NEW CHALLENGES FOR FEDERAL REGULATIONS: EXECUTIVE BRANCH RESPONSES

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Over the last decade, federal regulations have faced increasingly more challenging hurdles. The Supreme Court's 2024 decision in Loper Bright*, putting an end to* Chevron *deference, and its 2022 decision in* West Virginia v. EPA*, announcing the "major questions doctrine," have gotten the most attention. But the Court's 2024 decision in* Ohio v. EPA *and its 2015 decision in* Michigan v. EPA *are also part of the equation. Moreover, since the second term of the Obama administration, state attorneys general of the party opposing the president have become aggressive litigants, often filing cases in single-judge divisions of judicial districts before sympathetic judges who frequently grant nationwide injunctions against the challenged rules. And since the first term of the Trump administration, incoming administrations have begun using a variety of tools, including disapprovals under the Congressional Review Act, to undo the regulatory output of predecessors of the opposite party.*

Largely through empirical work, this Article explores how the Executive Branch has responded to these challenges—particularly during the last two years of the Biden administration—to make its regulations more resilient. First, the Article examines efforts to publish rules reflecting important administration policy priorities earlier in the last year of the president's term than had previously been the case, thereby shielding them more effectively from hostile actions by an incoming administration. Second, the Article studies the far greater and far more robust use of severability as a tool to protect portions of regulations even if other portions of the same regulations are struck down. Third, the Article looks at the similarly more robust efforts of agencies to discuss the regulatory antecedents for their actions and, thus, improve their litigation position following Loper Bright *and* West Virginia v. EPA.

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Introduction

The Supreme Court's decisions in *Loper Bright* in 2024 and *West Virginia v. EPA* in 2022 were viewed in some quarters as "ringing blows" to federal rulemaking.[1] *Loper Bright* overruled the 40-year-old *Chevron* scheme under which courts accorded deference to the interpretation by administrative agencies of the statutes they were empowered to administer.[2] Writing about *Loper Bright*, Professor Laurence Tribe lamented that the Court "essentially deconstructed the administrative state."[3] Similarly, Professor Gillian Metzger indicated that, in part as a result of the decision, agencies are "becoming increasingly and unjustifiably hamstrung."[4] And Professor Lisa Heinzerling said that courts will now be more likely to strike down regulations protecting Americans in connection with their "drinking water, their health, their retirement account, discrimination on the job, if they fly on a plane, drive a car, if they go outside and breathe the air."[5]

Similar reactions had greeted *West Virginia v. EPA* two years earlier.[6] In that case, the Court first announced the "major questions doctrine,"[7] under which, absent "clear congressional authorization," agencies cannot promulgate regulations that assert an "unheralded power" and represent a "transformative expansion" of their regulatory authority.[8]

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[1] Charlie Savage, *Regulatory Agencies Suffered Their Latest Blow in* Chevron *Ruling*, N.Y. Times (June 28, 2024), https://www.nytimes.com/2024/06/28/us/politics/scotus-chevron-agencies.html [https://perma.cc/6W56-EP8F].

[2] 144 S. Ct. 2244, 2254, 2273 (2024).

[3] *Evaluating the Supreme Court: Harvard Law Faculty Weigh In on 2023-2024 SCOTUS Term*, Harv. L. Today (July 2, 2024), https://hls.harvard.edu/today/evaluating-the-supreme-court-harvard-law-faculty-weigh-in-on-2023-scotus-term [https://perma.cc/EE4E-7JQF] (statement of Laurence Tribe).

[4] Rachel Reed, *Did the Administrative State Die with* Chevron*?*, Harv. L. Today (Oct. 1, 2024), https://hls.harvard.edu/today/did-the-administrative-state-die-with-chevron [https://perma.cc/M7HY-T3QX].

[5] Coral Davenport, Christina Jewett, Alan Rappeport, Margot Sanger-Katz, Noam Scheiber & Noah Weiland, *Here's What the Court's* Chevron *Ruling Could Mean in Everyday Terms*, N.Y. Times (June 28, 2024), https://www.nytimes.com/2024/06/28/us/politics/chevron-deference-decision-meaning.html [https://perma.cc/GX23-G4KJ]; *see also* Patrick Boyle & Charles Slidders, *The End of US Environmental Protection Regulation as We Know It*, Ctr. for Int'l Env't L. (Aug. 5, 2024), https://www.ciel.org/the-end-of-environmental-protection-regulation-as-we-know-it [https://perma.cc/L5NF-3TRZ] (viewing *Loper Bright* as one of four cases the Court decided in June 2024 "that could profoundly weaken the administrative state, foreshadowing widespread dysfunction for federal agencies and the vast regulatory regimes they oversee").

[6] 142 S. Ct. 2587 (2022).

[7] *Id.* at 2605, 2609–10, 2614. The Court had previously applied this standard in a small number of cases. *See id.* at 2609; Natasha Brunstein & Richard L. Revesz, *Mangling the Major Questions Doctrine*, 74 Admin. L. Rev. 217, 219 n.6, 224–35 (2022).

[8] *See West Virginia v. EPA*, 142 S. Ct. at 2610 (internal quotation marks omitted) (quoting Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014)).

According to Heinzerling, this case "represents the culmination of the right's decades-long project to dismantle the administrative state, and nothing less than the future of the effective governance is at stake."[9] Along the same lines, Professor Eric Orts argued that the major questions doctrine "subvert[s] the government's authority to protect citizens' lives with respect to gun violence, reproductive health, and climate damage."[10]

There are, to be sure, alternative views about these cases. With respect to *Loper Bright*, some commentators believe that the jury is still out on its significance.[11] For example, Professors Cary Coglianese and Daniel Walters explained that, given the "ambiguities" of the decision, "there has been, unsurprisingly, a great deal of variation in predictions about the way the decision might alter how government works."[12] Similarly, Professor Christopher Walker argued that it is hard to predict the impact the ruling will have on administrative law and regulatory practice because the opinion "contains hints of *Skidmore*-like respect being given to the agency's views"[13] and does not give hints as to "how broadly or narrowly" courts should interpret what are "policy questions" committed to agencies, as opposed to "legal questions" reserved for the courts.[14]

In turn, on *West Virginia v. EPA*, some commentators find solace in the fact that the operative language in the Supreme Court opinion does not turn exclusively on whether a regulation has "vast economic or political significance"—broad language that had appeared in prior cases.[15] Instead, as Natasha Brunstein and Donald Goodson pointed out, under Chief Justice Roberts's majority opinion, the doctrine applies when two narrower conditions are also met: an agency claims "to discover in a long-extant statute an unheralded power" and that

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9 Lisa Heinzerling, *How Government Ends*, Boston Rev. (Sept. 28, 2022), https://www.bostonreview.net/articles/how-government-ends [https://perma.cc/6MDL-FCS7].

10 Eric W. Orts, *Supreme Illegitimacy*, 11 Regul. Rev. Depth 21, 26 (2022).

11 *See* Cary Coglianese & Daniel E. Walters, *The Great Unsettling: Administrative Governance After* Loper Bright, 77 Admin. L. Rev. 1, 36–52 (2025). For a comprehensive collection of reactions to the decision, see *id.* at 54–64.

12 *Id.* at 18.

13 Under *Skidmore*, courts give weight to an agency's interpretation based on "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." Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

14 Christopher J. Walker, *Congress and the Shifting Sands in Administrative Law*, 34 Widener Commw. L. Rev. 187, 198–99 (2025).

15 *See* Natasha Brunstein & Donald L.R. Goodson, *Unheralded and Transformative: The Test for Major Questions After* West Virginia, 47 Wm. & Mary Env't L. & Pol'y Rev. 47, 88–93 (2022).

power represents a "transformative expansion in [its] regulatory authority."[16]

Regardless of how momentous *Loper Bright* and *West Virginia v. EPA* turn out to be, these two cases account for only a subset of the hurdles that regulations have begun to face in the last decade.[17] Also part of the equation are the Supreme Court's 2024 decision in *Ohio v. EPA*,[18] and its 2015 decision in *Michigan v. EPA*,[19] both of which arguably imposed additional analytical burdens on agencies.[20] In *Ohio v. EPA*, the Court considered a challenge to an Environmental Protection Agency (EPA) rule imposing nitrogen oxide emissions-control measures to twenty-three states.[21] When twelve states received individual judicial stays against the rule, the remaining eleven challenged EPA's decision to continue to apply the rule to them. They argued that the rule was arbitrary and capricious on the ground that the agency had not explained how the regulation would continue to be cost-effective when applied to only a subset of the original states.[22] The Court determined that the regulation did not explain "how [its] measures" would continue to "maximize cost effectiveness" if more than half of the states were

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[16] West Virginia v. EPA, 142 S. Ct. 2587, 2610 (2022) (alteration in original) (quoting Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014)); *see* Brunstein & Goodson, *supra* note 15, at 74–82.

[17] There was a potential additional dark cloud on the horizon. In March 2025, the Supreme Court heard oral argument in a case that could lead to the revival of the nondelegation doctrine. *See* FCC v. Consumers' Rsch., 109 F.4th 743 (5th Cir. 2024), *cert. granted*, 145 S. Ct. 587 (mem.) (2024); *see also* Petition for Writ of Certiorari, *Consumers' Rsch.*, 145 S. Ct. 587 (No. 24-354). Commentators speculated that the Court might well be sympathetic to the doctrine's revival. *See, e.g.*, Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 Colum. L. Rev. 277, 279 (2021) ("For the first time in modern history, a working majority on the Supreme Court may be poised to give the nondelegation doctrine real teeth."). In the end, the Court determined that the delegation at issue in the case did not violate the nondelegation doctrine. FCC v. Consumers' Rsch., 145 S. Ct. 2482, 2507 (2025).

[18] 144 S. Ct. 2040 (2024).

[19] 576 U.S. 743 (2015).

[20] Within a week of its decisions in *Loper Bright* and *Ohio v. EPA*, the Supreme Court decided two other important administrative law cases in a manner unfavorable to agencies. In *Corner Post, Inc. v. Bd. of Governors of the Fed. Rsrv. Sys.*, the Court held that a claim under the Administrative Procedure Act (APA) accrues when the plaintiff is injured by the agency action, rather than when the agency publishes the regulation. 144 S. Ct. 2440, 2447–49 (2024). And, in *SEC v. Jarkesy*, the Court held that the SEC cannot seek penalties for securities fraud before an administrative law judge and must instead proceed in district court. 144 S. Ct. 2117, 2125, 2130–31 (2024). *Corner Post* extends the period during which certain regulations can be challenged, thereby increasing the probability that they will ultimately be struck down. And *Jarkesy* puts constraints on the ability of agencies to enforce certain regulatory violations. But neither *Corner Post* nor *Jarkesy* change the standards under which courts evaluate regulations. For that reason, they are not a focus of this Article.

[21] 144 S. Ct. at 2049.

[22] *Id.* at 2052.

severed from the plan,[23] brushing aside an explanation—along the lines the Court sought—that EPA had in fact provided.[24]

And in *Michigan v. EPA*, the Court held that EPA had to take costs into account in determining whether the regulation of hazardous air pollutant emissions from power plants was "appropriate and necessary" for the purposes of section 112(n) of the Clean Air Act.[25] The Court also indicated that "[n]o regulation is 'appropriate' if it does significantly more harm than good."[26] And, in discussing the "good"—that is, the benefits of the regulation—the Court did not account for either the unmonetized direct benefits or the monetized indirect benefits of the regulation.[27] The Court thus telegraphed the possibility that it would take an aggressive role in reviewing the consequences of regulation in cases involving other statutory provisions.

Two other hurdles faced by regulations over the last decade are not related to jurisprudential moves by the Supreme Court, but to the increasing polarization of the political parties.[28] First, the polarization has led to aggressive joint litigation by state attorneys general of one party against the regulatory output of the opposite party's presidential administration. And second, incoming administrations have undertaken unprecedented efforts to undo the regulatory output of predecessors from the opposite party.

While state attorneys general had previously challenged federal regulations,[29] such efforts began intensifying significantly during the Obama administration.[30] The phenomenon is perhaps best illustrated

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[23] *Id.* at 2055.

[24] *See id.* at 2057 n.14 ("Admittedly, the dissent points to some statements in the [Federal Implementation Plan] suggesting EPA considered nationwide data in parts of its analysis."); *id.* at 2066–67 (Barrett, J., dissenting).

[25] 576 U.S. 743, 751 (2015).

[26] *Id.* at 752.

[27] *See id.* at 759.

[28] *See generally* Leonard Bierman & Rafael Gely, *Political Polarization in America: Its Impact on Industrial Democracy and Labor Law*, 89 Brook. L. Rev. 177, 196–204 (2023) (exploring dimensions of political polarization); Cynthia R. Farina, *Congressional Polarization: Terminal Constitutional Dysfunction?*, 115 Colum. L. Rev. 1689, 1693–1705 (2015) (providing empirical evidence of polarization since the 1970s).

[29] *See* Mark C. Miller, *State Attorneys General, Political Lawsuits, and Their Collective Voice in the Inter-Institutional Constitutional Dialogue*, 48 J. Legis. 1, 19 (2021) ("[M]ostly Democratic attorneys general sued the George W. Bush administration seventy-six times during that president's eight years in office.").

[30] *See* Margaret H. Lemos & Ernest A. Young, *State Public-Law Litigation in an Age of Polarization*, 97 Tex. L. Rev. 43, 43, 73, 86, 92 (2018) (citing Paul Nolette, Federalism on Trial: State Attorneys General and National Policymaking in Contemporary America 30–31 (2015)) (showing "a 'large spike' in interstate conflicts" during the Obama administration); Lisa Friedman & John Schwartz, *Borrowing G.O.P. Playbook, Democratic States Sue the Government and Rack Up Wins*, N.Y. Times (Mar. 21, 2018), https://www.

by a quote attributed to Governor Greg Abbott of Texas concerning his time as state attorney general: "I go into the office, I sue the federal government and I go home."[31] In fact, Republican attorneys general took the lead in challenging regulations of the Obama and Biden administrations,[32] and Democratic attorneys general did so during the first Trump term[33] and are doing so again during the second Trump term.[34] Republican attorneys general often filed their challenges in single-judge divisions of judicial districts in the Fifth Circuit, before judges known to be particularly unsympathetic to regulation.[35] Despite

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nytimes.com/2018/03/21/climate/attorneys-general-trump-environment-lawsuits.html [https://perma.cc/E5WR-M2AQ] ("During the administration of President Barack Obama, attorneys general from Republican states developed a powerful tool: They teamed up dozens of times to sue the federal government to block environmental initiatives.").

31 Friedman & Schwartz, *supra* note 30.

32 *See* Jessica Bullman-Pozen, *Preemption and Commandeering Without Congress*, 70 Stan. L. Rev. 2029, 2034, 2036 (2018) (reporting that "coalition[s] of Republican state attorneys general" challenged the Obama administration over its emissions reduction plan and the implementation of many aspects of the Affordable Care Act); Miranda Willson, *Republican AGs Linked Arms to Fight Biden Energy Agenda*, E&E News (Nov. 1, 2024), https://www.eenews.net/articles/republican-ags-linked-arms-to-fight-biden-energy-agenda [https://perma.cc/L3PW-J2GJ] (concluding from review of correspondences from 2022 "that the chief legal officers in two dozen states . . . formed a united front against Biden administration regulation"); Alan Greenblatt, *How State AGs Became a Check on the President*, Governing (Sept. 30, 2021), https://www.governing.com/now/how-state-ags-became-a-check-on-the-president [https://perma.cc/ZD32-DXQF] (noting that GOP attorneys general have "banded together to file suit against [Biden's] LGBTQ policies, his moratorium on oil and natural gas leases, and [his] provision in the American Rescue Plan . . . [that] blocks states from using [their] funds for tax cuts").

33 *See* Friedman & Schwartz, *supra* note 30 ("Blue-state attorneys general have filed more than two dozen environmental lawsuits against the Trump administration since January 2017 . . . ."); Alan Neuhauser, *State Attorneys General Lead the Charge Against President Donald Trump*, U.S. News (Oct. 27, 2017), https://www.usnews.com/news/best-states/articles/2017-10-27/state-attorneys-general-lead-the-charge-against-president-donald-trump [https://perma.cc/4KQZ-DA5U] ("Under Trump in particular, [the office of state attorney general has] become a way to appear on the national stage as a champion of the opposition to the current administration, . . . a leader of the so-called 'resistance.'").

34 *See* Ann O'Leary, *State Attorneys General Are the Last Line of Defense Against Trump*, The Hill (Nov. 12, 2024), https://thehill.com/opinion/judiciary/4984650-state-attorneys-general-challenge-trump-agenda [https://perma.cc/48FR-6PYY] (urging Democratic attorneys general to weaponize legal tools like the major questions doctrine to "constrain dangerous Trump administration policies"); Derick Dailey, *Democratic Attorneys General Are Itching to Challenge Trump's Agenda*, The Hill (Dec. 8, 2024), https://thehill.com/opinion/judiciary/5026708-democratic-attorneys-general-fight-trump [https://perma.cc/2Y9V-CDX7] (quoting a number of Democratic attorneys general who have made statements that they will challenge the Trump administration in court); Geoff Mulvihill, *Why Democratic State Leaders Could Have a Tougher Time Countering Trump in His 2nd Term*, PBS News (Nov. 13, 2024), https://www.pbs.org/newshour/politics/why-democratic-state-leaders-could-have-a-tougher-time-countering-trump-in-his-2nd-term [https://perma.cc/Q662-WCFZ] (discussing efforts by Democratic state officials to challenge Trump administration policies).

35 *See* Richard L. Revesz, *The Evolution of Regulatory Review*, 77 Admin. L. Rev. 131, 152 (2025) [hereinafter Revesz, *Evolution*]. Many important cases were filed in Amarillo,

the controversy surrounding this remedy,[36] judges frequently granted nationwide injunctions.[37] And the decisions of these judges were then reviewed by the appellate courts most hostile to regulation.[38]

Moreover, beginning with the Trump administration in 2017, incoming administrations have begun using a variety of tools to attempt to undo the regulatory output of predecessors of the opposite party. The robust use of the Congressional Review Act (CRA) has received the most attention.[39] Other efforts include seeking abeyances

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Texas, where Judge Matthew Kacsmaryk is the only federal district judge. *See* Ian Millhiser, *Republicans Will No Longer Be Able to Handpick Their Judge When They Sue Biden*, Vox (Mar. 12, 2024), https://www.vox.com/scotus/2024/3/12/24098760/supreme-court-matthew-kacsmaryk-judge-shopping-republicans-judicial-conference [https://perma.cc/5X6R-A3E3] (explaining that this practice turned Judge Kacsmaryk "into one of the most powerful government officials in the whole country"). More generally, a recent empirical study found that "the four U.S. District Courts in Texas alone accounted for over 25% of all venues where challenges to the Biden Administration's major rules were initially filed." Libby Dimenstein, Donald L.R. Goodson & Tyler Szeto, *Major Rules in the Courts: An Empirical Study of Challenges to Federal Agencies' Major Rules*, 13 Tex. A&M L. Rev. 1, 65 (2025). The Judicial Conference of the United States sought to constrain this practice through district-wide assignment, as opposed to assignment to a single-judge division, for civil cases seeking to bar or mandate nationwide enforcement of a federal law, but some of the affected courts interpreted this effort as being "only an encouragement to the courts." Tobi Raji, *U.S. Courts Clarify Policy Limiting 'Judge Shopping'*, Wash. Post (Mar. 16, 2024), https://www.washingtonpost.com/politics/2024/03/16/judge-shopping-guidance-abortion-patent-courts [https://perma.cc/R2FZ-2HC6] (quoting Chief Judge Randy Crane of the Southern District of Texas). Unlike district courts with single-judge divisions staffed by judges appointed by Republican presidents, which fought the Judicial Conference's efforts to randomize case assignments, those staffed by judges appointed by Democratic presidents moved to comply. *See, e.g.*, Nate Raymond, *Massachusetts Federal Court Curbs 'Judge Shopping' as Trump Lawsuits Mount*, Reuters (Feb. 13, 2025), https://www.reuters.com/legal/government/massachusetts-federal-court-curbs-judge-shopping-trump-lawsuits-mount-2025-02-12 [https://perma.cc/9S7C-N64X].

[36] *See* William Baude & Samuel L. Bray, *Proper Parties, Proper Relief*, 137 Harv. L. Rev. 153, 168–72, 177–83 (2023) (discussing shifts in preliminary injunction practice and voices that are becoming critical about the practice).

[37] *See District Court Reform: Nationwide Injunctions*, 137 Harv. L. Rev. (Devs. L.) 1701, 1705–07 (2024). The Trump administration is now taking a strong position against nationwide injunctions. *See* Alexandra Hutzler, *Nationwide Injunctions Are Central to Trump's Feud with Judges. Here's What to Know*, ABC News (Mar. 21, 2025), https://abcnews.go.com/Politics/nationwide-injunctions-central-trumps-feud-judges/story?id=119990974 [https://perma.cc/4L77-4ZVW] (explaining that the Trump administration argues that "[n]o single judge . . . should be able to use an injunction to block the powers of the country's elected chief executive").

[38] *See* Dimenstein, Goodson & Szeto, *supra* note 35 (manuscript at 65) (showing a high proportion of challenges to Biden administration regulations in the Fifth Circuit); Jennifer Rubin, *Even More Radical than Supreme Court Conservatives: The 5th Circuit*, Wash. Post (June 30, 2024), https://www.washingtonpost.com/opinions/2024/06/30/fifth-circuit-court-radical [https://perma.cc/TR6S-L5F9] (detailing success rate of those challenges).

[39] *See* Bethany A. Davis Noll & Richard L. Revesz, *Presidential Transitions: The New Rules*, 39 Yale J. on Regul. 1100, 1102, 1109–10 (2022) [hereinafter Davis Noll & Revesz, *Presidential Transitions*] (discussing the new set of tools the Trump administration debuted

in pending challenges to regulations by the preceding administration[40] and suspending the effective dates of these regulations.[41] Both these strategies facilitate the eventual repeal of the rules.[42]

Largely through empirical work, this Article explores how administrative agencies responded to the challenges caused by less sympathetic courts and increased political polarization. Agencies did not just keep doing what they had done before, thereby resigning themselves to worse outcomes. Instead, the Executive Branch has responded to these challenges,[43] particularly beginning in 2023, in ways designed to increase the resilience of its regulations. Part I examines the efforts to publish priority rules earlier in the last year of the president's term than had previously been the case, thereby partially shielding the rules from hostile actions by an incoming administration. Part II studies the far greater and more robust use of severability as a tool to protect portions of regulations even if other portions are struck down. Part III looks at the significantly enhanced efforts that agencies have undertaken to discuss the regulatory antecedents for their actions, as a way to be in a better litigation position following *Loper Bright* and *West Virgina v. EPA*.

I
Timing

Perhaps the most important way that an administration can protect itself from a subsequent administration undoing its rules is by not waiting until too late in the president's term before finalizing the rules. Under the CRA's look-back period, a rule finalized during the last sixty legislative days of a congressional session can be disapproved by a subsequent Congress under fast-track procedures that, most importantly, bypass the filibuster rule that otherwise would apply in the Senate.[44] As a result, regulations can be disapproved by a simple

"to roll back a predecessor's policies outside of textbook administrative law," including the passing resolutions under the CRA); Bethany A. Davis Noll & Richard L. Revesz, *Regulation in Transition*, 104 Minn. L. Rev. 1, 14–24 (2019) [hereinafter Davis Noll & Revesz, *Regulation in Transition*].

40 *See* Davis Noll & Revesz, *Presidential Transitions*, *supra* note 39, at 1118–27; Davis Noll & Revesz, *Regulation in Transition*, *supra* note 39, at 24–33.

41 *See* Davis Noll & Revesz, *Presidential Transitions*, *supra* note 39, at 1134–44; Davis Noll & Revesz, *Regulation in Transition*, *supra* note 39, at 33–41.

42 *See* Davis Noll & Revesz, *Regulation in Transition*, *supra* note 39, at 33, 41–47.

43 While the focus of this Article is on the Executive Branch, some of the empirical work also includes independent agencies, as does the case study in Section III.C.

44 *See* 5 U.S.C. §§ 801(a)(3), (f) (providing that Congress may, within sixty days of a rule's publication, disapprove it by a joint resolution such that it "shall be treated as though [it] had never taken effect"); 5 U.S.C. § 802(d)(2) (removing the filibuster or any motion to postpone, proceed with other matters, or recommit a joint resolution from CRA review).

majority vote in the Senate, as opposed to the sixty votes otherwise needed to advance a bill.[45]

Typically, because presidential approval is also required, this mechanism works only if a presidency changes party hands and if the incoming president's party also controls both the House and Senate. Absent unified congressional control, the resolution of disapproval would be unlikely to pass. And absent a president aligned with the congressional majorities in both chambers, the president would veto such a resolution. Moreover, given the relatively close balance of seats in Congress in recent decades, the veto is unlikely to be overridden. But in recent history, because incoming presidential administrations often face unified government when they take office, CRA disapprovals are a real possibility that administrations must contend with. Indeed, the last instance of a president taking office with a Congress of the opposite party was in 1989, with George H.W. Bush.[46]

But there are many other reasons why publication of rules earlier in a presidential term increases a regulation's resilience. For example, a rule is more likely to survive judicial scrutiny if the administration that promulgated the rule gets to defend it in court before leaving office—or at least gets to participate in as many stages of the litigation as possible.[47] Also, even if an administration completes a rule too late to protect it from CRA disapproval or defend it in court, there is value in ensuring that the rule's effective date occurs before the end of the administration. Otherwise, it might be easier for the next administration to repeal it.[48]

Section I.A consists of an empirical study establishing that the Biden administration succeeded in implementing a plan to complete its priority regulations much earlier in its last year in office than had ever previously been the case. Section I.B shows how, as a result, the Biden administration protected all of its priority regulations from CRA disapproval and even conducted the early phases of litigation for some of them. Section I.C discusses an optimal strategy for the period between Election Day and Inauguration Day and shows how the Biden administration implemented it.

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[45] *See* Davis Noll & Revesz, *Regulation in Transition*, *supra* note 39, at 15–16; Maeve P. Carey & Christopher M. Davis, Cong. Rsch. Serv., IF10023, The Congressional Review Act (CRA): A Brief Overview (2024), https://www.congress.gov/crs-product/IF10023 [https://perma.cc/GY33-MFNG].

[46] *See Party Government Since 1857*, U.S. H.R., https://history.house.gov/Institution/Presidents-Coinciding/Party-Government [https://perma.cc/6M2A-WYMZ].

[47] *See infra* text accompanying notes 116–47.

[48] *See infra* Section I.C.

A. April Push

In light of the significant benefits in not waiting until too close to the end of the presidential term to complete priority regulations, the Biden administration undertook a successful and unprecedented effort to do so earlier than the previous norm.[49] Discussing the sprint to finalize major environmental regulations early in 2024, Vicki Arroyo, then the EPA Associate Administrator, indicated: "We were all on the same team trying to really deliver on these priority rules for the administration so that we could ultimately protect human health and the environment, which is what our mission is."[50]

The early completion of the Biden administration's priority regulations was made possible in part by the leadership exerted by the Office of Information and Regulatory Affairs (OIRA),[51] which is responsible for managing the regulatory process for Executive Branch agencies and which I led at the time.[52] Commentators widely acknowledged OIRA's key role in accelerating the completion of these rules.[53] For example, the *New York Times* credited me with "piloting"

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[49] *See* Kevin Bogardus, *Meet the Man Who Changed Biden's Regs Game*, E&E News (Jan. 13, 2025), https://subscriber.politicopro.com/article/eenews/2025/01/13/meet-the-man-who-changed-bidens-regs-game-00197261 [https://perma.cc/S3MQ-H9PN] [hereinafter Bogardus, *Meet the Man*]; *Richard Revesz Talks About Putting His Scholarship into Practice at the White House*, NYU Law News (Feb. 28, 2025), https://www.law.nyu.edu/news/richard-revesz-OIRA-administrative-regulation [https://perma.cc/HTH4-3RMU] [hereinafter *Richard Revesz Talks*].

[50] Kevin Bogardus & Robin Bravender, *How Biden Beat the Clock on Big Environmental Regs*, E&E News (June 12, 2024), https://www.eenews.net/articles/how-biden-beat-the-clock-on-big-environmental-regs [https://perma.cc/ZTL2-SV9Q].

[51] Bogardus, *Meet the Man*, *supra* note 49 ("This administration put out a very ambitious package, and we structured the process so that it would be out into the world earlier than is normally the case[.] . . . We front-loaded it, and that had never been done before." (quoting then OIRA Administrator Richard Revesz)).

[52] *See* Revesz, *Evolution*, *supra* note 35, at 164 ("[OIRA plays] a critical role in promoting the timely completion of regulations."); *id.* at 158 ("OIRA's role coordinating timely completion of agency regulations is becoming increasingly critical."); *Richard Revesz Talks*, *supra* note 49 (referring to OIRA's role in the "radical[]" change of having "[a] disproportionate share" of last-year regulations done in the first four months).

[53] *See* Bogardus & Bravender, *supra* note 50; Abigail Mihaly, *EPA Officials 'Very Focused' on Looming CRA Deadline for 'Priority' Rules*, InsideEPA (Feb. 26, 2024), https://insideepa.com/daily-news/epa-officials-very-focused-looming-cra-deadline-priority-rules [https://perma.cc/XXE7-WSJ7] ("[OIRA is] working very closely with our agency and with other agencies to try to get our priority rules done as soon as possible, because we are . . . aware of [the CRA] risk." (quoting Vicki Arroyo, then EPA Associate Administrator for Policy)); Vicki Arroyo, *Teaching Environmental Law in Tumultuous Times*, ACOEL (Jan. 16, 2025), https://acoel.org/teaching-environmental-law-in-tumultuous-times [https://perma.cc/92SC-952P] (referring to OIRA's "great support").

the Spring 2024 rollout "of what experts say are the most ambitious limits on polluting industries by government in a single season."[54]

To illustrate the unique pattern of the Biden administration's timing of its regulations during its last year, the following subsections compare its record to those of every presidential term since 2001 in which the president's party lost control of the White House.[55] In such situations, a president has additional incentives for his administration to promulgate regulations between Election Day and Inauguration Day—incentives that are not present for terms in which the president is reelected or the president's party retains control of the White House.

Indeed, given the polarization of the parties, it is exceedingly unlikely that an incoming administration would finalize the regulatory agenda of an outgoing administration of the opposite party. Both the first Trump administration and the Biden administration aggressively sought to undo the regulatory programs of their respective predecessors.[56] Project 2025,[57] as well as the Executive Orders signed

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[54] Coral Davenport, *You've Never Heard of Him, but He's Remaking the Pollution Fight*, N.Y. Times (June 2, 2023), https://www.nytimes.com/2023/05/28/climate/ricky-revesz-oira-regulation-biden.html [https://perma.cc/XR93-F857]; *see also* Kevin Bogardus, *Biden's Rules Chief Returns to Think Tank*, E&E News (Jan. 21, 2025), https://subscriber.politicopro.com/article/eenews/2025/01/21/bidens-rules-chief-returns-to-think-tank-00199719 [https://perma.cc/5A7M-CV47] [hereinafter Bogardus, *Biden's Rules Chief*] ("At OIRA, Revesz helped ensure several of the former president's high-priority rules were completed in time to avoid being axed under the Congressional Review Act.").

[55] Data sets were generated using OIRA's publicly available tool for tracking rules under OIRA review. *See Search of Regulatory Review*, OIRA, https://www.reginfo.gov/public/do/eoAdvancedSearchMain [https://perma.cc/AHZ5-2YY2] (on the *Search* page, mark *Review Status* as *Concluded*, enter the relevant date range under *Concluded Date Range*, and, depending on the stage of rulemaking sought, check under *Stage of Rulemaking* either *Proposed Rule* for notices of proposed rulemaking (NPRMs), or *Interim Final Rule*, *Final Rule*, and *Final Rule No Material Change* for final rules). Due to capacity limits on the OIRA website, the data transfer process occurred by setting the date range one year at a time—with the exception of the first and final calendar years of presidential terms, which begin on January 20 and end on January 19, respectively. Rules that were marked *Concluded* by OIRA for having been *Returned for Reconsideration* or *Improperly Submitted*—both uncommon occurrences—were filtered out of the analysis, given that they are not promulgated rules.

[56] *See* Davis Noll & Revesz, *Presidential Transitions*, *supra* note 39 *passim*; Davis Noll & Revesz, *Regulation in Transition*, *supra* note 39, at 19–21, 28–33, 37–41.

[57] *See* Heritage Found., Project 2025: Mandate for Leadership: The Conservative Promise 886 (2023), https://static.heritage.org/project2025/2025_MandateForLeadership_FULL.pdf [https://perma.cc/AVU8-QD2P] (highlighting ways a new administration can "undo the significant damage that will have been done during the Biden years" and identifying agencies that new appointees can "rein in"); *see also* Mike Wendling, *Project 2025: The Right-Wing Wish List for Trump's Second Term*, BBC News (Feb. 13, 2025), https://www.bbc.com/news/articles/c977njnvq2do [https://perma.cc/8Y7V-XVW4].

in the first week of President Trump's second term,[58] have signaled that the current administration will do the same. Indeed, on March 12, 2025, EPA announced that it would seek to repeal the core of the Biden administration's regulatory agenda.[59]

In contrast, a reelected president does not need to rush to promulgate regulations between Election Day and his swearing in to a new term on January 20 because he can just as easily accomplish the same objective early in his second term. Because the incentives faced by reelected presidents are not comparable, the statistics on the timing of regulations provided in the following subsections are limited to those promulgated by presidents whose successors were of a different party.

1. Conclusion of OIRA Review

Under Executive Order 12,866,[60] agencies other than independent agencies must submit any significant regulatory actions,[61] both proposed and final, for review by OIRA, and cannot move forward to finalize such rules until OIRA has concluded review.[62]

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[58] The list is truly staggering. *See* NPR, *All the Executive Orders Trump Has Signed After 1 Week in Office* (Jan. 28, 2025), https://www.npr.org/2025/01/28/nx-s1-5276293/trump-executive-orders [https://perma.cc/G8RR-KEKG].

[59] *See EPA Launches Biggest Deregulatory Action in U.S. History*, U.S. Env't Prot. Agency (Mar. 12, 2025), https://www.epa.gov/newsreleases/epa-launches-biggest-deregulatory-action-us-history [https://perma.cc/KZN3-9YSB]; Miranda Willson, Sean Reilly, Robin Bravender & Mike Lee, *Trump EPA Launches Assault on Environmental Regs*, E&E News (Mar. 12, 2025), https://www.eenews.net/articles/trump-epa-launches-assault-on-environmental-regs [https://perma.cc/3VD5-TRH7].

[60] Exec. Order No. 12,866, 58 Fed. Reg. 51735 (Sept. 30, 1993).

[61] A "significant regulatory action" is defined as "any regulatory action that is likely to result in" one of four types of rules. *Id.* § (3)(f). First, the rule may "[h]ave an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities." *Id.* § (3)(f)(1). Second, the rule may "[c]reate a serious inconsistency or otherwise interfere with an action taken or planned by another agency." *Id.* § (3)(f)(2). Third, the rule may "[m]aterially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof." *Id.* § (3)(f)(3). Fourth, the rule may "[r]aise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive order." *Id.* § (3)(f)(4).

[62] For perspectives on OIRA's role offered by former OIRA Administrators, see Revesz, *Evolution*, *supra* note 35, at 159–61 (Biden); Cass R. Sunstein, *The Office of Information and Regulatory Affairs: Myths and Realities*, 126 Harv. L. Rev. 1838, 1839–40 (2013) (Obama); John D. Graham, Paul R. Noe & Elizabeth L. Branch, *Managing the Regulatory State: The Experience of the Bush Administration*, 33 Fordham Urb. L.J. 953, 965–67 (2006) (George W. Bush); Susan E. Dudley, *The Office of Information and Regulatory Affairs and the Durability of Regulatory Oversight in the United States*, 16 Regul. & Governance 243, 250 (2022) (same); Sally Katzen, *OIRA at Thirty: Reflections and Recommendations*, 63 Admin. L. Rev. 103, 108–09 (2011) (Clinton).

Table 1 shows, for every presidential term since 2001 in which the president's party lost control of the White House, the month-by-month statistics for OIRA's conclusion of review on significant final rules. For the last year of each administration, the statistics include the number of rules on which OIRA concluded review the following January, before the end of the president's term on January 20.

TABLE 1. CONCLUSION OF OIRA REVIEW ON SIGNIFICANT FINAL RULES BY MONTH

	Bush II				**Obama II**			
	2005	2006	2007	2008	2013	2014	2015	2016
Jan.	5	17	19	18	4	9	13	12
Feb.	16	16	21	18	21	12	15	18
Mar.	39	23	25	18	15	11	9	14
Apr.	23	25	24	26	6	11	17	17
May	19	34	16	27	16	16	16	23
June	16	19	22	10	18	15	15	28
July	23	26	23	24	15	23	18	24
Aug.	33	42	39	16	18	11	15	22
Sept.	21	26	17	41	22	18	16	23
Oct.	19	18	17	57	8	18	26	37
Nov.	36	28	25	43	14	10	14	28
Dec.	28	30	32	38	21	25	15	71
Jan.	N/A	N/A	N/A	20	N/A	N/A	N/A	33
Year Total	**278**	**304**	**280**	**356**	**178**	**179**	**189**	**350**

	Trump				**Biden**			
	2017	2018	2019	2020	2021	2022	2023	2024
Jan.	0	5	6	17	1	7	11	20
Feb.	1	5	6	15	5	9	9	28
Mar.	0	5	5	13	8	20	22	47
Apr.	2	10	15	24	11	12	10	81
May	4	11	15	29	14	15	11	4
June	6	16	16	28	13	14	10	11
July	7	15	13	24	24	16	23	18
Aug.	6	13	15	32	15	14	19	10
Sept.	5	8	19	21	20	18	20	16
Oct.	10	15	16	32	12	14	14	20
Nov.	9	16	21	31	20	13	19	25
Dec.	16	12	17	61	19	13	21	47
Jan.	N/A	N/A	N/A	44	N/A	N/A	N/A	14
Year Total	**66**	**131**	**164**	**371**	**162**	**165**	**189**	**341**

Table 2 shows the percentage of its total rules for which each administration concluded review during its last year in office, through January 20 of the following year. Each administration concluded review on a disproportionate number of rules during that final year, with the proportion ranging from 29% for the second term of the Bush administration to 51% for the Trump administration. On this score, the pattern is reasonably similar across the four administrations.

Table 2. Proportion of Administration Rules Concluded During Its Last Year

Administration (Year)	Rules Concluded in the Last Year	Total Rules Concluded in the Full Term	Proportion of Last Year Rules
Biden (2024)	341	857	40%
Trump (2020)	371	732	51%
Obama II (2016)	350	896	39%
Bush II (2008)	356	1218	29%

But further disaggregation of the data reveals a significant difference, illustrating the unique efforts of the Biden administration to protect its rules by concluding OIRA review earlier than had been the norm. Table 3 shows, for the last year of each administration, the proportion of rules for which review was concluded during the first four months (January 1 through April 30) and last four months (October 1 through January 20).

Table 3. Proportion of Last-Year Rules Concluded Early and Late in the Year

Administration (Year)	% Concluded Jan.–Apr.	% Concluded May–Sept.	% Concluded Oct.–Jan.
Biden (2024)	52%	17%	31%
Trump (2020)	19%	36%	45%
Obama II (2016)	17%	34%	48%
Bush II (2008)	22%	33%	44%

Here, the differences are stark. The Bush, Obama, and Trump administrations, respectively, concluded review on only 22%, 17%, and 19% of their last-year rules during the first four months, compared to 44%, 48%, and 45% of reviews concluded during the last four months. In contrast, the Biden administration concluded review on 52% of its

last-year rules during the first four months, with only 31% concluded during the last four months.

Also, the significant, unprecedented falloff between the regulatory output in the first third of the year to the second third (52% as compared to 17% of the last-year rules) and, in particular, between April and May (81 rules as compared to 4 rules) is consistent with the Biden administration's concerted effort to get rules finalized by the end of April.[63] Moreover, the Biden administration's regulatory output of 81 rules promulgated in April 2024 was more than three times the record that any of the three other administrations covered by Table 1 had set in a corresponding April: 26 rules promulgated in April 2008 during President Bush's second term. As former OIRA Administrator Susan Dudley noted, "April [2024] was the busiest month on record for big ticket rules" for OIRA.[64]

The effort to conclude OIRA review on regulations by the end of April 2024 was not just a noteworthy statistic. The output that month includes some of the Biden administration's most significant regulatory priorities,[65] particularly with respect to environmental and climate change rules.[66] For example, the ten EPA rules on which OIRA concluded review in April included four important rules regulating the emissions of a range of pollutants from power plants—limiting their greenhouse gas emissions,[67] hazardous air pollutants emissions,[68] discharges into

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63 *See supra* text accompanying notes 49–54.

64 Susan E. Dudley, *A Rush to Regulate*, Forbes (May 7, 2024), https://www.forbes.com/sites/susandudley/2024/05/07/a-rush-to-regulate [https://perma.cc/E8GY-LALS]; *see* Gerard Edic, *Why Is the Biden Administration Completing So Many Regulations*, American Prospect (Apr. 23, 2024), https://prospect.org/politics/2024-04-23-biden-administration-regulations-congressional-review-act [https://perma.cc/Y7FP-ARBS] (describing April as "a month of regulatory action").

65 Bogardus, *Meet the Man*, *supra* note 49 (quoting then OIRA Administrator Richard Revesz, who described the Biden administration's unprecedented "front-load[ing]" of the rulemaking process).

66 Bogardus & Bravender, *supra* note 50 ("Rule writers across the federal government hustled to complete sweeping new regulations in recent months—including everything from a high-stakes power plant rule on climate pollution to a policy governing conservation of public lands."); Davenport, *supra* note 54 (referring to the Spring 2024 rollout of "what experts say are the most ambitious limits on polluting industries by the government in a single season").

67 *See* New Source Performance Standards for Greenhouse Gas Emissions from New, Modified, and Reconstructed Fossil Fuel-Fired Electric Generating Units, 89 Fed. Reg. 39798 (May 9, 2024) (to be codified at 40 C.F.R. pt. 60) [hereinafter Greenhouse Gas Rule].

68 *See* National Emission Standards for Hazardous Air Pollutants: Coal- and Oil-Fired Electric Utility Steam Generating Units Review of the Residual Risk and Technology Review, 89 Fed. Reg. 38508 (May 7, 2024) (to be codified at 40 C.F.R. pt. 63) [hereinafter Hazardous Air Pollutants Rule].

navigable waters,[69] and disposal of coal ash.[70] Also included among the ten EPA rules were two key rules under the Toxic Substances Control Act, one setting forth procedures for chemical risk evaluation[71] and the other limiting methylene chloride;[72] a rule limiting the emissions of hazardous air pollutants from copper smelters;[73] and a rule designating per- and poly-fluoroalkyl substances—known as "forever chemicals" because they remain in the environment for a very long time—as hazardous substances under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).[74]

By acting early compared to historical standards, OIRA significantly added to the resilience of the regulations reflecting the Biden administration's key priorities. In particular, by the end of April 2024, the Biden administration concluded review on its two most important climate change priorities. As indicated above, in April, OIRA concluded review on the EPA rule limiting the greenhouse gas emissions of power plants.[75] And on March 14, OIRA concluded review on EPA's vehicle emissions standards, which also produce significant greenhouse gas reductions.[76]

In the run-up to April, OIRA had also concluded review on other rules that were significant priorities for the Biden administration. For example, on March 27, OIRA concluded review on EPA's first-ever national primary drinking water regulation for six per- and poly-fluoroalkyl substances (PFAS).[77] And on January 31, OIRA concluded review on EPA's national ambient air quality standards for

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[69] *See* Supplemental Effluent Limitations Guidelines and Standards for the Steam Electric Power Generating Point Source Category, 89 Fed. Reg. 40198 (May 9, 2024) (to be codified at 40 C.F.R. pt. 423).

[70] *See* Hazardous and Solid Waste Management System: Disposal of Coal Combustion Residuals from Electric Utilities; Legacy Surface Impoundments, 89 Fed. Reg. 38950 (May 8, 2024) (to be codified at 40 C.F.R. pts. 9 & 257) [hereinafter Coal Ash Rule].

[71] *See* Procedures for Chemical Risk Evaluation Under the Toxic Substances Control Act (TSCA), 89 Fed. Reg. 37028 (May 3, 2024) (to be codified at 40 C.F.R. pt. 702).

[72] *See* Methylene Chloride; Regulation Under the Toxic Substances Control Act (TSCA), 89 Fed. Reg. 39254 (May 8, 2024) (to be codified at 40 C.F.R. pt. 751).

[73] *See* National Emission Standards for Hazardous Air Pollutants: Primary Copper Smelting Residual Risk and Technology Review and Primary Copper Smelting Area Source Technology Review, 89 Fed. Reg. 41648 (May 13, 2024) (to be codified at 40 C.F.R. pt. 63).

[74] *See* Designation of Perfluorooctanoic Acid (PFOA) and Perfluorooctanesulfonic Acid (PFOS) as CERCLA Hazardous Substances, 89 Fed. Reg. 39124, 39126 (May 8, 2024) (to be codified at 40 C.F.R. pt. 302).

[75] *See* Greenhouse Gas Rule, *supra* note 67.

[76] *See* Multi-Pollutant Emissions Standards for Model Years 2027 and Later Light-Duty and Medium-Duty Vehicles, 89 Fed. Reg. 27842 (Apr. 18, 2025) (to be codified at 40 C.F.R. pts. 85, 86, 600, 1036, 1037, 1066, 1068).

[77] *See* PFAS National Primary Drinking Water Regulation, 89 Fed. Reg. 32535 (Apr. 26, 2024) (to be codified at 40 C.F.R. pts. 141–42) [hereinafter PFAS Drinking Water Rule].

particulate matter[78]—a rule with enormous public health consequences, predicted to avoid 4,500 premature deaths, 800,000 cases of asthma symptoms, and 290,000 lost workdays per year.[79]

2. *Agency Target Dates*

In order to meet the Biden administration's ambitious regulatory schedule and ensure that it could conclude review on priority rules by April 2024, OIRA worked with agencies to accelerate some of their prior target dates for completing these rules. It is unusual for agencies to accelerate their timelines in this manner; delays are a more common occurrence.[80]

For example, in five of the ten EPA rules for which OIRA concluded review in April 2024, the agency had listed later dates in the regulatory agendas that it is required to submit twice a year to OIRA. In its Fall 2022 agenda, EPA listed the completion dates for its rules limiting the greenhouse gas emissions of power plants and of coal combustion residuals as June 2024.[81] With respect to its methylene chloride rule, the completion dates were listed as August 2024 in EPA's Fall 2022[82] and Spring 2022 agendas,[83] and as June 2024 in its Spring 2023 agenda.[84] In turn, the Spring 2023 agenda listed the completion date for chemical risk evaluation rules as November 2024.[85] And the copper smelting rule had a completion

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78 *See* Reconsideration of the National Ambient Air Quality Standards for Particulate Matter, 89 Fed. Reg. 16202 (Mar. 6, 2024) (to be codified at 40 C.F.R. pts. 50, 53, 58).

79 *See Final Rule to Strengthen the National Air Quality Health Standard for Particulate Matter: Fact Sheet*, U.S. Env't Prot. Agency, https://www.epa.gov/system/files/documents/2024-02/pm-naaqs-overview.pdf [https://perma.cc/RHK7-2TXF].

80 *See, e.g.*, Zoya Mirza, *SEC's ESG Greenwashing, Human Capital Disclosure Rules Pushed to October*, ESG Dive (July 10, 2024), https://www.esgdive.com/news/secs-esg-greenwashing-human-capital-disclosure-rules-pushed-to-october/721012 [https://perma.cc/9UGP-QJSF] (reporting that the SEC delayed the release of a disclosure-related final rule). The SEC is an independent agency and, as a result, OIRA did not review this rule. *See* text accompanying notes 60–61.

81 *See* Introduction to the Unified Agenda of Federal Regulatory and Deregulatory Actions—Fall 2022, 88 Fed. Reg. 10966, 11134–35 (Feb. 22, 2023) (greenhouse gas rule); *id.* at 11148–49 (residuals rule).

82 *See id.* at 11142–43.

83 *See* Spring 2022 Unified Agenda of Regulatory and Deregulatory Actions, 87 Fed. Reg. 48332, 48337 (Aug. 8, 2022).

84 *See* Spring 2023 Unified Agenda of Regulatory and Deregulatory Actions, 88 Fed. Reg. 48598, 48604 (July 27, 2023).

85 *See* Spring 2023 Unified Agenda Entry of Procedures for Chemical Risk Evaluation Under the Toxic Substances Control Act (TSCA), Off. of Info. & Regul. Affs., https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202304&RIN=2070-AK90 [https://perma.cc/Z5F2-5ZNP].

date of June 2024 and May 2024 in its Spring 2023[86] and Fall 2023 agendas, respectively.[87]

3. Publication in the Federal Register

OIRA's conclusion of review on a rule is a necessary precursor but additional steps are necessary to protect the rule. In addition to conclusion of review, for the rule to be effective it needs to be signed by the agency head and then published by the Office of the Federal Register.[88] Moreover, the litigation process cannot start—and therefore the litigation benefits of early completion of rules cannot accrue[89]—until the rules are published in the Federal Register.[90]

The publication processes are complex and potentially time-consuming, but the concerted action undertaken by the Biden

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[86] *See* Spring 2023 Unified Agenda Entry of National Emission Standards for Hazardous Air Pollutants: Primary Copper Smelting Residual Risk and Technology Review and Primary Copper Smelting Area Source Technology Review, Off. of Info. & Regul. Affs., https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202304&RIN=2060-AU63 [https://perma.cc/YUZ6-RWWM].

[87] *See* Fall 2023 Unified Agenda Entry of National Emission Standards for Hazardous Air Pollutants: Primary Copper Smelting Residual Risk and Technology Review and Primary Copper Smelting Area Source Technology Review, Off. of Info. & Regul. Affs., https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202310&RIN=2060-AU63 [https://perma.cc/XUW7-KUNA].

[88] *See* Freedom of Information Act, 5 U.S.C. § 552(a)(1); Administrative Procedure Act, 5 U.S.C. § 553(d); Federal Register Act, 44 U.S.C. § 1505(a); Nat'l Council of Agric. Emps. v. U.S. Dep't of Lab. (*NCAE*), 143 F.4th 395, 399–400, slip op. at 3–4 (D.C. Cir. 2025).

[89] *See infra* text accompanying notes 116–47.

[90] But courts have differed in their view regarding the kind of publication that is required before litigation can begin. *See, e.g.*, Nat. Res. Def. Council v. Nat'l Highway Traffic Safety Admin., 894 F.3d 95, 106 (2d Cir. 2018) ("[P]ublication in the Federal Register [i]s . . . the controlling point for determining when a challenge must be filed in the court of appeals. [¶] . . . Because it is only through publication in the Federal Register that an agency's action can take legal effect . . . [and] caus[e] someone to be 'adversely affected.'"); Nat. Res. Def. Council v. EPA, 559 F.3d 561, 565 (D.C. Cir. 2009) (interpreting the Federal Register Act to require that agency statements are published in the Code of Federal Regulations, not just in the Federal Register, before they can have legal effect and become subject to judicial review); *NCAE*, 143 F.4th at 400–02, 405–08, slip op. at 5–8, 15–20 (explaining that, under the Federal Register Act, the "key step" at which a rule "becomes valid as to the public at large" occurs before publication in the Federal Register, at the point in the publication process when the Office of the Federal Register finishes confidentially processing the rule and places it on a publicly available docket for inspection); *In re* Elec. Security Ass'n, No. 24-60570, slip op. at 6 (5th Cir. Nov. 19, 2024) (recognizing that an agency may "issue" a rule, and thereby toll the period during which a petitioner can request review of the rule in one or more courts of appeals, even before publication in the Federal Register, such as when making the rule publicly known via its official website, a released press statement, or a social media post). Some statutes make publication in the Federal Register an explicit requirement to suit. *See* Clean Air Act, 42 U.S.C. § 7607(b) ("Any petition for review under this subsection shall be filed within sixty days from the date notice of such promulgation, approval, or action appears in the Federal Register.").

administration in early 2024 sped it up significantly. In early 2024, there had been reason to worry about the pace of publication in the Federal Register. For example, EPA finalized its limits on the greenhouse gas emissions of oil and gas installations on December 2, 2023,[91] but the rule was not published in the Federal Register until March 8, 2024,[92] more than three months later.[93] Delays of this sort could have nullified the effort that OIRA undertook to conclude review on rules earlier in the last year of the presidential term than had been the norm.

To avoid repeating the delay at issue in the rule on oil and gas installations, OIRA worked closely with agencies to make sure that publication in the Federal Register took place expeditiously.[94] The effort paid off. Of the 81 rules on which OIRA concluded review in April 2024, 25% were published by April 26, 50% by May 3, 75% by May 8, and all by May 20.[95]

In contrast, publication in the Federal Register took much longer for the ten rules on which OIRA concluded review in April 2023, when CRA concerns were in the more distant future and special efforts to speed up the process were therefore not necessary. In this cohort, 25% were published by April 27, 50% by May 11, 75% by June 1, and they did not all get published until August 4. Thus, it took two-and-a-half months longer to publish all the April 2023 rules than it did to publish all the April 2024 rules.

Similarly, it took prior administrations considerably longer to publish the rules they promulgated during the April of their last year in office. With respect to the 24 rules for which the Trump administration concluded review in April 2020, the last one was not published in the Federal Register until July 2. And with respect to the 17 rules for which

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91 *See* EPA's Final Rule for Oil and Natural Gas Operations: Trainings, EPA, https://www.epa.gov/controlling-air-pollution-oil-and-natural-gas-operations/epas-final-rule-oil-and-natural-gas [https://perma.cc/RY73-F3BN].

92 Standards of Performance for New, Reconstructed, and Modified Sources and Emissions Guidelines for Existing Sources: Oil and Natural Gas Sector Climate Review, 89 Fed. Reg. 16820 (Mar. 8, 2024) (to be codified at 40 C.F.R. pt. 60) [hereinafter Oil and Gas Rule].

93 *See* Robin Bravender, *A Bureaucratic Printer Jam Holds Up a Major Biden Climate Rule*, E&E News (Feb. 22, 2024), https://www.eenews.net/articles/a-major-epa-climate-rule-is-stuck-in-limbo [https://perma.cc/7QY8-YRDV].

94 *See* Bogardus, *Meet the Man*, *supra* note 49 ("OIRA worked with agencies to streamline their submissions to the Register so there would be fewer hiccups in publishing regulations."); Revesz, *Evolution*, *supra* note 35, at 164 ("OIRA's work to help manage the timing of agency regulatory activity sometimes extends beyond the conclusion of OIRA review of a given rule, to matters concerning the publication in the Federal Register.").

95 To find a rule's Federal Register publication date, visit federalregister.gov and use the "Search Documents" function to enter the rule's Regulation Identifier Number (RIN). To identify a rule's RIN, visit RegInfo.gov and search by agency, keyword, or regulation title; the RIN appears in the regulatory action details.

the Obama administration concluded review in April 2016, the last one was not published in the Federal Register until July 28.

The discrepancy between the faster publication of the April 2024 rules and the greater delays for April 2023, April 2020, and April 2016 rules is even starker because OIRA concluded review on so many more rules in April 2024. Reflecting the efforts that the Biden administration undertook to speed up the regulatory process in its final year,[96] the greater number of rules competing for the Federal Register's attention, other things being equal, should have caused more delays in 2024.[97]

4. Submission to Congress

To protect a rule from disapproval under the CRA, it must also be properly submitted to both the House and Senate.[98] This process has idiosyncrasies that can delay the date of submission in ways that the administration does not control. Most importantly, the Senate Parliamentarian has determined that the relevant time window for the purposes of the CRA cannot begin until the date that the *Congressional Record* specifies for the rule to be referred to the relevant Senate committee.[99] Because of Senate policies against conducting business during pro forma sessions, Senate recesses can create substantial lags between publication in the Federal Register and referral to a Senate committee.[100] In election years, which have practical relevance for CRA purposes, Senate recesses are very long. For example, in 2024, the Senate was scheduled to be in recess (euphemistically, the "state-work period") from August 5 to September 6 (a five-week period) and from September 30 to November 11 (a six-week period).[101]

Once again, OIRA's work with agencies to ensure speedy submission of every rule to Congress paid off.[102] All 81 of the rules for which OIRA concluded review in April 2024 were appropriately submitted to Congress by August 2.[103] In contrast, the Biden administration did not

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96 *See supra* notes 49–54.

97 *See* Bravender, *supra* note 93 ("[A]n unusually high volume of documents submitted can cause lengthy [delays].") (quoting Allyson Pokres, Federal Register Chief of Staff)).

98 *See* 5 U.S.C. 801(a)(1).

99 *See* Jesse M. Cross, *Revisiting the Congressional Review Act*, 11 Tex. A&M L. Rev. 1, 37 (2023).

100 *See id.*

101 Tentative 2024 Legislative Schedule, United States Senate, https://www.senate.gov/legislative/2024_schedule.htm [https://perma.cc/3QWZ-P2QJ].

102 *See supra* note 94.

103 The Congressional submission date is the later of the House report date and the Senate report date. To find a rule's Senate report date, visit Congress.gov and search under "Senate Communications" listed under the "More Options" button, using the rule's RIN, title, or key

properly submit all 10 of its April 2023 rules until September 19, the Trump administration did not properly submit all 24 of its April 2020 rules until August 25, and the Obama administration did not properly submit all 17 of its April 2016 rules until September 6. So, despite the smaller number of regulations at issue, it took the presidential administrations in these prior years up to a month-and-a-half longer to validly submit all of their regulations to Congress than the Biden administration took in 2024.

B. Consequences

The accelerated timeline with which the Biden administration's regulations were promulgated is consequential for several reasons discussed below.

1. Protection from CRA Disapproval

For end-of-term Biden administration regulations, the look-back period under the CRA began on August 16, 2024.[104] As a result, the Biden administration was able to protect all the rules for which it concluded review in April (and in all earlier months) from CRA disapproval, including by ensuring their publication and successful submission to Congress before the onset of the look-back period. Moreover, the Biden administration ended up with a two-week cushion, since the last of the promulgated rules was protected on August 2. The Trump and Obama administrations, on the other hand, were able to protect all of their April rules from CRA disapproval only on August 25 and September 6, respectively. Thus, if the Federal Register publication and congressional submission processes had proceeded the way they did in the Trump and Obama administrations, or more slowly given the far bigger volume of rules, some of the Biden administration rules for which review was concluded in April would have been caught in the CRA dragnet that commenced on August 16.

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terms to locate the official Senate communication documenting the referral date of the rule. Refine results with the "Congress (Years)" filter under if needed. A similar protocol is used for the House report date. On obtaining the RIN, see *supra* note 95.

104 *See* U.S. H.R., 118TH CONG., U.S. HOUSE OF REPRESENTATIVES AND HISTORY OF LEGISLATION § 21 (2024 calendar) (Jan. 3, 2025), https://www.govinfo.gov/content/pkg/CCAL-118hcal-2025-01-03/pdf/CCAL-118hcal-2025-01-03.pdf [https://perma.cc/QWK9-ADYH] (showing that the sixty-day look-back period for the House began on August 16); U.S. S., 119TH CONG., CALENDAR OF BUSINESS 4 (Mar. 12, 2025), https://www.govinfo.gov/content/pkg/CCAL-119scal-2025-03-12/pdf/CCAL-119scal-2025-03-12.pdf [https://perma.cc/BMZ3-7HT2] (showing that the sixty-day look back period for the Senate began on August 20). Under the CRA, the earlier of the periods controls. 5 U.S.C. § 801(d).

Also, because Congress ended up meeting in late 2024, for a few more days than had originally been predicted, the CRA look-back period's August 16 onset was later than had been anticipated. As late as August 21, 2024, the Congressional Research Service had estimated that the look-back period would begin on August 1.[105] If that had turned out to be the case, only one of the 81 rules for which OIRA concluded review in April 2024 would have ended up in the look-back period. As it turns out, the Biden administration achieved a significant cushion for most of the rules which OIRA reviewed by April 2024, since 75% of these rules had both been published in the Federal Register and properly submitted to Congress by June 1.

A cushion of this sort is desirable for three reasons. First, although publication in the Federal Register and proper submission to Congress proceeded more quickly in 2024 than had previously been the case, the Biden administration could not be certain in early 2024 that this would be the case.

Second, just as Congress added legislative days at the end of the session, thereby pushing the beginning of the look-back period from August 1 to August 16, it could have just as easily cancelled legislative days, thereby advancing the beginning of the look-back period into July. The planning necessary to conclude review in April needs to be well underway the prior year so that the agency can respond to comments on its proposed rule, draft its final rule, and submit it to OIRA for review. While this process is ongoing, it is impossible to know how Congress will manage its calendar in future months.

Third, during all of 2024, it appeared likely that there would be one or more government shutdowns which could have halted agencies' regulatory efforts. And at the beginning of the year, it was impossible to predict when such shutdowns might occur. Indeed, when Fiscal Year 2024 began, Congress had not yet passed full-year appropriations bills. Instead, the government operated under continuing resolutions initially funding it through November 17, 2023; then funding some agencies through January 19 and others through February 2; then extending those deadlines to March 1 and 8, respectively; and finally extending the deadlines even further to March 8 and 22, respectively.[106] It was

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[105] Christopher M. Davis & Maeve P. Carey, Cong. Rsch. Serv., IN12408, CRA Lookback Period Currently Estimated to Begin in August 1 Time Frame (2024), https://www.congress.gov/crs-product/IN12408 [https://perma.cc/F534-FXSK].

[106] *See Appropriations Watch: FY 2024*, Comm. for a Responsible Fed. Budget (Apr. 24, 2024), https://www.crfb.org/blogs/appropriations-watch-fy-2024 [https://perma.cc/U6B9-DYH3].

only at this point that the government got funded through the end of the fiscal year.[107]

And Fiscal Year 2025 started with another continuing resolution, this one funding the government only through December 20, 2024.[108] During each of the funding deadlines, there was a serious risk of a lapse in appropriations. Such a lapse would have led to a government shutdown and would have stopped (or at least severely constrained) regulatory work, including publication in the Federal Register and submission to Congress.[109] And if a shutdown occurred late in the year and led to an increase in congressional recess periods, it would move the beginning of the CRA look-back period to an earlier date. Therefore, a cushion between the relevant completion dates and the beginning of the originally estimated CRA look-back period served as an insurance policy against a government shutdown.

A significant consequence of the Biden administration's push to conclude OIRA review of its priority rules by April 2024 is that all those rules (as well as earlier ones) were protected from CRA disapproval. As one commentator noted: "Some of the highest-priority regulations that a conservative government would have wanted to overturn are not going to be in the look-back window."[110] Therefore, if the second Trump administration will want to undo them, it will need to engage in the laborious task of doing so through notice-and-comment rulemaking,[111] which is subject to judicial review.[112] It will be unable to proceed through the quick, streamlined, and low-burden CRA process, which comes with the draconian consequence of foreclosing the promulgation of

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107 *See id.*

108 *See* Paige Mellerio, *Congress Enacts a Continuing Resolution to Avert Government Shutdown Through December 20, 2024*, Nat'l Ass'n of Cntys. (Sept. 26, 2024), https://www.naco.org/news/congress-enacts-continuing-resolution-avert-government-shutdown-through-december-20-2024 [https://perma.cc/LN63-CWKE].

109 *See* Eloise Pasachoff, *The President's Budget as a Source of Agency Policy Control*, 125 Yale L.J. 2182, 2232–35 (2016); Off. of Mgmt. & Budget, Frequently Asked Questions During a Lapse in Appropriations 3 (Sept. 27, 2023), https://bidenwhitehouse.archives.gov/wp-content/uploads/2023/09/Agency-Lapse-FAQs-9.27.2023.pdf [https://perma.cc/Y7YB-248Y].

110 Maeve Sheehey & Kellie Lunney, *Biden's Quick Moves Put GOP's Most-Hated Rules Out of Reach*, Bloomberg L. (Dec. 3, 2024), https://www.bloomberglaw.com/product/blaw/bloomberglawnews/environment-and-energy/BNA%20000001935470da0aabdb567f45950002?bna_news_filter=environment-and-energy [https://perma.cc/9B8E-H3ZB] (quoting Sarah Hay); *see also* Bogardus, *Biden's Rules Chief*, *supra* note 54 ("At OIRA, Revesz helped ensure several of the former president's high-priority rules were completed in time to avoid being axed under the Congressional Review Act.").

111 *See* 5 U.S.C. § 553.

112 *See* 5 U.S.C. § 706(2)(A).

"substantially the same" rule in the future absent a specific congressional authorization.[113]

Even opponents of the Biden administration's regulatory policies acknowledged the success of its effort to shield priority regulations from CRA disapproval. According to two commentators, "[t]he Biden administration was, of course, aware of all this and therefore promulgated virtually all of its marquee regulations—and submitted them to Congress—well in advance of the CRA's lookback period."[114] Another commentator lamented that "these costly rules are likely 'safe' in terms of the CRA's sixty-day window, so court challenges, plus incoming Trump administration laborious rewrites will be the cumbersome avenues to address them."[115]

2. Surviving Judicial Review

Although the CRA has gotten most of the attention, it is not the only reason for agencies to avoid waiting until late in an administration's last year in office to complete their regulatory priorities. Another important reason for speedily completing priority rules is to enable the administration that promulgated the rules to handle the suits challenging them,[116] at least through the initial stages. The litigation strategy is then likely to be best aligned with the administration's policy decisions. Indeed, "[t]he more [an] administration can handle litigation against its own rules, the more likely they can survive scrutiny."[117]

In contrast, if the judicial review of the rule takes place after the end of the administration, a subsequent administration of the opposite party may not defend it.[118] During the most recent presidential transition,[119]

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113 *See* 5 U.S.C. § 801(b)(2); Davis Noll & Revesz, *Regulation in Transition*, *supra* note 39, at 14–15.

114 Michael Buschbacher & Jimmy Conde, *Congress Has the Authority to Review EPA "Waivers" of Clean Air Act Preemption*, Yale J. on Reg. Notice & Comment (Mar. 5, 2025), https://www.yalejreg.com/nc/congress-has-the-authority-to-review-epa-waivers-of-clean-air-act-preemption-by-michael-buschbacher-jimmy-conde [https://perma.cc/BNH2-MUA8]; Eric Schmitt, The Post-Chevron Working Group Report 8 (2025), https://aboutbgov.com/birs [https://perma.cc/ZA2K-CP8M].

115 Clyde Wayne Crews Jr., *An Inventory of Biden Regulations to Overturn Quickly in the 119th Congress*, Forbes (Jan. 1, 2025), https://www.forbes.com/sites/waynecrews/2024/12/29/an-inventory-of-biden-regulations-to-overturn-quickly-in-the-119th-congress [https://perma.cc/TX48-Q262].

116 Bogardus, *Meet the Man*, *supra* note 49.

117 *Id.* (quoting then OIRA Administrator Richard Revesz).

118 *See US SEC Votes to Stop Defending Climate Disclosure Rules*, Reuters (Mar. 27, 2025), https://www.reuters.com/business/environment/us-sec-votes-stop-defending-climate-disclosure-rules-2025-03-27 [https://perma.cc/5JM8-PPRB] (discussing the Trump administration's lack of effort to defend Biden administration regulations).

119 *See infra* text accompanying notes 133–36.

and the two prior ones,[120] the incoming administration asked courts to hold pending challenges in abeyance while it considered whether to repeal or amend the rule. An advantage in doing so is that it permits an incoming administration to reconsider the regulation without the possibility of an intervening judicial decision upholding the rule and making its reconsideration more difficult.[121]

The courts have often granted abeyances that incoming administrations have requested.[122] And in cases where a lower court strikes down a rule, an unsympathetic subsequent administration could decide not to pursue an appeal, thereby leading to the rule's vacatur if no intervenors support it.[123] Or even if the subsequent administration continues to defend a rule promulgated by its predecessor, the successor might not make certain arguments favored by the predecessor if they are inconsistent with the successor's policy preferences.

By concluding OIRA review of its priority rules in April 2024 and getting all of them published in the Federal Register a month later,[124] the Biden administration gained a significant head start on the litigation front. For example, it was able to successfully litigate the stay requests for some of EPA's most significant regulations. Most importantly, in 2024, both the D.C. Circuit—where many environmental rules of nationwide application are challenged[125]—and the Supreme Court denied stays on four important rules discussed above: three of the EPA's power plant rules on which OIRA concluded review in April 2024,[126] as well as the oil and gas installation rule on which OIRA concluded review in November 2023 but which was not published in the Federal Register

120 *See* Davis Noll & Revesz, *Presidential Transitions*, *supra* note 39, at 1118–27; Davis Noll & Revesz, *Regulation in Transition*, *supra* note 39, at 25–28.

121 *See* Davis Noll & Revesz, *Regulation in Transition*, *supra* note 39, at 25.

122 *See* Davis Noll & Revesz, *Presidential Transitions*, *supra* note 39, at 1118–27 (discussing the Biden and Trump administrations' successful use of abeyances in advanced stages of litigation); Davis Noll & Revesz, *Regulation in Transition*, *supra* note 39, at 28–33 (discussing the Trump administration's successful abeyance requests).

123 *See* Davis Noll & Revesz, *Presidential Transitions*, *supra* note 39, at 1127.

124 *See supra* text accompanying note 95.

125 *See, e.g.*, 42 U.S.C. § 7607(b)(1) (challenges to regulations of nationwide scope and effect under the Clean Air Act); 42 U.S.C. 9613(a) (challenge to regulations under the Comprehensive Environmental Response, Compensation, and Liability Act); 15 U.S.C. § 2618(a)(1)(C) (challenges to designations of chemical substances under the Toxic Substances Control Act).

126 *See* Greenhouse Gas Rule, *supra* note 67, *stay denied*, West Virginia v. EPA, No. 24-1120, 2024 WL 3542546 (D.C. Cir. July 19, 2024), *stay denied*, 145 S. Ct. 2 (mem.) (2024); Hazardous Air Pollutants Rule, *supra* note 68, *stay denied*, North Dakota v. EPA, No. 24-1119, 2024 WL 3730667 (D.C. Cir. Aug. 6, 2024), *stay denied*, NACCO Nat. Res. Corp. v. EPA, 145 S. Ct. 120 (mem.) (2024); Coal Ash Rule, *supra* note 70, *stay denied*, City Utils. of Springfield v. EPA, No. 24-1200, 2024 WL 4903937 (D.C. Cir. Nov. 1, 2024), *stay denied*, E. Ky. Power Coop., Inc. v. EPA, 145 S. Ct. 838 (mem.) (2024).

until March 2024.[127] In addition, the D.C. Circuit denied stays for three other rules published in early 2024[128]—rules for which Supreme Court stays were not sought.

The denial of a stay on the EPA rule limiting the greenhouse gas emissions of power plants is particularly significant because the Supreme Court had granted a stay on the rule's predecessor from the Obama administration—the Clean Power Plan.[129] Victories on the stay applications matter. Not only can they provide signals to lower courts while litigation continues there, but they also have more concrete effects: Absent a stay, the clock towards the rule's compliance deadline continues to tick and the rule may go into effect even while litigation against it continues. And as that happens, the regulated community is more likely to make the durable investments necessary to come into compliance, thus effectuating the rule's purpose.

Also, because the argument on the merits in the D.C. Circuit challenge to the EPA rule limiting the greenhouse gas emissions of power plants took place on December 6, 2024, the Biden administration got to both brief and argue the case.[130] And, ten days later, the D.C. Circuit heard the challenge to EPA's tightened national ambient air quality standards for particulate matter.[131] But the oral argument

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127 *See* Oil and Gas Rule, *supra* note 92, *stay denied*, Texas v. EPA, No. 24-1054, 2024 WL 3384818 (D.C. Cir. July 9, 2024), *stay denied*, Oklahoma v. EPA, 145 S. Ct. 121 (mem.) (2024).

128 National Emission Standards for Hazardous Air Pollutants: Taconite Iron Ore Processing, 89 Fed. Reg. 16408 (Mar. 6, 2024) (to be codified at 40 C.F.R. pt. 63), *stay denied*, Minnesota v. Regan, No. 20-1392, 2024 U.S. App. LEXIS 25174 (D.C. Cir. Oct. 3, 2024); National Emissions Standards for Hazardous Air Pollutants: Integrated Iron and Steel Manufacturing Facilities Technology Review, 89 Fed. Reg. 23294 (Apr. 3, 2024) (to be codified at 40 C.F.R. pt. 63), *stay denied*, Cleveland-Cliffs, Inc. v. EPA, No. 24-1170, 2024 U.S. App. LEXIS 27070 (D.C. Cir. Oct. 24, 2024) (per curiam order), *reconsideration denied en banc*, 2025 U.S. App. LEXIS 739 (D.C. Cir. Jan. 13, 2025) (per curiam order); New Source Performance Standards for the Synthetic Organic Chemical Manufacturing Industry and National Emissions Standards for Hazardous Air Pollutants for the Synthetic Organic Chemical Manufacturing Industry and Group I & II Polymers and Resins Industry, 89 Fed. Reg. 42932 (May 16, 2024) (to be codified at 40 C.F.R. pts. 60, 63), *stay denied*, Denka Performance Elastomer LLC v. EPA, No. 24-1135, 2024 U.S. App. LEXIS 15581 (D.C. Cir. June 26, 2024) (per curiam order), *reconsideration denied en banc*, 2024 U.S. App. LEXIS 17606 (D.C. Cir. July 17, 2024) (per curiam order).

129 *See* West Virginia v. EPA, 577 U.S. 1126 (2016).

130 *See* Niina H. Farah & Lesley Clark, *5 Takeaways from the Biden Carbon Rule Big Day at the D.C. Circuit*, E&E News (Dec. 9, 2024), https://www.eenews.net/articles/5-takeaways-from-the-biden-carbon-rules-big-day-at-the-dc-circuit [https://perma.cc/8WLJ-G3XS]; Niina H. Farah & Lesley Clark, *EPA's Power Plant Rule Faces Critical Test in D.C. Circuit*, E&E News (Dec. 6, 2024), https://www.eenews.net/articles/epa-power-plant-rule-faces-critical-test-in-dc-circuit [https://perma.cc/WUJ9-XUP7].

131 *See* Jennifer Hijazi, *Panel Grapples with Limits of EPA Particulate Matter Rule Review*, Bloomberg L. (Dec. 16, 2024), https://news.bloomberglaw.com/environment-and-energy/panel-grapples-with-limits-of-epa-particulate-matter-rule-review [https://perma.cc/V8PM-VUY4]; Sean Reilly, *D.C. Circuit Appears to Side with EPA on Trump Era Soot Rule*

on other priority cases did not get to take place during the Biden administration. For example, the challenge to EPA's risk evaluation standard for toxics, also discussed above, took place March 21, 2025.[132] And, the oral arguments on likely challenges to other rules have not yet been scheduled.

Importantly, at the end of the Biden administration, the D.C. Circuit had not decided the challenges to any of the environmental regulations for which OIRA had concluded review in April 2024. Predictably, the Trump administration sought abeyances in several pending cases. And, consistent with prior practices,[133] the D.C. Circuit granted many of them. For example, the court granted abeyances in the challenges to EPA's limits on the greenhouse gas emissions of power plants,[134] and on their emissions of hazardous air pollutants.[135] It also granted an abeyance on the challenge to the national ambient air quality standards for particulate matter.[136]

In summary, despite the Biden administration's unprecedented success at publishing priority regulations earlier in the president's last year than had previously been the case, it did not reap the full benefits with respect to the suits challenging these rules. To fully accomplish the goal of litigating these suits to completion, the priority rules would need to be completed significantly before April of the last year of a president's term.

Indeed, in the D.C. Circuit, the median time from the filing of a petition for review to publication of a judicial opinion is approximately

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Reversal, E&E News (Dec. 16, 2024), https://www.eenews.net/articles/dc-circuit-appears-to-side-with-epa-on-trump-era-soot-rule-reversal [https://perma.cc/4FGV-JZLC].

132 *See* Oral Argument Calendar, U.S. Ct. of Appeals for the D.C. Cir., https://media.cadc.uscourts.gov/calendar/calendar.php?startD=[2025,3,21]&endD=[2025,3,21] [https://perma.cc/C6CT-DWH9] (showing date of Oral Argument, United Steel, Paper & Forestry, Rubber, Mfrs. v. EPA, 2025 U.S. App. LEXIS 10519 (D.C. Cir. Apr. 30, 2025) (No. 24-1151)).

133 *See supra* text accompanying notes 119–21. This practice, however, was not universal. The D.C. Circuit denied an abeyance on the challenge to EPA's chemical risk evaluation rule—though in that case the Trump administration was defending the rule in a manner consistent with the Biden administration's approach. *See* Maria Hegstad, *EPA Defends "Framework" Rule as Split Panel Maintains Suit's Schedule*, InsideEPA (Feb. 18, 2025), https://insideepa.com/daily-news/epa-defends-framework-rule-split-panel-maintains-suit-s-schedule [https://perma.cc/K3HS-W93Z].

134 *See* Alex Guillén, *Court Pauses Power Plant Climate Rule Case at EPA's Request*, E&E News (Feb. 20, 2025), https://www.eenews.net/articles/court-pauses-power-plant-climate-rule-case-at-epas-request [https://perma.cc/U2W9-ZQBQ].

135 *See D.C. Circuit Hold MATS Suit in Abeyance, Scraps Argument*, InsideEPA (Feb. 20, 2025), https://insideepa.com/daily-feed/dc-circuit-hold-mats-suit-abeyance-scraps-argument [https://perma.cc/V7QD-5VBF].

136 *See* Stuart Parker, *D.C. Circuit Pauses PM Limits Suit as EPA Seeks to Stay Denka EtO Case*, InsideEPA (Feb. 25, 2025), https://insideepa.com/daily-news/dc-circuit-pauses-pm-limits-suit-epa-seeks-stay-denka-eto-case [https://perma.cc/GFU8-KP5D].

one year.[137] And, under some statutes, challenges to a rule must be filed within sixty days of its publication in the Federal Register.[138] So, for the median regulation, it takes fourteen months from publication in the Federal Register to a D.C. Circuit decision—meaning that it takes even longer for half the regulations. Moreover, these statistics do not include the time for possible Supreme Court review, where an incoming administration can undo the work of a prior administration simply by not seeking certiorari from an adverse decision below. So, to have a reasonable probability of completing the judicial review process on priority regulation by the end of an administration, these rules would need to be promulgated during the third year of the administration, rather than the fourth year.

3. Rethinking Presidential Transitions

Because of the time it takes to promulgate complex rules, the regulatory calendar is punishing for a one-term president. It has typically taken at least two years of work to publish a proposed rule and at least a year of additional work to publish a final rule.[139] As a result of the efforts discussed in this Part,[140] the Biden administration did better than the historical median with respect to the proposed-to-final period. For the unusually long and complex EPA rules on which OIRA concluded review in April 2024, for example, the median time from proposed rule to final rule was around 315 days[141]—thus shaving about two months off the historical statistics for median rules. By contrast, for the EPA rules on which OIRA concluded review in April 2020, during the Trump administration, and April 2016, during the Obama administration, the median time from proposed rule to final rule was 356 and 366 days, respectively.[142]

But while this accomplishment is noteworthy, a reasonable probability of completing judicial review on priority regulation by the end of an administration would require the time frame from taking office to publishing the priority proposed rules to be shortened as well.

The most likely candidate for a significant improvement in this area is the presidential transition process. Under the Presidential Transition Act,[143] each major party candidate for president gets resources to begin

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137 *See* Davis Noll & Revesz, *Regulation in Transition*, *supra* note 39, at 57.

138 *See, e.g.*, 42 U.S.C. § 7607(b)(1).

139 *See* Davis Noll & Revesz, *Regulation in Transition*, *supra* note 39, at 55–56.

140 *See supra* text accompanying notes 49–54.

141 For the protocol used to make this determination, see *supra* note 55.

142 *See id.*

143 3 U.S.C. § 102 note (1988) (Presidential Transition Act). For primers on presidential transitions, see generally Henry B. Hogue, Cong. Rsch. Serv., R46602, Presidential

to shape its policies several months before the election. During the last two transitions, incoming administrations used this time to prepare the voluminous package of Executive Orders that were issued during the first days of the new administrations.[144] These Executive Orders typically give direction to agencies to reconsider the prior administration's regulations.[145] But in the future, incoming administrations could also make the basic policy decisions around the replacement regulations ahead of taking office.[146]

There are, to be sure, limitations to how much can be accomplished during the transition. Drafting work could probably not start until the administration takes office and has access to agency career staff, with whom a great deal of the government's scientific and economic expertise resides.[147] But making the priority decisions during the transition would undoubtedly lead to quicker drafting once the president takes office.

Taking on this project would not be an easy task. For starters, it would require more robust transition operations than had previously been the case. And more importantly, it would need a transition team, including the incoming president's senior advisers, with the authority to make such policy decisions.

C. Election Day to Inauguration Day

After Election Day, the sitting president knows whether their party will control the White House, the House, and the Senate. If the election went badly for the party of the incumbent president on all three fronts, CRA disapproval will be a worry for any regulations that were published and submitted to Congress during the look-back period and therefore not protected in time.[148] But even if the party of

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Transition Act: Provisions and Funding (2024), https://www.congress.gov/crs-product/R46602 [https://perma.cc/NJ5F-YDV6]; Presidential Transition Act Summary, Ctr. for Presidential Transition (Mar. 13, 2024), https://presidentialtransition.org/reports-publications/presidential-transition-act-summary [https://perma.cc/3TAZ-QU82].

144 *See All the Executive Orders Trump Has Signed After 1 Week in Office*, NPR (Jan. 28, 2025), https://www.npr.org/2025/01/28/nx-s1-5276293/trump-executive-orders [https://perma.cc/6386-CWPA]; Christopher Hickey, Curt Merrill, Richard J. Chang, Kate Sullivan, Jane Boschma & Sean O'Kay, *Here Are the Executive Actions Biden Signed in His First 100 Days*, CNN Politics (Apr. 30, 2021), https://edition.cnn.com/interactive/2021/politics/biden-executive-orders [https://perma.cc/WV3V-HYXA] (showing the Executive Orders signed during the first week).

145 Exec. Order No. 14,148 § 2, 90 Fed. Reg. 8237, 8241 (Jan. 28, 2025) (rescinding executive orders issued by the Biden administration); Exec. Order No. 13,990 § 2, 86 Fed. Reg. 7037, 7038 (Jan. 25, 2021) (rescinding executive orders issued by the first Trump administration).

146 *See generally* Christopher P. Liddell, Year Zero: The Five-Year Presidency (2024) (discussing approaches for making presidential transitions more effective).

147 *See* Davis Noll & Revesz, *Regulation in Transition*, *supra* note 39, at 67–70.

148 *See supra* text accompanying notes 45–46.

the incumbent president wins control of both chambers of Congress, the litigation challenges discussed in Section I.B.2 remain if the party of the incumbent president loses the White House. For these reasons, control of the Executive Branch is all that matters.

After Election Day, it is too late to protect rules against CRA disapproval if they have not yet been published and submitted by then. Similarly, litigation over any rules that have yet to be published in the Federal Register will not be completed before Inauguration Day. Nonetheless, the outgoing administration has strategies that it can implement to increase the resilience of regulations that it has not completed by Election Day. And it can maximize its aggregate success by acting strategically.

Regulations that have been issued but not yet gone into effect at the end of an administration are generally easier for the incoming administration to undo. For rules that have been finalized but have not yet gone into effect at the time of a presidential transition, it has become standard practice in presidential transitions for the incoming administration to suspend their effective dates by sixty days.[149] In doing so, agencies often rely on a provision of the Administrative Procedure Act (APA),[150] which courts have held "permits an agency to postpone the effective date of a rule that has not yet taken effect, but does not permit an agency to suspend, without notice and comment, a rule that is already in effect."[151]

During the period of a delayed effective date, the incoming administration can search for ways to make the suspension longer, sometimes through a quick notice-and-comment rulemaking that extends the effective date and provides adequate reasons for doing so.[152] During this longer period, it can search for yet other ways to undo the rule.[153] Suspensions also allow the incoming administration to plan outright repeals before the regulated community has expended costs to comply with the outgoing administration's rule. The expenditure of such sunk costs would otherwise lower the cost savings of a repeal, rendering it less attractive from a benefit-cost perspective.[154]

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149 *See* Davis Noll & Revesz, *Regulation in Transition*, *supra* note 39, at 6 n.17.

150 5 U.S.C. § 705.

151 Ctr. for Biological Diversity v. Regan, 691 F. Supp. 3d 1, 8 (D.D.C. 2023) (quotation omitted) (citing Safety-Kleen Corp. v. EPA, 1996 U.S. App. LEXIS, at *2–3 (D.C. Cir. Jan. 19, 1996)); *see also* Ctr. for Biological Diversity v. Regan, 597 F. Supp. 3d 173, 204 (D.D.C. 2022) (collecting cases).

152 *See* Davis Noll & Revesz, *Regulation in Transition*, *supra* note 39, at 41–43.

153 *See id.* at 42–43 (describing the "whack-a-mole" tactic of withdrawing a suspension once another strategy to block a rule has been identified).

154 *See id.* at 44–47.

In this connection, four different buckets of rules are relevant. First, rules that are "major" for the purposes of the CRA—generally, ones that have an annual effect on the economy of $100 million or more[155]—cannot go into effect until sixty days after publication in the Federal Register,[156] absent special circumstances discussed below.[157] After Election Day, the Biden administration moved quickly to publish some important major rules so that they could go into effect before Inauguration Day. For example, EPA's methane emissions charge[158] and two of the Department of Agriculture's regulations under the Supplemental Nutrition Assistance Program[159] were published in the Federal Register on November 18 and went into effect on January 17, 2025, the last working day of the Biden administration.

Second, under the APA, rules that are not "major" for the purposes of the CRA cannot go into effect until thirty days after their publication in the Federal Register,[160] again, absent special circumstances.[161] Such rules could go into effect before Inauguration Day even if published between thirty and sixty days before the end of the administration. For example, the Department of Health and Human Services published a rule extending telemedicine flexibilities for prescribing controlled substances on November 19, and the rule went into effect on January 1, 2025.[162]

Third, when an agency has "good cause,"[163] it can waive the CRA's sixty-day delay and the APA's thirty-day delay to make the rule go into effect upon publication.[164] Examples during the Biden administration's final days in office include two rules expanding eligibility for veterans

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155 5 U.S.C. § 804(2)(A). Rules can also be major if they lead to a "major increase" in costs or prices, or if they lead to a "significant adverse effect" on a variety of factors. *Id.* § 804(2)(B)–(C).

156 *Id.* § 801(a)(3).

157 *See* 5 U.S.C. § 553(d)(3); *see also infra* text accompanying notes 163–66.

158 *See* Waste Emissions Charge for Petroleum and Natural Gas Systems: Procedures for Facilitating Compliance, Including Netting and Exemptions, 89 Fed. Reg. 91094 (Nov. 18, 2024) (to be codified at 40 C.F.R. pts. 2, 98–99).

159 *See* Supplemental Nutrition Assistance Program: Standardization of State Heating and Cooling Standard Utility Allowances, 89 Fed. Reg. 91198 (Nov. 18, 2024) (to be codified at 7 C.F.R. pt. 273); Supplemental Nutrition Assistance Program (SNAP): Employment and Training Program Monitoring, Oversight and Reporting Measures, 89 Fed. Reg. 90547 (Nov. 18, 2024) (to be codified at 7 C.F.R. pts. 271, 273).

160 5 U.S.C. § 553(d).

161 *See* 5 U.S.C. § 808; *see also infra* text accompanying notes 163–66.

162 *See* Third Temporary Extension of COVID–19 Telemedicine Flexibilities for Prescription of Controlled Medications, 89 Fed. Reg. 91253, 91253 (Nov. 19, 2024) (to be codified at 42 C.F.R. pt. 12).

163 *See* Reed Shaw, *"Good Cause" for a Good Cause: Using an APA Exception to Confront the COVID-19 Crisis*, 21 J.L. Soc'y 116, 118 (2021).

164 5 U.S.C. § 553(d)(3).

benefits to individuals exposed to toxic substances,[165] and a Department of Commerce rule imposing controls on exports involving artificial intelligence.[166] All three rules were published in January 2025 and went into effect immediately.

Fourth, the situation is different for regulations, such as the energy conservation standards promulgated by the Department of Energy (DOE), which are constrained by statutes containing anti-backsliding provisions.[167] For instance, the Energy Policy and Conservation Act (EPCA) gives DOE the authority to establish "energy conservation standards" for "covered products," which include consumer products.[168] But the anti-backsliding provision in the EPCA prevents DOE from "prescrib[ing] any amended standard[s] which . . . increase[] the maximum allowable energy use . . . of a covered product."[169] As the Second Circuit noted in a leading case, this provision has the effect of barring DOE from replacing an energy efficiency standard with one that is less energy efficient.[170] Thus, as a result of this anti-backsliding

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165 *See* Presumptive Service Connection for Leukemias, Multiple Myelomas, Myelodysplastic Syndromes, and Myelofibrosis Due to Exposure to Fine Particulate Matter, 90 Fed. Reg. 1894 (Jan. 10, 2025) (to be codified at 38 C.F.R. pt. 3); Presumptive Service Connection for Bladder, Ureter, and Related Genitourinary Cancers Due to Exposure to Fine Particulate Matter, 90 Fed. Reg. 23 (Jan. 2, 2025) (to be codified at 38 C.F.R. pt. 3).

166 *See* Framework for Artificial Intelligence Diffusion, 90 Fed. Reg. 4544 (Jan. 15, 2025) (to be codified at 15 C.F.R. pts. 732, 740, 742, 744, 748, 750, 762, 772, 774).

167 The Safe Drinking Water Act (SDWA) also contains an anti-backsliding provision. Under the SDWA, every six years, EPA must review and revise, as appropriate, any promulgated national primary drinking water regulation. Such revisions must "maintain, or provide for greater, protection of the health of persons." 42 U.S.C. § 300g-1(b)(9). EPA's PFAS primary drinking water regulation was published on April 26, 2004 and went into effect on June 25, 2024. *See* PFAS Drinking Water Rule, *supra* note 77, at 32535. Under the Trump administration, EPA has indicated that it is considering rolling back EPA's PFAS drinking water regulation, but the effort is likely to fail as a result of the SDWA's anti-backsliding provision. *See* Miranda Willson, *Roadblock Looms as EPA Weighs 'Forever Chemicals' Rollback*, E&E News (Apr. 2, 2025), https://www.eenews.net/articles/roadblock-looms-as-epa-weighs-forever-chemicals-rollback [https://perma.cc/84AH-8JFH].

168 42 U.S.C. §§ 6291, 6295.

169 *Id.* § 6295(o)(1).

170 *See* NRDC v. Abraham, 355 F.3d 179, 197 (2d Cir. 2004) (holding that the anti-backsliding provision must be interpreted in light of "the appliance program's goal of steadily increasing the energy efficiency of covered products" and the congressional intent to provide a "sense of certainty on the part of manufacturers as to the required energy efficiency standards"). The DOE, under the first Trump administration, explored getting around this provision by redefining the classes of "covered products," and promulgated a rule for new classes of fast dishwashers and laundry machines. *See* Energy Conservation Program: Establishment of a New Product Class for Residential Dishwashers, 85 Fed. Reg. 68723 (Oct. 30, 2020) (to be codified at 10 C.F.R. pt. 430). Following litigation in the Fifth Circuit, the Biden administration withdrew the rule. *See* Energy Conservation Program: Energy Conservation Standards for Dishwashers, Residential Clothes Washers, and

provision, an incoming administration cannot strategically delay the effective date as a prelude to an eventual repeal.[171]

Several DOE energy conservation standards that were published before the end of the Biden administration had effective dates after Inauguration Day. For example, the energy conservation standard for walk-in coolers and freezers,[172] instantaneous water heaters,[173] and commercial refrigerators and freezers[174] were published in the Federal Register on December 23, December 26, and January 21, 2025,[175] respectively, but had effective dates of February 25, March 11, and March 24, respectively.[176] As a result of EPCA's anti-backsliding provision, however, these regulations ultimately cannot be repealed even though their effective dates were after the end of the Biden administration.

The four categories of rules described in this Section define a strategy for intelligent post-Election Day rulemaking. On Election Day in 2024, OIRA had more than 100 rules in its portfolio.[177] And there were less than two weeks for OIRA to conclude review on "major" rules and for the agencies to publish these rules in the Federal Register so that they could go into effect before the end of the administration. Obviously, neither OIRA nor the agencies could get all of these rules out the next day. But the four categories of rules described above define

Consumer Clothes Dryers, 89 Fed. Reg. 105408 (Dec. 27, 2024) (to be codified at 10 C.F.R. pt. 430).

171 *See supra* text accompanying notes 152–54.

172 *See* Energy Conservation Program: Energy Standards for Walk-In Coolers and Walk-In Freezers, 89 Fed. Reg. 104616 (Dec. 23, 2024) (to be codified at 10 C.F.R. pt. 431).

173 *See* Energy Conservation Program: Energy Conservation Standards for Consumer Gas-fired Instantaneous Water Heaters, 89 Fed. Reg. 105188 (Dec. 26, 2024) (to be codified at 10 C.F.R. pt. 430).

174 *See* Energy Conservation Program: Energy Conservation Standards for Commercial Refrigerators, Freezers, and Refrigerator-Freezers, 90 Fed. Reg. 7464 (Jan. 21, 2025) (to be codified at 10 C.F.R. pt. 431).

175 The January 21 issue of the Federal Register was finalized before the Biden administration ended its term on January 20. Otherwise, the incoming Trump administration would have blocked its publication. *See* Regulatory Freeze Pending Review, 90 Fed. Reg. 8249, 8249 (Jan. 28, 2025).

176 *See* Energy Conservation Standards for Walk-In Coolers and Walk-In Freezers, 89 Fed. Reg. at 104616; Energy Conservation Standards for Consumer Gas-fired Instantaneous Water Heaters, 89 Fed. Reg. at 105188; Energy Conservation Standards for Commercial Refrigerators, Freezers, and Refrigerator-Freezers, 90 Fed. Reg. at 7464.

177 Relevant rules were manually isolated from reginfo.gov's Historical Reports page. Off. of Info. and Regul. Affs., *Historical Reports*, REGINFO.GOV, https://www.reginfo.gov/public/do/eoHistoricReport [https://perma.cc/U968-S2J9]. For each regulatory review that OIRA has concluded in any given calendar year, the page displays the dates on which OIRA received the submission from the relevant agency and concluded its review. Of the rules submitted before Election Day, OIRA concluded review of 76 rules between Election Day and the end of 2024, and 33 rules between the start of 2025 and Inauguration Day. *Id.*

what an optimal strategy looks like. Following an election that will lead to a change of party control in the White House, there needs to be an immediate push to focus on "major" rules and a second push for the bulk of other rules. Then, there is time until Inauguration Day for a third push focusing on rules that are immediately effective for "good cause" or covered by an anti-backsliding provision. The examples presented in this Section illustrate how the Biden administration carried out this strategy.

II
Severability

One important way in which agencies have responded to the more challenging judicial landscape for regulations has been by significantly increasing their efforts to ensure that a judicial decision striking down one portion of a regulation is not fatal for the whole rule. The relevant legal inquiry in this context is whether the portion of the rule struck down by the court is severable from the rest of the rule.[178] If it is, the rest of the rule survives.[179] If not, the whole rule is struck down.[180]

Section II.A discusses the legal regime concerning severability. Section II.B suggests four best practices for agencies to follow. Section II.C presents the results of an empirical study showing that, over more than two decades, there had been relatively few references to severability in the regulatory materials, but that this number ballooned in 2023 and 2024, as did the robustness of the references. Section II.D presents further empirical work suggesting that this increase was linked to Supreme Court decisions in 2022 and 2023 signaling a higher probability that at least some portions of regulations might be struck down. Finally, Section II.E presents two examples of regulations promulgated in 2024 that reflect the use of the four best practices.

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178 *See* Carlson v. Postal Regul. Comm'n, 938 F.3d 337, 351 (D.C. Cir. 2019) ("[After finding a regulatory provision unlawful, a court] must next determine whether the [unlawful provision] can be severed from the other parts of [the regulation]."); MD/DC/DE Broadcasters Ass'n v. FCC, 236 F.3d 13, 22 (D.C. Cir. 2001) (noting that a court "must address" whether to "sever" aspects of a regulation it finds unconstitutional).

179 *See Carlson*, 938 F.3d at 351 ("An 'agency action' may be either 'the whole or a part of an agency rule [or] order.' Thus, the APA permits a court to sever a rule by setting aside only the offending parts of the rule." (alteration in original) (citations omitted)); *see also* Belmont Mun. Light Dep't v. FERC, 38 F.4th 173, 188 (D.C. Cir. 2022) ("[A] reviewing court must consider 'whether the remainder of the regulation could function sensibly without the stricken provision.'").

180 *See MD/DC/DE Broadcasters*, 236 F.3d at 23 ("[Where] the unconstitutional provisions of the rule cannot be severed . . . the entire rule must be vacated."); EchoStar Satellite L.L.C. v. FCC, 704 F.3d 992, 1000 (D.C. Cir. 2013) (reasoning that the FCC's challenged orders were not severable because they could not operate without the "encoding rules").

A. Legal Regime

The black letter law on severability is relatively straightforward. Whether the offending portions of a regulation are severable "depends upon the intent of the agency and upon whether the remainder of the regulation could function sensibly without the stricken provisions."[181] While formulations of the test vary somewhat, commentators have recognized that this two-prong test of "intent" and "workability" has effectively been the rule dating to the Supreme Court's 1988 decision in *K-Mart Corp. v. Cartier*.[182] While the majority of cases applying the rule come from the D.C. Circuit,[183] there does not appear to be meaningful circuit variation on the issue.[184]

The case law does not explicitly require agencies to address severability in a regulation's preamble or text. Sometimes, severability arguments arise for the first time in litigation, with the Department of Justice making arguments about why some provisions of a rule should survive even if others are struck down.[185] Historically, this approach appears to have been the norm. Agencies have "tend[ed] to clarify their positions on severability only when required to do so in litigation," instead of including discussion of severability or explicit clauses in final rules.[186]

Sometimes these arguments succeeded.[187] For example, in *Belmont Municipal v. FERC*, the D.C. Circuit found that while the Federal Energy Regulatory Commission (FERC) "did not explicitly address

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181 Texas v. United States, 126 F.4th 392, 419 (5th Cir. 2025) (quoting *MD/DC/DE Broadcasters*, 236 F.3d at 22).

182 *See* 486 U.S. 281, 294 (1988) (applying two-part severability test to invalidate one subsection of a regulation while preserving the remainder, based on agency's intent and the independent function of the surviving provisions); *see also* Charles W. Tyler & E. Donald Elliott, *Administrative Severability Clauses*, 124 YALE L.J. 2286, 2296–97 (2015) ("Since the *K-Mart* decision, courts have applied the same test to determine the severability of administrative provisions. . . . [which] depend[s] on the intent and workability questions.").

183 *See, e.g.*, *Belmont Mun. Light Dep't*, 38 F.4th at 187–88; *Carlson*, 938 F.3d at 351; Verizon v. FCC, 740 F.3d 623, 659 (D.C. Cir. 2014); *EchoStar Satellite*, 704 F.3d at 1000; *MD/DC/DE Broadcasters*, 236 F.3d at 22.

184 *See, e.g.*, *Texas v. United States*, 126 F.4th at 419 (applying the two-part severability test and declining to sever where the agency's intent was unclear and the provision was not independently operative); N.Y. Legal Assistance Grp. v. Cardona, No. 21-888-cv, 2024 WL 64220, at *2 (2d Cir. Jan. 5, 2024); Flores v. Rosen, 984 F.3d 720, 736 (9th Cir. 2020) (same); Ariz. Pub. Serv. Co. v. EPA, 562 F.3d 1116, 1122 (10th Cir. 2009) (same).

185 *See, e.g.*, *Verizon*, 740 F.3d at 659 (accepting agency counsel's explanation during oral argument that an unlawful regulatory provision was severable despite the lack of discussion of severability in the regulatory materials); Virginia v. EPA, 116 F.3d 499, 500 (D.C. Cir. 1997) (considering an agency's arguments about the severability of challenged regulatory provisions that were raised for the first time in a petition for rehearing).

186 Tyler & Elliott, *supra* note 182, at 2319.

187 *See Verizon*, 740 F.3d at 659 (severing an unlawful provision of a regulation despite the absence of any clause or text in the regulation discussing severability); Sorenson Comm's Inc. v. FCC, 755 F.3d 702, 710 (D.C. Cir. 2014) (same); *Virginia v. EPA*, 116 F.3d at 501 (same).

whether any portion of [the challenged regulation] was severable" in the regulation itself, the design of the regulation and past FERC precedent were sufficient evidence to render a challenged provision severable.[188]

But other times the arguments failed.[189] Indeed, almost two decades ago, the D.C. Circuit indicated that it expressly disfavored severability arguments raised for the first time during litigation.[190] Accepting such *post hoc* arguments where severability was not addressed in the regulation itself would be in tension with the "fundamental principle that agency policy is to be made, in the first instance, by the agency itself—not by courts, and not by agency counsel."[191] Thus, by failing to include a severability clause or discussion of severability in a regulation, an agency exposes itself to risk that a court will refuse to sever unlawful provisions.

B. Best Practices

As a result of the judicial skepticism to severability arguments raised for the first time in litigation, agencies increase the probability that a court will find provisions contained within regulations severable by explicitly addressing the test in their regulatory materials. To do so, agencies should employ four best practices. While not all agencies deploy all four strategies simultaneously, each approach allows agencies to explicitly address severability before the issue is litigated in court.

1. Severability Language in the Final Rule To Establish Intent

First, agencies should explicitly state that the rule is severable in the final rule. Doing so virtually guarantees that the intent prong will be met. Courts of appeals have universally found the intent prong

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188 38 F.4th at 188–89. In a more striking example, the D.C. Circuit held that an unlawful provision of an EPA regulation was severable where EPA asserted in a rehearing petition that, contrary to its position at oral argument, the standards could stand alone. *See* Davis Cnty. Solid Waste Mgmt. v. EPA, 108 F.3d 1454, 1457 (D.C. Cir. 1997) (per curiam).

189 *See* Sierra Club v. FERC, 867 F.3d 1357, 1366–67 (D.C. Cir. 2017) (declining to sever a provision of an agency order that did not discuss severability in the regulatory materials); Nat'l Ass'n of Mfrs. v. NLRB, 717 F.3d 947, 962–63 (D.C. Cir. 2013) (declining to sever an unlawful provision from a regulation and noting the National Labor Relations Board "did not include a severability clause in its rule and [] did not include a statement on severability in its preamble to the final rule"), *overruled on other grounds by* Am. Meat Inst. v. USDA, 760 F.3d 18, 22-23 (D.C. Cir. 2014) (en banc); Epsilon Elecs., Inc. v. United States Dep't of Treasury, Off. of Foreign Assets Control, 857 F.3d 914, 929 (D.C. Cir. 2017) (same); Nasdaq Stock Mkt. LLC v. SEC, 38 F.4th 1126, 1144 (D.C. Cir. 2022) (same). More generally the D.C. Circuit has recently held that "regulations—like statutes—are presumptively severable." Bd. of Cnty. Comm'rs of Weld Cnty., Colorado v. EPA, 72 F.4th 284, 296 (D.C. Cir. 2023).

190 *See* Nat'l Treasury Emps. Union v. Chertoff, 452 F.3d 839, 867 (D.C. Cir. 2006) (declining to sever unlawful provisions of a Department of Homeland Security regulation in spite of agency counsel's arguments to the contrary).

191 *Id.* (quotations omitted).

to be satisfied by explicit mentions of severability,[192] whether in the preamble[193] or in the regulatory text.[194] Indeed, the Fifth Circuit has adopted a rule that accepts the "text of a severability clause"—whether in the preamble or codified in the regulatory text—as dispositive of agency intent to make a regulatory provision severable, "absen[t] extraordinary circumstances."[195]

To be sure, courts have found the intent prong satisfied even where a final rule lacks an explicit reference to severability.[196] But numerous courts have also come out the other way, declining to sever the unlawful provision absent an express regulatory reference to severability.[197] So, the safest way to demonstrate intent is to say so in the final rule.

2. *Robust Discussion of Severability in the Preamble To Establish Workability*

Second, agencies should include robust discussion in the preamble about why specific portions of the rule should survive even if others fail. This makes it more likely that a court will find the workability prong of the test satisfied. For example, in guidance to agencies, the Administrative Conference of the United States (ACUS) has suggested that courts are more likely to find an unlawful provision severable from the rest of a regulation where an agency "includes in the rule's statement of basis and purpose a reasoned explanation for why the

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192 In fact, when the regulation has discussed severability, the courts of appeals have reversed district court decisions that declined to find agency intent for its regulation to be severable. *See* Texas v. United States, 126 F.4th 392, 419–20 (5th Cir. 2025) (reversing district court's refusal to sever where the regulation contained an express severability clause and the valid and invalid provisions were independent); Flores v. Rosen, 984 F.3d 720, 736 (9th Cir. 2020) (holding that district court erred in invalidating entire rule despite express severability provision and agency's clear intent to preserve lawful portions). Commentators note that this result should be obvious. When a severability clause is already written out in the rule, "it is odd for a court to conduct an independent inquiry into whether the agency intended for the remainder to stay in effect. To do so amounts to a search for the agency's *putative* intent when the rule already contains a statement of the agency's *actual* intent." Tyler & Elliott, *supra* note 182, at 2298 (alteration in original) (noting that, since *K-Mart*, courts have applied a consistent severability test focused on agency intent and the workability of the remaining provisions).

193 *See* Am. Fuel & Petrochem. Mfrs. v. EPA, 3 F.4th 373, 384 (D.C. Cir. 2021) (declining to sever portions of the rule where EPA indicated in the preamble that the challenged provisions were part of a unified program and not intended to be severable); Nat'l Ass'n of Mfrs. v. SEC, 105 F.4th 802, 815–16 (5th Cir. 2024) (finding intent prong satisfied where SEC included an express severability clause in the 2022 Rescission).

194 *See Texas v. United States*, 126 F.4th at 419 (noting that the final rule contains the severability clause).

195 *Id.* (quoting *Nat'l Ass'n of Mfrs.*, 105 F.4th at 815).

196 *See supra* text accompanying notes 187–88.

197 *See supra* text accompanying notes 189–91.

agency believes some portions of the rule can and should function independently."[198] By raising these explanations during rulemaking and before litigation, agencies would avoid violating "the fundamental principle that agency policy is to be made, in the first instance, by the agency itself—not by courts, and not by agency counsel."[199] Charles W. Tyler and E. Donald Elliott, who published the leading academic study on regulatory severability,[200] made a similar recommendation in a report to ACUS after interviewing officials from various prominent agencies.[201] That is because a reviewing court is more likely to find that justifications for the entire rule continue to apply to the parts that survive a judicial challenge where an agency includes an explanation on severability in the rule's preamble.[202]

The case law also supports the view that an agency strengthens its severability claim when it includes a robust discussion of workability in the rule's preamble. To be sure, some courts of appeals decisions have found workability satisfied merely by the presence of a reference to severability in a rule's preamble or the regulatory text.[203] But conclusory statements in the regulatory materials, claiming that a regulation will remain workable even if a provision is struck down, are sometimes not enough to satisfy a reviewing court.[204] For example, in *Nasdaq*, the D.C. Circuit refused to sever an unlawful provision from a Securities and Exchange Commission regulatory plan despite the fact that the agency addressed severability in both the preamble and text of the plan.[205]

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198 Admin. Conf. of the U.S., Recommendation 2018-2, Severability in Agency Rulemaking, 83 Fed. Reg. 30683, 30685–86 (June 29, 2018) [hereinafter ACUS Severability Guidance].

199 *Id.* at 30685 (quoting Nat'l Treasury Emps. Union v. Chertoff, 452 F.3d 839, 867 (D.C. Cir. 2006)).

200 *See infra* text accompanying note 221.

201 Charles W. Tyler & E. Donald Elliott, Tailoring the Scope of Judicial Remedies in Administrative Law 24, 24–26 (2018), https://www.acus.gov/sites/default/files/documents/tailoring-the-scope-of-judicial-remedies-in-administrative-law-final-report.pdf [https://perma.cc/3AP5-ZEJM].

202 *Id.*

203 *See* Flores v. Rosen, 984 F.3d 720, 729 (9th Cir. 2020) (noting that the agency's preamble framed its implementation plan as "workable in light of subsequent statutory, factual, and operational changes," which courts have treated as bolstering severity arguments); Am. Fuel & Petrochem. Mfrs. v. EPA, 3 F.4th 373, 384 (D.C. Cir. 2021) (relying on the agency's statement in the preamble that different parts of the rule operated independently to justify severing and vacating only the unlawful portion); *see also* Nat'l Ass'n of Mfrs. v. SEC, 105 F.4th 802, 815–16 (5th Cir. 2024) (noting that a severability provision in a regulation's preamble puts the burden on challengers to show that the regulation "cannot function sensibly" without the unlawful provision).

204 *See* Tyler & Elliott, *supra* note 182, at 2299 (highlighting that courts often give little weight to severability clauses that do not substantively address workability).

205 Nasdaq Stock Mkt. LLC v. SEC, 38 F.4th 1126, 1145 (D.C. Cir. 2022) (declining to sever unlawful portions of an SEC regulatory plan despite the presence of a severability clause, citing concerns that the remaining provisions could not function as intended without

The court determined that attempting to sever the unlawful provision raised a workability issue: The remaining provisions would result in a contradiction that the references to severability in the regulatory materials did not address or explain.[206] Similarly, in *MD/DC/DE Broadcasters v. FCC*, the D.C. Circuit declined to enforce a severability provision in the preamble of an Equal Employment Opportunity rule.[207] The court concluded that severing unconstitutional provisions of the rule would render it unworkable due to resulting absurdities.[208] Like the rule in *Nasdaq*, the preamble of the rule challenged in *MC/DC/DE* did not explain how the rule would remain workable absent the severed provisions.[209]

It is tempting to distinguish *Nasdaq* and *MC/DC/DE* by their extreme circumstances: Courts plausibly only require robust explanations of workability in the regulatory materials when severing provisions would produce internal contradictions or otherwise absurd consequences.[210] Absent such extreme consequences, courts often appear to gloss over workability analysis by deferring to explicit references to severability in the regulatory materials.[211]

But this stable pattern of judicial treatment of workability over several decades was potentially upended last June by the Supreme Court's decision in *Ohio v. EPA*,[212] which involved a challenge to an EPA rule imposing nitrogen oxide emissions-control measures to twenty-three states.[213] In response to the challenge by the eleven states that had not received stays and sought to set aside the whole rule, EPA pointed

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them), *vacating* Joint Industry Plan; Order Approving, as Modified, a National Market System Plan Regarding Consolidated Equity Market Data, 86 Fed. Reg. 44142, 44207, 44221 (Aug. 11, 2021) (including a severability clause stating that invalid provisions shall not affect the enforceability of the remainder of the regulatory plan).

206 *Nasdaq*, 38 F.4th at 1144 ("[I]f we were to invalidate the [offending] provision and leave the remainder of the [SEC regulatory plan] intact, that would result in simultaneously requiring both a two-thirds and a simple majority vote of approval by the [plan participants] . . . ."); *see also* Joint Industry Plan; Order Approving, as Modified, a National Market System Plan Regarding Consolidated Equity Market Data, 86 Fed. Reg. at 44207, 44221 (mentioning provisions are severable without explaining how the rule would remain workable absent severed provisions).

207 236 F.3d 13, 23 (D.C. Cir. 2001).

208 *Id.* at 22 (noting that severing the provisions would either "undercut the whole structure of the rule" by making an optional condition "mandatory" or unreasonably "grant a greater preference to white women than to minority men").

209 *See* Rev. of the Comm'n's Broadcast & Cable Equal Emp. Opportunity Rules & Pol'ys & Termination of the EEO Streamlining Proceeding, 15 FCC Rcd. 2329, 2420 ¶ 232 (2000) (noting that unlawful provisions should be severed without explanation of workability).

210 *See supra* text accompanying notes 205–08.

211 *See supra* note 203 and accompanying text.

212 *See supra* text accompanying notes 21–24.

213 Ohio v. EPA, 144 S. Ct. 2040, 2049 (2024).

to the "severability provision" in the preamble of the final rule.[214] The Court rejected this argument.[215] Even though it did not explicitly refer to the "workability" prong, the Court determined that EPA had failed to show that the rule was cost-effective when applied only to the states not covered by stays. The Court's ruling could be characterized as an unusually aggressive application of the workability prong, because the Court heavily scrutinized the rule's workability absent the types of contradictions or absurdities that arose in *Nasdaq* or *MC/DC/DE*. And that was the position taken in Justice Barrett's dissent, which concluded that an explanation of the rule's cost-effectiveness could "reasonably be discerned" in the original rulemaking record despite the absence of an explicit explanation.[216]

It is possible that *Ohio v. EPA* was the product of the case's unique posture. Because the plans of twenty-three states were at issue, there were literally millions of permutations that could result when the courts adjudicated the validity of each of these plans.[217] Under these circumstances, a full analysis of workability would be an impossible undertaking. Also, even though entities commenting on the proposed rule had "raise[d] concerns about the consequences of post-promulgation litigation," the agency's response that the rule was severable did not provide a robust explanation.[218] In any event, in the wake of *Ohio v. EPA*, agencies may be wise to more carefully explain in their regulations how different provisions can properly function if severed from one another.

3. Severability Language in the Proposed Rule To Invite Public Comment

A third practice that agencies can use to increase the likelihood that a court will find regulations severable is, as ACUS suggests, to

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[214] *Id.* at 289; *see also* Federal "Good Neighbor Plan" for the 2015 Ozone National Ambient Air Quality Standards, 88 Fed. Reg. 36654, 36693 (June 5, 2023) (to be codified at 40 C.F.R. pts. 52, 75, 78, 97) (asserting severability of the rule across jurisdictions and sectors in response to anticipated legal challenge).

[215] *Ohio v. EPA*, 144 S. Ct. at 2055 (finding EPA's reliance on severability provision unpersuasive for failing to address whether emissions measures remained cost-effective when applied to fewer states).

[216] *Id.* at 2064 (Barrett, J., dissenting) (arguing that the rule's cost-effectiveness rationale was sufficiently evident from the record even without an express explanation).

[217] *See* Transcript of Oral Argument at 25, *Ohio v. EPA*, 144 S. Ct. 2040 (No. 23A349), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2023/23a349_iie0.pdf [https://perma.cc/GNA9-S4WE] (noting the complexity of the case posture in questioning due to the number of states involved and the resulting permutations that could arise from partial invalidation of the rule).

[218] *See* Jack Lienke, *Every Court Everywhere All at Once:* Ohio v. EPA *and the Litigation Multiverse*, 135 YALE L.J.F. 32, 38 (2025).

include severability language in the proposed regulatory materials, rather than just in the final rule.[219] By doing so, an agency affords the public an opportunity to comment on the severability of the regulation during rulemaking, which decreases the probability that a court will reject a severability argument as a *post hoc* addition for litigation purposes.[220] Likewise, in the most influential academic study on regulatory severability,[221] Tyler and Elliot argued that agencies are more likely to prevail in severability claims if they make a "severability clause," whether in a preamble or regulatory text of the proposed rule,[222] available for public comment.[223] Where the public is given "an opportunity to exercise accountability over an agency's decision to promulgate a severability clause," Tyler and Elliot argue, judicial deference to severability language in a regulation should be heightened for reasons of democratic accountability.[224]

Another benefit of inviting public comment on severability language is economy. While an agency can attempt to explain how the rest of the regulation functions independently from provisions anticipated to most likely be challenged in court, one regulation can contain numerous permutations of subparts that may be severable from one another.[225] Agencies cannot feasibly anticipate and address all of these.[226] Public comment, however, is a good measure of thumb for identifying which provisions are most likely to be attacked in litigation and, consequently, which provisions deserve detailed severability explanations in the preamble of the final rule. Including

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219 ACUS Severability Guidance, *supra* note 198, at 30685.

220 *Id.* at 30685–86.

221 Tyler and Elliott's article has been widely cited in: (1) academic scholarship, *see* Aaron L. Nielson, *Sticky Regulations*, 85 U. Chi. L. Rev. 85, 88 n.10 (2018); Jennifer Nou & Edward H. Stiglitz, *Regulatory Bundling*, 128 Yale L.J. 1174, 1213 n.167 (2019); (2) by courts, *see* Ass'n of Wash. Bus. v. Dep't of Ecology, 455 P.3d 1126, 1134–35 (Wash. 2020); and (3) by agencies, *see* ACUS Severability Guidance, *supra* note 198, at 30685 n.3.

222 *See* Tyler & Elliott, *supra* note 182, at 2288 n.2 (describing how agencies usually include a severability clause in the regulatory text but also sometimes within a rule's preamble).

223 *See id.* at 2303–06 (arguing that traditional principles of administrative law should require courts to defer to a severability clause that has gone through notice-and-comment procedures).

224 *Id.* at 2304.

225 *See* Lienke, *supra* note 218 (manuscript at 5) ("If [a regulation has] 10 provisions, that's over a thousand combinations. If there are 20, it's over a million.").

226 *Id.* (manuscript at 26) ("On the cost side, investigating and reflecting on the various regimes that might result from severability (i.e., identifying all possible subsets of a rule's provisions and assessing their desirability) could be quite time-consuming for an agency's staff." (internal quotations omitted)).

severability language in a proposed rule thus allows agencies to shift some of the costs of rulemaking onto commenters.[227]

4. Severability Language in the Regulatory Text To Preserve Issue Waiver

Finally, a fourth practice agencies should adopt is discussing severability in a clause of the final rule's regulatory text (and for the reason just discussed, in a clause of the proposed rule's regulatory text as well), not just in its preamble.[228] For one, only language in a regulation's regulatory text, not its preamble, is binding.[229] Moreover, including a severability clause in the proposed rule makes agencies more likely to benefit from the doctrine of issue waiver, which permits courts to decline to hear challenges to a regulation that were not raised before the agency during the notice-and-comment period.[230] However, issue waiver only applies "where the party had notice of the issue."[231] And a court may find that an agency provided inadequate notice on severability if that language only appeared in the rule's preamble and not its regulatory text—especially if the preamble's references to severability were sparse, unclear, and did not explicitly solicit public comment.[232] Including severability language in the proposed regulatory text avoids this problem and, thus, maximizes an agency's opportunity

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[227] Notably, the costs of identifying and considering the various ways a regulation is likely severable may historically have deterred agencies from making their regulations severable. *See* Tyler & Elliott, *supra* note 182, at 2322. For a rather stark example of this cost shifting, see *infra* text accompanying notes 300–02, which describes how public commenters made workability arguments for a Department of Labor regulation.

[228] ACUS Severability Guidance, *supra* note 198, at 30685.

[229] Peabody Twentymile Mining, LLC v. Sec'y of Lab., 931 F.3d 992, 998 (10th Cir. 2019) ("[W]hile the preamble can inform the interpretation of the regulation, it is not binding and cannot be read to conflict with the language of the regulation itself."); *see also* NRDC v. EPA, 559 F.3d 561, 564–65 (D.C. Cir. 2009); Nat'l Wildlife Fed'n v. EPA, 286 F.3d 554, 569–70 (D.C. Cir. 2002).

[230] *See* CSX Transp., Inc. v. Surface Transp. Bd., 584 F.3d 1076, 1079 (D.C. Cir. 2009) (describing the doctrine of issue waiver); Nat'l Ass'n of Mfrs. v. U.S. Dep't of the Interior, 134 F.3d 1095, 1111 (D.C. Cir. 1998) (same); *see also* Jeffrey S. Lubbers, *Fail to Comment at Your Own Risk: Does Issue Exhaustion Have a Place in Judicial Review of Rules?*, 70 Admin. L. Rev. 109, 136 (2018) ("Issue exhaustion doctrine has grown to cover more and more rulemakings, even where there is no such statutory provision.").

[231] *CSX Transp.*, 584 F.3d at 1079; *see also* Lubbers, *supra* note 230, at 152–53 (discussing the lack-of-notice exception to the issue-waiver doctrine).

[232] *See* McLouth Steel Prods. Corp. v. Thomas, 838 F.2d 1317, 1322–23 (D.C. Cir. 1988) (finding that notice of a rule's provision was inadequate because it appeared only in an ancillary portion of the preamble, and stating that notice must "be clear and to the point"); *cf.* Chem. Waste Mgmt., Inc. v. EPA, 869 F.2d 1526, 1534 (D.C. Cir. 1989) ("[Challengers] contend that the notice given was inadequate because it consisted only of brief references which were 'buried' within lengthy preambles in the Notices of Proposed Rulemaking.").

to invoke issue waiver on severability issues raised for the first time in litigation.

So far, the courts of appeals do not seem more likely to find that the two prongs of the severability test are satisfied if the references to severability are in the regulatory text, as opposed to merely in preamble language.[233] But litigants have raised this issue. For example, in a 2023 challenge to the Revised Definition of the "Waters of the United States" Rule, the plaintiffs relied upon the ACUS guidance to argue that none of the rule's provisions were severable because the reference to severability was in the preamble, rather than the regulatory text.[234] Ultimately, the district court did not rule on the severability question because the parties jointly agreed to strike the plaintiffs' motion for summary judgment due to an intervening amendment in the challenged rule.[235] However, because this issue might be raised again in future litigation, agencies might provide additional protection for their regulations by including codified severability clauses within the regulatory text.

In summary, agencies can put themselves in the best position to have their regulations found severable by adopting four best practices.[236] First, an explicit discussion of severability in the preamble or regulatory text of a final rule increases the probability the first prong of the test—intent—is satisfied. Second, robust discussion in the preamble about why portions of the rule should survive even if others fail makes it more likely that the second prong of the text—workability—is satisfied. Third, discussion of severability in the proposed rule allows for the public to comment on severability and for agencies to craft their responses in a way that will strengthen their arguments for severability in court.

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233 In a variety of cases where no clause appears in the regulatory text, courts of appeals have relied on severability references in the preamble of a rule to find an unlawful provision was severable from the rest of the regulation. In none of these cases did the courts note that the lack of a clause in the regulatory text made any difference to the analysis. *See, e.g.*, Nat'l Ass'n of Mfrs. v. SEC, 105 F.4th 802, 815–16 (5th Cir. 2024); Am. Fuel & Petrochem. Mfrs. v. EPA, 3 F.4th 373, 384 (D.C. Cir. 2021); *see also* Tyler & Elliott, *supra* note 182, at 2288 n.2 (noting that severability references in a rule's preamble "have many of the same benefits as severability clauses included in a rule's text").

234 Bus. Plaintiffs' Motion for Summary Judgment at 27, Texas v. EPA, No. 3:23-cv-00017 (S.D. Tex. June 28, 2023) (citing ACUS Severability Guidance, *supra* note 198, at 30685–86).

235 *See* Parties' Proposal for Further Proceedings at 2, Texas v. EPA, No. 3:23-cv-00017 (S.D. Tex. Sept. 29, 2023); Texas v. EPA, No. 3:23-cv-00017, slip op. at 1 (S.D. Tex. Oct. 10, 2023) (order granting parties' joint proposal for further proceedings and striking plaintiffs' motions for summary judgment).

236 For a similar approach, see Adelaide Duckett & Donald L.R. Goodson, Inst. for Pol'y Integrity, Administrative Severability: A Tool Federal Agencies Can Use To Address Legal Uncertainty 4–5 (2023), https://policyintegrity.org/publications/detail/administrative-severability [https://perma.cc/56YM-NLYA].

And fourth, an explicit reference to severability in the proposed and final regulatory text increases the chance that an agency can invoke issue waiver against severability arguments raised for the first time in litigation.

C. Trends

Over the last two years, agencies significantly expanded their efforts to comply with the four best practices identified in Section II.A. Following a relatively flat trend over more than two decades under administrations of both parties, agencies during 2023 and 2024 significantly increased their references to severability in the regulatory materials of both proposed and final rules, including in the regulatory text, and increased the robustness of such references.

1. Severability Language in Proposed and Final Rules

In the last two years of the Biden Adminsitration, the annual number of regulations published in the Federal Register that mention severability or severable provisions drastically increased.[237] In 2023 and 2024, respectively, there were 147 and 327 published regulations—both proposed and final—that contained such references.[238] While there had been a modest recent increase in the number of such regulations leading up to these two years, the significant increase in these two years compared to the average for all previous years dating back to the

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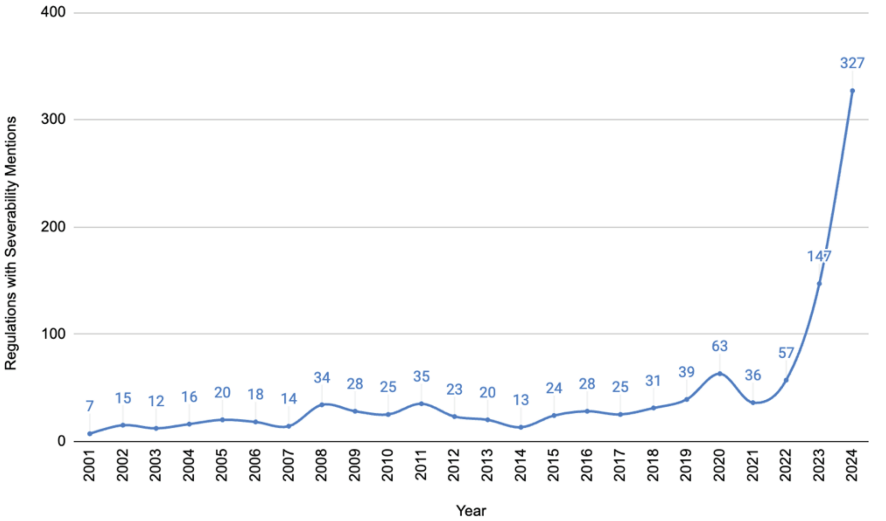
[237] For ease of reference, I refer to "regulations published in the Federal Register that mention the severability or severable provisions" interchangeably with "regulations with severability mentions" or "regulations that mention severability."

[238] *See infra* Figure 1. To collect this data, a search was run on Westlaw's Federal Register database of all published proposed and final regulations with the following search logic: adv: (#severability) (severable /10 provision) % (non-severability) % (anti-severability) % (circumvention /2 severability). *See Federal Register – All*, Thomson Reuters Westlaw Precision, https://1.next.westlaw.com/Browse/Home/ProposedAdoptedRegulationsCurrent/ProposedAdoptedRegulationsAll/FederalRegisterAll?transitionType=Default&contextData=(sc.Default) [https://perma.cc/7TTA-SZBU]; *Search with Terms and Connectors*, Thomson Reuters, https://www.thomsonreuters.com/en-us/help/westlaw-edge/searching/search-with-terms-and-connectors [https://perma.cc/FMR4-439B] (explaining Westlaw's search logic). This search was tailored to avoid returning regulations that were explicitly not severable and a group of EPA regulations that consistently mention "severability" in a table of the regulatory text that is irrelevant to the severability of the rule. *See, e.g.*, National Emission Standards for Hazardous Air Pollutants from the Portland Cement Manufacturing Industry, 74 Fed. Reg. 21136, 21190 (proposed May 6, 2009) (revising Table 1 to Subpart LLL of 40 C.F.R. § 63 to include text "Circumvention, Severability"). The searches were indexed by year, beginning on January 20 and ending on January 19 of the following year, to correspond to turnovers in presidential administrations, which occur on January 20 (or the 21st, if the 20th falls on a Sunday in a given year).

beginning of 2001 is striking. Figure 1 shows the number of regulations with severability mentions for each year between 2001 and 2024. Particularly, the number of regulations with severability mentions in 2024 is a whole order of magnitude greater than both the mean, 26.25, and median, 24.5, annual numbers of such regulations from 2001 to 2022. The most published regulations with severability mentions in any year between 2001 and 2022 had been 63 in 2020—less than a fifth of the number in 2024.

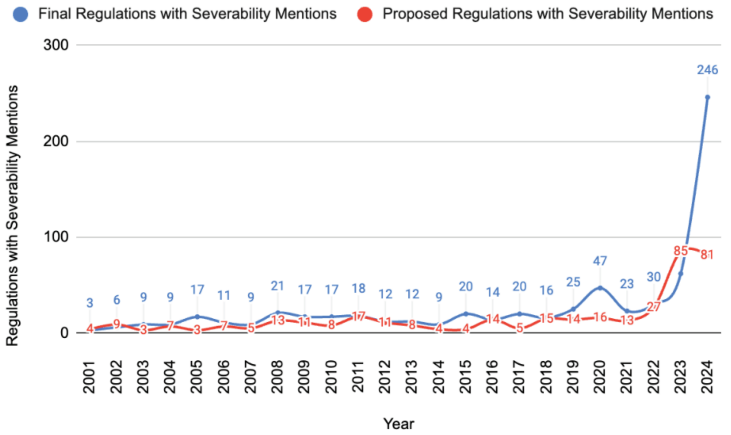
FIGURE 1. REGULATIONS WITH SEVERABILITY MENTIONS BY YEAR



The recent increase in the number of regulations that mention severability has occurred for both proposed and final rules. This can be seen in Figure 2, which breaks down the data in Figure 1 into the two categories.[239] In 2023 and 2024, the numbers of final rules that mention severability were at all-time highs compared to all years dating back to 2001: 62 and 246, respectively. These numbers were almost four and fifteen times greater than the mean, 16.6, and median, 16.5, for the prior twenty-two years. There were similar all-time highs for the number of proposed rules which mention severability: 85 in 2023 and 81 in 2024. These were roughly eight times the mean, 9.9, and ten times the median, 8.5, of the prior twenty-two years.

[239] The same protocol discussed in note 238, *supra*, was used to collect this data, using Westlaw's internal filters for final (i.e., "adopted") and proposed rules to demonstrate the splits.

FIGURE 2. PROPOSED AND FINAL REGULATIONS WITH SEVERABILITY MENTIONS BY YEAR



As discussed above, a best practice is for agencies to mention severability in both the proposed and final versions of the rule.[240] The increase in the number of proposed rules that mention severability demonstrates that agencies are doing a better job of implementing this best practice. However, Figure 2 shows that the increase in final rules is outpacing the increase in proposed rules. For example, the 246 final rules mentioning severability in 2024 were almost three times the 85 proposed rules doing so in 2023. Mathematically, most 2024 final rules mentioning severability cannot have mentioned severability in their proposed rules.

Timing may explain this gap. As discussed in Section II.D below, the decisions in *Loper Bright* and *Ohio v. EPA* may partially account for the increase in severability mentions.[241] The Court's grants of certiorari and review in either case did not occur until later in 2023, on May 1 and December 20, respectively.[242] Given that it usually takes at least a year for a proposed rule to become final,[243] many of the final rules mentioning severability that were published in 2024 would have had their proposed rules published before the Court took up either case. Agencies responding to these cases would have had to add severability language in many final rules that were initially proposed before the decisions. In any event, the data in Figure 3 shows that, at the very least, agencies dealt with severability issues explicitly to a far larger extent in 2024 than in 2023. It remains to be seen whether, going forward, they

240 *See supra* text accompanying notes 219–27 (explaining various benefits of adding severability language in a proposed rule).

241 *See infra* text accompanying notes 260–73.

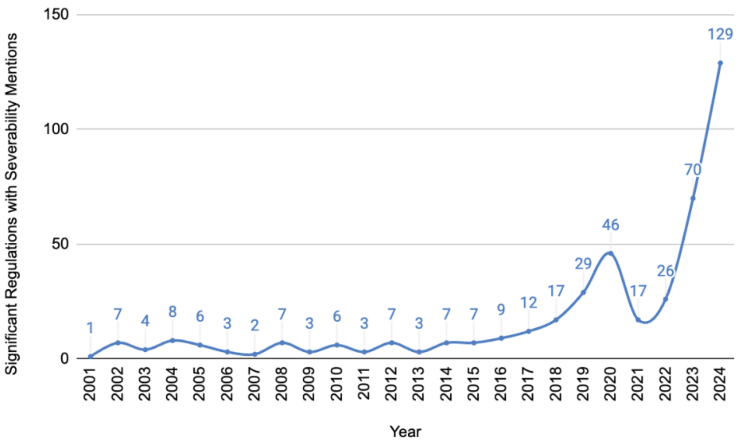
242 *See infra* Figure 6 and notes 257, 265.

243 *See supra* text accompanying note 139.

will raise the issue in proposed rules, as they should, to the same extent they do in final rules.

The same trend of recent increases in references to severability is also apparent when looking at the number of published regulations deemed significant under Executive Order 12866.[244] Figure 3 shows that in 2023 and 2024, respectively, 70 and 129 published significant regulations contained mentions of severability or severable provisions.[245] These represented significant departures from the mean, 10.45, and median, 7, annual number of significant regulations with severability mentions from 2001 to 2022. The highest number of significant regulations with severability mentions published in any year from 2001 to 2022 was 46, which is around a third of the number in 2024.

FIGURE 3. SIGNIFICANT REGULATIONS WITH SEVERABILITY MENTIONS BY YEAR



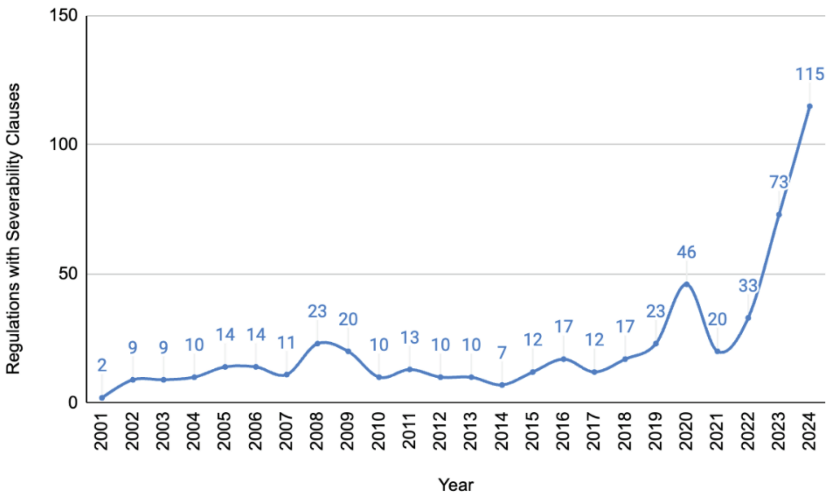
[244] Exec. Order No. 12,866, 58 Fed. Reg. 51735 (Sept. 30, 1993); *see also supra* text accompanying notes 60–62 (explaining OIRA's review of significant regulatory actions).

[245] *See infra* Figure 3. To collect this data from the Federal Register website database, all proposed and final regulations deemed significant under Executive Order 12,866 in each presidential year (i.e., years counted from January 20 to January 19 of the following year) were searched for mentions of "severability" or "severable" within ten terms of the word "provision." *See Document Search*, FED. REG., https://www.federalregister.gov/documents/search#advanced [https://perma.cc/63RT-5V32]. The search logic used for this was "=severability | "severable provision"~10." *See Reader Aids: Insight into the FR Ecosystem*, FED. REG., https://www.federalregister.gov/reader-aids/videos-tutorials/utilizing-complex-search-terms [https://perma.cc/XG4K-2MRK] (explaining the website's search logic). The Federal Register website was selected for this search because it contains a built-in filter for significant regulations, which Westlaw lacks. However, constraints on the search logic of the Federal Register website did not allow for results mentioning "anti-severability," "non-severability," or "Circumvention, Severability" to be excluded, as the Westlaw search logic did when collecting the data for Figure 1. While this introduces a source of error for the Figure 3 data, it likely is insignificant. When results mentioning "anti-severability" or "non-severability" were included in the Westlaw search depicted in Figure 1, both 2023 and 2024 still had significantly more regulations than any other year. Given that the inclusion of these results did not affect the quality of the Figure 1 data, there is no reason to expect that they will affect the quality of the Figure 3 data either.

2. *Severability Language in the Regulatory Text*

The data depicted in Figures 1 and 3 includes severability mentions for each published rule that appear either in the preamble or in the regulatory text. But the same sharp increase is observed solely in the regulatory text as well. Agencies included significantly more severability clauses in the regulatory text of their regulations in the last two years of the Biden administration than in any of the previous twenty-two years.[246] Figure 4 shows the number of regulations with severability mentions in the regulatory text for each year between 2001 and 2024. 73 published regulations contained severability clauses in their regulatory text in 2023 and 115 did so in 2024. Once again, compared to the mean, 15.55, and median, 12.5, of the prior twenty-two years, these increases are significant. The highest number of regulations with severability clauses in those twenty-two years was 46 in 2020—less than half of the 115 such regulations published in 2024.

FIGURE 4. REGULATIONS WITH SEVERABILITY CLAUSES IN THE REGULATORY TEXT BY YEAR



The increases reflected in Figures 1, 3, and 4 occurred despite a general decrease in the number of rules agencies published in the Federal Register from 2001 to 2024. For example, dating back to 2001,

246 *See infra* Figure 4. To collect this data, the same search terms used in note 238, *supra*, were used in Westlaw's Federal Register database for all proposed and final rules. The results were then manually screened for mentions of the terms that appear after the phrase "List of Subjects," which is universally used in regulations to indicate the point at which the preamble ends and the regulatory text begins. *See, e.g.*, Greenhouse Gas Rule, *supra* note 67, at 40027.

the years 2023 and 2024 had the second- and third-lowest numbers of total published proposed and final rules—5,090 and 5,137, respectively—despite having the first- and second-highest number of published regulations with mentions of severability.[247]

3. Robustness of the Severability Discussions

Although the preceding discussion examined the number of regulations agencies published each year with mentions of severability and severable provisions, it did not track the robustness with which severability was discussed in each regulation. The robustness of the discussion is particularly relevant to the second prong of the severability analysis used by the courts—workability.[248] In this connection, a rule that has specifically determined that a particular provision in one place "could function sensibly without the stricken provision"[249] in another place is likely to be more persuasive to a court than a single, blanket statement on workability that purports to apply to the whole rule.[250]

A Westlaw search feature called "snippets" was used to measure the robustness of the discussion of severability throughout the preamble or regulatory text of rules. For each search result, "snippets" count the number of times a search term appears more than twenty terms apart from any other mention of the same search term. While snippets are only an indirect measure of search term frequency in any given search result, they provide one crucial advantage over gross counts of search terms: They are more likely to show when regulations are discussing severability in separate parts of the preamble or the regulatory text, rather than many times in the same isolated part.[251] Thus, the number of snippets is more likely than the total number of mentions to reflect the robust, cross-sectional use of a query term in the search text.

Figure 5 shows, for each year between 2001 and 2024, the number of regulations with five or more snippets. Once again, in 2023 and 2024 compared to prior years, there were drastic increases of regulations

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247 To collect this data, a search was run without any search terms on the Federal Register website database of all proposed and final regulations published, and the number of search results was counted. *See Document Search*, *supra* note 245. The data was indexed by year beginning on January 20 and ending on January 19 of the following year.

248 *See supra* text accompanying notes 181–82.

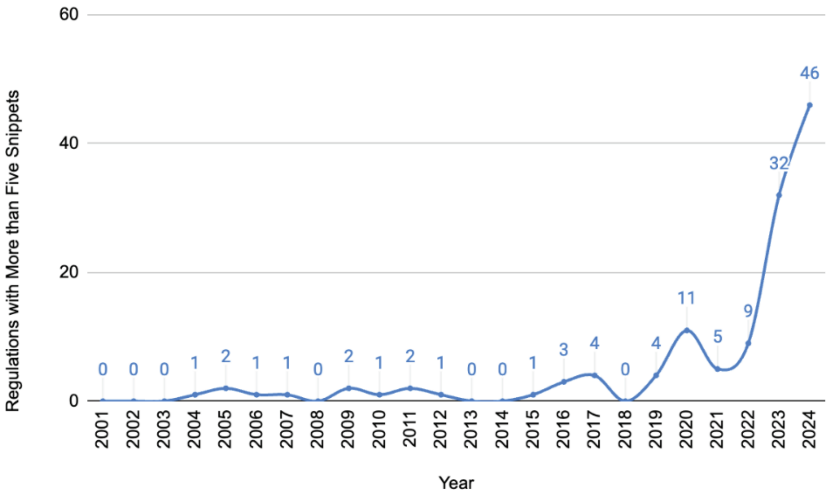
249 Texas v. United States, 126 F.4th 392, 419 (5th Cir. 2025) (quoting MD/DC/DE Broadcasters Ass'n v. FCC, 236 F.3d 13, 22 (D.C. Cir. 2001)).

250 *See supra* text accompanying notes 198–218.

251 For example, a sentence which uses the term "severability" five times will be counted as one snippet—at least so long as there are fewer than twenty terms between any two mentions of "severability" in the sentence. But if a regulation has five separate severability clauses tailored to five different provisions in its regulatory text, Westlaw will likely count this as at least five snippets.

with more than five snippets which mention severability or severable provisions.[252] There were 32 such regulations in 2023 and 46 in 2024. As with the prior data, these numbers were significantly higher than the mean, 2.18, and median, 1, of this measure from 2001 through 2022. The maximum number of regulations with five or more snippets during those twenty-two years was 11 in 2020—about a third of the 2023 number and a fourth of the 2024 number.

FIGURE 5. REGULATIONS WITH MORE THAN FIVE SNIPPETS BY YEAR



One possible reason for the recent increase in regulations with more snippets discussing severability could be that agencies are not just mentioning severability in isolated boilerplate language. Instead, they might be providing more robust justifications for why parts of a rule should survive even if another part is struck down.

D. Possible Explanations

The trends highlighted in Section II.C cannot be explained by changes in the case law concerning severability. As Section II.A shows, this case law has been stable over the last few decades. The one

[252] *See infra* Figure 5. To collect this data, the same search logic as mentioned in note 238, *supra*, was used in Westlaw's Federal Register database. The data was indexed by years running from January 20 to January 19 of the following year. The number of regulations with more than five snippets were counted in each year. While five was chosen as the high snippet cutoff, the trends depicted in Figure 5 were independent of the cutoff selected within a broad range of values: 2023 and 2024 had drastically more regulations with more two, five, seven, and nine snippets than any other year.

potential change on this score has been the high bar that the Supreme Court may have applied to the second prong of the severability test in *Ohio v. EPA*.[253] But by June 2024, when the case was decided, the trends were well underway. There remain two other potential explanations for why agencies began to rely much more heavily on claims of severability embedded within rules in 2023 and 2024.

The first is the message that the Supreme Court telegraphed by granting review in *Ohio v. EPA*.[254] The Court's action might have suggested that agencies needed to meet higher bars to prevail on severability claims, thereby leading to more mentions of severability per regulation or more mentions of severability in the regulatory text. But a closer analysis of the posture of the case reveals that this explanation is not compelling. In their application to the Supreme Court for a stay of EPA's federal implementation plan for states violating the Clean Air Act's Good Neighbor Provision, the opposing states barely briefed the issue of severability, spending a single paragraph in twenty-eight pages on the issue.[255] Nor did the issue get significant attention in EPA's opposition brief, which devoted a little over one page in fifty-one to the question.[256] Ultimately, the Supreme Court granted review on the issue of whether "the emissions controls imposed by the Rule are reasonable regardless of the number of States subject to the Rule."[257] Crucially, however, the Court did not explicitly mention severability in its order.[258]

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253 144 S. Ct. 2040 (2024); *see also supra* text accompanying notes 213–16, discussing how the decision in *Ohio v. EPA* may change the application of the workability prong of the test.

254 Because the posture of the case was an emergency appeal of the D.C. Circuit's denial to grant a stay of EPA's rule, the court technically granted review of an appeal rather than a petition for certiorari. *See* Lienke, *supra* note 218 (manuscript at 12–13) (explaining the procedural posture of the case).

255 *See* State Applicants' Emergency App. for a Stay of Admin. Action at 20–21, Ohio v. EPA, 144 S. Ct. 2040 (2024) (No. 23A349). The D.C. Circuit decision that the States appealed was an unreasoned summary order did not signal anything about the issues that would be presented to the Supreme Court. Utah v. EPA, No. 23-1157, 2023 WL 6285159 (D.C. Cir. Sept. 25, 2023).

256 *See* Response in Opposition to the Applications for a Stay at 27–28, *Ohio v. EPA*, 144 S. Ct. 2040 (No. 23A349).

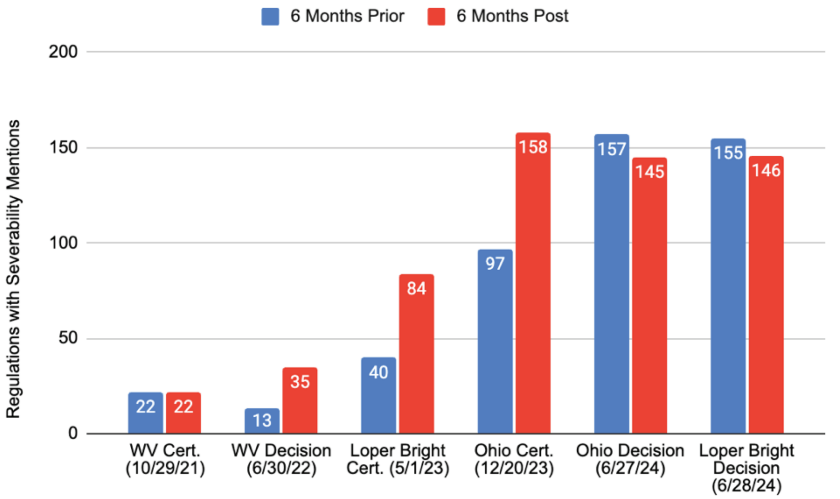
257 *See* Supreme Court Docket, *Ohio v. EPA*, 144 S. Ct. 2040 (No. 23A349) (docketed Dec. 20, 2023) [hereinafter *Ohio v. EPA* Grant of Review], https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/23a349.html [https://perma.cc/S5V9-VE26] ("Arguing counsel should be prepared to address, among other issues related to the challenge based on the SIP [State Implementation Plan] disapprovals, whether the emissions controls imposed by the Rule are reasonable regardless of the number of States subject to the Rule.").

258 *See id.*

The second explanation is the more challenging judicial landscape faced by regulations,[259] including as a result of the Supreme Court's decisions in *Loper Bright*,[260] *West Virginia v. EPA*,[261] and *Ohio v. EPA*[262] itself—or what the Court might have telegraphed by granting certiorari in the first two of the cases.[263] In the face of the hostile judicial environment resulting from these cases, it is rational for agencies concerned about a court striking down a provision of a regulation to take more significant precautions to protect the regulation from being struck down entirely.

To try to untangle the cause for the striking increase in agency attention to severability in 2023 and 2024, Figure 6 presents the number of regulations with severability mentions in the six-month period preceding and following six landmark judicial outcomes: the grants of certiorari or review in *West Virginia v. EPA*,[264] *Loper Bright*,[265] and *Ohio v. EPA*,[266] and the decisions in these three cases.

FIGURE 6. REGULATIONS WITH SEVERABILITY MENTIONS BEFORE & AFTER MAJOR CASES (6 MONTHS)



[259] *See supra* text accompanying notes 35–38 (discussing litigation before single-judge divisions).

[260] Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244 (2024).

[261] 142 S. Ct. 2587 (2022).

[262] 144 S. Ct. 2040 (2024).

[263] *See supra* text accompanying notes 1–24.

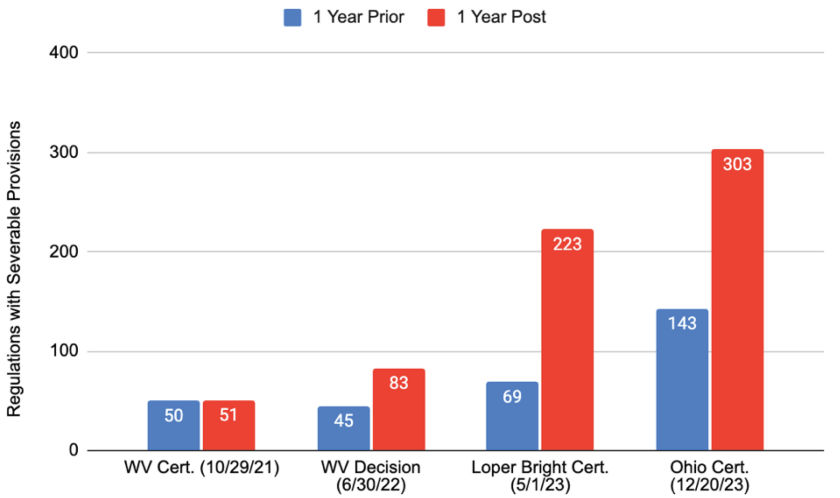
[264] Am. Lung Ass'n v. EPA, 985 F.3d 914 (D.C. Cir. 2021), *cert. granted*, West Virginia v. EPA, 142 S. Ct. 420 (mem.) (2021).

[265] Loper Bright Enters. v. Raimondo, 45 F.4th 359 (D.C. Cir. 2022), *cert. granted*, 143 S. Ct. 2429 (mem.) (2023).

[266] *Ohio v. EPA* Grant of Review, *supra* note 257.

To guard against random variations over a relatively short period of time and against possible delays in agency responses to the judicial decisions, Figure 7 presents the same information using a one-year aperture. It does so for only four of the six judicial decisions because the other two came down less than a year ago.

FIGURE 7. REGULATIONS WITH SEVERABILITY MENTIONS BEFORE AND AFTER MAJOR CASES (1 YEAR)



These two figures show some striking results. First, with respect to *Loper Bright*, the number of regulations with mentions of severability increased significantly after the Court's grant of certiorari. Compared to the six-month period prior to the certiorari grant, the number of regulations with severability mentions in the six months immediately after the certiorari grant more than doubled, from 40 to 84. The number more than tripled, from 69 to 223, between the year preceding the certiorari date and the year following it. Once the Court granted certiorari in that case, legal observers overwhelmingly believed that the Court would overrule *Chevron*.[267] As a result, agencies faced higher

[267] *See, e.g.*, Ian Millhiser, *A New Supreme Court Case Seeks to Make the Nine Justices Even More Powerful*, Vox (May 2, 2023, 7:30 AM), https://www.vox.com/politics/2023/5/2/23706535/supreme-court-chevron-deference-loper-bright-raimondo [https://perma.cc/KBM7-RZXL] (noting that it is "reasonably likely" the Court would overrule *Chevron* upon granting certiorari in *Loper Bright*); Christina Pazzanese, 'Chevron *Deference' Faces Existential Test*, HARV. GAZETTE (Jan. 16, 2024), https://news.harvard.edu/gazette/story/2024/01/chevron-deference-faces-existential-test [https://perma.cc/QF8Q-EVPE] (interviewing Harvard Law Professor Jody Freeman who noted that, "[a]t a minimum, the court will likely narrow

risks that their regulations would be struck down and took additional precautions to ensure that portions of their rules would be safe even if other portions did not withstand judicial scrutiny. Consistent with the view that agencies anticipated the decision in *Loper Bright* at the time of the grant of certiorari, Figure 6 shows that there was no change in the number of mentions of severability after the decision came down.

Second, *West Virginia v. EPA* displays the opposite pattern. There was virtually no change in the mentions of severability after the grant of certiorari (22 as compared with 22 using a six-month aperture and 51 as compared with 50 using a twelve-month aperture). The dominant view at the time of the *West Virginia v. EPA* grant of certiorari was that the Court would strike down the Clean Power Plan, which was EPA's regulation of the greenhouse gas emissions of existing power plants.[268] But unlike in the case of the *Loper Bright* grant, there was no consensus that the Court would use that case as a vehicle to make far-reaching pronouncements about administrative law.[269] In contrast, there was a

Chevron"); Adam Liptak, *Conservative Justices Appear Skeptical of Agencies' Regulatory Power*, N.Y. Times (Jan. 17, 2024), https://www.nytimes.com/2024/01/17/us/supreme-court-chevron-case.html [https://perma.cc/AK7X-GVUK] (noting that the Court's "conservative majority seemed inclined . . . to limit or even overturn" *Chevron* during *Loper Bright*'s oral argument); Evan Nelson & Allison Kernisky, Chevron *Deference Running on Fumes?*, Holland & Knight SECond Ops. Blog (May 19, 2023), https://www.hklaw.com/en/insights/publications/2023/05/chevron-deference-running-on-fumes [https://perma.cc/ZMH4-4J34] (noting that, especially given Justice Jackson's recusal, the Court would likely overturn *Chevron* in *Loper Bright*); Eli Nachmany, *With a Cert Grant in* Relentless, Inc. v. Department of Commerce*,* Loper Bright *Gets Some Company*, Yale J. on Regul. Blog (Oct. 13, 2023), https://www.yalejreg.com/nc/with-a-cert-grant-in-relentless-inc-v-department-of-commerce-loper-bright-gets-some-company-by-eli-nachmany [https://perma.cc/5KX2-N42J] ("[At the time the Court granted certiorari] [m]any expected that the Court would use *Loper Bright* to reject the reasoning of *Chevron* or at least limit *Chevron*'s reach."); Beckett Cantley & Geoffrey Dietrich, Loper v. Raimondo*: The U.S. Supreme Court's Potential Extension of Its Anti-Regulatory Direction to Overturning* Chevron *Deference*, 39 J. Land Use & Env't. L. 79 (2023) (noting the Supreme Court will likely overturn *Chevron* and exploring the ramifications).

268 *See* Rachel Reed & Harv. L. Sch. News Staff, *Supreme Court Preview:* West Virginia v. EPA, Harv. L. Today (Feb. 28, 2022), https://hls.harvard.edu/today/scotus-preview-west-virginia-v-epa [https://perma.cc/R3K7-5HE3] (noting that the Court would likely rule against EPA in the case); Alexander C. Kaufman, *Supreme Court Will Consider Limiting EPA's Power to Regulate Greenhouse Gases*, Mother Jones (Nov. 1, 2021), https://www.motherjones.com/politics/2021/11/supreme-court-epa-power-regulate-climate-change-greenhouse-gas [https://perma.cc/L9RA-V8ZC] (suggesting that the Court's "6-3 conservative majority" is likely to rule against EPA in the case); Pamela King, *Supreme Court Under Pressure to Punt Climate Case*, E&E News (June 16, 2022), https://www.eenews.net/articles/supreme-court-under-pressure-to-punt-climate-case [https://perma.cc/AU2N-KVQN] (interviewing law professors who noted it was likely the Supreme Court would strike down the Clean Power Plan rather than dismiss the case as improvidently granted).

269 *See* Reed & Harv. L. Sch. News Staff, *supra* note 268 (noting there were a variety of ways the Court could resolve the case, including, but not limited to, the Major Questions Doctrine); Kaufman, *supra* note 268 (omitting any mention of the Major Questions Doctrine

significant increase in mentions of severability following the decision on the merits in *West Virginia v. EPA*. The number increased from 13 to 35 using a six-month window and from 45 to 83 using a twelve-month window. This significant jump is consistent with the view that *West Virginia v. EPA* placed a significant hurdle for regulations.

Third, there was also a significant jump in mentions of severability following the grant of review in *Ohio v. EPA* (158 as compared with 97 using a six-month aperture and 223 as compared with 69 using a twelve-month aperture). As explained above, the grant of review is unlikely to have presaged significant changes in the law of severability.[270] But it is an aggressive move for the Court to grant a stay where an appeal is pending in the D.C. Circuit and the D.C. Circuit has denied such a stay.[271] The last time this had happened was in connection with the Clean Power Plan,[272] and that stay was a harbinger to *West Virginia v. EPA*.[273] The increase in the number of mentions of severability is consistent with agencies' expectation that *Ohio v. EPA* might pave the path to more intrusive judicial review of the justification of regulations generally, even if not specifically with respect to the law of severability. And, as in the case of *Loper Bright*, there was no change in the number of mentions of severability after the *Ohio v. EPA* decision came down, perhaps because by then the message about the more challenging path for regulations had become clear. In any event, the striking trends identified in Section II.B were already underway.

In summary, the empirical work in this Section establishes that during 2023 and 2024 there was a large increase in: (1) the number of regulations that mention severability, including significant ones,

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as a way to resolve *West Virginia v. EPA*); Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine*, 109 Va. L. Rev. 1009, 1013–14 (2023) (noting that *West Virginia v. EPA* was "the first time the Court actually used the phrase 'major questions doctrine'" and arguing that the advent of this doctrine was largely unprecedented).

270 *See supra* text accompanying notes 254–58.

271 *See* Pamela King, *Supreme Court 'Shadow Docket' Halts Another EPA Rule*, E&E News (July 9, 2024), https://www.eenews.net/articles/supreme-court-shadow-docket-halts-another-epa-rule [https://perma.cc/9B6W-VCTE] (explaining how the Court granted review in the case as part of its "emergency docket" after the D.C. Circuit had denied a stay but before the Circuit had reached a decision on the merits).

272 West Virginia v. EPA, 577 U.S. 1126 (2016) (granting the stay of the Clean Power Plan pending litigation in the D.C. Circuit); *see also* Pamela King, *Supreme Court 'Shadow Docket' Casts Pall on Environmentalists*, E&E News (Aug. 24, 2021), https://www.eenews.net/articles/supreme-court-shadow-docket-casts-pall-on-environmentalists [https://perma.cc/RDB8-5CRR] (explaining how the Court had stayed the Clean Power Plan in 2016 while "the rule was subject to a challenge" in the D.C. Circuit, "which had issued a unanimous decision just weeks earlier" to deny a stay pending appeal).

273 142 S. Ct. 2587, 2604 (2022) ("After [the D.C. Circuit] declined to enter a stay of the rule, the challengers sought the same relief from this Court. We granted a stay, preventing the rule from taking effect.").

(2) the robustness of severability mentions cross-sectionally within regulations, and (3) the number of regulations that mention severability in the regulatory text. This increase occurred contemporaneously with three outcomes at the Supreme Court that were widely seen as placing significant judicial roadblocks in the path of regulations: the decision in *West Virginia v. EPA*, the grant of certiorari in *Loper Bright*, and the grant of review in *Ohio v. EPA*. While it is not possible to prove a causal link, the evidence is quite suggestive of the proposition that, in the face of Supreme Court decisions signaling a higher probability that some portions of their regulations might be struck down, agencies paid significant additional attention to severability as a way to protect as much of each new regulation as possible.

E. Case Studies

As described in Section II.B, agencies can increase the chance a court will sever unlawful provisions from their regulations—rather than vacate them in their entirety—by implementing four best practices: explicitly stating that the provisions of the regulation are severable, explaining robustly why portions of the rule should survive even if others fail, including discussion of severability in the proposed rule, and having an explicit reference to severability in the regulatory text.

Many agency regulations published in 2023 and 2024 adopt each of these four best practices (although some do not). Two regulations, both published in 2024, are considered here as exemplars for how agencies can do so: a rule by the Department of Labor's Employment and Training Administration (ETA) amending provisions governing temporary agricultural workers,[274] and a rule by the Department of Labor's Wage and Hour Division (WHD) revising regulations issued under the Fair Labor Standards Act (FLSA) that exempted certain classes of employees from minimum wage and overtime pay requirements.[275] Both regulations were deemed significant as defined by Executive Order 12,866,[276] and therefore were reviewed by OIRA.[277]

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[274] Improving Protections for Workers in Temporary Agricultural Employment in the United States, 89 Fed. Reg. 33898 (Apr. 29, 2024) (to be codified at 20 C.F.R. pts. 651, 653, 655, 658) [hereinafter Final ETA Rule].

[275] Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees, 89 Fed. Reg. 32842 (Apr. 26, 2024) (to be codified at 29 C.F.R. pt. 541) [hereinafter Final WHD Rule].

[276] Final ETA Rule, *supra* note 274, at 34043; Final WHD Rule, *supra* note 275, at 32888.

[277] *See supra* text accompanying notes 60–62.

1. ETA Rule

The ETA rule makes various changes to regulations implementing the Immigration and Nationality Act's H-2A program,[278] which provides a nonimmigrant visa for a worker "having a residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States to perform agricultural labor or services . . . of a temporary or seasonal nature."[279] In its notice of proposed rulemaking, the agency explained in the preamble that it proposed to make all provisions in the H-2A regulations severable from one another and sought public comment on the proposed severability language.[280] It also included severability clauses in two different parts of the proposed rule regulatory text:

> If any provision of this subpart is held to be invalid or unenforceable by its terms, or as applied to any person or circumstance, or stayed pending further agency action, the provision shall be construed so as to continue to give the maximum effect to the provision permitted by law, unless such holding is one of total invalidity or unenforceability, in which event the provision or sub-provision shall be severable from this subpart and shall not affect the remainder thereof.[281]

In ETA's final rule as well, the severability language was extensively discussed in the preamble in response to public comments, and adopted in the regulatory text with minor language edits.[282]

The agency received a variety of public comments on severability, which it used in the final rule to explain how different parts of the regulation could operate independently of one another.[283] For example, one commenter charged that no provision would be workable without the others because every provision was "intended to serve the same goal of improving protections for workers in temporary agricultural employment in the United States."[284] In response, ETA noted that while each of the regulation's provisions served the same goal, this was not dispositive of whether they could function sensibly without

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278 Final ETA Rule, *supra* note 274, at 33901.

279 8 U.S.C. § 1101(a)(15)(H)(ii)(a).

280 Improving Protections for Workers in Temporary Agricultural Employment in the United States, 88 Fed. Reg. 63750, 63773 (proposed Sept. 15, 2023) [hereinafter Proposed ETA Rule].

281 *Id.* at 63828, 63831.

282 Final ETA Rule, *supra* note 274, at 33952 (preamble); *id.* at 34065, 34068 (regulatory text).

283 *Id.* at 33952–53.

284 *Id.*

one another.[285] Many of the provisions, for instance, advanced the same goal through independent means.[286] As an example, ETA noted that various provisions "provide[d] layers of protection to prevent adverse effect[s]" upon workers, but did so separately.[287] For example, worker voice and empowerment provisions provided protections from employer retaliation and suppression against workers advocating for better working conditions, whereas disclosure requirement provisions provided better transparency for prospective workers being recruited by an employer.[288]

Another commenter raised a variety of challenges as to whether specific parts of the rule could operate independently. The agency effectively used its responses to make workability arguments.[289] For example, the commenter argued that striking down certain provisions—such as an exemption to paying workers who abandoned work or were terminated for cause—would create perverse incentives for workers if other provisions were upheld—namely, guaranteed payment for three-fourths of the workdays on a worker's contract.[290] In response, the agency noted that the language of the latter provision would be subject to "interpretation by an adjudicator" in any event and could be construed to guard against the possibility that the commenter raised.[291] In response to other provision-specific arguments raised by the commenter, the agency also explained that new parts of the regulation which merely supplemented, and did not amend, existing provisions functioned independently from one another: Activities that were "already protected by the existing regulations" did "not rely upon the existence of the other protected activities being added."[292]

After addressing the arguments against the severability language raised by the commenters, ETA was also careful to note that these were not exhaustive of its views on severability. Specifically, it noted that "although this preamble does not address every possible interrelationship between the various provisions included in this final rule, that does not imply that the Department believes that provisions not discussed are interdependent."[293]

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285 *Id.*
286 *Id.*
287 *Id.*
288 *Id.* at 33901–02, 33952–53.
289 *Id.* at 33952.
290 *Id.* at 33953.
291 *Id.*
292 *Id.*
293 *Id.*

2. *WHD Rule*

Like the ETA rule, the WHD rule adopted all four of the proposed best practices for meeting the two-pronged severability test. As noted above, the rule updated and revised regulations issued under FLSA regarding exemptions from minimum wage and overtime pay requirements for executive, administrative, professional, outside sales, and computer employees.[294] Among its revisions, the regulation increased the standard salary level for determining whether salaried workers fit under the exemption; increased the threshold for the highly compensated employee (HCE) test, allowing the agency to streamline certain exemption determinations; and added a mechanism for the timely and efficient updating of the standard and HCE salary thresholds.[295]

In its notice of proposed rulemaking, the agency explained in the preamble that it proposed to make all parts of the regulatory scheme severable from one another.[296] And it included a severability clause in the proposed regulatory text:

> If any provision of this part is held to be invalid or unenforceable by its terms, or as applied to any person or circumstance, or stayed pending further agency action, the provision must be construed so as to continue to give the maximum effect to the provision permitted by law, unless such holding be one of utter invalidity or unenforceability, in which event the provision will be severable from part 541 and will not affect the remainder thereof.[297]

Severability was also extensively discussed in the preamble of the final rule in response to public comments, and similar severability language appeared in the final rule's regulatory text as well.[298]

WHD received a number of public comments on the severability language.[299] Notably, a group of administrative law professors supported the inclusion of the language and provided some additional arguments as to how the rule would remain workable even if certain of its provisions were invalidated.[300] For example, the professors argued

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294 Final WHD Rule, *supra* note 275, at 32842.

295 *Id.* at 32842–43.

296 Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees, 88 Fed. Reg. 62152, 62180–81 (proposed Sept. 8, 2023) [hereinafter Proposed WHD Rule].

297 Proposed WHD Rule, *supra* note 296, at 62238.

298 Final WHD Rule, *supra* note 275, at 32885–87 (preamble); *id.* at 32971 (regulatory text).

299 *Id.* at 32885–86.

300 *Id.* at 32885.

that the "invalidation of the updating provision 'would have no bearing on the rationality or administrability of the standard salary and HCE salary thresholds'" set forth in the rule.[301] The professors further explained that in the event of the invalidation of either the standard salary level or the HCE salary threshold, the updating provision could function independently because "updating would simply take as the 2023 baseline the thresholds left in place from the 2019 rule."[302]

In contrast, some commenters representing employer interests opposed the proposed severability provision.[303] For example, one argued that a district court decision fully vacating an analogous 2016 rule demonstrated that the automated update provision and the minimal salary level provisions could not be severed.[304] In response, WHD explicitly adopted an argument from the administrative law professors, noting that "[i]f either of the new thresholds were vacated, the updating provision would simply use the existing methodologies set in the 2019 rule as the baseline for the update."[305] With this argument, the agency distinguished the updating provision of the proposed rule from that of the 2016 rule because the earlier rule depended on "specific methodologies set in that rule" and lacked methodologies to fall back on in case those were invalidated.[306]

Beyond addressing arguments raised by commenters, the WHD rule also included a number of WHD's own examples and explanations for how provisions of the regulation would be able to function separately from one another in the event a court invalidated some of them. For example, the agency explained in detail how the standard salary level under the new methodology operated independently of the new updating section or the revision to the HCE total compensation threshold.[307] The agency illustrated that if the latter two provisions were invalidated, the new salary level of $1,128 would still go into effect.[308] It noted that this standard salary level alone would work effectively to better define who is exempted from FLSA "by restoring the initial screening function that the salary level long fulfilled and adjusting the salary level to account" for the test used to determine these exemptions.[309]

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301 *Id.*
302 *Id.*
303 *Id.*
304 *Id.* at 32885–86.
305 *Id.* at 32886.
306 *Id.*
307 *Id.*
308 *Id.*
309 *Id.*

WHD provided similar explanations for how the increases to the HCE total compensation threshold and the standard salary level could operate in the event the other two main provisions were struck down. In each case, it outlined: (1) the effects of invalidating the two provisions on the remaining provisions, (2) the benefits the remaining provision would still provide, and (3) how these benefits would still serve the overall purposes of the regulation.[310]

In summary, both the ETA and WHD regulations provide strong examples of how agencies can implement the four best practices for regulatory severability. First, both included explicit indications in their preambles and regulatory text that their provisions were severable. Second, both provide explanations and examples for how the regulations' provisions could function independently of each other in the event any were invalidated—helping to demonstrate workability. Third, both rules included the severability language in their proposed rules that generated public comment on the question of severability. ETA and WHD were able to use these comments to fashion a number of arguments about the workability of various provisions in their rules. WHD even received arguments supporting workability from commenters, which it was able to deploy in responses to other comments calling the severability provision into question. And fourth, both agencies included severability language in the regulatory text of their proposed rules, providing adequate notice for issue waiver.

III
Regulatory Antecedents

A. Value

In *West Virginia v. EPA*,[311] the Supreme Court held that EPA lacked the authority to adopt the Clean Power Plan, the Obama-era regulation of the greenhouse gas emissions of power plants. The Court determined that EPA had "'claim[ed] to discover in a long-extant statute *an unheralded power*' representing a 'transformative expansion in [its] regulatory authority.'"[312] As a result, the Court found that "there is every reason to hesitate before concluding that Congress meant to confer on EPA the authority" to promulgate the Clean Power Plan.[313]

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310 *Id.* at 32886–87.

311 142 S. Ct. 2587 (2022).

312 *Id.* at 2610 (emphasis added) (quoting Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014)).

313 *Id.* at 2610 (internal citations omitted).

Whether the power an agency asserts is "unheralded" depends exclusively on whether the regulation has antecedents. The more robust the antecedents, the less unheralded the power.[314] The relevant inquiry therefore revolves around whether the agency action constitutes "a marked and substantial departure" from actions the agency had taken previously.[315]

Both Chief Justice Roberts's majority opinion and Justice Kagan's dissent directly engaged with the question of whether the Clean Power Plan was unheralded. But they came to a radically different conclusion on whether the handful of prior regulations that EPA had brought to the Court's attention were relevant antecedents for the Clean Power Plan. Chief Justice Roberts's majority opinion focused only on the one power plant regulation that had been promulgated under the same section of the Clean Air Act as the Clean Power Plan, and found that it was not analogous.[316] Justice Kagan strongly disagreed with the majority's narrow view of "novelty" and credited the relevance of five antecedents, including ones promulgated under different sections of the statute.[317] But regardless of how one resolves the dispute between Chief Justice Roberts's majority opinion and Justice Kagan's dissent on whether the Clean Power Plan had analogous antecedents, both opinions stand for the proposition that regulatory antecedents are an important factor in determining the validity of a regulation.[318]

Loper Bright provides further support for the relevance of regulatory antecedents. In that case, the Supreme Court repeatedly

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314 The Court first clearly articulated the connection between novelty and a major questions inquiry in Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2013) ("When an agency claims to discover in a long-extant statute an unheralded power to regulate 'a significant portion of the American economy,' . . . we typically greet its announcement with a measure of skepticism." (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000)); *see* Richard L. Revesz & Max Sarinsky, *Regulatory Antecedents and the Major Questions Doctrine*, 36 Geo. Env't L. Rev. 1, 3 (2023).

315 *See* Revesz & Sarinsky, *supra* note 314, at 3. For further academic commentary, see Todd Phillips & Beau J. Baumann, *The Major Questions Doctrine's Domain*, 89 Brook. L. Rev. 747, 766, 796, 799 (2024); Rachel Rothschild, *The Origins of the Major Questions Doctrine*, 100 Ind. L.J. 57, 131 (2024).

316 *See West Virginia v. EPA*, 142 S. Ct. at 2610.

317 *See id.* at 2639–40 (Kagan, J., dissenting) (citing Brief of Amicus Curiae Richard L. Revesz in Support of Federal, Non-Governmental Organization and Trade Association, Power Company, and State and Municipal Respondents at 24–29, West Virginia v. EPA, 597 U.S. 697 (2022) (No. 20-1530) (collecting and analyzing antecedents)).

318 *See id.* at 2640 (noting that, "just as established practice may shed light on the extent of power conveyed by general statutory language, so the want of assertion of power by those who presumably would be alert to exercise it, is equally significant in determining whether such power was actually conferred"); *id.* at 778 (Kagan, J., dissenting) ("I do not dispute that an agency's longstanding practice may inform a court's interpretation of a statute delegating the agency power.").

explained that two factors make it more likely for statutory interpretations by administrative agencies to be accorded respect. First, the interpretation must have been issued "roughly contemporaneously with the enactment of the statute."[319] And second, the interpretation must have "remained consistent over time"—that is, it must have had regulatory antecedents.[320] And when both factors appear together, the respect accorded to agency interpretations is even greater. The *Loper Bright* Court showed that these principles have long historical pedigree, spanning two centuries.

Quoting from the 1827 case of *Edwards' Lessee v. Darby*,[321] the Court explained that, "[i]n the construction of a doubtful and ambiguous law, the contemporaneous construction of those who were called upon to act under the law, and were appointed to carry its provisions into effect, is entitled to very great respect."[322] It also indicated that a court's determination of "what the law is" can be informed by "the longstanding practice of the government."[323] Similarly, invoking its 1944 decision in *Skidmore v. Swift & Co.*,[324] the Court noted that greater weight might be accorded to an agency's interpretation based on "its consistency with early and later pronouncements."[325] And, relying on the 1841 case of *United States v. Dickson*,[326] the Court added that respect for agency interpretations is "especially warranted" when both factors are present, that is, when the interpretations are "contemporaneous[]" and have "remained consistent over time."[327]

And, in March 2025, in its first case applying *Loper Bright*, the Supreme Court once again reaffirmed the relevance of regulatory antecedents. *Bondi v. VanDerStok* upheld the Biden administration's regulation of "ghost guns," which are firearms that individuals assemble from weapon parts kits.[328] As in *Loper Bright*, the Court explained that "the contemporary and consistent views of a coordinate branch of government can provide evidence of the law's meaning" and found

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319 Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2258 (2024).

320 *See id.*; *see also infra* text accompanying notes 322–30.

321 25 U.S. 206, 210 (1827).

322 *Loper Bright*, 144 S. Ct. at 2257 (2024); *see id.* at 2259 (noting that "an interpretation issued contemporaneously" with a statute's enactment could then "be entitled to great weight" (internal quotations omitted)).

323 *Id.* at 2258.

324 323 U.S. 134, 140 (1944).

325 *Loper Bright*, 144 S. Ct. at 2259.

326 40 U.S. 141, 161 (1841).

327 *Loper Bright*, 144 S. Ct. at 2258; *see id.* at 2262 ("And interpretations issued contemporaneously with the statute at issue, and which have remained consistent over time, may be especially useful in determining the statute's meaning.").

328 145 S. Ct. 857, 864–65 (2025).

that, "for decades," the agency had "consistently interpreted" the relevant statutory provision to apply to unfinished gun components.[329] Importantly, the antecedents on which the court relied extend back to 1990, and not to the time of the statute's passage in 1968. *VanDerStok* therefore stands for the proposition that prior consistent practice, even if it is not contemporaneous with the passage of the statute, is sufficient to defeat the novelty arguments that are at the core of "unheralded power" inquiries.[330]

B. Trends

Since the Supreme Court's decision in *West Virginia v. EPA*, a few trends have emerged concerning how agencies seek to be as prepared for major questions challenges as possible by invoking regulatory antecedents for their actions. First, agencies are increasingly discussing regulatory antecedents when addressing the applicability of the major questions doctrine to their rules. Second, while final rules discussing regulatory antecedents have become more common, few proposed rules are doing so. Third, this trend began only in 2022, when *West Virginia v. EPA* was decided (and accelerated in 2023 and 2024), even though the Supreme Court had made the relevance of antecedents clear at least as far back as its decision in *Utility Air Regulatory Group v. EPA* in 2014.[331]

Given the interrelatedness of the Supreme Court's concern with the major questions doctrine and its increased scrutiny of regulatory antecedents, looking at proposed and final rules that directly mention the major questions doctrine can provide useful information on the attention that agencies are paying to antecedents.[332] Among all proposed and final rules published in the Federal Register through the end of the Biden administration, 75 mention the "major questions

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329 *Id.* at 873–74.

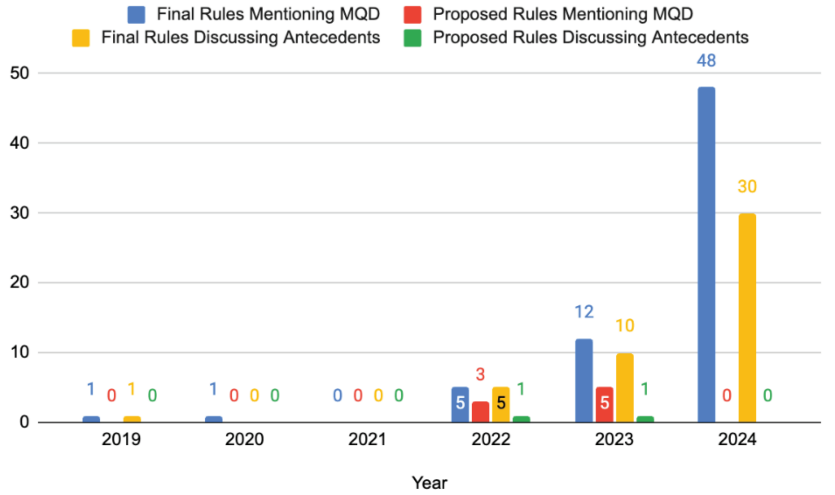
330 *See supra* text accompanying notes 315–18.

331 573 U.S. 302, 324 (2014).

332 Rules do not always mention the major questions doctrine when discussing regulatory antecedents. *See, e.g.*, Revised Definition of "Waters of the United States," 88 Fed. Reg. 3004, 3021 (Jan. 18, 2023) (to be codified at 40 C.F.R. pt. 120). However, collecting data on all rules that discuss antecedents is impracticable because agencies have not historically used standardized language to discuss antecedents. *Compare id.* (discussing antecedents in terms of "longstanding interpretation" and "practice"), *with* Retirement Security Rule: Definition of an Investment Advice Fiduciary, 89 Fed. Reg. 32122, 32175 (Apr. 25, 2024) (to be codified at 29 C.F.R. pt. 2510) (discussing antecedents by noting that the rule "builds on an extensive and continuous history" of regulation). But agencies appear to have begun to standardize discussion of regulatory antecedents when they explicitly reference the major questions doctrine. These references are collected here.

doctrine" or "major question doctrine" in their preambles.[333] While not all of these rules discuss regulatory antecedents,[334] many do. The year-by-year data is displayed below in Figure 8 in four data sets: published final rules that mention the major questions doctrine; proposed rules that mention the doctrine; final rules that mention the doctrine and discuss antecedents; and proposed rules that mention the doctrine and discuss antecedents.[335]

FIGURE 8. RULES MENTIONING "MAJOR QUESTIONS DOCTRINE" AND DISCUSSING ANTECEDENTS BY YEAR



[333] This data was collected through Westlaw's Federal Register using the following search logic: adv: ("major questions doctrine" "major question doctrine"). *See Federal Register – All*, *supra* note 238; *Search with Terms and Connectors*, *supra* note 238 (explaining Westlaw's search logic). Non-regulations like executive orders were filtered out of the search results by selecting only "Proposed Regulations" and "Adopted Regulations." An alternative search was also run for rules that mention "major questions" or "major question," given that agencies can discuss the major questions doctrine with this shorter phrase. However, the data from this search was not used due to its over-inclusivity. More often than not, "major questions" is a phrase used in rules for purposes unrelated to the major questions doctrine.

[334] *See, e.g.*, Overdraft Lending: Very Large Financial Institutions, 89 Fed. Reg. 106768, 106819–20 (Dec. 30, 2024) (to be codified at 12 C.F.R. pts. 1005, 1026) (arguing the major questions doctrine does not apply when removing an exception from a pre-existing rule).

[335] This data was collected by manually reviewing the 75 regulations returned in the search performed in note 333, *supra*, and counting those which discussed regulatory antecedents. Years were indexed beginning on January 20 and ending on January 19 of the following year to correspond to turnovers in presidential administrations, which occur on January 20 (or January 21 if the 20th falls on a Sunday in a given year).

The earliest appearance of the phrase "major questions doctrine"[336] in the Federal Register was in a 2019 EPA rule repealing the Clean Power Plan.[337] All but one other rule mentioning the doctrine were published after the Supreme Court's decision in *West Virginia v. EPA* on June 30, 2022. Indeed, in 2022, the first proposed or final rule mentioning the doctrine was not published until August 22 of that year.[338] Figure 8 shows that, since then, there has been a steady increase in the total number of proposed and final rules which mention the doctrine each year: The 17 such regulations in 2023 were more than double the number in 2022, and the 48 published in 2024 were almost triple the number in 2023. These successive increases line up with Supreme Court case law during the same period, which placed increasing emphasis on the requirement that new rules be consistent with their regulatory antecedents.[339]

Final rules that mentioned the major questions doctrine and included analysis of regulatory antecedents show the same upward trend. In 2022, only 5 final rules did so; that number doubled to 10 in 2023; and that number in turn tripled to 30 in 2024. Again, these successive increases are consistent with successive Supreme Court cases heightening scrutiny of regulatory antecedents during the same time period.[340]

Qualitatively, later rules in this time frame appear to discuss regulatory antecedents in greater depth than earlier rules.[341] For example, a final FTC rule published in January 2025[342] devotes an entire section to addressing the major questions doctrine and a full subsection to discussing regulatory antecedents.[343] This quantitative and qualitative increase accords with a previously suggested best practice

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336 *West Virginia v. EPA* was the first time that the Supreme Court mentioned the phrase "major questions doctrine." *See* Deacon & Litman, *supra* note 269, at 1013. However, the Court had previously mentioned "major questions" in the context of regulatory authority. *See* FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000) (quoting Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 Admin. L. Rev. 363, 370 (1986)). For reasons mentioned above, however, this search was limited to rules which mentioned the full name of the doctrine. *See supra* note 333.

337 *See* Repeal of the Clean Power Plan, 84 Fed. Reg. 32520, 32529 (July 8, 2019) (to be codified at 40 C.F.R. pt. 60).

338 Trade Regulation Rule on Commercial Surveillance and Data Security, 87 Fed. Reg. 51273, 51290 (proposed Aug. 22, 2022).

339 *See supra* Section III.A.

340 *See id.*

341 *See also infra* Section III.C for a case study of a rule with robust discussion of regulatory antecedents.

342 Rules published before January 20, 2025 were included in the 2024 data in Figure 8 because they were promulgated under the Biden administration. *See supra* note 335 (discussing methodology for indexing years in data by presidential terms).

343 Trade Regulation Rule on Unfair or Deceptive Fees, 90 Fed. Reg. 2066, 2108–09 (Jan. 10, 2025) (to be codified at 16 C.F.R. pt. 464).

to lower litigation risk in response to the major questions doctrine, which is to include more extensive analysis of regulatory antecedents in final rules.[344] In contrast, many earlier final rules in this period discuss regulatory antecedents with brief, more conclusory sentences.[345]

A further best practice suggested in prior scholarship is to include analysis of regulatory antecedents in proposed rules, not just final ones.[346] Doing so allows agencies to refine their presentation of regulatory antecedents in the final regulation by rebutting counterarguments about the antecedents raised by antagonistic commentors, adding antecedents identified by supportive commenters, or expanding analysis of particular antecedents in response to targeted objections.[347] Figure 8 reveals, however, that of the 75 regulations that mention the doctrine since 2019, only eight were proposed rules. Of these eight, only two contain analyses of regulatory antecedents[348]: a pair of proposed EPA rules promulgated under the Clean Air Act that discuss regulatory antecedents to distinguish themselves from the Clean Power Plan struck down in *West Virginia v. EPA*.[349] And the final versions of both these proposed rules similarly contain robust discussion of regulatory antecedents, having refined and expanded the analyses in response to public comment.[350] Thus, these two rules showcase the advantage of referring to antecedents in proposed rules.

The other six proposed rules that mention the doctrine denied its applicability either in response to comments raised during the pre-proposal formation period[351] or in questions to solicit comments

344 *See* Revesz & Sarinsky, *supra* note 314, at 36–37.

345 *See, e.g.*, Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights, 87 Fed. Reg. 73822, 73855 (Dec. 1, 2022) (to be codified at 29 C.F.R. pt. 2550) (addressing the regulatory antecedent question only by noting that the agency has "for decades" issued guidance rules that were consistent with the final legislative rule). The brevity of discussion of regulatory antecedents in earlier rules mentioning the major questions doctrine has likewise been noted in prior scholarship. *See* Revesz & Sarinsky, *supra* note 314, at 16.

346 *See* Revesz & Sarinsky, *supra* note 314, at 32–36.

347 *See id.* at 36; *see also supra* text accompanying notes 219–27 (explaining how adding severability language in a proposed rule has similar benefits).

348 *See* New Source Performance Standards for Greenhouse Gas Emissions from New, Modified, and Reconstructed Fossil Fuel-Fired Electric Generating Units, 88 Fed. Reg. 33240, 33269–72 (proposed May 23, 2023); Adoption and Submittal of State Plans for Designated Facilities: Implementing Regulations Under Clean Air Act Section 111(d), 87 Fed. Reg. 79176, 79207–08 (proposed Dec. 23, 2022).

349 *See supra* text accompanying notes 311–13.

350 *See* Greenhouse Gas Rule, *supra* note 67, at 39824–32, 39899–901; Adoption and Submittal of State Plans for Designated Facilities: Implementing Regulations Under Clean Air Act Section 111(d), 88 Fed. Reg. 80480, 80533–38 (Nov. 17, 2023) (to be codified at 40 C.F.R. pt. 60).

351 *See, e.g.*, Energy Conservation Program: Energy Conservation Standards for Consumer Boilers, 88 Fed. Reg. 55128, 55179 (proposed Aug. 14, 2023) (responding to an interviewed stakeholder's comment).

about the doctrine's applicability.[352] While none of these six include significant regulatory antecedent analysis, the final-rule versions for four of them do analyze regulatory antecedents rather robustly.[353] In this connection, while the first-best practice for proposed rules is to include robust discussion of regulatory antecedents, where agencies believe that opponents will invoke the major questions doctrine, they should at least either explicitly deny that the doctrine applies or pose questions to solicit comments on the doctrine's applicability. By doing so, an agency will at least be able to generate public comments that it can use to frame its analysis of regulatory antecedents in the final rule,[354] just as the agencies did in these instances.

While the Court has grounded the requirement that regulations be consistent with their antecedents in longstanding precedent,[355] data suggests that agencies did not respond to previous decisions pertaining to regulatory antecedents. For instance, one of the progenitor cases to *West Virginia v. EPA*'s major questions doctrine was *Utility Air Regulatory Group v. EPA* (*UARG*),[356] decided on June 23, 2014. In *UARG*, the Court invalidated an EPA regulation in part because the agency had not promulgated any similar regulations using the statutory authority it was then using to promulgate its rule—in other words, the new rule lacked any regulatory antecedents.[357] That portion of *UARG* was later quoted by the Court in *West Virginia v. EPA* to justify the major questions doctrine and its regulatory antecedent requirement.[358]

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352 *See, e.g.*, Safeguarding and Securing the Open Internet, 88 Fed. Reg. 76048, 76062 (proposed Nov. 3, 2023) (soliciting comment on the applicability of the major questions doctrine to the proposed rule).

353 *See* Safeguarding and Securing the Open Internet, 89 Fed. Reg. 45404, 45456–57 (May 22, 2024) (to be codified at 47 C.F.R. pts. 8, 20); Non-Compete Clause Rule, 89 Fed. Reg. 38342, 38353–54 (May 7, 2024) (to be codified at 16 C.F.R. pts. 910, 912). Two proposed rules shared the same final rule, with significant antecedent analysis. *See* Trade Regulation Rule on Unfair or Deceptive Fees, 90 Fed. Reg. 2066, 2108–09 (Jan. 10, 2025) (to be codified at 16 C.F.R. pt. 464). And another proposed rule was never finalized. *See* Trade Regulation Rule on Commercial Surveillance and Data Security, 87 Fed. Reg. 51273 (proposed Aug. 22, 2022).

354 *See* Revesz & Sarinsky, *supra* note 314, at 36 (arguing that public comments can be used to refine presentation of regulatory antecedents in the final regulation when an agency considers objections raised by commenters).

355 *See supra* text accompanying notes 320–27.

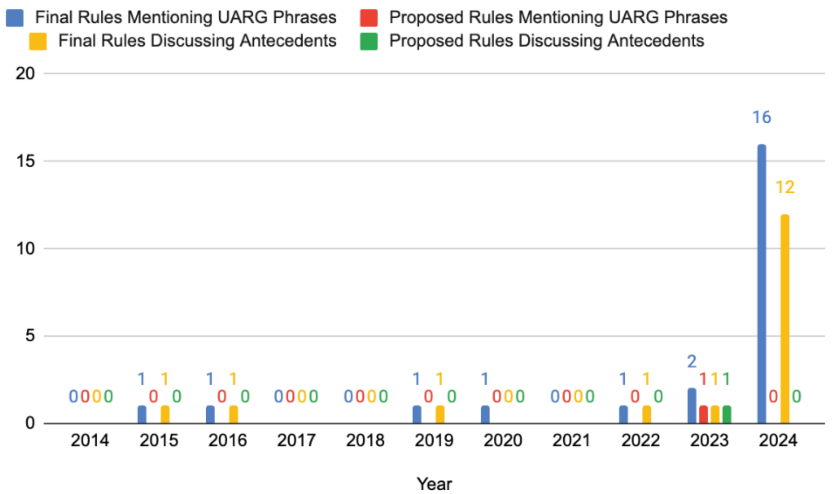
356 573 U.S. 302 (2014); *see* Mila Sohoni, *The Major Questions Quartet*, 136 Harv. L. Rev. 262, 270–74 (2022) (discussing *UARG*).

357 *Id.* at 324 ("EPA's interpretation is also unreasonable because it would bring about an enormous and transformative expansion in EPA's regulatory authority . . . . When an agency claims to discover in a long-extant statute an unheralded power to regulate . . . we typically greet its announcement with a measure of skepticism.").

358 142 S. Ct. 2587, 2624 (2022).

Certain phrases from *UARG* relevant to regulatory antecedents are repeatedly quoted in later cases (including *West Virginia v. EPA*)[359] to target rules that mark a "transformative expansion" in an agency's regulatory authority or assert an "unheralded power" from a "long-extant statute."[360] At least one of these three phrases is mentioned in the preambles of 24 proposed and final rules published in the Federal Register since *UARG* was decided.[361] However, only two of these rules were published within the two years succeeding the *UARG* decision. In contrast, almost all of the rules, twenty, were published after the *West Virginia v. EPA* decision in 2022.[362] Year-by-year data on these rules is collected in Figure 9 in four sets: all published final rules that mention at least one of the *UARG* phrases; all proposed rules that do so; all final rules that mention at least one of the phrases and discuss regulatory antecedents; and all proposed rules that do so.

FIGURE 9. RULES MENTIONING *UARG* PHRASES AND DISCUSSING ANTECEDENTS BY YEAR



359 *See* Revesz & Sarinsky, *supra* note 314, at 13 n.77 (collecting cases).

360 *Util. Air Regul. Grp.*, 573 U.S. at 324, 328.

361 This data was collected through a search of Westlaw's Federal Register database of all published proposed and final regulations with the following search logic: adv: ("transformative expansion" "unheralded power" "long-extant statute"). *See Federal Register – All*, *supra* note 238; *Search with Terms and Connectors*, *supra* note 238 (explaining Westlaw's search logic).

362 *See* Figure 9. This data was collected by manually reviewing the 25 regulations returned in the Westlaw Federal Register search performed in note 361, *supra*, and counting those which discussed regulatory antecedents. Years were indexed beginning on January 20 and ending on January 19 of the following year to correspond to turnovers in presidential administrations, which occur on January 20 (or January 21 if the 20th falls on a Sunday in a given year).

Figure 9 shows that only four rules, all final ones, between the Court's 2014 decision in *UARG* and 2022 decision in *West Virginia v. EPA* discuss the language from *UARG* pertaining to regulatory antecedents.[363] With less than a handful of exceptions, agencies did not respond to *UARG* by addressing in their rules the phrases from the case that could call some regulations into question. And to reiterate, during this period, there are no references to any of the three *UARG* phrases in any proposed rules.

Three of the four rules predating the 2022 decision in *West Virginia v. EPA* and mentioning the *UARG* phrases included a discussion of regulatory antecedents. But these numbers are strikingly small when compared to the 48 rules pictured in Figure 8 that discussed regulatory antecedents and the major questions doctrine after 2022. So even though the Court's emphasis on the importance of regulatory antecedents was not entirely novel by the time *West Virginia v. EPA* was decided, agencies only began paying attention to the issue after this decision.

As Figure 9 shows, following the Supreme Court's decision in *West Virginia v. EPA*, reference to at least one of the *UARG* phrases—the relevance of all of which the Supreme Court reaffirmed[364]—appears in two final rules promulgated in 2023 and in 16 final rules promulgated in 2024. Thus, by 2024, agencies were taking the benefits of discussing antecedents in their regulatory materials more seriously. But even after *West Virginia v. EPA*, only one proposed rule refers to at least one of the *UARG* phrases,[365] underscoring the point that agencies are failing to avail themselves of the advantages that early discussion of antecedents could provide.[366]

In summary, the empirical work in this Section shows that agencies are increasingly discussing the major questions doctrine in their rules and increasingly discussing regulatory antecedents when addressing the doctrine. These increases, however, seem to be limited to final rules, with discussions of regulatory antecedents in proposed rules lagging far behind. Finally, despite prior Supreme Court decisions such as *UARG*, which struck down regulations for their novelty, agencies appear to have responded only to *West Virginia v. EPA* and subsequent decisions. And they began doing so much more extensively in 2024 than they had in 2023.

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363 Prior commentators had reached the same conclusion. *See* Revesz & Sarinsky, *supra* note 314, at 16 ("[A]s of November 2022, agencies have explicitly discussed . . . 'unheralded power,' and related phrases on just a handful of occasions.").

364 *See supra* text accompanying notes 311–20.

365 New Source Performance Standards for Greenhouse Gas Emissions from New, Modified, and Reconstructed Fossil Fuel-Fired Electric Generating Units, 88 Fed. Reg. 33240, 33270 (proposed May 23, 2023) (using the phrase "transformative expansion").

366 *See supra* text accompanying notes 346–47.

C. Case Study

An important Securities and Exchange Commission (SEC) rule requiring registered companies to provide detailed disclosure of their climate-related risks, including their greenhouse gas emissions, provides a good example of how agencies improved their consideration of regulatory antecedents between 2022, when the rule was proposed,[367] and 2024, when it was finalized.[368] As this Section shows, the discussion of antecedents was cryptic in the proposed rule but far more robust in the final rule.

At the time of the proposal, the dissenting commissioner argued that the rule, which she believed strayed from the SEC's standard financial disclosure requirements, involved the assertion of "an unheralded power."[369] Such an assertion could have made the rule run afoul of the line of cases that acquired prominence starting with the Supreme Court's 2014 decision in *UARG* and culminating in *West Virginia v. EPA*,[370] which was decided two months after the publication of the proposed rule and almost two years before the publication of the final rule. The SEC could have answered this challenge, posed by one of its own members, by providing a detailed discussion of the regulatory antecedents for various aspects of the rule, as it did in the final rule. Instead, the discussion in the proposed rule was cursory and commentators criticized it on these grounds.[371]

The discussion of regulatory antecedents in the proposed rule was mostly confined to a four-paragraph background section, which primarily discussed two antecedents involving the required disclosure

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367 The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. 21334, 21382–83 (proposed Apr. 11, 2022) [hereinafter Proposed Climate Disclosure Rule].

368 The Enhancement and Standardization of Climate-Related Disclosures for Investors, 89 Fed. Reg. 21668, 21732–37 (May 28, 2024) (to be codified at 17 C.F.R. pts. 210, 229–30, 232, 239, 249) [hereinafter Final Climate Disclosure Rule]. The Trump administration recently decided not to defend this rule in litigation. Andrew Ramonas, *SEC Ends Defense of Climate Disclosure Rules in Litigation*, Bloomberg L. (Mar. 27, 2025), https://www.bloomberglaw.com/product/blaw/bloomberglawnews/environment-and-energy/BNA%2000000195-d913-d0ac-a395-ff13395e0001 [https://perma.cc/A4N7-R8EE].

369 *See* Hester M. Peirce, Comm'r, Sec. and Exch. Comm'n, We Are Not the Securities and Environment Commission – At Least Not Yet (Mar. 21, 2022), https://www.sec.gov/newsroom/speeches-statements/peirce-climate-disclosure-20220321 [https://perma.cc/A4N7-R8EE] (arguing that, unlike the proposed rule "[c]urrent SEC disclosure mandates are intended to provide investors with an accurate picture of the company's present and prospective performance through managers' own eyes," and suggesting, citing *UARG*, that the agency is asserting an "unheralded power").

370 *See supra* Section III.A.

371 *See* Revesz & Sarinsky, *supra* note 314, at 5, 20.

of certain environmental risks.[372] First, in the 1970s and early 1980s, the SEC issued interpretative releases and a regulation requiring disclosure of "litigation and other business costs arising out of compliance with federal, state, and local laws that regulate the discharge of materials into the environment or otherwise relate to the protection of the environment."[373] Second, the SEC relied on a guidance document issued in 2010 in which it noted that companies voluntarily disclosing climate-related information "should be aware" that they may be required to disclose some of this information in SEC filings as well.[374]

In contrast, the discussion of antecedents in the final rule was far more robust. The SEC devoted to this matter a new four-page section, "Commission Authority to Adopt Disclosure Rules."[375] At the outset, the SEC noted that "[t]he Commission has amended its disclosure requirements dozens of times over the last 90 years based on the determination that the required information would be important to investment and voting decisions."[376]

The SEC also strengthened the discussion of environmental antecedents, making it clear that its required disclosures of various environmental matters spanned "the past 50 years."[377] And, in addition to the two environmental examples discussed in the proposed rule, it added another: a 2020 action in which the SEC amended its disclosure rules to require "disclosure of the material effects that compliance with government regulations, *including environmental regulations*, may have upon the capital expenditures, earnings, and competitive position of the registrant and its subsidiaries" when such disclosure is "material to an understanding of the business taken as a whole."[378]

Also, in discussing several non-environmental, non-financial analogies, it highlighted perhaps the oldest antecedent. In 1933, when the Federal Trade Commission was still empowered to administer the Securities Act, it required disclosure of information "important to investor decision-making," including "a statement of all litigation that may materially affect the value of the security to be offered."[379]

To further support the final rule's disclosure requirement for climate-related risks, the SEC highlighted previous requirements on firms to provide information on material risks facing registrants,

372 *See* Proposed Climate Disclosure Rule, *supra* note 367, at 21337–38.
373 *Id.* at 21338.
374 *Id.*
375 Final Climate Disclosure Rule, *supra* note 368, at 21683–87.
376 *Id.* at 21683–84.
377 *Id.* at 21670.
378 *Id.* at 21685 (emphasis added).
379 *Id.* at 21684.

thereby underscoring that risks faced by companies are relevant to investors regardless of the nature of the risks. The SEC referred to its "longstanding view that understanding the material risks faced by a registrant and how the registrant manages those risks can be just as important to assessing its business operations and financial condition as knowledge about its physical assets or material contracts."[380]

For example, the SEC pointed to a 1982 rule in which it had required registrants to disclose "Risk Factors"—that is, "discussion of the material factors that make an investment in the registrant or offering speculative or risky."[381] And, in 1997, it required the disclosure of quantitative information about market risks.[382] As examples of relevant risks, the SEC referred to "interest rate risk, foreign currency exchange rate risk, commodity price risk, and other relevant market risks, such as equity price risk,"[383] thereby stressing the breadth of the requirement.

The SEC also referred to several other rules requiring that registrants disclose the specific elements and impacts of particular risks they face, including material legal proceedings.[384] And, in 2009, it required disclosure of the board's role in the registrant's risk oversight.[385]

The SEC's final climate disclosure rule published in 2024 amended Regulation S-X, which prescribes the requirements for companies' financial statements,[386] to require the disclosure of certain climate-related metrics.[387] As relevant antecedents, the SEC referred to the numerous prior amendments to Regulation S-X and noted its prior determination that the additional requirements covered by these amendments had been responsive to the information needs of investors.[388]

The SEC also discussed relevant antecedents to support the final climate disclosure rule's amendment to Regulation S-K, which prescribes the narrative disclosure requirements for registrants' periodic filings with the SEC. The amendments required discussion of how material climate-related risks have affected or are reasonably likely to affect the registrant's consolidated financial statements.[389] In this connection,

380 *Id.*
381 *Id.*
382 *See id.*
383 *Id.*
384 *See id.*
385 *See id.*
386 *See id.* at 21780.
387 *See id.* at 21685–86.
388 *Id.* at 21686.
389 *See id.* at 21780.

the SEC pointed to several prior rules requiring narrative explanations of a number of other aspects of the registrant's business.[390]

In summary, the SEC in its final rule did not only provide a more extensive discussion of the environmental antecedents for the rule. It also pointed to its longstanding regulations that had imposed requirements for companies to disclose information that is relevant to investors but not directly related to its financial information. The SEC also disaggregated various components of the rule, including specific requirements for financial statement and narrative disclosures, providing relevant line antecedents for each.

Conclusion

This Article has highlighted some important ways in which the Executive Branch, beginning in 2023 and accelerating in 2024, responded to the significant hurdles in the path of regulation. By moving a significantly greater proportion of the administration's policy priorities earlier into the last year of the president's term, the Biden administration was able to protect them from CRA disapprovals and conduct at least part of the legal defense when the regulations were challenged. And it paid significantly greater attention to severability and regulatory antecedents as part of its design to increase the legal resilience of its regulatory initiatives.

But significant work remains to be done on these fronts. At the end of the Biden administration, litigation on the priority rules had not yet been completed, thereby making it easier for the Trump administration to undo them. Fully addressing this issue would require a large-scale restructuring on how presidential transitions are organized, so that incoming administrations can hit the ground running on the regulatory front. And, with respect to severability and regulatory antecedents, agencies frequently addressed these issue for the first time in their final rules, thereby foregoing the considerable benefits that would attach to doing so in the proposed rules as well.

Cynics might wonder whether, given judicial hostility to regulation, the measures that the Biden administration undertook to make its rules more resilient to legal challenges will end up having their intended effect. In this connection, the poor record of the first Trump administration in defending its deregulatory measures in court,[391]

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390 *See id.* at 21696.

391 *See Roundup: Trump Era Agency Policy in the Courts*, Inst. for Pol'y Integrity (2021), https://policyintegrity.org/trump-court-roundup [https://perma.cc/P6WW-R4JF]; *see also* Dimenstein, Goodson & Szeto, *supra* note 35 (manuscript at 25–28) (studying rules that are "major" under the CRA).

even late in the term when the composition of the judiciary was most favorable because of the administration's many judicial appointments, should provide some solace. As should the fact that the Supreme Court, even with its full complement of Trump-appointed Justices, dealt the Trump administration a significant blow at the end of its first term,[392] which might be a harbinger of how the Court deals with some of the Trump administration's second-term deregulatory measures.

The proposition that careful work by agencies is likely to increase the resilience of regulations is further supported by an example that has gotten virtually no attention. As discussed at the outset of this Article, an early case in which the Supreme Court began imposing additional hurdles in the path of regulation was *Michigan v. EPA*.[393] For quite a long time, it looked like the hurdles would never be overcome. Following the Court's decision, the Obama-era EPA reissued the determination that the regulation of hazardous air pollutant emissions from power plants was "appropriate and necessary" under section 112(n) of the Clean Air Act.[394] The ensuing litigation was pending at the beginning of the Trump administration,[395] which eventually repealed the "appropriate and necessary" determination.[396] The suit challenging this repeal was then pending when President Biden took office.[397] The Biden administration in turn reissued the "appropriate and necessary" determination.[398] But it provided significantly more analytical support for the determination, particularly with respect to benefits that cannot

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392 *See* Dep't of Com. v. New York, 139 S. Ct. 2551, 2575–76 (2019) ("[T]he decision to reinstate a citizenship question cannot be adequately explained in terms of DOJ's request for improved citizenship data to better enforce the VRA.") (blocking use of citizenship question in 2020 census).

393 *See supra* text accompanying notes 25–27.

394 *See* Supplemental Finding That It Is Appropriate and Necessary to Regulate Hazardous Air Pollutants from Coal- and Oil-Fired Electric Utility Steam Generating Units, 81 Fed. Reg. 24420 (Apr. 25, 2016) (to be codified at 40 C.F.R. pt. 63).

395 *See Polluters Continue Legal Challenges over Mercury and Air Toxics Standards*, Env't Def. Fund (Apr. 25, 2016), https://www.edf.org/media/polluters-continue-legal-challenges-over-mercury-and-air-toxics-standards [https://perma.cc/5VVA-XGZZ] (discussing filing of the action); *Mercury and Air Toxics Standards*, Env't & Energy L. Program at Harv. L., https://eelp.law.harvard.edu/tracker/mercury-and-air-toxics-standards [https://perma.cc/SF6A-CCWN] (last updated Oct. 4, 2024) (discussing Trump administration's successful abeyance).

396 *See* National Emission Standards for Hazardous Air Pollutants: Coal- and Oil-Fired Electric Utility Steam Generating Units: Reconsideration of Supplemental Finding and Residual Risk and Technology Review, 85 Fed. Reg. 31286, 31299 (May 22, 2020) (to be codified at 40 C.F.R. pt. 63).

397 *See Mercury and Air Toxics Standards*, *supra* note 395 (discussing abeyance).

398 National Emission Standards for Hazardous Air Pollutants: Coal- and Oil-Fired Electric Utility Steam Generating Units—Revocation of the 2020 Reconsideration and Affirmation of the Appropriate and Necessary Supplemental Finding, 88 Fed. Reg. 13956 (Mar. 6, 2023) (to be codified at 40 C.F.R. pt. 63).

be quantified or monetized, than the Obama administration had done.[399] This time, despite the prior decade of litigation, the "appropriate and necessary" determination was not even challenged.[400] And this was not because such a challenge would have outlived its usefulness. Indeed, a successful challenge would have been fatal for a then-pending rule that relied on the "appropriate and necessary" determination in seeking to regulate hazardous air pollutant emissions from power plants,[401] and that was itself vigorously opposed by twenty-three states and multiple industry groups when ultimately finalized.[402] But the expanded analytical support made the Biden administration's underlying "appropriate and necessary" determination resilient to legal challenge.

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399 *Compare* National Emission Standards for Hazardous Air Pollutants: Coal- and Oil-Fired Electric Utility Steam Generating Units—Revocation of the 2020 Reconsideration and Affirmation of the Appropriate and Necessary Supplemental Finding, 88 Fed. Reg. at 13980–88 (Biden final rule containing nine pages of analytical support), *with* Supplemental Finding That It Is Appropriate and Necessary to Regulate Hazardous Air Pollutants from Coal- and Oil-Fired Electric Utility Steam Generating Units, 81 Fed. Reg. at 24426–27 (Obama final rule containing two pages of analytical support).

400 *See Mercury and Air Toxics Standards*, *supra* note 395.

401 *See* National Emission Standards for Hazardous Air Pollutants: Coal- and Oil-Fired Electric Utility Steam Generating Units Review of the Residual Risk and Technology Review, 88 Fed. Reg. 24854 (proposed Apr. 24, 2023); Kipper Berven, *EPA Reaffirms It Is Appropriate and Necessary to Limit Hazardous Air Pollution from Power Plants*, Env't & Energy L. Program at Harv. L. (Apr. 13, 2023), https://eelp.law.harvard.edu/epa-reaffirms-it-is-appropriate-and-necessary-to-limit-hazardous-air-pollution-from-power-plants [https://perma.cc/T2XK-UJ5A] ("EPA's recent reaffirmed appropriate and necessary finding has important legal significance. This determination provides the foundation for EPA's evaluation of whether to propose new, more stringent [hazardous air pollutant] emission standards for power plants, which EPA subsequently proposed [in an unofficial early publication] on April 5, 2023.").

402 Hazardous Air Pollutants Rule, *supra* note 68, *stay denied*, North Dakota v. EPA, No. 24-1119, 2024 WL 3730667 (D.C. Cir. Aug. 6, 2024), *stay denied*, NACCO Nat. Res. Corp. v. EPA, 145 S. Ct. 120 (mem.) (2024); *see also Mercury and Air Toxics Standards*, *supra* note 395 (discussing unsuccessful state and private attempts to stay rule).