
ADMINISTRATIVE LAW — FEDERAL ADVISORY COMMITTEES —
D.C. CIRCUIT FINDS EPA DIRECTIVE INVALID. — *Physicians for
Social Responsibility v. Wheeler*, 956 F.3d 634 (D.C. Cir. 2020).

The precepts of administrative law are being challenged. Justices have expressed skepticism over *Chevron*¹ deference,² chiseled away at *Auer*³ deference,⁴ and begun rekindling the nondelegation doctrine.⁵ A less prominent development — but arguably more foundational⁶ — is the rumbling around judicial reviewability: before a court reaches the merits of a case, agencies have tried to insulate their actions from review under § 701(a)(2) of the Administrative Procedure Act⁷ (APA).⁸ Mired in debate since its passage,⁹ the provision precludes judicial review of agency actions that are “committed to agency discretion by law.”¹⁰ Recently, in *Physicians for Social Responsibility v. Wheeler*,¹¹ the D.C. Circuit took a novel approach to this doctrine. In 2017, the Environmental Protection Agency (EPA) issued an internal directive that barred EPA grant recipients — namely scientists — from serving on EPA advisory committees.¹² To invalidate the directive, the court first determined whether the agency’s action qualified for one of § 701(a)(2)’s two common law exceptions to the APA’s presumption of reviewability.¹³ In doing so, the D.C. Circuit departed from precedent by collapsing the two exceptions into a single test: whether there is a “meaningful standard[]” to apply.¹⁴ By removing a redundant exception,

¹ *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

² See *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149–58 (10th Cir. 2016) (Gorsuch, J., concurring).

³ *Auer v. Robbins*, 519 U.S. 452 (1997).

⁴ See *Kisor v. Wilkie*, 139 S. Ct. 2400, 2408 (2019).

⁵ See *Gundy v. United States*, 139 S. Ct. 2116, 2131–48 (2019) (Gorsuch, J., dissenting).

⁶ See Ronald M. Levin, *Understanding Unreviewability in Administrative Law*, 74 MINN. L. REV. 689, 694 (1990) (“[U]nreviewability is a threshold defense, like standing or ripeness. When the government prevails on this defense, a particular administrative action or finding receives no scrutiny — not even deferential scrutiny — on judicial review.”).

⁷ 5 U.S.C. §§ 551–559, 561–570a, 701–706.

⁸ See, e.g., *Dep’t of Com. v. New York*, 139 S. Ct. 2551, 2567–69 (2019); *Dep’t of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1905–07 (2020).

⁹ See, e.g., Viktoria Lovei, Comment, *Revealing the True Definition of APA § 701(a)(2) by Reconciling “No Law to Apply” with the Nondelegation Doctrine*, 73 U. CHI. L. REV. 1047, 1050 (2006) (recognizing that § 701(a)(2) “has caused confusion and controversy since its inception”). Compare *New York*, 139 S. Ct. at 2567–69 (holding that agency action was not exempted from judicial review), with *id.* at 2597–606 (Alito, J., concurring in part and dissenting in part) (arguing that the agency action was unreviewable under § 701(a)(2)).

¹⁰ 5 U.S.C. § 701(a)(2).

¹¹ 956 F.3d 634 (D.C. Cir. 2020).

¹² See *id.* at 638.

¹³ See *id.* at 642–44.

¹⁴ See *id.* at 643 (quoting *Drake v. FAA*, 291 F.3d 59, 71 (D.C. Cir. 2002)).

the *Physicians* approach appropriately streamlined the test for reviewability.

To fulfill its statutory mission, the EPA relies on twenty-two advisory committees — governed by the Federal Advisory Committee Act¹⁵ (FACA) — that provide the agency with expertise.¹⁶ FACA requires the General Services Administration (GSA) to develop uniform standards for these advisory committees, and, in turn, the GSA requires advisory committee members to comply with ethics rules promulgated by the Office of Government Ethics (OGE).¹⁷ Traditionally, the EPA has permitted recipients of EPA grants to serve on its scientific advisory committees, and none of the OGE’s ethics rules have precluded this practice.¹⁸

In October 2017, then-EPA Administrator Scott Pruitt¹⁹ changed this policy, issuing a directive entitled “Strengthening and Improving Membership on EPA Federal Advisory Committees” (the Directive).²⁰ The Directive introduced four new “principles and procedures,” one of which required “that no member of an EPA federal advisory committee be currently in receipt of EPA grants.”²¹ Along with the Directive, Pruitt issued a memorandum explaining that the Directive was meant to avoid “potential interference with [committee members’] ability to independently and objectively serve” the EPA.²² The Directive led to a dismissal of many scientists serving on EPA advisory committees, and three organizations and three individuals filed suit.²³

The District Court for the District of Columbia granted the EPA’s motion to dismiss.²⁴ The court first found that the Directive was an appropriate exercise of the Administrator’s “broad appointment discretion.”²⁵ While recognizing that this discretion was “not unbounded,” the court held that ethics regulations and a conflict of interest statute did

¹⁵ Pub. L. No. 92-463, 86 Stat. 770 (1972).

¹⁶ *Physicians*, 956 F.3d at 639.

¹⁷ *Id.* at 640.

¹⁸ *See id.* at 641.

¹⁹ Andrew Wheeler, the EPA’s Acting Administrator, was substituted for Pruitt as a party to the case under Federal Rule of Civil Procedure 25(d). *Physicians for Soc. Resp. v. Wheeler*, 359 F. Supp. 3d 27, 32 n.1 (D.D.C. 2019).

²⁰ *Physicians*, 956 F.3d at 641; *see also* Directive, E. Scott Pruitt, Adm’r, Env’t Prot. Agency, Strengthening and Improving Membership on EPA Federal Advisory Committees (Oct. 31, 2017), https://www.epa.gov/sites/production/files/2017-10/documents/final_draft_fac_directive-10.31.2017.pdf [<https://perma.cc/DW27-BN2J>].

²¹ Directive, *supra* note 20.

²² *Physicians*, 359 F. Supp. 3d at 34 (alteration in original).

²³ *Physicians*, 956 F.3d at 641.

²⁴ *Id.*

²⁵ *Physicians*, 359 F. Supp. 3d at 40; *see also id.* at 41.

not “constrain an agency’s ability to appoint and retain individuals under a higher ethical standard” than required.²⁶ The court next found that the OGE’s procedural requirements did not provide a private cause of action and that FACA’s “fairly balanced” and “inappropriately influenced” requirements provided no meaningful standard for review.²⁷ Then, the court held that the statutes establishing the EPA advisory committees did not require the EPA to recruit the “most qualified” scientists; the agency had discretion to assess the qualifications of potential committee members.²⁸ Because neither FACA nor the advisory committee statutes offered a meaningful standard for review, the agency’s action was unreviewable under § 701(a)(2).²⁹ Finally, even if the action was reviewable, the court concluded that the EPA had “sufficiently explained its change in policy” — accordingly, the action could survive arbitrary and capricious review.³⁰

The plaintiffs appealed, and the D.C. Circuit reversed.³¹ Writing for a unanimous panel, Judge Tatel³² held that the Directive was reviewable.³³ He noted that agency actions were presumptively reviewable,³⁴ but any challenge to an agency action must “clear the hurdle”³⁵ of § 701(a)(2)’s “two related, but distinct” bars to judicial review.³⁶ First, § 701(a)(2) precludes judicial review of administrative decisions that courts “traditionally have regarded as ‘committed to agency discretion.’”³⁷ Second, § 701(a)(2) applies when “statutes are drawn in such broad terms that in a given case there is no law to apply.”³⁸ According to Judge Tatel, both bars could be overcome as long as there were “meaningful standards to cabin the agency’s . . . discretion.”³⁹ Here, there were such standards, as the GSA had promulgated regulations to govern federal advisory committees.⁴⁰ Thus, Judge Tatel held that the Directive was not exempted from review.⁴¹

²⁶ *Id.* at 41.

²⁷ *See id.* at 43–47.

²⁸ *Id.* at 47–48.

²⁹ *See id.* at 43–44, 47–48.

³⁰ *Id.* at 49.

³¹ *Physicians*, 956 F.3d at 650.

³² Judge Tatel was joined by Judges Rogers and Ginsburg.

³³ *Physicians*, 956 F.3d at 642–44.

³⁴ *Id.* at 642 (citing *Steenholdt v. FAA*, 314 F.3d 633, 638 (D.C. Cir. 2003)).

³⁵ *Id.* (quoting *Heckler v. Chaney*, 470 U.S. 821, 828 (1985)).

³⁶ *Id.*

³⁷ *Id.* (quoting *Lincoln v. Vigil*, 508 U.S. 182, 191 (1993)).

³⁸ *Id.* (quoting *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971)).

³⁹ *Id.* at 643 (quoting *Drake v. FAA*, 291 F.3d 59, 71 (D.C. Cir. 2002)). Such standards could be found in policy statements, regulations, and statutes. *Id.* (citing *Steenholdt*, 314 F.3d at 638).

⁴⁰ *Id.*

⁴¹ *Id.*

Having established reviewability, Judge Tatel rejected the appellants' assertion that the Directive was inconsistent with OGE's ethics standards.⁴² Because OGE had permitted agencies to "tailor" their own ethics rules "to the functions and activities of [the] agency,"⁴³ the differences between the Directive and OGE standards were permissible.⁴⁴

However, Judge Tatel held that the Directive was arbitrary and capricious because the EPA failed to provide a rational basis for its policy change.⁴⁵ He noted that even though the Directive represented a "major break from the agency's prior policy," the Directive was "silent" with respect to that prior policy.⁴⁶ While admitting that the EPA had the discretion to change its policies, Judge Tatel recognized that an agency must both "display awareness that it *is* changing position"⁴⁷ and "provide a reasoned explanation for the change."⁴⁸ Thus, even if the Directive could be construed as displaying awareness of the policy change, the EPA failed to provide a "reasoned explanation" for it.⁴⁹ Accordingly, the Directive was arbitrary and capricious and thus invalid.⁵⁰

Finally, Judge Tatel deemed the Directive procedurally flawed.⁵¹ The OGE regulations prescribe a procedure for issuing supplemental ethics rules — a procedure with which the EPA "d[id] not claim to have complied" on the grounds that the Directive fell "outside the regulations' purview."⁵² Judge Tatel held that the Directive was indeed subject to the OGE procedures and should have been submitted to the OGE "for its concurrence and joint issuance" in the Federal Register.⁵³ Thus, the D.C. Circuit reversed the district court's dismissal and remanded.⁵⁴

In applying the § 701(a)(2) exceptions to reviewability, the D.C. Circuit drifted from precedent. The statutory language — preventing

⁴² *Id.* at 644.

⁴³ Standards of Ethical Conduct for Employees of the Executive Branch, 57 Fed. Reg. 35,006, 35,006 (Aug. 7, 1993) (to be codified at 5 C.F.R. pt. 2635).

⁴⁴ *Physicians*, 956 F.3d at 644.

⁴⁵ *Id.* at 644–47.

⁴⁶ *Id.* at 645.

⁴⁷ *Id.* at 646 (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009)).

⁴⁸ *Id.* (quoting *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016)).

⁴⁹ *Id.* (quoting *Encino Motorcars*, 136 S. Ct. at 2125). Judge Tatel noted that a thorough analysis was especially warranted because the OGE and the EPA had reached opposite conclusions as to whether grant recipients could ethically serve. *Id.* at 646–47.

⁵⁰ *Id.* at 647.

⁵¹ *See id.* at 648.

⁵² *Id.*

⁵³ *Id.* (quoting 5 C.F.R. § 2635.105(a) (2019)). Judge Tatel also dismissed the EPA's argument that a disclaimer in the OGE regulations prevented judicial review. *Id.* at 649. While similar language had previously precluded review of executive orders and internal agency documents, Judge Tatel recognized that "a final rule . . . cannot preclude judicial review on its own." *Id.* at 649–50.

⁵⁴ *Id.* at 650.

review of “agency action . . . committed to agency discretion by law”⁵⁵ — is ambiguous. To make the provision workable, the *Physicians* court followed precedent in interpreting it to establish two discrete exceptions to the general presumption of reviewability: an action is unreviewable if (1) it is one “traditionally . . . ‘committed to agency discretion’”⁵⁶ or (2) the governing statute offers “no law to apply.”⁵⁷ In considering those exceptions, however, the court simply applied a “meaningful standards” test.⁵⁸ By searching solely for an applicable standard, the *Physicians* court rendered the “traditionally committed” exception superfluous. But rather than upset reviewability, this approach streamlines the doctrine.

Two cases form the foundation of § 701(a)(2)’s jurisprudence. The Supreme Court first considered the provision in *Citizens to Preserve Overton Park, Inc. v. Volpe*.⁵⁹ By looking to legislative history, it held that the clause provided a “very narrow” exemption from judicial review when “statutes are drawn in such broad terms that in a given case there is *no law to apply*.”⁶⁰ Fourteen years later, the Court held in *Heckler v. Chaney*⁶¹ that “an agency’s decision not to take enforcement action should be presumed immune from judicial review under § 701(a)(2).”⁶² Such enforcement decisions were “traditionally” committed to agency discretion and thus “presumptively unreviewable.”⁶³ The Court, however, articulated a caveat: the presumption could be rebutted when “the substantive statute . . . provide[s] guidelines for the agency to follow.”⁶⁴

Subsequent cases have read *Overton Park* and *Chaney* as establishing two exceptions under § 701(a)(2).⁶⁵ First, agency actions can be exempted from review under *Overton Park* if the agency’s governing statute is so vague as to provide “no law to apply.”⁶⁶ Second, when an agency action is one “traditionally committed” to agency discretion,

⁵⁵ 5 U.S.C. § 701(a)(2).

⁵⁶ *Physicians*, 956 F.3d at 642 (quoting *Lincoln v. Vigil*, 508 U.S. 182, 191 (1993)). This includes decisions to allocate lump-sum appropriations and decisions not to initiate enforcement proceedings. *See id.*

⁵⁷ *Id.* The term “no law to apply” is used interchangeably with the term “meaningful standards” — both look for statutes or regulations against which to judge the agency’s exercise of discretion. *See, e.g., Lincoln*, 508 U.S. at 191.

⁵⁸ *Physicians*, 956 F.3d at 643 (quoting *Drake v. FAA*, 291 F.3d 59, 71 (D.C. Cir. 2002)).

⁵⁹ 401 U.S. 402 (1971).

⁶⁰ *Id.* at 410 (quoting S. REP. NO. 79-752, at 212 (1945)) (emphasis added).

⁶¹ 470 U.S. 821 (1985).

⁶² *Id.* at 832.

⁶³ *Id.*

⁶⁴ *Id.* at 833.

⁶⁵ *See Physicians*, 956 F.3d at 642; *see also Lincoln v. Vigil*, 508 U.S. 182, 191 (1993). Justice Scalia laid the groundwork for the two-exceptions approach. *See Webster v. Doe*, 486 U.S. 592, 606–10 (1988) (Scalia, J., dissenting) (criticizing the majority for applying only the *Overton Park* standard and failing to recognize other factors, like traditional commitment to agency discretion, that render agency action unreviewable).

⁶⁶ *See Physicians*, 956 F.3d at 642.

there is a *Chaney* presumption of unreviewability that can only be overcome if there are “meaningful standards” to apply.⁶⁷ Federal agencies may invoke both to attempt to evade judicial review.⁶⁸

Recent Supreme Court cases have affirmed the contours of this approach. In 2019, the Court addressed the reviewability of the Secretary of Commerce’s decision to reinstate a census question concerning citizenship status.⁶⁹ The Court began its APA analysis by acknowledging the narrow scope of § 701(a)(2): it applies only “where the relevant statute is drawn so that a court would have no meaningful standard against which to judge the agency’s exercise of discretion.”⁷⁰ A subset of these cases were those involving “certain categories of administrative decisions . . . traditionally . . . regarded as ‘committed to agency discretion.’”⁷¹ Because the “taking of the census [was] not one of those areas traditionally committed to agency discretion” and the relevant statute “furnishe[d]” a “meaningful standard,”⁷² the action was reviewable.⁷³

Admittedly, the Court did not cleanly identify two discrete exceptions under § 701(a)(2). But by considering them separately, the Court treated the two as distinct. In a case challenging the U.S. Fish and Wildlife Service’s decision to designate land as a “critical habitat,”⁷⁴ the Court took a similar approach. It did not distinguish between the two exceptions but still expressly considered whether the decision was traditionally committed to agency discretion, saying that “this case involves the sort of routine dispute that federal courts regularly review.”⁷⁵ It then found a “meaningful standard” in the statute.⁷⁶ While recognizing that the “traditionally committed” and “no law to apply” tests are closely related, these cases suggest that they still warrant independent analyses.⁷⁷

The D.C. Circuit has followed this approach. In 2006, the Secretary of Labor sued the Federal Mine Safety and Health Review Commission, arguing that it improperly overturned a decision to cite two parties for

⁶⁷ See *Drake v. FAA*, 291 F.3d 59, 71 (D.C. Cir. 2002).

⁶⁸ See, e.g., Final Brief for Appellee at 19–21, *Physicians*, 956 F.3d 634 (No. 19-5104).

⁶⁹ *Dep’t of Com. v. New York*, 139 S. Ct. 2551, 2561, 2567 (2019).

⁷⁰ *Id.* at 2568 (quoting *Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, 139 S. Ct. 361, 370 (2018)).

⁷¹ *Id.* (quoting *Lincoln v. Vigil*, 508 U.S. 182, 191 (1993)).

⁷² *Id.*

⁷³ *Id.* at 2569.

⁷⁴ *Weyerhaeuser*, 139 S. Ct. at 364.

⁷⁵ *Id.* at 370.

⁷⁶ *Id.* at 371 (quoting *Lincoln*, 508 U.S. at 191).

⁷⁷ The Court applied § 701(a)(2) in a case from the 2019 Term when it reviewed the Department of Homeland Security’s decision to rescind the Deferred Action for Childhood Arrivals program. See *Dep’t of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1901–05 (2020). In holding that the decision was reviewable, the Court addressed only the “traditionally committed” exception, *id.* at 1905–07, as it was the thrust of the agency’s § 701(a)(2) argument. See Brief for the Petitioners at 17–21, *Regents*, 140 S. Ct. 1891 (Nos. 18-587, 18-588, 18-599).

safety violations.⁷⁸ The court ruled for the Secretary, holding that it lacked the authority to review decisions like the Secretary's because the governing statute provided no "meaningful standards" against which to assess them.⁷⁹ To reach this conclusion, the court described § 701(a)(2)'s two exceptions⁸⁰ and said that decisions to issue citations were "traditional[ly]" unreviewable.⁸¹ But the court also stated that neither exception would "be dispositive" if the statute provided a "meaningful standard."⁸² Like the Supreme Court, the D.C. Circuit noted the supremacy of "meaningful standards" but still considered the "traditionally committed" exception, suggesting it remains necessary to the analysis.⁸³

In *Physicians*, the D.C. Circuit charted a slightly different course, applying solely a "meaningful standards" test for unreviewability.⁸⁴ The EPA had argued that the Directive qualified for both exceptions: first, decisions related to the "membership of [an agency's] advisory committees"⁸⁵ were "traditionally committed" to agency discretion,⁸⁶ and, second, there was "no law to apply" because "none of the statutes governing [the EPA's] committees provides any basis for review[]." ⁸⁷ While acknowledging both arguments, the court declined to consider the exceptions independently.⁸⁸ Instead, it held that, under either, judicial review was available "where there [were] 'meaningful standards to cabin the agency's otherwise plenary discretion.'" ⁸⁹ Even if the Directive fell within the "traditionally committed" exception, it would still be rebutted by the presence of a "meaningful standard." Thus, a "meaningful standard" would both provide "law to apply" — precluding one exception — and rebut the *Chaney* presumption of unreviewability — foreclosing the other. By not analyzing the "traditionally committed" exception that the EPA claimed, the court rendered it unnecessary.⁹⁰

Defenders of unreviewability argue that the "traditionally committed" exception is central to the doctrine. The Court has previously noted

⁷⁸ *Sec'y of Lab. v. Twentymile Coal Co.*, 456 F.3d 151, 152 (D.C. Cir. 2006).

⁷⁹ *Id.*

⁸⁰ *Id.* at 156 ("[W]e consider both the nature of the administrative action at issue and the language and structure of the statute that supplies the applicable legal standards . . ." (quoting *Drake v. FAA*, 291 F.3d 59, 70 (D.C. Cir. 2002))).

⁸¹ *Id.*

⁸² *Id.* at 157 (citing *Drake*, 291 F.3d at 72).

⁸³ *Id.*; see also *Drake*, 291 F.3d at 71 (analyzing the Federal Aviation Administration's dismissal of a complaint under the "traditionally committed" exception, even though "the statute at issue gives virtually unfettered discretion to the [agency] to act" and was thus unreviewable).

⁸⁴ *Physicians*, 956 F.3d at 643.

⁸⁵ Final Brief for Appellee, *supra* note 68, at 19.

⁸⁶ *Physicians*, 956 F.3d at 643.

⁸⁷ *Id.* (first alteration in original) (quoting Final Brief for Appellee, *supra* note 68, at 22).

⁸⁸ See *id.*

⁸⁹ *Id.* (quoting *Drake v. FAA*, 291 F.3d 59, 71 (D.C. Cir. 2002)).

⁹⁰ See *id.*

that the APA's drafters intended to codify "the common law" of judicial review of agency action, which would exempt from review those actions "traditional[ly]" left to an agency's discretion prior to the APA's passage.⁹¹ One scholar, claiming that § 701(a)(2) "expresses a general presumption *against* review,"⁹² argues that courts should consider extratextual factors in assessing reviewability.⁹³ Others have contended that a search solely for "meaningful standards" would make § 701(a)(2) redundant with § 706,⁹⁴ which requires reviewing courts to "set aside agency action[s]" that are "abuse[s] of discretion."⁹⁵ Under *Physicians*, § 701(a)(2) would designate actions as "unreviewable" only when there is no standard against which to assess them. But such agency actions would also survive a merits scrutiny for abuse of discretion: § 701(a)(2) would not exempt any actions from review that would otherwise be held unlawful under § 706(2)(A). Thus, a search solely for "meaningful standards" threatens to leave § 701(a)(2) meaningless.

Despite these justifiable concerns, the *Physicians* approach would have few, if any, practical consequences. Currently, only a narrow band of agency actions is deemed unreviewable — § 701(a)(2) is restricted to "rare circumstances."⁹⁶ But while these unreviewable actions may be "traditionally committed" to agency discretion, they *also* lack a "meaningful standard."⁹⁷ In these cases, reviewability rests on the "meaningful standards" inquiry; consideration of an agency's traditional discretion does no work. Since the "traditionally committed" exception was largely toothless to begin with, the *Physicians* approach is unlikely to significantly expand judicial review.⁹⁸ But it still has significance. Because courts must know *when* to review an agency action before deciding *how* to review it, streamlining reviewability might make way for other evolutions in administrative law. The *Physicians* court did just that.

⁹¹ See *Heckler v. Chaney*, 470 U.S. 821, 832 (1985) (citing KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE § 28:5 (2d ed. 1984)); see also *Webster v. Doe*, 486 U.S. 592, 608–10 (1988) (Scalia, J., dissenting) (quoting *Chaney*, 470 U.S. at 832) (arguing that § 701(a)(2) was intended to preserve the "common law" of judicial review, which designates "certain issues and certain areas . . . beyond the range of review," *id.* at 608). This proposition, however, cannot be easily gleaned from the legislative history. See Lovei, *supra* note 9, at 1052 ("[L]egislators on both sides of the debate inserted their interpretation of [§ 701(a)(2)] into the legislative history, rendering it contradictory and unreliable.")

⁹² Harvey Saferstein, *Nonreviewability: A Functional Analysis of "Committed to Agency Discretion"*, 82 HARV. L. REV. 367, 370 (1968) (emphasis added).

⁹³ *Id.* at 371 (encouraging courts to consider the "basic interests the legislature would weigh").

⁹⁴ See Levin, *supra* note 6, at 713.

⁹⁵ 5 U.S.C. § 706(2)(A).

⁹⁶ See *Lincoln v. Vigil*, 508 U.S. 182, 191 (1993).

⁹⁷ See, e.g., *id.* at 193–94; *Drake v. FAA*, 291 F.3d 59, 71–72 (D.C. Cir. 2002); *Sec'y of Lab. v. Twentymile Coal Co.*, 456 F.3d 151, 152 (D.C. Cir. 2006).

⁹⁸ Even if a "meaningful standards" test were to expand judicial review of agency actions, courts could still afford deference to certain categories of agency action. See *Heckler v. Chaney*, 470 U.S. 821, 840–55 (1985) (Marshall, J., concurring) (challenging the majority's "presumption of unreviewability," *id.* at 843, and instead advocating that enforcement decisions should be reviewable but given "substantial deference," *id.* at 842).