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## **Administrative Reliance**

Haiyun Damon-Feng

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# ADMINISTRATIVE RELIANCE

HAIYUN DAMON-FENG<sup>†</sup>

## ABSTRACT

*Presidential regime change and the federal policy shifts that accompany it raise significant questions concerning continuity, stability, and governance in the administrative state. Presidential policymaking through the administrative state may generate serious reliance interests recognized under administrative law (what this Article calls “administrative reliance”), which agencies must consider prior to enacting policy change. Administrative reliance has developed into a robust form of judicial review over agency action. Administrative reliance has been invoked in highly politicized contexts, such as immigration law, to challenge a sitting administration’s termination of a prior administration’s policies. Despite its powerful and consequential effects, the doctrine of administrative reliance has been underdeveloped by the courts and underexplored in legal scholarship. The resulting confusion allows partisan litigants—including States—to effectively veto federal policy change and allows the judiciary to subsume policymaking power traditionally wielded by the executive branch.*

*This Article fills an important gap in the literature and begins to present a coherent understanding of administrative reliance. It provides the first in-depth account of the doctrine’s development and evolution, and it looks to the doctrine’s history to identify what values administrative reliance seeks to protect. This Article argues that courts*

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*should adopt a threshold inquiry to focus administrative reliance-based review in a way that adheres to these values, and that privileges reliance-based claims asserting concrete expectations arising from rights, statuses, or benefits previously granted through agency action.*

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#### INTRODUCTION

During oral arguments for *Department of Homeland Security v. Regents of the University of California*,<sup>1</sup> Justice Stephen Breyer pressed

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1. Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891 (2020).

Solicitor General Noel Francisco to show how the Department of Homeland Security (“DHS”) had considered the multitude of reliance interests at stake in the department’s decision to terminate the Deferred Action for Childhood Arrivals (“DACA”) program.<sup>2</sup> Justice Breyer questioned how DHS Secretary Kirstjen Nielsen’s one-sentence acknowledgment that she was “keenly aware that DACA recipients” had availed themselves of the policy in “pursuing their lives”<sup>3</sup> adequately accounted for the reliance interests of the 700,000 DACA recipients, 66 healthcare organizations, 3 labor unions, 210 educational associations, 6 military organizations, 3 home buildings, 5 states, 108 municipalities and cities, 129 religious organizations, and 145 businesses that had come forward during the course of the litigation.<sup>4</sup> The solicitor general’s response, that the secretary’s cursory acknowledgment of reliance was all that the Administrative Procedure Act (“APA”) required, proved to be unpersuasive.<sup>5</sup>

Ultimately, a majority of the Court agreed that DHS had failed to give due consideration to the DACA recipients’ reliance interests in the program before taking steps to terminate it, making the termination decision arbitrary and capricious under the APA.<sup>6</sup> Since *Regents*, lower courts have recognized an expansive array of reliance interests—including States’ general economic interests in an existing regulatory regime—to invalidate a range of agency action.<sup>7</sup> These courts have read *Regents* as permitting judicial review of virtually any State-sponsored challenge to federal policy change, distorting what interests or values reliance interest claims are meant to protect, usurping executive and federal administrative power, and delaying the

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2. Transcript of Oral Argument at 23–24, *Regents*, 140 S. Ct. 1891 (No. 18-587).

3. Memorandum from Kirstjen Nielsen, Sec’y, Dep’t Homeland Sec., Re: Rescission of DACA 3 (June 28, 2018), [https://www.dhs.gov/sites/default/files/publications/18\\_0622\\_S1\\_Memorandum\\_DACA.pdf](https://www.dhs.gov/sites/default/files/publications/18_0622_S1_Memorandum_DACA.pdf) [<https://perma.cc/3Y7U-728X>].

4. Transcript of Oral Argument, *Regents*, *supra* note 2, at 22–24.

5. *See id.*; *Regents*, 140 S. Ct. at 1915.

6. *See Regents*, 140 S. Ct. at 1913 (holding that ignoring “serious reliance interests . . . would be arbitrary and capricious” (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009))). The Justices disagreed, however, on what the agency is required to say in response to the reliance interests it considered. *Compare id.* at 1915 (“[DHS] was required to assess whether there were reliance interests, determine whether they were significant, and weigh any such interests against competing policy concerns.”), *with id.* at 1928 (Thomas, J., dissenting) (“Given this state of affairs, it is unclear to me why DHS needed to provide any explanation whatsoever when it decided to rescind DACA.”). *See also infra* Part 0.

7. *See discussion infra* Part II.0.

effect that democratic elections ought to have on federal policy change.<sup>8</sup>

To date, courts have not provided a cohesive framework under which agencies ought to operate with respect to reliance interests, leading to operational confusion and a doctrine of judicial review centered on reliance interests in administrative law—what this Article calls “administrative reliance”—that is subject to weaponization and abuse.

Questions surrounding administrative reliance are particularly salient in the context of “regime change,” wherein a sitting presidential administration is replaced by a new administration, often of a different political party.<sup>9</sup> Presidential administrations wield executive power to direct informal agency action and advance their own policy agendas.<sup>10</sup> Over time, parties may come to rely on this type of administrative policy despite the policy’s lack of formally binding legal effect under traditional administrative law doctrine.<sup>11</sup> Courts have, in turn, recognized such reliance interests and have held that when an agency changes course, it must give due consideration to the serious reliance interests engendered by existing agency policy.<sup>12</sup> Failure to do so would

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8. See discussion *infra* Part II.E.3.

9. See Cristina M. Rodríguez, *The Supreme Court 2020 Term Foreword: Regime Change*, 135 HARV. L. REV. 1, 7 (2021) [hereinafter Rodríguez, *Regime Change*].

10. See, e.g., Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2281–82 (2001); Rodríguez, *Regime Change*, *supra* note 9, at 72; Blake Emerson & Jon D. Michaels, *Abandoning Presidential Administration: A Civic Governance Agenda To Promote Democratic Equality and Guard Against Creeping Authoritarianism*, 68 UCLA L. REV. 104, 107 (2021); Jud Mathews, *Presidential Administration in the Obama Era*, in THE U.S. SUPREME COURT AND CONTEMPORARY CONSTITUTIONAL LAW: THE OBAMA ERA AND ITS LEGACY 67, 67 (Anna-Bettina Kaiser, Niels Peterson & Johannes Saurer eds., 2019); Kathryn A. Watts, *Controlling Presidential Control*, 114 MICH. L. REV. 683, 685–86 (2016); Kathryn E. Kovacs, *From Presidential Administration to Bureaucratic Dictatorship*, 135 HARV. L. REV. F. 104, 108–13 (2021); Jerry L. Mashaw & David Berke, *Presidential Administration in a Regime of Separated Powers: An Analysis of Recent American Experience*, 35 YALE J. ON REGUL. 549, 562–88 (2018); Ming H. Chen, *Administrator-in-Chief: The President and Executive Action in Immigration Law*, 69 ADMIN. L. REV. 347, 378–412 (2017).

11. See KATE R. BOWERS, CONG. RSCH. SERV., LSB10591, AGENCY USE OF GUIDANCE DOCUMENTS 1 (2021) (explaining how guidance documents differ from formal legislative rules).

12. See, e.g., *Dep’t of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1899 (2020) (“[T]he agency . . . was required to assess the existence and strength of any reliance interests, and weigh them against competing policy concerns. Its failure to do so was arbitrary and capricious.”).

render the new agency action arbitrary and capricious, and therefore invalid, under the APA.<sup>13</sup>

But any agency action will likely generate some kind of reliance interest, and “[p]artisan litigants may well find partisan courts to use arbitrary and capricious review” to push the government into overly formal procedural processes that inhibit an administration’s electoral mandate to implement a new set of policy views.<sup>14</sup> Indeed, in recent years, reliance interests have been cited by parties across the political spectrum, in opposing contexts and against opposing political administrations, in efforts to prevent the administration in power from undoing the prior administration’s signature policies.<sup>15</sup>

Striking examples of this phenomenon include the DACA program, which provided relief from deportation to certain undocumented individuals brought to the United States as children,<sup>16</sup> and the Remain in Mexico policy, which required certain asylum seekers arriving to the United States through the southern land border to return to Mexico while they pursued protection in the United States.<sup>17</sup> Both policies were effectuated through informal agency action, primarily by way of agency memoranda announcing the policies as directed by the president.<sup>18</sup> Both policies were later terminated (or

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13. *Id.*; see also *infra* Part III.

14. Cristina M. Rodríguez, *Reading Regents and the Political Significance of Law*, 2020 SUP. CT. REV. 1, 31–32 [hereinafter Rodríguez, *Reading Regents*].

15. See *infra* Parts II and III.

16. Memorandum from Janet Napolitano, Sec’y, U.S. Dep’t of Homeland Sec., to David V. Aguilar, Acting Comm’r, U.S. Customs & Border Prot. et al., *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children 1* (June 15, 2012) [hereinafter DACA Memo], <https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf> [<https://perma.cc/2END-8V6L>].

17. Memorandum from Kirstjen M. Nielson, Sec’y, Dep’t of Homeland Sec., to L. Francis Cissna, Dir., U.S. Citizenship & Immigr. Serv., et al., *Policy Guidance for Implementation of the Migrant Protection Protocols 1* (Jan. 25, 2019), [https://www.dhs.gov/sites/default/files/publication/s/19\\_0129\\_OPA\\_migrant-protection-protocols-policy-guidance.pdf](https://www.dhs.gov/sites/default/files/publication/s/19_0129_OPA_migrant-protection-protocols-policy-guidance.pdf) [<https://perma.cc/FJ76-MAUM>].

18. See President Barack Obama, *Remarks by the President on Immigration* (June 15, 2012), <https://obamawhitehouse.archives.gov/the-press-office/2012/06/15/remarks-president-immigration> [<https://perma.cc/T82R-YR9Z>] (“This morning, Secretary Napolitano announced new actions my administration will take to mend our nation’s immigration policy, to make it more fair, more efficient, and more just—specifically for certain young people sometimes called ‘Dreamers.’”); @realDonaldTrump, TWITTER (Nov. 24, 2018, 6:49 PM), <https://www.thetrumparchive.com> [<https://perma.cc/8Z44-GEKL>] (“Migrants at the Southern Border will not be allowed into the United States until their claims are individually approved in court. . . . No ‘Releasing’ into the U.S. . . .”); @realDonaldTrump, TWITTER (Nov. 24, 2018, 6:56 PM), <https://www.thetrumparchive.com>

attempted to be terminated) by an incoming presidential administration with divergent policy preferences, and both termination decisions were challenged in federal court.

In both cases, courts invalidated the agency's termination action on the theory that the agency did not give due consideration to the reliance interests at stake.<sup>19</sup> However, the courts did so on dramatically different accounts of what types of interests count as legally cognizable reliance interests, to whom the interests belong, how such interests are created, and what the APA requires of agencies when they seek to change policies that implicate such interests.<sup>20</sup> This divergence in judicial interpretations of administrative reliance leaves the doctrine vulnerable to weaponization by partisan litigants—including States—who may seek to use the doctrine to attack any policy change with which they disagree, which in turn would significantly affect a presidential administration's ability to implement its own policy agenda.

In recent years, administrative reliance has grown into a robust form of arbitrary and capricious review, particularly within the lower federal courts.<sup>21</sup> But in these cases, courts have treated vastly different types of reliance interests as being the same for purposes of triggering judicial review, and, relatedly, for overturning agency action.<sup>22</sup> Administrative reliance has been particularly visible in the immigration realm, where presidents have used their executive authority to create policy through agency memoranda (as opposed to, for example, notice-and-comment rulemaking) and where subsequent presidential administrations have been required, in the name of reliance interests, to undertake processes that go beyond a simple exercise of executive power to undo such policies.

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ive.com [<https://perma.cc/8Z44-GEKL>] (“All will stay in Mexico.”); Joshua Partlow & Nick Miroff, *Deal with Mexico Paves Way for Asylum Overhaul at U.S. Border*, WASH. POST (Nov. 25, 2018, 9:30 PM), [https://www.washingtonpost.com/world/national-security/deal-with-mexico-pave-s-way-for-asylum-overhaul-at-us-border/2018/11/24/87b9570a-ef74-11e8-9236-bb94154151d2\\_story.html](https://www.washingtonpost.com/world/national-security/deal-with-mexico-pave-s-way-for-asylum-overhaul-at-us-border/2018/11/24/87b9570a-ef74-11e8-9236-bb94154151d2_story.html) [<https://perma.cc/BMT2-NCVC>] (“The Trump administration has won the support of Mexico’s incoming government for a plan to remake U.S. border policy by requiring asylum seekers to wait in Mexico while their claims move through U.S. courts . . .”).

19. *Dep’t of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1913 (2020); *Texas v. Biden*, 20 F.4th 928, 989 (2021), *rev’d on other grounds*, *Biden v. Texas*, 597 U.S. 785 (2022).

20. *See infra* Parts II.D. and E.

21. *See infra* Parts II and III.

22. *Id.*

In today's political climate, when deep-seated partisanship pervades our legislative and judicial institutions and presidents turn to executive action to advance their policy agendas, administrative reliance may play an increasing role in how they govern.<sup>23</sup> Consider, for example, President Joe Biden's executive actions on abortion access. Immediately after the Supreme Court's draft opinion in *Dobbs v. Jackson Women's Health Organization*<sup>24</sup> was leaked, suggesting the Court's impending decision to overturn *Roe v. Wade*,<sup>25</sup> President Biden took a series of executive actions to protect access to abortion.<sup>26</sup> A future administration with a different view on abortion, however, might seek to overturn these policies. Would this agency action generate cognizable reliance interests that would form the basis of an APA claim challenging such a policy change? And if so, who should be able to assert such claims in court?

What courts decide with respect to whose, and which, reliance interests must be considered by agencies as part of a proposed policy change is highly consequential from both a governance and a rights perspective. However, a cohesive framework theorizing the use, role, and ramifications of invoking reliance interests has been largely absent from scholarly and judicial discussions.<sup>27</sup> This has created confusion over critical foundational questions about when reliance sets in, how reliance is established, what interests may generate reliance, and whose reliance interests matter.<sup>28</sup>

This Article offers the first comprehensive account of the doctrine of administrative reliance. It examines the doctrinal development of administrative reliance to uncover the values the doctrine seeks to

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23. See generally Bethany A. Davis Noll & Richard L. Revesz, *Presidential Transitions: The New Rules*, 39 YALE J. ON REGUL. 1100 (2022) (arguing that the Trump model of aggressive, executive action-driven policymaking is the new norm).

24. *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022).

25. *Roe v. Wade*, 410 U.S. 113 (1973), *overruled by Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022).

26. Alice Miranda Ollstein, *Biden Pledges Executive Orders on Abortion. His Options Are Limited.*, POLITICO (June 9, 2022, 4:47 PM), <https://www.politico.com/news/2022/06/09/biden-abortion-00038565> [<https://perma.cc/J5Z4-Z2HE>]; see also *infra* Part I.A.0.

27. Scholarly discussions of reliance interests have largely accepted reliance interests as a feature of "basic administrative law" without looking behind the doctrine, as this Article seeks to do. Rodríguez, *Reading Regents*, *supra* note 14, at 8; see also Blake Emerson, *The Claims of Official Reason: Administrative Guidance on Social Inclusion*, 128 YALE L.J. 2122, 2137 (2019) ("Once guidance has been issued, it may generate 'serious reliance interests that must be taken into account' by other officials." (quoting *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 222 (2016))).

28. See discussion *infra* Part III.



uphold in order to discern what interests administrative reliance ought to protect. It proposes a threshold inquiry for administrative reliance interests that would focus the reliance inquiry on assertions of concrete, settled expectations that derive from the policy at issue and that are being directly disrupted by the proposed policy change, paying special attention to claims rooted in rights, statuses, or benefits that were extended by the policy. This threshold reliance screening would attend to the key values underlying administrative reliance while minimizing the potential for undesirable distortion and delay.

Part I lays the groundwork by discussing how reliance interests can be generated through executive power and informal agency action, how questions of legal transitions and regime change have been analyzed in the existing scholarship, and the role that courts play in overseeing policy change following regime change. Part II traces the doctrinal development of administrative reliance. It first examines the Supreme Court's treatment of administrative reliance through *DHS v. Regents*. It then explains how, post-*Regents*, the doctrine has been expanded and weaponized by lower courts, particularly those in the Fifth Circuit, to give States a basis rooted in the APA to challenge and enjoin disfavored policy change. This strategy has been a favorite of Texas and other States to oppose the Biden administration's changes to immigration enforcement and regulation.

Part III begins the project of identifying the concerns and values motivating administrative reliance to understand why administrative reliance is important and what it seeks to preserve. This Part identifies three principal concerns at the heart of administrative reliance: bolstering agency legitimacy and accountability, encouraging stability, and avoiding upsetting settled expectations. Through this lens, Part III then evaluates recent administrative reliance case law and concludes by advocating for an approach that focuses the reliance interest inquiry on reliance claims based in concrete, settled expectations that derive from the policy at issue and that are being directly disrupted by the proposed policy change, especially when the disrupted expectations are of rights, statuses, or benefits extended by the policy. This approach would be an important step in cabining the doctrine in a way that would uphold vested rights, promote democratic accountability, and minimize the potential for backend partisan manipulation.

## I. RELIANCE INTERESTS AND REGIME CHANGE

Much of current governance and policymaking is effectuated through the administrative state and, increasingly, through the president's direction of informal agency action.<sup>29</sup> The administrative state has grown to include wide-ranging and robust agencies tasked with implementing broad federal legislation, regulating a multitude of issues including, but not limited to, environmental policy, public benefits programs, taxation, financial services, television and internet, federal roads and highways, federal parks, and immigration.<sup>30</sup>

Agencies are generally classified as “executive” or “independent,” depending in part on the president's ability to appoint or remove the agency heads, but all agencies are subject to some degree of presidential control.<sup>31</sup> Modern administrative law scholarship generally acknowledges the political nature of agencies.<sup>32</sup> One line of administrative and constitutional law scholarship has lauded the injection of politics into the administrative state, arguing that it promotes the values of transparency and political accountability.<sup>33</sup>

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29. Davis Noll & Revesz, *supra* note 23, at 1144–48; *see also* Michael J. Klarman, *Foreword: The Degradation of American Democracy—and the Court*, 134 HARV. L. REV. 1, 25–28 (2020) (explaining the ways in which President Trump sought to influence and control agency officials for both political and personal gain).

30. *See* Kagan, *supra* note 10, at 2248; Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 581–86 (1984). Agencies derive power through authorizing statutes passed by Congress, which delegate substantive regulation, enforcement, and oversight responsibilities to agencies in accordance with each agency's substantive expertise. *Id.* at 579–80.

31. *See generally* Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 CORNELL L. REV. 769 (2013) (identifying indicia of “independent” versus “executive” agencies, but arguing that all agencies are somewhat “executive” in nature and are better conceptualized as falling along a spectrum ranging from more independent to less independent).

32. *See, e.g.*, Kagan, *supra* note 10, at 2246 (describing the use of presidential power and control via administrative agencies under Presidents Reagan and Clinton). Another source commented on the political nature of agencies, writing:

Although the institutions of centralized oversight have evolved since Elena Kagan's canonical account of their rise in the late twentieth century, they persist as a way for the White House to begin to comprehend and possibly influence and coordinate the sprawling activities of the executive branch the President has a constitutional duty to oversee.

Rodríguez, *Regime Change*, *supra* note 9, at 76.

33. *See, e.g.*, Kagan, *supra* note 10, at 2331–46; Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law Redux*, 125 YALE L.J. 104, 112 (2015) [hereinafter Cox & Rodríguez, *Immigration Law Redux*]; Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J. 2, 8, 12–13 (2009) [hereinafter Watts, *Proposing*

Another line of scholarship is more skeptical of the marrying of politics and administration, viewing the “merger of law and politics in the office of the White House [as] a major threat to the rule of law.”<sup>34</sup> These scholars largely dispute that the “accountability” narrative is an adequate way to police the executive.<sup>35</sup> They argue that the idea that voters are paying attention to or voting on decisions made by agency leaders misunderstands how voters make decisions at the ballot box.<sup>36</sup> Further, other barriers to voting or democratic participation could diminish a voter’s ability to hold an elected representative (including one who appoints agency heads) accountable.<sup>37</sup> Lastly, in areas such as immigration law, where the regulated parties generally do not have the ability to vote, accountability may take on a different meaning altogether.<sup>38</sup>

This Part discusses the increasingly robust version of presidential administration being deployed by the executive, how it has led to more governance through presidentially directed agency action, and how this form of governance generates greater concern about policy whiplash and administrative reliance.

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*a Place for Politics*]. But see Mark Seidenfeld, *The Irrelevance of Politics for Arbitrary and Capricious Review*, 90 WASH. U. L. REV. 141, 170–88 (2012) (arguing that courts should not consider political justifications of agency action as part of hard look review); Jodi L. Short, *The Political Turn in American Administrative Law: Power, Rationality, and Reasons*, 61 DUKE L.J. 1811, 1844–57 (2012) (rejecting arguments that courts should give enhanced deference to political justifications of agency action because doing so would, among other things, undermine the disclosure, transparency, and accountability goals of reason-giving requirements generally).

34. David S. Rubenstein, *Taking Care of the Rule of Law*, 86 GEO. WASH. L. REV. 168, 179 (2018).

35. See Glen Staszewski, *Reason-Giving and Accountability*, 93 MINN. L. REV. 1253, 1266 (2009) (“[T]he presumption that elected officials are politically accountable for their specific policy decisions is wildly unrealistic.”); Nicholas O. Stephanopoulos, *Accountability Claims in Constitutional Law*, 112 NW. U. L. REV. 989, 989 (2018).

36. See Staszewski, *supra* note 35, at 1266; Stephanopoulos, *supra* note 35, at 989.

37. E.g., Brandon J. Johnson, *The Accountability-Accessibility Disconnect*, 58 WAKE FOREST L. REV. 65, 68–71 (2023) (describing partisan gerrymandering and voter ID laws as impediments to voter participation).

38. The democratic accountability argument generally operates on a background assumption that people can hold parties in power accountable for their decisions by voicing agreement or dissent at the ballot box. The threat of electoral consequences then, in turn, motivates accountable bodies to be responsive to voter concerns and preferences. See, e.g., Cox & Rodriguez, *Immigration Law Redux*, *supra* note 33, at 169–70. However, where regulated parties are not able to participate in the electoral process, the accountability check necessarily relies on other parties to function. This might, in turn, affect the relative import voters place on the issue, especially when the effects of such regulation are experienced in less immediate or direct ways.

### A. *Reliance on Informal Agency Action*

For better or worse, the president has taken an increased role in directing and supervising administrative agencies and has come to wield tremendous control over the administrative state.<sup>39</sup> Administrative agencies now frequently promulgate rules and implement policies in response to the president's political agenda and priorities, often at the president's express direction.<sup>40</sup> This view of agencies recognizes them as admittedly (or perhaps inherently) partisan bodies, controlled by the executive branch and responsive to democratic shifts in priorities and policy preferences.<sup>41</sup>

1. *Governing Through Guidance and Generating Reliance.* Presidential control is exerted both directly (for example, through executive orders and directives)<sup>42</sup> and indirectly (for example, through

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39. See Kagan, *supra* note 10, at 2250, for then-Professor Elena Kagan's seminal article on presidential administration. See also Strauss, *supra* note 30, at 587. Immigration law is an area over which the president has historically wielded an immense amount of power and discretion, which is often exercised through directing administrative action. See generally Cox & Rodríguez, *Immigration Law Redux*, *supra* note 33 (providing an account of the president's historical control over immigration policy). Professor David Rubenstein questions whether there is an absolute or agreed-upon concept when various presidential administrations have appealed to the "Rule of Law" to justify their scope and use of presidential power. Rubenstein, *supra* note 34, at 105–07. See also Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 469–91 (2003), for an overview of the development of the presidential control model.

40. Kagan, *supra* note 10, at 2277.

41. While this view of administrative agencies applies most forcefully to executive agencies, scholars have argued that they apply to independent agencies as well, which are also subject to executive appointment power and otherwise influenced by political wins and losses. See Strauss, *supra* note 30, at 587–91.

42. For example, President Biden turned to executive action following the Supreme Court's decision in *Dobbs* to preserve access to reproductive health care, including by issuing Executive Orders 14,076 and 14,079. Exec. Order No. 14,076, 87 Fed. Reg. 42053 (July 8, 2022); Exec. Order No. 14,079, 87 Fed. Reg. 49505 (Aug. 3, 2022). These executive orders resulted in swift administrative action taken by the Department of Health and Human Services in implementing the directives set forth in the orders. See, e.g., Press Release, U.S. Dep't of Health & Hum. Servs., HHS, DOL, and Treasury Issue Guidance Regarding Birth Control Coverage (July 28, 2022), <https://www.hhs.gov/about/news/2022/07/28/hhs-dol-treasury-issue-guidance-regarding-birth-control-coverage.html> [<https://perma.cc/A36G-ZMW8>] (reporting on agency action taken within twenty days of Executive Order 14,076 to preserve the accessibility of contraceptive coverage per the directives of the executive order); Off. for C.R., *Guidance to Nation's Retail Pharmacies: Obligations Under Federal Civil Rights Laws To Ensure Nondiscriminatory Access to Comprehensive Reproductive Health Care at Pharmacies*, U.S. DEP'T OF HEALTH & HUM. SERVS. (Sept. 29, 2023) [hereinafter *Guidance to Nation's Retail Pharmacies*], <https://www.hhs.gov/civil-rights/for-individuals/special-topics/reproductive-healthcare/pharmacies-guidance/index.html> [ht

the president's appointment and removal powers).<sup>43</sup> One way that presidential control translates to on-the-ground policy is through the president's direction of "informal agency action," which refers to the issuance of subregulatory guidance or other systematic agency actions taken without formal or informal rulemaking or adjudication.<sup>44</sup> Examples of informal agency action include more "stroke of the pen" actions, like issuing policy memoranda, letters, or other guidance documents that set forth an agency's enforcement priorities, procedures, or interpretive positions.<sup>45</sup>

Although informal agency action does not formally carry the weight of law, its effects are often indistinguishable from more formal

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[tps://perma.cc/2GPC-MCKS](https://perma.cc/2GPC-MCKS)] (providing guidance by the Department of Health and Human Services reminding retail pharmacies of federal obligations to provide nondiscriminatory access to medication, including prescription medication used to treat pregnancy loss).

43. See, for example, President Trump's decision to remove Secretary of Homeland Security Kirstjen Nielsen. The removal was rumored to be an effort to replace Nielsen with "a replacement who will implement his policy ideas with more alacrity" following Nielsen's reluctance to implement some of the president's more extreme immigration positions. Nick Miroff, Josh Dawsey & Philip Rucker, *Trump Is Preparing To Remove Kirstjen Nielsen as Homeland Security Secretary*, AIDES SAY, WASH. POST (Nov. 12, 2018, 10:36 AM), [https://www.washingtonpost.com/world/national-security/trump-is-preparing-to-remove-kirstjen-nielsen-as-homeland-security-secretary-aides-say/2018/11/12/77111496-e6b0-11e8-bbdb-72fdbf9d4fed\\_story.html](https://www.washingtonpost.com/world/national-security/trump-is-preparing-to-remove-kirstjen-nielsen-as-homeland-security-secretary-aides-say/2018/11/12/77111496-e6b0-11e8-bbdb-72fdbf9d4fed_story.html) [<https://perma.cc/9M6W-XSUL>]. Secretary Nielsen ultimately resigned her post in April 2019. Zolan Kanno-Youngs, Maggie Haberman, Michael D. Shear & Eric Schmitt, *Kirstjen Nielsen Resigns as Trump's Homeland Security Secretary*, N.Y. TIMES (Apr. 7, 2019), <https://www.nytimes.com/2019/04/07/us/politics/kirstjen-nielsen-dhs-resigns.html> [<https://perma.cc/P8YU-KHK5>].

44. Emerson, *supra* note 27, at 2198. For a helpful and thorough discussion on the nature, role, and effect of guidance, see *id.* at 2132–37. See also Alfred C. Aman, Jr., *Informal Agency Actions and U.S. Administrative Law — Informal Procedure in a Global Era*, 42 AM. J. COMPAR. L. 665, 665 (1994) (explaining that informal agency actions "usually are defined negatively—that is, they are those actions not covered by the formal adjudicatory and rulemaking provisions of the U.S. Administrative Procedure Act" and characterizing them as a "residual category of agency actions, encompassing a great variety of governmental actions that take a number of administrative forms"). These types of actions are also referred to as "nonlegislative rules" or "sub-regulatory rules." Jill E. Family, *Administrative Law Through the Lens of Immigration Law*, 64 ADMIN. L. REV. 565, 566 (2012).

45. See, for example, the memoranda implementing DACA and MPP, discussed in Part II.D and Part II.E *infra*. See, e.g., Letter from Russlynn Ali, Assistant Sec'y for C.R., Off. for C.R., U.S. Dep't of Educ., to Colleagues (Apr. 4, 2011) (rescinded), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf> [<https://perma.cc/HLD8-Q7BV>] (specifying how educational institutions should address sexual harassment complaints to comply with Title IX); Memorandum from Karen L. Tritz, Dir., Surv. & Operations Grp., & David R. Wright, Dir., Quality, Safety & Oversight Grp., to State Surv. Agency Dirs., Ref: QSO-22-22 Hospitals (Aug. 25, 2022), <https://www.cms.gov/files/document/qso-22-22-hospitals.pdf> [<https://perma.cc/2JCQ-ZNWB>] (restating guidance reiterating physician and hospital obligations under the Emergency Medical Treatment and Labor Act in light of new state laws restricting or prohibiting access to abortion).

(and formally binding) sources of law.<sup>46</sup> And even though this type of informal agency action is nonbinding and can theoretically be undone as easily as it was enacted—that is, with a unilateral stroke of a pen—it nevertheless might generate reliance interests, which can enhance its durability. Reliance interests are invoked across legal doctrines spanning private and public law, but they have generally been conceptualized and theorized in shifting and squishy ways.<sup>47</sup> Scholars generally recognize three primary categories of reliance: “classic” reliance, which captures private interests arising from expectations set out in contract and property-oriented agreements; “public” reliance, which refers to expectations that parties have in past public acts or pronouncements; and “societal” reliance, which is founded in rights, values, or expectations that have become so engrained in society as to become part of the fabric of the culture.<sup>48</sup> A common thread ties these

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46. Guidance documents generally articulate an agency’s position but do not operate as law to bind the public; conversely, legislative rules and statutes do bind the public. BOWERS, *supra* note 11, at 1. Nevertheless, guidance documents are generally adhered to as a practical matter because parties subject to regulation by the agency often seek to operate in ways that will avoid the risk, uncertainty, and expense that might come with behaving in ways that risk noncompliance with the agency’s stated position. See Jill E. Family, *Easing the Guidance Document Dilemma Agency by Agency: Immigration Law and Not Really Binding Rules*, 47 U. MICH. J.L. REFORM 1, 4–5 (2013); Emerson, *supra* note 27, at 2126–28.

47. See, e.g., William N. Eskridge Jr., *Reliance Interests in Statutory and Constitutional Interpretation*, 76 VAND. L. REV. 681, 681 (2023) (describing reliance interests as the “dark matter” underlying statutory and constitutional interpretation); Nina Varsava, *Precedent, Reliance, and Dobbs*, 136 HARV. L. REV. 1845, 1847–48, 1885 (2023) (explaining the *Dobbs* Court’s distinction between “tangible” and “intangible” reliance interests for purposes of stare decisis analysis and arguing that “intangible” reliance should factor into a stare decisis analysis); Randy J. Kozel, *Stare Decisis as Judicial Doctrine*, 67 WASH. & LEE L. REV. 411, 415 (2010) (describing the role of reliance interests in stare decisis analysis as one that “seeks to protect the legitimate expectations of those who live under the law” (cleaned up)); Trevor W. Morrison, *Stare Decisis in the Office of Legal Counsel*, 110 COLUM. L. REV. 1448, 1479–81, 1507–18 (2010) (analyzing the role of stare decisis in the Office of Legal Counsel and finding that the office generally follows the *Casey* stare decisis factors but that OLC may overrule its precedents if they are incompatible with the president’s constitutional views); L.L. Fuller & William R. Perdue, Jr., *The Reliance Interest in Contract Damages: I*, 46 YALE L.J. 52, 53 (1936) (describing the reliance interest arising from a contract as a measure of contract damages); Margaret F. Brinig & June Carbone, *Reliance Interest in Marriage and Divorce*, 62 TUL. L. REV. 855, 856 (1988) (defining the reliance interest as “the parties’ change of position in reliance on the joint enterprise” and examining the application of the reliance interest framework to the marriage relationship).

48. See, e.g., Eskridge, *supra* note 47, at 687–89 (distinguishing between “private reliance,” “societal reliance,” and “public reliance”); Kozel, *supra* note 47, at 452–64 (identifying specific—individual or organizational—reliance, governmental reliance, doctrinal reliance, and societal reliance as modes of reliance for purposes of stare decisis analysis); Fuller & Perdue, *supra* note 47, at 54 (describing forms of reliance in contract law to include expectations resulting in a change in the promisee’s conduct and expectations in the value to be created); Joseph William Singer,

types of reliance together: all sorts of individuals and entities plan their affairs around some set of future expectations that are grounded in past promises made by others, and these past promises need to be properly accounted for if they are to be altered or rescinded.<sup>49</sup>

Reliance interests can be generated across a range of agency actions,<sup>50</sup> but this Article is primarily concerned with informal agency action directed by the president for three reasons. First, although an agency's reasons for changing a policy generally do not need to be more detailed than what the agency needs to justify action taken on a blank slate, policy changes that implicate serious reliance interests *do* need to be better justified.<sup>51</sup> The asymmetry between what is required to implement a policy compared to what is required for a subsequent administration to terminate or rescind that policy raises interesting questions related to how administrations may choose to govern.<sup>52</sup> Second, unlike notice-and-comment rulemaking, which requires

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*The Reliance Interest in Property*, 40 STAN. L. REV. 611, 665–701 (1988) (describing expectations arising from rights of access, expectations arising from the marketplace and property-oriented contracts, expectations arising from interpersonal relationships, and expectations arising from state-established legal regimes or benefits programs as types of property-based reliance interests).

“Classic” reliance occurs when a party expects to receive the benefit of an agreed-upon bargain with their counterparty. “Public” reliance occurs when, for example, legislatures rely on past judicial interpretations of laws in crafting new legislation. An example of “societal” reliance arises in the context of *Miranda* rights for criminal defendants. See *Dickerson v. United States*, 530 U.S. 428, 443 (2000) (“*Miranda* has become embedded in routine police practice to the point where the warnings have become part of our national culture.”).

49. Cf. *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 287–89 (2022) (discussing the relevance of various types of reliance in stare decisis analysis and the strength of expectations that may arise therefrom); see also *id.* at 2325 (Breyer, J., dissenting) (citing *Casey* to note that, historically, the Court has emphasized societal reliance alongside private reliance in determining the weight of the reliance interest at stake); Varsava, *supra* note 47, at 1849 (arguing that the central principle behind stare decisis is to “encourag[e] and enabl[e] us to form reasonable and reliable expectations about our future legal rights and duties”); Rachel Bayefsky, *Tangibility and Tainted Reliance in Dobbs*, 136 HARV. L. REV. F. 384, 387–97 (2023) (arguing that distinctions between “concrete” and “intangible” reliance interests are blurry and difficult to classify).

50. See *infra* notes 143–50 and accompanying text.

51. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

52. One critique levied against informal agency action is that the consequences of such action may be (and frequently are) sweeping and wide-ranging but that the action is not undertaken in ways that promote public accountability. BOWERS, *supra* note 11, at 1. Another critique is that informal agency action is taken pursuant to what some scholars have identified as a residual discretionary power not expressly delegated by Congress, and which other scholars have critiqued as unlawful executive overreach. *E.g.*, Emerson, *supra* note 27, at 2128–29; Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals and the Like—Should Federal Agencies Use Them To Bind the Public?*, 41 DUKE L.J. 1311, 1315 (1992); PHILIP HAMBURGER, *IS ADMINISTRATIVE LAW UNLAWFUL?* 260 (2014).

agencies to engage with questions and comments raised by the public prior to finalizing a rule (or change in rule), informal agency action typically does not allow for ex ante public engagement.<sup>53</sup> Asserting reliance interests ex post might be the first opportunity a stakeholder has to confront the agency, and administrative reliance might give the public—particularly those with the most at stake—an important participatory right to the process. But an overly broad view of administrative reliance might also give parties and courts too much say in policymaking matters that are traditionally within the authority of the executive branch. Third, presidentially directed informal agency action is often a more expedient response to fulfilling the president’s policy mandate.<sup>54</sup> Administrative reliance can provide for a meaningful brake on hasty policy change, but judicial interference under the guise of reliance interest review can also result in undue delay. For all these reasons, it is important to tailor the administrative reliance inquiry to preserve the participatory benefits while limiting the possibility of judicial overreach.

To think through how the administrative reliance problem might play out, consider President Biden’s executive order regarding access to abortion medication.<sup>55</sup> In the aftermath of the Supreme Court’s decision in *Dobbs v. Jackson Women’s Health Organization*<sup>56</sup> and the myriad state laws limiting or eliminating access to abortion that followed, President Biden turned to executive action.<sup>57</sup> In a Twitter post, President Biden said, “This Court has made it clear it will not protect the rights of women. I will. That’s why today I’m signing an Executive Order to protect access to reproductive health care.”<sup>58</sup> One significant aspect of the executive order was the president’s directive that the Department of Health and Human Services (“HHS”) take steps to preserve access to emergency medical care for pregnant

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53. The APA’s public engagement requirements of rulemaking do not extend to the creation of guidance documents. 5 U.S.C. § 553; BOWERS, *supra* note 11, at 1–2.

54. See Davis Noll & Revesz, *supra* note 23, at 1153–54 (explaining that modern administrations turn to informal actions to quickly, but not necessarily durably, enact the new president’s policy preferences).

55. Exec. Order No. 14,076, 87 Fed. Reg. 42053 (July 8, 2022).

56. *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215 (2022) (overturning *Roe v. Wade*, 410 U.S. 113 (1973), and eliminating federal constitutional protections for reproductive choice).

57. See Joseph Biden (@POTUS), TWITTER (July 8, 2022, 12:10 PM), <https://twitter.com/POTUS/status/1545440070156648450> [<https://perma.cc/MQB6-W9MQ>].

58. *Id.*



patients and to expand access to abortion medication by mail, notwithstanding state laws that may ban or restrict access to such care or medication.<sup>59</sup> Three days later, HHS sent a letter to healthcare providers and released new guidance emphasizing that federal law preempts state law and protects health care providers seeking to provide emergency care to pregnant patients. This move was meant to preserve the availability of certain types of healthcare that would terminate a pregnancy, irrespective of any conflicting state laws.<sup>60</sup> HHS also issued guidance reminding retail pharmacies of their obligation to provide abortion medications to patients in a manner free from discrimination, including discrimination against pregnant people.<sup>61</sup>

It remains unclear what will happen to such access following a regime change out of the Biden administration and in the absence of federal legislation addressing the issue.<sup>62</sup> What if a presidential administration that disagrees with the Biden administration's stance on abortion is elected and seeks to reverse course on the guidance issued pursuant to Biden's executive order? Access to emergency abortion procedures or medication may be exceptionally important to the health and wellbeing of women across the country, particularly in states that

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59. Exec. Order No. 14,076. President Biden issued a second executive order a month later directing HHS to provide further guidance to healthcare providers on preserving or enhancing access to reproductive care and information to patients. Exec. Order No. 14,079, 87 Fed. Reg. 49505 (Aug. 3, 2022).

60. Letter from Xavier Becerra, Sec'y of Health & Hum. Servs., to Health Care Providers (July 11, 2022), <https://www.hhs.gov/sites/default/files/emergency-medical-care-letter-to-health-care-providers.pdf> [<https://perma.cc/NNT8-RQSS>].

61. *Guidance to Nation's Retail Pharmacies*, *supra* note 42.

62. The same day he signed the executive order, President Biden also called on the public to elect congresspeople during the following midterm election that would pass federal legislation protecting access to abortion, underscoring the importance of the political process in preserving or eliminating the right to reproductive choice and abortion. Jeff Mason & Nandita Bose, *Biden Signs Executive Order on Abortion, Declares Supreme Court 'Out of Control,'* REUTERS (July 9, 2022, 3:26 AM), <https://www.reuters.com/world/us/biden-sign-executive-order-help-safeguard-access-abortion-contraception-2022-07-08> [<https://perma.cc/85VN-5Z4Z>]. Abortion access was on state ballots across the country, including in Kansas, Michigan, California, Kentucky, Montana, and Vermont. Joshua Needelman, *Five States Have Abortion Referendums on the Ballot*, N.Y. TIMES (Nov. 8, 2022), <https://www.nytimes.com/2022/11/08/us/politics/abortion-ballot-state-referendums.html> [<https://perma.cc/SU3P-DUEX>]. In all six states, voters rejected measures that would have further limited abortion access, and in California, Michigan, and Vermont, voters approved state constitutional amendments that would affirmatively protect the right to abortion in the states' constitutions. *Id.*; Veronica Stracqualursi, Devan Cole & Paul LeBlanc, *Voters Deliver Ringing Endorsement of Abortion Rights on Midterm Ballot Initiatives Across the U.S.*, CNN (Nov. 9, 2022, 12:53 PM), <https://www.cnn.com/2022/11/09/politics/abortion-rights-2022-midterms> [<https://perma.cc/5MB6-36SA>].

would otherwise outlaw such forms of care.<sup>63</sup> What if this new administration has a different understanding of what federal law requires and issues guidance allowing medical providers to defer to state laws that would prohibit this type of healthcare? People in these states might come to expect that women in their communities do not have access to abortion, and state and local governments may approve budgets that do not allocate funds to hospitals to provide emergency abortion procedures.<sup>64</sup> Would, or should, future administrations seeking to change either policy need to consider these to be legally cognizable reliance interests? If so, who can assert these interests? And when should courts intervene to set aside or enjoin future executive action that would alter or rescind these policies?

2. *Reversing Guidance.* The president is, of course, not bound by the policies of their predecessor—everyone agrees that they can change policy.<sup>65</sup> The question is how easily or quickly a new regime may change course on policies installed by a prior regime. This question may seem trivial—after all, nothing bars an ultimate change in policy—but its implications run much deeper. It is a question about executive power and the separation of powers: Will the incoming administration be permitted to take office and implement its own policy agenda, or will its ability to govern be impeded by (perhaps activist or partisan) judges?<sup>66</sup> It is a question of how we think about democratic accountability and how that should be reflected in the administrative state. It is a question sounding in rule of law concerns:

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63. Reliance interests also factor into a court's stare decisis analysis, which played a significant role in protecting a more robust version of the right to abortion in *Casey*, but which did not factor significantly into the Court's decision to overturn *Roe* and *Casey* in *Dobbs*. See *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 280 (2022). Following the *Dobbs* decision, there were numerous reports of women who had, in fact, relied on their ability to access abortion. Eleanor Klibanoff, *More Women Join Lawsuit Challenging Texas' Abortion Laws*, TEX. TRIB. (Nov. 14, 2023, 9:00 AM), <https://www.texastribune.org/2023/11/14/texas-abortion-laws-lawsuit> [<https://perma.cc/C4ZQ-F2YN>]. Nevertheless, twenty-five states took steps to outlaw or restrict access to abortion following *Dobbs*. *After Roe Fell: Abortion Laws by State*, CTR. FOR REPROD. RTS., <https://reproductiverights.org/maps/abortion-laws-by-state> [<https://perma.cc/C4W9-8VQ4>]. The Court's treatment (or nontreatment) of reliance in this instance, although outside of the administrative law context, is another striking example of the potential for judicial gamesmanship around reliance interests in the absence of a stronger unifying theory of reliance.

64. These arguments are similar to those made by States challenging President Biden's decision to terminate the Trump-era Remain in Mexico policy, discussed in detail *infra* Part II.E.

65. *E.g.*, *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 56–57 (1983).

66. Rodríguez, *Reading Regents*, *supra* note 14, at 30–31.

How should parties think about the stability or predictability of the laws and regulatory schemes that govern their lives or businesses, and how might this affect broader personal, liberty, or economic interests? And it is a question about due process: What notice or justification should be required of agencies seeking to implement changes that would upset someone's rights or expectations grounded in promises the government had previously made?

Scholars generally agree that the president's powers to reverse their predecessor's policies are quite robust. The Trump and Biden administrations have deployed similarly aggressive toolkits for reversing the regulatory policies of their predecessors.<sup>67</sup> This type of hands-on governance via the administrative state, including presidentially directed policy implementation and reversal, is likely here to stay, and presidents are typically able to implement more durable policies if they are elected to a second term.

Professors Adam Cox and Cristina Rodríguez have argued that, in the immigration context, the president's power to implement and reverse policy is one way that democratic accountability manifests in governance.<sup>68</sup> They have cautioned against overly wooden procedural requirements that would inhibit a president's ability to implement their own policy agenda, even if that agenda marks a reversal or a departure from existing policy.<sup>69</sup> They argue that this back-and-forth is part of democratic accountability: regimes ought to be able to reap the spoils of their victories and, on the other end, must accept the lumps that come with defeat.<sup>70</sup> Rodríguez and Cox have argued against a robust view of reliance interests because judicial intervention resting on a ratcheted-up version of arbitrary and capricious review would be tantamount to "interventionist administrative law that empowers courts to second guess agency policy judgments and block policy development."<sup>71</sup>

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67. See generally Davis Noll & Revesz, *supra* note 23 (describing the invocation of the Congressional Review Act to disapprove existing regulations, the reversal (or acquiescence) of an agency's position in pending litigation challenging a regulation, and the suspension of a prior administration's pending regulations as tools that recent presidential administrations are using to roll back the policies implemented by their predecessors).

68. Cox & Rodríguez, *Immigration Law Redux*, *supra* note 33, at 175.

69. ADAM COX & CRISTINA M. RODRÍGUEZ, *THE PRESIDENT AND IMMIGRATION LAW* 230 (2020) [hereinafter COX & RODRÍGUEZ, *PRESIDENT AND IMMIGRATION*].

70. *Id.* at 230–31.

71. Cristina Rodríguez & Adam Cox, *The Fifth Circuit's Interventionist Administrative Law and the Misguided Reinstatement of Remain in Mexico*, JUSTSECURITY (Dec. 21, 2021), <https://www.justsecurity.org/2021/12/21/the-fifth-circuit-s-interventionist-administrative-law-and-the-misguided-reinstatement-of-remain-in-mexico/>

Other scholars have argued that the president's power to reverse is inherent in the constitutional authority granted to the president and that it is, in some ways, even stronger than that of the other branches.<sup>72</sup> This line of argument views the president's reversal of a prior administration's policy as being similar to other types of presidential reversal—such as de-designations of national monuments, differing interpretations of the Constitution, and removal of special prosecutors or other officers—as a “natural and inherent,” and perhaps plenary, power attached to the office of the presidency.<sup>73</sup>

As described more fully below, this Article takes a more cautionary approach to policy reversal in large part because it takes a less skeptical view of reliance interests' value writ large. While acknowledging that the president retains the power to reverse policies instituted by prior administrations, this Article also takes the view that whipsaws in policy from administration to administration can be harmful, both from institutional and individual perspectives, particularly when parties have come to structure their lives, businesses, and other decisions around existing governmental policies. The more important questions, then, are how we ought to think about reliance interests, and what interests are legally cognizable, given their significance to the holders of the interests and their role as a check on executive and agency power.

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w.justsecurity.org/79617/the-fifth-circuits-interventionist-administrative-law-and-the-misguided-reinstatement-of-remain-in-mexico [https://perma.cc/F4JT-GQVY].

72. John C. Yoo, *The Executive Power of Reversal*, 42 HARV. J.L. & PUB. POL'Y 59, 61 (2019); see also Gary Lawson, *Command and Control: Operationalizing the Unitary Executive*, 92 FORDHAM L. REV. 441, 447 (2023) (arguing that the Constitution vests all executive power in the president, and that the president therefore retains control of “all exercises of executive power”).

73. Compare Lawson, *supra* note 72, at 447 (arguing that the Constitution gives the president full control of executive power), and John Yoo & Todd Gaziano, *Presidential Authority To Revoke or Reduce National Monument Designations*, 35 YALE J. ON REGUL. 617, 621 (2018) (arguing that the president does have authority to de-designate national monuments), with Letter from 121 Env't L. Professors to Ryan Zinke, Sec'y, U.S. Dep't of Interior, & Wilbur Ross, Sec'y, U.S. Dep't of Com. (July 6, 2017), <https://www.nationalparkstraveler.org/sites/default/files/attachments/national-monuments-comment-letter-from-law-professors.pdf> [https://perma.cc/28SE-RJK3] (arguing that, with respect to the regulation of federal lands, Congress retains plenary authority, and that Congress's delegation to the president of the authority to designate national monuments was a one-way delegation, wherein Congress retained the authority to *de-designate* national monuments for itself).

*B. Regime Change, Legal Transitions, and Agency Action*

The prevailing view in administrative law acknowledges the political nature of administrative agencies, which raises a critical and fundamental question: How can—or should—agencies act following regime change?<sup>74</sup> Rodríguez defines regime change as “the replacement within the executive branch of one set of constitutional, interpretive, philosophical, and policy commitments with another.”<sup>75</sup> To restate the question more plainly, what happens (or should happen) when the outgoing presidential administration is replaced by an administration with (sometimes dramatically) different political ideologies and policy agendas?

On the one hand, a newly elected administration takes office having just won an election in which its political judgments, in theory, persuaded the electorate and carried the day.<sup>76</sup> Having secured an electoral victory and mandate to govern, the new administration is expected to execute on its own policy agenda, which might well differ from its predecessor’s.<sup>77</sup> When it comes to administrative rules and policies, the new administration has a number of tools available to halt or reverse policies that were recently implemented by the prior administration. It can, among other things, pull regulations that are in the earlier stages of the rulemaking process, delay effective dates of promulgated rules that have not yet been implemented, and take different litigation positions on rules that are being challenged in court.<sup>78</sup> With respect to policies implemented through informal agency action, the new administration can issue its own set of executive orders,

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74. Rodríguez, *Regime Change*, *supra* note 9, at 7.

75. *Id.*

76. This is an admittedly idealized version of U.S. democracy and the role the electoral college plays in picking the president. See, e.g., Katherine Shaw, “A Mystifying and Distorting Factor”: *The Electoral College and American Democracy*, 120 MICH. L. REV. 1285, 1285–86 (2022) (describing the electoral college as a “profoundly dangerous institution” and noting that the Electoral College has twice, in the past twenty years, named a presidential winner who lost the popular vote); Akhil Reed Amar, *Some Thoughts on the Electoral College: Past, Present, and Future*, 33 OHIO N.U. L. REV. 467, 470–71 (2007) (describing the countermajoritarian effects, as well as racist and sexist roots, of the electoral college). For a robust discussion regarding the concerns around “midnight rules” and the practice of promulgating regulations during an administration’s lame duck period, see Jack M. Beermann, *Midnight Rules: A Reform Agenda*, 2 MICH. J. ENV’T & ADMIN. L. 285, 312–16 (2013).

77. Rodríguez, *Regime Change*, *supra* note 9, at 12–14; see Beermann, *supra* note 76, at 289 (explaining that late-term rulemaking reflects the outgoing administration’s will to enact policies before the new administration changes policy agendas).

78. Beermann, *supra* note 76, at 335–53.

guidance documents, and agency memoranda to undo policies implemented through similar means by the prior administration.<sup>79</sup> All of these would be expected, and maybe even desired, actions following electoral change.

But this sort of whipsaw in federal policy may also have undesired and destabilizing effects. There might be concern over a system that is so sensitive to political elections that it limits the sustainability of administrative policies—real policies that govern important aspects of peoples’ day-to-day lives, around which they have planned, and upon which they have come to depend.<sup>80</sup> This concern might arise from principles grounded in fairness or due process—a worry that parties previously subject to regulation, and who might have acted in reliance upon such regulation, would suddenly have the rug pulled out from under them at the end of every election cycle. It might arise from concerns stemming from rule of law principles such as stability and predictability in the law.<sup>81</sup> Or it might come from questions about the degree to which agencies should be subject to political control—that is, maybe there is the expectation that while politics might influence an agency’s priorities, there should still be some agreement surrounding scientific or technocratic judgments such that there remains some continuity in governance across administrations, and variation in policies is limited to some bounded (but perhaps variable and ill-defined) range of deviation.

One proposal that has been advanced to protect liberty-based, rather than economic or pecuniary, reliance interests is to allow reliance-based or estoppel-type defenses. The Supreme Court has endorsed the possibility of reliance-based defenses when it comes to

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79. *Id.* at 287.

80. See generally Jerry L. Mashaw & David Berke, *Presidential Administration in a Regime of Separated Powers: An Analysis of Recent American Experience*, 35 *YALE J. ON REGUL.* 549 (2018) (discussing the lack of durability that accompanies policy directives that flow from robust versions of “presidentialism,” or presidential control of administration).

81. See, e.g., Emerson, *supra* note 27, at 2155, 2206 (identifying “equal, predictable, and consistent treatment” as principles the rule of law seeks to uphold, and arguing that procedural requirements encouraging disclosure and transparency may apply “soft procedural brakes to reduce regulatory whiplash” when changing policy); see also Jeremy Waldron, *The Rule of Law and the Importance of Procedure*, in *NOMOS 50: GETTING TO THE RULE OF LAW* 3, 4–7, 14, 19–20 (James E. Fleming ed., 2011) (arguing that the “rule of law” requires procedural protections alongside substantive consistency in the norms that govern societal behavior). *But see* Rubenstein, *supra* note 34, at 173 (arguing that appeals to the “rule of law” are made by all sides and calling into question a unified “rule of law” principle).

enforcement based on a change in agency policy or position.<sup>82</sup> The Court has also acknowledged limited reliance-based defenses sounding in estoppel, which would limit an agency's ability to change its interpretation of an authorizing statute when such interpretation is inconsistent with prior consistent readings of such law.<sup>83</sup>

With respect to prior agency promises of nonenforcement, some scholars have argued that when there are conflicting decriminalization or nonprosecution policies, future government action that contravenes such policies should be subject to estoppel and reliance-based defenses.<sup>84</sup> Others have adopted a narrower position, arguing that an administration's ability to change course as to nonenforcement decisions should be limited only in circumstances raising particularly acute fairness or separation of powers concerns, but that the government should be estopped from using information from parties that was given in reliance on nonenforcement policies in future prosecutorial actions.<sup>85</sup>

These concerns might also relate to the use of "transitions relief" practices, such as delayed implementation or a phasing-in of policy change. Some scholars have critiqued these interventions as costly and inefficient,<sup>86</sup> whereas others have argued that legal transitions inevitably bring increased costs that are better (and more justly) borne

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82. See, e.g., *United States v. Pa. Indus. Chem. Corp.*, 411 U.S. 655, 670 (1973) (holding that reliance on a prior agency position can be a defense to enforcement based on a changed position); see also Zachary S. Price, *Reliance on Nonenforcement*, 58 WM. & MARY L. REV. 937, 944 (2017) (finding that federal courts have generally been reluctant to recognize estoppel defenses in civil and administrative actions based on government assurances of nonenforcement).

83. See *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974) ("[T]here may be situations where the Board's reliance on adjudication would amount to an abuse of discretion.").

84. Mary D. Fan, *Legalization Conflicts and Reliance Defenses*, 92 WASH. U. L. REV. 907, 912 (2015).

85. Price, *supra* note 82, at 996–97.

86. See, e.g., Michael J. Graetz, *Legal Transitions: The Case of Retroactivity in Income Tax Revision*, 126 U. PA. L. REV. 47, 49–52 (1977) (arguing that the government is ill-equipped to predict relief policies that would address individual fairness claims and that the affected party would be best positioned to mitigate their own costs in anticipation of, or response to, legal transitions); Louis Kaplow, *An Economic Analysis of Legal Transitions*, 99 HARV. L. REV. 509, 513 (1986) (arguing that transitions relief is inefficient because it creates incentives or insulates from consequences, which in turn distorts private party behavior); Kyle D. Logue, *Legal Transitions, Rational Expectations, and Legal Processes*, 13 J. CONTEMP. LEGAL ISSUES 211, 214 (2003) (arguing that anticipatory incentive effects on private actors that may otherwise lead to hedging and cost-internalization generally do not have much force when the change occurs due to a regime change).

by the party initiating the change.<sup>87</sup> These debates have generally centered around the economic effects on industry following regulatory change, particularly in the tax realm. One way to think about the central question raised in these discussions is to ask which party is better able to hedge against or absorb the costs of regulatory change. Businesses can build uncertainty into pricing models or purchase insurance, and some scholars argue that these entities are in a better position to calculate and hedge against the uncertainty following regime change (or regulatory change more generally).<sup>88</sup> Similarly, States might be accustomed to responding to generalized shifts in federal regulatory policy. Individuals, however, are positioned otherwise. They behave in different ways, generally have different experiences with shifting regulation, and are generally not able to hedge the same way businesses or States are.<sup>89</sup> Especially when it comes to rights, benefits, or statuses that they were previously granted through government action, individuals might come to expect that those protections or entitlements will continue. If those protections or entitlements are later rescinded, individuals might need more time to adjust their lives and affairs to mitigate the disruption caused by the policy shift.<sup>90</sup>

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87. Richard A. Epstein, *Beware of Legal Transitions: A Presumptive Vote for the Reliance Interest*, 13 J. CONTEMP. LEGAL ISSUES 69, 71–72 (2003). Professor Epstein also argues that a heightened level of judicial intervention would be appropriate in this context, with an eye toward preserving liberty and property. *Id.* at 74.

88. See, e.g., Kaplow, *supra* note 86, at 520–36 (“The belief that market solutions to problems of risk and incentives are generally more efficient than government remedies implies that the market response to legal transitions is similarly more efficient than government transitional relief.”).

89. Cf. Fan, *supra* note 84, at 941–47 (explaining that private individuals are rarely successful in bringing cases when they have relied on a since-altered government position). Justice Gorsuch acknowledged this distinction between types of regulated parties during oral arguments for *Relentless Inc. v. Department of Commerce*, No. 22-1219 (U.S. argued Jan. 17, 2024), and *Loper Bright Enterprises v. Raimondo*, No. 22-451 (U.S. argued Jan. 17, 2024), in discussing disruptions of reliance interests in agency interpretations that may be upheld under *Chevron* deference. During the *Relentless* argument, Justice Gorsuch noted that regulated industries “can take care of themselves” when agencies change policies following a change of administration, but that individuals—“the immigrant, the veteran seeking his benefits, the Social Security Disability applicant, who have no power to influence agencies, who will never capture them, and whose interests are not the sorts of things on which people vote”—are differently situated and experience agency “flip-flop” differently. Oral Argument at 1:50:48, *Relentless, Inc. v. Dep’t of Commerce*, No. 22-1219 (U.S. argued Jan. 17, 2024), <https://www.oyez.org/cases/2023/22-1219> [<https://perma.cc/XXW6-DJHK>]. As of the date of this writing, the Court had not yet rendered a decision on *Relentless* or *Loper Bright*.

90. Fan, *supra* note 84, at 941–47.



Administrative reliance can be a helpful and robust way to address these concerns. Forcing agencies to wrestle with, consider, and explain their thinking as to the serious reliance interests implicated by policy change can promote better decision-making, transparency, and accountability.<sup>91</sup> Public reason-giving also constrains decisionmakers by committing them to the justifications and rationales they provide.<sup>92</sup> This practice aligns with other general mandates requiring agencies to engage in *ex ante* public reason-giving.<sup>93</sup> Administrative reliance can also be a powerful way for affected groups to confront an agency, particularly in the context of informal agency action. Unlike notice-and-comment rulemaking, where an agency would hold open a period of time for the public to comment on a proposed rule, informal agency action is typically undertaken in a nonpublic forum. Informal agency action does not allow impacted parties an *ex ante* opportunity to make their concerns known to the agency. In these instances, administrative reliance-based claims might be the first opportunity individuals have to demand that the agency address their serious reliance interests and provide reasons for disrupting them. Administrative reliance may be an especially important remedial option for historically marginalized groups or groups who lack political power, for whom participating in elections is not a realistic option, but who nevertheless are deeply affected by the regulatory choices that follow the outcomes of elections.

Thus, judicial oversight over administrative reliance can be a very good, and very important, intervention, but there remains a difficult foundational question to answer: When should courts intervene to say that an agency did not consider the right type of reliance interests during the agency's decision-making process? Right now, there is no coherent theory for what interests constitute cognizable administrative

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91. See, e.g., Ashley S. Deeks, *Secret Reason-Giving*, 129 YALE L.J. 612, 626–34 (2020) (discussing the virtues of public reason-giving); Daniel Deacon, *Responding to Alternatives*, 122 MICH. L. REV. (forthcoming 2024) (manuscript at 18–21), <https://ssrn.com/abstract=4362386> [<https://perma.cc/T4YN-P2GS>] (discussing the common justifications for agency reason-giving requirements). For a discussion on the reasons for reason-giving, see generally Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633 (1995) (discussing the logic of giving reasons).

92. Schauer, *supra* note 91, at 645; Deeks, *supra* note 91, at 628–29.

93. See, e.g., 5 U.S.C. § 553(c) (requiring that an agency provide a “concise general statement” of the “basis and purpose” for final regulations promulgated through notice-and-comment rulemaking).

reliance interests, which has resulted in a doctrine of judicial review that is subject to abuse, manipulation, and overreach.

### C. *Judicial Oversight over Regime Change*

The APA, which is the “super statute” governing agency action, provides procedural checks on agencies to guard against abuses in exercises of agency power.<sup>94</sup> The APA’s prohibitions include barring agencies from acting outside of their statutorily delegated authority, from acting without observing procedures required by law, and from acting in ways that are arbitrary or capricious.<sup>95</sup> The APA was a result of a compromise aimed at balancing the need for a robust and dynamic administrative state that was capable of implementing broad federal statutes against concerns that agencies would not be sufficiently democratically accountable or otherwise comply with rule of law constraints or values.<sup>96</sup> Driving the debate were a pro-regulatory New Deal administration on the one hand, and on the other, pro-business interests with strong concerns over protecting vested property and contractual rights from arbitrary regulatory interference.<sup>97</sup>

Thus, it was these types of classic reliance concerns that prompted what Professors William Eskridge and John Ferejohn describe as the APA’s “deep compromise.”<sup>98</sup> In exchange for recognizing the

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94. William N. Eskridge, Jr. & John Ferejohn, *The APA as a Super-Statute: Deep Compromise and Judicial Review of Notice-and-Comment Rulemaking*, 98 NOTRE DAME L. REV. 1893, 1894–95 (2023) [hereinafter Eskridge & Ferejohn, *APA as Super-Statute*] (defining super-statutes as laws that entrench “governmental structures and quasi-constitutional norms” and that establish a new normative or institutional framework carrying societal and cultural significance, and identifying the APA as “part of the foundation of the modern American state”); Kathryn E. Kovacs, *Superstatute Theory and Administrative Common Law*, 90 IND. L.J. 1207, 1223–37 (2015) (applying the theory of super-statutes developed by WILLIAM N. ESKRIDGE, JR. & JOHN FERREJOHN, *A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION* 10 (2010) [hereinafter ESKRIDGE & FERREJOHN, *REPUBLIC*]).

95. 5 U.S.C. § 706(2)(A)–(C).

96. Eskridge & Ferejohn, *APA as Super-Statute*, *supra* note 94, at 1903.

97. *Id.* at 1903, 1909, 1925; *see also* George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557, 1592–93, 1626–28, 1680 (1996) (describing the history of negotiation behind the passage of the APA).

98. Eskridge and Ferejohn describe this deep compromise as resulting from robust deliberation between liberal and conservative factions. Eskridge & Ferejohn, *APA as Super-Statute*, *supra* note 94, at 1921–23. Although scholars disagree over the depth of the deliberative compromise that continues to inform and interpret the APA, they typically agree that, at its passage, the APA was a result of great compromise between these factions. *See, e.g.*, Kovacs, *supra* note 94, at 1227 (“In sum, the APA of 1946 represented Congress’s response to a conservative movement and emerged from an enthusiastic Congress following years ‘of public

legitimacy and vast delegations of authority granted to the modern administrative state, the APA provides for robust forms of democratic participation and judicial review to constrain secret or arbitrary agency action. The paradigmatic reform of this compromise was notice-and-comment rulemaking, which addresses democratic and accountability-oriented concerns by (1) allowing stakeholders and the general public to comment on an agency's proposed rulemaking activity and (2) forcing the agency to respond and show its work in publicly justifying its ultimate rulemaking decision.<sup>99</sup>

Over time, the procedural protections of the APA have been read to safeguard more than vested property or contractual rights.<sup>100</sup> The APA has been invoked to protect against the unreasoned disruption of certain expectations—namely, those that parties had formed as a result of quasi-contractual promises made by the government through prior agency policy—even if those expectations would not otherwise rise to the level of a recognized property or contract right.<sup>101</sup> These concerns resemble classic reliance interests and are what this Article calls “classic reliance-type” interests or expectations.

The APA protects these classic reliance-type expectations through another “deep compromise” to codify judicial review of agency action,<sup>102</sup> which included the provision that courts may “hold unlawful and set aside agency action” that is arbitrary or capricious.<sup>103</sup> As discussed in Part II below, informal agency action can generate serious reliance interests. An informal action can be rescinded, of course, but courts have held that the APA provides a check on how

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discussion and official deliberation’ within and between Congress, the Executive Branch, the ABA, and the public.” (quoting William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1231 (2001))).

99. Kovacs, *supra* note 94, at 1232–33; Eskridge & Ferejohn, *APA as Super-Statute*, *supra* note 94, at 1922.

100. See, e.g., ESKRIDGE & FEREJOHN, *REPUBLIC*, *supra* note 94, at 122 (“[Superstatutes] provide a mechanism whereby a great principle can be recognized and entrenched, but the details worked out by experts and institutions [in the future].”).

101. See, for example, the discussion of *Fox Television*, *infra* at Part II.B (distinguishing between affirmative changes to agency regulation and prior quasi-contractual promises without official agency policy).

102. Eskridge & Ferejohn, *APA as Super-Statute*, *supra* note 94, at 1922.

103. 5 U.S.C. § 706(2)(A). Scholars disagree over the legitimacy or desirability of the type of “hard look” review provided by *State Farm*. See, e.g., Christopher J. Walker & Scott T. MacGuidwin, *Interpreting the Administrative Procedure Act: A Literature Review*, 98 NOTRE DAME L. REV. 1963, 1966–89 (2023) (describing the different theories of APA interpretation and summarizing the defenses and critiques of “hard look” review).

agencies may do so, which includes requiring agencies to give due consideration to the serious reliance interests at stake before finalizing their decisions.<sup>104</sup>

So how should agency policy change be balanced against the rights that stand to be implicated or rescinded by such change? Professor Blake Emerson argues that a judicially enforced procedural requirement might provide a desirable soft brake to “reduce regulatory whiplash” that might otherwise transpire following each change in administration.<sup>105</sup> Similarly, Professor Benjamin Eidelson views certain types of increased judicial oversight as an accountability-forcing tool that pushes agencies to be more forthright about the reasons underlying their decisions.<sup>106</sup>

However, the administrative reliance doctrine, as applied today, seems to have departed from the goals intended by the APA. Judicial oversight can keep agencies honest and force transparency and accountability, both of which are desirable in a system where such visibility can help voters understand the consequences of their choices and equip them to make informed decisions in subsequent elections. But the current scheme not only provides for judicial oversight—it also allows for judicial overreach. Professors Michael Kang and Joanna Shepherd spotlighted the issue of partisan judicial decision-making following *Bush v. Gore*<sup>107</sup> and found that Republican judges were more likely to favor their own party in election cases, suggesting that adherence to partisan preferences and outcomes can play a role in judicial decision-making.<sup>108</sup> Ideological polarization and “increasingly fractious opinions” within the federal judiciary have risen in the past few decades.<sup>109</sup> In recent years, and particularly with respect to lawsuits against President Donald Trump and his administration, ideology is a “strong predictor of case outcomes,” including in cases involving “fundamental constitutional issues” relating “to questions of executive

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104. See *infra* Part II.

105. Emerson, *supra* note 27, at 2206.

106. Benjamin Eidelson, *Reasoned Explanation and Political Accountability in the Roberts Court*, 130 YALE L.J. 1748, 1758–60 (2021).

107. *Bush v. Gore*, 531 U.S. 98 (2000).

108. Michael S. Kang & Joanna Shepherd, *The Long Shadow of Bush v. Gore: Judicial Partisanship in Election Cases*, 68 STAN. L. REV. 1411, 1416 (2016).

109. Adam Bonica & Maya Sen, *Estimating Judicial Ideology*, 35 J. ECON. PERSPS. 97, 99 (2021).

authority.”<sup>110</sup> If the judiciary is becoming more politically polarized, and if there is a tendency for judges to rule along ideological or partisan lines when confronted with fundamental questions implicating the bounds of executive power, it is not clear that they would adjudicate procedural claims brought under the APA in ways that are not results oriented.

In the context of immigration law, where questions and policies are intensely political and the political branches maintain plenary power<sup>111</sup> to regulate the field, there is an ongoing and robust debate about what role courts should have in policing executive and agency action.<sup>112</sup> Perspectives on this question often rest on how one views the position of agencies and administrative policies within the democratic structure and process. Cox and Rodríguez view regime change—and the changes in policies that accompany it—as a manifestation of democratic will, and they have cautioned against imposing inflexible procedural requirements that would inhibit an incoming regime’s ability to govern according to its own policy preferences.<sup>113</sup>

## II. JUDICIAL DEVELOPMENT OF ADMINISTRATIVE RELIANCE

Reliance interests in administrative law have comprised part of arbitrary and capricious review<sup>114</sup> for decades, but the Supreme Court has generally addressed reliance in only cursory ways. For much of the history of administrative reliance, the Court has simply stated that reliance interests are something that agencies must consider when

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110. *Id.* at 115.

111. There has been doctrinal confusion as to whether plenary power over immigration rests with Congress, or the executive, or both (and if both, then what powers are plenary as to whom). See generally Cox & Rodríguez, *Immigration Law Redux*, *supra* note 33, at 465–527 (summarizing the history and division of power over immigration regulation between the political branches); COX & RODRÍGUEZ, *PRESIDENT AND IMMIGRATION*, *supra* note 69, at 1–13 (explaining that power over immigration policy has been consolidated in the executive branch).

112. *Id.* at 230; Rodríguez, *Reading Regents*, *supra* note 14, at 30; see also Bijal Shah, *Reliance Interests & DACA Rescission*, ACS BLOG (Apr. 27, 2018), <https://www.acslaw.org/expertforum/reliance-interests-the-daca-rescission> [<https://perma.cc/N7F2-VLHZ>] (noting that even highly political and seemingly exceptional immigration policies must also adhere to administrative law principles and the requirements of the APA).

113. Rodríguez, *Reading Regents*, *supra* note 14, at 30; COX & RODRÍGUEZ, *PRESIDENT AND IMMIGRATION*, *supra* note 69, at 230.

114. For an account of the judicial development of administrative law doctrines, see Gillian E. Metzger, *Embracing Administrative Common Law*, 80 GEO. WASH. L. REV. 1293, 1298–1320 (2012).

there is a change in the agency's position. The Court has indicated that administrative reliance applies across the spectrum of agency action, including to agency adjudication,<sup>115</sup> rulemaking,<sup>116</sup> an agency's interpretive rules,<sup>117</sup> an agency's interpretations of its own regulations,<sup>118</sup> and other types of informal agency action.<sup>119</sup> What the Court has not done, however, is provide a cohesive framework within which to understand and apply administrative reliance. Instead, the Court has invoked administrative reliance on a seemingly ad hoc basis, which has led to confusion among lower courts and litigants alike.

This Part takes a close look at the Court's jurisprudence on administrative reliance up to its decision in the DACA case *DHS v. Regents*.

#### A. *State Farm and the Seeds of Administrative Reliance in Arbitrary and Capricious Review*

The Supreme Court sowed the seeds for administrative reliance in *Motor Vehicle Manufacturers' Association v. State Farm*.<sup>120</sup> In *State Farm*, the Court concluded that rationales grounded in shifting political whims were not sufficient to justify agency action.<sup>121</sup> That case concerned President Ronald Reagan's deregulatory political agenda as it applied to the repeal of a Carter-era regulation mandating the installation of automatic crash protection in newly manufactured automobiles.<sup>122</sup> At the time (and for over fifty years prior), car accidents were the leading cause of accidental death and injury in the

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115. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

116. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 49–51 (1983).

117. *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 222 (2016).

118. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2421 (2019).

119. *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1981, 1913 (2020).

120. *State Farm*, 463 U.S. at 29.

121. *Id.* at 47–50, 57; *id.* at 59 (Rehnquist, J., concurring in part and dissenting in part); see also Watts, *Proposing a Place for Politics*, *supra* note 33, at 5 (explaining that *State Farm* “has been read to clarify [that] agencies should explain their decisions in technocratic, statutory, or scientifically driven terms, not political terms” (emphasis in original)); Jerry L. Mashaw, *The Story of Motor Vehicle Mfrs Ass'n of the U.S. v. State Farm Mutual Automobile Ins. Co.*: *Law, Science and Politics in the Administrative State*, in *ADMINISTRATIVE LAW STORIES* 335, 335 (Peter L. Strauss ed., 2006); Kevin M. Stack, *The President's Statutory Powers To Administer the Laws*, 106 *COLUM. L. REV.* 263, 307 n.191 (2006) (noting that a change of administration does not serve as a sufficient basis for agency action and that agencies must instead rationalize their decisions in statutory and other terms).

122. *State Farm*, 463 U.S. at 36–39.

United States.<sup>123</sup> In 1966, Congress passed the National Traffic and Motor Vehicle Safety Act, which directed the Secretary of Transportation to issue motor safety standards to improve the safety of automobile travel.<sup>124</sup> In 1977, the National Highway Traffic Safety Administration under the Carter administration issued a rule requiring car manufacturers to install either air bags or automatic seatbelts in cars beginning with model year 1982.<sup>125</sup> In 1980, then-president Jimmy Carter lost his reelection bid to Ronald Reagan. Within weeks of taking office, Reagan's Secretary of Transportation took steps to reopen and rescind the safety restraint regulation.<sup>126</sup>

Reagan campaigned on a deregulatory agenda, and rescinding the automatic restraint rule was a key component of his policy.<sup>127</sup> The Reagan administration took steps to rescind the rule wholesale, reasoning that economic circumstances had changed and the economic condition of the automobile industry had worsened, and that the requirement was no longer reasonable or predictably effective.<sup>128</sup> The Court ultimately found the agency's explanation for rescission to be insufficient and unanimously held that the rescission was arbitrary and capricious under the APA.<sup>129</sup> In so doing, the Court scrutinized the agency's reasoning for rescinding the rule, articulated the principle that "an agency must cogently explain why it has exercised its discretion in a given manner," and held that failure to do so would render such a decision arbitrary and capricious under APA § 706.<sup>130</sup>

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123. *Id.* at 33.

124. *Id.*

125. *Id.* at 37. The regulation had a somewhat convoluted and contentious history. NHTSA took over ten years to study the efficacy of various types of passenger restraints. *Id.* at 34–35. Automobile manufacturers balked at the expense of having to install these new restraints in cars. *Id.* at 36. Ultimately, after several rounds of notice, comment, promulgation, rescission, and revision, the agency promulgated the final rule in 1975, with an effective date of August 31, 1976. *Id.* at 35–36.

126. *Id.* at 37.

127. Linda Greenhouse, *High Court Backs Airbags Mandate*, N.Y. TIMES (June 25, 1983), <https://www.nytimes.com/1983/06/25/us/high-court-backs-airbags-mandate.html> [<https://perma.cc/YH6L-WE62>]; Fred Barbash, *Rescission Of Air Bag Rule Is Hit*, WASH. POST (June 24, 1983), <https://www.washingtonpost.com/archive/politics/1983/06/25/rescission-of-air-bag-rule-is-hit/9d0be0eb-f8de-4d17-8add-f21df18f73de> [<https://perma.cc/4DVJ-PHZ6>].

128. *State Farm*, 463 U.S. at 38–39.

129. *Id.* at 46.

130. *Id.* at 48.

This type of review has come to be known as “arbitrary and capricious” or “hard look” review.<sup>131</sup> It does not require an agency to adhere to a policy indefinitely, but the agency must provide certain transparency and reasoning if the agency later seeks to change it.<sup>132</sup> In considering what is required of an agency seeking to rescind or reverse course from a prior agency decision, the Court reasoned that “an agency must be given ample latitude to adapt their rules and policies to the demands of changing circumstances” but, in such cases, the agency must “supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance.”<sup>133</sup>

The Court’s opinion spoke in nonpolitical terms, but then-Justice William Rehnquist, writing separately, acknowledged the political motives behind the policy change.<sup>134</sup> Justice Rehnquist wrote, “The agency’s changed view of the standard seems to be related to the election of a new President of a different political party. . . . A change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency’s reappraisal of the costs and benefits of its programs and regulations.”<sup>135</sup> In other words, Justice Rehnquist would have allowed for justifications grounded in political preferences to satisfy arbitrary and capricious review.<sup>136</sup>

Regardless of what explanations agencies facially give for their actions or what explanations the courts will accept from agencies, it would be naïve to think that agencies are motivated by purely scientific or technocratic determinations.<sup>137</sup> Professor Kathryn Watts has argued that courts should adopt a version of Justice Rehnquist’s formulation in *State Farm* and allow for certain political rationales—particularly those linked to legitimate policy goals and preferences (as opposed to simply rewarding partisan influences)—to be considered as legitimate

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131. See Louis J. Virelli III, *Deconstructing Arbitrary and Capricious Review*, 92 N.C. L. REV. 721, 723, 728 (2013); Thomas J. Miles & Cass R. Sunstein, *The Real World of Arbitrariness Review*, 75 U. CHI. L. REV. 761, 772 (2008).

132. *State Farm*, 463 U.S. at 57.

133. *Id.* at 42.

134. *Id.* at 59.

135. *Id.*

136. *Id.* at 58–59.

137. Watts, *Proposing a Place for Politics*, *supra* note 33, at 8–9; see also *Dep’t of Com. v. New York*, 139 S. Ct. 2551, 2573 (2019) (requiring agencies to provide non-pretexual justifications).



justifications for purposes of arbitrary and capricious review.<sup>138</sup> Watts reasoned that this would, among other things, bring hard look review in line with the current model of administrative decision-making, which acknowledges political influences over the administrative state, as well as bring political influences out into the open to promote political accountability throughout the system.<sup>139</sup>

The Court since *State Farm* has made clear that the fact that agency action is motivated by or aligned with an administration's policy agenda does not by itself render the action invalid.<sup>140</sup> Presidents continue to exercise influence and control over the administrative state, and recent presidential administrations have made effective use of the executive power to advance the administration's policy agenda across issues and agencies.<sup>141</sup> And regardless of one's view on the proper role of politics in administrative governance, it is clear that changes to administrative policy and procedure often follow a change in regime.<sup>142</sup>

Although the Court did not explicitly consider reliance interests in *State Farm*, its searching review of agency action and justification laid the foundation for potentially stringent judicial oversight of such action, particularly with respect to agency action that changes course on previously established rules or policies.

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138. Watts, *Proposing a Place for Politics*, *supra* note 33, at 8.

139. *Id.* at 9, 12–13, 32–45.

140. *E.g.*, *Biden v. Texas*, 597 U.S. 785, 812 (2022) (“But the agency’s ex ante preference for terminating MPP—like any other feature of an administration’s policy agenda—should not be held against the October 29 Memoranda.”); *New York*, 139 S. Ct. at 2574 (2019) (“It is hardly improper for an agency head to come into office with policy preferences and ideas . . . and work with staff attorneys to substantiate the legal basis for a preferred policy.”); *see also State Farm*, 463 U.S. at 59 (Rehnquist, J., concurring in part and dissenting in part) (“As long as [an] agency remains within the bounds established by Congress, it is entitled to assess administrative records and evaluate priorities in light of the philosophy of the administration.”).

141. *See supra* notes 23–26, 67 and accompanying text.

142. Indeed, policies regarding how agencies ought to act and produce guidance also may change with administrations. *See, e.g.*, Exec. Order No. 13,891, 84 Fed. Reg. 55235 (Oct. 9, 2019) (seeking to curtail the use of agency guidance in favor of promulgating policy through notice-and-comment rulemaking); Exec. Order No. 13,992, 84 Fed. Reg. 7049 (Jan. 20, 2021) (revoking Executive Order 13,891 and announcing that it was the “policy of [the Biden] Administration to use available tools,” including equipping agencies “with the flexibility to use robust regulatory action,” in the administration’s governance strategy).

### B. Doctrinal Development of Administrative Reliance

In the years since *State Farm*, the Supreme Court has considered on several occasions the question of how agencies must explain a change of course, but it has neglected to develop or apply a coherent theory of administrative reliance.<sup>143</sup> In *Smiley v. Citibank*,<sup>144</sup> the Court summarily stated that “[s]udden and unexplained change . . . or change that does not take account of legitimate reliance on prior interpretation . . . may be arbitrary, capricious or an abuse of discretion.”<sup>145</sup> The Court’s reasoning consisted of just one paragraph and focused on whether the change at issue constituted a change of “official agency position.”<sup>146</sup> The Court looked at whether prior informal agency statements constituted “binding agency policy” such that subsequent agency action marked a departure from the prior official agency position.<sup>147</sup> In *Perez v. Mortgage Bankers Ass’n*,<sup>148</sup> the Court extended the application of administrative reliance to an agency’s interpretive rules, and in *Christopher v. SmithKline*,<sup>149</sup> the Court held that new agency interpretations that upset longstanding reliance interests would

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143. The Court had previously considered reliance in other contexts involving agency decision-making. *See, e.g.*, *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 295 (1974) (holding that the NLRB could engage in enforcement through case-by-case adjudications, notwithstanding potential reliance by parties on outcomes of prior adjudications); *United States v. Pa. Indus. Chem. Corp.*, 411 U.S. 655, 673–75 (1973) (holding that a party can assert reliance on longstanding agency interpretation and regulation as a defense in agency enforcement actions). Scholars have also considered whether estoppel-type defenses should be permitted on reliance grounds. *See supra* notes 84–85 and accompanying text. *See generally* Frank C. Newman, *Should Official Advice Be Reliable? – Proposals as to Estoppel and Related Doctrines in Administrative Law*, 53 COLUM. L. REV. 374 (1953) (discussing the availability of estoppel-related defenses for parties that rely on official agency advice).

144. *Smiley v. Citibank* (S.D.), N.A., 517 U.S. 735 (1996). *Smiley* concerned regulations promulgated by the comptroller governing an out-of-state bank’s ability to charge credit card late fees as “interest” such that a resident of a state otherwise disallowing such charges from an in-state bank would nevertheless be subject to them from an out-of-state bank. *Id.* at 737–38. The petitioner in that case was an individual resident of California contesting the charges; the respondent was the bank that issued credit cards to the petitioner and charged the late fees at issue. *Id.* The Court ultimately held that the agency’s proposed regulations did not constitute a sudden departure from prior agency policy. *Id.* at 742.

145. *Id.* at 742 (cleaned up).

146. *Id.*

147. *Id.* at 743.

148. *Perez v. Mortg. Bankers Ass’n*, 575 U.S. 92, 105–06 (2015). The *Perez* Court also rejected the D.C. Circuit’s requirement that agencies engage in rulemaking in order to overturn previously established interpretive positions. *Id.* at 100.

149. *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 159 (2012).

not receive *Auer* deference, which directs courts to defer to agencies' reasonable interpretations of their own ambiguous regulations.<sup>150</sup>

Throughout this line of cases, the Court has focused on changes in agency regulation, policy, and interpretation. It has repeatedly distinguished these types of affirmative changes from new agency action. In *FCC v. Fox Television Studios*,<sup>151</sup> the Court held that an agency must provide “a more detailed justification than what would suffice for a new policy created on a blank slate” when “its new policy rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interests that must be taken into account.”<sup>152</sup> Through this holding, the Court clarified that it was concerned with “serious” reliance interests, but did not elucidate what “serious” means.<sup>153</sup> The Court also set up two categories of agency action: action that produces a “new policy created on a blank slate” and action that alters some previously crafted policy.<sup>154</sup>

The focus of this line of cases on changes in official agency policy makes some degree of sense. After all, those were the facts of the cases presented to the Court. What the Court's “blank slate” distinction in *Fox Television* and this line of cases overlooks, however, is that there might be longstanding agency practice that arises not from an affirmative agency statement or regulation but rather from historical practice undertaken in the absence of an official agency policy.<sup>155</sup> It is not clear whether a departure from that type of practice would

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150. *Id.* at 159; *see also* *Kisor v. Wilkie*, 139 S. Ct. 2400, 2421 (2019) (noting that longstanding interpretations are more likely to receive deference).

151. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009). *Fox Television* concerned FCC enforcement actions brought in response to award-show broadcasts that included single utterances of “fleeting expletives.” *Id.* at 510–13. The FCC had previously limited its enforcement of statutory prohibitions against indecent broadcasts to instances where there was a “repetitive occurrence of . . . indecent words” but changed course in the early 2000s. *Id.* at 507–08. The Court ultimately found that the FCC's acknowledgment of its departure from prior agency policy, evidenced from its declining to assess penalties in connection with enforcement actions under the new policy, was sufficient to render the agency's action “neither arbitrary nor capricious.” *Id.* at 517.

152. *Id.* at 515.

153. *See id.* (using the phrase “serious reliance interests” without explaining it any further).

154. *Id.*

155. The Court has suggested that a “very lengthy period of conspicuous inaction” may generate reliance interests such that a new agency interpretation favoring enforcement may constitute “unfair surprise” and therefore not be subject to *Auer* deference with respect to retroactive enforcement. *SmithKline*, 567 U.S. at 158–59.

constitute a “new” agency policy or whether established but unofficial practice could nevertheless generate serious reliance interests meriting consideration and protection.

This question is not merely hypothetical. For example, until 2019, individuals seeking asylum in the United States were permitted to remain in the United States while pursuing their asylum claims, regardless of when or how they entered the country.<sup>156</sup> In 2019, DHS implemented a series of agency memoranda announcing the application of so-called “contiguous territory return” provisions of the Immigration and Nationality Act to asylum seekers entering the United States through Mexico—the first time the agency had interpreted and applied such provisions in this way.<sup>157</sup> This new policy, officially named the Migrant Protection Protocols (“MPP,” also known as the “Remain in Mexico” policy), arguably did not constitute a change from a prior official agency rule or interpretation but rather a departure from historical understandings of federal and international legal rights and obligations owed to asylum seekers and the practices that followed therefrom.<sup>158</sup>

This question also may implicate an agency’s ability to regulate spaces or issues that it previously has not. Here, one question may be whether businesses can have serious reliance interests in de facto nonregulation. Generally, agencies do need to consider the costs and benefits of certain regulations that are expected to have significant economic effects, and such reliance interests may be captured in that analysis.<sup>159</sup> Another unresolved question is whether an agency’s reliance interest analysis would require something additional to and apart from an otherwise mandated cost-benefit analysis.

Answers to these questions largely depend on the way in which we conceive of the theory of administrative reliance. It remains unclear

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156. Haiyun Damon-Feng, *Restoring the Right To Seek Asylum: The Case for Rescinding Removal Orders Issued Under the “Remain in Mexico” Policy*, HARV. L. & POL’Y REV. BLOG (Mar. 5, 2021) [hereinafter Damon-Feng, *Restoring the Right*], <https://journals.law.harvard.edu/lpr/2021/03/05/restoring-the-right-to-seek-asylum-the-case-for-rescinding-removal-orders-issued-under-the-remain-in-mexico-policy> [https://perma.cc/P2BK-XCMF].

157. See *infra* note 251.

158. See, e.g., Brief in Opposition at 32, *Mayorkas v. Innovation L. Lab*, 141 S. Ct. 2842 (2021) (No.19-1212), 2020 WL 4196749, at \*32 (noting that MPP is a “dramatic departure from established practices that the government previously deemed necessary”).

159. See, e.g., Exec. Order No. 12,866, 58 Fed. Reg. 51735 (Oct. 4, 1993) (requiring agencies to undertake cost-benefit analysis when undertaking certain regulatory actions).

when people can come to rely on agency action, what types of action they may rely on, and who the agency must consider when it evaluates reliance interests. These are significant questions that have largely been left open by prior case law, and they are the questions that this Article disentangles and begins to address.

### C. Encino Motorcars

The Court's most thorough application and explication of administrative reliance came in *Encino Motorcars, LLC v. Navarro*.<sup>160</sup> That case concerned Department of Labor ("DOL") guidance and regulations interpreting whether car "service advisors" were covered under the "salesman" overtime pay exemption applicable to car dealerships covered by the Fair Labor Standards Act ("FLSA").<sup>161</sup> In 1970, the DOL issued an interpretive rule that had the effect of excluding car service advisors from the exemption.<sup>162</sup> Then, in 1978, following a statutory amendment to FLSA and a series of federal court cases rejecting the DOL's interpretation, the agency issued an opinion letter stating that service advisors could be exempt under FLSA, which the agency also acknowledged in its Field Operations Handbook nine years later.<sup>163</sup> In 2008, the last year of President George W. Bush's administration, the DOL issued a notice of proposed rulemaking seeking to codify the exemption for service advisors.<sup>164</sup> The agency did not complete the rulemaking process until 2011, during the Obama administration, when it changed course and announced that it was not proceeding with the 2008 proposed rule.<sup>165</sup> Instead, the DOL issued a final rule that took the opposite position from the proposed rule (and the agency's position for the preceding thirty-three years) and reverted to the agency's 1970 interpretation.<sup>166</sup>

Following the agency's promulgation of the new rules, a group of car service advisors employed at a Los Angeles-area Mercedes-Benz dealership sued the dealership for failing to pay them overtime because under the new rules, they were no longer considered to be exempt

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160. *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211 (2016).

161. *Id.* at 214–16.

162. *Id.* at 216.

163. *Id.* at 217.

164. *Id.*

165. *Id.* at 218.

166. *Id.*

employees under FLSA.<sup>167</sup> The question before the Court was whether *Chevron* deference should be afforded to the agency's interpretation, and to decide that issue, it looked to whether the agency followed proper procedure in promulgating the regulation.<sup>168</sup> In so doing, the Court largely focused on whether the agency had given sufficient attention to the reliance interests generated by the agency's prior policy.<sup>169</sup>

The Court, citing *Fox Television* and *Smiley*, reiterated that an agency could change its position, but the agency must display an "awareness that it is changing position and show that there are good reasons for the new policy." The agency also must be "cognizant that longstanding policies may have engendered serious reliance interests that must be taken into account" in its explanation.<sup>170</sup> Recognizing such reliance does not require additional justification, nor does it trigger a heightened standard of review, but it does require "a reasoned explanation" for the agency's departure from prior policy.<sup>171</sup>

In applying this framework, the Court came to the "unavoidable conclusion . . . that the 2011 regulation was issued without the reasoned explanation that was required in light of the Department's change in position and the significant reliance interests involved."<sup>172</sup> The Court weighed heavily the "decades of industry reliance on the Department's prior policy," finding that reliance was evidenced by years of service advisors and dealerships negotiating and structuring compensation schemes in consideration of the 1978 policy.<sup>173</sup> The Court also emphasized more structural industry-wide reliance, finding that compliance with the new policy could require "systemic, significant changes to the dealerships' compensation arrangements."<sup>174</sup> Lastly, the Court considered the new risk of liability facing car dealerships whose service advisors were not compensated appropriately under the DOL's new interpretation and explained that such reliance interests needed to

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167. *Id.*

168. *Id.* at 219–21.

169. *Id.* at 221–22.

170. *Id.* at 221–22 (cleaned up).

171. *Id.* at 222; *see also* *FCC v. Fox Television*, 556 U.S. 502, 515 (2009).

172. *Encino*, 579 U.S. at 222.

173. *Id.*

174. *Id.* at 222–23.

be considered by the agency even if such reliance could be used as a defense to retroactive liability in future litigation.<sup>175</sup>

The Court criticized the 2011 action, noting that “[t]he Department gave little explanation for its decision to abandon its decades-old practice of treating service advisors as exempt” under FLSA.<sup>176</sup> Although the 2011 rule included an explanation that “the statute does not include such positions and the Department recognizes that there are circumstances under which the requirements for the exemption would not be met,” it did not explain the reasons for why the statute *should* be interpreted this way and why the agency found these arguments persuasive.<sup>177</sup> The Court ultimately held that the sum of the agency’s stated rationales amounted to “almost no reasons at all” and that “[i]n light of the serious reliance interests at stake, the Department’s conclusory statements do not suffice to explain its decision.”<sup>178</sup>

In her concurrence, Justice Ruth Bader Ginsburg, joined by Justice Sonia Sotomayor, cited *Fox Television* and reiterated that reliance interests do not *bar* an agency from changing position and that the Court was not imposing a heightened standard of review for changes in position.<sup>179</sup> Justice Ginsburg agreed that here, “[i]ndustry reliance may spotlight the inadequacy of an agency’s explanation” and that the agency’s “summary discussion” was inappropriate given the “decades of industry reliance.”<sup>180</sup> She underscored, however, that the agency was within its rights to change its position notwithstanding widespread reliance and the systemic and significant industry-wide changes the new policy would require.<sup>181</sup>

It is precisely the line that Justice Ginsburg draws that illustrates the power of asserting claims based on administrative reliance and the necessity for additional clarity on what reliance interests require of agencies. When an agency fails to properly address reliance interests,

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175. *Id.* at 223.

176. *Id.* at 218.

177. *Id.* at 223–24 (cleaned up).

178. *Id.* at 224.

179. *Id.* at 225 (“[N]othing in today’s opinion disturbs well-established law. In particular, where an agency has departed from a prior position, there is no ‘heightened standard’ of arbitrary-and-capricious review.” (quoting *FCC v. Fox Television*, 556 U.S. 502, 515 (2009))).

180. *Id.* at 226 (cleaned up).

181. *Id.* at 226–27 (“Even if the Department’s changed position would necessitate systemic, significant changes to the dealerships’ compensation arrangements, the Department would not be disarmed from determining that the benefits of overtime coverage outweigh those costs.” (cleaned up)).

courts can check agency action to make sure that it goes back and does so. But when should courts intervene? What are the types of reliance claims we are concerned with, and who should assert them? The Court elaborated on its view of these questions in *DHS v. Regents*.

#### D. *The DACA Case*

In the DACA case, *DHS v. Regents*, the Supreme Court expanded its view on reliance interests. There, the Court held that even informal policies that disclaimed reliance by their own terms could generate legally cognizable reliance interests because of the real-world reliance the policies had engendered.<sup>182</sup> A careful reading of the Court's analysis reveals that the Court actually applied a fairly narrow construction of whose, and what type, of reliance interests counted. However, because it did not expressly discuss these points, and because of the case's sweeping effects more generally, *Regents* has been read expansively—I argue, too expansively—in a way that misuses the doctrine and impedes efficient governance.

1. *Implementation and Rescission of DACA*. The Deferred Action for Childhood Arrivals program was one of President Barack Obama's signature immigration policies. DACA invited eligible undocumented young people to “come out of the shadows,”<sup>183</sup> promising forbearance from removal and work authorization while they were enrolled in the program.<sup>184</sup> It was also one of his most controversial policies, implemented through executive action following political frustration

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182. Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1913–1914 (2020); see Rodríguez, *Reading Regents*, *supra* note 14, at 26 (“[T]he Court rejects the government's argument . . . that because DACA never promised an entitlement, no reliance interests could be said to have arisen.”).

183. In a speech on immigration reform and relief for Dreamers, President Obama said, “If you meet the criteria, you can come out of the shadows and get right with the law.” Jim Acosta & Stephen Collinson, *Obama: “You Can Come Out of the Shadows,”* CNN POLITICS (Nov. 21, 2014, 10:50 AM) (cleaned up), <https://www.cnn.com/2014/11/20/politics/obama-immigration-speech/index.html> [<https://perma.cc/XUW9-N2L4>].

184. DACA Memo, *supra* note 16, at 2, 3 (laying out the guidance for ICE, CBP, and USCIS upon encountering undocumented individuals who qualify for DACA); *Consideration of Deferred Action for Childhood Arrivals (DACA)*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/DACA> [<https://perma.cc/6PA3-QLS3>] (“[C]ertain people who came to the United States as children and meet several guidelines may request consideration of deferred action for a period of 2 years, subject to renewal. They are also eligible to request work authorization.”).



and partisan gridlock in Congress.<sup>185</sup> Unable to make headway with immigration reform in Congress, President Obama turned to executive action.<sup>186</sup> In a now-historic speech delivered in the Rose Garden, President Obama announced that he was directing the Department of Homeland Security to take immediate steps to protect Dreamers—youth who would have been covered by the DREAM Act—notwithstanding Congress’s refusal to pass the bill.<sup>187</sup>

That same day, Secretary of Homeland Security Janet Napolitano issued a memo establishing DACA.<sup>188</sup> The three-page memo classified the agency action as an “exercise of . . . prosecutorial discretion.”<sup>189</sup> It directed Immigration and Customs Enforcement (“ICE”), the agency with responsibility over prosecuting removal cases, to exercise

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185. In 2010, Congress was considering the DREAM Act, which the Obama administration called “common-sense legislation” that had bipartisan support and would provide undocumented young people who were brought to the U.S. as children a pathway to citizenship. *Get The Facts on the DREAM Act*, WHITE HOUSE (Dec. 1, 2010, 7:19 PM), <https://obamawhitehouse.archives.gov/blog/2010/12/01/get-facts-dream-act> [<https://perma.cc/B6JM-YW7U>]. At the same time, Republicans had taken control of the House in the midterms. Paul Harris & Ewen MacAskill, *US Midterm Election Results Herald New Political Era as Republicans Take House*, GUARDIAN (Nov. 3, 2010), <https://www.theguardian.com/world/2010/nov/03/us-midterm-election-results-tea-party> [<https://perma.cc/2WMV-XCHN>] (“In midterm election races across America, Republicans pummeled their opponents.”). Representative John Boehner was slated to take over as Speaker and had pledged that Republicans would “do everything – and I mean everything we can do – to kill [Obama’s agenda], stop it, slow it down, whatever we can.” Michael O’Brien, *Boehner: ‘Not a Time for Compromise’*, HILL (Oct. 27, 2010), <https://thehill.com/blogs/blog-briefing-room/news/73755-boehner-not-a-time-for-compromise> [<https://perma.cc/557C-S6CS>] (cleaned up). In the Senate, then-Senate Minority Leader Mitch McConnell agreed, saying, “The single most important thing we want to achieve is for President Obama to be a one-term president.” Andy Barr, *The GOP’s No-Compromise Pledge*, POLITICO (Oct. 28, 2010, 8:09 AM), <https://www.politico.com/story/2010/10/the-gops-no-compromise-pledge-044311> [<https://perma.cc/ZJ2D-QLNQ>] (cleaned up). When it came time to vote on the DREAM Act in December 2010, the bill passed the House, but it died in the Senate and was never revived. Scott Wong & Shira Toeplitz, *DREAM Act Dies in Senate*, POLITICO (Dec. 18, 2010, 11:39 AM), <https://www.politico.com/story/2010/12/dream-act-dies-in-senate-046573> [<https://perma.cc/ZG73-6AVF>] (examining the five-vote loss of the DREAM Act).

186. See *supra* note 185.

187. Obama, *supra* note 18 (“[E]ligible individuals who do not present a risk to national security or public safety will be able to request temporary relief from deportation proceedings and apply for work authorization.”).

188. DACA Memo, *supra* note 16, at 1 (laying out the new guidance for DHS’s enforcement of U.S. immigration law).

189. *Id.*

discretion with respect to individuals covered by the memo.<sup>190</sup> The memo carefully walked the line between authorized executive action and impermissible encroachment upon Congress's domain.<sup>191</sup> The last paragraph of the memo reads:

This memorandum confers no substantive right, immigration status or pathway to citizenship. Only the Congress, acting through its legislative authority, can confer these rights. It remains for the executive branch, however, to set forth policy for the exercise of discretion within the framework of the existing law. I have done so here.<sup>192</sup>

Even though the memo appears to disavow the creation of a substantive right—and with it, any reliance on the continuation of DACA or the privileges it confers—commentators (and likely President Obama himself) thought that, over time, DACA would nevertheless generate reliance interests.<sup>193</sup>

DACA was a political livewire.<sup>194</sup> During the 2016 election cycle, then-candidate Donald Trump pledged to “immediately terminate”

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190. *Id.* at 2 (“ICE and CBP should immediately exercise their discretion, on an individual basis, in order to prevent low priority individuals from being placed into removal proceedings or removed from the United States.”).

191. Despite these efforts, however, DACA has been criticized since its inception as an unlawful overreach by the executive. Julia Preston & John H. Cushman Jr., *Obama To Permit Young Migrants To Remain in U.S.*, N.Y. TIMES (June 15, 2012), <https://www.nytimes.com/2012/06/16/us/us-to-stop-deporting-some-illegal-immigrants.html> [<https://perma.cc/PDZ2-FWET>] (“Republicans reacted angrily, saying the president had overstepped his legal bounds to do an end run around Congress.”).

192. DACA Memo, *supra* note 16, at 3.

193. Washington Week PBS, *From the Washington Week Vault: President Obama Signs DACA*, YOUTUBE (June 15, 2012), <https://www.youtube.com/watch?v=-BhgngtQmTk> [<https://perma.cc/8UPL-ZNP2>] (“You’re talking about nearly a million people who, like you just said, for all intents and purposes, are here unless they make some grave mistake and break the law.”). In 2022, the Biden administration promulgated regulations codifying DACA. Deferred Action for Childhood Arrivals, 87 Fed. Reg. 53152 (Aug. 30, 2022) (to be codified at 8 C.F.R. pts. 106, 236, 274a). According to USCIS, the rule intends “to preserve and fortify the DACA policy.” *Consideration of Deferred Action for Childhood Arrivals (DACA)*, *supra* note 184.

194. At the time, House Speaker John Boehner considered filing a lawsuit against President Obama challenging Obama’s use of executive authority in implementing DACA. Dara Lind, *Boehner’s Preparing To Sue Obama Again — over Immigration*, VOX (Jan. 27, 2015, 2:00 PM), <https://www.vox.com/2015/1/27/7922525/congress-lawsuit-immigration> [<https://perma.cc/NHJ4-3J98>] (“Speaker of the House John Boehner said on Tuesday that he’s moving closer toward suing President Obama over his executive actions on immigration.”). Since then, challenges to DACA’s legality have continued. Most recently, the Fifth Circuit held that DACA was unlawfully adopted by DHS as exceeding the agency’s statutory authority. *Texas v. United States*, 50 F.4th 498, 526 (5th Cir. 2022). While that appeal was pending, the Biden DHS issued final rules codifying DACA

DACA, calling it an “illegal executive order on immigration.”<sup>195</sup> After President Trump was elected, his administration announced its plans to phase out and terminate the DACA program through a series of

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in the regulations, but the U.S. District Court for the Southern District of Texas extended its injunction to the final rule as well. *See DACA Litigation Information and Frequently Asked Questions*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Oct. 14, 2022), <https://www.uscis.gov/humanitarian/consideration-of-deferred-action-for-childhood-arrivals-daca/daca-litigation-information-and-frequently-asked-questions> [<https://perma.cc/38C6-XUWZ>].

For his part, President Obama sought to expand DACA with the Deferred Action for Parents of Americans (“DAPA”). AM. IMMIGR. COUNCIL, DEFENDING DAPA AND EXPANDED DACA BEFORE THE SUPREME COURT 2 (2016), <https://www.americanimmigrationcouncil.org/research/defending-dapa-and-expanded-daca-supreme-court> [<https://perma.cc/B37N-GS6T>]. A coalition of states, led by Texas, successfully challenged DAPA in federal court. *Texas v. United States*, 809 F.3d 134, 146 (5th Cir. 2015), *aff’d by an equally divided Court*, *United States v. Texas*, 579 U.S. 547 (2016) (per curiam).

195. Katie Reilly, *Here’s What President Trump Has Said About DACA in the Past*, TIME (Sept. 5, 2017, 12:00 PM), <https://time.com/4927100/donald-trump-daca-past-statements> [<https://perma.cc/HU2U-D2ZN>] (cleaned up).

agency actions,<sup>196</sup> culminating in a memorandum from Homeland Security Secretary Elaine Duke that rescinded DACA.<sup>197</sup>

The DACA rescission was immediately challenged in litigation across the country.<sup>198</sup> In January and February 2018, federal courts in

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196. Exec. Order No. 13,768, 82 Fed. Reg. 8799 (Jan. 30, 2017) (“We cannot faithfully execute the immigration laws of the United States if we exempt classes or categories of removable aliens from potential enforcement. The purpose of this order is to direct executive departments and agencies . . . to employ all lawful means to enforce the immigration laws of the United States.”); Michael D. Shear & Julie H. Davis, *Trump Moves To End DACA and Calls on Congress To Act*, N.Y. TIMES (Sept. 5, 2017), <https://www.nytimes.com/2017/09/05/us/politics/trump-daca-dreamers-immigration.html> [<https://perma.cc/QAG5-J4LJ>] (“President Trump . . . ordered an end to the Obama-era program that shields young undocumented immigrants from deportation.”).

To initiate the termination of DACA, Attorney General Jeff Sessions sent a letter to Acting Secretary of Homeland Security Elaine Duke advising that the Department of Homeland Security rescind DACA because it was an unlawful program effectuated through “an unconstitutional exercise of authority by the Executive Branch” that was an “open-ended circumvention of immigration laws.” Letter from Jefferson B. Sessions, Att’y Gen., to Elaine Duke, Acting Sec’y of Homeland Sec., on the Rescission of DACA (Sept. 4, 2017), [https://www.dhs.gov/sites/default/files/publications/17\\_0904\\_DOJ\\_AG-letter-DACA.pdf](https://www.dhs.gov/sites/default/files/publications/17_0904_DOJ_AG-letter-DACA.pdf) [<https://perma.cc/D6V8-LBDN>]. In his letter, Sessions cited the Fifth Circuit’s determination in *Texas v. United States*, 809 F.3d 134, 171 (5th Cir. 2015), that the DAPA program was an unlawful encroachment in Congressional power over immigration admissions criteria. *Id.* DAPA would have employed a discretionary framework similar to that of DACA, but it would have granted deferred action to millions more undocumented individuals. Jens Manuel Krogstad, *Key Facts About Immigrants Eligible for Deportation Relief Under Obama’s Expanded Executive Actions*, PEW RSCH. CTR. (Jan. 19, 2016), <https://www.pewresearch.org/short-reads/2016/01/19/key-facts-immigrants-obama-action> [<https://perma.cc/47VD-URHV>] (estimating that DAPA and an expanded DACA would have made 3.9 million undocumented immigrants eligible for deportation relief and work authorization). The government appealed the Fifth Circuit’s decision to the Supreme Court, which granted certiorari, *United States v. Texas*, 577 U.S. 1101 (2016), but Justice Scalia passed away before the Court issued its opinion. Terri Langford & Jordan Rudner, *Supreme Court Justice Antonin Scalia Found Dead in West Texas*, TEX. TRIB. (Feb. 13, 2016, 5:00 PM), <https://www.texastribune.org/2016/02/13/us-supreme-court-justice-antonin-scalia-found-dead> [<https://perma.cc/8MU2-JZ88>]. Ultimately, the Fifth Circuit’s decision was allowed to stand by an equally divided court, which issued a 4–4 decision affirming the circuit court’s ruling without discussion. *United States v. Texas*, 579 U.S. 547, 548 (2016) (per curiam). For a more detailed background summary of the DAPA decision, see Muzaffar Chishti and Faye Hipsman, *Supreme Court DAPA Ruling a Blow to Obama Administration, Moves Immigration Back to Political Realm*, MIGRATION POL’Y INST. (June 29, 2016), <https://www.migrationpolicy.org/article/supreme-court-dapa-ruling-blow-obama-administration-moves-immigration-back-political-realm> [<https://perma.cc/R3C7-V7BP>].

197. Elaine C. Duke, Acting Sec’y, Dep’t of Homeland Sec., *Memorandum on Rescission of DACA*, DEP’T OF HOMELAND SEC. (Sept. 5, 2017), <https://www.dhs.gov/news/2017/09/05/memorandum-rescission-daca> [<https://perma.cc/Y8EC-PB9L>].

198. *Multiple Lawsuits Challenge DACA Rescission*, CLINIC LEGAL (July 11, 2019), <https://cliniclegal.org/resources/humanitarian-relief/multiple-lawsuits-challenge-daca-rescission> [<https://perma.cc/X3FH-P82F>] (examining the lawsuits brought to challenge the rescission of DACA).

California and New York issued nationwide preliminary injunctions that enjoined the termination of DACA and required DHS to continue accepting certain DACA applications pending final resolution of the litigation.<sup>199</sup> On April 24, 2018, the District Court for the District of Columbia found that the government's rescission of DACA was arbitrary and capricious for failing to provide adequate justification for its decision and vacated the Duke memo.<sup>200</sup>

On June 22, 2018, then-Secretary of Homeland Security Kirstjen Nielsen issued a second memorandum elaborating on DHS's rescission decision.<sup>201</sup> The Nielsen memo addressed the issue of reliance interests in its last substantive paragraph.<sup>202</sup> It summarily acknowledged (without further discussion, description, or consideration) that DACA recipients may have come to rely on DACA for "continuing their presence in this country and pursuing their lives" but concluded that any such reliance is outweighed by DACA's "questionable legality."<sup>203</sup> It then argued that the liminal terms of DACA itself—that it was announced as a temporary solution and not a permanent fix; that its grant was limited to renewable two-year periods; and that, by its own terms, it "conferred no substantive rights, and it was revocable at any time"—cut against any reliance individuals may have had on its

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199. See, e.g., *Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Sec.*, 279 F. Supp. 3d 1011, 1042 (N.D. Cal. 2018), *aff'd*, 908 F.3d 476, 512 (9th Cir. 2018); *Batalla Vidal v. Nielsen*, 279 F. Supp. 3d 401, 438 (E.D.N.Y. 2018). In March, a district court in Maryland, departing from the other courts, found that the DACA rescission was lawful but enjoined the government from using information it had obtained through the DACA process for enforcement purposes. *CASA de Md. v. Dep't of Homeland Sec.*, 284 F. Supp. 3d 758, 772–73, 778–79 (D. Md. 2018), *aff'd in part, vacated in part*, 924 F.3d 684 (4th Cir. 2019).

200. *NAACP v. Trump*, 298 F. Supp. 3d 209, 243, 245 (D.D.C. 2018) ("[I]t fails even under the deferential arbitrary and capricious standard."). *Regents* was consolidated to include the *NAACP* and *Batalla Vidal* cases for argument before the Supreme Court. *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 139 S. Ct. 2779 (2019).

201. Memorandum from Kirstjen Nielsen, *supra* note 3, at 1. Notably, Nielsen did not rescind the prior Duke memorandum and issue a new agency decision to terminate DACA. *Id.* at 1. She instead relied on DHS's prior decision to terminate DACA and issued a second memorandum seeking to further explain the agency's prior decision. *Id.* The Nielsen memorandum gave three principal reasons for DHS's decision to terminate DACA. *Id.* at 2. First, as with the Duke memo, the Nielsen memo cited the attorney general's conclusion that DACA "was contrary to law." *Id.* Second, the Nielsen memo posited that regardless of the ultimate legal conclusion, her view that DACA was a discretionary policy that was, at the least, legally suspect was enough to justify its termination. *Id.* Third, Nielsen echoed the new Trump administration's enforcement priorities, which, under Executive Order 13768, called for the "faithful execution of the immigration laws of the United States against all removable aliens." *Id.*

202. *Id.* at 3.

203. *Id.*

continuation.<sup>204</sup> In litigation, the government took the more extreme position that the apparently transient nature of DACA could generate no legally cognizable interests at all.<sup>205</sup>

2. *DHS v. Regents*. The litigation challenging DHS's decision to rescind DACA made its way up to the Supreme Court, which consolidated the DACA cases into *DHS v. Regents*.<sup>206</sup> The Court ultimately held that DHS's rescission decision was arbitrary and capricious for several reasons, including that the Duke memo "failed to address whether there was legitimate reliance on the [Obama] DACA Memorandum."<sup>207</sup> Citing its earlier decisions in *Encino Motorcars* and *Fox Television*,<sup>208</sup> the Court reiterated that when an agency changes course, it must "be cognizant that longstanding policies may have 'engendered serious reliance interests that must be taken

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204. *Id.*

205. The Government raised the specter of this argument in its opening brief in *Regents*, then elaborated on it in its reply brief. Brief for the Petitioners at 52, Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891 (2020) (Nos. 18-587, 18-588, and 18-589), 2019 WL 3942900, at \*52 ("And to the extent the asserted reliance interests are cognizable, the Nielsen Memorandum elaborated on the reasons why they were insufficient to maintain the prior policy."); Reply Brief for the Petitioners at 17, *Regents*, 140 S. Ct. 1891, 2019 WL 5589031, at \*17 ("Against this backdrop, the DACA policy could not engender any legally cognizable reliance interests in the government's continuing facilitation of DACA recipients' unlawful status.").

206. *Regents* was consolidated with *Trump v. NAACP* from the D.C. Circuit and *Wolf v. Batalla Vidal* from the Second Circuit. See *supra* notes 199–200.

207. *Regents*, 140 S. Ct. at 1913 (cleaned up). The Court also held that the Nielsen memo was a "post hoc rationalization" and that the agency therefore was limited to the reasons it had articulated in the Duke memo. *Id.* at 1908. Scholarly reception of the Court's decision on this point has been mixed. See, e.g., Rodríguez, *Reading Regents*, *supra* note 14, at 30 ("Some scholars have begun to interpret *Regents* as standing on the right side of this line – as promoting accountability in government. Others have suggested that the decision distorts the policy process, making what should otherwise be swift and decisive policy change subject to a slog in the courts."); Eidelson, *supra* note 106, at 1768 (arguing that the Court's decision is a positive accountability-forcing mechanism that would disallow administrations from shielding themselves from the potential political consequences of their actions); Zachary Price, *Symposium: DACA and the Need for Symmetric Legal Principles*, SCOTUSBLOG (June 19, 2020), <https://www.scotusblog.com/2020/06/symposium-daca-and-the-need-for-symmetrical-legal-principles> [<https://perma.cc/C6NU-RVKS>] (arguing that the Court's decision was a departure from their general jurisprudence disfavoring reliance-based defenses premised on past assurances of nonenforcement).

208. See *supra* Parts II.B and C for additional background on these cases.

into account.”<sup>209</sup> Otherwise, the agency’s action would be arbitrary and capricious.<sup>210</sup>

The threshold question before the Court was whether there could be legally cognizable reliance interests in DACA at all.<sup>211</sup> The Court rejected the government’s argument that a temporary (but renewable) stopgap program such as DACA, which explicitly stated that it was not conferring substantive rights in its authorizing memo, could not generate legally cognizable reliance interests.<sup>212</sup> A 5–4 majority ultimately held that the DACA recipients had legally cognizable reliance interests in DACA.<sup>213</sup>

Justice Clarence Thomas, joined by Justices Samuel Alito and Neil Gorsuch, drafted a separate opinion dissenting in part, stating that he agreed with the government’s position on this point.<sup>214</sup> In Justice Thomas’s view, DACA was an unlawful program established by the executive without statutory authority and, consequently, DHS did not need to discuss reliance interests in rescinding the program.<sup>215</sup> However, Justice Thomas did leave open the possibility that in some cases, *ultra vires* agency action can generate reliance interests (although he did not elaborate as to when this might be the case).<sup>216</sup> He went on to argue that the *type* of interest created by the policy matters.<sup>217</sup> With respect to DACA, a program that grants individuals deferred action, there could be no reliance because deferred action was not a right in which a person could have a reliance interest.<sup>218</sup> Justice Thomas also viewed the agency’s historic statements as to the general revocability of DACA as evidence that the government had disavowed the creation of reliance interests since the program’s creation and that

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209. *Regents*, 140 S. Ct. at 1913 (cleaned up).

210. *Id.* (“It would be arbitrary and capricious to ignore such matters.” (internal quotations omitted)).

211. *Id.*

212. Justices Roberts, Ginsburg, Sotomayor, Kagan, and Kavanaugh agreed on this point. *See id.*; *id.* at 1933 (Kavanaugh, J., concurring in the judgment in part and dissenting in part).

213. *Id.* at 1915.

214. *Id.* at 1928 (Thomas, J., concurring in the judgment in part and dissenting in part) (“Because DHS failed to engage in the statutorily mandated process, DACA never gained status as a legally binding regulation that could impose duties or obligations on third parties.”).

215. *Id.*

216. *Id.* at 1930.

217. *See id.* at 1930–31.

218. *Id.*

the terminable nature of the program meant it could not generate reliance interests.<sup>219</sup>

The majority acknowledged these attributes of the program as “surely pertinent in considering the *strength* of any reliance interests,” but it affirmed that these attributes did not preclude reliance interests altogether.<sup>220</sup> Further, the majority held that agencies must consider the reliance interests (and the relative strengths thereof) in the first instance of agency action.<sup>221</sup> Rodríguez has explained this as the Court “privileg[ing] a social fact over a legal construct”<sup>222</sup> as the Court looked to the real-world effects—and real-world reliance—generated by the policy, notwithstanding any formal or legal disclaimers of reliance made by the agency.<sup>223</sup> The Court went even further, though, and suggested that a program that was unlawful when implemented could nevertheless generate reliance interests that must be considered before the program is terminated.<sup>224</sup> The Court held that the agency’s failure to consider alternatives to full termination (such as retaining forbearance or accommodating particular reliance interests)—even if the attorney general had determined that the interests and benefits stemmed from an illegal program—was arbitrary and capricious.<sup>225</sup> The Court’s position on this point “rais[es] the political costs to the agency and the administration”<sup>226</sup> of reversing course on prior agency action and, consequently, incentivizes policymaking through informal agency action.

Extrapolating outward, the Court’s conclusion on this point may be read to apply more broadly to other programs, particularly rights-giving or forbearance-oriented programs, which may generate legally cognizable reliance interests that future administrations must grapple with if they want to change course. Under one view, this might be a welcome check on the president, one which recognizes that major policy changes regarding governmental promises that people have

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219. *Id.* at 1930–31.

220. *Id.* at 1913–14 (emphasis added).

221. *Id.*

222. Rodríguez, *Reading Regents*, *supra* note 14, at 26.

223. *Regents*, 140 S. Ct. at 1913–14.

224. Although the government argued that DACA was an illegal program when created, the Court did not opine on the legality of DACA; instead, it reasoned that regardless of the legal status of DACA, the program generated legally cognizable reliance interests vis-à-vis the DACA recipients. *See Regents*, 140 S. Ct. at 1910.

225. *Id.* at 1913.

226. Rodríguez, *Reading Regents*, *supra* note 14, at 27.



come to rely upon should be carefully considered and should take time. Under another view, the Court's conclusion might be seen as imposing unnecessary costs and procedural hurdles that impede political accountability and effective governance. These considerations are discussed in greater depth in Part III below.

Having found that DACA did generate legally cognizable interests, we are left to determine what these interests were, to whom these interests belonged, and what the agency needed to do to give sufficient consideration to such interests. This Article is primarily concerned with the first two questions. The third is discussed here but will be more fully explored in a future project.

As to the question of whose reliance interests matter, the respondents and their amici presented the Court with numerous and varied assertions of reliance, including from individuals who had applied for and received DACA, from the schools and colleges at which these individuals studied or were studying, and from the companies and organizations that employed them.<sup>227</sup> The Court's analysis focused on the first category, DACA recipients,<sup>228</sup> while acknowledging that the effects of the DACA rescission would radiate outward to affect the recipients' families, schools, businesses, communities, state and local governments, and even the broader economic market.<sup>229</sup> The Court explicitly said that DHS needed to consider the reliance interests of DACA recipients,<sup>230</sup> but it did not say the same with respect to the other interests it had been presented. This may be because the Court did not need to reach those interests for its analysis, but it may also be because the Court did not consider those interests as rising to the necessary level of seriousness, perhaps because they were too diffuse or general, or perhaps because the parties asserting those interests were not the relevant parties to consider. The Court in *Regents*, therefore, applied a relatively narrow reading of administrative reliance.<sup>231</sup> Its reasoning turned on the reliance of parties regulated by the policy (in this case, DACA recipients), with respect to interests that flowed directly from the subject of the

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227. See *Regents*, 140 S. Ct. at 1914.

228. *Id.*

229. *Id.*

230. *Id.*

231. See *id.* at 1913–15.

regulation (in this case, relief from removal, work authorization, and the benefits and expectations that followed).<sup>232</sup>

The Court then addressed the question of how DHS could meet its obligation to consider reliance interests.<sup>233</sup> First, the Court quickly acknowledged that the agency has “considerable flexibility in carrying out its responsibility,” echoing previous holdings in *State Farm* and subsequent cases.<sup>234</sup> The Court then gave numerous examples of how the agency could have addressed the issue of reliance, including finding that reliance interests stemming from unlawful (or questionably lawful) policies were entitled to diminished or no weight, that reliance was unjustified in light of the express limitations in the authorizing memorandum, or that other policy concerns outweighed any reliance interests the policy may have engendered.<sup>235</sup> Essentially, what the Court *gives* with respect to the creation of reliance interests in the preceding part, it *takes away* here, leaving the agency with significant latitude to absolve itself of the hard work of actually considering reliance. With this passage, the potentially sharp teeth of reliance interests may be substantially filed down.

The Court then emphasized that DHS was not required to consider alternatives to termination or to modify its wind-down, nor was the Court suggesting that it would have looked behind the agency’s decision if it considered reliance interests and ultimately ended up with the same policy decision.<sup>236</sup> What the agency did need to do, however, was to “assess whether there were reliance interests, determine whether they were significant, and weigh any such interests against competing policy concerns.”<sup>237</sup> Justice Brett Kavanaugh, concurring in part and dissenting in part, did not explicitly address whether he would have found that DACA did, in fact, generate legally cognizable reliance interests, but he noted that he would have found that Secretary Nielsen’s cursory one-sentence acknowledgement of reliance interests constituted sufficient consideration by the agency.<sup>238</sup> Justice

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232. *Id.* at 1920. As discussed in Part III, *infra*, the Fifth Circuit’s interpretation of the reliance interests recognized in *Regents* is a significantly more expansive view than that which the Court actually applies in *Regents*.

233. *Id.* at 1914.

234. *Id.*

235. *Id.*

236. *Id.* at 1914–15.

237. *Id.* at 1915.

238. *Id.* at 1933 (Kavanaugh, J., concurring in the judgment in part and dissenting in part).

Kavanaugh's position on this point raises serious questions about the rigor with which agencies must consider and justify actions that would fly in the face of reliance interests. The *State Farm*<sup>239</sup> and *Encino Motorcars*<sup>240</sup> Courts would likely have demanded more than a one-sentence acknowledgment of serious reliance interests. Taken seriously, Justice Kavanaugh's position would diminish administrative reliance to a perfunctory checkbox exercise rather than a robust requirement that agencies consider, negotiate, and balance reliance interests against other policy concerns when changing course.

The Court's discussion of reliance interests in *Regents* leaves us in a somewhat confusing place. Juxtaposing its discussion of when reliance interests are created against its discussion of how agencies can satisfy their obligation to consider such interests suggests that perhaps one of the most salient effects of the decision is the opportunity for litigation challenging changes in agency action. A permissive view of administrative reliance leaves the door open to challenge agency actions that neglect serious reliance interests, to be sure. But an overly broad view of reliance interests leaves the door open for what Rodríguez has previously warned against: partisan litigants using partisan courts to challenge legitimate agency action in the name of arbitrary and capricious review.<sup>241</sup>

Situated within the broader context of the Court's recent moves to limit the power of the administrative state,<sup>242</sup> administrative reliance might be understood as a way for the Court to further subsume agency power through robust forms of judicial review. The Court's own administrative reliance jurisprudence has so far been somewhat limited and latent, but lower courts have seized upon the opportunity that *Regents* presents to use their review power as a judicial veto to administrative policy change.<sup>243</sup>

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239. See *supra* Part II.A.

240. See *supra* Part II.C.

241. See Rodríguez, *Reading Regents*, *supra* note 14, at 31–32.

242. See, e.g., Daniel T. Deacon & Leah M. Littman, *The New Major Questions Doctrine*, 109 VA. L. REV. 1009, 1011 (2023) (discussing the development and operation of the major questions doctrine as a “powerful weapon wielded against the administrative state” by the Court); Gillian E. Metzger, *The Roberts Court and Administrative Law*, 2019 SUP. CT. REV. 1, 3–4 (describing the Roberts Court's anti-administrative turn, including its assault on *Chevron* deference); see also Adam B. Cox & Emma Kaufman, *The Adjudicative State*, 132 YALE L.J. 1769, 1774 (2023) (arguing that the Court has adopted a “new and highly interventionist approach” to regulatory policymaking while leaving agency adjudication largely within agency and presidential control).

243. See *infra* Part II.0.

*E. Migrant Protection Protocols: The Case that Swallowed the Rule*

The administrative reliance doctrine's ability to halt policy change has real bite, and the *Regents* decision bore significant real-life consequences. From when DACA's termination was enjoined to March 31, 2020, the government approved over 712,000 DACA applications,<sup>244</sup> allowing those individuals the ability to go to school, work, and live without fear of deportation. In another immigration law case—this time, challenging the termination of a signature Trump-era immigration policy, the Migrant Protection Protocols—courts took the *Regents* holding and expanded it in a way that allows states to challenge changes in federal agency policy. This case, *Texas v. Biden*,<sup>245</sup> functionally expanded administrative reliance in a way that would subsume arbitrary and capricious review and have the potential to significantly delay the policy effects from elections through state-sponsored litigation and court-imposed injunctions on APA grounds.

1. *Implementation and Termination of MPP.* During his first presidential run, President Trump campaigned on a generally restrictionist immigration platform and quickly took steps to limit immigration across the board.<sup>246</sup> Like President Obama before him, President Trump used his executive authority to further his immigration agenda by creating a new immigration policy—the Migrant Protection Protocols, also known as the Remain in Mexico policy, or MPP—through the issuance of agency memoranda.<sup>247</sup>

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244. *USCIS Releases DACA Data and Statistics as of March 31, 2020*, PRESIDENTS' ALL. (Apr. 8, 2020), <https://www.presidentsalliance.org/uscis-releases-daca-data-and-statistics-as-of-march-31-2020> [<https://perma.cc/2UMM-EEPS>], (last updated Aug. 20, 2020).

245. *Texas v. Biden*, 20 F.4th 928, 989 (5th Cir. 2021), *rev'd on other grounds*, *Biden v. Texas*, 597 U.S. 785 (2022).

246. See, e.g., Nick Corasaniti, *A Look at Trump's Immigration Plan, Then and Now*, N.Y. TIMES (Aug. 31, 2016), <https://www.nytimes.com/interactive/2016/08/31/us/politics/donald-trump-immigration-changes.html> [<https://perma.cc/FX5T-N3UZ>] (summarizing then-candidate Trump's positions on immigration, including promises that he would “deport many people, many, many people”; erect a border wall; and implement a ban on Muslims seeking to enter the United States).

247. President Trump tweeted a series of statements announcing a policy requiring asylum seekers arriving via the southern border to “stay in Mexico” on November 24, 2018. Brett Samuels, *Trump Tweets Migrants Will Stay in Mexico Until Asylum Claims Approved; Incoming Mexican Official Says No Deal*, HILL (Nov. 25, 2018), <https://thehill.com/homenews/administration/418109-mexican-official-pushes-back-on-trump-claim-that-asylum-seekers-will> [<https://perma.cc/2SPD-MMXF>]. A series of memoranda from DHS and CBP were released shortly thereafter, implementing the policy. See *infra* note 251.

On December 20, 2018, DHS Secretary Nielsen announced that, for the first time and effective immediately, DHS would begin invoking § 235(b)(2)(C) of the Immigration and Nationality Act to return people arriving without documentation in the United States through Mexico—in many cases asylum seekers—to Mexico for the duration of their immigration proceedings.<sup>248</sup> MPP upended decades of well-settled asylum law and policy, which generally permitted individuals to seek asylum—and remain in the United States while doing so—regardless of how or where they entered the country.<sup>249</sup> Under MPP, asylum seekers entering the United States through the southern border were required to wait in Mexico while litigating their asylum cases before U.S. immigration courts, raising significant due process concerns.<sup>250</sup> Migrants subjected to MPP were further forced to wait in inhumane and unsanitary conditions where they were vulnerable to extreme violence, including kidnapping, sexual assault, and murder. On January

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248. *Secretary Kirstjen M. Nielsen Announces Historic Action To Confront Illegal Immigration*, DEP'T OF HOMELAND SEC. (Dec. 20, 2018), <https://www.dhs.gov/news/2018/12/20/secretary-nielsen-announces-historic-action-confront-illegal-immigration> [<https://perma.cc/GQ2S-WZ7L>].

249. Pursuant to the INA and prior to the start of MPP, asylum seekers entering the United States from Mexico were processed into the United States as described in INA §§ 235(b)(1)(A)(ii) and 235(b)(1)(B), often referred to as the “credible fear” process, wherein they are referred for an interview to screen them for a “credible fear” of persecution. Individuals who receive a positive credible fear determination are processed into the United States and permitted to pursue their asylum claim—they are typically placed into removal proceedings under INA § 240, where they may assert an asylum claim as a defense to removal. Individuals who are found not to have a credible fear of persecution are ordered removed pursuant to INA § 235(b)(1)(B)(iii). MPP bypassed the credible fear process by placing individuals directly into INA § 240 removal proceedings and returning them to Mexico to litigate these proceedings before U.S. immigration courts located at certain ports of entry along the U.S.-Mexico border. *Innovation L. Lab v. Wolf*, 951 F.3d 1073, 1082 (9th Cir. 2020). Scholars and commentators, including myself, have argued that forcing asylum seekers to wait in Mexico, where they were vulnerable to targeted violent attacks, is likely prohibited by international law. *See, e.g.,* Jaya Ramji-Nogales, *Non-Refoulement Under the Trump Administration*, AM. SOC'Y OF INT'L L. INSIGHTS (Dec. 3, 2019), <https://www.asil.org/insights/volume/23/issue/11/non-refoulement-under-trump-administration> [<https://perma.cc/7BNR-U4B8>]; Ashley B. Armstrong, *Co-opting Coronavirus, Assailing Asylum*, 35 GEO. IMMIGR. L.J. 361, 388–95 (2021); Haiyun Damon-Feng, *Refoulement as Pandemic Policy*, 31 WASH. INT'L L.J. 185, 195–97 (2022).

250. *See generally* Laura Lynch & Amy Greiner, *Remain in Mexico Is Alive and Well: Current Disenrollment Process Harms Vulnerable Asylum Seekers*, NAT'L IMMIGR. L. CTR. (Sept. 20, 2022), [https://www.nilc.org/wp-content/uploads/2022/09/MPP-Policy-Brief\\_Explainer-09.20.2022.pdf](https://www.nilc.org/wp-content/uploads/2022/09/MPP-Policy-Brief_Explainer-09.20.2022.pdf) [<https://perma.cc/5PNT-YVDP>] (describing various due process violations attendant to MPP).

28, 2019, DHS issued a series of memoranda implementing the MPP policy.<sup>251</sup>

MPP immediately raised serious due process, humanitarian, and legal concerns under both domestic and international law. Migrants in Mexico, particularly migrant families with small children, were vulnerable to kidnapping, extortion, sexual assault or other grave violence.<sup>252</sup> Nearly no one had access to counsel for their immigration proceedings.<sup>253</sup> Many people abandoned or conceded their asylum cases because they could not sustain themselves in Mexico, some were issued removal orders after they missed their court hearings because they were kidnapped or suffering medical emergencies during their hearings, and others were denied asylum on the merits after being forced to pursue their claims within a system that made it all but impossible to mount a successful asylum case.<sup>254</sup> MPP created a humanitarian crisis at the border and resulted in extreme violence and

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251. U.S. CITIZENSHIP & IMMIGR. SERVS., U.S. DEP'T OF HOMELAND SEC., PM-602-0169, GUIDANCE FOR IMPLEMENTING SECTION 235(B)(2)(C) OF THE IMMIGRATION AND NATIONALITY ACT AND THE MIGRANT PROTECTION PROTOCOLS (Jan. 28, 2019), <https://www.uscis.gov/sites/default/files/document/memos/2019-01-28-Guidance-for-Implementing-Section-35-b-2-C-INA.pdf> [<https://perma.cc/VLU8-X9EC>]; Memorandum from Kevin K. McAleenan, Comm'r, U.S. Customs & Border Prot., to Todd C. Owen, Exec. Assistant Comm'r of Field Operations & Carla L. Provost, Chief, U.S. Border Patrol, Implementation of the Migrant Protection Protocols (Jan. 28, 2019), <https://www.cbp.gov/sites/default/files/assets/documents/2019-Jan/Implementation+of+the+Migrant+Protection+Protocols.pdf> [<https://perma.cc/W56C-Y6EQ>]; Memorandum from Todd A. Hoffman, Exec. Dir., Admissibility & Passenger Programs, U.S. Customs & Border Prot., to Dirs. of Field Operations, U.S. Customs & Border Prot., Guidance on Migrant Protection Protocols (Jan. 28, 2019), <https://www.cbp.gov/sites/default/files/assets/documents/2019-Jan/MPP+OFO+Memo+1-28-19.pdf> [<https://perma.cc/3WPZ-N49R>]. MPP applies only to non-Mexican asylum seekers. GUIDANCE FOR IMPLEMENTING SECTION 235(B)(2)(C), *supra*. Initially, it purportedly applied only to Spanish-speaking, nonvulnerable asylum seekers, but Customs and Border Patrol (“CBP”) expanded the use of MPP over time. ENF’T PROGRAMS DIV., U.S. CUSTOMS & BORDER PROT., SUPPLEMENTAL MIGRANT PROTECTION PROTOCOLS GUIDANCE (2020), <https://www.cbp.gov/sites/default/files/assets/documents/2020-Dec/Supplemental-Migrant-Protection-Protocols-Guidance-MPP-Amenability.pdf> [<https://perma.cc/BT4U-4PLC>].

252. HUM. RTS. FIRST, ANY VERSION OF “REMAIN IN MEXICO” POLICY WOULD BE UNLAWFUL, INHUMANE, AND DEADLY 1 (2021) [hereinafter HUM. RTS. FIRST, UNLAWFUL, INHUMANE, AND DEADLY] <https://humanrightsfirst.org/wp-content/uploads/2022/09/MPPUnlawfulInhumaneandDeadly.pdf> [<https://perma.cc/RN7G-2SV4>]. There have been over 1,544 publicly reported cases of attacks and killings of migrants under Remain in Mexico. *Id.*

253. *Details on MPP (Remain in Mexico) Deportation Proceedings: by Hearing Location and Attendance, Representation, Nationality, Month and Year of NTA, Outcome, and Current Status*, TRAC IMMIGR., <https://trac.syr.edu/phptools/immigration/mpp> [<https://perma.cc/6KEQ-C42D>] (last updated May 2021) (showing that only 68 of 10,904 immigrants were represented).

254. Damon-Feng, *Restoring the Right*, *supra* note 156, at 2.

exploitation targeting vulnerable refugees. Ultimately, some 68,000 people were returned to Mexico under MPP before President Biden sought to terminate the program.<sup>255</sup>

Biden criticized MPP on the campaign trail<sup>256</sup> and, after he was elected president, promised that he would end MPP.<sup>257</sup> Seeing the writing on the wall, the outgoing Trump DHS entered into a Memorandum of Understanding with the State of Texas (the “Texas MOU”) that sought to create an evidentiary record of Texas’s reliance interests in the then-existing level of immigration enforcement.<sup>258</sup> The Texas MOU was executed<sup>259</sup> by the outgoing Trump DHS two weeks before President Biden’s inauguration as an apparent attempt to tee up

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255. *Texas v. Biden*, 20 F.4th 928, 948 (5th Cir. 2021), *rev’d on other grounds*, *Biden v. Texas*, 597 U.S. 785 (2022).

256. During a presidential debate, Biden was highly critical of the Remain in Mexico policy, attacking the policy for its unprecedented nature and the dangerous and inhumane conditions into which it forced asylum seekers. Chantal Da Silva, *Immigration Makes It into Election Debate for First Time—Here Is Where Trump and Biden Stand*, FORBES (Oct. 23, 2020, 7:13 AM), <https://www.forbes.com/sites/chantaldasilva/2020/10/23/immigration-makes-it-into-election-debate-for-first-time—here-is-where-trump-and-biden-stand> [<https://perma.cc/H7TM-3CUB>].

257. *President-elect Biden Holiday Remarks and News Conference* (C-SPAN television broadcast Dec. 22, 2020), <https://www.c-span.org/video/?507485-1/president-elect-biden-marks-loss-320000-coronavirus-pledges-economic-relief> [<https://perma.cc/9X89-YWML>]; *The Biden Plan for Securing Our Values as a Nation of Immigrants*, JOE BIDEN FOR PRESIDENT: OFFICIAL CAMPAIGN WEBSITE, <https://web.archive.org/web/20230101003620/https://joebiden.com/immigration> [<https://perma.cc/9SXX-QRK5>].

258. Agreement Between Dep’t of Homeland Sec. and the State of Texas 1–2 (Jan. 8, 2021) [hereinafter *Texas MOU*], <https://web.archive.org/web/20220128071240/https://thetexan.news/wp-content/uploads/2021/01/21-0020-FINAL-TEXAS-DHS-SAFE-MOU-1.8.2021.pdf> [<https://perma.cc/L5AV-YKG4>].

259. The Texas MOU was signed by Kenneth Cuccinelli, the Senior Official Performing the Duties of the Deputy Secretary of Homeland Security, on behalf of DHS. *Id.* at 8. At the time, Chad Wolf was the Acting Secretary of Homeland Security. Priscilla Alvarez & Geneva Sands, *Acting Secretary of Homeland Security Chad Wolf Resigns; FEMA Administrator Pete Gaynor To Take Over*, CNN (Jan. 11, 2021, 9:21 PM), <https://www.cnn.com/2021/01/11/politics/chad-wolf-homeland-security/index.html> [<https://perma.cc/6LVS-HQ36>]. Both Cuccinelli and Wolf’s appointments—and the orders issued thereunder—were called into question due to findings by the Government Accountability Office that their appointments were illegal under the Federal Vacancies Reform Act. U.S. GOV’T ACCOUNTABILITY OFF., B-331650, DEPARTMENT OF HOMELAND SECURITY—LEGALITY OF SERVICE OF ACTING SECRETARY OF HOMELAND SECURITY AND SERVICE OF SENIOR OFFICIAL PERFORMING THE DUTIES OF DEPUTY SECRETARY OF HOMELAND SECURITY 11 (2020), <https://www.gao.gov/assets/710/708830.pdf> [<https://perma.cc/E2A6-VADV>].

and strengthen Texas’s litigation position in anticipation of challenging the incoming president’s immigration policies.<sup>260</sup>

Through the Texas MOU, DHS expressly recognized “that Texas, like other States, is directly and concretely affected by changes to DHS rules and policies that have the effect of easing, relaxing, or limiting immigration enforcement.”<sup>261</sup> The Texas MOU further went on to say that DHS was entering into a “binding and enforceable commitment” with Texas, wherein DHS would “consult Texas and consider its views before taking any action, adopting or modifying a policy or procedure, or making any decision that could . . . reduce, redirect, reprioritize, relax, or in any way modify immigration enforcement.”<sup>262</sup> The Texas MOU further contained a provision acknowledging that a violation of its terms would result in irreparable harm, for which there is no adequate remedy at law, and which would therefore entitle the aggrieved party to injunctive relief.<sup>263</sup>

On January 20, 2021—Inauguration Day—the new Biden administration, through DHS, issued a statement suspending all new enrollments into MPP,<sup>264</sup> and two weeks later, President Biden issued an executive order calling for DHS to review the MPP policy to determine whether it should be modified or terminated.<sup>265</sup> During this time, DHS began to process the people with pending MPP cases into the United States through the use of humanitarian parole.<sup>266</sup> On June

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260. It is not clear that a court would have found the Texas MOU enforceable on its terms, but the Texas MOU did more than attempt to provide a path to a remedy. It sought to provide evidentiary support for Texas’s reliance interests in ongoing levels of immigration enforcement, including the continuation of MPP. *See Texas v. Biden*, 20 F.4th 928, 989–90 (5th Cir. 2021) (noting that the Texas MOU “underscores the reliance interests at play” and “demonstrates DHS’s prior knowledge of the States’ reliance interests *and* affirmatively created reliance interests all its own”), *rev’d on other grounds*, *Biden v. Texas*, 597 U.S. 785 (2022). Indeed, Texas would later cite the Texas MOU in its litigation challenging the termination of MPP to support its reliance interest–based arguments, which were persuasive to the Fifth Circuit. *Id.*

261. *Texas MOU*, *supra* note 258, at 1.

262. *Id.* at 2.

263. *Id.* at 5.

264. Press Release, Dep’t of Homeland Sec., DHS Statement on the Suspension of New Enrollments in the Migrant Protection Protocols Program (Jan. 20, 2021), <https://www.dhs.gov/news/2021/01/20/dhs-statement-suspension-new-enrollments-migrant-protection-protocols-program> [<https://perma.cc/4AMC-MRW2>].

265. Exec. Order No. 14,010, 86 Fed. Reg. 8267 (Feb. 2, 2021).

266. *President Biden’s Initial Rollback of the Migrant Protection Protocols (MPP): What You Need To Know*, JUST. FOR IMMIGRANTS (Feb. 19, 2021), <https://justiceforimmigrants.org/wp-content/uploads/2021/02/Initial-Rollback-of-MPP-English-.pdf> [<https://perma.cc/2PGY-GG76>].



1, 2021, DHS Secretary Alejandro Mayorkas issued a memorandum officially terminating the program (the “June Termination Memo”).<sup>267</sup>

2. *Texas v. Biden*. The states of Texas and Missouri challenged the Biden administration’s termination of MPP in the case *Texas v. Biden*,<sup>268</sup> and in August 2021, a federal district court in Texas enjoined the termination of MPP.<sup>269</sup> The court held that the Biden administration failed to adequately consider the reliance interests that plaintiffs Texas and Missouri had vested in the continuation of MPP.<sup>270</sup> Relying on the Supreme Court’s decision in *DHS v. Regents*, which invalidated the prior administration’s attempts to terminate DACA, the Fifth Circuit affirmed the injunction and required the Biden administration to continue implementing MPP along the southern border.<sup>271</sup>

Again, the invocation of administrative reliance resulted in significant real-world consequences. From when the termination of MPP was enjoined through June 30, 2022, over nine thousand people were enrolled in MPP,<sup>272</sup> many of whom were forced to return to

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267. Memorandum from Alejandro N. Mayorkas, Sec’y, Dep’t of Homeland Sec., Termination of the Migrant Protection Protocols Program 1–2 (June 1, 2021), [https://www.dhs.gov/sites/default/files/publications/21\\_0601\\_termination\\_of\\_mpp\\_program.pdf](https://www.dhs.gov/sites/default/files/publications/21_0601_termination_of_mpp_program.pdf) [<https://perma.cc/CY2X-FEM7>].

268. *Texas v. Biden*, 554 F. Supp. 3d 818 (N.D. Tex. 2021), *rev’d*, *Biden v. Texas*, 597 U.S. 785 (2022).

269. *Id.* at 856–57.

270. *Id.* at 848–49.

271. *Texas v. Biden*, 20 F.4th 928, 989, 1004 (5th Cir. 2021), *rev’d*, *Biden v. Texas*, 597 U.S. 785 (2022). The *Texas v. Biden* injunction mandating the recommencement of MPP also bore significant foreign affairs consequences that courts have historically left to the discretion of the executive branch. See Peter Margulies, *Ending the Remain in Mexico Program: Judging the Boundaries of Executive Discretion*, LAWFARE (Jan. 20, 2022, 8:01 AM), <https://www.lawfareblog.com/ending-remain-mexico-program-judging-boundaries-executive-discretion> [<https://perma.cc/MD6X-TTNG>] (noting the adverse effects of MPP on U.S. relations with Mexico, due largely to the strain that MPP placed on Mexican government resources). See generally Haiyun Damon-Feng, *Asylum, Interrupted*, HARV. L. & POL’Y REV. (2021) [hereinafter Damon-Feng, *Asylum Interrupted*], <https://journals.law.harvard.edu/lpr/2021/09/16/asylum-interrupted> [<https://perma.cc/F4RS-3WRD>] (discussing how *Texas v. Biden* “broke with long-standing precedent cautioning judicial deference” to the other branches in cases involving foreign affairs).

272. OFF. OF IMMIGR. STATS., U.S. DEP’T OF HOMELAND SEC., MIGRANT PROTECTION PROTOCOLS COHORT REPORT 2–4 (2022), [https://www.dhs.gov/sites/default/files/2022-07/2022\\_0722\\_pclp\\_mpp\\_cohort\\_report\\_july\\_2022.pdf](https://www.dhs.gov/sites/default/files/2022-07/2022_0722_pclp_mpp_cohort_report_july_2022.pdf) [<https://perma.cc/8VEG-XFD8>]. The Supreme Court reversed the lower court’s decision in an opinion delivered on June 30, 2022, and the District Court lifted its injunction on August 8, 2022, at which point DHS stopped enrolling individuals in

extremely dangerous conditions where they would be vulnerable to kidnapping, robbery, assault, and death.<sup>273</sup> The Supreme Court ultimately reversed the Fifth Circuit on other grounds and did not discuss the States' arguments regarding reliance interests.<sup>274</sup>

In halting the Biden administration's termination of MPP, the district court, and later the Fifth Circuit, adopted a much more expansive and diffuse view of administrative reliance. This view recognized incidental reliance interests (in this case, general fiscal and financial savings) of parties that were neither regulated parties nor direct beneficiaries of the policy (in this case, Texas) stemming from the heightened level of border enforcement resulting from MPP. The Fifth Circuit held that "agencies 'must' assess the strength of reliance interests (even *weak* interests, it seems) 'in the first instance,'" and that "failure to do so is arbitrary and capricious."<sup>275</sup> The Department of Justice, on the other hand, advocated for a narrower application of

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MPP. *Court Ordered Reimplementation of the Migrant Protection Protocols*, HOMELAND SEC. (Nov. 1, 2022), <https://www.dhs.gov/archive/migrant-protection-protocols> [<https://perma.cc/2CFU-XZYK>].

273. See, e.g., HUM. RTS. FIRST, *DELIVERED TO DANGER: ILLEGAL REMAIN IN MEXICO POLICY IMPERILS ASYLUM SEEKERS' LIVES AND DENIES DUE PROCESS 1-2* (2019) <https://humanrightsfirst.org/wp-content/uploads/2022/10/Delivered-to-Danger-August-2019-.pdf> [<https://perma.cc/78G2-ZLVT>] (noting the frequency of rape, kidnapping, and assault among asylum seekers returned to Mexico and observing that many asylum seekers returned to Mexico were left without housing, support, or work authorization); HUM. RTS. FIRST, *UNLAWFUL, INHUMANE, AND DEADLY*, *supra* note 252, at 1 (noting at least 1,544 publicly reported cases of attacks and killings of migrants in Mexico); AM. IMMIGR. COUNCIL, *THE "MIGRANT PROTECTION PROTOCOLS"* 5 (2022), [https://www.americanimmigrationcouncil.org/sites/default/files/research/the\\_migrant\\_protection\\_protocols\\_0.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/research/the_migrant_protection_protocols_0.pdf) [<https://perma.cc/XH3J-QAEL>] (reporting that many asylum seekers who returned to Mexico were raped, kidnapped, or assaulted, sometimes within hours of crossing the border); STEPHANIE LEUTERT, UNIV. OF TEX. AT AUSTIN STRAUSS CTR. FOR INT'L SEC. & LAW, *MIGRANT KIDNAPPING IN NUEVO LAREDO DURING MPP AND TITLE 42*, at 2 (2021) (cataloging kidnappings and attempted kidnappings of individuals in MPP); Kevin Sieff, *They Missed Their U.S. Court Dates Because They Were Kidnapped. Now They're Blocked from Applying for Asylum*, WASH. POST (Apr. 24, 2021, 12:16 PM), <https://www.washingtonpost.com/world/2021/04/24/mexico-border-migrant-asylum-mpp> [<https://perma.cc/25X7-7ZCP>] (observing that many asylum seekers missed their day in court because they had been kidnapped upon return to or else detained by Mexican officials).

274. The Supreme Court also expanded a previous holding in determining that, pursuant to 8 U.S.C. § 1252(f)(1), lower courts lack jurisdiction to enter injunctions "that order federal officials to take or to refrain from taking actions to enforce, implement, or otherwise carry out" certain provisions of the Immigration and Nationality Act, including provisions relating to inspection, apprehension, exclusion, and removal. *Biden v. Texas*, 597 U.S. 785, 797 (2022) (quoting *Garland v. Gonzalez*, 596 U.S. 543, 550 (2022)).

275. *Texas v. Biden*, 20 F.4th 928, 990 (5th Cir. 2021) (emphasis in original), *rev'd on other grounds*, *Biden v. Texas*, 597 U.S. 785 (2022).

reliance interests, arguing that a party must take some specified action *in reliance on* the policy in question for such party to have cognizable reliance interests in the policy.<sup>276</sup>

At the district-court level, Judge Matthew Kaczmaryk of the Northern District of Texas found that Secretary Mayorkas’s termination decision was arbitrary and capricious because, among other things, Mayorkas “failed to consider the costs to Plaintiffs and Plaintiffs’ reliance interests in the proper enforcement of federal immigration law.”<sup>277</sup> Judge Kaczmaryk cited *Regents* for the proposition that a State’s economic expectations arising from a federal enforcement regime may constitute reliance interests that the agency must consider.<sup>278</sup> As discussed in Part II.D.2 above, it is not at all clear that *Regents* supports such an expansive reading. In *Regents*, the Court did acknowledge that States alleged that DACA’s termination would trigger negative consequences for the States, including damage to their tax revenue, but the Court’s discussion of reliance interests—and the reliance interests it held that the agency must consider—was limited to that of the DACA recipients.<sup>279</sup>

Judge Kaczmaryk then went on to say that the Secretary failed to consider whether the States had a reliance interest “in the ongoing implementation of MPP.”<sup>280</sup> This reasoning marks a departure from courts’ general reluctance to allow states and localities to ratchet up immigration enforcement practices beyond that provided by the federal government. Courts have long held that immigration enforcement is a uniquely federal issue and have generally curtailed

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276. The case was appealed to the Supreme Court, which reversed the Fifth Circuit’s decision. *Biden v. Texas*, 597 U.S. at 814. Texas dedicated significant sections of its briefing to the issue of reliance interests. Brief for Respondents at 6–13, 46–48, *Biden v. Texas*, 597 U.S. 785 (No. 21-954), 2022 WL 1097049, at \*6–13, \*46–48. The government, in contrast, focused its briefing on substantive questions relating to the detention and foreign policies also at issue in the case. Brief for the Petitioners at 18–37, *Biden v. Texas*, 597 U.S. 785 (No. 21-954), 2022 WL 815341, at \*18–37. The Court did not reach the issue of reliance interests in its decision. See generally *Biden v. Texas*, 597 U.S. 785 (never mentioning reliance interests). Critically, the Court held that only the Supreme Court had jurisdiction to issue injunctive relief relating to the government’s execution of immigration removal and detention statutes, but questions remain as to lower courts’ ability to grant declaratory and set-aside relief pursuant to § 706 of the APA. *Id.* at 797 (citing *Garland*, 596 U.S. at 550).

277. *Texas v. Biden*, 554 F. Supp. 3d 818, 848 (N.D. Tex. 2021).

278. *Id.* at 849.

279. See *supra* notes 227–30 and accompanying text.

280. *Texas v. Biden*, 554 F. Supp. 3d at 849.

State efforts to conduct enforcement in excess of the federal level.<sup>281</sup> To recognize State reliance interests in immigration enforcement would essentially open a back door for States to intrude upon the federal government's ability to regulate immigration by weaponizing administrative law to undercut established limits on immigration federalism.<sup>282</sup>

On appeal, the Fifth Circuit affirmed the district court and engaged in a more in-depth discussion regarding the agency's failure to consider the States' reliance interests.<sup>283</sup> In so doing, the Fifth Circuit cited the Texas MOU as evidence that DHS had been aware of and had expressly acknowledged Texas's reliance in the continuation of MPP as an immigration enforcement mechanism.<sup>284</sup> The Fifth Circuit then repeated the district court's reading of *Regents* as requiring the agency to consider states' economic interests as reliance interests.

The Fifth Circuit further rejected the government's argument that the States lacked a legally cognizable reliance interest in MPP because the States failed to show what actions they took in reliance on MPP.<sup>285</sup> According to the Fifth Circuit's theory of reliance interests, seemingly no action *in reliance* would be necessary to generate a reliance interest. This would constitute an expansive interpretation of reliance interests, wherein any party that incurs an incidental benefit from a specific policy could claim that they have a cognizable reliance interest in the

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281. See Damon-Feng, *Asylum Interrupted*, *supra* note 271, at 5–6 nn. 23–25; Arizona v. United States, 567 U.S. 387, 400–03 (2012) (holding that States are prohibited from supplementing federal immigration registration policies because “[f]ederal law makes a single sovereign responsible for maintaining a comprehensive and unified system to keep track of aliens within the Nation’s borders” and that granting States “independent authority to prosecute federal registration violations” would encroach on the federal government’s exclusive control over this domain).

282. In a subsequent case where Texas and Louisiana challenged the Biden Administration’s guidance narrowing the federal government’s immigration enforcement priorities from those established under the Trump administration, the Supreme Court denied the States’ claim on standing grounds. See *United States v. Texas*, 599 U.S. 670, 677 (2023) (finding no precedent for courts to “order[] the Executive Branch to change its arrest or prosecution policies so that the Executive Branch makes more arrests or initiates more prosecutions”).

283. *Texas v. Biden*, 20 F.4th 928, 989–90 (5th Cir. 2021).

284. *Id.* On its terms, either party to the Texas MOU could terminate the agreement with a 180-day notice period. *Texas MOU*, *supra* note 258, at 7. The Biden administration took steps to terminate the Texas MOU promptly upon taking office. *Texas v. Biden*, 554 F. Supp. 3d 818, 835 (N.D. Tex. 2021).

285. *Texas v. Biden*, 554 F. Supp. 3d at 835.

continuation of that policy—even if that party has not taken any action in reliance of such policy.

The Fifth Circuit also cited the Texas MOU as creating reliance interests *a fortiori* by acknowledging that Texas would be “irreparably damaged” if DHS were to implement “policy changes that relaxed strictures on illegal border crossings.”<sup>286</sup> The Fifth Circuit’s interpretation of reliance interests runs contrary to the nonformalist view of reliance interests adopted by the *Regents* Court.<sup>287</sup> In *Regents*, the Court focused on reliance that had developed organically as a result of the DACA policy, irrespective of the government’s formal disclaimers of reliance<sup>288</sup>; in *Texas v. Biden*, the Fifth Circuit recognized a set of more contrived or artificial reliance interests—reliance generated through formal documentation.<sup>289</sup> The Fifth Circuit’s view of administrative reliance would open the door to manipulation and abuse by outgoing administrations seeking to weaponize reliance interests as a way to create stickier policies, making it more difficult for their successors to change course and implement their own policy agendas.

The Fifth Circuit was ultimately reversed by the Supreme Court on grounds unrelated to administrative reliance, and the district court’s injunction was consequently vacated.<sup>290</sup> The States did raise arguments around administrative reliance before the Supreme Court, but the Court (through Justice Kavanaugh) asked just one question concerning reliance during oral arguments and did not mention reliance at all in its opinion.<sup>291</sup> The Supreme Court’s opinion in *Biden v. Texas* neither endorsed nor repudiated the Fifth Circuit’s holding with respect to administrative reliance, leaving the door open for lower courts to use the doctrine to review policy change across the administrative state.<sup>292</sup>

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286. *Id.*

287. See discussion *supra* Part II.D.

288. See *supra* notes 212–26 and accompanying text.

289. See *Texas v. Biden*, 20 F.4th 928, 990 (5th Cir. 2021) (noting that the Texas MOU “explicitly acknowledged” that Texas had some sort of reliance interest).

290. See *Biden v. Texas*, 597 U.S. 785, 814 (2022).

291. Transcript of Oral Argument at 72–73, *Biden v. Texas*, 597 U.S. 785 (No. 21-954).

292. See discussion *infra* Part III.B. Such an expansive view of administrative reliance is especially vulnerable to manipulation and partisan gamesmanship interfering with democratically elected political change, while not limiting itself to addressing the core concerns of administrative reliance. It may also have the effect of expanding standing, which raises additional questions of efficiency and judicial economy that are beyond the scope of this article.

3. *A New, Expansive View of Administrative Reliance.* Since *Texas v. Biden*, lower federal courts, including those in the Fifth Circuit and in border states, have continued to apply this expansive view of administrative reliance to issue nationwide injunctions invalidating other agency policy changes, particularly in the realm of immigration regulation.<sup>293</sup> Unsurprisingly, these challenges largely fall along partisan lines. Republican-led states have repeatedly used this strategy to challenge a number of Biden-era immigration policies that step back from the maximalist enforcement mandates of Trump-era policies.<sup>294</sup> Courts have not only adhered to the Fifth Circuit’s holding that state financial interests can constitute legally cognizable reliance interests but have seemingly adopted a standard that requires agencies to show

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293. There has been much recent scholarship debating the legality, propriety, and desirability of nationwide injunctions. *See generally* Ronald A. Cass, *Nationwide Injunctions’ Governance Problems: Forum Shopping, Politicizing Courts, and Eroding Constitutional Structure*, 27 GEO. MASON L. REV. 29 (2019) (arguing that expanded use of nationwide injunctions undermines rule-of-law values and erodes the separation of functions between the judiciary and political branches); Zayn Siddique, *Nationwide Injunctions*, 117 COLUM. L. REV. 2095 (2017) (providing a comprehensive account of the issuance of nationwide injunctions); Amanda Frost, *In Defense of Nationwide Injunctions*, 93 N.Y.U. L. REV. 1065 (2018) (defending the use of nationwide injunctions as a form of effective remedial intervention); Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417 (2017) (arguing against the issuance of nationwide injunctions); Spencer E. Amdur & David Hausman, *Nationwide Injunctions and Nationwide Harm*, 131 HARV. L. REV. F. 49 (2017) (defending the use of nationwide injunctions to extend relief to parties similarly situated to named plaintiffs and to prevent widespread harm); Alan M. Trammell, *The Constitutionality of Nationwide Injunctions*, 91 U. COLO. L. REV. 977 (2020) (defending the constitutionality of nationwide injunctions); Michael T. Morley, *Disaggregating Nationwide Injunctions*, 71 ALA. L. REV. 1 (2019) (proposing a taxonomy of nationwide injunctions); Howard M. Wasserman, “*Nationwide*” *Injunctions Are Really “Universal” Injunctions and They Are Never Appropriate*, 22 LEWIS & CLARK L. REV. 335 (2018) (arguing that injunctive relief should not extend beyond the plaintiffs to a case); Jonathan Remy Nash, *State Standing for Nationwide Injunctions Against the Federal Government*, 94 NOTRE DAME L. REV. 1985 (2019) (arguing against using States’ special solicitude to gain greater access to nationwide injunctions against the federal government).

294. *See, e.g.*, *Louisiana v. CDC*, 603 F. Supp. 3d 406, 439 (W.D. La. 2022) (assuming that State reliance interests of “financial harms” resulting from the termination of the “Title 42” policy, which effectively closed the southern border to asylum seekers due to purported COVID concerns, are cognizable reliance interests); *Texas v. United States*, 606 F. Supp. 3d 437, 491–92 (S.D. Tex. 2022) (holding that the Biden DHS issuance of a new immigration enforcement memo was arbitrary and capricious and expressly rejecting arguments that (1) indirect or downstream effects, such as impacts to state finances resulting from a change in policy, are too attenuated to generate reliance interests requiring agency consideration, and (2) reliance interests ought to be limited to circumstances a party has taken detrimental action in reliance of a policy).

their work, and possibly provide evidentiary support for their positions, when considering and weighing such interests.<sup>295</sup>

Notably, in a different *Texas v. Biden* case<sup>296</sup>—this time challenging a Centers for Disease Control order temporarily exempting unaccompanied children from the “Title 42” border closure and expulsion policy<sup>297</sup>—the Northern District of Texas took an even

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295. *Texas v. United States*, 40 F.4th 205, 228 (5th Cir. 2022) (holding that an agency’s failure to cite evidence and conclusion that “no such reasonable reliance interests exist” was insufficient consideration of States’ reliance interests in the Trump administration’s immigration enforcement priorities, and that “[s]tating that a factor was considered . . . is not a substitute for considering it. Rather, courts must make a searching and careful inquiry to determine if [the agency] actually *did* consider it” (cleaned up)).

296. *Texas v. Biden*, 589 F. Supp. 3d 595 (N.D. Tex. 2022).

297. In March 2020, at the start of the COVID-19 pandemic, the CDC invoked its emergency powers under Title 42 of the U.S. Code to summarily expel certain groups of individuals—targeting Mexican and Central American migrants and asylum seekers—from the United States in the name of public health. Interim Final Rule: Control of Communicable Diseases; Foreign Quarantine: Suspension of Introduction of Persons Into United States From Designated Foreign Countries or Places for Public Health Purposes, 85 Fed. Reg. 16559–60 (Mar. 24, 2020) (to be codified at 42 C.F.R. 71); KELSEY Y. SANTAMARIA, CONG. RSCH. SERV., LSB10874, COVID-RELATED RESTRICTIONS ON ENTRY INTO THE UNITED STATES UNDER TITLE 42: LITIGATION AND LEGAL CONSIDERATIONS 1 (Mar. 13, 2023).

Migrants from Mexico, Guatemala, Honduras, and El Salvador accounted for nearly 95 percent of Title 42 expulsions. John Gramlich, *Key Facts About Title 42, the Pandemic Policy That Has Reshaped Immigration Enforcement at U.S.-Mexico Border*, PEW RSCH. CTR. (Apr. 27, 2022), <https://www.pewresearch.org/short-reads/2022/04/27/key-facts-about-title-42-the-pandemic-policy-that-has-reshaped-immigration-enforcement-at-u-s-mexico-border> [<https://perma.cc/Q7JE-CR57>] (“Six-in-ten of those who have been expelled under Title 42 have been from Mexico, while 15% have been from Guatemala, 14% have been from Honduras, [and] 5% have been from El Salvador . . .”).

There have been millions of Title 42 expulsions, and many of the migrants expelled under Title 42 have been exploited, kidnapped, raped, assaulted, and killed. See *Nationwide Enforcement Encounters: Title 8 Enforcement Actions and Title 42 Expulsions*, U.S. CUSTOMS & BORDER PROT. (2023), <https://www.cbp.gov/newsroom/stats/cbp-enforcement-statistics/title-8-and-title-42-statistics> [<https://perma.cc/LF2C-4EYQ>]; *Nationwide Enforcement Encounters: Title 8 Enforcement Actions and Title 42 Expulsions Fiscal Year 2022*, U.S. CUSTOMS & BORDER PROT. (2023), <https://www.cbp.gov/newsroom/stats/cbp-enforcement-statistics/title-8-and-title-42-statistics-fy22> [<https://perma.cc/59DV-67J6>]; *Nationwide Enforcement Encounters: Title 8 Enforcement Actions and Title 42 Expulsions Fiscal Year 2021*, U.S. CUSTOMS & BORDER PROT. (2023), <https://www.cbp.gov/newsroom/stats/cbp-enforcement-statistics/title-8-and-title-42-statistics-fy21> [<https://perma.cc/7VC4-WTMB>]; *Nationwide Enforcement Encounters: Title 8 Enforcement Actions and Title 42 Expulsions Fiscal Year 2020*, U.S. CUSTOMS & BORDER PROT. (2023), <https://www.cbp.gov/newsroom/stats/cbp-enforcement-statistics/title-8-and-title-42-statistics-fy20> [<https://perma.cc/5MTM-BALN>]; HUM. RTS. FIRST, UNLAWFUL, INHUMANE, AND DEADLY, *supra* note 252, at 1; Lucas Guttentag, *Coronavirus Border Expulsions: CDC’s Assault on Asylum Seekers and Unaccompanied Minors*, SLS BLOG (Apr. 15, 2020), <https://law.stanford.edu/2020/04>

more expansive approach to administrative reliance. In that case, the court concluded that the agency must consider “all” of the State of Texas’s reliance interests, and that such interests must be “fully explore[d]” by the agency.<sup>298</sup> The court then went further to say that Texas did not even need to specify what reliance interests they were alleging went unconsidered. Instead, “consideration [of any reliance interests] must be undertaken by the agency in the *first* instance,” and an agency’s failure to meaningfully consider all such interests alone is “fatal.”<sup>299</sup>

Taken together, these cases raise the mandate imposed by administrative reliance to an impossibly high watermark. Not only can remote, incidental, and unpredictable interests constitute cognizable reliance interests, but agencies have an obligation to consider and thoroughly discuss every reliance interest—even ones that may be inarticulable by a future challenger of the policy—in the first instance.

### III. ADMINISTRATIVE RELIANCE PRINCIPLES AND CABINING JUDICIAL REVIEW

Judicial interpretation and acceptance of which asserted reliance interests are legally cognizable for purposes of APA review has undoubtedly expanded the courts’ policymaking role in administrative law. The Supreme Court has neither theorized nor articulated a principled framework for determining what, and whose, reliance interests “count” for purposes of the administrative reliance inquiry. Lower federal courts have seized this opening as an opportunity to override agency action and substitute litigants’ and judges’ policy views for those of agencies and, often, the president. This Article argues that an overly expansive view of administrative reliance poses real issues from separation of powers, federalism, and political accountability perspectives.

In theory, a workable doctrine of administrative reliance ought to strike a better balance between protecting the values that

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/15/coronavirus-border-expulsions-cdcs-assault-on-asylum-seekers-and-unaccompanied-minors [https://perma.cc/K5Z7-TQAV] (documenting the violence faced by expelled migrants); Adam Isacson, *Weekly U.S.-Mexico Border Update: Title 42’s Gradual Loosening*, WOLA (May 21, 2021), <https://www.wola.org/2021/05/title-42-weekly-border-update-isacson-update-border-mexico-us> [https://perma.cc/GFN8-S5DX] (“[Migrants] were even being held by kidnappers when they were supposed to appear in court.”).

298. *Texas v. Biden*, 589 F. Supp. 3d 595, 620 (N.D. Tex. 2022).

299. *Id.* at 620 n.15 (cleaned up).



administrative reliance seeks to protect, on the one hand, and the court's oversight and review function, on the other. This Part begins the project of identifying the core considerations motivating administrative reliance to understand what the underlying concerns are and what these reliance interests seek to preserve. It then applies these core considerations to the reliance interests recently recognized by the courts and critiques the recognition of overly broad or diffuse reliance interests. Finally, it makes the case for tailoring the threshold inquiry for administrative reliance in a way that affirms the rights-preserving function of reliance interests while promoting democratic accountability and minimizing the potential for partisan manipulation.

#### A. *Values Motivating Administrative Reliance*

The Supreme Court has, to date, done very little to address the question of what it seeks to preserve through its administrative reliance jurisprudence.<sup>300</sup> An attempt to theorize administrative reliance fully is a much bigger project than can be tackled in this Article, but here, we can begin to derive the core considerations motivating administrative reliance to better identify what the doctrine seeks to accomplish. Administrative reliance seems to serve two forcing functions. First, it forces agencies to consider, examine, and name the reliance interests generated by existing policy and to confront how these interests would be affected by the proposed change.<sup>301</sup> This, in turn, forces agencies to give serious thought to who would be affected by the proposed change and what rights, benefits, or expectations it would upset through the change.<sup>302</sup> Second, it forces agencies to give sufficient, public reasons justifying the proposed change.<sup>303</sup> This promotes legitimacy, transparency, and accountability in the administrative state, and it constrains agency action by committing decisionmakers through the public reason-giving function.<sup>304</sup> In other words, it forces agencies to

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300. See *supra* Part II.

301. See *supra* Part II.A (discussing *State Farm*).

302. See *supra* Part II.B–D.

303. See *supra* Part II.A–D.

304. See Schauer, *supra* note 91, at 645; Deeks, *supra* note 91, at 626, 628 (“[T]hose who give the reasons benefit just as much from the process as those who receive them.” Not only do decision makers benefit, but “[m]aking a general assertion (in the form of a reason) creates a kind of promise about future behavior, which itself serves as a constraint.”).

own their decisions and to hold their policy choices up to public scrutiny.<sup>305</sup>

With these objectives in mind, we can turn to excavating the values that administrative reliance, functioning as a form of arbitrary and capricious review, seeks to uphold. A careful parsing of the Court's language suggests that it has three central concerns. First, the Court is concerned with agency legitimacy and accountability.<sup>306</sup> As an arguably less democratically accountable body, an agency ought to be required to show its work so that there is some justification to the exercise of its tremendous policymaking power.<sup>307</sup> Second, the Court is concerned with stability, and it uses administrative reliance to buffer against sudden swings in policy stemming from shifting political priorities.<sup>308</sup> Considerations of reliance interests through the lens of preserving stability can help mitigate the whiplash from sudden policy change. Third, the Court is concerned about upsetting settled expectations arising from longstanding policy.<sup>309</sup> Here, the Court has focused on the expectations of those who have either been directly regulated *by* or directly benefited *from* the policy.<sup>310</sup> Thus, the expectations that have historically been of central concern to the APA and the Court's administrative reliance jurisprudence are classic reliance-type interests—that is, expectations that arise out of quasi-contractual promises made through prior agency action.<sup>311</sup>

It is this third value that most relates to the question of whether a party's asserted reliance interests are legally cognizable, and it is this value that ought to form the basis of a preliminary threshold inquiry into whether the asserted interests can form the basis for judicial review. Much of the recent doctrinal confusion surrounding administrative reliance stems from the lack of such a threshold inquiry,

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305. At oral arguments, Justices Breyer, Ginsburg, Gorsuch, Kagan, Kavanaugh, and Sotomayor all asked questions relating to the agency's consideration of reliance interests and justification of its decision for purposes of promoting agency accountability for its policy choice. *See generally* Transcript of Oral Argument, *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891 (2020) (No. 18-587).

306. *See, e.g., supra* Part II.B (discussing *Smiley*).

307. *See, e.g., supra* Part II.D (discussing *Regents*).

308. *See, e.g., supra* Part II.A–C, and in particular discussion of *State Farm* and *Fox Television*.

309. *See, e.g., supra* Part II.C (discussing *Encino Motorcars* and *Fox Television*).

310. *See, e.g., supra* Part II.B (discussing *SmithKline*); Part II.C (discussing *Encino Motorcars*).

311. *See supra* Part I.C. This is not to disclaim the import of other types of reliance or to foreclose other types of reliance as a proper basis for APA review predicated on administrative reliance. It is to say, however, that “classic” reliance interests likely form the strongest basis for APA review.

which has allowed all different types of reliance interests claims, asserted by all different types of parties, to be reviewed and adjudicated by the courts. Instead, focusing on this third value suggests that administrative reliance interest claims should be screened in a way that focuses the inquiry on upsetting settled expectations that are closely linked to, or directly created by, the policy at issue, and that are being directly disrupted by the policy change being proposed. That is, it is not enough that expectations are being disrupted as a more indirect or downstream consequence of some generalized change in background conditions or regulatory regimes. This type of change happens all the time, and it generally does not give rise to a legal claim. Instead, administrative reliance claims should be focused on expectations that flow more directly from prior government action and that are being affirmatively disturbed or taken away by the change in policy. Furthermore, because administrative reliance can function as a robust procedural check that forces agencies to justify their actions, reliance claims rooted in rights, statuses, or benefits may warrant particular attention. As discussed in Part I.B above, individuals who have come to rely on rights or entitlements that were previously granted through agency action might come to have more deeply engrained, or less flexible, expectations in those cases.<sup>312</sup>

Three central concerns should ground the threshold administrative reliance inquiry in this framework. First, the concern about upsetting settled expectations is faithful to the classic reliance-type claims that motivated the formulation of the APA and the compromise generating its procedural guardrails, including its provision for judicial review of agency action.<sup>313</sup> Specific or concrete

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312. See Emerson, *supra* note 27, at 2137 (discussing the importance of dignitary rights granted through informal agency action and the significant reliance such rights generate).

313. Historically, the APA grew out of a New Deal-era movement to protect private property interests from overreaching governmental regulation. See *supra* Part I.0; Jill E. Family, *Regulated Immigrants: An Administrative Law Failure*, 66 HOW. L.J. 1, 7 (2022) (describing the development of the APA as “a reaction to the New Deal’s regulation of property rights”). With respect to immigration law, Jill Family has argued that the APA was debated and drafted in a context that excluded the former Immigration and Naturalization Service from its purview, and that immigration law is thus a poor fit for the trans-substantive procedural system established by the APA. Family, *supra*, at 14–15 (arguing that “[t]he legislative history of the APA reveals that immigration was an awkward fit from the very beginning” and “[t]he absence of informal adjudication procedures in the APA means that even if the APA’s informal procedures applied, the APA would not provide the procedural demands that immigration law needs”). Family argues that immigration law is a system that regulates human rights rather than property rights, and that enhanced, human rights-oriented procedural safeguards may be required in lieu of those provided

expectations arising out of past promises made by agencies resemble the types of expectations private parties might have as a result of contractual or quasi-contractual promises.<sup>314</sup> In the case of administrative reliance, an agency has effectively promised to act in a specified way that generates a set of expectations among affected parties. It is this set of expectations that may in turn generate reliance interests. To date, the Supreme Court’s administrative reliance inquiry has generally been limited to already regulated spaces where the agency is seeking to alter the regulatory policy,<sup>315</sup> which suggests that the Court has been primarily concerned about upsetting expectations that agencies affirmatively created through their policymaking activities.

That leads to the second core concern that should govern the administrative reliance framework. It is not enough that a party’s expectations generally are being disrupted. The type of expectation and, more specifically, the ways in which that expectation connects to the policy are of critical importance. Generally, the Court has been concerned with expectations that arise as a result of the policy at issue.<sup>316</sup> One way to conceptualize this requirement might be to ask whether the expectation is, in some ways, proximately linked to the existing policy. An alternate way to get at this “linkage” question might be to look at who a policy’s “intended beneficiaries”<sup>317</sup> or “regulated parties” are. These groups are certainly more likely to have claims of expectations that arise from the policy at issue, and the identity of the

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by the generalized adjudication parameters established by the APA. *Id.* at 134–36. I have not drawn that distinction here and have argued that rights-based promises deserve equal, if not more, protection as property-based promises under the proposed reliance interest framework, as both are emblematic of classic reliance-type interests. Insofar as reliance interests are concerned with ensuring some degree of due process prior to agency rescission of a prior promise, rights-based claims (including those that would generally arise in the immigration context) may deserve heightened consideration.

314. David M. Hasen, *Legal Transitions and the Problem of Reliance*, 1 COLUM. J. TAX L. 120, 162 n.127 (2010) (noting that “[t]he reliance argument is sometimes framed as resulting from a notion of quasi-contract between the government and private actors” but arguing that a “quasi-promise” is the better conceptual framework, as there is no consideration exchanged in the legal rule context).

315. *See supra* Part II.

316. *See supra* Part II.

317. *See* Landyn Wm. Rookard, *Misplaced Reliance: Recalibrating the Role of Reliance Interests in Judicial Review of Agency Policy Changes*, 92 UMKC L. REV. 355, 358 (2023) (“[I]f anyone’s reliance interests should matter, it is those of the intended beneficiaries of a regulatory scheme.”).

claimant is certainly relevant to the overall inquiry. That said, these group-based proxies may not capture all parties that have concrete interests or expectations created by the policy. If the fundamental concern motivating reliance interests is really about upsetting settled expectations, as it seems to be, then focusing on the interests that are actually generated as a result of the policy, rather than the groups the policy seeks to regulate or account for, is a more tailored way to get at that concern.

The third core concern gets at how the relevant expectations are being disrupted. The APA and Supreme Court have historically been concerned with restraining arbitrary and capricious government action. Focusing on the action in question, the APA and Supreme Court have been most concerned with action that would effectuate an affirmative revocation of previously created expectations.<sup>318</sup> That is, it is not enough to have one's expectations disrupted because of some downstream effect that results from shifting background conditions or generalized regulatory change. Instead, the disruptions of central concern are those that are a direct result of the proposed policy change. Background conditions shift all the time, and those shifts generally do not give rise to judicial intervention; direct government takings, however, generally *do* give rise to claims against the government.<sup>319</sup> Similarly, in the administrative reliance context, it is government action that looks more like the latter that forms the basis of administrative reliance claims.

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318. See *supra* Part II. In the *Encino Motorcars* case, for example, the Court was concerned with upsetting expectations related to overtime payments required by the Department of Labor's interpretation of worker classifications. *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 222 (2016). In the *FCC Television* case, the Court was concerned with upsetting expectations created as a result of the agency's long-standing interpretive position and enforcement practices. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 517 (2009). And in the *Regents* case, the Court was concerned with upsetting expectations like protection from deportation and work authorization that were extended to individuals by DACA. *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1914 (2020) In all three cases, the Court's administrative reliance inquiry was tied to agency change action that would have directly and explicitly disrupted, or did disrupt, these expectations.

319. In the standing context, this concept can be found in general restrictions on taxpayer standing to challenge changes in policy that would affect the public writ large, as opposed to permissive taxpayer standing if there is a close link between the claim being asserted and the legislative enactment at issue. Compare *Frothingham v. Mellon*, 262 U.S. 447, 487 (1923) (denying taxpayer standing for generalized claims challenging acts of Congress that are "essentially a matter of public and not of individual concern"), with *Flast v. Cohen*, 392 U.S. 83, 102 (1968) (finding that taxpayers may have standing if there exists a "logical nexus between the status asserted and the claim sought to be adjudicated").

Administrative reliance claims can arise out of all different contexts. Some may be rights-based; others may be more economic in nature. The goal of administrative reliance is not to prohibit agencies from changing course; rather, it is to ensure that agencies give due consideration to the relevant interests at stake such that they are not running roughshod over relevant and important expectations as they engage in policy change. If an agency were to change a policy that allowed for a certain level of carbon emissions in favor of a policy that would more strictly limit such emissions, the administrative reliance doctrine would likely require the agency to consider the effects of this change on the affected companies. And likewise, if the policy change were to flow in the other direction, administrative reliance would likely require the agency to consider the effects the change would have on the individuals in the relevant areas and their access to clean air.

In these ways, administrative reliance may not impose much more than the generalized reason-giving and cost-benefit inquiries agencies are already required to undertake. Administrative reliance does, however, give affected parties an opportunity to confront the agency if their relevant reliance interests should have been, but were not, considered or addressed as part of the policy change process. This type of procedural check may be especially important if the reliance interests being claimed arise out of rights, statuses, or benefits that were previously granted through agency action. Individual rights claims have historically enjoyed a greater degree of durability than more strictly economic claims. For example, in the *stare decisis* context, where reliance interests also play a major—and better theorized—role, courts place a premium on precedents recognizing status or reaffirming individual rights.<sup>320</sup> Precedents “protecting individual liberties and implicating ‘individual or societal reliance’” are often given greater weight.<sup>321</sup> By contrast, precedents *denying* individual rights merit “a markedly less restrictive caution.”<sup>322</sup> This is particularly true in the

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320. See Varsava, *supra* note 47, at 1860–61 (“Although the *stare decisis* force that the Court affords to constitutional precedent is generally understood to be weaker than the force afforded to other types of precedent, constitutional precedents that protect personal liberties would seem to be an exception.”).

321. *Id.* at 1859 (quoting *Lawrence v. Texas*, 539 U.S. 558, 577 (2003)); *id.* at n.59 (“In *Casey* we noted that when a court is asked to overrule a precedent recognizing a constitutional liberty interest, individual or societal reliance on the existence of that liberty cautions with particular strength against reversing course.” (quoting *Lawrence*, 539 U.S. at 577)).

322. *Id.* at 1860 (quoting ARTHUR J. GOLDBERG, *EQUAL JUSTICE: THE WARREN ERA OF THE SUPREME COURT* 74–75, 85 (1971)).

context of the State's power to regulate conduct.<sup>323</sup> In the administrative law context, agencies and courts should also be more cautious when evaluating action that would alter policy in a way that reduces or eliminates previously recognized rights, statuses, or benefits that parties have come to expect or plan around in specific or concrete ways.<sup>324</sup> Considering administrative reliance from this perspective would screen in situations where reliance interests are strongest, while screening out purported interests that are more attenuated and diffuse.<sup>325</sup>

### B. *The Case for Reeling It In*

Viewing the doctrine through a lens oriented around concrete expectations rooted in prior governmental grants of rights, statuses, or benefits, it becomes clear that the Court's recognition of administrative reliance interests in *Regents* fits squarely within this central concern, while the view of administrative reliance adopted by the Fifth Circuit and certain lower courts goes too far. As discussed above, the doctrine of administrative reliance largely arose from a concern over agencies suddenly ripping the rug out from under people.<sup>326</sup> This is consistent with the Court's repeated holding that reliance interests may be particularly strong when the purported change is to a "longstanding" agency policy.<sup>327</sup> This makes a good amount of sense—in such cases,

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323. *Id.* In these cases, courts typically ask whether an individual enjoys a right that would allow it to be free of the State's police powers or other forms of State intervention or intrusion. This is similar to the situation where federal policy has had a role in acknowledging or creating rights or entitlements that are either based in liberty or in a form of State protection from a designated harm.

324. As noted above, relevant interests can also be economic in nature, and agencies should likewise address those reliance interests when the relevant benefit that is being altered or rescinded is a primarily economic one. *See* Exec. Order No. 12,866, 58 Fed. Reg. 51735 (Oct. 4, 1993) (“[A]gencies should assess all costs and benefits of available regulatory alternatives, including the alternative of not regulating. Costs and benefits shall be understood to include . . . quantifiable measures . . .”).

325. *See* Rookard, *supra* note 317, at 42 (arguing that reliance interests are most salient when considered from the vantage point of the “intended beneficiary”).

326. *See* *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 742 (1996) (“Sudden and unexplained change, or change that does not take account of legitimate reliance on prior interpretation, may be ‘arbitrary, capricious [or] an abuse of discretion.’” (citations omitted)).

327. *See, e.g.*, *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515–16 (2009) (“Sometimes [an agency must provide a more detailed justification]—when, for example its new policy rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interests . . .”); *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221–22 (2016) (“In explaining its changed position, an agency must also be cognizant that

regulated or otherwise-affected parties and industries may have structured their businesses or lives around such policies.<sup>328</sup>

The Court's decision in *Regents* recognized a paradigmatic case of administrative reliance in the DACA recipients' reliance on the program. There, the government had made an express promise resembling a contractual deal to the DACA recipients: come out of the shadows and enroll in the program, and we promise not to pursue a deportation case against you and that you will be eligible for work authorization—so long as you have a valid DACA grant.<sup>329</sup> In *Regents*, the DACA recipients asserted classic reliance-type interests that were rooted in claims of rights, statuses, and benefits that flowed directly from promises made by the policy at issue.<sup>330</sup>

Conversely, in the context of the State-sponsored immigration challenges, it is not obvious that the immigration policies at issue made any rights-, status-, or benefits-based promises to States. That is, although the States are asserting claims that sound in classic reliance-type interests, these interests do not arise out of any contractual or quasi-contractual agreement vis-à-vis the States and the policy at issue.<sup>331</sup> If anything, the States' claims rested most strongly on the idea that they had expected downstream economic effects resulting from a

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longstanding policies may have 'engendered serious reliance interests that must be taken into account'" (citation omitted)); *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1913 (2020) ("Duke also failed to address whether there was 'legitimate reliance' on the DACA Memorandum.").

328. See *supra* Part II.C (discussing *Encino Motorcars*). Other scholars have suggested that reliance interests should focus on the interests of the "intended beneficiaries" of the regulation. See Rookard, *supra* note 317, at 35 ("Specifically, agencies should be required to identify and accommodate the reliance interests of the intended beneficiaries of their policies.").

329. See *supra* Part II.D (discussing *Regents*).

330. See *supra* Part III.A (discussing classic reliance).

331. There is much more to investigate and say about State interests in this arena, including what types of interests States may allege for purposes of standing as well as what interests States may allege on the merits. Some courts have allowed States to assert injury arising from economic expenditures for unauthorized immigrant residents in satisfying standing requirements. See Jennifer Lee Koh, *The Rise of the 'Immigrant-as-Injury' Theory of Standing*, 72 AM. U. L. REV. 885, 926–27 (2023) (tracing and critiquing State claims of increased costs as a result of increased immigrant presence as a cognizable injury for purposes of State standing); Jacob Hamburger, *Immigration Federalism Standing*, 66 B.C. L. REV. (forthcoming 2025) (draft on file with author) (critiquing State special solicitude standing as applied in the immigration context). The Court recently held that States do not have a cognizable interest in the immigration-related prosecution of individuals (even those residing within such States) and thus lack standing to challenge the federal government's immigration enforcement priorities. *United States v. Texas*, 599 U.S. 670, 676–77 (2023).



federal regulatory regime, but this is not the type of concrete or specific reliance that courts should be concerned with.<sup>332</sup> Thus, the States' administrative reliance claims in these cases should fail the threshold inquiry under the proposed doctrinal framework.

Further, to extend the doctrine to apply to alleged State economic interests in an existing policy—particularly when that policy is highly politicized and frequently changes with presidential turnover—makes for bad public policy for three additional reasons. First, recognition of State economic interests as reliance interests requiring agency consideration would give States a sledgehammer to strike down functionally any change in federal policy. This is too big and too broad a power. Returning to immigration law as our case study, consider the issue of immigration enforcement priorities. Of course, any change in the level of immigration enforcement stands to affect a state's finances in any number of ways. Higher enforcement might mean detaining more individuals (which can be profitable to States that lease out space in their prisons and jails to DHS to detain noncitizens), and it might also mean a reduction in the State's workforce and, thus, economic productivity. Conservative States might sue over policy changes that would lessen enforcement, citing economic loss; liberal States might sue over policy changes that would increase enforcement, also citing economic loss. Either way, the Fifth Circuit's expansive view of administrative reliance would give States a functional veto over the policy, as courts would be able to issue judgments that would enjoin or vacate the policy on a nationwide basis. This is clearly not the result intended under the APA, nor does it serve the values motivating the doctrine of administrative reliance.

Second, the demands of the Fifth Circuit's view are administratively unworkable. On its view, it is insufficient for the agency to say that they considered the fact that certain States' finances may be implicated by the policy change; the Fifth Circuit has required that agencies provide more specificity and possibly evidentiary proof

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332. In the standing context, the Supreme Court has suggested that States' claims to these types of downstream economic harms may not be sufficient injury to establish standing. *United States v. Texas*, 599 U.S. at 680 n.3 (“[I]n our system of dual federal and state sovereignty, federal policies frequently generate indirect effects on state revenues or state spending. And when a State asserts, for example, that a federal law has produced only those kinds of indirect effects, the State’s claim for standing can become more attenuated.”).

(although it remains unclear what that requirement looks like).<sup>333</sup> Some courts have gone even further to require that an agency meaningfully consider and “fully explore” “all” of a State’s reliance interests in the first instance.<sup>334</sup> And, further still, the courts have held that a State has no obligation to notify the agency of what those interests might be—that is the agency’s job to work out.<sup>335</sup> This sets up a paradigm where the agency’s obligations are broad and potentially not only unknown, but unknowable, and opens the door to extreme Monday-morning quarterbacking. It allows litigants and courts to raise a seemingly unbounded set of reliance interests and claim that the agency failed to give them meaningful consideration. For administrative reliance to be a workable doctrine, agencies need to be able to determine, *ex ante*, what their obligations are, and courts ought to be constrained, *ex post*, in how they can intervene or oversee the agency’s decision-making process.<sup>336</sup>

Third, this view of administrative reliance harms the legitimacy of our political process. Policy change often follows regime change, and regime change is a consequence of our national politics. Whatever one thinks of the reasons (democratic or antidemocratic) that give rise to a particular presidential election’s outcome, a change in presidential administration generally signals a shift in the nation’s policy agenda.<sup>337</sup> Thus, when administrative reliance is invoked and results in a suspension of the new administration’s shift away from its predecessor’s policies in favor of its own, that is a move that both rebukes and stymies the electoral outcome. Overly expansive procedural requirements inhibit an incoming administration’s ability to govern and slows the realization of that administration’s policy agenda. If we accept that the primary reasons we require agencies to engage in public reason-giving derive from our concerns about legitimacy and

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333. *Texas v. United States*, 40 F.4th 205, 228 (5th Cir. 2022). The question of how, and how much, agencies must “show their work” when discussing reliance interests is one on which the Justices may disagree, and one which Justice Kavanaugh emphasizes in his separate opinion in *Regents. Dep’t of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1933–34 (2020) (Kavanaugh, J., concurring in the judgment in part and dissenting in part).

334. *Texas v. Biden*, 589 F. Supp. 3d 595, 620 (N.D. Tex. 2022).

335. *Id.* at 620 n.15.

336. For a discussion on how agencies can meet their obligation to choose and reason through alternatives to their chosen courses of action, see generally Deacon, *supra* note 91.

337. See *supra* note 76 and accompanying text.

accountability,<sup>338</sup> it is difficult to justify reason-giving requirements that stand in the way of those values.

Ultimately, a workable doctrine of administrative reliance should balance the concrete, rights-oriented concerns motivating the reliance interest inquiry with the flexibility and accountability mechanisms that grow out of the democratic political process. An overly narrow view of administrative reliance stands to filter out important rights-preserving checks on agencies. An overly broad view of administrative reliance stands to elevate the policy judgments and preferences of individual judges over those of agencies—and, ultimately, presidents.

The above makes the case for setting some limits around administrative reliance, but how we delineate those limits remains an open question. It also highlights the fact that fundamental questions underlying the doctrine of administrative reliance have thus far gone unanswered. When are reliance interests created? Whose reliance interests matter? What constitutes a legally cognizable reliance interest? Who has standing to bring a claim of reliance interests, and under what circumstances? How must agencies deal with reliance interests, what do they need to consider, and how much reason-giving do they need to engage in? This Article takes a first step toward answering these questions in order to help develop a workable doctrine of administrative reliance.

#### CONCLUSION

As U.S. politics becomes more polarized and partisan,<sup>339</sup> presidential administrations may increasingly turn to executive power and informal agency action to effectuate their own policy preferences. Those policies—even ones that are formally temporary or nonbinding—may nevertheless generate reliance interests. In practice, the invocation of reliance interests serves as a brake on policy change and prolongs the effect of existing policies, an issue that is particularly salient following presidential regime change. On the one hand, this brake might be necessary or desired in certain instances, particularly

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338. For a more fulsome discussion on the concerns motivating agency reason-giving, see Deeks, *supra* note 91, at 629–34.

339. *E.g.*, PEW RSCH. CTR., POLITICAL POLARIZATION IN THE AMERICAN PUBLIC 6 (2014), <https://www.pewresearch.org/politics/2014/06/12/political-polarization-in-the-american-public> [https://perma.cc/J3JV-5Z78] (“Partisan animosity has increased substantially over the same period. In each party, the share with a highly negative view of the opposing party has more than doubled since 1994.”).

when agencies speed through rescinding policies that have severe consequences for important rights held by those who are regulated by, or are beneficiaries of, the policy at issue. On the other hand, litigants and courts may weaponize reliance interests to preserve and prolong the policies of prior administrations.

The doctrine of administrative reliance is powerful, but important and fundamental questions remain surrounding the nature, holder, and cognizability of reliance interests, as well as the values and rationale underlying such a doctrine. A next step in this project, therefore, is to develop a cohesive theory of administrative reliance and framework for an agency's work in this space—one that provides both an account of reliance in response to these questions and a roadmap that guides future applications of the doctrine.