigates how amicus briefs fit within that landscape. Because of the important interplay among forms of agency action, procedures, and deference doctrines, Part II next discusses the major doctrines and how

they apply to amicus briefs — thus entering the world of *Skidmore*,[46] *Auer*,[47] *Chevron* (once upon a time),[48] and *Loper Bright*.[49]

Part III offers a new contribution to the scholarship on administrative law by canvassing the landscape of agency amicus briefs through that administrative law lens. By far the largest portion of agency amicus activity concerns private enforcement actions to vindicate statutory rights. Relatedly, agencies file numerous amicus briefs dedicated to accessing the courts and overcoming hurdles to review. Preemption cases — like *City of Berkeley* — also comprise a sizable share of amicus activity. But other categories include federally funded, state-administered restorative justice programs and views on other agencies' authorities.

As demonstrated in Part IV, this typology reveals the weaknesses of many of the objections hypothesized earlier. For example, agency amicus behavior offsets unitary executive objections and furthermore promotes important access-to-justice values. Overall, this analysis points to concerns not with agencies, but with the Court's evolving understanding of administrative law — what Justice Kagan has called a "roll back [of] agency authority, despite congressional direction to the contrary."[50] To start, courts' engagement with these amici is not always principled or predictable. This lack of comity is inconsistent with even the least deferential of the review doctrines, and it offers predictive power for what to anticipate in the post-deference world of *Loper Bright*. Part V synthesizes these threads of evaluation, concluding that agency amici both play an important role in furthering congressional statutory

[46] Skidmore v. Swift & Co., 323 U.S. 134, 134 (1944).

[47] Auer v. Robbins, 519 U.S. 452 (1997) (concerning deference to agencies' interpretations of their own regulations); *see* Kisor v. Wilkie, 588 U.S. 558, 563-64 (2019) (plurality opinion) (declining to overrule *Auer* but narrowing its applicability).

[48] Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984), *overruled by* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244 (2024). *See generally* West Virginia v. EPA, 597 U.S. 697 (2022) (applying Major Questions Doctrine as an exception to the *Chevron* framework); Lisa Heinzerling, *The Supreme Court's Clean-Power Power Grab*, 28 GEO. ENV'T L. REV. 425 (2016) (raising early alarms at this development); Mila Sohoni, *The Major Questions Quartet*, 136 HARV. L. REV. 262 (2022) (critiquing nondelegation explanation for the doctrine).

[49] 144 S. Ct. 2244 (2024).

[50] *Id.* at 2311 (Kagan, J., dissenting).

objectives, and in contributing to a three-branch conversation about what matters most in administrative law.

I. AGENCY AMICI IN THE BROADER LITERATURE

Before considering the administrative law of agency amici, a broader perspective is helpful. Indeed, a strong body of work provides accounts of amicus briefs in litigation and especially before the Supreme Court.[51] In addition, numerous scholars have studied the SG's role at the Supreme Court, including amicus participation.[52] Within this literature, one finds both normative and empirical projects. A brief overview of this work helps situate agency amici in the broader literature and identify commonalities and points of departure for this Article's project.

Historically speaking, Professor Samuel Krislov's foundational work traces amici to Roman law, identifying their origins as in-person assistants to the court[53] before a shift to advocacy around the turn of the twentieth century.[54] This shift accelerated along with the rise of interest group participation in democratic decision-making more generally.[55] Now, as Professors Allison Orr Larsen and Neal Devins put it, "everyone sees the amicus brief as the arm of an activist."[56] Indeed, this perception is sometimes reflected in judicial opinions: Judge Posner for example has emphasized that requests for leave to file amicus briefs should not

[51] *E.g.*, Kearney & Merrill, *supra* note 45, at 749; Larsen & Devins, *supra* note 38, at 1902; Simmons, *supra* note 38, at 185.

[52] *E.g.*, MICHAEL A. BAILEY & FORREST MALTZMAN, THE CONSTRAINED COURT: LAW, POLITICS, AND THE DECISIONS JUSTICES MAKE 121-39 (2011). *See generally* Covert & Wang, *supra* note 37 (focusing on oral arguments); Richard L. Pacelle, Jr., *Amicus Curiae or Amicus Praesidentis? Reexamining the Role of the Solicitor General in Filing Amici*, 89 JUDICATURE 317 (2006) (examining relationship between President and SG in connection with amicus filings).

[53] Krislov, *supra* note 38, at 695.

[54] *Id.* at 720 ("Groups inherently weak in the political arenas . . . have quite naturally been the leaders in the use of the brief. The growth of the regulatory process and the welfare state have played a significant role in fostering group organization and an awareness of policy determination by the judiciary.").

[55] *Id.*

[56] Larsen & Devins, *supra* note 38, at 1910.

be granted when they are merely "an attempt to inject interest group politics into the federal appeals process."[57]

This perception reflects concerns about the integrity of the judicial process, which also animate the many studies of the attitudinal model of judicial decision-making.[58] Whether or not one agrees with the model or its application to amicus briefs,[59] there is no denying that the sheer volume of amicus activity has increased. In their foundational empirical project published in 2000, Professors Joseph Kearney and Thomas Merrill created a dataset of all amicus briefs filed with the Supreme Court from the 1946 to 1995 terms.[60] Among their important findings was clear confirmation of earlier smaller studies' observations that the incidence of amicus activity before the Court had increased significantly — eight hundred percent during their study's timeframe.[61]

[57] Voices for Choices v. Ill. Bell Tel. Co., 339 F.3d 542, 544 (7th Cir. 2003); *see also* Jaffee v. Redmond, 518 U.S. 1, 36 (1996) (Scalia, J., dissenting) (noting, in case involving evidentiary privilege for licensed social workers, that fourteen amicus briefs were filed for the social workers and none for respondents: "That is no surprise. There is no self-interested organization out there devoted to pursuit of the truth in the federal courts."); *cf.* Sierra Club, Inc. v. EPA, 358 F.3d 516, 518 (7th Cir. 2004) ("Courts value submissions not to see how the interest groups line up, but to learn about facts and legal perspectives that the litigants have not adequately developed.").

[58] The attitudinal model suggests that judges' voting patterns can be predicted based on their ideological views, as indicated, for example, by the appointing president's party. *See* William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from* Chevron *to* Hamdan, 96 GEO. L.J. 1083, 1155 (2008) (interpreting data from empirical study of deference regimes at the Supreme Court to conclude Justices' interpretations often aligned with their ideologies); Cass R. Sunstein & Thomas J. Miles, *Depoliticizing Administrative Law*, 58 DUKE L.J. 2193, 2199-209 (2009) (describing methodology and results of empirical study revealing politicized voting patterns in administrative law).

[59] *Cf.* Larsen & Devins, *supra* note 38, at 1903 (concluding interest-group model of amicus behavior is unsatisfactory).

[60] Kearney & Merrill, *supra* note 45, at 749.

[61] The authors also documented small numbers of cases that attracted especially large numbers of amicus briefs. Not surprisingly, many of these cases involved controversial issues like abortion and affirmative action. *Id.* at 755. Note further that the Court's informal policy has been to grant leave to amici when the opposing party denies consent. *Id.* at 763-64 (noting this approach started to become clear by the late 1950s and early 1960s).

Kearney and Merrill's aim largely was to test various hypothesis about judicial models and amicus success rates,[62] but they offered additional important insights. For example, along with an increase in numbers of amici, they documented that the Court's frequency of citations to such briefs increased over the study period, with citations to the SG's briefs experiencing a greater-than-proportional uptick.[63] Perhaps counterintuitively, their work also suggested that citations to amicus briefs do not predict success.[64] Still, their analysis was consistent with prior work suggesting that the SG's amicus briefs enjoy a much higher-than-average success rate.[65]

Indeed, the SG's outsized impact on win rates seems both well documented and uniformly accepted (as a descriptive matter) among scholars.[66] Of course, this generalized observation may obscure

[62] These include the legal model, attitudinal model, and interest group model. *See id.* at 775-87 (providing overviews of each model). Kearney and Merrill interpreted their results as most consistent with the legal model. *Id.* at 816-19. For purposes of this article, I do not intend to premise my analysis on any particular model; rather, I am interested in theories of administrative behavior.

[63] *Id.* at 757-61; *see also id.* at 757 ("The only publicly visible manifestation of the impact of amici is the frequency with which their briefs are cited or quoted in the opinions of the Justices.").

[64] *Id.* at 812 ("Our results . . . provide no support for the proposition that cited briefs enjoy greater success than noncited amicus briefs."). Other works are consistent with the conclusion that citation rates do not necessarily correlate with success. *E.g.*, Ryan Juliano, Note, *Policy Coordination: The Solicitor General as Amicus Curiae in the First Two Years of the Roberts Court*, 18 CORNELL J. L. & PUB. POL'Y 541, 558 (2009) (explaining within sample studied that "reference in opinions did not translate into success"). This Article's review produced similar observations. *Compare e.g.*, Reyes-Gaona v. N.C. Growers Ass'n, 250 F.3d 861, 865-66 (4th Cir. 2001) (discussing and expressly rejecting EEOC's pro-plaintiff policy-guidance position asserting that place of employment is relevant, rather than place of decision, for determining extraterritoriality of Age Discrimination in Employment Act claim), *with* Woods v. Friction Materials, Inc., 30 F.3d 255, 260 n.3 (1st Cir. 1994) (disagreeing with EEOC amicus brief and responding to it in a footnote in holding that plaintiff's Age Discrimination in Employment Act claim was properly rejected on summary judgment). Numerous other examples are noted throughout this Article.

[65] Kearney & Merrill, *supra* note 45, at 803 (documenting largest correlation with win rates when SG participated).

[66] *E.g.*, BAILEY & MALTZMAN, *supra* note 52, at 121-39 (presenting empirical work confirming that the SG influences justices and suggesting that the degree of influence is somewhat dependent on ideological positioning); Juliano, *supra* note 64, at 555-57

variability, as made evident when one examines win rates by subject matter.[67] Normatively, many view this impact as unobjectionable; the SG's work is known for a high degree of professionalism, reliability, and quality.[68] An occasional scholar argues that the SG should be more circumspect in participation. Professor Michael E. Solimine, for example, suggests that the SG should intervene only in matters of national security, foreign affairs, or when the government possesses statutory enforcement authority, and should receive deference only in such matters.[69] His argument reflects a fundamental discomfort with politically influenced amicus participation — what former SG Rex Lee called "the President's social agenda"[70] — but he does not necessarily tie that argument to any particular constitutional principles. Rather, he grounds this concern in the reputational interest of the SG and worries about interference with the adversarial process.[71] Numerous other scholars, by contrast, find considerable normative justification for the SG's efforts in unitary executive theory, the Take Care clause, and the co-creational roles of the three branches in contributing to constitutional law.[72]

(documenting high win rate during first two years of Roberts Court); Dick Thornburgh, *The Role of the Federal Government in Private Appellate Civil Litigation*, 46 FED. LAW. 24 (Mar. 13, 1999) (citing various sources identifying a seventy-five percent win rate for SG in petitioning for certiorari); *see also* Pacelle, *supra* note 52, at 323.

[67] *See* Rebecca E. Deen, Joseph Ignagni & James Meernik, *The Solicitor General as Amicus 1953-2000: How Influential?*, 87 JUDICATURE 60, 71 (2003) (suggesting win rates in civil rights cases have been lower over time).

[68] Kearney & Merrill, *supra* note 45, at 818-19; *cf.* Rossi, *supra* note 40, at 465-66 (acknowledging this point but asking whether any advantage is instead attributable to the identity of the client (the government) rather than the expertise of the lawyer (the SG)).

[69] Michael E. Solimine, *The Solicitor General Unbound: Amicus Curiae Activism and Deference in the Supreme Court*, 45 ARIZ. ST. L.J. 1183, 1186-88 (2013) (criticizing this outsized impact).

[70] Rex E. Lee, *Lawyering for the Government: Politics, Polemics & Principle*, 47 OHIO ST. L.J. 595, 599 (1986).

[71] Solimine, *supra* note 69, at 1202-03.

[72] *E.g.*, John O. McGinnis, *Principle Versus Politics: The Solicitor General's Office in Constitutional and Bureaucratic Theory*, 44 STAN. L. REV. 799, 805-06 (1992) (arguing SG represents views of President, thereby promoting political accountability); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 221 (1994) ("The President's power to interpret the law is, within the

Regarding administrative law (as opposed to broad advancements of policy), these justifications are even more salient, and any concerns are likely dampened. The executive branch has a strong interest in matters of administrative law by virtue of the Take Care Clause, making it legitimate both to weigh in and for the Court to afford some measure of deference to the executive branch's views.[73] Furthermore, agencies' interests in offering amicus views in the lower courts are not typically borne of abstract policy preferences of the sort that have attracted criticism when the SG is offering them to the Supreme Court. Rather, as the typology presented in Part IV reflects, an agency's interests are usually directly related to the agency's statutory mission on which the agency has meaningful experience and expertise. It is of course true that agencies may be guided in such matters by presidential policy preferences, but this is no different from any other dimension of administrative law. While there may be reasons to critique policy vacillation or the role of naked politics in administrative law,[74] those are endemic to the administrative state and do not offer a special reason to object to amicus briefs, at least in the abstract.[75]

As is evident from the foregoing, most scholarship on amicus activity — whether in general or specifically by the U.S. Government — focuses

sphere of his powers, precisely coordinate and coequal in authority to the Supreme Court's."); *see also* Nikolas Bowie & Daphna Renan, *The Separation-of-Powers Counterrevolution*, 131 YALE L.J. 2020, 2030 (2022) (arguing Congress and the President have roles, even more than the judiciary, in defining separation of powers).

[73] Rossi, *supra* note 40, at 467; *see* Emily Hammond, *Deference and Dialogue in Administrative Law*, 111 COLUM. L. REV. 1722, 1735-36 (2011).

[74] *See generally* Thomas O. McGarity, *Administrative Law as Blood Sport: Policy Erosion in a Highly Partisan Age*, 61 DUKE L.J. 1671, 1673-74 (2012) (describing substantially heightened role of politics in implementing regulatory statutes).

[75] Moreover, some agency amici participate at the court's invitation or request, which is consistent with the more traditional "friend" view described by Krislov, *supra* note 38, at 695. *E.g.*, Cefalu v. E. Baton Rouge Par. Sch. Bd., 117 F.3d 231, 232 (5th Cir. 1997) (noting that court had asked the Department of Education to submit an amicus brief to aid the court in "interpreting this vague and difficult statute," the Individuals with Disabilities Education Act). To those concerned about agency amicus advocacy outside of traditional administrative procedures, a judicial request may be less problematic in its initiation. However, it is true that the position of the agency still escapes public input. Where the information is available, I make note of amicus briefs that are invited so that the reader can draw their own conclusions about whether any concerns are dampened.

on the Supreme Court. One notable exception is Professor Deborah Thompson Eisenberg's 2013 empirical study of 324 of DOL's amicus briefs in Fair Labor Standards Act ("FLSA") cases in the federal and state courts from the Roosevelt to the Obama Administrations.[76] These wage-and-hour cases involved private litigation in which Labor intervened. In her study, Eisenberg documented a sixty-five percent win rate for DOL in federal circuit courts — about the same as the Supreme Court win rate (sixty-four percent) and not quite as high as the federal district court win rate (seventy-five percent).[77] Eisenberg was particularly concerned about the interplay among deference doctrines, changing presidential administrations, and DOL's strategic use of amicus briefs to advance policy changes; these are points to which I will return in greater detail later.[78] For the time being, this overview suggests that it is reasonable to proceed on the premise that agency amici can make a difference.

II. THE ADMINISTRATIVE LAW OF AGENCY AMICI

This Part establishes the administrative-law principles most relevant to agency amicus activities and creates a theoretical account of those activities. By understanding amicus briefs as discrete agency activities meant to influence law and policy, we can locate them in the vast universe of agency behavior and craft a framework for their evaluation. The following sections discuss the links among unitary executive theory, access to justice, procedure and legitimacy, and relevant deference doctrines. But first, an overview of agencies' authorities to file amicus briefs frames the discussion.

A. Amicus Authorities

An agency's power to take a given action derives from some legislative grant of that power. This principle extends to acting as an amicus in

[76] *See generally* Eisenberg, *supra* note 33 (presenting empirical study); Victor Zapana, Note, *The Statement of Interest as a Tool in Federal Civil Rights Enforcement*, 52 HARV. C.R.-C.L. L. REV. 227, 230 (2017) (cataloguing more than 120 federal statements of interest in district court civil rights cases since 1925).

[77] Eisenberg, *supra* note 33, at 1250.

[78] *See infra* Part II.D.

litigation, raising the question: by what authority does an agency appear as an amicus? The landscape is more varied than one might predict. The baseline expectation is that all responsibility for conducting litigation rests with the Department of Justice;[79] the Attorney General has further delegated amicus authority to the SG.[80] But in the lower courts, numerous agencies enjoy at least some independent litigating authority; that is, the agencies' organic statutes set forth exceptions to the general rule of Attorney General representation.[81]

Notably, this grouping only partly coincides with the traditional independent versus executive agency distinction.[82] Further, one agency enjoys explicit amicus authority: the Small Business Administration's ("SBA") Chief Counsel has authority to file an amicus brief "in any action brought in a court of the United States" regarding another agency's compliance with the Regulatory Flexibility Act ("RFA").[83]

[79] 28 U.S.C. § 516. Numerous agencies' organic statutes reinforce this point. *See, e.g.*, 21 U.S.C. § 335(b) (FDA may initiate enforcement administratively or by request to the Attorney General for a civil action); 42 U.S.C. § 7192(c) (setting default Attorney General representation for DOE).

[80] 28 C.F.R. § 0.20(c) (2023).

[81] Note as well that even for those that enjoy independent litigating authority, it is not always clear that the authority would extend to amicus filings. *Compare* 29 U.S.C. § 154(a) (NLRB attorneys may "appear for and represent the Board in any case in court"), *and* 42 U.S.C. § 7171(i) (except for matters before the Supreme Court, FERC attorneys may appear in "any civil action brought in connection with any function carried out by the Commission"), *with* 33 U.S.C. § 1366 (EPA can represent itself in Clean Water Act litigation "to which the Administrator is a party," but only if the Attorney General fails to timely represent EPA), *and* 42 U.S.C. § 7605 (similar for EPA in Clean Air Act matters). Scholars occasionally call for new independent litigating authorities. *E.g.*, C. Joseph Ross Daval, *Litigating Authority for the FDA*, 100 WASH. U. L. REV. 175, 214-17 (2022) (FDA); Jon Paul Suttile, Note, *Separating Litigation: How SEPs Demonstrate the Need for Centralized Environmental Litigation*, 47 WM. & MARY ENV'T L. & POL'Y REV. 357, 359 (2023) (EPA).

[82] *Compare* Humphrey's Ex'r v. U.S., 295 U.S. 602 (1935) (viewed as upholding constitutionality of for-cause removal protections for independent agency heads), *with* Myers v. U.S., 272 U.S. 52 (1926) (recognizing broad of authority of President to remove executive agency heads for any reason). *See also* Michael Herz & Neal Devins, *The Consequences of DOJ Control of Litigation on Agencies' Programs*, 52 ADMIN. L. REV. 1345, 1347 (2000) ("One searches in vain for an organizing principle to explain when and to what extent agencies are granted independent litigating authority.").

[83] 5 U.S.C. § 612(b); *see also* Nw. Mining Ass'n v. Babbitt, 5 F.Supp. 2d 9, 16 (D.D.C. 1998) (remanding for compliance with RFA).

Though rarely utilized,[84] this authority raises the specter of interagency clashes which, while not uncommon, are uncommonly made public in a court battle.[85] Moreover, the prospect of independent litigating authority means that an agency might take a position different from what the President would prefer. And this outcome is possible, at least theoretically, even in executive agencies. The ramifications of interagency disputes and potentially departing from presidential preferences relate to the unitary executive, to which this Article turns next.

B. The Unitary Executive

Article II dictates that the President is to "take care that the Laws be faithfully executed."[86] To carry out this responsibility, the President needs some ability to manage the executive branch — a point thoroughly developed in then-Professor Kagan's seminal article, *Presidential Administration*.[87] As noted in the Introduction, agency amicus participation may avoid some customary methods of presidential oversight that other forms of agency action undergo.[88] This possibility is discussed in more detail below, but for now it is helpful to understand that a number of informal methods of coordination likely ameliorate concerns about oversight.[89] Still, I acknowledge that while functional means of presidential control remain alive and well, a stronger and more formalistic view of the unitary executive is gaining steam, especially at the Supreme Court.[90] It is thus necessary to grapple with how this view interacts with the varieties of amicus authority noted above. This

[84] *See* Daniel A. Farber & Anne Joseph O'Connell, *Agencies as Adversaries*, 105 CALIF. L. REV. 1375, 1465 (2019) (describing this statutory scheme as having been used only once, and discussing constitutional concerns that may arise when Congress authorizes agencies to litigate against one another).

[85] *See* Emily Hammond, *Presidential Control, Expertise, and the Deference Dilemma*, 61 DUKE L.J. 1763, 1797 (2012) ("It is rare for agencies to be directly opposing parties before a court.").

[86] U.S. CONST. art. II, § 3.

[87] Kagan, *supra* note 22, at 2339-46.

[88] *See supra* notes 24–28 and accompanying text.

[89] *See infra* Part II.D.

[90] *See* Barnett, *supra* note 24, at 1356 (noting that Court's stance toward the unitary executive model has become more formalistic).

Section sketches that interaction — a potential vulnerability for agency amici in the present climate — and raises an additional Article II concern relevant to amicus briefs.

1. Independence Increasingly Impugned

The shift to the strong unitary executive is especially evident in the Court's recent appointments and removals jurisprudence. In the 2010 decision *Free Enterprise Fund v. Public Company Accounting Oversight Board*,[91] the Court rested the unconstitutionality of a double-layered, for-cause removal provision directly on the need for the President to control the actions of administrative officers. This rationale has continued to gain momentum, with the Court's 2020 decision in *Seila Law v. CFPB*[92] rejecting a removal restriction on the single head of the CFPB, and *Collins v. Yellin*[93] a year later rejecting the removal restriction on the single head of the Federal Housing Finance Agency despite his much more limited role than in *Seila*. Each of these decisions was premised on presidential control in furtherance of democratic accountability, rooted in the Article II Vesting Clause.[94]

To emphasize the momentum of this shift, consider as well that the Court in its 2023 Term considered the constitutionality of the double for-cause removal limitations on Administrative Law Judges ("ALJs") in *SEC v. Jarkesy*.[95] Unlike the officials in the cases above, ALJs are supported by considerable legislative history demonstrating Congress's intent to shield these adjudicatory decision-makers from political pressures, thereby protecting the rights of those subject to enforcement

[91] 561 U.S. 477 (2010).

[92] 591 U.S. 197, 224 (2020) (grounding reasoning in constitutional imperative of ensuring presidential democratic accountability).

[93] 594 U.S. 220, 252 (2021) ("The removal power helps the President maintain a degree of control over the subordinates he needs to carry out his duties as the head of the Executive Branch, and it works to ensure that these subordinates serve the people effectively and in accordance with the policies that the people presumably elected the President to promote.").

[94] *See also* U.S. v. Arthrex, Inc., 594 U.S. 1, 23 (2021) (holding patent judges are inferior officers whose appointments violate the Appointments Clause, with reasoning in part based on removal restrictions).

[95] 144 S. Ct. 2117 (2024).

proceedings.[96] The Court did not decide the issue, ruling instead on Seventh Amendment grounds that the petitioner was entitled to defend against an enforcement action seeking civil penalties before a jury.[97] But the constitutionality of ALJs' removal protections remains live in the lower courts and is evidence of how far adherents of a formalistic unitary executive will push.[98]

Moreover, the constitutionality of independent agencies is increasingly questioned by strong devotees to the unitary executive, sometimes on liberty grounds.[99] These developments are important to the project of this Article because, for the agencies that have independent litigating authority, some observers may find the corresponding lack of presidential — and hence democratic — accountability constitutionally problematic. Start with independent agencies. Not only are the agency heads protected from removal at will, but their independent litigating authority adds another layer of separation in the judicial forum, where law is made and individual liberty may be distinctly at stake. Within executive agencies, the ability of the President to remove the head of the agency might provide the formalistic accountability necessary to satisfy unitary executive devotees, but litigating independence seems somewhat inconsistent with the expected structure of such agencies.

These issues are not hypothetical; as Professor Neal Devins has identified, independent litigating authority carries significant real-

[96] Much of the relevant history is recounted in *Wong Yang Sung v. McGrath*, 339 U.S. 33, 36-45 (1950).

[97] SEC v. Jarkesy, 144 S. Ct. 2117, 2139 (2024).

[98] *See* Christopher J. Walker, *What* SEC v. Jarkesy *Means for the Future of Agency Adjudication*, YALE J. ON REGUL. (June 27, 2024), https://www.yalejreg.com/nc/what-sec-v-jarkesy-means-for-the-future-of-agency-adjudication/ [https://perma.cc/2W2Q-F23Y] ("[I]t's only a matter of time until the Supreme Court must weigh in, as the issue is already pending in number of cases in the lower courts.").

[99] As I have detailed elsewhere, then-Judge Kavanaugh has expressed deep skepticism of independent agencies in *In re Aiken Cnty.*, 645 F.3d 428, 438-46 (D.C. Cir. 2011) (Kavanaugh, J., concurring). *See* Hammond, *supra* note 85, at 1767-68 (describing and critiquing Judge Kavanaugh's reasoning); *see also* Neal Devins & David E. Lewis, *The Independent Agency Myth*, 108 CORNELL L. REV. 1305, 1307-09 (2023) (collecting examples of strong criticism).

world separation-of-powers baggage.[100] Moreover, these competing authorities mean that the President or DOJ might find itself in conflict with an independent amicus position. As described above, the Regulatory Flexibility Act explicitly invites this scenario. And it has happened in other contexts too.[101] For example, the Reagan Administration clashed with EEOC in *Williams v. New Orleans*,[102] with DOJ arguing that EEOC lacked authority to file an amicus brief that would have supported including race-conscious hiring goals in the settlement of a Title VII matter.[103] Ultimately, EEOC backed off, and the court rejected DOJ's per se argument that affirmative action remedies were never permissible under Title VII.[104] But the draft EEOC brief was filed by private amici and partly reprinted in a concurring opinion, further ventilating the matter.[105]

A pure formalist would object to agencies' independent litigating authorities even in the absence of these explicit examples; the objectionable structure alone would suffice. Thus, that an amicus brief is merely offering a perspective (in contrast to an agency appearing as a party) would not likely temper the formalistic concerns. And to the extent unitary executive formalism is tied to liberty values, there is another potential normative hurdle for agency amici: as the Part III typology illustrates, by far the majority of agency amicus activity is in private enforcement actions. In other words, agencies are often weighing in on whether a private party should be held liable for violation of a federal statute in a suit brought by someone claiming injury.

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[100] *See* Devins, *supra* note 24, at 265-69 (detailing historical tensions on this topic between presidents and Congress dating to New Deal); Roberta S. Karmel, *Little Power Struggles Everywhere: Attacks on the Administrative State at the Securities and Exchange Commission*, 72 ADMIN. L. REV. 207, 243 (2020) (describing President Carter's failed attempts to persuade Congress to divest SEC of its independent litigating authority).

[101] *See* Devins, *supra* note 24, at 265-69 (collecting examples). Others are less concerned. *See, e.g.*, Thornburgh, *supra* note 66, at 28 (acknowledging an "inevitable degree of tension between the Solicitor General's Office and its agency clients, particularly the independent agencies," but also stating that traditionally, the entities have "interacted positively").

[102] 729 F.2d 1554 (5th Cir. 1984).

[103] This episode and significant context are provided in Devins, *supra* note 24, at 266-67.

[104] *Williams*, 729 F.2d at 1557.

[105] *Id.* at 1572 n.5 (Wisdom, J., concurring in part and dissenting in part).

Nevertheless, as will be evident in Part IV, I ultimately conclude that this feature of amicus activity is more than adequately cabined by several offsetting considerations, one of which is the topic of the next subsection.

2. Article II and Private Enforcement Suits

Many federal statutory schemes establish enforcement authorities for both agencies and private individuals, which are rationalized on the understanding that private individuals can supplement the government's resource-constrained enforcement activities.[106] These statutory schemes may well have compensatory aims for individual plaintiffs alleging specific harm by a defendant, but they also have a public aim of deterrence.[107] Environmental laws harkening to the 1970s are especially known for their citizen-suit provisions, which add public choice theory to the list of rationales — the idea being that such suits are needed to combat industry capture of regulatory agencies.[108] The

[106] *E.g.*, *Oversight on Civil RICO Suits: Hearings before the Sen. Comm. On the Jud.*, 99th Cong., 2 (1985) (explaining that private citizen suits for RICO violations can supplement government efforts in fighting organized crime); David E. Adelman & Jori Reilly-Diakun, *Environmental Citizen Suits and the Inequities of Races to the Top*, 92 U. COLO. L. REV. 377, 400 (2021) (collecting sources for early studies' findings confirming that environmental citizen suits increased in frequency with decrease in EPA enforcement); Pamela H. Bucy, *Private Justice*, 76 S. CAL. L. REV. 1, 33 (2002) (noting most experts have concluded that there will never be sufficient public resources adequate to support enforcement of environmental laws).

[107] Stephenson, *supra* note 35, at 98 ("While the motivation for creating many of these rights of action has been compensatory, private suits by victims of statutory violations often serve an important public function . . . [they] can deter potential violators.").

[108] Bucy, *supra* note 106, at 32-33. For this reason, some statutes authorize suits against government agencies as well, *id.* at 36, which are beyond the scope of this Article. For a fulsome discussion of theories supporting private enforcement mechanisms, see Stephenson, *supra* note 35, at 106-113. Note that citizen suits also bring a dimension of public participation to enforcement. *See* David R. Hodas, *Enforcement of Environmental Law in a Triangular Federal System: Can Three Not Be a Crowd When Enforcement Authority is Shared By the United States, the States, and Their Citizens?*, 54 MD. L. REV. 1552, 1572 (1995) (arguing citizen suits are a natural extension of public participation already built into rulemaking and permitting processes).

efficacy of these statutory schemes is a matter of debate,[109] but there is another set of criticisms relevant to Article II matters.[110] Specifically, several commentators have argued that private enforcement suits can interfere with administrative prerogatives to set enforcement agendas,[111] develop relevant legal principles, and work cooperatively with regulated entities to secure heightened compliance.[112]

Indeed, for some observers, these concerns go to the heart of Article II authorities because they privilege private, politically unaccountable enforcement decision-making over that of the executive.[113] As Professor Matthew Stephenson explains the concern, "judicial decisions rendered in citizen suits, brought piecemeal before nonexpert courts by citizen groups with particularized interests, may establish adverse or inconsistent precedents that complicate or disrupt government enforcement efforts."[114] A related objection stems from worries about drift: agencies have a reduced ability to maintain fidelity to statutes with

[109] A thorough description of benefits and drawbacks of private enforcement regimes is set forth in Stephen B. Burbank, Sean Farhang & Herbert M. Kritzer, *Private Enforcement*, 17 LEWIS & CLARK L. REV. 637, 662-71 (2017). A notable recent analysis demonstrates structural inequities in citizen suit filings patterns and geography, such that disparities are reinforced rather than ameliorated. Adelman & Reilly-Diakun, *supra* note 106, at 434-35. The authors also dismiss the constitutional concerns as not especially significant, because they found that only eighteen percent of citizen suits in their dataset involved retail litigation, that is, suits brought by citizens against polluters. *Id.* at 380-81.

[110] *See, e.g.*, Robert F. Blomquist, *Rethinking the Citizen as Prosecutor Model of Environmental Enforcement Under the Clean Water Act: Some Overlooked Problems of Outcome-Independent Values*, 22 GA. L. REV. 337 (1988) (offering criticisms); Bucy, *supra* note 106, at 22-23, 43 (collecting a variety of criticisms); Hodas, *supra* note 108, at 1651-55 (having considered criticisms, concluding nonetheless that citizen suits are beneficial); Stephenson, *supra* note 35, at 114-20 (collecting criticisms).

[111] In cooperative federalism statutory schemes, this critique also bears a federalism dimension. Blomquist, *supra* note 110, at 409; Hodas, *supra* note 108, at 1648-49 (providing accounts in the context of the Clean Water Act).

[112] Stephenson, *supra* note 35, at 118-19 (collecting sources) ("[J]udicial decisions rendered in citizen suits, brought piecemeal before nonexpert courts by citizen groups with particularized interests, may establish adverse or inconsistent precedents that complicate or disrupt government enforcement efforts.").

[113] *See* sources cited *supra* note 35.

[114] Stephenson, *supra* note 35, at 119.

private suits in the picture,[115] and Congress lacks the same oversight levers over private litigants that it would have over agencies.[116] Thus far, these arguments have failed to manifest changes to the law, but as unitary executive theory continues to animate the development of administrative law, one can predict a fresh debate about private enforcement on the horizon.[117]

In fact, these kinds of arguments may be gaining traction in a different way as they relate to Article III standing doctrine.[118] Here the contention is that for private enforcement actions, standing doctrine has a more principled rooting in Article II than Article III to the extent that it screens out lawsuits that would interfere with executive powers.[119] In the specific context of private enforcement against private entities for violations of statutory rights, this understanding might require an analysis of whether the underlying suit was one of "a personal nature" as opposed to one of "an executive nature."[120] The former would involve a plaintiff bringing suit "to vindicate his own rights and to seek remedies that will accrue to him personally."[121] Thus, suits that involve public rights and result in, say, a fine paid to the Treasury, would fall in to the

[115] David Freeman Engstrom, *Agencies as Litigation Gatekeepers*, 123 YALE L.J. 616, 630-41 (2013). In the environmental context, recent empirical work suggests that citizen suits are not inconsistent with "agency priorities" and "local values," contradicting this line of criticism. Adelman & Reilly-Diakun, *supra* note 106, at 418.

[116] Burbank, Farhang & Kritzer, *supra* note 109, at 669-70.

[117] For a forceful critique of the Clean Water Act's citizen suit provisions grounded in unitary executive principles, see Blomquist, *supra* note 110, at 340 (arguing "the vast executive powers ceded by Congress to citizens . . . are [] far-reaching and uncircumscribed").

[118] *See* Lujan v. Defs. of Wildlife, 504 U.S. 555, 560-61 (1992) (setting forth requirements for Article III standing). This argument is not new, see generally Tara Leigh Grove, *Standing as an Article II Nondelegation Doctrine*, 11 U. PA. J. CONST. L. 781, 782 (2009), but it is receiving fresh attention. *See* Laufer v. Arpan LLC, 29 F.4th 1268, 1294-95 (11th Cir. 2022) (Newsom, J., concurring); Sierra v. City of Hallandale Beach, 996 F.3d 1110, 1132 (11th Cir. 2021) (Newsom, J., concurring); Jonathan H. Adler, *Standing Without Injury*, 59 WAKE FOREST L. REV. 1, 1-60 (2024) (providing detailed exploration of Judge Newsom's approach).

[119] This approach would do away with the injury-in-fact requirement in favor of an Article II analysis. *See Sierra*, 996 F.3d at 1131.

[120] *Id.* at 1135.

[121] *Id.* at 1136.

latter category and be limited by Article II.[122] This proposed approach raises more questions than it answers, including the separation-of-powers conundrum of whether Congress can authorize private enforcement actions that have as all or part of their purpose to vindicate public policy.[123] After all, as just discussed, these kinds of suits do many types of work.[124]

Although the specific standing debate is beyond the scope of this Article, I note that amicus briefs are poised to offset both the traditional concern about interference with executive enforcement prerogatives, and the emerging concern about Article II limits on Congress's authority. And in any event, these concerns overly discount the meaningful role of private enforcement in the big picture. This includes both respecting congressional intent to protect rights-based norms and permitting access to justice. Indeed, the latter has implications for all three branches and relevance to agency amici as well.

C. Access to Justice

Access to justice is a topic only beginning to make an appearance in the administrative law literature, despite that it is very much tied to how many people experience the administrative state — especially those most in need of agency-administered benefits and protections.[125] As Professor Amy Widman puts it: "Administrative law needs to embrace the experience of its users, particularly its historically underserved users, and structure itself in a way that is reasonable from their

[122] *Id.*

[123] *See* Grove, *supra* note 118, at 822. Professor Grove conceives of this approach not as protecting executive power, but of protecting individual liberty. *Id.* at 784. For a different exploration of public rights related to the scope of agencies' adjudicative powers, see generally John M. Golden & Thomas H. Lee, *Congressional Power, Public Rights, and Non-Article III Adjudication*, 98 NOTRE DAME L. REV. 1113 (2023).

[124] *See supra* text accompanying notes 106–108.

[125] Widman, *supra* note 36, at 28-29 ("Administrative law needs to embrace the experience of its users, particularly its historically underserved users, and structure itself in a way that is reasonable from their perspective."). Indeed, administrative law is only just developing critical theories specific to the field. *See* Shah, *supra* note 36, at 10 (calling for this development).

perspective."[126] As Widman explores, there are numerous opportunities for reforms to agencies' procedures and activities that would promote access-to-justice values.[127] Notably, agencies also stand to reinforce access to justice in the courts with their amicus activities.

This possibility reverberates in *In re Estelle*,[128] where the Texas Department of Corrections sought a writ of mandamus to prevent the United States from intervening in, or acting as an amicus to, a prisoners' civil rights suit. The court easily rejected the petition, with some difference among the three-judge panel as to the grounds.[129] In a portion of the opinion representing solely the view of Judge Tuttle, he emphasized the value of the United States' amicus activities in such suits:

> Participation by the United States has been appropriate in these cases not only to vindicate the federal interests we have outlined above, but to [e]nsure that indigent plaintiffs receive the quality of legal representation commensurate with the rights of which they claim they have been deprived. I cannot ignore the fact that prisoners and mental patients are almost invariably indigents who are represented by unpaid or low-paid appointed counsel lacking the means and resources completely to develop their claims. Without the participation of the United States, meritorious claims might fail for sheer lack of legal manpower. I would not be comfortable with the obvious result — that only minor constitutional deprivations on a small scale could be successfully vindicated, while wide-spread, multifaceted deprivations went uncured due simply to the awesome magnitude of their evil.[130]

In other words, the participation of the United States can support these important values.

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[126] Widman, *supra* note 36, at 28 (applying access-to-justice framework to system of administrative law).

[127] *See generally id.* (so arguing).

[128] 516 F.2d 480 (5th Cir. 1975).

[129] *Id.* at 482 n.*.

[130] *Id.* at 487 n.5.

The term "access to justice" has many dimensions, several of which have special relevance to agency amicus activities. Specifically, agencies can support a private party's access to court, access to the attention of court personnel, access to representation, and substantive access to the vindication of protected rights.[131] These dimensions of access relate both to Article III fairness norms and Article I prerogatives to create statutory protections, poising agency amici to do substantial work toward justice. This Article returns to these points in Part V. In the meantime, this Part continues mapping the theory of agency amicus briefs by examining matters of traditional administrative law — procedure, and standards of review.

D. Procedure and Legitimacy

Despite the critiques described above, administrative law has historically been concerned with procedure, and procedure is expected to carry a significant load for reinforcing agency legitimacy by supporting values like transparency, participation, deliberation, and reasoned decision-making.[132] Because notice-and-comment rulemaking

[131] *See* Shapiro, *supra* note 36, at 1485-1501 (creating conceptual map of the various types of access that scholars associate with access to justice).

[132] *See* sources cited *supra* note 18; David Arkush, *Democracy and Administrative Legitimacy*, 47 WAKE FOREST L. REV. 611, 625-26 (2012) (arguing democratic model of administrative legitimacy places high value on citizen participation); Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 528-29 (2003) (explaining how reason-giving both promotes accountability and guards against arbitrariness); Rossi, *supra* note 35, at 182 (describing benefits of participation). These values primarily are associated with democratic legitimacy, but they also overlap with procedural justice values. *See* Hammond & Markell, *supra* note 18, at 317. They provide an incomplete picture of legitimacy, however, because they do not necessarily attend to the distributive consequences of agency actions and are incompletely correlated with fidelity to statute. *See also* Daniel E. Walters, *Symmetry's Mandate: Constraining the Politicization of American Administrative Law*, 119 MICH. L. REV. 455, 499 (2020) (concluding that administrative law has become imbalanced by monitoring exceedances of statutory authority but not under-implementations of that authority). Moreover, procedure does not necessarily achieve all that it promises. *See generally* Nicholas Bagley, *The Procedure Fetish*, 118 MICH. L REV. 345 (2019) (critiquing unquestioning faith in procedure).

and proceduralized[133] adjudication result in outcomes that carry the force of law, an agency's attendance to procedure helps justify the coercive power of the state while facilitating multiple forms of oversight.[134] By contrast, forms of agency action like interpretive rules and policy statements — so-called nonlegislative rules — are exempted from the APA's procedural expectations.[135] Such rules are furthermore often exempt from the internal White House review associated with OIRA, which involves cost-benefit analysis, interagency review and input, and legal review.[136] Though the value of OIRA review is hotly debated, the theory is that these additional procedures attend to presidential control, thereby reinforcing the legitimacy for the administrative state.[137] Moreover, a host of such agency activities are also exempt from judicial review by the terms of the APA or other

[133] I use this term to include both formal adjudication under the APA §§ 556 and 557, and non-APA adjudication that meets procedural due process requirements and offers "relatively formal" features of adversarial proceedings, both types of which produce outcomes carrying the force of law. United States v. Mead Corp., 533 U.S. 218, 230 (2001) (describing the kinds of agency actions that carry the force of law); *see, e.g.*, Nuclear Info. Res. Serv. v. Nuclear Regul. Comm'n, 969 F.2d 1169 (D.C. Cir. 1992) (upholding Nuclear Regulatory Commission procedural rules for reactor licensing that did not meet the full requirements of APA §§ 556 and 557).

[134] *See* Lisa Schultz Bressman, *Procedures as Politics in Administrative Law*, 107 COLUM. L. REV. 1749, 1810 (2007) (explaining how administrative law as developed by the Court facilitates oversight).

[135] 5 U.S.C. § 553(b)(3)(A); Perez v. Mortg. Bankers Ass'n, 575 U.S. 92, 100 (2015) (holding agency's changes to interpretive rules did not require notice and comment). Even though nonlegislative rules are exempt from APA notice-and-comment procedures, many agencies invite comment on at least some of their guidance documents.

[136] Traditionally, significant notice-and-comment rulemakings are subject to OIRA review, but the agency sometimes also reviews guidance documents. *See* Exec. Order No. 13,422 § 3(h), 72 Fed. Reg. 2763 (Jan. 18, 2007) (defining significant guidance document for purposes of OIRA review); Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Sept. 30, 1993) (establishing modern OIRA review process); Nina A. Mendelson & Jonathan B. Wiener, *Responding to Agency Avoidance of OIRA*, 37 HARV. J.L. & PUB. POL'Y 447, 485-89 (2014) (explaining that as a practical matter, OIRA reviews numerous guidance documents, but transparency as to this practice is lacking).

[137] *See* sources cited *supra* note 22.

reviewability doctrines,[138] making this extra legitimizing check on agency behavior important where review is unavailable.

The reality is that agencies use any number of methods to effectuate policy, incentivize compliance, and otherwise implement their statutory mandates that do not fall into the traditional, relatively formal APA categories, many of which are not reviewable.[139] Agencies indeed need the flexibility to act outside of the APA strictures, and there is much to be said about the benefits of increased responsiveness, helpfulness, and professionalism of agencies in these contexts.[140] But when the practical consequences of such agency activities are experienced as overreach by the regulated community,[141] or as abrogation by statutory beneficiaries,[142] agencies can expect criticism and lawsuits.[143]

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[138] If a nonlegislative rule does not carry the force of law, it is likely not final because it is not an agency action "from which legal consequences will flow." Bennett v. Spear, 520 U.S. 154, 177-78 (1997); *see also* 5 U.S.C. § 704 (setting forth finality requirement for APA cause of action); Nat'l Mining Ass'n v. McCarthy 758 F.3d 243, 250 (D.C. Cir. 2014) (noting nonlegislative rules are not necessarily reviewable final agency action for this reason); Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118, 129 (2014) (APA challenges must fall within the zone of interests the statute protects).

[139] *E.g.*, Heckler v. Chaney, 470 U.S. 821, 831 (1985) (presumptive un-reviewability of enforcement decisions).

[140] *See* Elizabeth Magill & Adrian Vermeule, *Allocating Power Within Agencies*, 120 YALE L.J. 1032, 1036-41 (2011) (examining ways that internal allocations of power can enhance administrative restraint); Jon D. Michaels, *An Enduring, Evolving Separation of Powers*, 115 COLUM. L. REV. 515, 544 (2015) (describing role of civil service in imposing restraint). For empirical support, see generally Hammond & Markell, *supra* note 18 (documenting such behaviors at EPA).

[141] *See* Perez v. Mortg. Bankers Ass'n, 575 U.S. 92, 105 (2015) (criticizing use of nonlegislative rules to "skirt notice-and-comment provisions"); Exec. Order No. 13,891 § 1, 84 Fed. Reg. 55,235 (Oct. 9, 2019) (criticizing agency use of guidance documents "inappropriately in attempts to regulate the public without following the rulemaking procedures of the APA").

[142] Ohio Forestry Ass'n, Inc. v. Sierra Club, 523 U.S. 726, 728 (1998) (holding unripe a challenge to the Forest Service's land resource management plan, despite that plaintiff claimed the plan erroneously favored logging and clearcutting). *See generally* Nina A. Mendelson, *Regulatory Beneficiaries and Informal Agency Policymaking*, 92 CORNELL L. REV. 397 (2007) (arguing regulatory beneficiaries suffer distinctive losses when agencies issue nonlegislative rules, owing to their lack of opportunity to participate or obtain judicial review).

[143] There is a "smog" of caselaw in this realm. Cmty. Nutrition Inst. v. Young, 818 F.2d 943, 946 (D.C. Cir. 1987); *see also* Christopher S. Havasy, *Relational Fairness in the*

Similarly, amicus briefs appear to evade these regularized and legitimizing procedures; they undergo no public participation, no agency engagement with concerns raised, no record-building processes, and — while briefs are of course public documents — there is no requirement that they be made easily accessible to interested persons not involved in the litigation.[144] Nor is there any requirement that they undergo review by White House counsel, other agencies, or OIRA staff. When one considers that at least some nonlegislative rules undergo voluntary notice-and-comment or White House review, amicus briefs might start to look even more lax. This is especially true because the entire purpose of an amicus brief is to influence a favorable development in the law — law that will constrain the executive branch[145] as much as regulated entities or statutory beneficiaries. But this points to a key distinction: whereas nonlegislative rules are difficult to review, by definition, amicus briefs are subject to judicial consideration. Perhaps the potential for a judicial airing of amicus arguments saves the form from some of the criticism garnered by nonlegislative rules.

Before committing to this position, an additional facet merits consideration: agencies' amicus briefs often point to nonlegislative rules to support their arguments and demonstrate that they have thoroughly considered the matter.[146] Under this scenario, when a court agrees with an agency's amicus position, the agency's position becomes law, constrained only by the scope of the court's holding.[147] On one hand, this

Administrative State, 109 VA. L. REV. 749, 813 (2023) (contending that various judicial tests have "only brought further confusion").

[144] *See supra* note 44 (describing challenges of locating agency amicus briefs for the lower courts outside of judicial paywalls).

[145] Mendelson & Wiener, *supra* note 136, at 499 (noting that litigation can insulate agencies from OIRA review, and in particular, OIRA lacks authority to undo a fixed judicial outcome).

[146] The classic is *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). Further examples are set forth *infra* Part II.E (considering deference).

[147] This observation includes both the substantive scope and the geographical scope. *See* Robert L. Glicksman & Emily Hammond, *Agency Behavior and Discretion on Remand*, 32 J. LAND USE & ENV'T. L. 483, 489-94 (2017) (describing how scope of judicial remand order shapes scope of agency discretion on remand); Robert L. Glicksman & Emily Hammond, *The Administrative Law of Regulatory Slop and Strategy*, 68 DUKE L.J. 1651, 1695-1707 (2019) (canvasing debate about nationwide injunctions in administrative law and offering perspectives on when they are appropriate).

means that the ultimate legal determination is doubly insulated from public participation — first at the agency and then at the court. But one might also view the judicial decision as correcting any legitimacy flaws because the judicial system itself involves a variety of procedures and norms to further its own legitimacy. Standing at the intersection of these competing views is the matter of deference, to which I now turn.

E. The Deference Debates

With few exceptions, agencies typically argue issues of law in their amicus briefs.[148] As will be illustrated in the typology below, these issues most commonly relate to the meaning of the agencies' statutory mandates or implementing regulations. Thus enters the matter of appropriate levels of judicial deference to agencies' legal interpretations. This Section maps the relevant doctrines, paying

[148] *See, e.g.*, *Amicus Curiae Program*, EEOC, https://www.eeoc.gov/amicus-curiae-program (last visited Sept. 18, 2024) [https://perma.cc/RV82-TQHU] ("EEOC does not generally participate in cases raising primarily factual issues."); Seema Nanda, *How We Use Amicus Briefs to Shape the Law that Impacts Workers*, U.S. DEP'T OF LAB. BLOG (Feb. 9, 2023), https://blog.dol.gov/2023/02/09/how-we-use-amicus-briefs-to-shape-the-law-that-impacts-workers [https://perma.cc/LL2Q-A94W] (providing examples that involve legal issues); *Request for Commission "Amicus" Participation in a Pending Case*, SEC (June 26, 2024), https://www.sec.gov/ogc/request-for-commission-amicus-participation-in-a-pending-case ("The Commission files . . . briefs in cases raising issues of significance to the federal securities laws."); *Suggest a Case*, *Frequently Asked Questions*, CFPB, https://www.consumerfinance.gov/compliance/amicus/suggest/ (last visited Sept. 17, 2024) [https://perma.cc/LEX9-BANB] ("We do not weigh in on purely factual disputes."). Several Fair Housing Act amicus briefs filed jointly by HUD and DOJ Civil Rights Division raise arguments of mixed questions of law and fact. *E.g.*, Brief for the United States as Amicus Curiae in Support of Plaintiffs-Appellees and Urging Affirmance on the Issue Addressed Herein at 11-12, Women's Elevated Sober Living LLC v. City of Plano 86 F.4th 1108 (5th Cir. 2023) (No. 22-40637) (urging affirmance of district court holding in plaintiff's favor in Fair Housing Act enforcement suit); Brief for the United States as Amicus Curiae in Support of Plaintiff-Appellee/Cross-Appellant and Urging Affirmance at 9, Klossner v. IADU Table Mound MHP, LLC 65 F.4th 349 (8th Cir. 2023) (No. 21-3503) (joint amicus brief of HUD and DOJ Civil Rights Division supporting plaintiff's private enforcement of Fair Housing Act claim and arguing evidence was sufficient to support her claim); Brief for the United States as Amicus Curiae Supporting Plaintiffs-Appellees and Urging Affirmance at 11, Valencia v. City of Springfield 883 F.3d 959 (7th Cir. 2018) (No. 17-2773) (supporting plaintiffs' Fair Housing Act claim and district court's preliminary injunction determination that plaintiffs were likely to succeed on the merits).

special attention to the rationales for deference and how they relate to the specific context of amicus briefs. A word of caution: parts of the landscape are in flux. As explored later in Part IV, however, judicial engagement with amicus briefs may well provide a glimpse into the future of deference.

1. *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.* for Underlying Regulations (and its *Loper Bright* Demise).

For decades, a key deference differentiator was the form of the agency's interpretation: statutory interpretations in regulations received *Chevron* deference, whether directly challenged or advanced in an amicus brief.[149] Although *Chevron* has now been overruled, it deserves mention here for at least two reasons. Pragmatically, it is part of the history of amicus briefs and helps illuminate the relative roles of each branch when agencies act as amici.[150] Finally, *Chevron*'s replacement — the *Skidmore* doctrine — already has a longstanding presence in the world of agency amicus briefs, as will be shown below.

To review, under *Chevron*, a court was to consider whether the statutory language was clear; if so, that clear language controlled.[151] But if the language was ambiguous, a court was to defer to the agency's interpretation if that interpretation was reasonable.[152] *Chevron* was premised on agencies' political accountability and comparative institutional competence related to expertise.[153] As the Court explained, deference at step two furthered Article III soft norms: challenges to interpretations that "really center[ed] on the wisdom of the agency's

[149] *See* Chevron USA, Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984). This general rule carried a variety of corollaries, several of which are collected in *Loper Bright Enters., Inc. v. Raimondo*, 144 S. Ct. 2244, 2268-69 (2024).

[150] One additional reason might be that deference to agencies' interpretations of ambiguous statutory language is still a possibility in limited situations, such as where the statutory mandate expressly directs the agency to define a statutory term through regulations or uses language defining a scope of permissible interpretations. *See Loper*, 144 S. Ct. at 2263, nn. 5–6 (providing examples).

[151] *Chevron*, 467 U.S. at 842-43.

[152] *Id.* at 843.

[153] *See id.* at 865-66.

policy" must be respected by federal judges "who have no constituency."[154]

Duckworth v. Pratt & Whitney, Inc.[155] illustrates the then-standard approach. There, the First Circuit was called upon to determine whether an employer's refusal to rehire an employee after a statutorily protected absence fell within the scope of authorized private rights of action for violation of the Family and Medical Leave Act ("FMLA") and a related state law.[156] The interpretive question involved FMLA's private-right-of-action provision, which extends to "employees."[157] The plaintiff had taken a voluntary layoff but was denied his application to be rehired due to having taken prior protected medical leave — as the employer explained, because of excessive absences.[158] The district court granted the employer's motion to dismiss, reasoning that the statutory language extended only to current employees.[159] DOL appeared as amicus, asserting its regulatory interpretation favoring the plaintiff's claim, which extended to job applicants.[160]

Given that DOL's regulations had been promulgated through notice-and-comment rulemaking, the court applied *Chevron*. First, the court deeply considered the statutory text and other related statutory schemes before concluding that the term "employee" was ambiguous; this analysis did not reference DOL's amicus brief at all.[161] At step two, the court widened its focus, incorporating the agency's examples of perverse outcomes that would flow from the employer's proffered interpretation.[162] Ultimately, the court concluded that the agency's

[154] *Id.* at 866.

[155] 152 F.3d 1 (1st Cir. 1998).

[156] *Id.* at 1.

[157] 29 U.S.C. § 2617(a)(2). Note that the employer conceded the plaintiff could bring an administrative claim. *Duckworth*, 152 F.3d at 4.

[158] *Duckworth*, 152 F.3d at 3.

[159] *Id.*

[160] *Id.*

[161] *See id.* at 5-9. In a footnote, the court mentioned that in this situation, there was no evidence that Congress had relied on an agency definition when drafting the provision; and in any event, the court emphasized its step-one role of simply determining whether Congress had unambiguously expressed its intent. *Id.* at 6 n.6.

[162] *Id.* at 10.

interpretation was "within the permissible range of policy options which Congress delegated" to it.[163]

The Court overruled *Chevron* in the twin cases *Loper Bright Enterprises, Inc. v. Raimondo* and *Relentless v. Dep't of Commerce*.[164] To *Chevron's* justification of superior political accountability in the executive branch, the Court rejected any suggestion that the art of statutory interpretation is influenced by judicial policy preferences.[165] The Court was similarly dismissive of the superior institutional competence rationale related to expertise, reasoning that "[t]he parties and *amici* in such cases are steeped in the subject matter, and reviewing courts have the benefit of their perspectives."[166] Indeed, the Court cited *Skidmore* for the proposition that such perspectives could be considered by reviewing courts.[167]

2. *Skidmore v. Swift & Co.* and its Amicus Origins

As *Loper Bright* instructed, *Chevron* is no more, and agencies' statutory interpretations embedded in regulations are subject only to the framework set forth in the classic 1944 decision in *Skidmore v. Swift & Co*.[168] As it happens, *Skidmore* involved an agency amicus brief, and courts since 1944 have largely continued to apply it to agencies' statutory interpretations offered for the first time in amicus briefs, or that are perhaps described in very informal materials like guidance documents or letters which are then referenced in such briefs.[169] In

[163] *Id.* at 11.

[164] 144 S. Ct. 2244 (2024).

[165] *Id.* at 2268 (quoting the Federalist, No. 78, for judges' ability to construe statutes with "[c]lear heads" and "honest hearts").

[166] *Id.* at 2267.

[167] *Id.*

[168] 323 U.S. 134, 140 (1944).

[169] There has been some deviation, as the typology will demonstrate. Moreover, at one time, Justice Scalia argued that agency statutory interpretations offered for the first time in amicus briefs should qualify for stronger deference — that is, the *Chevron* framework — because they represent the "authoritative view" of the agency. *See* Christensen v. Harrison Cnty., 529 U.S. 576, 587 (2000) (declining to extend *Chevron* to agency amicus view supported by an opinion letter); *id.* at 590-91 (Scalia, J., concurring in part) (arguing *Chevron* should apply). This discussion arose as the Court delineated

Skidmore, the Supreme Court considered a labor dispute brought by employees against their employer, who argued that "waiting time" constituted "working time" under the Fair Labor Standards Act ("FLSA").[170] FLSA is enforceable in the courts; DOL does not initially adjudicate FLSA claims.[171] Thus, in *Skidmore* the Court noted that Congress had not given the agency any authority to administratively determine whether, based on the facts, the "waiting time" was within the statute's coverage.[172] Nevertheless, the Court noted the comparative institutional advantage of the agency in gaining experience with the statute's applicability in a variety of situations given its enforcement role.[173] Moreover, the Court emphasized that "[g]ood administration of the [a]ct and good judicial administration alike" would best be served by uniform interpretations as between administrative enforcement actions by the agency and private enforcement actions in court.[174] Of course, the agency's amicus brief — in which it referenced an Interpretive Bulletin setting forth its view that some of the waiting time would constitute working time — was not binding on the Court.[175] But the Court made clear that such interpretations were entitled to respect depending on "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."[176]

the bounds of *Chevron* in that doctrine's early years and was put to rest in *United States v. Mead Corp.*, 533 U.S. 218, 237-38 (2001).

[170] *Skidmore*, 323 U.S. at 136.

[171] *See* A. B. Kirschbaum Co. v. Walling, 316 U.S. 517, 523 (1942) ("In this task of construction, we are without the aid afforded by a preliminary administrative process for determining whether the particular situation is within the regulated area. . . . [T]he Fair Labor Standards Act puts upon the courts the independent responsibility of applying *ad hoc* the general terms of the statute to an infinite variety of complicated industrial situations.").

[172] *Skidmore*, 323 U.S. at 137.

[173] *Id.* at 139 ("the Administrator's policies are made in pursuance of official duty, based upon more specialized experience and broader investigations and information than is likely to come to a judge in a particular case").

[174] *Id.* at 140.

[175] *Id.* at 139. The agency also had a guidance document that provided some insights, but the Court did not separately consider that source. *Id.* at 140.

[176] *Id* at 140.

This passage and its supporting reasoning have had remarkable staying power. For example, when *Chevron* was in effect, the *Skidmore* standard operated as a backstop to apply when *Chevron* did not.[177] And of course, it has once again been freshly endorsed in *Loper Bright*.[178] The reason for this longevity makes pragmatic sense even for a mere litigating position: just as a court would consider any party's brief for its power to persuade, so too would agency briefs — even as amici — be evaluated for their persuasiveness, a feature of which is that the interpretation is coming from a federal agency with experience with the statute.[179] At the same time, an amicus brief "has not been subjected to any sort of public scrutiny,"[180] which justified a lower standard of deference than that provided by the *Chevron* line of cases. As one court explained how it saw an agency interpretation fitting this mold, it offers "some corroboration that our own reasoning is sound."[181] This seems consistent with how the *Loper Bright* Court understood its role in consulting agency interpretations for "guidance" and their "useful[ness]."[182]

[177] United States v. Mead Corp., 533 U.S. 218, 234 (2001) (emphasizing that *Skidmore* remains in force even when *Chevron* does not apply); *see also* Kisor v. Wilkie, 139 S. Ct. 2400, 2414 (2019) (plurality opinion) (*Skidmore* applies even when *Auer* does not). Indeed, in some cases the *Skidmore* factors are not materially different than the factors courts would use to decide whether alternative deference regimes would apply. *See, e.g.*, Barnhart v. Walton, 535 U.S. 212, 222 (2002) (in dicta, describing *Skidmore*-like factors bearing on applicability of *Chevron* deference). Further, *Skidmore* bears substantial overlap with other factor-based deference regimes. *See Kisor*, 139 S. Ct. at 2424-25 (Roberts, C.J., concurring in part) (emphasizing that although *Skidmore* and the plurality's *Auer* factors are not strictly the same because they go to differing deference questions, they "largely overlap").

[178] *See* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2267 (2024).

[179] *Cf. Mead*, 533 U.S. at 250 (Scalia, J., dissenting) (calling this principle an "empty truism and trifling statement of the obvious").

[180] Shikles v. Sprint/United Mgmt. Co., 426 F.3d 1304, 1316 (10th Cir. 2005) (declining to extend deference to EEOC brief, finding it unpersuasive).

[181] Ecological Rts. Found. v. Pac. Gas & Elec. Co., 874 F.3d 1083, 1097 n.5 (9th Cir. 2017) (treating EPA's amicus reliance on a DOJ legal opinion merely as persuasive authority).

[182] *Loper*, 144 S. Ct. at 2262.

3. *Auer v. Robbins* and the *SEC v. Chenery Corp.* (Chenery I) Distinction

One further deference doctrine has special relevance to amicus briefs. Under *Auer v. Robbins*,[183] courts are to extend "controlling weight" to an agency's interpretation of its own regulations unless the interpretation is plainly erroneous.[184] *Auer* itself involved a private action under FLSA, brought by police officers against police commissioners for overtime pay.[185] The legal issue was whether the plaintiffs were exempt from FLSA's overtime requirements; the exemption was defined in DOL regulations.[186] As an invited amicus, DOL offered its interpretation of its own regulations — which under the circumstances favored the defendants — and the Court adopted DOL's view.[187] In response to the plaintiffs' complaint that an argument in an amicus brief was unworthy of deference, the Court explained that DOL's argument was "in no sense a '*post hoc* rationalization' advanced by an agency seeking to defend past agency action against attack . . . . There is simply no reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question."[188]

Notice two principles in the Court's explanation. The latter relates to the agency's considered judgment and buttresses the point that an agency is in the best position to know the meaning of its own regulations. The former distinguishes an entirely different line of authority, that is, the principle from *SEC v. Chenery Corp.* (*Chenery I*)[189] that agencies are judged on the basis of their reasoning at the time they made their decisions, rather than on reasons adduced for a judicial defense.[190] This long-standing, bedrock rule of administrative law[191] is

[183] 519 U.S. 452 (1997).

[184] *Id.* at 461.

[185] *Id.* at 455.

[186] *Id.*

[187] *Id.* at 461.

[188] *Id.* at 462 (italics in original) (citing Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 212 (1988).

[189] 318 U.S. 80 (1943).

[190] *Id.* at 87-88.

[191] *See, e.g.*, Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 591 U.S. 1, 20 (2020) (adhering to *Chenery I* in reviewing challenge to Trump Administration's

based in separation-of-powers principles. Congress has given the agency the role of making decisions in the first instance, so courts reinforce legislative delegations by reviewing actual exercises of agency authority.[192] What is more, this rule rejects the kind of minimum-rationality review that courts extend to legislatures in the absence of heightened constitutional concerns.[193] Agencies instead must justify their actions with reason-giving if they want any hope of having those actions upheld; this in turn helps legitimize the broad delegations of authority characteristic of the contemporary administrative state.[194]

This brief *Chenery I* detour is worthwhile because it clarifies two points. The first relates to a vision of a balanced relationship among the three branches, with judicial acceptance of (1) legislative prerogatives in delegating authority and (2) agencies' exercises of that authority, provided that (3) agencies adhere to legitimizing norms. This relationship has always preserved for the courts a checking function, tempered with various deference norms to maintain the courts' own

revocation of Deferred Action for Childhood Arrivals ("DACA")); Michigan v. EPA, 576 U.S. 743, 758 (2015) (adhering to *Chenery I* in reviewing Obama EPA's rules for toxic emissions from power plants).

[192] *Chenery I*, 318 U.S. at 88.

[193] *Id.* at 93 ("The Commission's action cannot be upheld merely because findings might have been made and considerations disclosed which would justify its order as an appropriate safeguard for the interests protected by the Act."); *see also* Motor Vehicles Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 n.9 (1983) (rejecting agency's invitation to treat arbitrary-and-capricious standard akin to that of minimum rationality under Due Process Clause); Bowman Transp., Inc. v. Ark-Best Freight Sys., Inc., 419 U.S. 281, 285-86 (1974) ("[W]e may not supply a reasoned basis for the agency's action that the agency itself has not given . . . ."); Universal Camera Corp. v. NLRB, 340 U.S. 474, 477-84 (1951) (reviewing legislative history of APA supporting conclusion that judicial review provisions require more than minimum rationality review).

[194] *See* Emily Hammond, *Deference and Dialog*, 111 COLUM. L. REV. 1722, 1737 (2011) (linking *Chenery* to reasoned decision-making requirements); Gillian E. Metzger, *Ordinary Administrative Law as Constitutional Common Law*, 110 COLUM. L. REV. 479, 492 (2010) (linking hard look review to alleviation of separation-of-powers concerns); Kevin M. Stack, *The Constitutional Foundations of* Chenery, 116 YALE L.J. 952, 1000 (2007) ("[P]art of the tradeoff for Congress's choice to delegate authority is that the recipient of that power must be more articulate about the grounds for its action than Congress would be."); *id.* at 959 (linking *Chenery* to the *Chevron* standard).

place in the constitutional scheme. I shall return to this point later in Part IV.

The second point is perhaps more obvious: agency amicus briefs by definition do not involve direct challenges to agency actions of the sort that *Chenery I* considered. The *Auer* Court made this point in justifying its deference to DOL's amicus interpretation, and it warrants emphasis.[195] Unlike situations where an agency is acting with the force of law to govern behavior or establish rules for entitlements, in the amicus context, these liberty- and due-process-flavored[196] impacts are attenuated because no specific agency action is being challenged. The Court's use of this understanding to rationalize *Auer* deference suggests a view that in such cases, the judiciary need not be as vigilant. In addition, this understanding helps offset the liberty-infused concerns described earlier with respect to unitary executive theory.

Auer endured the criticism that it incentivized strategic agency behaviors like adopting vague regulations and then seeking deference for interpretations that did not undergo notice and comment.[197] Scholars have not identified empirical support for this proposition.[198] Still, even if agencies have little interest in purposefully issuing vague regulations, it is true that they can use nonlegislative rules to adapt their interpretations to changing presidential policies, obtaining judicial stamps of approval along the way.[199] Particularly at DOL, the Bush and Obama Administrations each departed from prior presidential policies using nonlegislative rules to interpret their regulations and then sought deference for those interpretations in amicus briefs.[200] As Eisenberg examined in her study discussed above in Part I, this practice gave rise

[195] Auer v. Robbins, 519 U.S. 452, 462-63 (1997).

[196] *See Dep't of Homeland Security*, 591 U.S. at 24 (quoting Justice Holmes, "the Government should turn square corners when dealing with people.").

[197] *E.g.*, Decker v. Nw. Env't. Def. Ctr., 568 U.S. 597, 620 (2013) (Scalia, J., concurring in part and dissenting in part).

[198] *See, e.g.*, Daniel E. Walters, *The Self-Delegation False Alarm: Analyzing* Auer *Deference's Effects on Agency Rules*, 119 COLUM. L. REV. 85, 92 (2019) ("[A]nalysis reveals that agencies did not measurably increase the vagueness of their rules in response to *Auer*.").

[199] *See generally* Eisenberg, *supra* note 33 (supporting this proposition with empirical evidence of DOL behavior).

[200] *Id.* at 1228-30.

to the critique of "regulation by amicus"[201] and contributed to mounting concerns about the wisdom of *Auer* deference.[202]Depending on the policies being changed, regulated entities viewed some nonlegislative rules as illegal attempts to get compliance; and regulatory beneficiaries viewed others as illegal attempts to diminish the scope of regulatory protections.[203] This, of course, brings full circle the procedural laxity concerns discussed above in Part II.C. And no matter who benefited during a given administration, regulatory certainty was undermined by this shifting landscape.

4. The Decline of Deference: *Christopher v. SmithKline Beecham Corp.* and *Kisor v. Wilkie*

Indeed, the Court strongly limited *Auer* deference in the face of such policy chicanery in *Christopher v. SmithKline Beecham Corp.*[204] The underlying action was private enforcement of FLSA, with two pharmaceutical salespersons seeking overtime pay from the defendant pharmaceutical company.[205] Once again, a DOL amicus brief set forth the agency's interpretation of its own regulations; indeed, the agency had filed several such briefs in the lower courts, advancing an interpretation favorable to the plaintiffs.[206] Then before the Supreme Court, the agency advanced a different rationale for the same outcome.[207] The Court decided that there were strong reasons for withholding *Auer* deference, especially when there was evidence that the interpretation was not the result of considered judgment: the agency's interpretation would impose "potentially massive liability" on an entire industry without the benefit of notice and comment, and it amounted to unfair surprise because the agency had seemingly acquiesced in the

[201] *Id.* at 1225.

[202] *See e.g.*, Talk Am. Inc. v. Mich. Bell Tel. Co., 564 U.S. 50, 69 (2011) (Scalia, J., concurring) (noting that although *Auer* promoted predictability for administrators, it allowed agencies to benefit from adopting vague regulations).

[203] For more on the interplay of these concerns with administrative procedure, see *supra* Part II.C.

[204] 567 U.S. 142 (2012).

[205] *Id.* at 152.

[206] *See id.* at 153-54 (providing details).

[207] *Id.* at 154.

industry's approach in previous administrations given that it never brought any enforcement actions or otherwise announced its interpretation.[208]

Then in *Kisor v. Wilkie*,[209] a plurality led by Justice Kagan limited the reach of *Auer* perhaps to the doctrine's extinction.[210] Rather than being automatic, *Auer* deference is to be extended only if a multitude of factors are met, among them: the regulation must be ambiguous, the interpretation must be reasonable, and the court should independently evaluate the "character and context" of the interpretation, which should be the product of considered judgment and agency expertise and avoid unfair surprise.[211] In a footnote, Justice Kagan elaborated that the general rule "is not to give deference to agency interpretations advanced for the first time in legal briefs. . . . But we have not entirely foreclosed that practice."[212] It is not clear whether this crack in the door for amicus briefs might be opened in the lower courts, though at least one court has engaged in a *Skidmore*-type analysis under such conditions, as set forth below in Part III.[213] In fact, there is not yet a fulsome body of lower court jurisprudence from which to draw generalized principles about how *Kisor* will work in practice. And given the strong language of *Loper Bright*, one can predict that *Auer* deference may simply collapse into *Skidmore*.[214]

I will say more about deference in Part IV, but for now, this overview provides texture for the typology in the next section: most agency amici offer legal interpretations, and under some circumstances, courts have given some amount of deference to those interpretations. All the relevant doctrines share some recognition of agencies' political

[208] *Id.* at 155-58.

[209] 588 U.S. 558, 576-79 (2019) (plurality opinion).

[210] Several Justices would have overruled *Auer*. *Id.* at 591 (Gorsuch, Thomas, Kavanaugh & Alito, Justices, concurring).

[211] *Id.* at 559 (2019) (plurality opinion) (citing Christopher v. SmithKline Beacham Corp., 567 U.S. 142, 155 (2012)).

[212] *Id.* at 577 n.6 (2019) (plurality opinion) (citing *Auer*, 519 U.S. at 462).

[213] *See also* Metzger, *supra* note 40, at 66 (emphasizing that *Kisor*'s impact will be shaped if not defined by lower courts' implementation of it).

[214] *Loper Bright* grounded its reasoning in § 706 of the APA, which speaks to courts reviewing "legal interpretations." 5 U.S.C. § 706. The same paragraph references courts "determin[ing] the meaning or applicability of the terms of an agency action," which arguably includes interpretations of agency regulations. *Id.*

accountability and expertise, but they have varied according to the form of the underlying interpretation. Now, with the broader world of how courts review agencies' legal interpretations seemingly converging on *Skidmore*, the examples that follow offer potential glimpses of the future. But independent of reviewability doctrines, the typology offers a look at an unaccounted-for aspect of agency behavior, to which I turn next.

III. A TYPOLOGY

What do agencies have to say as amici? In this Part, I present a typology comprised of: (1) shared private and public enforcement responsibilities; (2) access to courts and hurdles to review; (3) preemption; (4) federally funded, state-administered restorative justice programs; and (5) offering views on another agency's statutory interpretation. As this accounting demonstrates, agency amici in the lower federal courts typically adhere to prescriptions of restraint suggested in Part I. That is, they are not usually advocating sweeping policy reforms but are instead offering their views on legal matters relating to their statutory authority. Still, this typology suggests beneficial roles for agency amici and holds insights for the way that contemporary administrative law is changing, as will be developed later in Part IV.

A. Shared Private and Public Enforcement Responsibilities

Numerous statutory schemes establish shared private and public enforcement authorities.[215] That is, an agency can enforce a statute by

[215] A helpful taxonomy and collection of examples is presented in Bucy, *supra* note 106. *See, e.g.*, The Sherman Act, 15 U.S.C. § 15 (authorizing private suit for harm caused by violation of antitrust laws); *id.* § 4 (authorizing Attorney General to initiate enforcement actions for violation of such laws); *see also* the Federal Trade Commission Act, 15 U.S.C. § 56 (authorizing FTC to bring enforcement actions for violations of antitrust laws subject to detailed delineations of authority vis-à-vis Attorney General); the Consumer Product Safety Act, 15 U.S.C. § 2072; Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692l(b)(6), (d) (enforcement for CFPB); *id.* § 1692k (authorizing citizen suits); the Civil Rights Act of 1964, 42 U.S.C. §§ 1981–2000; *id.* § 2000e(f)(1) (setting forth circumstances under which EEOC, Attorney General, or aggrieved persons may initiate civil suit for violations of statute); the Americans with Disabilities Act, 42 U.S.C. § 12133 (incorporating Civil Rights Act remedies for disability discrimination claimants).

bringing an administrative enforcement action or initiating a suit in federal court, or a party aggrieved by a regulated entity's violation of the statute may bring a private enforcement suit.[216] A significant portion of amicus briefs fit into this kind of design, offering the agency's view of a legal matter in the context of a private enforcement suit.[217] When an agency offers its amicus perspective in such cases, it is seeking to influence the meaning of the statute and accordingly, the scope of its own enforcement authority.[218] Across all the circuit courts of appeal, moreover, the agency has an interest in these matters being applied uniformly.[219]

[216] There is some variation among agency authorities as to the details, but those are not especially relevant unless otherwise noted herein. For example, FLSA claims are generally enforceable by a private party or DOL in federal court, 29 U.S.C. §§ 216(b), 217, whereas DOE may initiate administrative enforcement proceedings with the possibility of a federal judicial proceedings under some circumstances, 42 U.S.C. § 6303. And in some contexts, a private party must first exhaust administrative remedies before filing an enforcement suit. *E.g.*, 42 U.S.C. § 2000e-5(e)(1) (EEOC).

[217] *See generally* Brief for the United States as Amicus Curiae Supporting Plaintiffs-Appellants, Conn. Fair Housing Ctr. v. CoreLogic Rental Prop. Sols., No. 23-1166 (2d Cir. 2023) (joint amicus brief of Department of Housing & Urban Development ("HUD") and DOJ Civil Rights Division, concerning application of Fair Housing Act to tenant-screening companies in private enforcement suit); Brief for the United States as Amicus Curiae Supporting Plaintiffs-Appellees, Women's Elevated Sober Living LLC v. City of Plano, 86 F.4th 1108 (5th Cir. 2023) (No. 22-40637) (urging affirmance of district court holding in plaintiff's favor in Fair Housing Act enforcement suit); Brief for the United States and FTC as Amici Curiae Supporting Plaintiffs-Appellees, *In re* Rail Freight Fuel Surcharge Antitrust Litig., 725 F.3d 244 (D.C. Cir. 2021) (No. 2021) (joint brief of DOJ Antitrust Division and FTC in support of plaintiffs' private antitrust enforcement claim involving Sherman Act and Staggers Rail Act); Brief for the Sec'y of Labor as Amicus Curiae Supporting Plaintiffs-Appellees, Castellanos-Contreras v. Decatur Hotels, LLC, 576 F.3d 274, 2009 (5th Cir. 2009) (No. 07-30942) (arguing for rehearing en banc in support of migrant workers' FLSA claims).

[218] *See, e.g.*, Brief for the Sec'y of Labor as Amicus Curiae Supporting Plaintiff-Appellant, N.R. v. Raytheon Co., 24 F.4th 740, 2020 (1st Cir. 2022) (No. 20-1639) ("The issues addressed by the Secretary in this case affect his enforcement responsibilities and powers."); Brief for the SEC as Amicus Curiae Supporting Appellant, Safarian v. Am. DG Energy Inc., 622 Fed.Appx. 149 (3d Cir. 2015) (No. 14-2734) (describing agency's twofold interest in protecting whistleblowers and maintaining enforcement authorities).

[219] *See* Brief for the CFPB as Amicus Curiae Supporting Plaintiffs-Appellants at 7, Bender v. Elmore & Throop, P.C., 963 F.3d 403 (4th Cir. 2020) (No. 19-1325) ("The Bureau agrees with the vast majority of federal courts.").

Demonstrating several of these points is the following. In 2015, SEC filed amicus briefs in seven circuit courts of appeal on the same issue arising from private enforcement actions: the scope of the anti-retaliation provision for whistleblowers added to the Securities and Exchange Act by Dodd-Frank,[220] section 21F(h)(1).[221] The question was whether the provision applied to whistleblowers who reported potential violations of securities laws to company management but not to SEC.[222] Interpreting the statutory language in light of a variety of cross-references and legislative history, SEC issued regulations answering the question in the affirmative.[223] Numerous courts of appeals were soon confronted with the issue, and SEC filed amicus briefs across the country. This activity yielded a circuit split: the Second Circuit agreed with the agency,[224] but the Fifth Circuit did not.[225] The Ninth Circuit

[220] The Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

[221] 15 U.S.C. § 78u-6. *See generally* Brief of SEC as Amicus Curiae Supporting Appellant, Verfuerth v. Orion Energy Sys., Inc., 879 F.3d 789 (7th Cir. 2018) (No. 16-3501) (brief in which SEC argues for an interpretation of the whistleblower protections); Brief of SEC as Amicus Curiae Supporting Appellant, Deykes v. Cooper-Standard Auto., Inc., 2017 WL 11688065 (6th Cir. 2017) (No. 16-274) (same); Brief of SEC Amicus Curiae Supporting Appellant, Duke v. Prestige Cruises Int'l Inc., 2018 WL 11429858 (11th Cir. 2018) (No. 16-15426) (same); Brief of SEC as Amicus Curiae Supporting Appellant, Danon v. Vanguard Grp., Inc., 686 Fed. Appx. 101, (3rd Cir. 2017) (No. 16-2881) (same); Brief of SEC as Amicus Curiae Supporting Appellee, Somers v. Digital Realty Tr. Inc., 583 U.S. 149 (9th Cir. 2018) (No. 15-17352) (same); Brief of SEC as Amicus Curiae, Verble v. Morgan Stanley Smith Barney LLC, 676 Fed. Appx. 421 (6th Cir. 2017) (No. 15-6397) (same); Brief of SEC as Amicus Curiae Supporting Appellant, Beacom v. Oracle Am., Inc., 825 F.3d 376 (8th Cir. 2016) (No. 15-1729) (same); Brief of the SEC as Amicus Curiae Supporting Appellant, Berman v. Neo@Ogilvy LLC, 801 F.3d 145 (2d Cir. 2015) (No. 14-1426), (same); Brief of SEC as Amicus Curiae Supporting Appellant, Safarian v. Am. DG Energy Inc., 622 Fed. Appx. 149 (3d Cir. 2015) (No. 14-2734), (same); Brief of SEC as Amicus Curiae Supporting Appellant, Liu Meng-Lin v. Siemens AG, 763 F.3d 175 (2d Cir. 2014) (No. 13-4385) (same).

[222] *E.g.*, Digit. Realty Tr., Inc. v. Somers, 583 U.S. 149, 153 (2018) (describing question presented).

[223] The rulemaking history is set forth in *Digital Realty Trust*, 583 U.S. at 157-58 (noting that SEC's proposed rule required reporting to the SEC, whereas the final rule did not).

[224] Berman v. Neo@Ogilvy LLC, 801 F.3d 145, 146 (2d Cir. 2015), *overruled by* Digit. Realty Tr., Inc. v. Somers, 583 U.S. 149 (2018).

[225] Asadi v. G.E. Energy (USA), LLC, 720 F.3d 620, 623 (5th Cir. 2013).

applied the *Chevron* framework in considering the validity of SEC's interpretation, and it determined that the statutory language was both ambiguous and reasonably resolved by SEC.[226] The Ninth Circuit case, *Digital Realty Trust, Inc. v. Somers*, made its way to the Supreme Court, where SEC and SG jointly filed an amicus brief.[227] The Supreme Court, however, determined the statutory language was clear — and contrary to SEC's interpretation.[228]

EPA similarly sought uniformity in *Blackstone Headwaters Coalition, Inc. v. Gallo Builders, Inc.*,[229] where the agency amicus offered its interpretive views of the Clean Water Act ("CWA") for the First Circuit's en banc reconsideration of prior precedent.[230] In the underlying case, an environmental organization sought declaratory and injunctive relief against a developer for alleged CWA violations at a construction site.[231] But prior to the suit, the state environmental agency had reached a consent order with the developer to pay a penalty for CWA violations.[232] On a motion for summary judgment, therefore, the defendant argued that the plaintiff's claims were barred by a statutory provision in the CWA that places limits on citizen suits for "civil penalty action[s]" when the state is diligently prosecuting an administrative action.[233] On appeal from the district court's entry of summary judgment, the en banc First Circuit determined that the limitation did not bar a suit for prospective relief to enjoin ongoing violations.[234]

[226] *See Digit. Realty Tr. Inc.*, 583 U.S. at 159 (describing procedural history). Note that this is an example of an amicus brief interpretation being subjected to *Chevron* because regulations were at issue (the interpretation was not proffered for the first time in the amicus brief).

[227] Brief for United States as Amicus Curiae Supporting Respondent, Digit. Realty Tr., Inc. v. Somers, 583 U.S. 149 (2018) (No. 16-1276). Future work might test the hypothesis that agency amicus participation in the lower courts increases the likelihood that the SG will agree to amicus participation before the Supreme Court.

[228] *Digit. Realty Tr. Inc.*, 583 U.S. at 169 (explaining no deference was due the agency's interpretation because the statutory language was clear).

[229] 32 F.4th 99, 104-05 (1st Cir. 2022) (en banc). The government's brief was invited. *Id.* at 104.

[230] *Id.*

[231] *Id.* at 102.

[232] *Id.* at 101-02.

[233] *Id.* at 103.

[234] *Blackstone Headwaters Coal., Inc.*, 32 F.4th at 101.

Although the court engaged in a thorough statutory analysis that included the language of the statute, legislative history, related statutory provisions, and case law — concluding that the answer was "seemingly clear"[235] — it did not engage any of the arguments in the amicus brief. Instead, it simply documented that the government agreed with the outcome.[236]

The brief, however, offers important insights into the government's views. Filed jointly by EPA and the DOJ Environment and Natural Resources Division, the government noted that its position was one it had consistently held.[237] Not only did EPA have a 1987 guidance document proffering this interpretation, but the government had advanced its interpretation in other amicus briefs.[238] Moreover, the government emphasized its interest in the supplemental function that CWA citizen suits play in enforcement: "Citizen suits bolster limited government enforcement resources."[239] And because they are frequently brought by members of the community directly impacted by illegal discharges, they have a "personal connection" that uniquely situates their ability to identify and pursue violations.[240] Notably, the amicus brief also was positioned to promote uniform applicability of federal laws. The issue in *Blackstone Headwaters* involved a circuit split, and the government's position urged an outcome consistent with other circuits that had considered the matter.[241]

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[235] *Id.* at 108.

[236] *Id.* at 105.

[237] Brief for the United States as Amicus Curiae Supporting Plaintiff-Appellant, Blackstone Headwaters Coal., Inc. v. Gallo Builders, Inc., 32 F.4th 99 (1st Cir. 2022) (No. 19-2095), 2021 WL 5410772, at *23.

[238] *Id.* at *23-24.

[239] *Id.* at *22.

[240] *Id* .at 23.

[241] *Id.* at *19-20 (describing Tenth Circuit's alignment with government's view); *see also* Brief for the United States as Amicus Curiae Supporting Plaintiffs-Appellees, Citizens for a Better Env't v. Union Oil Co. of Cal., 83 F.3d 1111 (9th Cir. 1996) (No. 95-15139), 1995 WL 17069780, at *20 (noting that the Ninth Circuit had rejected the reasoning of First Circuit's prior precedent). *Compare* Etcheverry v. Tri-Ag Serv., Inc., 22 Cal.4th 316, 332 (Cal. 2000) (rejecting amicus EPA's preemption analysis that would have conflicted with eight federal circuit courts of appeals), *with id.* at 330 ("Even though the question presented . . . has been addressed by nine of the federal circuit courts of appeals, the United States failed to file amicus curiae briefs in any of the cases and

Similarly, in *Chambers v. District of Columbia*,[242] a plaintiff-employee sued her employer, the District of Columbia, under Title VII of the Civil Rights Act of 1964, arguing that the defendant discriminated against her based on her sex when it denied her an opportunity to transfer to another department. This argument raised the legal questions whether such denial was within the statutory phrase "terms . . . of employment," and whether a plaintiff must make some additional showing of impact beyond the mere fact of the denial of the opportunity to state a claim.[243] The court met en banc to reconsider its prior negative precedent, which it overruled after a full consideration of the statutory text (which it called "straightforward"[244]) and related case law.[245] The Attorney General and EEOC jointly submitted an amicus brief supporting the plaintiff's interpretation,[246] noting that they shared enforcement responsibilities with respect to state and local-government employers; moreover, the United States itself had an interest in the case because of its status as an employer subject to Title VII.[247] Furthermore, the United States had advanced the same position in other litigation, including as a party before the Supreme Court.[248] In contrast to *Blackstone Headwards*,

permitted those courts to proceed upon a fundamental assumption that it now characterizes as mistaken."). For an early example of a CWA suit in which EPA filed an amicus brief, see Sierra Club v. Abston Constr. Co., 620 F.2d 41, 44-45 (5th Cir. 1980) (agreeing with EPA's amicus position interpreting meaning of CWA's point-source requirement).

[242] 35 F.4th 870 (D.C. Cir. 2022).

[243] *Id.* at 873-74.

[244] *Id.* at 874.

[245] *Id.* at 881.

[246] The government expressly provides any position on the merits of the plaintiff's claim. En Banc Brief for the United States as Amicus Curiae Supporting Plaintiff-Appellant, Chambers v. District of Columbia, 35 F.4th 870 (D.C. Cir. 2021) (No. 19-7198), 2021 WL 2853571, at *11 n.4.

[247] *Id.* at *1.

[248] In *Forgus v. Esper*, 141 S. Ct. 234 (2020), the petition for certiorari was denied. Thus, the Supreme Court had yet to decide the issue. Note that in *Forgus*, the government's legal interpretation was consistent with that in *Chambers*, but it argued the plaintiff had failed to show sufficient facts to support her claim. Brief for the Resp't in Opp'n, Forgus v. Shanahan, 141 S. Ct. 234 (2020) (No. 18-942), 2019 WL 2006239 at *8. The government has pursued the interest of uniformity on this kind of issue through other amicus activities. *See* Brief of the United States as Amicus Curiae, Lyons v. Alexandria, (4th Cir. 2020) (No. 20-1656), 2020 WL 5846681, at *3-4 (noting

here the D.C. Circuit cited the government's brief favorably, but with limited engagement and only to punctuate its own analysis.[249]

By their terms, both *Blackstone Headwaters* and *Chambers* might have been *Skidmore* cases. EPA's brief might especially have merited such deference: its interpretation was longstanding and thoroughly set forth, and it was rooted in EPA's expertise with the big-picture enforcement modalities of the statute. Given the discussion in Part II.D above, one might have predicted greater judicial engagement with the agencies' positions, at least considering whether they bore any persuasive power. Perhaps the courts' reticence can be explained by their own conclusions that the statutes were "seemingly clear" [250] and "straightforward."[251] If the statute is clear, deference is a non-issue — just as was illustrated in *Digital Realty Trust*, where the Supreme Court agreed with the lower court that the *Chevron* framework applied, but determined the statute was clear.[252]

To envision what deeper engagement might look like, compare the approach of the Eleventh Circuit in another private enforcement case, *Blanco v. Samuel*,[253] which called on the court to construe FLSA's overtime pay requirements as applied to a plaintiff nanny who sought overtime pay from defendant parents for whom she worked.[254] In general, under FLSA, nannies employed by parents and who live in a separate residence are due overtime pay.[255] The district court granted summary judgment for the parents who contended as a matter of law that the plaintiff resided with them.[256] The Eleventh Circuit concluded that — even viewing the facts most favorably to the defendants — the

government's interest in scope of actionable employment actions and citing *Forgus* argument for proposition that additional detrimental impact should not be required).

[249] *See* Chambers v. District of Columbia, 35 F.4th 870, 874 (D.C. Cir. 2022) ("Indeed, as the Government aptly says, 'it is difficult to imagine a more fundamental term or condition of employment than the position itself.'" (citations omitted)).

[250] Blackstone Headwaters Coal., Inc. v. Gallo Builders, Inc., 32 F.4th 99, 108 (1st Cir. 2022).

[251] *Chambers*, 35 F.4th at 875.

[252] Digit. Realty Tr., Inc. v. Somers, 583 U.S. 149, 169 (2018).

[253] 91 F.4th 1061 (11th Cir. 2024).

[254] *See id.* at 1065.

[255] *See* 29 U.S.C. § 213(b)(21) (2018).

[256] *Blanco*, 91 F.4th at 1065.

plaintiff had not resided with them within the meaning of FLSA because, among other things, she maintained a separate residence, slept at the defendant's house only as part of her duties, and kept very few personal items at the defendants' home.[257] Although the court viewed its conclusion as flowing directly from the statutory text, it also engaged the parties' arguments about how DOL regulations bore on the matter.[258]

The agency had not expressly defined "resides," but it had described its view of the term in a preamble to a final rule, using an illustration that the parents argued applied in their favor.[259] DOL, however, offered its competing amicus view that the parents had misread the illustration, an approach supported by a 1981 opinion letter that provided further elaboration.[260] The court first noted that no deference was owed to the agency because (a) the statutory language was clear, and (b) neither preamble language nor opinion letters carry the force of law.[261] It further explained, however, that if the statutory language were unclear, it would apply the *Skidmore* framework and find the Department's interpretation persuasive because of the depth of its analysis over time.[262]

Once again, *Blanco* provides an example of a judicial ruling rooted in the statutory text. Although the Eleventh Circuit engaged with the agency's brief in *Blanco*, it made clear that that portion of the opinion was essentially dicta.[263] In fact, the Eleventh Circuit's approach seemed designed mainly to reassure the parties that its reasoning was sound, much as the D.C. Circuit in *Chambers* had done when it mentioned that the government agreed with its position.[264] Yet engagement with the

[257] *Id.* at 1070-73.

[258] *Id.* at 1074 n.11. In a concurrence, Judge Hull noted that she did not join the part of the opinion discussing the Department's interpretation because it was unnecessary, that is, dicta. *See id.* at 1083 (Hull, J., specially concurring in part).

[259] *See id.* at 1075.

[260] *See id.* at 1077.

[261] *Id.* at 1079.

[262] *Id.*

[263] *See id.*

[264] Such notes are common. *See, e.g.*, *In re* Rail Freight Surcharge Antitrust Litig., 34 F.4th 1, 10-11 (D.C. Cir. 2022) (in antitrust private enforcement suit, interpreting statute's "plain terms" and referencing SEC amicus arguments only to bolster court's independent analysis); Ecological Rts. Found. v. Pac. Gas & Elec. Co., 874 F.3d 1083, 1097

agency's position also demonstrates some measure of respect for a co-equal branch, adhering to the spirit of *Skidmore* even when statutory terms are clear.

Despite these examples, one should not presume that agency amici always side with plaintiffs in private enforcement suits.[265] They might disavow any view of the merits while adopting a legal interpretation favored by the plaintiff,[266] or they might support a position favored by the defendant, though this approach seems less common in the aggregate.[267] Nor do the amicus positions always correspond with what might be predicted given presidential policies.[268] Future empirical work

n.5 (9th Cir. 2017) (treating EPA's amicus reliance on a DOJ legal opinion merely as persuasive authority providing "some corroboration that our own reasoning is sound").

[265] *See generally* Eisenberg, *supra* note 33 (empirically documenting this point for DOL amicus activity).

[266] *E.g.*, Brief for the United States as Amicus Curiae in Support of Neither Party at 2 n.1, Lyons v. Alexandria, 35 F.4th 285 (4th Cir. 2022) (No. 20-1656), 2020 WL 5846681, at *2 n.1; En Banc Brief for the United States as Amicus Curiae in Support of Plaintiff-Appellant and Urging Reversal on the Issue Presented Herein at 11 n.4, Chambers v. District of Columbia, 35 F.4th 870 (D.C. Cir. 2022) (No. 19-7198), 2021 WL 2853571, at *11 n.4.

[267] As Eisenberg notes, during the first Bush Administration, DOL began frequently filing amicus briefs on behalf of employers, though it continued also to file on behalf of employees. *See* Eisenberg, *supra* note 33, at 1248. *See also* Brief for United States & FTC as Amicus Curiae in Support of Defendants-Appellees in Response to Court Order of Nov. 22, 2004 at 4, Empagran S.A. v. F. Hoffman-Laroche, Ltd., 417 F.3d 1267 (D.C. Cir. 2005) (No. 01-7115), 2005 WL 6488381, at *4 (arguing against plaintiff's expansive interpretation of Foreign Trade Antitrust Improvements Act because it would undermine government's coordinated international anti-cartel enforcement policies).

[268] *Compare* Brief for the United States as Amicus Curiae Supporting Plaintiffs-Appellants and Reversal, Easom v. U.S. Well Servs., Inc., 37 F.4th 238 (5th Cir. 2022) (No 21-2020) (during Biden Administration, advancing pro-worker regulatory interpretation under Worker Adjustment and Retraining Notification Act), *and* Brief for the United States as Amicus Curiae Supporting Plaintiff-Appellee and Affirmance, Benson v. Enter. Leasing Co. of Orlando, LLC, No. 21-11911 (11th Cir. Sept. 17, 2021) (similar), *and* Sec'y of Lab.'s Brief as Amicus Curiae in Support of Plaintiff-Appellant and Reversal of the District Court's Decision, Uronis v. Cabot Oil & Gas Corp., 49 F.4th 263 (3rd Cir. 2022) (No. 21-1874) (during Biden Administration, advancing pro-worker interpretation of FLSA), *with* Brief of the Sec'y of Lab. as Amicus Curiae in Support of Plaintiff-Appellant, Ziccarelli v. Dart, 35 F.4th 1079 (7th Cir. 2022) (No. 19-3435) (during Trump Administration, advancing pro-worker interpretation of Family and Medical Leave Act), *and* Brief of Sec'y of Labor, as Amicus Curiae Supporting Plaintiff-Appellant, N.R. v. Raytheon Co., 24 F.4th 740 (1st Cir. 2022) (No. 20-1639) (during Trump Administration,

might illuminate the conditions under which executive agencies in particular advance interpretations generally inconsistent with prevailing presidential policy. In the meantime, one might also hypothesize that such divergences illustrate that some amicus briefs can escape careful presidential oversight.

B. Access to Courts and Hurdles to Review

Agencies do not limit their amicus perspectives to substantive provisions of statutes. They also frequently offer their interpretive views of provisions that could cut off a would-be plaintiff's access to the courts. Statutes of limitations top this list,[269] but the scope of

advancing pro-beneficiary interpretation of Employee Retirement Income Security Act of 1974). *See also* En Banc Brief for the United States as Amicus Curiae in Support of Plaintiff-Appellant and Urging Reversal on the Issue Presented Herein at 1-2, Chambers v. District of Columbia, 35 F.4th 870 (D.C. Cir. 2022) (No. 19-7198), 2021 WL 2853571, at *1-2 (during Biden Administration, recounting previous amicus advocacy effort favoring employee's interpretation of Title VII in May 2019, under Trump Administration).

[269] *E.g.*, Wolf v. Fed. Nat'l Mortg. Ass'n, 512 Fed. Appx. 336, 340 (4th Cir. 2013) (upholding dismissal of plaintiff's case even assuming, in accord with CFPB amicus, plaintiff's Truth in Lending Act claims were not time-barred); Hernández-Miranda v. Empresas Díaz Massó, Inc., 651 F.3d 167, 174-75 (1st Cir. 2011) (adopting position consistent with EEOC amicus perspective regarding time at which discrimination claim counts for damages calculations under Civil Rights Act of 1991 following Title VII violation); Crowley v. L.L. Bean, Inc., 303 F.3d 387, 400-01 (1st Cir. 2002) (citing EEOC amicus brief and agreeing with agency that matters outside of filing time period were properly considered by jury for Title VII and Maine Human Rights Act claims); Rivera v. JPMorgan Chase Bank, 140 F. Supp. 3d 88, 92 (D.D.C. 2015) (holding statute of limitations had run on plaintiff's Fair Credit Reporting Act claim without engaging CFTC and FTC's contrary amicus arguments).

immunity,[270] appropriateness of the forum,[271] exhaustion of remedies,[272] and applicability of arbitration clauses[273] might also be included in this category. Many of these interpretive categories do not fit squarely within the deference framework described in Part II,[274] but courts do not necessarily squarely confront such questions in any event.

Demonstrating a scope-of-immunity issue is *Amphastar Pharmaceuticals Inc. v. Momenta Pharmaceuticals, Inc.*[275] The matter involved the parameters of Sherman Act immunity (the *Noerr-*

[270] *E.g.*, Henderson v. Source for Pub. Data, 53 F.4th 110, 117 (4th Cir. 2022) (court aligned with, but did not cite, amici FTC, CFPB, and State of North Carolina in view that plaintiffs' Fair Credit Reporting Act claims were not barred by immunity provisions of Communications Decency Act); Merlini v. Canada, 926 F.3d 21, 29 (1st Cir. 2019) (in court-ordered brief, State Department amicus discussed foreign relations in connection with Foreign Sovereign Immunity Act; court discussed but rejected that view in U.S. citizen's suit against Canada as an employer).

[271] *E.g.*, CF Indus., Inc. v. Transcon. Gas Pipe Line Corp., 614 F.2d 33, 35-36 (4th Cir. 1979) (FERC amicus illuminated the appropriate scope of a referral from federal court to the agency of a dispute involving a jurisdictional contract for wholesale sale of natural gas; court discussed agency position and partially agreed).

[272] *E.g.*, Brooks v. Dist. Hosp. Partners, 606 F.3d 800, 802 (D.C. Cir. 2010) (court aligned with, but did not cite EEOC amicus argument in favor of permitting external job applicants to remain as intervenors where similarly situated plaintiff had exhausted administrative remedies).

[273] *E.g.*, Lyons v. PNC Bank, Nat'l Assoc., 26 F.4th 180, 183 (4th Cir. 2022) (court aligned with, but did not cite, CFPB amicus position that plaintiff's Truth in Lending Act claims were not subject to arbitration under provision of Dodd-Frank Act); Kabba v. Rent-A-Center, Inc., 730 Fed. Appx. 141, 142-43 (4th Cir. 2018) (EEOC amicus argued that state law applied to issue of whether an arbitration clause was part of an employment contract, and it offered its view that plaintiff's claim was not subject to arbitration as a matter of state contract law; court did not engage agency brief and concluded applicability of arbitration clause rested on a genuine issue of material fact); *see also* Brief of EEOC as Amicus Curiae in Support of Appellee and in Favor of Affirmance at 1, Kabba v. Rent-A-Center, Inc., 730 Fed. Appx. 141 (4th Cir. 2018) (No. 17-1595), 2017 WL 5171398, at *1 ("The EEOC has a strong interest in seeing that employees who have not agreed to arbitrate may proceed in court.").

[274] *E.g.*, Negusie v. Holder, 555 U.S. 511, 521 (2009) (no *Chevron* deference for interpretations of court opinions); Allegheny Def. Project v. FERC, 964 F.3d 1, 11 (D.C. Cir. 2020) ("Federal agencies do not administer and have no relevant expertise in enforcing the boundaries of the courts' jurisdiction."); AKM LLC v. Sec'y of Lab. 675 F.3d 752, 754-55 (D.C. Cir. 2012) (declining to decide whether deference is owed agency interpretations of statutes of limitation).

[275] 850 F.3d 52 (1st Cir. 2017).

Pennington doctrine[276]) where the plaintiff alleged that the defendant — a competitor in pharmaceutical manufacturing — had failed to disclose to a private standard-setting organization ("SSO") that its test method was the subject of a patent application.[277] After the SSO adopted the method and it became a regulatory requirement for the plaintiff, the defendant sued the plaintiff for patent infringement in a suit that was ultimately unsuccessful.[278] Thereafter, the plaintiff brought a Sherman Act claim against the defendant for its failure to disclose to the SSO, and the defendant claimed immunity.[279] The court held that the defendant could not avail itself of *Noerr-Pennington* immunity under the facts as alleged, and it therefore concluded that the district court had improperly dismissed the complaint.[280] FTC filed an amicus brief, explaining that it had considered the scope of the doctrine in staff reports and had itself challenged the type of conduct at issue in the case before the court.[281] It engaged in a lengthy analysis of the doctrine's case law, but the court did not engage with the brief other than to note the agency's agreement with its approach.[282]

Nor did the court interact with CFPB's amicus views in *Bender v. Elmore & Throop, P.C.*,[283] which considered the scope of the one-year limitations period under the Fair Debt Collection Practices Act. The case involved the plaintiffs' dispute with their homeowners' association ("HOA") about HOA assessments and associated attorney's fees.[284] The plaintiffs alleged that they had paid the assessments on time, but the

[276] *See* United Mine Workers of Am. v. Pennington, 381 U.S. 657, 669-70 (1965) (holding alleged activities of labor union, if proved, were not excepted from Sherman Act liability); E.R.R. Presidents Conf. v. Noerr Motor Freight Inc., 365 U.S. 127, 136-37 (1961) (rejecting Sherman Act claim based on competitors seeking to influence public officials).

[277] *Amphastar Pharms., Inc.*, 850 F.3d at 54.

[278] *Id.*

[279] *Id.*

[280] *Id.* at 57-58.

[281] Brief of Amicus Curiae FTC in Support of Neither Party and in Favor of Reversal at 2-3, Amphastar Pharms., Inc. v. Momenta Pharms., Inc., 850 F.3d 52 (1st Cir. 2017) (No. 1602113), 2016 WL 6833812, at *2-3.

[282] *See Amphastar Pharms., Inc.*, 850 F.3d at 57 n.3.

[283] 963 F.3d 403 (4th Cir. 2020).

[284] *Id.* at 405.

defendants continued to seek attorneys' fees; numerous contacts and collection attempts occurred over a period of years.[285] The district court granted the defendants' motion to dismiss, concluding that the plaintiffs' claims were time-barred because the one-year limitation period ran from the date of the first violation.[286] In a very succinct opinion, the Fourth Circuit rejected the district court's approach, holding that each alleged violation — even if arising from the same series of events — started the limitations period anew.[287]

This holding was in accord with CFPB's amicus stance despite the fact that the court did not engage it. And CFPB took an analytical approach far more detailed than that presented in the court's opinion.[288] Beginning with a textual analysis, the agency next surveyed each of the court of appeals decisions that had adopted its preferred interpretation before distinguishing lower-court decisions that had reached different interpretations.[289] The agency also offered a comprehensive analysis of the Act's purpose and its concerns about behavioral incentives should the court rule in favor of the defendants.[290] Finally, CFPB set forth its assessment of how the legal principles applied to the plaintiff's claims.[291] Overall, the brief provided a classic, fulsome analysis far more thorough than the court's ultimate opinion. Nevertheless, perhaps the thorough brief gave confidence to the court that its decision was well grounded, as suggested in the preceding Section. Moreover, it may have supported the plaintiffs' efforts, suggesting a role for amicus briefs in accessing justice in fields where retail litigation is not necessarily incentivized sufficiently to attract the support of major firms or interest groups.[292]

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[285] *Id.* at 405-06.

[286] *Id.* at 406.

[287] *Id.* at 407-08.

[288] *See generally* Brief of Amicus Curiae CFPB in Support of Plaintiffs-Appellants and Reversal, Bender v. Elmore & Throop, P.C., 963 F.3d 403 (4th Cir. 2020) (No. 19-1325) (providing detailed analysis).

[289] *Id.* at 9-18.

[290] *Id.* at 18-20.

[291] *Id.* at 20-23.

[292] This observation is not intended as a criticism of the plaintiffs' attorney in this specific case, who was a solo practitioner specializing in plaintiffs' litigation. *See Bender*, 963 F.3d at 404 (listing attorneys of record). Rather, it is a systemic observation rooted in the literature on access-to-justice issues, a subset of which involves access to

C. Preemption

Whereas the preceding sections address matters that directly implicate statutory rights — and access to them — preemption cases extend to matters of federalism. As the Introduction depicted, DOE's participation in the California natural gas ban litigation provides an example.[293] Here, the competing interests are strong: by definition, preemption involves both the scope of the agency's power, and the federalism matter of a state's power to deviate from federal law. In the absence of express delegation from Congress for an agency's regulations to preempt state law, courts do not automatically defer to an agency's

resources like adequate legal representation. *See* Shapiro, *supra* note 36, at 1488 (presenting typology of access-to-justice dimensions including party resources); Burbank, Farhang & Kritzer, *supra* note 109, at 675-79 (describing how financial incentives can promote access-to-justice values for private enforcement); *see also* Brief of the Sec'y of Lab. as Amicus Curiae in Support of Plaintiff-Appellant at 6, Ziccarelli v. Dart, 35 F.4th 1079 (7th Cir. 2022) (No. 19-3435), (recounting procedural history in which appellate court recruited counsel for pro se plaintiff and invited the views of the United States by amicus in a FLSA matter). Note that another dimension of access to justice is substantive; private causes of action to enforce statutory rights fall into this category. Shapiro, *supra* note 36, at 1499. Agency amicus briefs can thus promote multiple dimensions.

[293] Cal. Rest. Ass'n v. City of Berkeley 65 F.4th 1045 (9th Cir. 2023), *amended and superseded on denial of reh'g en banc*, 89 F.4th 1094 (9th Cir. 2024); *see also*, CSX Transp., Inc. v. Healey, 861 F.3d 276, 285 (1st Cir. 2017) (DOL and DOJ Civil Rights Division amicus argued that Railroad Unemployment Insurance Act and ERISA did not preempt Massachusetts Earned Sick Time Law; court mostly disagreed); Nat'l City Bank of Ind. v. Turnbaugh, 463 F.3d 325, 331-32 (4th Cir. 2006) (court extended *Chevron* deference to Office of the Comptroller's regulation, resulting in plaintiff's claims against Maryland's Commissioner of Financial Regulation being conflict-preempted); Pub. Serv. Co. of N.H. v. Patch, 167 F.3d 15, 19 n.4 (1st Cir. 1998) (expressing confusion about Federal Power Act's preemptive scope but failing to engage with FERC's brief that had addressed the issue). *See generally* Brief for the United States as Amicus Curiae Supporting Defendant-Appellee and Intervenor Defendants-Appellees and Urging Affirmance, Austin Apartment Ass'n v. City of Austin, No. 15-50186 (5th Cir. July 13, 2015) (HUD and DOJ Civil Rights Division argued city ordinance prohibiting discrimination on the basis of tenants' source of income was not preempted by Housing Choice Voucher program), *appeal dismissed*, Aug. 6, 2015.

conclusion that a state law is or is not preempted.[294] Instead, such agency interpretations receive *Skidmore* deference.[295]

An example of both this level of deference and the competing interests involved in preemption cases is provided by *Capron v. Office of Attorney General of Massachusetts*.[296] There, the controversy involved the preemptive scope of the State Department's wage regulations for the popular Au Pair Program and the corresponding applicability of Massachusetts's wage and hour laws for in-home childcare providers.[297] The case arose because host families and an au pair sponsoring agency sought a declaratory judgment that the state law was preempted, and the State Department weighed in as amicus favoring preemption, represented by the DOJ Civil Division.[298] In a carefully reasoned opinion, the court concluded that the state law was neither field- nor conflict-preempted.[299] Notably, the court devoted a full section to engaging with the State Department's amicus arguments, which focused on interpretations of the agency's regulations.[300] Here the court cited *Kisor v. Wilkie*, explaining that *Kisor* had left the possibility of deference available even for arguments raised to the first time in an amicus brief.[301] Having carefully considered all of the agency's arguments, however, including those based on past agency commentary, guidance, fact sheets, and even statements to the press,[302] the court declined to defer to the agency's interpretation.[303]

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[294] *See* Wyeth v. Levine, 555 U.S. 555, 576 (2009); *cf.* 30 U.S.C. § 1254 (authorizing Secretary of Interior to "set forth any State law or regulation which is preempted and superseded by" a federal surface coal mining program).

[295] *See Wyeth*, 555 U.S. at 576-77.

[296] 944 F.3d 9 (1st Cir. 2019).

[297] *Id.* at 12. As the court noted, the Au Pair Program also implicates U.S. foreign affairs interests. *See id.* at 22.

[298] *Id.* at 12-13.

[299] *Id.* at 40.

[300] *Id.* at 40-41.

[301] *Id.* at 40.

[302] *See id.* at 33-42.

[303] *Id.* at 42 ("[W]hile we do owe respectful deference to the DOS's own view of its regulations, the portions of the regulatory text and the passages in the underlying regulatory history . . . simply do not support [the agency's] assertions.").

To see another point of comparison concerning both depth of engagement with the agency's view and the level of deference a court might offer, consider finally the rest of the story of DOE's participation in *City of Berkeley* as introduced at the outset of this Article. Recall that the Restaurant Association challenged the City of Berkeley's ban on new natural gas hookups, arguing that the ordinance was prohibited by the Energy Policy Conservation Act ("EPCA"), which DOE administers.[304] DOE filed an amicus brief before the Ninth Circuit panel supporting the City of Berkeley's position, but the court disagreed.[305] DOE as amicus then supported rehearing en banc.[306] The Ninth Circuit declined, but it issued a superseding opinion that reinforced its view that the statutory text was clearly in favor of the plaintiff's position.[307] EPCA's preemption provision states that once an energy efficiency standard for an appliance becomes effective, state regulations "concerning the energy efficiency [or] energy use" of such products are preempted.[308] The court concluded that the plain language supported preemption, reasoning among other things that "zero" is an amount of energy use.[309] It dedicated a full subsection of its opinion to refuting DOE's contrary textual analysis, but it did not engage in any discussion of deference and failed to grapple with the concerns DOE raised about its administration of the statute should preemption apply.[310] A whopping eight judges dissented from denial of rehearing en banc and urged "any future court that interprets [EPCA] not to repeat the panel opinion's mistakes."[311]

These cases illustrate the usefulness of agency amicus briefs in preemption cases. In both instances, the agency amici provided

[304] Cal. Rest. Ass'n v. City of Berkeley, 89 F.4th 1094, 1098-1101 (9th Cir. 2024) (denying reh'g en banc).

[305] *See* Cal. Rest. Ass'n v. City of Berkeley, 65 F.4th 1045, 1049, 1054 (9th Cir. 2023), *amended and superseded by Cal. Rest. Ass'n*, 89 F.4th 1094. The court engaged with some, but not all, of DOE's amicus arguments. *E.g.*, *id.* at 1053-54.

[306] Brief for the United States as Amicus Curiae in Support of Petition for Rehearing at 27, Cal. Rest. Owners Ass'n v. City of Berkeley, 89 F.4th 1094 (9th Cir. 2024) (No. 21-16278) (favoring reh'g en banc).

[307] *See Cal. Rest. Ass'n*, 65 F.4th at 1056.

[308] 42 U.S.C. § 6297(c).

[309] *Cal. Rest. Ass'n*, 89 F.4th at 1102.

[310] *Id.* at 1104 (calling DOE's textual analysis "wrong").

[311] *Id.* at 1119 (Friedland, J., dissenting).

significant background and understanding about the operations of the statutes they administer, which was available to help inform the court's analysis of the relevant statute's preemptive scope. But they also demonstrate a judicial reluctance to offer any deference at all to the agencies' positions. Even the *Capron* court, which acknowledged the flexibility left open by *Kisor*, found the agency's interpretation unconvincing.[312] In this context at least, the uphill battle that agencies seem to face offers a palliative to those who might be concerned about the potential impact of agency amici in influencing the law outside of regularized procedures.

Overwhelmingly, most agency amici participate in the types of cases presented thus far: private enforcement actions, hurdles to review, and preemption. Two other types bear discussion, however, because they complete the picture of agencies' amicus activity and offer additional insights into the theory of agency amici: these include the state administration of federally funded restorative justice programs, and litigation to which another agency is a party.

D. Federally Funded, State-Administered Restorative Justice Programs

Congress has established several funding statutes whereby federal agencies set standards for programs that are administered by the federal agencies or states.[313] When those standards include restorative justice values, they might be challenged on constitutional rather than statutory grounds. Often these cases involve direct challenges to federal agencies' actions, taking them out of the scope of this Article's amicus focus.[314] Moreover, no deference is awarded to agencies' constitutional interpretations.[315] Nevertheless, I offer an amicus example here to

[312] *See* Capron v. Off. of Att'y Gen. of Mass., 944 F.3d 9, 42 (1st Cir. 2019).

[313] For some examples, see generally Heidi A. Reamer, *Defining Recipients of Federal Financial Assistance Under the Nondiscrimination Statutes*, 57 WASH. & LEE L. REV. 1355, 1358-61, 1364-66 (2000).

[314] *E.g.*, Vitolo v. Guzman, 999 F.3d 353, 356-57 (6th Cir. 2021) (enjoining, on Equal Protection grounds, Small Business Administration's administration of COVID-19 restaurant relief aid with preferences based on race and sex); Wynn v. Vilsack, 545 F. Supp. 3d 1271, 1295 (M.D. Fla. 2021) (enjoining, on Equal Protection grounds, USDA's debt relief program for historically disadvantaged farmers and ranchers).

[315] *E.g.*, Gulf Power Co. v. FCC, 208 F.3d 1263, 1272 (11th Cir. 2000).

complete the typology and underscore an additional way agencies can influence the law's development of justice values.[316]

Consider *Associated General Contractors of America v. California Dep't of Transportation*.[317] There, a general contracting association challenged California's implementation of provisions of a federal transportation funding statute designed to provide race and sex preferences in the transportation contracting industry to rectify past and ongoing discrimination.[318] Under the statutory scheme, the Department of Transportation ("DOT") approves state plans meeting the statutory requirements, which opens pathways to federal funding.[319] The plaintiff argued that California's implementation plan, which relied on a statistical study demonstrating underrepresentation by race and sex in transportation contracts, was unconstitutional.[320] The court therefore confronted a constitutional issue concerning the type of proof required to demonstrate narrow tailoring where Congress had already found a compelling national interest in addressing widespread effects of discrimination.[321]

The DOJ Civil Rights Division and DOT partnered in filing an amicus brief.[322] In their statement of interest, the amici noted that "the United States has a significant interest in ensuring that States are able to vindicate the federal interest in ensuring that public dollars are not

[316] *See generally* Brief for the United States as Amicus Curiae Urging Affirmance, Doe, v. Lower Marion Sch. Dist., 665 F.3d 524 (3d Cir. 2011) (No 10-3824) (brief of Department of Education and DOJ, Civil Rights Division, regarding constitutional and Title VI challenge to school district redistricting; arguing in favor of school district); Doe v. Lower Merion Sch. Dist., 665 F.3d 524 (3d Cir. 2011) (holding similarly to position advocated by government but not citing its amicus brief).

[317] 713 F.3d 1187 (9th Cir. 2013).

[318] *Id.* at 1190 (citing The Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users, Pub. L. 109-59 (2005)).

[319] *Id.* at 1190-91.

[320] *Id.* at 1190.

[321] *Id.* at 1196.

[322] *See generally* Brief for the United States as Amicus Curiae, Assoc. Gen. Contractors of Am., San Diego Chapter v. Cal. Dep't of Transp., 713 F.3d 1187 (9th Cir. 2013) (No. 11-16228) (brief of Department of Transportation and DOJ, Civil Rights Division, regarding the criticality of implementing the Disadvantaged Business Enterprise Program to counter the ongoing effects of racial discrimination).

spent in a manner that perpetuates the effects of discrimination."[323] Indeed, DOT explained its concern that district courts were applying too high a standard that effectively required States to prove a compelling interest anew.[324] The Ninth Circuit did not engage with the government's brief, but after a comprehensive analysis of the issue, it held in accord with the government's views, both in ruling that the industry association lacked standing and in its alternative holding that California's plan met strict scrutiny requirements.[325] Once again, this category of amicus activity reveals judicial reticence with respect to agencies' briefs. Although the constitutional nature of such cases takes any possibility of deference off the table, the lack of judicial engagement remains unsatisfying, particularly for such important issues.

E. Offering Views on Another Agency's Statutory Interpretation

It is well known that many agencies have overlapping and shared statutory responsibilities.[326] In turn, overlapping interests can prompt an agency to offer its amicus perspective in another agency's litigation. This context is another in which the amicus agency will receive no deference because it is not interpreting a statute it administers.[327] And as in many of the examples above, there is no guarantee a court will even reference the amicus agency's arguments.[328] In *Browning Ferris v. NLRB*,[329] for example, NLRB defended before the D.C. Circuit its administrative adjudication concluding that a recycling company and its labor-supply contractor were joint employers of recycling workers. This approach represented an expansion of NLRB's test and was the result of

[323] *Id.* at 2. The government also explained that it had regularly participated in litigation involving challenges to this particular program. *Id.*

[324] *Id.* at 23-24.

[325] San Diego Chapter v. Cal. Dep't of Transp., 713 F.3d 1187, 1195 (9th Cir. 2013).

[326] Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131, 1134 (2012) (developing critical typology of shared regulatory spaces). *See generally* Hammond, *supra* note 85 (considering challenges of judicial review of matters where multiple agencies have regulatory responsibility).

[327] *See* Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842 (1984).

[328] *See supra* Parts I–III.

[329] 911 F.3d 1195 (D.C. Cir. 2018).

considerable back-and-forth decision-making at the agency.[330] Even the General Counsel to NLRB — who is independent of the Board and answers to the President[331] — had appeared as amicus and advocated a position that the Board rejected.[332] EEOC was interested in the outcome of the case because the definition of "employer" in Title VII (which is enforced by EEOC) is read similarly with the definition in the National Labor Relations Act.[333] EEOC had adopted a flexible joint-employer test, and it argued that NLRB's approach was similar and appropriate.[334]

The court began by rejecting NLRB's argument that some deference was owed to its interpretation; because the Act used a common-law term, that "pure question of law" would be reviewed de novo.[335] Nevertheless, the court agreed with NLRB's common-law interpretation.[336] The court did not engage with the EEOC amicus brief, though it cited a private industry organization's amicus brief along the way to disagreeing with that position.[337] EEOC, however, articulated a common-law based approach very similar to that of NLRB and to that which the court adopted.[338] Perhaps given the complicated procedural

[330] *See id.* at 1205-6.

[331] Lewis v. NLRB, 357 U.S. 10, 16 n.9 (1958); NLRB v. United Food & Com. Workers Union, Local 23, 484 U.S. 112, 118 (1987); *see* NLRB v. SW Gen., Inc., 580 U.S. 288, 316-17 (2017) (Thomas, J., concurring) (describing independence of NLRB general counsel from the Board itself; Board has adjudicatory role, which is split from GC's prosecutorial role).

[332] *See Browning Ferris*, 911 F.3d at 1227 n.9 (Randolph, J., dissenting) (arguing court should not have issued a merits opinion due to unusual procedural posture and describing independence of NLRB general counsel and contrary position that counsel had taken in the administrative proceedings below).

[333] *See generally* Brief of United States Equal Employment Opportunity Commission as Amicus Curiae in Support of Respondent/Cross-Petitioner and in Favor of Enforcement, Browning Ferris v. NLRB, 911 F.3d 1195 (D.C. Cir. 2018) (No. 16-1028) (brief of U.S. Equal Employment Opportunity Commission, regarding its position to support the NLRB's new joint-employer test).

[334] *Id.*

[335] *Browning Ferris*, 911 F.3d at 1206.

[336] *Id.* at 1199-1200.

[337] *Id.* at 1213.

[338] *Browning Ferris*, 911 F.3d at 1209 (indicating agreement with NLRB that indirect control is relevant); Brief of United States Equal Employment Opportunity Commission as Amicus Curiae in Support of Respondent/Cross-Petitioner and in Favor of

posture of the case, the court was content to confine itself mostly to the parties' arguments. But failing to discuss EEOC's view meant a missed opportunity to at least provide context for the court's decision-making and Congress's structural and linguistic choices in the agencies' closely related fields of authority. The stakes seemed heightened as well, because although in this case EEOC and NLRB were in agreement, NLRB's General Counsel had not been earlier in the case's history.[339] Though an interagency dispute did not fully come to a head, the complex relationships in *Browning Ferris* offer a reminder about the unitary executive concerns discussed in Part II.

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As this typology has demonstrated, most agency amici confine themselves to matters squarely within their statutory domains; these cases do not merit the concern some have directed toward the SG's policy efforts at the Supreme Court.[340] Although it is reasonable to think that agency amici can make a difference, how much difference they make remains elusive, and courts' written engagement with agency amici appears no more predictive for outcomes than past empirical work has found.[341] Nevertheless, the richness of agency amicus activities reflected in this typology offer a number of insights bearing on the normative dimensions set forth in Part II, to which this Article turns next.

IV. EVALUATING AGENCY AMICI

This Part brings the above typology full circle to the matters discussed in Part II. As described herein, Part II's theoretical framework rightly insists on institutional integrity from the executive branch, and this is largely borne out by agency amici in practice. Further, the typology has revealed how agency amici can ameliorate concerns about private enforcement suits and has suggested an under-explored potential for agency amici to advance access-to-justice norms. What is perhaps most

Enforcement at 13-15, Browning Ferris v. NLRB, 911 F.3d 1195 (D.C. Cir. 2018) (No. 16-1028) (describing consideration of indirect control).

339 *Browning Ferris*, 911 F.3d at 1227 n.9 (Randolph, J., dissenting).

340 *See supra* text accompanying notes 69–71.

341 *See* Kearney & Merrill, *supra* note 45, at 816-19.

surprising is the inconsistent judicial treatment of agency amici, despite norms of review that are designed to offset some of the concerns about agency amici. As explained below, this observation may offer a glimpse of the future.

A. Unitary Executive

The typology presented above largely contradicts the deep unitary executive formalist objections that might be imagined with respect to amicus briefs. To be sure, I am offering a functional response that may not satisfy the most ardent of unitary executive adherents, because even a theoretical lack of control is sufficient to doom a given matter of institutional design. But to the extent one believes there is more flexibility than that in the constitutional structure, a functionalist unitary executive lens offers some productive insights about agency amici and suggests as avenues for future work.

First, it is evident that most briefs match expected presidential preferences.[342] This holds true across all categories but is especially apparent in the private enforcement context.[343] This suggests a functioning system of informal administration for amicus briefs despite lacking the centralized White House coordination that other administrative forms like rulemaking must undergo. For appointees removable at will, the ultimate threat of removal incentivizes them to informally vet any significant amicus proposals with the White House as a matter of courtesy and collaboration, whether or not the agency has independent litigating authority.[344] And for agencies that must seek SG approval and partnership to file amicus briefs, that separate vetting process involves rigorous legal discussions and development of drafts, and of course, is also cabined by removability of the SG.[345]

With respect to independent agencies, concerns are tempered in other ways. First, independent agencies are functionally unlikely to

[342] *See supra* notes 89–102 and accompanying text.

[343] *See supra* notes 103–121 and accompanying text.

[344] *See* Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 483 (2010) ("Since 1789, the Constitution has been understood to empower the President to keep these officers accountable — by removing them from office, if necessary.").

[345] *See, e.g.*, McGinnis, *supra* note 72, at 803 n.22 (explaining why SG is removable at will).

depart from presidential preferences even though their heads are removable only for cause; among many other things, these agencies' chairs were chosen by their politically aligned President.[346] The story in the Introduction provides a vivid illustration: CPSC quickly backed off of any suggestion that it would ban gas stoves, with the White House issuing a coordinated press release.[347] Additionally, as noted in several of the examples above, independent agencies are not monolithic in their design. Recall, for example, the independence of the NLRB general counsel in *Browning Ferris*; many such general counsel positions are likely removable at will.[348] And general counsel at independent agencies often must follow written procedures to vet amicus proposals with their agency heads, suggesting further opportunities for alignment with presidential preferences.[349]

What about the amicus briefs that do not align with predicted presidential preferences? A staunch adherent of the unitary executive might point to those examples to support the view that agency amici indeed run amok, at least sometimes. But this is too superficial an argument: it overlooks any possibility of subtlety within presidential administrations, and it discounts the real commitments that many

[346] For discussion, *see* Devins & Lewis, *supra* note 99, at 1355-57. For a thorough exploration of the many institutional design factors bearing on the actual independence of such agencies, *see generally* Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15 (2010).

[347] *Supra* text accompanying notes 1–4.

[348] The Ninth Circuit's reasoning in *NLRB v. Aakash, Inc.*, 58 F.4th 1099 (9th Cir. 2023), suggests many such general counsel positions may be removeable at will because they are single individuals exercising significant authority. *Id.* at 1103-06. This has been the practice as well; President Biden removed the EEOC General Counsel in 2021 after she refused to step down. Eli Rosenberg, *White House Fires Trump EEOC Official After She Refuses to Step Down*, WASH. POST (Mar. 6, 2021), https://www.washingtonpost.com/business/2021/03/05/biden-eeoc-general-counsel-trump/.

[349] *See, e.g.*, EEOC, *Revised Procedures for Commission Approval of Amicus Curiae Participation* (Jan. 13, 2021), https://www.eeoc.gov/revised-procedures-commission-approval-amicus-curiae-participation [https://perma.cc/U597-LJLL] (detailing procedures by which OGC must propose amicus participation to full Commission for approval); SEC, *Request for Commission* Amicus *Participation in a Pending Case* (June 28, 2021), https://www.sec.gov/ogc/request-for-commission-amicus-participation-in-a-pending-case [https://perma.cc/MXP9-4CQ2] (noting that OGC makes recommendation to file an amicus brief to the Commission, which votes whether to accept the recommendation).

agency personnel — whether appointed or career — have made to the agency's mission.[350] In addition, agency amici (and specifically, agency counsel) are operating under separate professionalism constraints as officers of the court. Just as the SG's reputation with the Court tempers her willingness to advance any and every presidential political whim,[351] so too may there be strong reasons for agencies to advance an amicus argument that does not superficially match expected presidential policies.[352]

Part II also raised the specter of intra-executive disputes, such as that between the President and EEOC over an amicus brief in *Williams v. New Orleans*.[353] This project did not uncover other such public disputes. In previous work, I have suggested how courts can manage disputes between executive and independent agencies in ways that are respectful of all three branches.[354] For example, courts can give primacy to Congress's choices in structural matters of agency design while retaining for themselves the role of judicial review for reasonableness, affording deference as warranted.[355] In the amicus context, this functional approach suggests that occasional tensions between an agency with independent litigating authority and the President are tolerable and consistent with legislative preferences. To the extent such tensions arise behind closed doors, any ultimate decisions benefit from

[350] *See also* Jon Michaels, *An Enduring, Evolving Separation of Powers*, 115 COLUM. L. REV. 515, 544 (2015) (describing role of civil service in imposing restraint); *see generally* Fisher & Shapiro, *supra* note 20 (elaborating how these points advance a rich understanding of agency expertise).

[351] *E.g.*, Kearney & Merrill, *supra* note 45, at 818-19 (underscoring SG's professionalism).

[352] For those interested in further empirical work on these issues, a case study approach may be most fruitful. Quantitative analyses might test the explanatory power of independent variables like whether the brief was invited, ordered, or volunteered, and whether the agencies was fully staffed with politically appointed positions at the time of the brief's development and findings. One might also investigate the extent to which certain agency positions carried over from one administration to another.

[353] *See supra* text accompanying notes 102–105.

[354] *See generally* Hammond, *supra* note 85 (discussing what courts should do "when courts review agency actions arising from shared regulatory space, political accountability").

[355] *Id.* at 1798-99.

deliberation.[356] To the extent such tensions become public, they invite accountability and oversight, serving the very values unitary theorists seek to protect.[357]

Also discussed in Part II was the constitutional objection to private enforcement suits, which maintains that such suits undermine the president's Take Care responsibilities. Relatedly, there is judicial and scholarly interest in grounding standing doctrine in Article II, which implies a limit on the kinds of private enforcement suits Congress can authorize.[358] Agency amicus briefs can ameliorate many of these concerns. With respect to private enforcement, when an agency determines that a private suit is sufficiently important for amicus attention, its role as amicus is less resource-intensive than had the agency brought the enforcement action itself. In that sense, the early rationale of private enforcement as a supplement still holds weight.[359] The later rationale for private enforcement suits — that of avoiding capture — can also be furthered by agency amicus briefs; a benefit to their status as court documents as opposed to notice-and-comment rules is that they are insulated from lobbying.[360]

Practically speaking, the amicus tool can also support the agency's interests in how the law develops, reinforce presidential policy preferences, and signal to a court the agency's perspective on the strength of the plaintiff's claim. These functions minimize the

[356] *See* Sidney A. Shapiro, Elizabeth Fisher & Wendy E. Wagner, *The Enlightenment of Administrative Law: Looking Inside the Agency for Legitimacy*, 47 WAKE FOREST L. REV. 463, 470 (2013) ("A deliberative dialogue is transformative in nature because different actors can learn from the process and reconsider their perspectives.").

[357] Independent litigating authority can undermine the principle that the Executive speaks with "one voice," which may pose concerns for presidential control but may conversely permit better accountability. *See* Eloise Pasachoff, *The President's Budget as a Source of Agency Policy* Control, 125 YALE L.J. 2182, 2210, 2253-56 (2016) (examining this tension with respect to presidential management of the budgeting process).

[358] *See supra* text accompanying notes 106–124.

[359] Notably, amicus briefs do not necessarily reinforce all the rationales for private enforcement. In particular, the alleviation of industry capture justification for citizen-suit provisions could be undermined by amicus activity. *See* Eisenberg, *supra* note 33, at 1258 (describing industry capture during Bush Administration).

[360] This point is also consistent with an anti-capture rationale for independent agencies, which may extend to independent litigating authority. *See* Barkow, *supra* note 346, at 21-24 (describing anti-capture rationale).

likelihood that a private suit would significantly disrupt executive prerogatives. What is more, agencies are not limited as to what "side" they take in an amicus action, even though they may be limited in how they appear as a party in a given matter.[361] Thus, if the Article II standing approach were to take hold, an agency's amicus brief could demonstrate how a private enforcement action interacts with public considerations. Should courts begin to take these Article II arguments seriously, they might also consider taking more seriously agencies' amicus briefs — a point to which I will return shortly. But first, there is another way agencies stand to make a difference in private enforcement suits.

B. Access to Justice

As demonstrated by both the private enforcement cases and the access-to-courts cases in the typology, agency amici can assist individuals seeking to vindicate their statutory rights.[362] Agencies are thereby positioned to serve Article I and Article III values even as they offset the Article II concerns mentioned above. For example, an agency amicus brief in favor of a plaintiff seeking to overcome hurdles to review can reinforce procedural access norms. By adding its voice to the case, the agency can assist in accessing the attention of the judge and can supplement challenges a plaintiff may have in obtaining adequately resourced counsel. And by contributing to a fulsome understanding of the scope of the substantive rights the plaintiff is seeking to enforce, the agency carries out Congress's legislative intent and guards against drift.[363]

Viewed in this way, amicus briefs suggest other creative approaches for agencies in promoting presidential policy. For example, Professor David Adelman and co-author Jori Reilly-Diakun's recent empirical

[361] *See* Adler, *supra* note 118, at 47 (noting that unlike in suits under the False Claims Act, in Clean Water Act suits the "government lacks the authority to prevent prosecution of the violation altogether").

[362] Eisenberg, *supra* note 33, at 1276 (in reference to DOL, "[a]s the agency entrusted by Congress with the power to enforce labor standards, it should not simply sit on the sidelines while systemic legal issues emerge in the courts").

[363] *See* sources cited *supra* note 292 (documenting dimensions of access to justice); Hammond & Markell, *supra* note 18, at 329 ("[T]he distributive consequences of a process also are important to assessments of the legitimacy of that process.").

research reveals that instead of mitigating a race to the bottom, CWA citizen suits tend to entrench disparities by directing more resources to states where policies are already more progressive.[364] Given President Biden's policy agenda of reducing inequities borne by underserved communities,[365] agencies deciding whether to file an amicus brief might use a mapping tool like the Climate and Economic Justice Screening Tool ("CEJST")[366] to identify whether particular communities or plaintiffs would be especially supported by an amicus brief. Thereafter, of course, they should coordinate with those communities to ensure that any proposed briefing positions are in fact supportive of those communities' preferences.[367]

There is an admitted flaw in this access-to-justice conception of agency amici: it is susceptible to changes in presidential policy. Not all administrations will look favorably on this theoretical foundation for agency amici, and some will affirmatively seek to diminish access to

[364] Adelman & Reilly-Diakun, *supra* note 106, at 435-36.

[365] Exec. Order 13,985 § 1 Advancing Racial Equity and Support for Underserved Communities Through the Federal Government (Jan. 21, 2021) (directing a "comprehensive approach to advancing equity for all, including people of color and others who have been historically underserved, marginalized, and adversely affected by persistent poverty and inequality").

[366] *See Climate and Economic Justice Screening Tool*, COUNCIL IN ENVIRON. QUALITY (Nov. 22, 2022), https://screeningtool.geoplatform.gov/en/#3/33.47/-97.5 [https://perma.cc/WL5T-S3XF] (providing details, data, and methodology).

[367] Centering a community's strategies for self-determination is paramount to a justice-centered approach. *See generally* LUKE COLE & SHEILA FOSTER, FROM THE GROUND UP: ENVIRONMENTAL RACISM AND THE RISE OF THE ENVIRONMENTAL JUSTICE MOVEMENT (2001) (illustrating the growth of environmental justice through individual stories of local communities); Rebecca Bratspies, *Shutting Down Poletti: Human Rights Lessons from Environmental Victories*, 36 WIS. INT'L L.J. 247, 270 (2019) ("[S]uccessful advocacy is bottom-up and must focus on demands that originate from, and resonate within, the affected community."); Tom I. Romero, II, *The Color of Local Government: Observations of a Brown Buffalo on Racial Impact Statements in the Movement for Water Justice*, 25 CUNY L. REV. 241 (2022) (centering the voices of racially minoritized communities' grassroots efforts in prescribing new approaches to overcome water injustices); Rebecca Tsosie, *Tribal Environmental Policy in an Era of Self-Determination: The Role of Ethics, Economics, and Traditional Ecological Knowledge*, 21 VT. L. REV. 225 (1996) (exploring tensions between indigenous self-determination and Anglo-American environmental law).

justice.[368] Acknowledging this point does not require conceding this framing, however. Instead, it uncovers another point of emphasis for those monitoring agency behavior and suggests a dimension of administrative law ripe for future research.

C. Procedure, Deference, and Legitimacy

Standing in contrast to formalist worries about presidential control is the concern that presidential policies may go too far, straying from the statutory mandate and into the realm of "naked preferences"[369] while evading procedures meant to ensure reasoned decision-making that maintains fidelity to statute. As established in Part II.C., ordinary administrative procedures also invite transparency and public engagement, facilitating accountability and oversight among the branches as well as to the public.

There is no doubt that agencies' amicus briefs simply do not undergo these procedures. A look at the spectrum of agency amicus activities as exemplified by the typology, however, offers considerable reassurance. First, as mentioned already, agency and DOJ lawyers as amici are acting as officers of the court, which incentivizes considerable self-restraint. Not only are they subject to the ethical rules of their bar organizations, but they have professional reputations to cultivate, both with judges and among other lawyers involved in each matter. In addition, norms of professionalism within agencies' general counsel offices, relationships across internal substantive divisions, and the tempering role of the civil service all stand to ensure that amicus briefs are sensitive to both presidential policies and agency mission.[370]

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[368] *See, e.g.*, City of El Cenizo v. Texas, 890 F.3d 164, 165 (5th Cir. 2018) (Department of Justice filed an amicus brief in support of Texas's position as defendant to numerous "sanctuary cities" within the state that challenged a Texas law prohibiting sanctuary policies).

[369] Kathryn Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J. 2, 53 (2009).

[370] *See also* Magill & Vermeule, *supra* note 140, at 1036-41 (examining ways that internal allocations of power can enhance administrative restraint); Michaels, *supra* note 140, at 544 (describing role of civil service in imposing restraint). This point responds to concerns that too much presidential control translates to a lack of reasoned decision-making. For thoughtful consideration of how these internal factors operate, *see generally* Anya Bernstein & Cristina Rodríguez, *The Accountable Bureaucrat*, 132 YALE L.J.

Courts, too, expect to render decisions using legal analysis, aided by the adversarial system's ventilating of the issues.[371] As a practical matter, this means that agency amici must justify their arguments beyond mere politics, tying their position to the statutory mandate, their experience, and any other factors having the "power to persuade."[372] In other words, the *Skidmore* standard instructs that if agencies wish to have an amicus voice, they must engage in reasoned argument.

This feature of the judicial process offers a proxy for reasoned decision-making, but it does not necessarily attend to other administrative-law values like participation and the deliberation that comes from engaging with significant comments raised.[373] The *Chevron*-era account of the deference doctrines was that the cost of foregoing such procedures was less deference — that is, *Skidmore* applied, rather than *Chevron*, for statutory interpretations.[374] This balance allowed courts to reinforce the transparency and oversight values of administrative law, and it attended to the *Chenery I* focus on reason-giving as a trade-off for broad delegations of authority.[375] Thus, even prior to *Loper Bright*, it made sense that *Skidmore* was the appropriate standard for interpretations raised for the first time in amicus briefs, because it offset agencies' ex ante procedural laxity. Now, of course, *Loper Bright* instructs that most all of agency statutory interpretations are subject to *Skidmore* consideration.[376]

1600 (2023) (presenting empirical evidence supporting proposition that agency personnel moderate shifting political preferences).

[371] As a matter of appellate procedure, a party's ability to respond to an agency's amicus brief as of right depends on the timing. Amicus briefs must be filed "no later than 7 days after the principal brief of the party being supported," or, if in favor of neither party, "no later than seven days after the . . . petitioner's principal brief is filed." FED. R. APP. P. 29(a)(6). Thus, both parties to a suit will have an opportunity to respond to agency amici arguments, whether in a response or a reply brief.

[372] Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

[373] *See supra* note 130 and accompanying text.

[374] United States v. Mead Corp., 533 U.S. 218, 230 (2001).

[375] *See supra* text accompanying notes 189–194.

[376] The majority did not engage these theories of how the *Chevron* framework attends to legitimizing agency behavior, though it was especially concerned with policy flip-flopping, which as we have seen, has been a central concern related to *Auer* deference as well. Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2272 (2024). Whether *Auer* will survive, even in its *Kisor* reformulation, remains to be seen. Note that the majority in

It is of interest, then, to reconsider the typology cases with this understanding in mind. The extent to which a court is persuaded by an agency's amicus interpretation is far from predictable despite well-established doctrinal parameters. In fact, it is not a given that courts will engage with agencies' amicus briefs at all. This latter observation is disappointing when viewed against norms of comity; as *Skidmore* itself emphasized, an agency's view is due at least some respect by virtue of the executive's position in the constitutional structure.[377] Further, courts could alleviate some of the transparency concerns regarding agency briefs simply by giving them a public airing — even if it is only a mention.

When courts do engage with agencies' amicus arguments, their approaches range. Some courts do carefully attend to the relevant standard, as the First Circuit did in the au pair preemption case *Capron v. Office of Attorney General of Massachusetts*.[378] More often, courts engage in their statutory interpretation and cite the agency's argument almost as an afterthought, perhaps as reassurance that they reached the right result, or perhaps to lump the agency in with the disappointed party when the court reaches a different result.[379] Sometimes courts do not reference the agency amicus at all.[380] Courts can do better. With *Skidmore* now applying broadly across agencies' statutory interpretations, one hopes judicial inconsistency as evidenced in this survey of amicus brief treatment does not foretell a similar lack of regularity in cases directly challenging agency action.

CONCLUSION: WHAT WE CAN LEARN FROM AGENCY AMICI

As this Article has demonstrated, agency amicus briefs are of a piece with the many discretionary actions available to agencies when deciding

Loper Bright did leave open two possibilities for a different approach, when a statute expressly delegates interpretative authority to agencies, and when Congress uses words that clearly give the agency some flexibility. *See id.* at 2263 (explaining the court's role in such circumstances is to independently interpret the statute and ensure the agency has engaged in reasoned decision-making).

377 Skidmore v. Swift & Co., 323 U.S. 134, 138-39 (1944).

378 944 F.3d 9, 30 (1st Cir. 2019).

379 *See supra* Parts I–III (providing numerous examples).

380 *Id.*

how to further the missions set forth in their statutory mandates. Despite beginning with a healthy skepticism of their place among the many legitimizing administrative-law norms, this account has also revealed their multi-dimensionality: a one-size-fits-all diagnosis would not do them justice.

In fact, agency amici offer an answer to separation-of-power concerns about private enforcement suits while also demonstrating a role for agencies in access to justice. An evaluation of the deference trade-offs for procedural laxity suggests a reasonable doctrinal balance in the Skidmore framework, but in reality, courts fall short of their responsibilities in this regard. If anything, judicial treatment of agency amici may give an early indication of how other agency actions will be reviewed post *Loper Bright*: inconsistently. In this way, this study of agency amici offers both a lens for evaluating a host of administrative law principles and a mirror for examining how the balance of powers is shifting in our constitutional structure.