Administrative Conference of the United States

TAILORING THE SCOPE OF JUDICIAL REMEDIES IN ADMINISTRATIVE LAW

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INTRODUCTION

This study examines the techniques that federal agencies employ or have considered employing to mitigate the costs of remedying legal infirmities in agency rules. Our goal is to identify best practices for agencies to mitigate the costs associated with remedying legal defects in agency rules.

Rulemaking can be procedurally treacherous terrain for agencies as the result of a series of challenges built into the structure of administrative law. First, rulemaking is costly, as compiling a rulemaking record and establishing a supporting enforcement apparatus often requires extraordinary investments of time and money. As a consequence of these challenges, the legal uncertainty associated with major rulemakings is also very costly. Second, an agency seeking to promulgate a new rule faces inherent uncertainty about whether a court will ultimately deem the rule to be a valid exercise of its authority. This is especially so for an agency attempting to introduce a new regulatory program, where the legal, scientific, or economic bases for the rule have not previously been reviewed by a court. Third, when a reviewing court determines that an administrative rule is legally infirm, the typical, default remedy is vacatur of the entire rule.

In addressing these challenges, the scholarly literature mostly focuses on what *courts* can do to minimize the collateral costs of judicial review of agency actions. For example, a common theme in the scholarly literature urges federal courts to review agency actions under deferential standards of review.[1] This study, by contrast, asks what *agencies* can do to reduce the costs of remedying legal defects in their rules.[2]

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[1] For representative examples, see Stephen Breyer, Judicial Review of Questions of Law and Policy, 38 Admin. L. Rev. 363 (1986); Antonin Scalia, Judicial Deference to Administrative Interpretations of Law, 1989 Duke L.J. 511; Elena Kagan, Presidential Administration, 114 Harv. L. Rev. 2245 (2001); Cass Sunstein, Law and Administration After *Chevron*, 90 Colum. L. Rev. 2071 (1990); and Jacob Gersen & Adrian Vermeule, Thin Rationality Review, 114 Mich. L. Rev. 1355 (2016).

[2] One exception is that this Report makes one recommendation to courts. See *infra* Recommendation #8.

To explore this topic, we interviewed officials in various agencies' offices of general counsel with responsibility either for providing advice on the form and content of proposed rules or for overseeing the defense of agency rules in litigation. We also interviewed several former officials at the Department of Justice with those responsibilities.[3]

This report is divided into four Parts. Part I provides background on the potential costs associated with remedying legal infirmities in administrative rules and summarizes related research. Part II explains the study's methodology and describes the respondents interviewed. Part III, which forms the heart of the study, reports the results of the interviews. Finally, Part IV recommends best practices for agencies to consider when promulgating rules and defending them in court.

I. Background And Summary Of Previous Research

A. Background

There are a series of challenges at the heart of judicial review of agency rules.

1. Legal Uncertainty

Rulemaking involves inherent legal uncertainty because it is, by statutory design, procedurally cumbersome. To promulgate a rule, an agency typically must comply with a host of requirements derived from the Administrative Procedure Act (APA).

Before issuing a final rule, an agency must first provide a "[g]eneral notice of proposed rule making," typically by publishing the proposed rule in the Federal Register.[4] And to give the aforementioned notice

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[3] For purposes of this report, the term "general counsel's office" includes agency departments that actually go by that name and their alternatively named functional equivalents in other agencies—e.g., the Office of the Solicitor at the Department of Labor.

[4] 5 U.S.C. § 553(b).

requirement teeth, judicial doctrine requires the agency's final rule to be a "logical outgrowth" of the proposed rule.[5]

After publishing the notice of proposed rulemaking, the agency must then "give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments."[6] Then, in promulgating the final rule, the agency must provide sufficient justification for the rule to assure a reviewing court that the rule is not "arbitrary and capricious."[7] Under the moniker of "hard look review," the federal courts have construed this requirement to impose a substantial burden of explanation on the agency. As the Supreme Court explained in its watershed *State Farm* decision: "[A]n agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."[8] One way that an agency can fall short of this mandate is by failing to provide a sufficient explanation of the rule's basis and purpose, including a response to all relevant and significant comments received during the notice-and-comment period.[9]

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[5] Int'l Union, United Mine Workers v. Mine Safety & Health Admin., 626 F.3d 84, 94-95 (D.C. Cir. 2010); Long Island Care at Home Ltd. v. Coke, 551 U.S. 158, 174 (2007).

[6] 5 U.S.C. § 553(c).

[7] 5 U.S.C. § 706(2)(A).

[8] Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co., 463 U.S. 29, 43 (1962). Although distinguished scholars have recently questioned whether, on the whole, contemporary courts generally apply a searching version of "hard look" review, see Gersen & Vermeule, *supra* note 1, at 1361-70, "hard look" review continues to be a substantial source of uncertainty for an agency contemplating the promulgation of a final rule.

[9] See Reyblatt v. Nuclear Regulatory Comm'n, 105 F.3d 715, 722 (D.C. Cir. 1997) ("An agency need not address every comment, but it must respond in a reasoned manner to those that raise significant problems."); PPL Wallingford Energy LLC v. FERC, 419 F.3d 1194, 1198 (D.C. Cir. 2005).

As this brief summary of the requirements of hard look review suggests, the APA's complex set of notice-and-comment requirements can create substantial legal uncertainty for an agency. More specifically, it is often difficult for an agency to predict whether a reviewing court will conclude that it has relied on impermissible factors;[10] failed to consider an important aspect of the problem it seeks to address;[11] adequately responded to all "significant" comments;[12] failed to provide notice of a rule from which the final rule "logically" grew; etc.

In addition to the uncertainty surrounding compliance with the APA's notice-and-comment requirements, the APA also has numerous exceptions, the applications of which can be difficult to predict. For example, agencies need not comply with the APA's notice-and-comment requirements when promulgating rules regulating foreign affairs, national security, and internal personnel matters;[13] when promulgating "general statements of policy" and "interpretative rules";[14] or when they have "good cause" to believe that they are "impracticable, unnecessary, or contrary to the public interest."[15] The application of these exceptions is often unclear. Case law, to be sure, reduces some of the uncertainty that these provisions engender, but in many circumstances an agency

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[10] See Jerry L. Mashaw, Improving the Environment of Agency Rulemaking: An Essay on Management, Games, and Accountability, 57 Law & Contemp. Probs. 185, 203 (1994) (noting the uncertainty that results because judges are relatively uninformed about which of the issues raised in a challenge to a rule are important).

[11] See Breyer, *supra* note 1, at 388 (noting uncertainty in whether a court will appreciate the "problems the agency faces in setting technical standards in complex areas").

[12] See Richard J. Pierce, Jr., Seven Ways To Deossify Agency Rulemaking, 47 Admin. L. Rev. 59, 69 (1995) ("Agencies can predict neither the scope nor the intensity of the duty [to explain rulemaking decisions] as it is ultimately applied by a reviewing court.").

[13] See 5 U.S.C. §§ 552-556.

[14] 5 U.S.C. § 553(b)(3)(A).

[15] 5 U.S.C. § 553(b)(3)(B).

will not know whether a reviewing court will conclude that a contemplated rule qualifies under one of the exceptions.[16]

An agency seeking to promulgate a new rule may also face uncertainty about its statutory authority to take a particular action. Under *Chevron*, a reviewing court must defer to a reasonable interpretation of an ambiguous statute offered by an agency to whom Congress has given interpretive authority. But it can be unclear whether Congress has delegated interpretive authority to the agency over the particular issue involved in the case.[17] It can also be uncertain whether a reviewing court will determine that the statute *is* ambiguous. As a consequence, it will not always be clear to an agency whether it is required, under the *Prill* doctrine, to explain its resolution of the statutory ambiguity,[18] or whether it will receive deference on its interpretation of the statute at all.

2. Harsh and Inflexible Remedies

The default judicial remedy for legal infirmity in an administrative rule is vacatur of the entire rule.[19] It is not entirely clear why this is so.

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[16] See Am. Mining Cong. v. Mine Safety & Health Admin., 995 F.2d 1106, 1108 (D.C. Cir. 1993) ("The distinction between those agency pronouncements subject to APA notice-and-comment requirements and those that are exempt has been aptly described as 'enshrouded in considerable smog.'").

[17] See, e.g., Gonzales v. Oregon, 546 U.S. 243 (2006). Although a reviewing court must defer to an agency's interpretation of a statutory ambiguity that concerns scope of its own statutory authority, it will not always be clear to the agency when the court will determine that the statute is ambiguous on that issue. See City of Arlington v. FCC, 569 U.S. 290, 299-08 (2013) (requiring deference to agencies' interpretations regarding the scope of their own authority under *Chevron*).

[18] Prill v. NLRB, 755 F.2d 941, 942 (D.C. Cir. 1985) (requiring an agency to identify a statutory ambiguity before benefiting from *Chevron* deference); see generally Daniel J. Hemel & Aaron Nielson, Chevron Step One-and-a-Half, 84 U. Chi. L. Rev. 757 (2017).

[19] Stephanie J. Tatham, Executive Summary, Admin. Conference of the United States, The Unusual Remedy of Remand Without Vacatur (2014),

Section 706 of the APA provides that a reviewing court "shall … hold unlawful and *set aside*" agency actions that violate one of the APA's requirements.[20] But nothing in the APA or the case law expressly says that § 706 must be interpreted to mean that courts must invalidate an entire administrative rule that contains a legal defect. And indeed, as explained more fully below, this is not the only remedial course that courts take.[21]

Instead, the default remedy in administrative law appears to be an effect of the *Chenery* doctrine. According to that doctrine, a reviewing court may not affirm an agency decision on a ground different from the ground invoked by the agency to justify the action when first taking it.[22] This principle is thought to prevent courts from substituting their judgment for the agency's. Similarly, the practice of vacating a defective rule to allow an agency to correct the defect appears to stem from the belief that it is the agency's primary responsibility to determine how to remedy defects in its rules and to decide whether provisions that were not affected by the defect should go into or remain in effect in the absence of the invalid provision. It is in this sense, as Judge Henry Friendly colorfully put it, that administrative law adheres to remedial "purism"—the view that "guessing by a court about what the agency might do when apprised of … an error is an unlawful intrusion into the sanctity of administrative process, and once such an error is detected, the case must

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http://perma.cc/2WVD-ZDH2; Nicholas Bagley, Remedial Restraint in Administrative Law, 117 Colum. L. Rev. 253, 257-58 (2017).

[20] 5 U.S.C. § 706(2) (emphasis added).

[21] Further, in at least one decision, the D.C. Circuit has suggested that the proper scope of a court's review is limited to the "part" of the rule that has been challenged. See Catholic Soc. Serv. v. Shalala, 12 F.3d 1123, 1128 (D.C. Cir. 1994).

[22] SEC v. Chenery Corp., 332 U.S. 194, 204 (1947); SEC v. Chenery Corp., 318 U.S. 80, 92-94 (1943).

go back so that the agency, as the sole repository of authority, can decide it right."[23]

3. High Costs of Rulemaking

The costs of total vacatur of an administrative rule are often quite substantial. First, total vacatur results in administrative waste, as much of the time and energy invested in promulgating the final rule will have been for naught. And if the agency wants to re-initiate the rulemaking, it will have to incur much of that same expense anew.[24] And as administrative rulemaking becomes ever more complex,[25] there is reason to think that these costs will increase.

Second, where the effects of a rulemaking were net positive, total vacatur eliminates the benefits that the final rule was meant to achieve, at least for the time that it takes the agency to repromulgate a similar rule.[26] And the regulatory delay can be substantial.[27] Moreover, the agency may ultimately decide to abandon the rule altogether because its "priorities may have changed, its staff may have been reassigned, or the external groups supporting action may have dispersed."[28] Finally, all of

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[23] Henry J. Friendly, *Chenery* Revisited: Reflections on Reversal and Remand of Administrative Orders, 1969 Duke L.J. 199, 223; see Bagley, *supra* note 19, at 257-58.

[24] Bagley, *supra* note 19, at 263.

[25] Jennifer Nou & Edward H. Stiglitz, *Regulatory Bundling*, 128 Yale L.J. -- (forthcoming 2019).

[26] To be sure, the net effect of a rulemaking could be negative, in which case the costs described in the main text would actually be benefits of vacatur.

[27] Connor Raso, Agency Avoidance of Rulemaking Procedures, 67 Admin. L. Rev. 101, 117 (2015); Robert J. Hume, How Courts Impact Federal Administrative Agency Behavior 70-91 (2009); Emily Hammond Meazell, Deference and Dialogue in Administrative Law, 111 Colum. L. Rev. 1722, 1781 (2011).

[28] Bagley, *supra* note 19, at 263; see Jerry L. Mashaw & David L. Harfst, Regulation and Legal Culture: The Case of Motor Vehicle Safety, 4 Yale J. on Reg. 257, 295 (1987); Richard J. Pierce, Jr., The Unintended Effects of Judicial Review of Agency

this expense may be for naught, as one study found that around 40% of the time agencies made little, if any, substantive changes on remand but merely provided additional evidence or explanation.[29]

B. Previous Research

One could adopt a number of strategies to redress these challenges. One could, for example, tweak administrative law doctrines in ways that would allow agencies more easily to determine whether their draft rules are likely to survive a judicial challenge.[30] Or one could attempt to reduce the cost and increase the speed of agency rulemaking by attempting to streamline agencies' internal rulemaking procedures.[31] These potential strategies are important and worthy of study, but this report addresses a third possibility: asking what an agency can do to encourage courts to order more limited judicial remedies, thereby reducing the costs of fixing legal infirmities in the agency's rules. The balance of this section summarizes some of the existing literature on this topic.

1. Severability

One strategy that an agency can take to convince a reviewing court to order a remedy that is less onerous than total vacatur of a rule is to include a severability clause in the rule. In 2015, the authors published an article in the *Yale Law Journal* on this topic.[32] That article explained that, as a general matter, agencies rarely include severability clauses in

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Rules: How Federal Courts Have Contributed to the Electricity Crisis of the 1990s, 43 Admin. L. Rev. 7 (1991).

[29] Peter H. Schuck & E. Donald Elliott, To the *Chevron* Station: An Empirical Study of Federal Administrative Law, 1990 Duke L.J. 984, 1050.

[30] See, e.g., Gersen & Vermeule, *supra* note 1, at 1370-1405; Adrian Vermeule, Deference and Due Process, 129 Harv. L. Rev. 1890 (2016).

[31] See, e.g., Jeffrey S. Lubbers, Better Regulations: The National Performance Review's Regulatory Reform Recommendations, 43 Duke L.J. 1165, 1173 (1994).

[32] See generally Charles W. Tyler & E. Donald Elliott, Administrative Severability Clauses, 124 Yale L.J. 2286 (2015).

their rules.[33] At the time of that article's publication, most agencies had never included a severability clause in one of their rules.[34] And of the agencies that had, only a handful had included a severability clause in more than 2% of their rules promulgated between 2000 and 2014.[35]

The article concluded that agencies' infrequent use of severability clauses is due to a feedback loop between the courts and the agencies. On one hand, judicial doctrine on severability, especially on severability clauses in administrative rules, is thin. The Supreme Court has never addressed the issue.[36] Several lower courts, however, have given substantial weight to agencies' expressions of intent through severability clauses.[37] However, because courts have not provided much guidance on the weight due to administrative severability clauses, some agencies appear to have concluded that it is not worthwhile to include a severability clause in final rules. On the other hand, because agencies rarely include severability clauses in their rules, courts have not had many opportunities to develop robust judicial doctrine on the subject.

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[33] Id. at 2319.

[34] Id.

[35] Id. at 2349-52; see id. at 2319 (explaining methodology).

[36] A prominent rule with a severability clause was the EPA's so-called Clean Power Plan. See Environmental Protection Agency: Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. at 64,662 (October 23, 2015). In February 2016, the Supreme Court stayed the enforcement of the Clean Power Plan pending a decision on the merits. Chamber of Commerce v. EPA, 136 S. Ct. 999 (2016). The Court did not address the severability clause and, given the rule's proposed repeal, the Court is unlikely to do so. See Exec. Order No. 13,783, 82 Fed. Reg. 16093 (Mar. 28, 2017) (proposed Executive Order to repeal the Clean Power Plan).

[37] See, e.g., High Country Conservation Advocates v. U.S. Forest Serv., No. 13-CV-01723-RBJ, 2014 WL 4470427, at *4 (D. Colo. Sept. 11, 2014) ("I conclude that the severability clause creates a presumption that the North Fork Exception is severable …."); Consumer Fin. Prot. Bureau v. The Mortg. Law Grp., LLP, 182 F. Supp. 3d 890, 894–95 (W.D. Wis. 2016) (deferring to severability clause on issue of whether the agency intended for the remainder of the rule to stay in effect); see also Tyler & Elliott, *supra* note 32, at 2312-18.

The article proposed two solutions to what the authors believed was an underuse of severability clauses in administrative rules. First, the article urged administrative agencies to consider including severability clauses in rules that they have determined are severable. Doing so is often fairly inexpensive for the agency, it would notify the public of the agency's position on the issue and would often bolster the agency's position on severability in litigation.[38] Second, the article urged courts to adopt a deferential framework for reviewing administrative severability clauses—i.e., a framework that typically would leave the lawful aspects of administrative rules in place when the regulatory text or the rule's statement of basis and purpose includes a severability clause.[39]

2. Prejudicial Error

Another strategy for tailoring the scope of administrative remedies is to persuade a reviewing court that a legal infirmity in an administrative rule is harmless. A recent article by Professor Nicholas Bagley contends that the APA's "prejudicial error" provision[40]—located in the same provision that specifies the grounds for judicial review of agency actions—has fallen into virtual desuetude.[41] He criticizes this development, arguing that courts should more frequently find that errors in administrative rules are harmless.[42]

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[38] Id. at 2318-23, 2344-48.

[39] Id. at 2331-47.

[40] 5 U.S.C. § 706 ("due account shall be taken of the rule of prejudicial error.")

[41] Bagley, *supra* note 19, at 262, 265; see United States v. Johnson, 632 F.3d 912, 931 (5th Cir. 2011) (concerns that an agency may flout procedural requirements "support the limited role of the harmless error doctrine in administrative law"); Allina Health Servs. v. Sebelius, 746 F.3d 1102, 1109 (D.C. Cir. 2014) ("We have not been hospitable to government claims of harmless error in cases in which the government violated § 553 of the APA by failing to provide notice.").

[42] Bagley finds case law support—albeit thin—in the Supreme Court's recent decisions in National Association of Home Builders v. Defenders of Wildlife, 551 U.S. 644, 659 (2007), Shinseki v. Sanders, 556 U.S. 396, 406-11 (2009), and Federal Express Corp. v. Mineta, 373 F.3d 112, 120 (D.C. Cir. 2004).

It is often the case, Bagley observes, that the legal infirmities in agency rules have had no detrimental effect on the party challenging the rule. Suppose, for example, that the agency consulted a party extensively before promulgating a final rule but that the party later challenges the rule in court on the ground that the agency did not comply with the APA's notice requirements. Even if the challenger is right that the agency failed to comply with the APA, the error was arguably harmless, at least with respect to the challenger.[43] After all, the agency consulted with the party on the substance of the rule before the rule was promulgated. In these circumstances, invalidating an otherwise-valid rule on the ground that this particular challenger was not given "notice" would arguably be a disproportionate remedy for the violation.[44]

3. Remand Without Vacatur

Remand without vacatur—that is, judicial remand of an agency action that permits the action to remain in place while the agency reviews its defects—is another, fairly modest remedial option available to a court reviewing an administrative rule. Under D.C. Circuit law, a court may order the remedy (a) where a rule was inadequately explained and where further explanation could potentially cure that defect; or (b) where immediate vacatur would cause great disruption to a legitimate regulatory program.[45]

The legality of this remedy has been the subject of some controversy in the D.C. Circuit. As mentioned above, the APA provides that reviewing

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[43] Bagley, *supra* note 19, at 266.

[44] Ronald M. Levin, Scope-of-Review Doctrine Restated: An Administrative Law Section Report, 38 Admin. L. Rev. 239, 284 (1986); Ronald M. Levin, "Vacation" at Sea: Judicial Remedies and Equitable Discretion in Administrative Law, 53 Duke L.J. 291, 312 (2003) ("This clause, a harmless error principle, necessarily implies that the 'shall … set aside' language found earlier in the provision must mean 'shall generally,' not 'shall always.'" (quoting Administrative Procedure Act, 5 U.S.C. § 706 (2000)).

[45] Tatham, *supra* note 19, at 1; Remand Without Vacatur, ACUS Recommendation 2013-6 (Adopted December 5, 2013).

courts "shall … hold unlawful and *set aside*" agency actions that violate one of the APA's requirements.[46] Does the APA's imperative that courts shall "set aside" agency action mean that a reviewing court must *vacate* defective rules? Some members of the D.C. Circuit have thought so.[47] But that position has always been a minority view. For its part, the Supreme Court has repeatedly declined to address the issue, despite numerous opportunities to do so.[48]

Several scholars have offered commentary on remand without vacatur—some of it positive and some of it negative.[49] And ACUS has sponsored a study on the remedy and issued a recommendation offering various suggestions to the courts and agencies.[50]

II. Methodology and Participants

In September 2015, ACUS first organized a roundtable discussion on the topic of severability clauses in administrative rules. That discussion made apparent the value in further study of administrative techniques for reducing the costs of remedying legal infirmities in rules. ACUS then commissioned this study and report in July 2017.

The authors asked ACUS members and affiliates at the following agencies to put the authors in touch with officials with knowledge and

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[46] 5 U.S.C. § 706(2) (emphasis added).

[47] See, e.g., Milk Train, Inc. v. Veneman, 310 F.3d 747, 758 (D.C. Cir. 2002) (Sentelle, J., dissenting) ("Although I greatly respect the majority's attempt to save a well-intended relief program from possibly inefficient further proceedings, I do not think we can lawfully do so."); Checkosky v. SEC, 23 F.3d 452, 490-91 (D.C. Cir. 2004) (Randolph, J., dissenting).

[48] Tatham, *supra* note 19, at 8-9 (identifying missed opportunities).

[49] Compare Levin, "Vacation", *supra* note 44; Kristina Daugirdas, Note, Evaluating Remand Without Vacatur: A New Judicial Remedy for Defective Agency Rulemakings, 80 N.Y.U. L. Rev. 278 (2005) with Daniel B. Rodriguez, Of Gift Horses and Great Expectations: Remands Without Vacatur in Administrative Law, 36 Ariz. St. L.J. 599 (2004).

[50] Tatham, *supra* note 19.

expertise about the subject of the study: the Environmental Protection Agency, the Department of Energy, the Department of Labor, the Federal Trade Commission, the Federal Drug Administration, the Securities Exchange Commission, the Federal Energy Regulatory Commission, the Department of Justice, the Department of Homeland Security, and the Consumer Financial Protection Bureau.[51] With the exception of the officials from the Justice Department, each respondent was either a current or former official in the functional equivalent of the agency's general counsel's office.

Over several months, the authors conducted phone interviews of agency staff (current and former). Before conducting some of the interviews, the authors distributed to the respondents a list of potential subtopics that would potentially be explored.

All respondents preferred to share their views anonymously and without attribution to their particular agency. The views expressed during the interviews thus reflect a mix of personal and institutional opinions. In some cases, a single agency official was interviewed; in others, multiple officials participated in the study.

III. Interview Responses

During the interviews, agency officials were asked about the techniques they use or have considered using for attempting to minimize the costs of remedying actual or potential legal defects in agency rules. This Part explains the responses given during interviews. Section A addresses techniques that agencies have employed or have considered employing *before* promulgating a final rule. Section B addresses techniques agencies can employ *after* promulgating a final rule.

A. Before Promulgation

Respondents were asked what steps their agencies have taken or have considered taking to limit the extent to which legal defects in rules

[51] Participants from the Department of Homeland Security and the Consumer Financial Protection Bureau respectfully declined to participate in the study.

will disrupt otherwise valid regulations. In other words, what steps can agencies take to avoid legal defects in parts of a regulatory program from tainting other aspects of the program?

1. Severability clauses

Respondents from four agencies indicated that their agencies had recently included a severability clause in at least one of their rules.[52] One official reported that his or her agency's general practice is to consider including a "blanket" severability clause in each rule that the agency promulgates—i.e., a clause providing that all provisions of a rule are intended to be severable.

The respondents who indicated that their agencies had used a severability clause in at least one of their recent rules were asked for their assessment of the additional costs associated with including a severability clause in a rule. Each official opined that the marginal drafting costs of including a severability clause in a rule were not appreciably high.

The respondents disagreed, however, about whether including a severability clause in a rule appreciably increased an agency's total regulation costs because they disagreed about whether including such a claim increased the chance that a rule would receive substantial scrutiny in court. On one hand, one official observed that his or her agency had regularly included severability clauses in some of its rules since the 1980s and had not found that it weakened the agency's position on the merits in litigation. On the other hand, two officials—one from an agency that has included a severability clause in a recent rule and another from an agency that has not—opined that a severability clause could signal

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[52] These reports were consistent with the authors' 2015 study on severability clauses, see Tyler & Elliott, *supra* note 32, at 2349-52, and with the authors' review of the Federal Register in preparing this report. Officials from several other agencies reported that they could not recall an instance in which the agency had included a severability clause in one of its rules. Although these reports were also consistent with the authors' 2015 study, the authors' recent review of the Federal Register identified at least one severability clause that had not been identified by the respondents.

weakness to a reviewing court. One of these officials also worried that a severability clause would lock the agency in to a position on severability that it may later realize, upon further reflection, it should not have adopted.

Officials at two agencies also cautioned that an agency's propensity for including severability clauses in its rules should depend on its subject matter and rulemaking processes. One official noted that the rules promulgated by the official's agency tend to be relatively atomistic, and therefore more easily divided into severable parts, as compared to the rules of some other agencies. Those comments were echoed by other officials, who warned that the practice of including blanket severability clauses for each rule that the agency promulgates would likely not be appropriate for an agency attempting to promulgate a rule for which the individual parts are highly interdependent.

2. Alternative Ways of Achieving Severability

Respondents were also asked about other techniques for attempting to achieve the same benefits as a severability clause without expressly including such a clause in the rule.

a. Respondents were asked whether their agencies had considered promulgating aspects of an otherwise unified regulatory program through multiple, discrete rules, rather than a single rule, in order to avoid the risk of an unlawful aspect of the program tainting the otherwise lawful aspects of the program. Officials from two agencies each reported that their agencies had done this, at least on one occasion, to mitigate the risk of legal taint. These officials cautioned, however, that dividing a rule into multiple segments can create legal risks for the agency's rule that would not otherwise exist. For example, two officials suggested that simultaneously promulgating multiple rules that cross-reference one another may increase the probability that either rule will be challenged and that a reviewing court will be skeptical of the segmented-rulemaking process. Deviations from the ordinary course, one might think, are circumstantial evidence of legal uncertainty.

Along related lines, two officials warned that, in some circumstances, segmenting rules may have the effect of weakening the agency's overall case for the regulatory program. If, for example, the agency has compiled a complex economic analysis to support the program as a whole, that analysis may not support any of the segmented aspects of the program as well as it would support a single rule implementing the entire program. Thus, the agency may fear that segmenting the rule into multiple rules would make the program vulnerable to the accusation that the rules comprising it are arbitrary and capricious.

Relatedly, an official from another agency suggested that, if the agency's authority to take a particular action is uncertain, agency officials may consider testing the legality of the action by promulgating a narrower, less costly rule that will tee up the legal question that the agency needs resolved, thereby avoiding the cost of a more costly regulatory program in the event that a reviewing court disagrees with the agency's legal theory.[53] Officials from that agency, however, hastened to add that it was rare—though not unprecedented—for the agency to issue rules where its authority to regulate was not well established.

By contrast, officials from two agencies reported that staff at their agencies would be reluctant to consider the possibility of segmenting a unified regulatory program into multiple rules due to competing demands for the agency heads' time and attention.[54] Similarly, officials from two agencies remarked that dividing a rule into discrete parts would require additional agency resources and that their agencies' regulatory

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[53] The authors note that, in appropriate settings, an agency can assert in the preamble of the rule that it has promulgated a discrete portion of a larger regulatory program as part of a larger plan to take "one step at a time." See Ctr. for Biological Diversity v. Envtl. Prot. Agency, 722 F.3d 401, 405-10 (D.C. Cir. 2013) (permitting agencies to take discrete steps toward a larger congressionally mandated goal as long as the agency demonstrates that it is cognizant of Congress' desired outcome and is taking steps to fulfill it).

[54] For the purposes of this report, the term "agency head" includes an agency's most senior official(s) whether a single agency head, such as the EPA Administrator, or a multimember commission or board, such as the FCC Commissioners.

timelines are often too short to consider this technique as a viable alternative to a severability clause.

b. Respondents were also asked whether their agencies had promulgated rules with fallback provisions—i.e., provisions that would take effect only in the event that a court were to vacate other provisions of the rule. For example, suppose an agency is contemplating two different standards for the size of fish that fishermen may keep—one based entirely on data about effects on the fish population and another based on that data as well as data about the agency's cost of implementing various standards. If the agency prefers the second standard, but is uncertain whether it may take the cost of implementation into account, the agency could promulgate the second standard with a fallback provision stating that the former standard shall take effect if a court determines that the latter standard is unlawful.[55] No respondent could recall or was willing to discuss a time that the agency had used a fallback provision in one of its rules.

c. Respondents were also asked whether their agencies have attempted to structure their rules to reflect their views about the severability of various provisions (even if not by including an express severability clause). Officials from three agencies reported that their agencies, when appropriate, will structure the regulatory text of rules so that each provision is independent of others, bolstering the agency's intended position in litigation that if one provision is held unlawful, the others should remain in effect. Attorneys from these agencies routinely search for places to clarify which aspects of the regulatory text are interdependent and which aspects of the text are independent. They also search for places to clarify where aspects of the regulatory text are supported by multiple, independently sufficient grounds. These officials also indicated that attorneys in charge of reviewing draft regulatory text

[55] Although this issue was not discussed with EPA officials, it occurred to the authors that this is arguably the structure of the Clean Power Plan. That rule requires states to meet emissions targets based on three "building blocks," but also provides that if a court determines that the agency was not permitted to base standards on one of the buildings blocks, that the standard shall be based on the other two. See 40 C.F.R. Part 60.

will sometimes advise officials in charge of drafting the text to subdivide provisions into more discrete chapters, sections, and parts, in order to bolster the agency's position to a reviewing court that certain provisions were intended to work independently, or conversely, to lump provisions together to bolster the agency's case that the provisions were intended to work together.

3. Stakeholder input

Respondents were also asked whether their agencies seek input from stakeholders concerning any of the issues discussed above. All agencies reported that they generally seek input from stakeholders regarding the expected impact of proposed rules but that they do not specifically seek input on procedural matters, such as severability clauses. One official, however, opined that stakeholder input may be particularly valuable on procedural issues. Some stakeholders will have a strong interest in a proposed regulation and will be willing to invest heavily into researching the interaction of various provisions, thus allowing those stakeholders to provide the agency with useful information that the agency might not otherwise have.

4. Litigation Risk Assessments

Respondents were asked about the content of litigation risk assessments prepared by their agencies' general counsel's offices. Officials from five agencies opined that litigation risk assessments were most useful when incorporated into an iterative drafting process between policy experts, legal compliance experts, and those responsible for drafting regulatory text. According to these officials, the development of regulatory text at their agencies is a collaborative process in which policy experts and compliance attorneys work together to balance the perceived costs and benefits of various regulatory options, *including* the potential risk of a judicial ruling invalidating aspects of the regulatory program. Officials from three agencies emphasized that the collaborative nature of the rule drafting process is aided by the fact that lawyers are brought in during the earliest stages of rule development. These officials also emphasized that, during the drafting process, officials have robust discussions about the risks of an adverse judicial ruling to a particular

program, as well as risks to *other* programs that may be vulnerable to same sort of legal challenge, but which have thus far not been challenged.

Several agencies' officials also mentioned that, on occasion, their agencies had robust communication with attorneys at the Department of Justice with responsibility for ultimately defending a proposed rule in litigation. However, the extent to which the Department of Justice was involved in the development of agency rules depended heavily on the nature of the rulemaking and the relationship between agency staff and the DOJ attorneys responsible for defending the agency's rules.

B. After Promulgation

Respondents were also asked to comment on techniques that their agencies have used or have considered using after promulgating a new final rule to mitigate the costs of remedying legally infirm rules.

1. Compromise

Officials from several agencies emphasized the importance of proactively engaging with regulated entities to reach compromises, where possible. In this regard, one agency strategy is to seek a settlement in litigation that is consistent with the agency's regulatory goals. Proactive settlement negotiations can be useful in allowing agencies to promote their regulatory objectives without substantial interference from the courts. Another strategy mentioned was to seek to understand the compliance difficulties that individual regulated entities face and to offer delayed implementation of new rules as to those entities for a reasonable amount of time.

2. Briefing Remedies

Respondents were also asked whether the government had requested specific remedies in briefs defending their rules as a means of limiting the costs flowing from an adverse judicial ruling.[56] In particular,

[56] Several scholars have noted that the issue of remedies "receive[s] little attention in briefing." Bagley, *supra* note 19, at 262; Daugirdas, *supra* note 49, at 310. In one sense, this is strange. If a more limited remedy would benefit the agency—and in

respondents were asked whether the government had (a) argued that an invalid provision of a rule was severable; (b) argued that the appropriate remedy for an invalid rule is remand without vacatur; (c) argued that a rule's legal infirmity was harmless error; or (d) sought a voluntary remand of a rule to avoid a damaging precedential ruling.[57]

a. Officials from two agencies reported that their agencies had at least on one occasion argued in a brief that an agency rule was severable. One of those officials said that the issue of severability commonly arises in moot courts in preparation for oral argument, but that it is much less likely to appear as an argument in the agency's briefs.[58] That official, as well as officials from another agency, opined that their agencies rarely affirmatively argue remedies in their briefs because the agencies' primary position is typically that their actions were lawful—i.e., that the agencies are right on the merits—and that an argument about remedies would weaken and distract from that position.

b. Officials from two agencies reported that the government had sought remand without vacatur in some cases challenging the agency's rules, while officials from another agency reported that they were unaware of an instance in which the government had made that argument in one of their cases. An official from a fourth agency remarked that he or she thought that the government should seek remand without vacatur more often than it does. The official speculated that litigators are hesitant to ask for remand without vacatur because they worry that

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many cases, it clearly would—then why don't agencies nearly always ask for it? One reason may be that agencies believe that arguments about remedy will fall on unreceptive ears. But, as explained in the main text, a more important reason may be related to litigation strategy—namely, an agency might believe that briefing remedies would weaken its position on the merits.

[57] We use the locution "the government" rather than "the agency" because some agencies studied here have independent authority to defend their rules in litigation, while other agencies are usually (if not always) represented by the Department of Justice.

[58] That lawyers who defend agency rules in court commonly prepare answers to remedy-related questions suggests that the issue arises with some frequency at oral argument.

doing so weakens the government's position on the merits. In other words, litigators may worry that asking for remand without vacatur signals to the court that the agency lacks confidence in its position on the merits. Officials from two agencies opined that the litigation-strategy concern was easily overstated. Any marginal risk associated with requesting a more limited remedy, these officials said, could likely be mitigated by making clear that the agency's primary position was that the rule is lawful and that the agency was only briefing the issue of remedy *in the alternative*.

c. Respondents were asked whether they were aware of an instance in which the government had argued that a flaw in an administrative rule was harmless error. Several officials said yes; most said no. One official recalled an instance in which agency had argued that failure to conduct notice and comment was harmless error because the parties subject to the rule were made sufficiently aware of the rule's content before the rule was promulgated.

d. Respondents were asked whether their agencies had ever sought a voluntary remand of a rule to avoid an adverse judicial ruling. Officials from one agency indicated that the agency has on occasion requested a voluntary remand of a rule in order to avoid the possibility of an adverse circuit court holding that the agency *generally* had no authority to take the kind of action in question.

Finally, on the issue of briefing remedies, a former official from one agency indicated that, in his or her view, asking for particular remedies when a rule has never been enforced would often be a tall order because it would be more difficult to show a reviewing court that large-scale reliance interests had been built up around the rule. Along similar lines, the same official opined that a court is much less likely to grant a more limited remedy sought by the agency if there is potentially a substantive problem with a rule—e.g., that the rule is ultra vires—than if the defects in the rule are entirely procedural—e.g., failure to provide adequate notice.

IV. Recommendations

This Part suggests practices that agencies should consider when drafting rules and defending them in litigation. One theme that emerged from our interviews with agency officials is that the techniques described in Part III are highly context-dependent. Each agency has its own unique mission, its own internal processes and structures, its own staff (with their various competencies and areas of expertise), its own relationship to other agencies and to the President and Congress, and its own budget. Each of those characteristics can affect whether the techniques discussed above are advisable in any particular situation. Accordingly, it would be unwise to recommend that all agencies should adopt a particular practice in all circumstances. Instead, this Part proposes a list of practices that agency staff should consider when promulgating new, final rules that involve an appreciable degree of legal uncertainty.

A. Before Promulgation

Recommendation #1: *Where the agency has determined that the rule's provisions would function independently, consider including a severability clause in the text of a rule and explaining the severability clause in the rule's statements of basis and purpose.*

Severing the invalid provisions of a rule from the valid provisions (and leaving the valid ones in effect) has the potential to avoid many of the costs of total vacatur. While the public may lose the benefits, such as they are, of legally infirm provisions, and while the agency may incur the expense of repromulgating those provisions, the unchallenged provisions may remain good law and continue to benefit the public and the agency.

Including a severability clause in the text of a final rule (that an agency would prefer to be severable) may increase the chance that a reviewing court will determine that the infirm portions of a rule actually are severable. In the absence of a severability clause, a reviewing court may be concerned that severing the remaining aspects of a rule would put the court in a position of endorsing a rule that the agency had not promulgated. Severability clauses can help alleviate this problem, by

assuring the reviewing court that the agency intended the remainder of the rule to stay in effect, even in the absence of the invalid provision.[59]

As a best practice, the agency should include the severability clause in the text of a proposed rule, to allow the public and regulated industries an opportunity to comment on the proposal. And the agency should include an explanation of the severability clause in the rule's statement of basis and purpose to ensure a reviewing court that the agency believes that the justifications for the rule also apply to the aspects of the rule that survive a judicial challenge.[60]

As explained above, some agency officials have the sense that including a severability clause in a final rule makes the rule more vulnerable to judicial challenge. That may be true in some cases, though we are skeptical that it is true as a general matter. Some areas of regulation are sufficiently controversial that any substantial rule in that area is destined to reach the courts, whether or not it contains a severability clause. And it is in *these* rules—those that are most likely to be challenged—where the benefits of severability clauses are at their apex.

To be clear, as the phrasing of this recommendation suggests, the authors do not recommend that agencies include severability clauses in every rule. Severability clauses are not advisable in all circumstances. A severability clause would be inappropriate where the rule's efficacy depends on the interconnectedness of its provisions. It would also be

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[59] See Tyler & Elliott, *supra* note 32, at 2298-99.

[60] The D.C. Circuit has, on occasion, held an entire rule unlawful where it had not been assured that the rule's statement of basis and purpose supported the remainder of the rule in the absence of a provision that had been targeted in a judicial challenge. See, e.g., MD/DC/DE Broadcasters v. FCC, 253 F.3d 732 (D.C. Cir. 2001); ACA Int'l v. FCC, 885 F.3d 687, 708-09 (D.C. Cir. 2018).

inappropriate where the agency simply does not know its position on severability at the time it promulgates the final rule.[61]

Recommendation #2: *When contemplating a new regulatory program, whose legality is not well established, consider rolling the program out through multiple rules, rather than a single rule.*

Another technique for preventing potential legal defects in one aspect of a regulation from tainting the other aspects of the regulation is to promulgate the regulation through multiple, discrete rules, rather than a single rule. This technique will guarantee that the various aspects of a regulation will be legally independent.

Promulgating multiple rules, however, can have drawbacks. Several respondents indicated that, in some instances, the administrative record may provide stronger support for a single rule than it does for either of two separately promulgated rules. Other officials opined that dividing regulations into separate rules would be too costly, time-consuming, and taxing of the agency heads' time to be seriously considered by their agencies. In addition, dividing regulations into multiple rules is a fairly heavy-handed technique that can achieve only some of the benefits of a severability clause. A severability clause can specify any number of relationships between regulatory provisions—e.g., that all of a rule's sections are severable; that a *particular* provision is severable; that particular provisions are severable from some provisions, but not from others; etc. By contrast, dividing a regulation into multiple rules only specifies one type of relationship—namely, that the regulations promulgated in one rule are independent from the regulations promulgated in the other rule.

Still, some agencies have, on occasion, found separating regulations into multiple rules to be a useful way of expressing to a reviewing court that the agency regards the regulations as independent. Agencies should therefore at least consider this as one of the options, on a menu of

[61] As explained above, some agencies indicated that they preferred to express their opinions on severability after litigation had been initiated, rather than during the process of promulgating a final rule.

available options, for attempting to minimize the costs of remedying potential legal defects in its rules.

Recommendation #3: *Organize rules in ways that clearly reflect the independence of or interdependence between their provisions.*

Several respondents emphasized that their offices of general counsel attempt to ensure that a rule's text and structure reflect the logical and practical relationships between a rule's provisions. For example, it is a best practice for an agency to make clear when it intends for features of a rule to function independently by dividing those features into separate parts and sections and indicating in the rule's text that those features are supported by independent justifications and evidence. Doing so can strengthen the agency's argument to a reviewing court that it intended the rule to be severable, even in the absence of a severability clause.

Recommendation #4: *Consider including "fallback" provisions in a new rule, where the agency's preferred course is legally uncertain and where there is a clear second-best alternative.*

When the legality of an agency's preferred regulatory course is not well established, the agency may know what its preferred second-best alternative would be, in the event that a reviewing court determines that its preferred course is unlawful. The agency, for example, may prefer to impose a standard—call it Standard X—that is based on extant scientific data and the agency's own costs of implementation. And the agency may also know that, if the agency is not permitted to take its own costs of implementation into account, that it would prefer a slightly more stringent standard—call it Standard Y—that is based only on the scientific data and not on the costs of implementation. In such circumstances, the agency should consider taking both Standard X and Standard Y through the notice-and-comment process and promulgating a rule that imposes Standard X and that specifies that Standard Y will take effect in the event that a reviewing court holds Standard X to be

unlawful.[62] This technique, however, is only advisable where compliance with the agency's fallback position is consistent with the compliance with its preferred position. If its fallback position and its preferred position require two different types of conduct, then the regulated entities who have complied with the agency's preferred position must be given time to adapt to its fallback position, in the event that a reviewing court holds its preferred position unlawful.

Recommendation #5: *When contemplating the promulgation of a new regulatory program, the legality of which is uncertain, consider promulgating a smaller, less costly rule as a test case.*

As discussed above, agencies sometimes wish to regulate in areas where their authority to do so is not well established. Such rulemakings can be associated with high administrative costs, as an agency may have to invest heavily in new research and a new enforcement apparatus. The risk that a reviewing court will not adopt the agency's position on its regulatory authority can therefore be very costly. Officials at one agency mentioned that one way to mitigate this risk is to promulgate a narrower, less costly rule as a form of "test case"—i.e., a rule that will allow the agency to test its legal theory in court without incurring the large costs of a new regulatory program.

To be sure, in many circumstances, this technique will not be advisable. The time it takes for a "test case" to be promulgated and to reach final judgment in court may be too long for an agency to wait before rolling out its intended program. Still, this is another option that agencies have in their toolbox when determining how best to minimize the costs of remedying potentially defective rules.

Recommendation #6: *Consider integrating litigation risk assessments early in the process of drafting regulatory text and include litigation risk as part of the process of choosing between various regulatory options.*

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[62] As noted above (note 55), this is arguably the structure of the EPA's Clean Power Plan.

Most respondents indicated that the formulation of new regulatory policy worked best when the process of drafting a rule's regulatory text was viewed as a close collaboration between policy experts, compliance experts, litigators, and rule drafters. They reported that iterative (rather than linear) rule drafting processes permit the agency to more finely balance the benefits of marginal increases in regulatory impact against the marginal costs of additional litigation risk. One reason why that arrangement works well is that it allows an agency to take the risk of litigation into account when determining the best regulatory course.

Some officials reported that the lawyers responsible for defending a rule in court were sometimes consulted only at the late stages of the rule-drafting process and even, on occasion, only after a final rule had been promulgated and litigation had begun. In our view, these agencies should collaborate with experienced litigators early in the rule-drafting process, at least when promulgating high-impact rules that are likely to be challenged in litigation.

B. After Promulgation

Recommendation #7: *Where the agency has a firm view about the appropriate remedy for a defective rule, consider proactively seeking that remedy in litigation briefs.*

With regard to remedies, one lesson is that agencies might not receive what they don't request. The authors believe that one contributing cause of total vacatur's status as a default remedy in administrative law is that agencies request more limited remedies less frequently than they should. We therefore recommend that, where appropriate, agencies affirmatively argue to courts their positions on the appropriate remedy for a defect in an administrative rule—e.g., that the provisions of a rule should be

severed; that an infirmity was harmless error; or that the court should remand the rule without vacating it.

Recommendation #8: *The federal courts should develop briefing policies and practices that would encourage agencies to submit briefing on remedies.*

Government lawyers defending agency rules in court are often faced with a strategic dilemma. On one hand, briefing remedies can be seen as a sign of weakness in the agency's position on the merits. On the other hand, an agency will often have a preference for a more limited remedy that it would prefer to explain to a reviewing court, if it knew that the court was going to find its rule unlawful. Due to streamlined briefing schedules, however, an agency that chooses not to brief remedies in its brief on the merits will often never be given a second opportunity to explain to the court why it should not vacate a rule in its entirety.

Courts should recognize this dilemma and consider taking steps to ameliorate the distortions it causes in the briefs that the courts receive. One way to do this would be to allow the parties to submit supplemental briefing in cases where the court believes it will likely hold an administrative rule unlawful. While this proposal would likely improve the quality of briefs submitted by the government on remedies, it has the drawback of making the time to decision slower.

Another way of ameliorating the dilemma is to provide in the court's briefing order that agencies are to submit any plausible arguments on remedies in their principal briefs on the merits. The D.C. Circuit's Rules already address a similar dilemma facing rule challengers. Parties challenging administrative rules often face plausible arguments that they lack standing. In the absence of any rule to the contrary, they may prefer for strategic reasons not to address standing in their opening briefs, even when they know that standing will feature prominently in the parties' arguments to the D.C. Circuit. The Circuit Rules ameliorate this issue by directing appellants or petitioners in cases involving direct review of administrative actions to include in their opening briefs

"arguments and evidence establishing the claim of standing."[63] Because the Circuit Rules require petitioners to address standing in their opening briefs, no one infers from that fact that they have made standing arguments that they are uncertain about their position on standing. Similarly, courts could ameliorate the strategic dilemma that agencies face by requiring the parties to brief remedies whenever there are plausible arguments that total vacatur would be inappropriate in the event that the reviewing court holds the agency's rule unlawful.

[63] D.C. Cir. Rule 28(a)(7) ("**Standing**. In cases involving direct review in this court of administrative actions, the brief of the appellant or petitioner must set forth the basis for the claim of standing. This section, entitled 'Standing,' must follow the summary of argument and immediately precede the argument. When the appellant's or petitioner's standing is not apparent from the administrative record, the brief must include arguments and evidence establishing the claim of standing. See Sierra Club v. EPA, 292 F.3d 895, 900-01 (D.C. Cir. 2002).").

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