
ADMINISTRATIVE LAW — IMMIGRATION AND NATIONALITY ACT — FIFTH CIRCUIT ALLOWS BOARD OF IMMIGRATION APPEALS TO CHANGE DEPARTMENT OF HOMELAND SECURITY STATUTORY INTERPRETATION WITHOUT REASONED EXPLANATION. — *Ali v. Barr*, 951 F.3d 275 (5th Cir. 2020).

From 2014 to 2018, more than 160,000 asylees in the United States were granted lawful permanent resident (LPR) status,¹ which confers additional rights and offers a path to citizenship.² But the potential consequences of adjusting from asylee to LPR status can be confusing and unclear.³ One such consequence was recently revealed in *Ali v. Barr*⁴ (*Ali II*), in which the Fifth Circuit upheld a Board of Immigration Appeals⁵ (BIA) judgment that, pursuant to a provision of the Immigration and Nationality Act⁶ (INA) codified at 8 U.S.C. § 1159(b), a noncitizen's asylee status automatically terminated when he became an LPR — thereby easing the government's path to deporting him.⁷ The Fifth Circuit deferred to the BIA's statutory interpretation despite prior guidance from the Department of Homeland Security (DHS) implying noncitizens could maintain *both* statuses under § 1159(b).⁸ But in its opinion, the court overlooked a significant doctrinal complication applicable to this case: how arbitrary and capricious review applies when Congress delegates authority over the same statutory provision to multiple agencies. The Fifth Circuit should have instead required the BIA to provide a reasoned explanation for its policy change from DHS's prior interpretation, thus ensuring a minimum level of procedural protection for noncitizens like Ali.

¹ See U.S. DEP'T OF HOMELAND SEC., 2018 YEARBOOK OF IMMIGRATION STATISTICS 18 tbl.6 (2019).

² See *Lawful Permanent Residents (LPR)*, U.S. DEP'T OF HOMELAND SEC. (Oct. 22, 2020), <https://www.dhs.gov/immigration-statistics/lawful-permanent-residents> [<https://perma.cc/QRZ9-24JA>]. LPRs, or “green card” holders, are authorized to live permanently in the United States. See *id.*

³ See *Ali v. Lynch (Ali I)*, 814 F.3d 306, 314 (5th Cir. 2016).

⁴ 951 F.3d 275 (5th Cir. 2020).

⁵ The BIA is an appellate body within the Department of Justice and hears appeals from immigration judges and certain officials from the Department of Homeland Security. See *Board of Immigration Appeals*, U.S. DEP'T OF JUST. (Dec. 7, 2020), <https://www.justice.gov/eoir/board-of-immigration-appeals> [<https://perma.cc/CPB7-F5SV>]. BIA decisions can be appealed to federal courts. *Id.*

⁶ Ch. 477, 66 Stat. 163 (1952) (codified as amended in scattered sections of 8 U.S.C.).

⁷ See *Ali II*, 951 F.3d at 276–78. Otherwise, the government would first have to conduct an asylum termination proceeding before removing him. See *Mahmood v. Sessions*, 849 F.3d 187, 190 (4th Cir. 2017).

⁸ See, e.g., U.S. CITIZENSHIP & IMMIGR. SERVS., AFFIRMATIVE ASYLUM PROCEDURES MANUAL (AAPM) 84 (2013).

In December 1991, Nadeem Ali, a citizen of Pakistan,⁹ entered the United States using a fraudulent visa.¹⁰ The federal government initiated removal proceedings against Ali, who then applied for and was granted asylum.¹¹ Under § 1159(b), Ali then voluntarily became an LPR in June 1993.¹² Section 1159(b) allows either the “Secretary of Homeland Security or the Attorney General” to, at their discretion, “adjust” the status of an asylee “to the status of an alien lawfully admitted for permanent residence” if an asylee applies for such an adjustment and meets certain other requirements.¹³ Prior DHS guidance under § 1159(b) had implied noncitizens could maintain both asylee and LPR statuses simultaneously.¹⁴

Twenty years later, the United States again initiated removal proceedings against Ali after he pleaded guilty to cocaine possession.¹⁵ Before an immigration judge, Ali argued that under the INA, the United States first had to terminate his asylee status before removing him from the country.¹⁶ The immigration judge instead held that Ali lost his asylee status when he voluntarily became an LPR in 1993 under § 1159(b).¹⁷ The BIA upheld the judgment on appeal, concluding Ali’s asylee status automatically terminated when he became an LPR.¹⁸

Ali petitioned the Fifth Circuit for review, arguing the BIA erred in holding that his asylee status had terminated.¹⁹ In *Ali v. Lynch*²⁰ (*Ali I*), a Fifth Circuit panel felt the INA’s underlying statutory language

⁹ Matter of N-A-I-, 27 I. & N. Dec. 72, 73 (B.I.A. 2017).

¹⁰ *Ali II*, 951 F.3d at 277.

¹¹ *Id.*

¹² *Id.*

¹³ 8 U.S.C. § 1159(b). Other requirements include that the applicant has “been physically present in the United States for . . . one year.” *Id.*

¹⁴ See U.S. CITIZENSHIP & IMMIGR. SERVS., *supra* note 8, at 84 (“Termination proceedings can only be initiated after an Asylum Approval has been issued, and may be initiated even if the individual has adjusted to LPR status.”); see also 8 C.F.R. § 208.14(g) (2020) (indicating that a noncitizen who is granted LPR status *while* applying for asylum can request that his or her asylum application still be adjudicated rather than abandoned); U.S. CITIZENSHIP & IMMIGR. SERVS., FACT SHEET: TRAVELING OUTSIDE THE UNITED STATES AS AN ASYLUM APPLICANT, AN ASYLEE, OR A LAWFUL PERMANENT RESIDENT WHO OBTAINED SUCH STATUS BASED ON ASYLUM STATUS 2 (2006) (noting that “[a]n individual’s underlying asylum status may be terminated even if the individual has already become a lawful permanent resident,” thereby suggesting an individual can maintain both statuses).

¹⁵ *Ali II*, 951 F.3d at 277.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* at 278; see also Matter of N-A-I-, 27 I. & N. Dec. 72, 75 (B.I.A. 2017) (holding that adjustment to LPR status “extinguishes [an] alien’s asylee status”). Under a separate INA provision, DOJ rulings (through the BIA) with respect to all questions of law are controlling on both the DOJ and DHS. See 8 U.S.C. § 1103(a)(1).

¹⁹ *Ali I*, 814 F.3d 306, 309 (5th Cir. 2016).

²⁰ 814 F.3d 306.

was ambiguous on whether granting LPR status terminated asylee status, but it ultimately concluded the BIA “ha[d] not yet exercised its *Chevron*^[21] discretion to interpret the statute in question.”²² The court remanded so the agency could explain its statutory interpretation in greater detail.²³ On remand, the BIA did exactly that; after revisiting the INA’s statutory language and addressing the Fifth Circuit’s concerns, the BIA again held that a noncitizen loses his asylee status after adjusting to LPR status.²⁴

Ali again petitioned for review in the Fifth Circuit, arguing he still maintained both his asylee and LPR statuses.²⁵ The court denied his petition.²⁶ Writing for a unanimous panel, Judge Oldham²⁷ first revisited the *Ali I* opinion. While Ali argued the *Ali I* court found the statutory provisions ambiguous, Judge Oldham instead described *Ali I* as a “*Chevron Step Zero*” decision.²⁸ This step is “the initial inquiry into whether the *Chevron* framework applies at all,”²⁹ which “cannot be completed where the agency has not yet offered its interpretation of the statute.”³⁰ Thus, *Ali I*’s statutory interpretation was offered only as guidance to “help” the BIA interpret the statute itself, but was not binding and did not reflect the Fifth Circuit’s *Chevron Step One* analysis.³¹

Upon reviewing the BIA’s more robust statutory analysis after remand, Judge Oldham held that its interpretation — that “a new LPR discards his old asylee status” — correctly reflected the “plain text” of the statute.³² More specifically, the word “to” in § 1159(b) denotes that a noncitizen’s “status is altered in a . . . fundamental sense — the [noncitizen] goes from one status *to* another”³³ — and indicates “the arrival at a new terminus.”³⁴ Further, the BIA’s interpretation was consistent with the INA’s “broader structure and context.”³⁵

While Ali argued the BIA changed its statutory interpretation from DHS’s prior guidance and thus needed to offer a “reasoned explanation”

²¹ *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

²² *Ali I*, 814 F.3d at 311.

²³ *Id.* at 314.

²⁴ *Matter of N-A-I*, 27 I. & N. Dec. 72, 75–81 (B.I.A. 2017).

²⁵ *See Ali II*, 951 F.3d at 276–78.

²⁶ *Id.* at 285.

²⁷ Judge Oldham was joined by Judges Jones and Ho.

²⁸ *Ali II*, 951 F.3d at 279.

²⁹ *Id.* (quoting Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 191 (2006)).

³⁰ *Id.*

³¹ *Id.*

³² *Id.* at 280.

³³ *Id.*

³⁴ *Id.* (citing dictionary definitions).

³⁵ *Id.* In Judge Oldham’s view, to allow a noncitizen to maintain both statuses would erase Congress’s carefully delineated benefits and requirements for each. *See id.*

for its policy reversal under *Encino Motorcars, LLC v. Navarro*,³⁶ Judge Oldham rejected this claim. The court indicated the BIA was “not its brother’s keeper” and was required to explain only its own intra-agency policy changes.³⁷ The court pointed to four major *Chevron*-related Supreme Court cases to support this point, highlighting that each involved one agency shifting its *own* policy interpretations.³⁸ Further, Judge Oldham pointed to a footnote in *United States v. Eurodif S.A.*³⁹ in which the Supreme Court concluded that one agency’s position did “not speak to the deference owed [a different agency].”⁴⁰ And even if agencies had a general obligation to speak to different agencies’ interpretations, such a rule would not apply in this case; internal executive branch regulations note that “decisions of the [BIA or Attorney General] shall be binding on all officers and employees of [DHS].”⁴¹ In a footnote, Judge Oldham further elaborated that interagency disputes are best settled within the executive branch.⁴²

Judge Oldham also refuted a handful of Ali’s other arguments. First, Judge Oldham noted that 8 U.S.C. § 1158(c)(2), which lists five scenarios under which the BIA can terminate a noncitizen’s asylee status (none of which include LPR adjustment), was not relevant in this case; Ali, and not the BIA, terminated his own asylum by voluntarily adjusting to LPR status.⁴³ Second, the court rejected Ali’s claim that the BIA misread the legislative history behind § 1158 and § 1159, with Judge Oldham reasoning that agencies have “no general obligation” to analyze legislative history.⁴⁴ Third, the court dismissed Ali’s argument that the 1992 asylum decision should have “issue-preclusive effect” on the immigration judge’s 2014 asylum determination.⁴⁵

Administrative agencies are generally free to change their prior policy positions to adapt to changed circumstances and political preferences. But under existing administrative law doctrine expressed in cases

³⁶ 136 S. Ct. 2117 (2016); *Ali II*, 951 F.3d at 281 (quoting *Encino Motorcars*, 136 S. Ct. at 2125).

³⁷ *Ali II*, 951 F.3d at 281.

³⁸ See *id.* (citing *Encino Motorcars*, 136 S. Ct. at 2122–23; *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 506–10 (2009); *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 1000–01 (2005); *Smiley v. Citibank (S.D.)*, N.A., 517 U.S. 735, 742–43 (1996)).

³⁹ 555 U.S. 305 (2009).

⁴⁰ *Ali II*, 951 F.3d at 281 (quoting *Eurodif*, 555 U.S. at 317 n.7).

⁴¹ *Id.* (quoting 8 C.F.R. § 1003.1(g) (2018)).

⁴² See *id.* at 281 n.3.

⁴³ *Id.* at 282.

⁴⁴ *Id.* Judge Oldham further elaborated that since agencies themselves play a role in *making* legislative history, requiring them to consider legislative history in rulemaking could create a concerning incentive for agencies to “self-deal” during the lawmaking process. *Id.* (quoting Christopher J. Walker, *Legislating in the Shadows*, 165 U. PA. L. REV. 1377, 1431 (2017)).

⁴⁵ *Id.* at 283. Issue preclusion applies only where the facts and law are unchanged from a prior proceeding, but Congress’s 2005 enactment of the REAL ID Act altered the law to give immigration judges additional discretion in asylum hearings. *Id.* at 284.

like *Encino Motorcars*, courts demand a “reasoned explanation” from agencies when they do so.⁴⁶ In *Ali II*, the Fifth Circuit held this doctrine did not apply to the BIA’s alteration of prior DHS policies, even where both agencies were delegated authority under the same statute. However, the court’s reasoning glossed over crucial distinctions with Supreme Court precedent and failed to fully appreciate the normative principles animating the reasoned explanation requirement — principles that are even more potent when agencies share statutory jurisdiction. The Fifth Circuit should have instead required the BIA to speak to DHS’s prior interpretations, thus deterring the administrative whipsawing that too often characterizes immigration law.

Under *Encino Motorcars*, agencies are required to provide a reasoned explanation when changing their existing policies.⁴⁷ This principle rests on a presumption that agency decisionmaking is arbitrary and capricious where an agency fails to provide “adequate reasons” for its policy choices,⁴⁸ which at minimum necessitates an “awareness” that an agency is shifting its position with “good reasons for the new policy.”⁴⁹ Agencies have a heightened explanatory burden when there are serious reliance interests at stake, which requires agencies to acknowledge a policy change and address the “facts and circumstances” underlying the prior policy.⁵⁰ These doctrinal requirements are normatively desirable, as they both protect affected parties’ settled expectations and uphold “rule of law virtues like stability . . . [and] predictability.”⁵¹ *Encino Motorcars* thus builds on decades of administrative law doctrine valuing consistency in agency statutory and regulatory interpretation.⁵²

In concluding *Encino Motorcars* did not apply to the BIA’s statutory interpretation, the Fifth Circuit disregarded a core fact of *Ali II* — that two agencies have dual authority over the same statutory language. The Fifth Circuit distinguished *Ali II* from *Encino Motorcars* on the basis that *Encino Motorcars* involved only one agency changing its own interpretation, whereas the BIA was shifting the policy of a different agency.⁵³ In Judge Oldham’s view, *Encino Motorcars* thus stood for the principle that agencies must give a reasoned explanation only when they change their *own* policies.⁵⁴ However, the statute at issue in *Encino*

⁴⁶ See *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016).

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.* at 2126 (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009)).

⁵⁰ *Id.* (quoting *Fox*, 556 U.S. at 516).

⁵¹ William W. Buzbee, *The Tethered President: Consistency and Contingency in Administrative Law*, 98 B.U. L. REV. 1357, 1441 (2018).

⁵² See Cass R. Sunstein & Adrian Vermeule, *The Morality of Administrative Law*, 131 HARV. L. REV. 1924, 1947–55 (2018).

⁵³ See *Ali II*, 951 F.3d at 281.

⁵⁴ *Id.*

Motorcars delegated statutory authority to *only* one agency,⁵⁵ whereas § 1159(b) explicitly delegates overlapping statutory authority to both the BIA (through the Attorney General) and DHS.⁵⁶ And because the BIA's rulings on questions of law — including, in this case, the meaning of § 1159(b) — are controlling on both agencies,⁵⁷ the BIA's determination amounted to a reversal of prior government policy. As such, the distinction the Fifth Circuit drew between *Ali II* and *Encino Motorcars* stems from differing fact patterns rather than a controlling rule of administrative law, making the court's reasoning unpersuasive.

For similar reasons, the other precedents relied upon by the Fifth Circuit fail to directly address the question at issue in *Ali II*. First, in addition to *Encino Motorcars*, the Fifth Circuit also referenced three major Supreme Court cases addressing arbitrary and capricious review. Judge Oldham highlighted that all three cases — *FCC v. Fox Television Stations, Inc.*,⁵⁸ *National Cable & Telecommunications Ass'n v. Brand X Internet Services*,⁵⁹ and *Smiley v. Citibank (South Dakota), N.A.*⁶⁰ — involved one agency changing its own statutory interpretation, thus supporting the court's reading of *Encino Motorcars*.⁶¹ But again, each involved an underlying statutory provision delegating authority to *only* that one agency, so these precedents are not controlling on *Ali II*'s dual-agency framework.⁶² Second, Judge Oldham referenced a footnote in *Eurodif* in which the Supreme Court stated that the Department of Energy's statutory interpretation in another case “would not speak to the deference owed the Commerce Department” in the issue at hand.⁶³ But in *Eurodif*, two different agencies were interpreting two *different* statutes in different contexts, not offering conflicting interpretations of the *same* statute like in *Ali II*.⁶⁴

The Fifth Circuit should have instead applied *Encino Motorcars*'s reasoned explanation standard to this case. The operating logic behind

⁵⁵ See *Encino Motorcars*, 136 S. Ct. at 2122 (describing how the Fair Labor Standards Act delegated statutory authority to the Department of Labor).

⁵⁶ 8 U.S.C. § 1159(b).

⁵⁷ See *id.* § 1103(a)(1); see also *INS v. Aguirre-Aguirre*, 526 U.S. 415, 424 (1999). While § 1103(a)(1) grants authority to the Attorney General specifically, the Attorney General vested this power in the BIA. See *Aguirre-Aguirre*, 526 U.S. at 425.

⁵⁸ 556 U.S. 502 (2009).

⁵⁹ 545 U.S. 967 (2005).

⁶⁰ 517 U.S. 735 (1996).

⁶¹ See *Ali II*, 951 F.3d at 281.

⁶² See *Fox*, 556 U.S. at 506 (Public Telecommunications Act delegating authority to FCC); *Brand X*, 545 U.S. at 975–76 (Communications Act delegating authority to FCC); *Smiley*, 517 U.S. at 739 (National Bank Act delegating authority to Comptroller of Currency).

⁶³ *United States v. Eurodif S.A.*, 555 U.S. 305, 317 n.7 (2009); see *Ali II*, 951 F.3d at 281.

⁶⁴ Compare *Eurodif*, 555 U.S. at 308, 316 (involving the Department of Commerce's interpretation of certain uranium contracts as “goods” under the Tariff Act of 1930), with *Fla. Power & Light Co. v. United States*, 307 F.3d 1364, 1366–68, 1372–73 (Fed. Cir. 2002) (involving the Department of Energy's interpretation of the same contracts as “services” under the Contract Disputes Act).

the Supreme Court's arbitrary and capricious cases applies just as well to the dual-agency scenario in *Ali II*. First, cases like *Encino Motorcars* emphasize reliance interests as a core rationale behind the reasoned explanation requirement.⁶⁵ Indeed, “[t]here . . . appears to be broad consensus on the Court for the proposition that arbitrariness review should impose a heightened burden of justification on agencies when serious reliance interests are at stake.”⁶⁶ This consensus was most recently exemplified in *DHS v. Regents of the University of California*,⁶⁷ where the reliance considerations of DACA beneficiaries were highly influential on the Court's decision to strike down DHS's rescission of the DACA program.⁶⁸ Likewise, in *Ali II*, Ali may have reasonably relied on official DHS communications implying he could maintain both LPR and asylee statuses.⁶⁹ Failing to recognize these reliance principles — regardless of which agency created them — undercuts one of the key normative principles animating the reasoned explanation requirement.

Second, requiring one agency to speak to another agency's statutory interpretation upholds important rule of law principles. The Court's reasoning in *Eurodif* perhaps suggested different agencies have leeway to operate within their own spheres even if reliance interests are at stake. However, other rule of law concerns seem distinctly different, and more pressing, when two agencies are interpreting the *same* statutory language rather than two different statutes. Core to the rule of law is the principle that “governmental pronouncements about the intrinsic meaning of legal texts should aspire to be impersonal and principled rather than results-oriented and political.”⁷⁰ Meeting this aspiration requires “[c]andid reason-giving” that helps regulated parties understand the legal regime under which they operate.⁷¹ While *Eurodif* involved the interpretation of multiple legal texts for different purposes, *Ali II* weighed the “intrinsic meaning” of one text for one purpose — determining whether an individual still had asylee status. This narrow focus on a single statutory text makes rule of law principles like consistency, transparency, and predictability all the more demanding, thus underscoring the need for a “reasoned explanation” in the context of a dual-agency statutory framework.

⁶⁵ See *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016) (arguing it would be arbitrary and capricious to ignore “serious reliance interests . . . engendered” by an agency's prior policy (quoting *Fox*, 556 U.S. at 515–16)).

⁶⁶ Sunstein & Vermeule, *supra* note 52, at 1952.

⁶⁷ 140 S. Ct. 1891 (2020).

⁶⁸ See *id.* at 1913–15 (noting that DHS was “required to assess whether there were reliance interests, determine whether they were significant, and weigh any such interests against competing policy concerns,” *id.* at 1915).

⁶⁹ See, e.g., sources cited *supra* note 14 (implying concurrent asylee and LPR statuses).

⁷⁰ Randy J. Kozel & Jeffrey A. Pojanowski, *Administrative Change*, 59 UCLA L. REV. 112, 148 (2011).

⁷¹ *Id.* at 150.

Finally, the Fifth Circuit's own unitary executive-type argument supports, rather than undermines, applying *Encino Motorcars* to this case. In advancing its position, the Fifth Circuit noted that the BIA and DHS's power "flows from the President," who "is empowered to resolve any disagreement between the two."⁷² Interagency disputes are thus executive branch questions "best settled" without the court's involvement.⁷³ But there are two problems with this reasoning. First, the President's involvement in inter- or intra-agency disputes does not give agencies carte blanche to evade arbitrary and capricious review; judicial review still applies regardless of the political decisions preceding agency action.⁷⁴ And second, if the BIA and DHS are both manifestations of the President's view, as Judge Oldham suggested, the objection to an unexplained inconsistency between them would seem *stronger*, not weaker. Ali relied on the executive branch's perspective at large; the executive branch should be obligated to consider that reliance in its administrative policymaking.

Immigration law is, as many have said, "exceptional,"⁷⁵ and perhaps it should evade yet another procedural protection applied in other areas of administrative law. But the reliance interests at stake are extraordinarily high, as exemplified by the perilous situations of the DACA recipients, asylum seekers, international students, and others who have fallen victim to administrative whipsawing in recent years.⁷⁶ These problems are only exacerbated by the unique level of agency overlap in the immigration context, where the DOJ (through the Attorney General and BIA) and DHS share authority in an often fractured and uncoordinated fashion.⁷⁷ This arrangement is the precise situation in which arbitrary and capricious review is most vital, both to ensure a baseline level of procedural protection for vulnerable parties and to encourage greater coordination between agencies.⁷⁸ Rather than abandoning *Encino Motorcars* in this context, the Fifth Circuit should have applied the reasoned explanation requirement with increased vigor.

⁷² *Ali II*, 951 F.3d at 281 n.3.

⁷³ *Id.* at 282 n.3.

⁷⁴ See, e.g., 5 U.S.C. §§ 702, 706.

⁷⁵ See, e.g., David S. Rubenstein & Pratheepan Gulasekaram, *Immigration Exceptionalism*, 111 NW. U. L. REV. 583, 584 (2017).

⁷⁶ See, e.g., Kim Bellware, *On Immigration, Attorney General Barr Is His Own Supreme Court. Judges and Lawyers Say That's a Problem.*, WASH. POST (Mar. 5, 2020, 9:51 AM), <https://www.washingtonpost.com/immigration/2020/03/05/william-barr-certification-power> [https://perma.cc/H2WS-NZPV]; Nicole Narea, *Trump Is Proposing to Limit Student Visas to Two Years for Citizens of 59 Countries*, VOX (Sept. 24, 2020, 4:20 PM), <https://www.vox.com/policy-and-politics/2020/9/24/21454348/trump-student-visa-rule-vietnam-nigeria-iran> [https://perma.cc/A87A-3PDX].

⁷⁷ See Mariano-Florentino Cuéllar, *The Political Economies of Immigration Law*, 2 U.C. IRVINE L. REV. 1, 45, 49–50 (2012) (noting that the DOJ and DHS "lack incentives to coordinate enforcement, adjudicatory, prosecutorial, and civil litigation capacity," *id.* at 49).

⁷⁸ See Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131, 1210 (2012).