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NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.,* 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

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LEARNING RESOURCES, INC., ET AL. *v.* TRUMP, PRESIDENT OF THE UNITED STATES, ET AL.

CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24–1287. Argued November 5, 2025—Decided February 20, 2026*

The question presented is whether the International Emergency Economic Powers Act (IEEPA) authorizes the President to impose tariffs. See 91 Stat. 1626. Shortly after taking office, President Trump sought to address two foreign threats: the influx of illegal drugs from Canada, Mexico, and China, Presidential Proclamation No. 10886, 90 Fed. Reg. 8327; Exec. Order No. 14193, 90 Fed. Reg. 9113; Exec. Order No. 14194, 90 Fed. Reg. 9117; Exec. Order No. 14195, 90 Fed. Reg. 9121, and "large and persistent" trade deficits, Exec. Order No. 14257, 90 Fed. Reg. 15041. The President determined that the drug influx had "created a public health crisis," 90 Fed. Reg. 9113, and that the trade deficits had "led to the hollowing out" of the American manufacturing base and "undermined critical supply chains," *id.*, at 15041. The President declared a national emergency as to both threats, deeming them "unusual and extraordinary," and invoked his authority under IEEPA to respond.

He imposed tariffs to deal with each threat. As to the drug trafficking tariffs, the President imposed a 25% duty on most Canadian and Mexican imports and a 10% duty on most Chinese imports. *Id.*, at 9114, 9118, 9122–9123. As to the trade deficit ("reciprocal") tariffs, the President imposed a duty "on all imports from all trading partners" of

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*Together with No. 25–250, *Trump, President of the United States, et al.* v. *V.O.S. Selections, Inc., et al.*, on certiorari to the United States Court of Appeals for the Federal Circuit.

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at least 10%, with dozens of nations facing higher rates. *Id.*, at 15045, 15049. Since imposing each set of tariffs, the President has issued several increases, reductions, and other modifications.

Petitioners in *Learning Resources* and respondents in *V.O.S. Selections* filed suit, alleging that IEEPA does not authorize the reciprocal or drug trafficking tariffs. The *Learning Resources* plaintiffs—two small businesses—sued in the United States District Court for the District of Columbia. That court denied the Government's motion to transfer the case to the United States Court of International Trade (CIT) and granted the plaintiffs' motion for a preliminary injunction, concluding that IEEPA did not grant the President the power to impose tariffs. The *V.O.S. Selections* plaintiffs—five small businesses and 12 States—sued in the CIT. That court granted summary judgment for the plaintiffs. And the Federal Circuit, sitting en banc, affirmed in relevant part, concluding that IEEPA's grant of authority to "regulate . . . importation" did not authorize the challenged tariffs, which "are unbounded in scope, amount, and duration." 149 F. 4th 1312, 1338. The Government filed a petition for certiorari in *V.O.S. Selections*, and the *Learning Resources* plaintiffs filed a petition for certiorari before judgment. The Court granted the petitions and consolidated the cases.

Held: IEEPA does not authorize the President to impose tariffs. The judgment in No. 24–1287 is vacated, and the case is remanded with instructions to dismiss for lack of jurisdiction; the judgment in No. 25–250 is affirmed.

No. 24–1287, 784 F. Supp. 3d 209, vacated and remanded; No. 25–250, 149 F. 4th 1312, affirmed.

THE CHIEF JUSTICE delivered the opinion of the Court with respect to Parts I and II–A–1:

Article I, Section 8, of the Constitution specifies that "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises." The Framers recognized the unique importance of this taxing power—a power which "very clear[ly]" includes the power to impose tariffs. *Gibbons* v. *Ogden*, 9 Wheat. 1, 201. And they gave Congress "alone . . . access to the pockets of the people." The Federalist No. 48, p. 310 (J. Madison). The Framers did not vest any part of the taxing power in the Executive Branch. See *Nicol* v. *Ames*, 173 U. S. 509, 515.

The Government thus concedes that the President enjoys no inherent authority to impose tariffs during peacetime. It instead relies exclusively on IEEPA to defend the challenged tariffs. It reads the words "regulate" and "importation" to effect a sweeping delegation of Congress's power to set tariff policy—authorizing the President to impose tariffs of unlimited amount and duration, on any product from any

country. 50 U. S. C. §1702(a)(1)(B). Pp. 5–7.

THE CHIEF JUSTICE, joined by JUSTICE GORSUCH and JUSTICE BARRETT, concluded in Part II–A–2:

The Court has long expressed "reluctan[ce] to read into ambiguous statutory text" extraordinary delegations of Congress's powers. *West Virginia* v. *EPA*, 597 U. S. 697, 723 (quoting *Utility Air Regulatory Group* v. *EPA*, 573 U. S. 302, 324). In several cases described as involving "major questions," the Court has reasoned that "both separation of powers principles and a practical understanding of legislative intent" suggest Congress would not have delegated "highly consequential power" through ambiguous language. *Id*., at 723–724. These considerations apply with particular force where, as here, the purported delegation involves the core congressional power of the purse. Congressional practice confirms as much. When Congress has delegated its tariff powers, it has done so in explicit terms and subject to strict limits.

Against that backdrop of clear and limited delegations, the Government reads IEEPA to give the President power to unilaterally impose unbounded tariffs and change them at will. That view would represent a transformative expansion of the President's authority over tariff policy. It is also telling that in IEEPA's half century of existence, no President has invoked the statute to impose *any* tariffs, let alone tariffs of this magnitude and scope. That " 'lack of historical precedent,' coupled with the breadth of authority" that the President now claims, suggests that the tariffs extend beyond the President's "legitimate reach." *National Federation of Independent Business* v. *OSHA*, 595 U. S. 109, 119 (quoting *Free Enterprise Fund* v. *Public Company Accounting Oversight Bd.*, 561 U. S. 477, 505). The " 'economic and political significance' " of the authority the President has asserted likewise "provide[s] a 'reason to hesitate before concluding that Congress' meant to confer such authority." *West Virginia*, 597 U. S., at 721 (quoting *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U. S. 120, 159–160). The stakes here dwarf those of other major questions cases. And as in those cases, "a reasonable interpreter would [not] expect" Congress to "pawn[]" such a "big-time policy call[] . . . off to another branch." *Biden* v. *Nebraska*, 600 U. S. 477, 515 (BARRETT, J., concurring).

There is no exception to the major questions doctrine for emergency statutes. Nor does the fact that tariffs implicate foreign affairs render the doctrine inapplicable. The Framers gave "Congress alone" the power to impose tariffs during peacetime. *Merritt* v. *Welsh*, 104 U. S. 694, 700. And the foreign affairs implications of tariffs do not make it any more likely that Congress would relinquish its tariff power through vague language, or without careful limits. Accordingly, the President must "point to clear congressional authorization" to justify

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his extraordinary assertion of that power. *Nebraska*, 600 U. S., at 506 (internal quotation marks omitted). He cannot. Pp. 7–13.

THE CHIEF JUSTICE delivered the opinion of the Court with respect to Part II–B, concluding:

(a) IEEPA authorizes the President to "investigate, block during the pendency of an investigation, regulate, direct and compel, nullify, void, prevent or prohibit . . . importation or exportation." §1702(a)(1)(B). Absent from this lengthy list of specific powers is any mention of tariffs or duties. Had Congress intended to convey the distinct and extraordinary power to impose tariffs, it would have done so expressly, as it consistently has in other tariff statutes.

The power to "regulate . . . importation" does not fill that void. The term "regulate," as ordinarily used, means to "fix, establish, or control; to adjust by rule, method, or established mode; to direct by rule or restriction; to subject to governing principles or laws." Black's Law Dictionary 1156. The facial breadth of this definition places in stark relief what "regulate" is not usually thought to include: taxation. Many statutes grant the Executive the power to "regulate." Yet the Government cannot identify any statute in which the power to regulate includes the power to tax. The Court is therefore skeptical that in IEEPA—and IEEPA alone—Congress hid a delegation of its birth-right power to tax within the quotidian power to "regulate."

While taxes may accomplish regulatory ends, it does not follow that the power to regulate includes the power to tax as a means of regulation. Indeed, when Congress addresses both the power to regulate and the power to tax, it does so separately and expressly. That it did not do so here is strong evidence that "regulate" in IEEPA does not include taxation.

A contrary reading would render IEEPA partly unconstitutional. IEEPA authorizes the President to "regulate . . . importation or exportation." §1702(a)(1)(B). But taxing exports is expressly forbidden by the Constitution. Art. I, §9, cl. 5.

The "neighboring words" with which "regulate" "is associated" also suggest that Congress did not intend for "regulate" to include the revenue-raising power. *United States* v. *Williams*, 553 U. S. 285, 294. Each of the nine verbs in §1702(a)(1)(B) authorizes a distinct action a President might take in sanctioning foreign actors or controlling domestic actors engaged in foreign commerce, as Presidential practice confirms. And none of the listed authorities includes the distinct and extraordinary power to raise revenue—a power which no President has ever found in IEEPA. Pp. 14–16.

(b) Several arguments marshaled in response are unpersuasive. First, the contention that IEEPA confers the power to impose tariffs because early commentators and the Court's cases discuss tariffs in

the context of the Commerce Clause answers the wrong question. The question is not whether tariffs can ever be a means of regulating commerce. It is instead whether *Congress*, when conferring the power to "regulate . . . importation," gave the President the power to impose tariffs at his sole discretion. And Congress's pattern of usage is plain: When Congress grants the power to impose tariffs, it does so clearly and with careful constraints. It did neither in IEEPA.

Second, the argument that "regulate" naturally includes tariffs because the term lies between two poles in IEEPA—"compel" on the affirmative end and "prohibit" on the negative end—is unavailing. Although tariffs may be less extreme than an outright compulsion or prohibition, it does not follow that tariffs lie on the spectrum between those poles; they are different in kind, not degree, from the other authorities in IEEPA. Tariffs operate directly on domestic importers to raise revenue for the Treasury and are "very clear[ly] . . . a branch of the taxing power." *Gibbons*, 9 Wheat., at 201. Thus, they fall outside the spectrum entirely.

Third, the argument based on IEEPA's predecessor, the Trading with the Enemy Act (TWEA), and the Court of Customs and Patent Appeals' decision in *United States* v. *Yoshida Int'l, Inc.*, 526 F. 2d 560, cannot bear the weight placed on it. A single, expressly limited opinion from a specialized intermediate appellate court does not establish a well-settled meaning that the Court can assume Congress incorporated into IEEPA.

Fourth, the historical argument based on the Court's wartime precedents fails. Those precedents are facially inapposite, as all agree the President lacks inherent peacetime authority to impose tariffs. And the attenuated chain of inferences from wartime precedents through multiple iterations of TWEA to IEEPA cannot support—much less clearly support—a reading of IEEPA that includes the distinct power to impose tariffs.

Finally, arguments relying on this Court's precedents lack merit. *Federal Energy Administration* v. *Algonquin SNG, Inc.*, 426 U. S. 548, bears little on the meaning of IEEPA. Section 232(b) of the Trade Expansion Act of 1962 contains sweeping, discretion-conferring language that IEEPA does not contain, and the explicit reference to duties in Section 232(a) renders it natural for Section 232(b) itself to authorize duties. Nor does *Dames & Moore* v. *Regan*, 453 U. S. 654, offer support because that case was exceedingly narrow, did not address the President's power to "regulate," and did not involve tariffs at all. Pp. 16–20.

JUSTICE KAGAN, joined by JUSTICE SOTOMAYOR and JUSTICE JACKSON, agreed that IEEPA does not authorize the President to impose tariffs, but concluded that the Court need not invoke the major

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questions doctrine because the ordinary tools of statutory interpretation amply support that result. Pp. 1–7.

JUSTICE JACKSON would also consult legislative history—in particular, the House and Senate Reports that accompanied IEEPA and its predecessor statute, TWEA—to determine that Congress did not intend for IEEPA to authorize the Executive to impose tariffs. Pp. 1–5.

ROBERTS, C. J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II–A–1, and II–B, in which SOTOMAYOR, KAGAN, GORSUCH, BARRETT, and JACKSON, JJ., joined, and an opinion with respect to Parts II–A–2 and III, in which GORSUCH and BARRETT, JJ., joined. GORSUCH, J., and BARRETT, J., filed concurring opinions. KAGAN, J., filed an opinion concurring in part and concurring in the judgment, in which SOTOMAYOR and JACKSON, JJ., joined. JACKSON, J., filed an opinion concurring in part and concurring in the judgment. THOMAS, J., filed a dissenting opinion. KAVANAUGH, J., filed a dissenting opinion, in which THOMAS and ALITO, JJ., joined.

NOTICE: This opinion is subject to formal revision before publication in the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, pio@supremecourt.gov, of any typographical or other formal errors.

SUPREME COURT OF THE UNITED STATES

Nos. 24–1287 and 25–250

LEARNING RESOURCES, INC., ET AL., PETITIONERS
24–1287 *v.*
DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL.

ON WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL., PETITIONERS
25–250 *v.*
V.O.S. SELECTIONS, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

[February 20, 2026]

CHIEF JUSTICE ROBERTS announced the judgment of the Court and delivered the opinion of the Court, except as to Parts II–A–2 and III.*

We decide whether the International Emergency Economic Powers Act (IEEPA) authorizes the President to impose tariffs.

*JUSTICE SOTOMAYOR, JUSTICE KAGAN, and JUSTICE JACKSON join only Parts I, II–A–1, and II–B of this opinion.

I

A

Shortly after taking office, President Trump sought to address two foreign threats. The first was the influx of illegal drugs from Canada, Mexico, and China. Presidential Proclamation No. 10886, 90 Fed. Reg. 8327 (2025); Exec. Order No. 14193, 90 Fed. Reg. 9113 (2025); Exec. Order No. 14194, 90 Fed. Reg. 9117 (2025); Exec. Order No. 14195, 90 Fed. Reg. 9121 (2025). The second was "large and persistent" trade deficits. Exec. Order No. 14257, 90 Fed. Reg. 15041 (2025). The President determined that the first threat had "created a public health crisis," 90 Fed. Reg. 9113, and that the second had "led to the hollowing out" of the American manufacturing base and "undermined critical supply chains," *id.*, at 15041. He invoked his authority under IEEPA to respond.

Enacted in 1977, IEEPA gives the President economic tools to address significant foreign threats. 91 Stat. 1626. When acting under IEEPA, the President must identify an "unusual and extraordinary threat" to American national security, foreign policy, or the economy, originating primarily "outside the United States." 50 U. S. C. §1701(a). And he must "declare[] a national emergency" under the National Emergencies Act. *Ibid.*; see 90 Stat. 1255. He may then, "by means of instructions, licenses, or otherwise," take the following actions to "deal with" the threat: "investigate, block during the pendency of an investigation, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest." §§1701(a), 1702(a)(1)(B).

President Trump declared a national emergency as to both the drug trafficking and the trade deficits, which he

deemed "unusual and extraordinary" threats. He then imposed tariffs to deal with each threat. As to the drug trafficking tariffs, the President imposed a 25% duty on most Canadian and Mexican imports and a 10% duty on most Chinese imports. 90 Fed. Reg. 9114, 9118, 9122–9123. As to the trade deficit (or "reciprocal") tariffs, the President imposed a duty "on all imports from all trading partners" of at least 10%. *Id.*, at 15045. Dozens of nations faced higher rates. *Id.*, at 15049. And these tariffs applied notwithstanding any extant trade agreements. *Id.*, at 15045.

Since imposing each set of tariffs, the President has issued several increases, reductions, and other modifications. One month after imposing the 10% drug trafficking tariffs on Chinese goods, he increased the rate to 20%. See Exec. Order No. 14228, 90 Fed. Reg. 11463 (2025). One month later, he removed a statutory exemption for Chinese goods under $800. Exec. Order No. 14256, 90 Fed. Reg. 14899 (2025). Less than a week after imposing the reciprocal tariffs, the President increased the rate on Chinese goods from 34% to 84%. Exec. Order No. 14259, 90 Fed. Reg. 15509 (2025). The very next day, he increased the rate further still, to 125%. Exec. Order No. 14266, 90 Fed. Reg. 15625, 15626 (2025). This brought the total effective tariff rate on most Chinese goods to 145%. The President has also shifted sets of goods into and out of the reciprocal tariff framework. See, *e.g.*, Exec. Order No. 14360, 90 Fed. Reg. 54091 (2025) (exempting from reciprocal tariffs beef, fruits, coffee, tea, spices, and some fertilizers); Exec. Order No. 14346, 90 Fed. Reg. 43737 (2025). And he has issued a variety of other adjustments. See, *e.g.*, Exec. Order No. 14358, 90 Fed. Reg. 50729, 50730 (2025) (extending "the suspension of heightened reciprocal tariffs" on Chinese imports).

B

Petitioners in *Learning Resources* and respondents in *V.O.S. Selections* filed suit, alleging that IEEPA does not

authorize the reciprocal or drug trafficking tariffs. The *Learning Resources* plaintiffs—two small businesses—sued in the United States District Court for the District of Columbia. The *V.O.S. Selections* plaintiffs—five small businesses and 12 States—sued in the United States Court of International Trade (CIT).

The Government moved to transfer the *Learning Resources* case to the CIT. It argued that the District Court lacked jurisdiction under 28 U. S. C. §1581(i)(1), which gives the CIT "exclusive jurisdiction of any civil action commenced against" the Government "that arises out of any law of the United States providing for . . . tariffs" or their "administration and enforcement." The District Court denied that motion and granted the plaintiffs' motion for a preliminary injunction, concluding that IEEPA did not grant the President the power to impose tariffs. 784 F. Supp. 3d 209 (DC 2025).

In the *V.O.S. Selections* case, the CIT granted the plaintiffs' motion for summary judgment. 772 F. Supp. 3d 1350 (2025). The Federal Circuit, sitting en banc, affirmed in relevant part. 149 F. 4th 1312 (2025). It first concluded that the CIT had exclusive jurisdiction because the plaintiffs' claims arose out of modifications to the Harmonized Tariff Schedule of the United States (HTSUS). *Id.*, at 1329. On the merits, it agreed with the CIT that IEEPA's grant of authority to "regulate . . . importation" did not authorize the challenged tariffs, which "are unbounded in scope, amount, and duration." *Id.*, at 1338. Judge Cunningham concurred (for four judges), reasoning that IEEPA did not authorize the President to impose *any* tariffs. *Id.*, at 1340. Judge Taranto dissented (for four judges), concluding that IEEPA authorized the challenged tariffs. *Id.*, at 1348.

The Government filed a motion to expedite and a petition for certiorari in *V.O.S. Selections*, and the *Learning Resources* plaintiffs filed a petition for certiorari before

judgment. We granted the motion and petitions and consolidated the cases. 606 U. S. 1050 (2025).[1]

II

Based on two words separated by 16 others in Section 1702(a)(1)(B) of IEEPA—"regulate" and "importation"—the President asserts the independent power to impose tariffs on imports from any country, of any product, at any rate, for any amount of time. Those words cannot bear such weight.

A

1

Article I, Section 8, of the Constitution sets forth the powers of the Legislative Branch. The first Clause of that provision specifies that "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises." It is no accident that this power appears first. The power to tax was, Alexander Hamilton explained, "the most important of the authorities proposed to be conferred upon the Union." The Federalist No. 33, pp. 202–203 (C. Rossiter ed. 1961). It is both a "power to destroy," *McCulloch* v. *Maryland*, 4 Wheat. 316, 431 (1819), and a power "necessary to the existence and prosperity of a nation"—"the one great power upon which the whole national fabric is based." *Nicol* v. *Ames*, 173 U. S. 509, 515 (1899).

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[1] We agree with the Federal Circuit that the *V.O.S. Selections* case falls within the exclusive jurisdiction of the CIT. The plaintiffs' challenges "arise[ ] out of " modifications to the HTSUS. 28 U. S. C. §1581(i)(1). Where, as here, such modifications are made under an "Act[ ] affecting import treatment," 19 U. S. C. §2483, they are "considered to be statutory provisions of law for all purposes," §3004(c)(1)(C). Thus, the plaintiffs' challenges "arise[] out of [a] law of the United States providing for . . . tariffs." 28 U. S. C. §1581(i)(1). For the same reasons, the United States District Court for the District of Columbia lacked jurisdiction in the *Learning Resources* case.

The power to impose tariffs is "very clear[ly] . . . a branch of the taxing power." *Gibbons* v. *Ogden*, 9 Wheat. 1, 201 (1824). "A tariff," after all, "is a tax levied on imported goods and services." Congressional Research Service (CRS), C. Casey, U. S. Tariff Policy: Overview 1 (2025). And tariffs "raise[] revenue," *West Lynn Creamery, Inc.* v. *Healy*, 512 U. S. 186, 193 (1994)—the defining feature of a tax, *United States* v. *Kahriger*, 345 U. S. 22, 28, and n. 4 (1953); *Sonzinsky* v. *United States*, 300 U. S. 506, 514 (1937). Indeed, the Framers expected that the Government would for "a long time depend . . . chiefly on" tariffs for revenue. The Federalist No. 12, at 93 (A. Hamilton). Little wonder, then, that the First Congress's first exercise of its taxing power (and its second enacted law, right after the one providing for the new officials to take an oath) was a tariff law. See Act of July 4, 1789, ch. 2, 1 Stat. 24.

Recognizing the taxing power's unique importance, and having just fought a revolution motivated in large part by "taxation without representation," the Framers gave Congress "alone . . . access to the pockets of the people." The Federalist No. 48, at 310 (J. Madison); see also Declaration of Independence ¶19. They required "All Bills for raising Revenue [to] originate in the House of Representatives." U. S. Const., Art. I, §7, cl. 1. And in doing so, they ensured that only the House could "propose the supplies requisite for the support of government," thereby reducing "all the overgrown prerogatives of the other branches." The Federalist No. 58, at 359 (J. Madison). They did not vest any part of the taxing power in the Executive Branch. See *Nicol*, 173 U. S., at 515 ("[T]he whole power of taxation rests with Congress").

The Government thus concedes, as it must, that the President enjoys no inherent authority to impose tariffs during peacetime. Tr. of Oral Arg. 70–71. And it does not defend the challenged tariffs as an exercise of the President's warmaking powers. The United States, after all, is not at

war with every nation in the world. The Government instead relies exclusively on IEEPA. It reads the words "regulate" and "importation" to effect a sweeping delegation of Congress's power to set tariff policy—authorizing the President to impose tariffs of unlimited amount and duration, on any product from any country. 50 U. S. C. §1702(a)(1)(B).

2

We have long expressed "reluctan[ce] to read into ambiguous statutory text" extraordinary delegations of Congress's powers. *West Virginia* v. *EPA*, 597 U. S. 697, 723 (2022) (quoting *Utility Air Regulatory Group* v. *EPA*, 573 U. S. 302, 324 (2014)). In *Biden* v. *Nebraska*, 600 U. S. 477 (2023), for example, we declined to read authorization to "waive or modify" statutory or regulatory provisions applicable to financial assistance programs as a delegation of power to cancel $430 billion in student loan debt. *Id.*, at 494 (quoting 20 U. S. C. §1098bb(a)(1)). In *West Virginia* v. *EPA*, we declined to read authorization to determine the "best system of emission reduction" as a delegation of power to force a nationwide transition away from the use of coal. 597 U. S., at 732 (quoting 42 U. S. C. §7411(a)(1)). And in *National Federation of Independent Business* v. *OSHA*, 595 U. S. 109 (2022) (*per curiam*), we declined to read authorization to ensure "safe and healthful working conditions" as a delegation of power to impose a vaccine mandate on 84 million Americans. *Id.*, at 114, 117 (quoting 29 U. S. C. §651(b)); see also, *e.g.*, *Alabama Assn. of Realtors* v. *Department of Health and Human Servs.*, 594 U. S. 758, 764–765 (2021) (*per curiam*); *King* v. *Burwell*, 576 U. S. 473, 485–486 (2015); *Utility Air*, 573 U. S., at 324.

We have described several of these cases as "major questions" cases. *Nebraska*, 600 U. S., at 505; *West Virginia*, 597 U. S., at 732; see also *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U. S. 120, 159 (2000) (citing S. Breyer,

Judicial Review of Questions of Law and Policy, 38 Admin. L. Rev. 363, 370 (1986)). In each, the Government claimed broad, expansive power on an uncertain statutory basis. And in each, the statutory text might "[a]s a matter of definitional possibilities" have been read to delegate the asserted power. *West Virginia*, 597 U. S., at 732 (internal quotation marks omitted). But "context" counseled "skepticism." *Id.*, at 721, 732. That context included not just other language within the statute, but "constitutional structure" and "common sense." *Nebraska*, 600 U. S., at 512, 515 (BARRETT, J., concurring). "[B]oth separation of powers principles and a practical understanding of legislative intent" suggested Congress would not have delegated "highly consequential power" through ambiguous language. *West Virginia*, 597 U. S., at 723–724.

These considerations apply with particular force where, as here, the purported delegation involves the core congressional power of the purse. "Congress would likely . . . intend[] for itself " the "basic and consequential tradeoffs," *id.*, at 730, inherent in uses of this "most complete and effectual weapon," The Federalist No. 58, at 359. And if Congress were to relinquish that weapon to another branch, a "reasonable interpreter" would expect it to do so " 'clearly.' " *Nebraska*, 600 U. S., at 514–515 (BARRETT, J., concurring) (quoting *Utility Air*, 573 U. S., at 324).

What common sense suggests, congressional practice confirms. When Congress has delegated its tariff powers, it has done so in explicit terms, and subject to strict limits. Congress has consistently used words like "duty" in statutes delegating authority to impose tariffs. (A customs "duty" is simply "the federal tax levied on goods shipped into the United States." Black's Law Dictionary 638 (12th ed. 2024).) See, *e.g.*, 19 U. S. C. §1338(d) ("rates of duty"); §2132(a) ("temporary import surcharge . . . in the form of duties"); §2253(a)(3)(A) ("duty on the imported article"); §2411(c)(1)(B) ("duties or other import restrictions"). It has

capped the amount and duration of tariffs. See, *e.g.*, §1338(d) (50% cap); §2132(a) (15% cap, 150-day time limit); §2253(e) (50% cap, phasedown requirement after one year). And it has conditioned exercise of the tariff power on demanding procedural prerequisites. See, *e.g.*, §2252 (investigation by the United States International Trade Commission, public hearings, report of findings and recommendation); §§2411–2414 (investigation by the United States Trade Representative, consultation with relevant country and interested parties, publication of findings).[2]

Against this backdrop of clear and limited delegations, the Government reads IEEPA to give the President power to unilaterally impose unbounded tariffs. On this reading, moreover, the President is unconstrained by the significant procedural limitations in other tariff statutes and free to issue a dizzying array of modifications at will. See *supra*, at 3. All it takes to unlock that extraordinary power is a Presidential declaration of emergency, which the Government asserts is unreviewable. Brief for Federal Parties 42. And the only way of restraining the exercise of that power is a veto-proof majority in Congress. See 50 U. S. C. §1622(a)(1) (requiring a "joint resolution" "enacted into law" to terminate a national emergency). That view, if credited, would "represent[] a 'transformative expansion'" of the President's authority over tariff policy, *West Virginia*, 597

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[2] The same is true of Section 232 of the Trade Expansion Act of 1962, 76 Stat. 877, which we have held authorizes sector-specific import "license fee[s]." *Federal Energy Administration* v. *Algonquin SNG, Inc.*, 426 U. S. 548, 571 (1976). Section 232(a) expressly references "duties." 19 U. S. C. §1862(a); see *infra*, at 19. And Section 232(c) authorizes the President to "adjust the imports" of an "article," §1862(c), but only after the Secretary of Commerce, in consultation with the Secretary of Defense, conducts an investigation and prepares a report finding that the "article is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security," §1862(b).

U. S., at 724 (quoting *Utility Air*, 573 U. S., at 324), and indeed—as demonstrated by the exercise of that authority in this case—over the broader economy as well. See Congressional Budget Office, CBO's Current View of the Economy From 2025 to 2028, p. 5 (Sept. 2025); Brief for Federal Parties 2–3. It would replace the longstanding executive-legislative collaboration over trade policy with unchecked Presidential policymaking. See CRS, Trade Promotion Authority (TPA) and the Role of Congress in Trade Policy (2015). Congress seldom effects such sea changes through "vague language." *West Virginia*, 597 U. S., at 724.

It is also telling that in IEEPA's "half century of existence," no President has invoked the statute to impose *any* tariffs—let alone tariffs of this magnitude and scope. *National Federation of Independent Business*, 595 U. S., at 119.[3] Presidents have, by contrast, regularly invoked IEEPA for other purposes. CRS, C. Casey, J. Elsea, & L. Rosen, The International Emergency Economic Powers Act: Origins, Evolution, and Use 18–21 (2025). At the same time, they have invoked other statutes—but never IEEPA—to impose tariffs, on products ranging from car tires to washing machines. See, *e.g.*, Presidential Proclamation No. 8414, 3 CFR 115 (2009 Comp.); Presidential

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[3] Indeed, even before IEEPA was enacted, only one President relied on its predecessor, the Trading with the Enemy Act (TWEA), ch. 106, 40 Stat. 411, to impose tariffs—and then only as a *post hoc* defense to a legal challenge. See Presidential Proclamation No. 4074, 36 Fed. Reg. 15724 (1971) (initially invoking the Tariff Act of 1930 and Trade Expansion Act of 1962); *United States* v. *Yoshida Int'l, Inc.*, 526 F. 2d 560, 572 (CCPA 1975). Those tariffs were also of limited amount, duration, and scope. See *id.*, at 568–569, 577–578 (noting that the 10-percent surcharge was described by President Nixon as " 'a temporary measure,' " was in effect less than five months, applied only to "articles which had been the subject of prior tariff concessions," and was capped at congressionally authorized rates); Economic Report of the President 70 (1972) ("When all exceptions to the 10-percent rule were taken into account, the effective rate of surcharge came down to 4.8 percent").

Proclamation No. 9694, 83 Fed. Reg. 3553 (2018). And those tariffs did not "even beg[in] to approach the size or scope" of the IEEPA tariffs at issue here. *Nebraska*, 600 U. S., at 502 (quoting *Alabama Assn.*, 594 U. S., at 765). The "'lack of historical precedent'" for the IEEPA tariffs, "coupled with the breadth of authority" that the President now claims, "is a 'telling indication'" that the tariffs extend beyond the President's "legitimate reach." *National Federation of Independent Business*, 595 U. S., at 119 (quoting *Free Enterprise Fund* v. *Public Company Accounting Oversight Bd.*, 561 U. S. 477, 505 (2010)).

The "'economic and political significance'" of the authority the President has asserted likewise "provide[s] a 'reason to hesitate before concluding that Congress' meant to confer such authority." *West Virginia*, 597 U. S., at 721 (quoting *Brown & Williamson*, 529 U. S., at 159–160). The President's assertion here of broad "statutory power over the national economy" is "extravagant" by any measure. *Utility Air*, 573 U. S., at 324. And as the Government admits—indeed, boasts—the economic and political consequences of the IEEPA tariffs are astonishing. The Government points to projections that the tariffs will reduce the national deficit by $4 trillion, and that international agreements reached in reliance on the tariffs could be worth $15 trillion. Brief for Federal Parties 3, 11. In the President's view, whether "we are a rich nation" or a "poor" one hangs in the balance. *Id.*, at 2. These stakes dwarf those of other major questions cases. See, *e.g.*, *Nebraska*, 600 U. S., at 483 ($430 billion); *Alabama Assn.*, 594 U. S., at 764 (nearly $50 billion); *West Virginia*, 597 U. S., at 714 ("billions of dollars in compliance costs"). As in those cases, "a reasonable interpreter would [not] expect" Congress to "pawn[]" such a "big-time policy call[] . . . off to another branch." *Nebraska*, 600 U. S., at 515 (BARRETT, J., concurring).

The Government and the principal dissent attempt to avoid application of the major questions doctrine on several grounds. None is convincing.

The Government argues first that the doctrine should not apply to emergency statutes. Brief for Federal Parties 35–36. But this argument is nearly identical to one it already advanced in *Nebraska*. There, the Government contended that a different emergency statute should be interpreted broadly because its "whole point" was to provide "substantial discretion to . . . respond to unforeseen emergencies." 600 U. S., at 500 (internal quotation marks omitted). We rejected that argument in *Nebraska*, and we reject it here as well. "Emergency powers," after all, "tend to kindle emergencies." *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579, 650 (1952) (Jackson, J., concurring). Dozens of IEEPA emergencies remain ongoing today, including the first—declared over four decades ago in response to the Iranian hostage crisis. CRS, Casey, International Emergency Economic Powers Act, at 20. And as the Framers understood, emergencies can "afford a ready pretext for usurpation" of congressional power. *Youngstown*, 343 U. S., at 650 (Jackson, J., concurring). Where Congress has reason to be worried about its powers "slipping through its fingers," *id.*, at 654, we in turn have every reason to expect Congress to use clear language to effectuate unbounded delegations—particularly of its "one great power," *Nicol*, 173 U. S., at 515.

The Government's and the principal dissent's proposed foreign affairs exception fares no better. Brief for Federal Parties 34–35; *post*, at 45–57 (opinion of KAVANAUGH, J.). As a general matter, the President of course enjoys some "independent constitutional power[s]" over foreign affairs "even without congressional authorization." *FCC* v. *Consumers' Research*, 606 U. S. 656, 707 (2025) (KAVANAUGH, J., concurring). And Congress certainly may intend to "give the President substantial authority and flexibility" in many

foreign affairs or national security contexts. *Post*, at 48 (opinion of KAVANAUGH, J.) (quoting *Consumers' Research*, 606 U. S., at 706 (KAVANAUGH, J., concurring)). But "flip[ping]" the "presumption" under the major questions doctrine, Brief for Federal Parties 34, makes little sense when it comes to tariffs. As the Government admits, the President and Congress *do not* "enjoy concurrent constitutional authority" to impose tariffs during peacetime. *Ibid.*; Tr. of Oral Arg. 70–71. The Framers gave that power to "Congress alone"—notwithstanding the obvious foreign affairs implications of tariffs. *Merritt* v. *Welsh*, 104 U. S. 694, 700 (1882). And whatever may be said of other powers that implicate foreign affairs, we would not expect Congress to relinquish its tariff power through vague language, or without careful limits.

The central thrust of the Government's and the principal dissent's proposed exceptions appears to be that ambiguous delegations in statutes addressing "the most major of major questions" should necessarily be construed broadly. Brief for Federal Parties 35. But it simply does not follow from the fact that a statute deals with major problems that it should be read to delegate all major powers for which there may be a "colorable textual basis." *West Virginia*, 597 U. S., at 722. It is in precisely such cases that we should be alert to claims that sweeping delegations—particularly delegations of core congressional powers—"lurk[]" in "ambiguous statutory text." *Id.*, at 723 (internal quotation marks omitted). There is no major questions exception to the major questions doctrine.

Accordingly, the President must "point to clear congressional authorization" to justify his extraordinary assertion of the power to impose tariffs. *Nebraska*, 600 U. S., at 506 (internal quotation marks omitted). He cannot.

B

To begin, IEEPA authorizes the President to "investigate, block during the pendency of an investigation, regulate, direct and compel, nullify, void, prevent or prohibit . . . importation or exportation." 50 U. S. C. §1702(a)(1)(B). Absent from this lengthy list of powers is any mention of tariffs or duties. That omission is notable in light of the significant but specific powers Congress *did* go to the trouble of naming. It stands to reason that had Congress intended to convey the distinct and extraordinary power to impose tariffs, it would have done so expressly—as it consistently has in other tariff statutes. See *supra*, at 8; accord, *post*, at 11, 26–27 (opinion of KAVANAUGH, J.).

The power to "regulate . . . importation" does not fill that void. "Regulate," as that term is ordinarily used, means to "fix, establish, or control; to adjust by rule, method, or established mode; to direct by rule or restriction; to subject to governing principles or laws." Black's Law Dictionary 1156 (5th ed. 1979); see also *Ysleta del Sur Pueblo* v. *Texas*, 596 U. S. 685, 697 (2022). This definition captures much of what a government does on a day-to-day basis. Indeed, if "regulate" is as broad as the principal dissent suggests, *post*, at 10–11, then the other eight verbs in §1702(a)(1)(B) are simply wasted ink. But the facial breadth of "regulate" places in stark relief what the term is not usually thought to include: taxation. The U. S. Code is replete with statutes granting the Executive the authority to "regulate" someone or something. Yet the Government cannot identify any statute in which the power to regulate includes the power to tax. The Government concedes, for example, that the Securities and Exchange Commission cannot tax the trading of securities, even though it is expressly authorized to "regulate the trading of . . . securities." 15 U. S. C. §78i(h)(1); see Brief for Federal Parties 31–32. We are therefore skeptical that in IEEPA—and IEEPA alone—Congress hid a

delegation of its birth-right power to tax within the quotidian power to "regulate."

Taxes, to be sure, may accomplish regulatory ends. See *Sonzinsky*, 300 U. S., at 513; *Gibbons*, 9 Wheat., at 201–202. But it does not follow that the power to regulate something includes the power to tax it as a means of regulation. Congressional practice suggests as much. When Congress addresses both the power to regulate and the power to tax, it does so separately and expressly. See, *e.g.*, 16 U. S. C. §460bbb–9(a) (distinguishing between the power to "tax persons, franchise, or private property" on lands and the power "to regulate the private lands"); 2 U. S. C. §622(8)(B)(i) ("government-sponsored enterprise" does not have the "power to tax or to regulate interstate commerce"). That is unsurprising, as the "power to regulate commerce" is "entirely distinct from the right to levy taxes." *Gibbons*, 9 Wheat., at 201. That Congress did not grant those authorities separately here is strong evidence that "regulate" in IEEPA does not include taxation.

A contrary reading would render IEEPA partly unconstitutional. IEEPA authorizes the President to "regulate . . . importation *or exportation*." 50 U. S. C. §1702(a)(1)(B) (emphasis added). Taxing exports, however, is expressly forbidden by the Constitution. Art. I, §9, cl. 5.

The "neighboring words" with which "regulate" "is associated" also suggest that Congress did not intend for "regulate" to include the revenue-raising power. *United States* v. *Williams*, 553 U. S. 285, 294 (2008). "Regulate" is one of nine verbs listed in §1702(a)(1)(B). Each authorizes a distinct action a President might take in sanctioning foreign actors or controlling domestic actors engaged in foreign commerce—blocking imports, for example, or prohibiting transactions. Presidential practice under IEEPA demonstrates as much. See CRS, Casey, International Emergency Economic Powers Act, at 79–106 (Table A–3); see, *e.g.*, Exec. Order No. 13194, 3 CFR 741 (2001 Comp.) (blocking

importation of diamonds from insurgent regime in Sierra Leone); Exec. Order No. 12947, 3 CFR 319 (1995 Comp.) (prohibiting transactions with those "who threaten to disrupt the Middle East peace process"). None of IEEPA's authorities includes the distinct and extraordinary power to raise revenue. And the fact that no President has ever found such power in IEEPA is strong evidence that it does not exist. See *supra,* at 10; *FTC* v. *Bunte Brothers, Inc.*, 312 U. S. 349, 351–352 (1941).

We do not attempt to set forth the metes and bounds of the President's authority to "regulate . . . importation" under IEEPA. That "interpretive question" is "not at issue" in this case, and any answer would be "plain dicta." *West Virginia*, 597 U. S., at 734–735, and n. 5. Our task today is to decide only whether the power to "regulate . . . importation," as granted to the President in IEEPA, embraces the power to impose tariffs. It does not.[4]

The Government, echoed point-for-point by the principal dissent, marshals several arguments in response. First, it contends that IEEPA confers the power to impose tariffs because early commentators and this Court's cases discuss tariffs in the context of the Constitution's Commerce Clause. See Brief for Federal Parties 24–25; *post*, at 12–13 (opinion of KAVANAUGH, J.). But that answers the wrong question. The question is not, as the Government would have it, whether tariffs can ever be a means of regulating commerce. It is instead whether *Congress*, when conferring the power to "regulate . . . importation," gave the President the power to impose tariffs at his sole discretion. And

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[4] The principal dissent surmises that the President could impose "most if not all" of the tariffs at issue under statutes other than IEEPA. *Post*, at 62 (opinion of KAVANAUGH, J.). The cited statutes contain various combinations of procedural prerequisites, required agency determinations, and limits on the duration, amount, and scope of the tariffs they authorize. See *supra*, at 8–9; *post*, at 62–63. We do not speculate on hypothetical cases not before us.

Congress's pattern of usage is most relevant to answering that question. That pattern is plain: When Congress grants the power to impose tariffs, it does so clearly and with careful constraints. It did neither here.

The Government raises another contextual argument. Because "regulate" "lies between" two "poles" in IEEPA—"compel" on the affirmative end and "prohibit" on the negative end—the term naturally includes the "less extreme, more flexible" tool of tariffs. Reply Brief 9 (internal quotation marks omitted); see *post*, at 29–30 (opinion of KAVANAUGH, J.) (making a greater-includes-the-lesser argument). But tariffs, as discussed above, are different in kind, not degree, from the other authorities in IEEPA. Unlike those authorities, tariffs operate directly on domestic importers to raise revenue for the Treasury. See 19 U. S. C. §1505(a); 19 CFR §141.1(b) (2025). Even though a tariff is, in some sense, "less extreme" than an outright compulsion or prohibition, it does not follow that tariffs lie on the spectrum between those poles. They are instead "very clear[ly] . . . a branch of the taxing power," *Gibbons*, 9 Wheat., at 201, and fall outside the spectrum entirely.

Finding no support in the statute the President invoked, the Government turns to one he did not: IEEPA's predecessor, TWEA. Ch. 106, 40 Stat. 411. In 1975, the Court of Customs and Patent Appeals held that the authority to "regulate . . . importation" in TWEA authorized President Nixon to impose limited tariffs. *United States* v. *Yoshida Int'l, Inc.*, 526 F. 2d 560, 572, 577–578. When Congress enacted IEEPA two years later, the Government contends, it conveyed that same authority (except without the limits). See also *post*, at 14–17 (opinion of KAVANAUGH, J.).

This argument cannot bear the weight the Government places on it. While this Court sometimes assumes that Congress incorporates judicial definitions into legislation, we do so "only when [the] term's meaning was 'well-settled'" before the adoption. *Kemp* v. *United States*, 596 U. S. 528,

539 (2022) (quoting *Neder* v. *United States*, 527 U. S. 1, 22 (1999)); see also *United States* v. *Kwai Fun Wong*, 575 U. S. 402, 412–415 (2015). A single, expressly limited opinion from a specialized intermediate appellate court does not clear that hurdle.[5] See *BP p.l.c.* v. *Mayor and City Council of Baltimore*, 593 U. S. 230, 244 (2021). The tariff authority asserted by President Nixon, moreover, was "far removed" from TWEA's "original purposes" of sanctioning foreign belligerents. Cohen, Fundamentals of U. S. Foreign Trade Policy, at 178–179. We are therefore skeptical that Congress enacted IEEPA with an eye toward granting that novel power.

The Government has another historical argument based on this Court's wartime precedents. See generally Brief for Professor Aditya Bamzai as *Amicus Curiae*; Reply Brief 9–11, 18. According to the Government, those precedents acknowledge an inherent Presidential power to impose tariffs during armed conflict. And, the argument goes, Congress in TWEA, and then in IEEPA, codified those precedents. But this argument fails at both steps. Insofar as the Government relies on our wartime cases themselves, they are facially inapposite. Regardless of what they might mean for the President's inherent *wartime* authority, all

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[5] The Government, citing the IEEPA House Committee Report, contends that Congress "indisputably knew of" *Yoshida*'s interpretation of TWEA. Brief for Federal Parties 26; see also *post*, at 15–16, and n. 11 (opinion of KAVANAUGH, J.). But even taking the Report at face value, it hardly helps the Government. The Report explains that "[s]uccessive Presidents have seized upon the open-endedness of [TWEA] section 5(b) to turn that section, through usage, into something quite different from what was envisioned in 1917." H. R. Rep. No. 95–459, pp. 8–9 (1977); accord, S. Cohen, R. Blecker, & P. Whitney, Fundamentals of U. S. Foreign Trade Policy 178–179 (2d ed. 2003). That is not exactly a stamp of approval on the action *Yoshida* guardedly endorsed. And in any event, the Government's "knew of" standard falls well short of the "broad and unquestioned" "judicial consensus" we have required to conclude that Congress incorporated a judicial definition into a statutory term. *Jama* v. *Immigration and Customs Enforcement*, 543 U. S. 335, 349 (2005).

agree that the President has no inherent peacetime authority to impose tariffs.

Nor are we persuaded that the dots connect from our wartime precedents, through multiple iterations of TWEA, to IEEPA, such that IEEPA should be interpreted to grant the President an expansive peacetime tariff power. This argument relies extensively on a series of inferences drawn from scant legislative history. Such an attenuated chain cannot support—much less "clearly" support—a reading of IEEPA that includes the distinct power to impose tariffs. *Alabama Assn.*, 594 U. S., at 764.

Turning to this Court's precedents, the Government first relies on *Federal Energy Administration* v. *Algonquin SNG, Inc.*, 426 U. S. 548 (1976). There, we held that Section 232(b) of the Trade Expansion Act of 1962, which allows the President to "adjust the imports" of particular goods to protect national security, includes the power to impose "license fees." *Id.*, at 561. But that holding bears little on the meaning of IEEPA. As a textual matter, Section 232(b) authorizes the President not only to "adjust . . . imports," but (as the Government emphasized in *Algonquin*) to "*take such action . . . as he deems necessary*" to adjust the imports of a good. Brief for Petitioners 26 (emphasis in original) and Tr. of Oral Arg. 6–7, in *Federal Energy Administration* v. *Algonquin SNG, Inc.*, O. T. 1975, No. 75–382. IEEPA does not contain such sweeping, discretion-conferring language. As for context, Section 232(a) states that "[n]o action shall be taken" to "decrease or eliminate" an existing "duty or other import restriction" if doing so would threaten national security. 19 U. S. C. §1862(a) (1970 ed.). This explicit reference to duties preceding Section 232(b) renders it natural for Section 232(b) itself to authorize duties. Thus, we decline to extend *Algonquin*'s expressly "limited" holding any further. 426 U. S., at 571.

Finally, the Government invokes *Dames & Moore* v. *Regan*, 453 U. S. 654 (1981), but that case offers no support.

Dames & Moore was exceedingly narrow,[6] did not address the President's power to "regulate," and did not involve tariffs at all. If anything, that case highlights the importance of close attention to IEEPA's text. "The terms of . . . IEEPA," we held, "do not authorize" the suspension of claims. *Id.*, at 675. So too here; the terms of IEEPA do not authorize tariffs.

III

The President asserts the extraordinary power to unilaterally impose tariffs of unlimited amount, duration, and scope. In light of the breadth, history, and constitutional context of that asserted authority, he must identify clear congressional authorization to exercise it.

IEEPA's grant of authority to "regulate . . . importation" falls short. IEEPA contains no reference to tariffs or duties. The Government points to no statute in which Congress used the word "regulate" to authorize taxation. And until now no President has read IEEPA to confer such power.

We claim no special competence in matters of economics or foreign affairs. We claim only, as we must, the limited role assigned to us by Article III of the Constitution. Fulfilling that role, we hold that IEEPA does not authorize the President to impose tariffs.

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[6] See, *e.g.*, 453 U. S., at 660 ("We are confined to a resolution of the dispute presented to us"); *ibid.* (We are "acutely aware of the necessity to rest decision on the narrowest possible ground capable of deciding the case"); *id.*, at 661 ("We attempt to lay down no general 'guidelines' covering other situations not involved here, and attempt to confine the opinion only to the very questions necessary to decision of the case"); *ibid.* ("[T]he decisions of the Court in this area have been rare, episodic, and afford little precedential value for subsequent cases"); *id.*, at 688 ("[W]e re-emphasize the narrowness of our decision"). This is not quite "no, no, a thousand times no," but should have sufficed to dissuade the principal dissent from invoking the case, see *post*, at 55–56, with respect to the quite distinct legal and factual issues present here.

The judgment of the United States Court of Appeals for the Federal Circuit in case No. 25–250 is affirmed. The judgment of the United States District Court for the District of Columbia in case No. 24–1287 is vacated, and the case is remanded with instructions to dismiss for lack of jurisdiction.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

Nos. 24–1287 and 25–250

LEARNING RESOURCES, INC., ET AL., PETITIONERS
24–1287 *v.*
DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL.

ON WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL., PETITIONERS
25–250 *v.*
V.O.S. SELECTIONS, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

[February 20, 2026]

JUSTICE GORSUCH, concurring.

The President claims that Congress delegated to him an extraordinary power in the International Emergency Economic Powers Act (IEEPA)—the power to impose tariffs on practically any products he wants, from any countries he chooses, in any amounts he selects. Applying the major questions doctrine, the principal opinion rejects that argument. I join in full. The Constitution lodges the Nation's lawmaking powers in Congress alone, and the major questions doctrine safeguards that assignment against executive encroachment. Under the doctrine's terms, the President must identify clear statutory authority for the extraordinary delegated power he claims. And, as the principal opinion explains, that is a standard he cannot meet.

Whatever else might be said about Congress's work in IEEPA, it did not clearly surrender to the President the sweeping tariff power he seeks to wield.

Not everyone sees it this way. Past critics of the major questions doctrine do not object to its application in this case, and they even join much of today's principal opinion. But, they insist, they can reach the same result by employing only routine tools of statutory interpretation. *Post*, at 1 (KAGAN, J., joined by SOTOMAYOR and JACKSON, JJ., concurring in part and concurring in judgment). Meanwhile, one colleague who joins the principal opinion in full suggests the major questions doctrine *is* nothing more than routine statutory interpretation. *Post,* at 1 (BARRETT, J., concurring). Still others who have joined major questions decisions in the past dissent from today's application of the doctrine. *Post*, at 1 (KAVANAUGH, J., joined by THOMAS and ALITO, JJ., dissenting). Finally, seeking to sidestep the major questions doctrine altogether, one colleague submits that Congress may hand over to the President most of its powers, including the tariff power, without limit. *Post*, at 1–2 (THOMAS, J., dissenting). It is an interesting turn of events. Each camp warrants a visit.

I

Start with the critics. In the past, they have criticized the major questions doctrine for two main reasons. The doctrine, they have suggested, is a novelty without basis in law. *West Virginia* v. *EPA*, 597 U. S. 697, 779 (2022) (KAGAN, J., joined by, *inter alios*, SOTOMAYOR, J., dissenting) (calling the doctrine a "special cano[n]" that has "magically appear[ed]"). And, they have argued, the doctrine is rooted in an "anti-administrative-state stance" that prevents Congress from employing executive agency officials to "d[o] important work." *Id.*, at 780. Today, the critics proceed differently. They join a section of the principal opinion that applies the major questions doctrine. *Ante,* at 14–20.

And rather than critique the doctrine, they say only that it is "unnecessary" in this case "because ordinary principles of statutory interpretation lead to the same result." *Post*, at 2–3 (opinion of KAGAN, J.).

A

Unpack that last claim first. My concurring colleagues contend that, as a matter of "straight-up statutory construction," IEEPA does not grant the President the power to impose tariffs. *Post*, at 7. In doing so, they make thoughtful points about the statute's text and context. But their approach today is difficult to square with how they have interpreted other statutes. Dissenting in past major questions cases, they have argued that broad statutory language granting powers to executive officials should be read for all it is worth. Yet, now, when it comes to IEEPA's similarly broad language granting powers to the President, they take a more constrained approach.

Consider some examples of how they have proceeded in the past. Dissenting in *National Federation of Independent Business* v. *OSHA*, 595 U. S. 109 (2022) (*per curiam*) (*NFIB*), two of my concurring colleagues confronted a statute charging the Occupational Safety and Health Administration with promoting "safe and healthful working conditions." *Id.*, at 127, 132 (joint opinion of Breyer, SOTOMAYOR, and KAGAN, JJ.) (internal quotation marks omitted). They read that language as authorizing the agency to impose a vaccine mandate on 84 million Americans. *Id.*, at 132; *id.*, at 120 (*per curiam*). In support of their reading, my colleagues stressed the statute's "expansive language," another provision authorizing the agency to issue temporary "emergency standards," and "the scope of the crisis" the agency was trying to address. *Id.*, at 132, 135 (joint dissent) (internal quotation marks omitted).

Dissenting in *Alabama Assn. of Realtors* v. *Department of Health and Human Servs.*, 594 U. S. 758 (2021)

(*per curiam*), my colleagues addressed a statute permitting the Centers for Disease Control and Prevention to issue regulations "necessary to prevent the . . . transmission . . . of communicable diseases." *Id.*, at 768 (opinion of Breyer, J., joined by SOTOMAYOR and KAGAN, JJ.) (internal quotation marks omitted). As they saw it, those terms granted the agency the power to regulate landlord-tenant relations nationwide during COVID–19. *Ibid.* In reaching this conclusion, my colleagues again highlighted the statute's "broad" language and suggested that it permitted the agency to impose even "greater restrictions" than the ones at issue in the case. *Id.*, at 769.

Dissenting in *West Virginia*, my colleagues faced a statute allowing the Environmental Protection Agency to ensure power plants employ the "best system of emission reduction." 597 U. S., at 758 (opinion of KAGAN, J.) (internal quotation marks omitted). They read that provision as authorizing the agency to effectively close many power plants and transform the electricity industry from coast to coast. See *id.*, at 754–755. In support, they once more argued that the statutory language was "broad" and "expansive," with "no ifs, ands, or buts." *Id.*, at 756–758. They stressed, too, that the relevant statutory terms appeared in "major legislation" intended to address "big problems," and that the statute authorized actions in the agency's "traditional lane" or "wheelhouse." *Id.*, at 756–757, 765.

Finally, dissenting in *Biden* v. *Nebraska*, 600 U. S. 477 (2023), my colleagues took up a statute permitting the Secretary of Education to "waive or modify any statutory or regulatory provision applying to [a federal] student-loan program" during a national emergency. *Id.*, at 533 (opinion of KAGAN, J., joined by SOTOMAYOR and JACKSON, JJ.) (internal quotation marks omitted). They said that language allowed the Secretary to cancel $430 billion in federal student-loan debt because of COVID–19. See *ibid.*; *id.*, at 501 (majority opinion). Once again, they argued that the

statutory terms were "broad," "expansive," "capacious," and designed to afford the Secretary a "poten[t]" power to respond to "national emergencies" that were "major in scope." *Id.*, at 533–542 (KAGAN, J., dissenting).

Now compare all that to how my colleagues proceed here. This case, they say, is "nearly the opposite." *Post*, at 3. While straight-up statutory interpretation granted executive officials all the power they sought in all those other cases, my colleagues insist this one is different because IEEPA simply does not "give the President the power he wants." *Ibid.*

That's a striking turn given the statutory terms before us. When the President declares a national emergency "to deal with any unusual and extraordinary threat . . . to the national security, foreign policy, or economy of the United States," 50 U. S. C. §1701(a), IEEPA permits him to "regulate . . . importation . . . of . . . any property in which any foreign country or a national thereof has any interest," §1702(a)(1)(B). Surely, the authority granted here is "broad" and "expansive." See *West Virginia*, 597 U. S., at 758–759 (KAGAN, J., dissenting). It has "no ifs, ands, or buts" either. *Id.*, at 756. As a matter of ordinary meaning, the term "regulate" means to "fix, establish or control," "adjust by rule, method, or established mode," "direct by rule or restriction," or "subject to governing principles or laws." Black's Law Dictionary 1156 (5th ed. 1979); see also *post*, at 4. And tariffs do just that—they fix rules that control, adjust, or govern imports of "property in which any foreign country or a national thereof has any interest." §1702(a)(1)(B).

Without question IEEPA is also "major legislation" designed to address "big problems" and "crises," *West Virginia*, 597 U. S., at 754, 756–758 (KAGAN, J., dissenting) (internal quotation marks omitted), along with "emergencies" that are "major in scope," *Nebraska*, 600 U. S., at 542 (KAGAN, J., dissenting). By its terms, the statute applies

only during declared national emergencies involving "threat[s]" to the "national security, foreign policy, or economy of the United States." §1701(a). And it tasks the President personally with responding to those emergencies, a responsibility surely more in his "lane" or "wheelhouse" than that of any other executive official. See *West Virginia*, 597 U. S., at 765 (KAGAN, J., dissenting). Notably, too, IEEPA grants the President the power to impose even "greater restrictions" than tariffs, *Alabama Assn. of Realtors*, 594 U. S., at 769 (Breyer, J., dissenting), because the statute also permits him to "nullify," "prevent," and "void" imports, §1702(a)(1)(B); see also *Nebraska*, 600 U. S., at 539 (KAGAN, J., dissenting).

Why do my concurring colleagues read IEEPA so much more narrowly than they have other broad statutory terms found in other major legislation addressing other emergencies? They say contextual clues justify a narrowing construction here. See *post*, at 3–7. But what the concurrence calls "context" looks remarkably like the major questions doctrine's rule that, when executive branch officials claim Congress has granted them an extraordinary power, they must identify clear statutory authority for it. See *ante,* at 13 (reciting the rule).

Take some examples. The concurrence points to the "unparalleled authority" the President asserts "to impose a tariff of any amount, for any time, on only his own say-so." *Post*, at 6. In other words, the President claims an "[e]xtraordinary" power. *West Virginia*, 597 U. S., at 723 (majority opinion). The concurrence observes that no "President until now understood IEEPA to authorize imposing tariffs." *Post*, at 6. In other words, the power is an "unheralded" one. *West Virginia*, 597 U. S., at 722 (internal quotation marks omitted). Along the way, the concurrence also adds "a modicum of common sense about how Congress typically delegates" and "consideration of whether Congress ever has before, or likely would, delegate the power the

Executive asserts." *Post*, at 2 (internal quotation marks omitted). In other words, the statutory text must be read in light of "separation of powers principles." *West Virginia*, 597 U. S., at 723.

Having borrowed all those concepts from the major questions doctrine, the concurrence then turns to the key statutory terms before us—"regulate . . . importation"—and observes that they "sa[y] nothing" (at least not expressly) "about imposing tariffs." *Post*, at 3. And why is that fatal to the President's case? Because the President is attempting to exercise the "'core congressional power'" over taxes and tariffs, a power Article I of the Constitution vests in Congress alone. *Post*, at 5 (quoting *ante,* at 8); see also *West Virginia*, 597 U. S., at 737 (GORSUCH, J., concurring) (explaining that the major questions doctrine "protect[s] the Constitution's separation of powers," and particularly Article I, which vests "all federal legislative . . . [p]owers in . . . Congress" (internal quotation marks and alteration omitted)).

If my colleagues all but apply the major questions doctrine today, maybe they are simply recognizing what they have in other separation of powers cases involving the delegation of legislative power: that "[t]he guidance needed is greater" when the executive branch seeks to take "action[s] [that] will affect the entire national economy." *FCC* v. *Consumers' Research*, 606 U. S. 656, 673 (2025) (opinion for the Court by KAGAN, J.) (internal quotation marks omitted). Or maybe my colleagues believe the power the President asserts here outstrips even those powers executive officials asserted in our past major questions cases. But whatever the case, my concurring colleagues' course today suggests that skeptics owe the major questions doctrine a second look.

All of which leads me to take up the challenges they have posed to it in the past. Is the doctrine really some "special cano[n]" that has only recently "magically appear[ed]"?

West Virginia, 597 U. S., at 779 (KAGAN, J., dissenting). And is it really grounded in an "anti-administrative-state stance" that prevents Congress from using executive branch officials to perform "important work"? *Id.*, at 780.

B

The major questions doctrine teaches that, to sustain a claim that Congress has granted them an extraordinary power, executive officials must identify clear authority for that power. Far from a novelty, much the same principle has long applied to those who claim extraordinary delegated authority, whether in private or public law.

1

Examples stretch across many fields. Consider first the common law of corporations. In early modern England, corporations could be formed only with "an explicit, ex ante and direct authorization." R. Harris, Industrializing English Law: Entrepreneurship and Business Organization, 1720–1844, p. 17 (2000). That authorization could be given by the Crown, an Act of Parliament, or a combination of the two. *Ibid.*; see also *id.*, at 19. Some of these corporations exercised regulatory functions not unlike those performed by modern administrative agencies. M. Bilder, The Corporate Origins of Judicial Review, 116 Yale L. J. 502, 516–517, 519–520 (2006). Indeed, the "[i]nitial settlements in Virginia and Massachusetts Bay, among others, were structured as corporations." *Id.*, at 535.

English law treated these corporations as having authority to issue bylaws. But that authority was subject to restrictions, one of which was that corporations could not regulate on major subjects without express authorization. Take *Kirk* v. *Nowill*, 1 T. R. 118, 99 Eng. Rep. 1006 (K. B. 1786). That case involved the Company of Cutlers, a corporation for makers of knives and other cutlery. See *id.*, at 118–119, 99 Eng. Rep., at 1006. An Act of Parliament gave

the company broad authority to regulate its members. *Id.*, at 118–121, 99 Eng. Rep., at 1006–1007. The company used that authority to adopt a bylaw allowing its officials to enter its members' "workshops and warehouses" and search for "deceitful and unworkmanly" cutlery. *Id.*, at 121–122, 99 Eng. Rep., at 1007. After the company seized supposedly unworkmanly forks, the aggrieved owner challenged the company's actions in court, arguing that the bylaw under which it acted was "bad in point of law" because the power to incur a forfeiture was not "expressly given to [the company] by Act of Parliament." *Id.*, at 118, 122–123, 99 Eng. Rep., at 1008. Applying a clear-statement rule, the King's Bench declared the bylaw, and therefore the seizure, unlawful. Lord Mansfield explained that the "power of making bye-laws to incur a forfeiture" was an "extraordinary power" over and above the default powers of corporations "created by charter." *Id.*, at 124, 99 Eng. Rep., at 1009. For this reason, the power needed to be "expressly given" by the company's progenitor, Parliament. *Ibid.* Since no such power had been clearly conferred, the seizure was unlawful. See *ibid.*

The same principle applied in American law. In *In re Election of Directors of Long Island R. Co.*, 19 Wend. 37, 40 (N. Y. Sup. Ct. 1837), a New York court addressed a case involving 2,700 shares of stock in the Long Island Railroad Company that the company had declared forfeited. *Ibid.* All agreed that the company had broad power to regulate its shares. See *id.*, at 41–42. Still, the court called the forfeiture an "extraordinary penalty," and held that no such power had been "expressly conferred" on the corporation by its charter. *Ibid.* In fact, the court borrowed the clear-statement rule from *Nowill*: If "extraordinary authority . . . is intended to be given, it must be by *express words* to that effect." *Id.*, at 43 (describing *Nowill* in detail).

The court in *Ex parte Burnett*, 30 Ala. 461 (1857), proceeded similarly. That case involved the incorporated town

of Cahaba, Alabama. See *id.*, at 464. The town set the price of a liquor license at $1,000, fined James Burnett for failing to obtain one, and eventually imprisoned him for not paying the fine. See *ibid.* Burnett sought a writ of habeas corpus and argued that Cahaba had acted beyond the scope of its corporate authority. *Ibid.*

Without a clear-statement rule, Burnett's argument would have stood little chance. That's because the town's charter granted it the authority "to make and establish all such rules, by-laws, and ordinances, respecting the streets, markets, buildings, . . . and police of said town, that shall appear to them requisite and necessary for the security, welfare, and convenience of said town, or for preserving health, peace, order, and good government within the same." *Id.*, at 467 (internal quotation marks omitted). The charter even specifically gave the town the "privileg[e] of granting licenses for retailing of spirituous and other liquors." *Ibid.* (internal quotation marks omitted). Semantically, the town's power was broad indeed and encompassed liquor licensing. But the court sided with Burnett anyway. Reasoning that the town's exorbitant licensing fee effectively banned the sale of liquor, the court held that Cahaba did not enjoy such extraordinary "prohibitory" power because it was "not authorized by any express grant of power" in the town's charter. *Id.*, at 469; see also *id.,* at 466.

These cases are not outliers. Treatises confirm that the extraordinary power principle was fundamental to municipal corporations. A statute could "not by implication invest [a] body with any extraordinary authority." J. Willcock, The Law of Municipal Corporations ¶226, p. 99 (1827). Extraordinary powers required "express words to that effect." *Ibid.* And "[a]ny fair, reasonable doubt concerning the existence of power [was] resolved by the courts against the corporation, and the power [was] denied." 1 J. Dillon, Commentaries on the Law of Municipal Corporations 145 (4th ed. 1890).

The takeaway is simple enough. Early corporations often functioned much like today's executive branch, exercising delegated regulatory authority. And, when interpreting the scope of that authority, the common law had a clear-statement rule that looked strikingly like the major questions doctrine.

Historically, a similar precept applied in agency law. As the leading early American treatise put it, instruments conferring powers of attorney were "ordinarily subjected to a strict interpretation." J. Story, Commentaries on the Law of Agency 80–81 (2d ed. 1844). So, for example, in *Attwood* v. *Munnings*, 7 Barn. & Cress. 278, 108 Eng. Rep. 727 (K. B. 1827), a principal had delegated broad power to an agent to act "generally for him and in his name," including in all things "as should be requisite, expedient, and advisable to be done in . . . his affairs and concerns, and as he might or could do if personally acting therein." *Id.*, at 279–280, 108 Eng. Rep., at 728 (internal quotation marks omitted). The agent then accepted certain debts on behalf of the principal. *Id.*, at 280, 108 Eng. Rep., at 728. The question for the court was whether this action was within the scope of the agent's authority. *Id.*, at 281, 108 Eng. Rep., at 728. The court said no. Powers of attorney are "instruments to be construed strictly." *Id.*, at 283, 108 Eng. Rep., at 729. And the power of attorney contained "no express power" to accept debts, so no such power had been given. *Ibid.*

Other examples abound. A power to sell casks of whiskey did not include the "unusual and extraordinary" power to offer a warranty against future seizures of the casks, unless granted by "express authority." *Palmer* v. *Hatch,* 46 Mo. 585, 587 (1870). Under a power of attorney, authority to enter contracts for a principal was subject to "strict interpretation" and generally did not authorize "contracts of an extraordinary character" outside those "connected with [the principal's] ordinary business." *Reynolds* v. *Rowley*, 4 La. Ann. 396, 398–399 (1849). And a power to manage a mine

did not authorize an agent to borrow money for the mine's operations on the principal's credit because there was no "express authority" for such a departure from the "usual manner" of running a mine. *Hawtayne* v. *Bourne*, 7 M. & W. 595, 599, 151 Eng. Rep. 905, 906 (Ex. 1841). This was true even "in cases of necessity," *id.*, at 599, 151 Eng. Rep., at 907, where the manager borrowed funds to address an "emergency suddenly arising," *id.,* at 600, 151 Eng. Rep., at 907.

Much the same principle applied to executive officials. Often, "[t]he legality of an executive action depended on the relationship between the size of the asserted power and the clarity of the underlying legal authority." T. Arvind & C. Burset, Partisan Legal Traditions in the Age of Camden and Mansfield, 44 Oxford J. Legal Studies 376, 388 (2024). *Entick* v. *Carrington*, 19 How. St. Tr. 1029 (C. P. 1765), offers an illustration. There, as part of an investigation for seditious libel, the English Secretary of State claimed authority to issue a warrant for the seizure of an author's papers. Lord Camden declared the seizure unlawful, reasoning that power asserted by the executive "ought to be as clear as it is extensive." T. Arvind & C. Burset, A New Report of *Entick* v. *Carrington* (1765), 110 Ky. L. J. 265, 324 (2022) (Arvind & Burset). Or, as another reporter described Camden's decision, "one should naturally expect that the law to warrant [the exercise of power] should be clear in proportion as the power is exorbitant." 19 How. St. Tr., at 1065–1066. The seizure represented an extraordinary exercise of power, Lord Camden found, and no legal authority clearly authorized it. See Arvind & Burset 324. Accordingly, the warrant was unlawful and the seizure could not stand. *Id.*, at 332.

2

Perhaps unsurprisingly given this history, American courts applied the extraordinary power principle when

Congress and the States started delegating new regulatory powers to executive agencies in the late 19th century. Take railroad commissions. After the Civil War, governments worried about the increasing power of railroad companies responded by creating new agencies and imbuing them with broad regulatory authority. These bodies were among the first modern administrative agencies. See *West Virginia*, 597 U. S., at 740 (GORSUCH, J., concurring). And when they claimed some extraordinary delegated power, both state and federal courts enforced a clear-statement rule. See, *e.g.*, *Siler* v. *Louisville & Nashville R. Co.*, 213 U. S. 175, 193–194 (1909) (declaring, in the course of interpreting a state statute, that an "enormous power" "must be conferred in plain language" "free from doubt"); *Board of R. Comm'rs of Ore.* v. *Oregon R. & Navigation Co.*, 17 Ore. 65, 77, 19 P. 702, 707–708 (1888) (When an agency exercises "powers delegated to [it] by the legislature" to carry out "important functions," the text must "define and specify the authority given it so clearly that no doubt can reasonably arise"); *ICC* v. *Cincinnati, N. O. & T. P. R. Co.*, 167 U. S. 479, 505 (1897) (holding a delegation of legislative power of "supreme delicacy and importance" must be "clear and direct"); *Gulf & Ship Island R. Co.* v. *Railroad Comm'n*, 94 Miss. 124, 134–135, 49 So. 118 (1908) ("It is universally held that a railroad commission . . . must be able to point to its grant of power . . . in clear and express terms, and nothing will be had by inference").

The railroad commissions may have been the first, but they were not the last. Whether executive officials claimed the power to criminally punish noncompliance with regulations, force employers to retain employees regardless of their unlawful conduct, or regulate intrastate candy sales, this Court held them to much the same standard. Because their claimed powers were so substantial, executive officials had to identify a "distinc[t]" authority for them, *United States* v. *Eaton*, 144 U. S. 677, 688 (1892), a "clear

legislative basis," *United States* v. *George*, 228 U. S. 14, 22 (1913), a "definite and unmistakable expression," *NLRB* v. *Fansteel Metallurgical Corp.*, 306 U. S. 240, 255 (1939), or a "clea[r] mandate," *FTC* v. *Bunte Brothers, Inc.*, 312 U. S. 349, 351, 355 (1941). Cf. *Industrial Union Dept., AFL–CIO* v. *American Petroleum Institute*, 448 U. S. 607, 645 (1980) (plurality opinion) ("In the absence of a clear mandate . . . it is unreasonable to assume that Congress intended to give the Secretary [of Labor] the unprecedented power over American industry" he claimed).

It is no mystery why the Court proceeded this way when interpreting legislative directions to the executive branch. Article I of the Constitution vests all federal legislative power in Congress, and Article II charges the executive branch with seeing that Congress's laws are faithfully executed. In a very real sense, then, when it comes to legislative power, Congress is the principal and executive officials are the agents. See generally G. Lawson & G. Seidman, "A Great Power of Attorney": Understanding the Fiduciary Constitution (2017).

So what is the basis for the charge that the major questions doctrine represents some "magica[l]" innovation? See *West Virginia*, 597 U. S., at 779 (KAGAN, J., dissenting). Part of the answer may have to do with the fact that, in the latter half of the 20th century, this Court began experimenting with a very different approach. The Court pushed aside its long-held skepticism of claims to extraordinary delegated powers and began affirmatively encouraging them. *Chevron* deference is just one example of this phenomenon, though a stark one. See *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984). That case established a presumption that was nearly the opposite of the major questions doctrine: When Congress failed to speak clearly, courts put a thumb on the scale in *favor* of delegated power. *Id.*, at 843–844. Given that development, the longstanding principles animating

the major questions doctrine may have receded from view for a time. After all, the two doctrines often applied in the same places and counseled opposite results. But with *Chevron* gone, so is the conflict. This Court's application of the major questions doctrine is not invention so much as return to form.

C

Now turn to my concurring colleagues' other charge: that the major questions doctrine is premised on an "anti-administrative-state stance." *West Virginia*, 597 U. S., at 780 (KAGAN, J., dissenting). It is important, they argue, to allow Congress to delegate expansive powers. Members of Congress unfortunately "often don't know enough—and know they don't know enough—to regulate sensibly on an issue." *Id.*, at 781. Nor can Congress easily "anticipate changing circumstances." *Ibid.* For these reasons, Members of Congress must rely on more adept and less constrained "people . . . found in agencies." *Ibid.* Indeed, my colleagues say, "administrative delegations . . . have helped to build a modern Nation." *Id.*, at 782. And the major questions doctrine, they worry, could jeopardize all that "astonish[ing] . . . progress." *Ibid.*

This policy complaint, of course, is no reason to disregard our precedents or longstanding legal principles. But, even taken on its own terms, it is a bit perplexing. The major questions doctrine is not "anti-administrative state." It is pro-Congress. Common-law courts understood that few written instruments can anticipate every eventuality, and that principals sometimes draft broad delegation language to account for this. At the same time, courts appreciated the corresponding risk that delegees could easily exploit loose language in their commissions for their own benefit and to the detriment of those they purported to serve. So common-law courts often strictly construed delegated

powers, not because they were anti-delegee, but because they were pro-principal.

The major questions doctrine performs a similar function. Article I vests all federal legislative power in Congress. But like any written instrument, federal legislation cannot anticipate every eventuality, a point my concurring colleagues have observed in the past. *Id.*, at 781–782. And highly resourceful members of the executive branch have strong incentives to exploit any doubt in Congress's past work to assume new power for themselves. The major questions doctrine helps prevent that kind of exploitation. Our founders understood that men are not angels, and we disregard that insight at our peril when we allow the few (or the one) to aggrandize their power based on loose or uncertain authority. We delude ourselves, too, if we think that power will accumulate safely and only in the hands of dispassionate "people . . . found in agencies." *Id.*, at 781. Even if unelected agency officials were uniquely immune to the desire for more power (an unserious assumption), they report to elected Presidents who can claim no such modesty. See *Myers* v. *United States*, 272 U. S. 52 (1926).

Another feature of our separation of powers makes the major questions doctrine especially salient. When a private agent oversteps, a principal may fix that problem prospectively by withdrawing the agent's authority. Under our Constitution, the remedy is not so simple. Once this Court reads a doubtful statute as granting the executive branch a given power, that power may prove almost impossible for Congress to retrieve. Any President keen on his own authority (and, again, what President isn't?) will have a strong incentive to veto legislation aimed at returning the power to Congress. Perhaps Congress can use other tools, including its appropriation authority, to influence how the President exercises his new power. Maybe Congress can sometimes even leverage those tools to induce the President to withhold a veto. But retrieving a lost power is no easy

business in our constitutional order. And without doctrines like major questions, our system of separated powers and checks-and-balances threatens to give way to the continual and permanent accretion of power in the hands of one man. That is no recipe for a republic.

This case offers an example of the problem. Article I grants Congress, not the President, the power to impose tariffs. Still, the President claims, Congress passed that power on to him in IEEPA, permitting him to impose tariffs on nearly any goods he wishes, in any amount he wishes, based on emergencies he himself has declared. He insists, as well, that his emergency declarations are unreviewable. A ruling for him here, the President acknowledges, would afford future Presidents the same latitude he asserts for himself. See Tr. of Oral Arg. 69. So another President might impose tariffs on gas-powered automobiles to respond to climate change. *Ibid*. Or, really, on virtually any imports for any emergency any President might perceive. And all of these emergency declarations would be unreviewable. Just ask yourself: What President would willingly give up that kind of power?

I recognize the concerns about the major questions doctrine. But it is not so novel as some have supposed. And it serves Article I values we all share. My concurring colleagues all but endorse it today. I hope past skeptics will give it another look.

II

Turn now to the second camp. If some have criticized the major questions doctrine, others have responded by seeking to soften its blow. Though joining today's principal opinion holding that "clear" statutory authority is required to sustain the exercise of an "extraordinary" power, *ante,* at 13, 20, JUSTICE BARRETT has suggested that the major questions doctrine might be reconceived. On her view, the doctrine need not be understood as a "substantive canon

designed to enforce Article I's Vesting Clause"—a "valu[e] external to a statute." *Nebraska*, 600 U. S., at 508, 510 (concurring opinion). Instead, the doctrine might be thought of as a "commonsense princip[e] of communication" that counsels "skepticism" when executive officials claim extraordinary powers derived from Congress. *Id.*, at 514, 516; see also *post*, at 1–4 (concurring opinion).

It is a thoughtful effort, but I harbor doubts. For one thing, there is no need to reconceive our doctrine; past critics all but apply the doctrine today and their previous criticisms fall flat. See Part I, *supra*. For another, this gloss on our major questions doctrine presents problems. Commonsense principles of communication do not explain many of our major questions cases—this one included. And if common sense really does go so far as to embrace a rule counseling "skepticism" of claims by executive officials that Congress has granted them extraordinary powers, that is common sense in name only. The reason for such skepticism must be Article I, a "substantive" source "external" to any statute.

A

Introducing her view that "commonsense principles of communication" can sometimes help resolve disputes over the meaning of statutory terms, JUSTICE BARRETT points to an old chestnut. *Nebraska*, 600 U. S., at 512, 514 (concurring opinion). Suppose a legislature used the phrase " whoever drew blood in the streets" in a criminal statute imposing punishment. As a matter of "common sense," JUSTICE BARRETT says, it would " 'g[o] without saying' " that the law doesn't apply to a surgeon accessing a patient's vein to save his life. *Ibid.* That is because the phrase "drew blood" is susceptible to two conventional idiomatic meanings: one "applicable to violent encounters with man or beast" and the other "to medical procedures," A. Scalia & B. Garner, Reading Law 357 (2012) (Scalia & Garner). And any

ordinary person faced with that phrase in a penal law would find it obvious which meaning applies. *Ibid.*; see also *Nebraska*, 600 U. S., at 512 (BARRETT, J., concurring).

The difficulty is, our major questions cases are different. Often, little about them "'goes without saying.'" *Ibid.* Take *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U. S. 120 (2000). There, the question was whether the FDA could regulate tobacco products. *Id.*, at 125. Looking only to common sense, the answer would have been yes. Congress authorized the FDA to regulate "drugs," which Congress defined expressly and broadly as " 'articles (other than food) intended to affect the structure or any function of the body.'" *Id.*, at 126. As a matter of common sense, nicotine qualifies as a "drug" based on this statutory definition, as it might even as a matter of everyday speech. *West Virginia*, 597 U. S., at 721–722 (noting the "colorable textual basis" for the executive branch's interpretation in *Brown & Williamson*). Still, we held the FDA could not regulate tobacco products. *Brown & Williamson*, 529 U. S., at 159–160.

Other cases follow suit. We have ruled that the term "air pollutant" does not include greenhouse gases, even though greenhouse gases pollute the air. *Utility Air Regulatory Group* v. *EPA*, 573 U. S. 302, 316, 323–324 (2014). We have held that the phrase "'[r]egulations . . . necessary to prevent the . . . spread of communicable diseases'" does not include eviction moratoriums, even without questioning that eviction moratoriums were necessary to prevent the spread of COVID–19, a communicable disease. *Alabama Assn. of Realtors*, 594 U. S., at 761, 764. And we have said that closing coal power plants is not the " 'best system of emission reduction,'" even while acknowledging that closing them would reduce emissions. *West Virginia*, 597 U. S., at 721, 732–735.

None of these cases can be readily explained by "commonsense principles of communication." *Nebraska*, 600 U. S., at 514 (BARRETT, J., concurring). None involved a

phrase like "drew blood" susceptible to two conventional idiomatic meanings, one of which any English speaker faced with the law at issue might quickly rule out. Quite the opposite; in each case the agency had a strong argument that the statutory language, commonsensically read, granted the power it claimed. Meanwhile, all our major questions cases can be easily explained by reference to a rule requiring the executive branch to identify clear statutory authority when it claims Congress has granted it an extraordinary power. And that is a "dice-loading" rule, plain and simple, one designed to protect Article I, a "[s]ubstantive . . . valu[e] external" to the statutory terms at hand. *Id.*, at 508.

Common sense not only fails to explain many of our major questions cases. It doesn't explain even some of the cases JUSTICE BARRETT has held up as examples of commonsense cases. In *Bond* v. *United States*, 572 U. S. 844 (2014), for example, the Court confronted a statute that defined "chemical weapon" to include " 'any chemical which through its chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or animals.'" *Id.*, at 851; see also *Nebraska*, 600 U. S., at 512–513 (BARRETT, J., concurring) (discussing *Bond*). Despite that broad definition, the Court held that "an arsenic-based compound" didn't fit the bill. *Bond*, 572 U. S., at 852, 866. To reach that result, we did not use common sense alone. How could we have? It hardly goes without saying that arsenic doesn't qualify as a "chemical" which can cause " 'permanent harm to humans or animals.'" *Id.*, at 851; see also *id.*, at 867 (Scalia, J., concurring in judgment) (calling it "beyond doubt" that the ordinary meaning of the relevant statutory terms embraced the chemicals at issue). Instead, we relied on a clear-statement rule grounded in the substance of the Constitution—namely, the federalism canon. *Id.*, at 860 (majority opinion) ("[W]e can insist on a clear indication that Congress meant to reach purely local crimes, before interpreting the statute's expansive

language in a way that intrudes on the police power of the States"). So *Bond* may well be like our major questions cases, but that is only because it applied a clear-statement rule grounded in another substantive feature of the Constitution.

Consider as well the babysitter hypothetical JUSTICE BARRETT has posed. Imagine a parent of young children who hands a babysitter a credit card and says, "'[m]ake sure the kids have fun.'" *Nebraska*, 600 U. S., at 513 (concurring opinion). Now suppose the babysitter takes the kids on a road trip to an amusement park, "where they spend two days on rollercoasters and one night in a hotel." *Ibid.* "Was the babysitter's trip consistent with the parent's instruction?" *Ibid.* JUSTICE BARRETT believes the answer is likely "no" as a matter of common sense. See *id.*, at 513–514.

Really, though, unless one is to believe children do not "have fun" on rollercoasters and at hotels, the babysitter hypothetical can be explained only with reference to some "external" and "substantive" norm. *Id.*, at 508, 513. And, in fact, just such a norm is baked into the babysitter hypothetical—one we encountered in Part I–B, *supra*. The babysitter is exercising authority the parents have *delegated* to her. She is acting as their *agent*. As a result, one might expect a clear statement from the parents before the babysitter may do something extraordinary, like take the kids on a road trip.

This substantive norm about delegated powers not only lurks beneath the surface of the babysitter hypothetical, it " 'loads the dice'" against her. *Nebraska*, 600 U. S., at 510 (BARRETT, J., concurring). Doubtless, she would see it that way. The babysitter would argue that a trip to an amusement park is "fun." And she would be right under a commonsense understanding of the word. But because the babysitter is exercising delegated authority, she cannot

exercise such an extraordinary power without clear authorization for it.

Notice, too, the same outcome is no longer guaranteed when we remove the delegated power feature. If one parent leaves the children with the other parent, the trip to the amusement park might well be fine. No other contextual clues are needed. See *id.*, at 516 (agreeing with this). So if the answer to the babysitter hypothetical seems a matter of common sense to many Americans, that is only because the substantive norms associated with parental delegations to babysitter agents are so deeply rooted in our society. Say the same instruction were given to a babysitter in a community where children are raised collectively, like a kibbutz. Same answer? Hardly obvious.[1]

B

To be sure, in places JUSTICE BARRETT concedes that her gloss on the major questions doctrine requires resort to something more than "common sense" instincts about what would " 'g[o] without saying' " to an ordinary English speaker. *Nebraska*, 600 U. S., at 512 (concurring opinion); see also *post*, at 2. Sometimes, she suggests, common sense doesn't just help illuminate the "most natural" meaning of an idiomatic term like "drew blood" based on its presence in a penal law. 600 U. S., at 508. Sometimes, she says, "commonsense principles of communication" go much further. *Id.*, at 514. So much so that they wind up dictating a rule

[1] Today, JUSTICE BARRETT protests that the foregoing discussion "takes down a straw man." *Post*, at 1 (concurring opinion). But it was JUSTICE BARRETT who previously wrote that the major questions doctrine "grows out of . . . commonsense principles of communication." *Biden* v. *Nebraska*, 600 U. S. 477, 514 (2023) (same). And it was JUSTICE BARRETT who used the various illustrations recounted above to suggest that our major questions decisions can be explained by reference to the kind of "common sense . . . that 'goes without saying.' " *Id.*, at 512. If JUSTICE BARRETT now means to put all that to the flame, the major questions doctrine is better for it.

counseling "skepticism" of executive claims to extraordinary delegated powers. *Id.*, at 516. Why? Because, JUSTICE BARRETT says, a "reasonable observer" consults "our constitutional structure." *Id.*, at 515, 520. But if that's true, this version of common sense *does* require us to account for "values" entirely "external to a statute," including specifically the "substan[ce]" of Article I. *Id.*, at 508. And in so doing, this expanded version of common sense just becomes the substantive major questions doctrine by another name.

Today's decision illustrates the point. The principal opinion gestures at "common sense." *Ante,* at 8. But throughout, this "common sense" is linked to "'constitutional structure'" and "'separation of powers principles.' " *Ibid.* The principal opinion begins with the Constitution, observing that Article I vests the tariff power in Congress, not the executive branch. *Ante*, at 5–6. The principal opinion recounts the President's claim that Congress has "delegated" an "extraordinary" amount of its tariff power to him in IEEPA. *Ante,* at 8–9. And from there, the principal opinion proceeds to apply a clear-statement rule. It acknowledges that the ordinary meaning of the key statutory term in IEEPA—the word "regulate"—is capacious, so much so that it could be understood to "captur[e] much of what a government does." *Ante*, at 14. Still, the principal opinion reasons, that is not enough to sustain the President's claim because the statute does not "clear[ly]" grant him the "extraordinary" delegated power he seeks. *Ante,* at 13, 20. When it comes down to it, common sense serves as little more than a segue to Article I's Vesting Clause.

That is as it must be. The statutory terms contain no ambiguity we could use (or need) "commonsense principles of communication" to resolve. *Nebraska*, 600 U. S., at 514 (BARRETT, J., concurring). This case is nothing like the " 'drew blood' " illustration, where it might " 'g[o] without saying'" that any ordinary person would immediately

understand which of two idiomatic meanings a penal statute employed. *Id.*, at 512. Indeed, today's principal opinion does not even "attempt to set forth the metes and bounds" of IEEPA's key phrase " 'regulate . . . importation,'" *ante*, at 16, much less find the "best" or "most natural" meaning of those words, *Nebraska*, 600 U. S., at 508, 521 (BARRETT, J., concurring); *post*, at 1. Instead, we need go no further than to recognize that IEEPA fails to "clear[ly]" authorize tariffs. *Ante*, at 13, 20. And the only reason we can stop there is because Article I—a "[s]ubstantive . . . valu[e] external to a statute," 600 U. S., at 508 (BARRETT, J., concurring)—imposes a clear-statement rule when executive officials claim Congress has afforded them an extraordinary authority.

There's another problem too. The equivocation on whether "commonsense principles of communication" include only those things that might "go without saying," or also include "external" and "substantive" Article I "values," leads to a further equivocation on how much "skepticism" common sense might dictate when assessing an executive official's claim to an extraordinary delegated power. Common sense, we are told, does not impose a " 'clarity tax,' " but it does add an "expectation of clarity." *Id.*, at 508, 514. Common sense does not " 'loa[d] the dice,' " but it does counsel "skepticism." *Id.*, at 510–511, 516. Common sense means never "forgo[ing] the most natural reading of a statute," *post*, at 3, but it always means "expect[ing that] Congress [will] make the big-time policy calls," *post*, at 2 (internal quotation marks omitted). I am uncertain what to make of this, except that it seems to toggle between a clear-statement rule and nothing at all.[2]

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[2] To the extent JUSTICE BARRETT suggests any skepticism "commonsense principles of communication" might (or might not) advise derives from a " 'practical understanding of legislative intent,' " rather than "external" and "substantive" Article I "values," that poses still further (and familiar) problems. *Nebraska*, 600 U. S., at 508, 515 (concurring

I am certain of one thing: Our cases hold a clear statement is required to support a claim to an extraordinary delegated power. We required Congress to "speak clearly" in *Utility Air*, 573 U. S., at 324. We demanded "clear congressional authorization" in *NFIB*, 595 U. S., at 118. We did the same in *Nebraska*, 600 U. S., at 506, and in *West Virginia*, 597 U. S., at 732, and we do so again today, *ante,* at 13. Nor do I see cause for being quite so reluctant about acknowledging this. The common law recognized many clear-statement rules. See, *e.g.*, Part I–B, *supra.* Our own cases have applied a host of Constitution-enforcing clear-statement rules as well. We just encountered the federalism clear-statement rule in *Bond*. Add to the list clear-statement rules against laws that might apply retroactively, waive or abrogate sovereign immunity, or create enforceable rights under the Taxing Clause—to name just a few. See, *e.g.*, *Landgraf* v. *USI Film Products*, 511 U. S. 244, 265–268 (1994); *Financial Oversight and Management Bd. for P. R.* v. *Centro De Periodismo Investigativo, Inc.*, 598 U. S. 339, 346–347 (2023); *Medina* v. *Planned Parenthood South Atlantic*, 606 U. S. 357, 383–384, n. 8 (2025). Maybe all these rules could be recast as "common sense"—at least if common sense means taking account of the "external" and

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opinion) (quoting *West Virginia* v. *EPA*, 597 U. S. 697, 723 (2022)). Down that road lies all the pitfalls associated with reliance on legislative history and those associated with conflating unenacted legislative intent with the law. Scalia & Garner 397; *post*, p. 1 (JACKSON, J., concurring in part and concurring in judgment). Similar problems attend the notion that the appropriate degree of skepticism due a delegation might turn on what people "expect." *Nebraska*, 600 U. S., at 514, 520 (BARRETT, J., concurring); see also *post*, at 2 (same). JUSTICE BARRETT has offered no evidence about what people "expect" when confronted with different congressional delegations. And to the extent she believes their "expectations" would reflect an appropriate consideration of the whole " '*corpus juris*,' including the Constitution," *post*, at 2, n. 1, that just circles us right back to the "external" and "substantive" Article I "values" she strives so hard to sideline, see *Nebraska*, 600 U. S., at 508 (BARRETT, J., concurring).

"substantive" "values" found in "our constitutional structure." *Nebraska*, 600 U. S., at 508, 515 (BARRETT, J., concurring). But whatever the label, it hardly requires some "judicial flex," *post*, at 4, to recognize that the "external" constitutional "values" at stake in our major questions cases are no less weighty than those at play in other settings where we routinely apply a clear-statement rule.[3]

III

That brings us to the third camp. My dissenting colleagues have defended the major questions doctrine in the past, and they do so again today. *Post*, at 31–33 (opinion of KAVANAUGH, J.). They agree that the doctrine is grounded in the Constitution. *Post*, at 32. They agree that the doctrine requires us to deviate from " 'routine' " statutory interpretation principles and instead place a "thumb on the scale," one requiring executive officials to identify " 'clear' " congressional authorization when they seek to exercise some "major" power. *Post*, at 33. But, my colleagues say, IEEPA provides the clear statement needed to sustain the President's tariffs. *Post*, at 38–45. Alternatively, they submit, we shouldn't apply the major questions doctrine to any statute, like IEEPA, that implicates "foreign affairs." *Post*, at 45–49. And this exception, they add, is particularly warranted here because Congress has historically granted the

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[3] Notably, past critics of the major questions doctrine have not hesitated to apply many of these clear-statement rules. See *Financial Oversight and Management Bd. for P. R.* v. *Centro De Periodismo Investigativo, Inc.*, 598 U. S. 339, 346–347 (2023) (opinion for the Court by KAGAN, J.); *Loper Bright Enterprises* v. *Raimondo*, 603 U. S. 369, 455–456, n. 1 (2024) (KAGAN, J., dissenting) (collecting examples); *West Virginia*, 597 U. S., at 751, n. 7 (GORSUCH, J., concurring) (same). Nor have they hesitated to adopt and apply other clear-statement rules with far less grounding in the Constitution than the major questions doctrine. See, *e.g.*, *Bowe* v. *United States*, 607 U. S. ___, ___–___ (2026) (slip op., at 9–10); *id.*, at ___–___ (GORSUCH, J., dissenting) (slip op., at 12–15); *Boechler* v. *Commissioner*, 596 U. S. 199, 208 (2022).

President large discretion in setting tariffs. *Post*, at 49–53. Once again, the points are thoughtful and merit careful consideration.

A

My dissenting colleagues begin by taking the major questions doctrine as they find it. They accept that the President's challenged actions are "of major economic and political significance." *Post*, at 33. They accept as well that he must identify "clear" congressional authorization to sustain those actions. *Ibid*. Still, the dissent maintains, IEEPA clearly grants the President the tariff power he asserts.

To arrive at that conclusion, the dissent consults four clues we have sometimes employed in our major questions cases to help assess whether a statute clearly authorizes an asserted power. See *West Virginia*, 597 U. S., at 746 (GORSUCH, J., concurring). The dissent formulates these clues largely as I would. See *post*, at 35–38. But, to my eyes, the dissent engages in a little grade inflation when applying them.

First, is the President seeking to exercise an "unheralded" or "newfound" power based on a "long-extant" statute? *Post*, at 39 (internal quotation marks omitted). The dissent insists that is not the case here because President Nixon imposed a 10 percent tariff on most imports in 1971, and then defended that action in lower courts under a predecessor to IEEPA, the Trading with the Enemy Act (TWEA). *Ibid.* But the words "regulate . . . importation" were added to TWEA in 1941. §301(1)(B), 55 Stat. 839. Congress used the same language in IEEPA in 1977. §203(a)(1)(B), 91 Stat. 1626. And in the 85 years of TWEA's existence with that language (and the 49 years of IEEPA's), that is the only time either statute has been invoked to impose tariffs. *Ante,* at 10–11, 17–18. A single time, and one never tested in this Court. Nor are these statutes seldom used. "Each year since 1990, Presidents have issued

roughly 4.5 executive orders . . . and declared 1.5 new national emergencies citing IEEPA." Congressional Research Service, The International Emergency Economics Powers Act: Origins, Evolution, and Use 20 (Sept. 1, 2025). That is pretty strong evidence the President here seeks to "deploy an old statute" in a novel way. *West Virginia*, 597 U. S., at 747 (GORSUCH, J., concurring).

Second, how has the executive branch interpreted IEEPA in the past? *Post*, at 40–41. The dissent says Presidents have long understood IEEPA to permit them to impose tariffs. *Ibid.* But for support, the dissent again relies on isolated evidence about other statutes. It points to the monetary exactions President Ford ordered under the Trade Expansion Act of 1962. *Post*, at 17, 40. And, once more, it points to President Nixon's invocation of TWEA to support his 1971 tariffs during lower court proceedings (though the dissent brushes aside the fact that President Nixon initially rejected the idea of relying on TWEA, see Brief for Carla Hills et al. as *Amici Curiae* 12–14). Whatever one makes of this history, it hardly reveals the kind of contemporaneous and consistent executive interpretation that might advance the dissent's cause. See *West Virginia*, 597 U. S., at 747 (GORSUCH, J., concurring). To the contrary, the fact that no President until now has invoked IEEPA to impose a duty—even one percent on one product from one country—is telling. *Id.*, at 748.

Third, is there a "mismatch" between the action the executive official seeks to take and his expertise? *Post*, at 41. On this one, I agree with the dissent. If tariffs fall in any executive official's "wheelhouse" (and not Congress's), it's the President's. *Ibid.*; see also *supra*, at 6.

Fourth, is the President "relying on oblique, elliptical, or cryptic language"? *Post*, at 41–42. The dissent says no because "[t]his case does not involve elephants in mouseholes." *Post*, at 41 (internal quotation marks omitted). Put another way, the dissent insists, the provisions of IEEPA

before us are not "ancillary" ones, but are designed to convey significant powers. *Post*, at 43 (internal quotation marks omitted). It's a fair enough point as far as it goes. But our cases ask not just whether a provision is a "mousehole" or "ancillary." They also caution against reading extraordinary powers into "broad or general" statutory language. *West Virginia*, 597 U. S., at 746 (GORSUCH, J., concurring) (internal quotation marks omitted); see also *Sossamon* v. *Texas*, 563 U. S. 277, 291 (2011) ("[C]lear statement rules ensure Congress does not, by broad or general language, legislate on a sensitive topic inadvertently or without due deliberation" (internal quotation marks omitted)). Indeed, and as we have seen, many of our major questions cases have found broad or general terms in significant statutes insufficient to support a claim to an extraordinary or unusual power. See Part I–A, *supra*. And here, the word "regulate" is broad as can be. So broad that it could be read to "captur[e] much of what a government does." *Ante,* at 14.

As I see it, then, three of the four clues the dissent relies on cut against it. It is important to add, as well, that as helpful as these clues can be in helping courts spot when a claimed power is *not* supported by clear statutory authority, they do not represent some exhaustive checklist, nor does satisfying one guarantee a claim will succeed. So, for example, even if an asserted power is in the agency's "wheelhouse," we might rule (and have ruled) against the agency if the power is "unheralded" because the statute has stood for decades without being interpreted to convey the power claimed. See, *e.g.*, *Brown & Williamson*, 529 U. S., at 144, 159–160.

Ultimately, the central question in any major questions case remains whether the executive branch's claim to an extraordinary power *is* supported by clear statutory authority. And, as the principal opinion explains at length, many additional clues beyond those the dissent addresses confirm that the President cannot meet that standard in this case.

These additional clues include the way the key statutory term "regulate" is used elsewhere in the U. S. Code, how Congress has delegated tariff authority in the past, and other neighboring language in IEEPA itself. *Ante*, at 14–15.

Contrary to the dissent's charge, too, the principal opinion's application of the major questions doctrine today in no way amounts to a "magic-words test." *Post*, at 44. Of course, if IEEPA included terms like "tariff" or "duty," that would have sufficed. But, to borrow a phrase from the dissent, "monetary exactions on foreign imports" would have worked just as well. *Post*, at 17. Same goes for "tax on imported goods." Or any similarly clear term or phrase. But IEEPA includes no such language, just a broad term that could cover almost anything a government does. And requiring specific rather than general language is just how clear-statement rules work. See, *e.g.*, *Sossamon*, 563 U. S., at 291.

B

If the President's claim fails under our usual major questions test, the dissent says we should respond by carving out an exception to it for cases (like this one) touching on "foreign affairs." *Post*, at 45.

On this score, I share a limited point of agreement with the dissent. Like the nondelegation doctrine, the major questions doctrine protects Article I's Vesting Clause and, for that reason, the doctrine does not apply where the President is exercising only his own inherent Article II powers. Like the nondelegation doctrine, too, the major questions doctrine may speak with less force where the President and Congress enjoy "overlap[ping] . . . authority." See *Gundy* v. *United States*, 588 U. S. 128, 159 (2019) (GORSUCH, J., dissenting); see also C. Bradley & J. Goldsmith, Foreign Affairs, Nondelegation, and the Major Questions Doctrine, 172 U. Pa. L. Rev. 1743, 1747 (2004) (Bradley & Goldsmith)

(explaining the "supposed foreign affairs exception" to the nondelegation doctrine "is better understood as a qualification that concerns situations in which a statutory authorization relates to an independent presidential power").

Doubtless, cases implicating overlapping powers can arise in the field of foreign affairs. The Constitution, for example, vests in Congress the power to raise and regulate armies, but it also vests in the President the commander-in-chief power. Compare Art. I, §8, cls. 12–14, with Art. II, §2, cl. 1. Similarly, Congress enjoys the power to regulate foreign commerce, but the President has power to negotiate treaties and nominate ambassadors. Compare Art. I, §8, cl. 3, with Art. II, §2, cl. 2. The President may even enjoy some "residual" powers pertaining to foreign affairs under Article II's Vesting Clause endowing him with the "executive Power." See S. Prakash & M. Ramsey, The Executive Power Over Foreign Affairs, 111 Yale L. J. 231, 234 (2001) (Prakash & Ramsey); but see C. Bradley & M. Flaherty, Executive Power Essentialism and Foreign Affairs, 102 Mich. L. Rev. 545, 551–552 (2004). Given all this, it is easy enough to imagine statutes and disputes under them that implicate both congressional and presidential powers where we might have reason to question whether the major questions doctrine applies with its usual force.

The problem for the dissent is that none of this is relevant here. Before us, the President concedes that he does not enjoy independent Article II authority to impose tariffs in peacetime. *Ante,* at 18–19. Nor does the President claim " 'concurrent'" constitutional authority to issue his tariffs. *Ante*, at 13 (citing Tr. of Oral Arg. 70–71). Instead, and to his credit, the President admits the power to authorize tariffs in peacetime is constitutionally vested in "Congress alone." *Ante,* at 13 (internal quotation marks omitted). Therefore, the President relies entirely on power derived from Congress, and that means the major questions doctrine applies in the normal way. See Bradley & Goldsmith

1796 ("IEEPA [is] not [an] authorizatio[n] that obviously connect[s] to independent presidential power in ways that would warrant the independent powers qualification").

Because of this problem, the dissent must argue for a much broader "foreign affairs" qualification to the major questions doctrine. Rather than ask whether an independent, constitutionally vested presidential power is implicated, the dissent would have us ask instead whether the President seeks to use the statute in question for a foreign affairs purpose—for example, as a "too[l]" to "incentivize a change in behavior by allies . . . or enemies." *Post*, at 50. When he does, the dissent submits, the major questions doctrine should not apply. And that's true, the dissent continues, even if the power the President asserts has "significant domestic ramifications." *Post*, at 51.

This new exception to the major questions doctrine would have (enormous) consequences hard to reconcile with the Constitution. Article I, §8, vests in Congress many powers that touch on "foreign affairs." Some of those powers were expected to be (and are) the "principal objects of federal legislation." The Federalist No. 53, p. 333 (C. Rossiter ed. 1961) (J. Madison). They include not only the power to impose tariffs, cl. 1, but also the power to establish uniform rules of naturalization, cl. 4, appropriate money for armies, cl. 12, and define and punish offenses against the law of nations, cl. 10. Under the dissent's view, all these legislative powers and more could be passed wholesale to the executive branch in a few loose statutory terms, no matter what domestic ramifications might follow. And, as we have seen, Congress would often find these powers nearly impossible to retrieve. See Part I–C, *supra*.

Consider an example. Imagine Congress adopted a law that arguably could be read to let the President borrow and spend money during peacetime as he sees fit. A law like that would represent an extraordinary delegation of Congress's power both to borrow "on the credit of the United

States," Art. I, §8, cl. 2, and to spend money in support of the "general Welfare," §8, cl. 1, and would carry with it "significant domestic ramifications," *post*, at 51. But if an enterprising executive could also use the law as a "tool" for affecting the behavior of "allies . . . or enemies," the dissent seemingly would have us exempt it from scrutiny under the major questions doctrine.

The dissent's exception is so broad it's hard not to wonder how it fits with some of our existing major questions precedents. In *West Virginia*, the Court applied the major questions doctrine over a dissent expressing concern that doing so would deny the EPA (and therefore the President) the power to respond to "the most pressing environmental challenge of our time"—"[c]limate chang[e]." 597 U. S., at 753 (KAGAN, J., dissenting) (internal quotation marks omitted). A challenge, the dissent continued, that threatened consequences global in scope, including "mass migration events[,] political crises, civil unrest, and even state failure." *Id.*, at 754 (internal quotation marks omitted). Was *West Virginia* a "foreign affairs" case? How about our major questions cases addressing efforts to combat the global pandemic that was COVID–19? See, *e.g.*, *NFIB*, 595 U. S., at 114.[4]

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[4] The dissent suggests that trying to identify when an independent Article II authority is in play would prove "jurisprudentially chaotic." *Post*, at 53, n. 23. But as the foregoing discussion illustrates, the dissent's alternative "foreign affairs" test poses its own challenges. And it seems to me only one is firmly rooted in the text of the Constitution. See Bradley & Goldsmith 1747; see also Prakash & Ramsey 233 ("[O]ne would think that the Constitution's text ought to play the preeminent role in discerning the Constitution's allocation of foreign affairs powers"). In this case, too, only one test promises any manner of "chao[s]" because all parties before us readily agree that the Constitution affords the President no independent power to impose peacetime tariffs. See H. Powell, The President's Authority Over Foreign Affairs: An Executive Branch Perspective, 67 Geo. Wash. L. Rev. 527, 549 (1999) ("The President has no independent power directly to regulate [or] tax . . . foreign commerce").

Seeking support for its sweeping new exception, the dissent points to three main precedents. *Post*, at 46–48, 53–57. I do not see how any of them might sustain its view. The first, *Hamdi* v. *Rumsfeld*, 542 U. S. 507 (2004), concerned the 2001 Authorization for Use of Military Force (AUMF), legislation which authorized the President to use "all necessary and appropriate force against those nations, organizations, or persons" responsible for the September 11, 2001, attacks. *Id.*, at 510 (internal quotation marks omitted). The dissent highlights the principal opinion's conclusion that the AUMF allowed the President to detain enemy combatants even though the law did not mention that power expressly. *Id.*, at 510, 516–517 (opinion of O'Connor, J.). And from this, the dissent draws the inference that any statute addressing foreign affairs should be exempt from scrutiny under the major questions doctrine. *Post*, at 54–55. But the dissent overlooks the fact that the principal opinion reached the conclusion it did only because it found detention of enemy combatants to be a traditional "incident to war." 542 U. S., at 518. And once Congress declares war (or, likewise, authorizes the use of military force abroad), that implicates the President's commander-in-chief powers. Put simply, *Hamdi* was a case of overlapping powers. Ours is not.

Second, the dissent invokes *Dames & Moore* v. *Regan*, 453 U. S. 654 (1981). See *post*, at 55–56. At its heart, that case involved an executive order by President Reagan suspending certain claims by U. S. citizens against Iran as part of a settlement involving the release of American hostages held there. 453 U. S., at 675. Just as we do today, *Dames & Moore* held that the "terms of the IEEPA . . . d[id] not authorize" the President's actions. *Ibid.* Even so, the Court proceeded to uphold those actions anyway, and did so based in part on its view (right or wrong) that the President enjoyed some " 'independent' " power to "enter into executive agreements" suspending certain claims. *Id.*, at 678, 682–

683. So unlike our case, *Dames & Moore* again involved overlapping powers. Along the way, too, the Court emphasized (repeatedly) the "narrowness" of its decision and that it should not be taken to "lay down" any "general 'guidelines' covering other situations not involved here." *Id.*, at 661; see also *id.*, at 660, 688. To derive from *Dames & Moore* a new general guideline exempting "foreign affairs" cases from the major questions doctrine's reach would thus require us to disregard its own cautionary direction.

Third, the dissent cites *United States* v. *Curtiss-Wright Export Corp.,* 299 U. S. 304 (1936). See *post*, at 46–48. There, the Court did suggest that nondelegation rules in the field of "domestic or internal affairs" should differ from those in the realm of "foreign or external affairs." *Curtiss-Wright*, 299 U. S., at 315. But what should we make of that language? If it means that the nondelegation doctrine (and perhaps, by extension, the major questions doctrine) must account for the President's independent Article II powers, I agree.

But I would hesitate to read more into the decision than that. Consider what was really at issue there. A statute permitted the President to ban the transfer of one class of goods (armaments). *Id.*, at 312. It did so with respect to two countries then engaged in a war (Bolivia and Paraguay). *Ibid.* The President's authority was conditioned on a finding that a ban "'may contribute to the reestablishment of peace between those countries.'" *Ibid.* Before making that finding, too, Congress directed him to consult " 'with the governments of other American Republics.'" *Ibid.* All told, then, the statute set forth the policy for the President to pursue. It bounded his authority by limiting his options with respect to a limited class of goods and countries. The statute further conditioned his exercise of those options on a factual finding reached after consultation with other nations. So whatever else might be said about *Curtiss-Wright*, one thing is apparent: In upholding the

President's actions under the law in question, the Court hardly allowed Congress to hand off all of its enumerated powers touching on foreign affairs to the President, the tariff power included.[5]

C

If its effort to secure a broad foreign affairs exception to the major questions doctrine won't work, the dissent hints at a more limited one specific to tariffs. Such an exception makes sense, the dissent says, because "Presidents have long been granted substantial discretion over tariffs." *Post*, at 52 (internal quotation marks omitted). Indeed, the dissent contends, this tradition traces "back to near the Founding." *Post*, at 59. If the dissent were right about that, one might hesitate before accepting the President's concession that this case does not implicate any inherent Article II authority. But, at least as I read it, history offers the dissent little to work with.

Americans fought the Revolution in no small part because they believed that only their elected representatives (not the King, not even Parliament) possessed authority to tax them. Declaration of Independence ¶19. And, they believed, that held true not just for direct taxes like those in the Stamp Act, but also for many duties on imports, like those found in the Sugar Act. E. Morgan & H. Morgan, The Stamp Act Crisis: Prologue to Revolution 72–74 (1995 ed.); see 1 E. Stanwood, American Tariff Controversies in the Nineteenth Century 60 (1903) (Stanwood); C. Van Tyne,

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[5] In places, the dissent also argues that the President's inherent Article II authority includes a wartime tariff power. See *post*, at 22–24; see also Brief for Professor Aditya Bamzai as *Amicus Curiae* 3. But this only highlights the dissent's bind. Whatever the full scope of the President's Article II war powers may be (and the briefs before us reveal a healthy debate whether they include the power to impose tariffs), those powers are not implicated here. IEEPA is not a wartime statute, nor does the President claim we are at war with the countries whose goods are subject to the tariffs.

The Causes of the War of Independence 126–136 (1922); J. Otis, The Rights of the British Colonies Asserted and Proved (1764), in The Collected Political Writings of James Otis 119, 161–162 (2015); see also *id.*, at xii (Introduction).

Americans later codified these beliefs in the Constitution. Under the Articles of Confederation, the national government was laden with debt and enjoyed few ways to repay it. To address that problem, the framers afforded the federal government new taxing powers in the Constitution. Art. I, §8, cl. 1. Many thought these powers among "the most important" features of the new federal charter. See, *e.g.*, The Federalist No. 33, at 202–203 (A. Hamilton). But, consistent with their view that only the people's elected representatives could constitutionally tax them, the framers gave Congress alone "access to the pockets of the people." *Id.*, No. 48, at 310 (J. Madison). And to cement that role, the Constitution required that "All Bills for raising Revenue shall originate in the House of Representatives," the body most responsive to the people. Art. I, §7, cl. 1.

For much of the Nation's history, this taxing power was essentially a tariff power. The framers even considered (and eventually rejected) the possibility of giving the federal government the power to tax only through tariffs. The Federalist No. 35, at 211 (A. Hamilton). No surprise, then, that Congress's first exercise of its taxing power was a tariff law. P. Ashley, Modern Tariff History 170–171 (2d ed. 1910). And until the 20th century, tariffs "accounted for between 50 and 90 percent" of the federal government's revenue. J. Dobson, Two Centuries of Tariffs: The Background and Emergence of the United States International Trade Commission 1 (1976).

How did Congress exercise its all-important tariff power? It debated every detail of the first tariff Act. Stanwood 39–71. Ultimately, Congress said, imported malt would incur a charge of 10 cents a bushel. Brown sugar one cent. Loaf sugar three cents. And so on. *Id.*, at 59. The first tariff Act

was set to last for seven years. *Id.*, at 72. It lasted barely one. *Ibid.* Soon, Congress was at it again, laying out another exacting schedule of duties. *Id.*, at 75–76. Throughout much of the 19th century, Congress proceeded similarly, enacting highly detailed tariff schedules one after another. See F. Taussig, The Tariff History of the United States 68–170 (8th ed. 1931).

An early debate over executive involvement in setting tariffs demonstrates just how strongly Congress felt that tariffs were a legislative business. In December 1791, President Washington told Congress that General St. Clair had been defeated in the Northwest Indian War, and the country would have to increase the size of the army. Stanwood 104. That meant the government needed more money. In response, a resolution was offered in the House of Representatives to solicit advice from the Secretary of the Treasury, Alexander Hamilton, on the best way to raise the additional revenue—including through new tariffs. 3 Annals of Congress 437 (1792); Stanwood 105–106. Ultimately, Hamilton's advice was sought, but only after a debate over the constitutionality of even asking a member of the executive branch for advice on raising revenue. *Ibid.*; 3 Annals of Congress 447.

To be sure, on later occasions Congress turned to the executive branch for more help still. But it usually did so to address changing trade practices in foreign countries. And in doing so, Congress set the important policies, with the executive branch responsible for finding facts—like what other countries' trade policies were at any given moment—or filling in the details. So, for example, Congress passed a statute in 1815 to repeal any "discriminating duty of tonnage . . . whenever the President" was "satisfied" that other countries' "discriminating or countervailing duties" had "been abolished." Act of Mar. 3, 1815, ch. 77, 3 Stat. 224; see also, *e.g.*, Act of Jan. 7, 1824, 4 Stat. 2–3.

Given this history, it's no surprise that the dissent relies mostly on statutes and cases after 1890. *Post*, at 59. But even they do little to support its claim. *J. W. Hampton, Jr., & Co.* v. *United States*, 276 U. S. 394 (1928), for example, involved a law instructing the President to "investigat[e]" the costs of production for American firms and their foreign counterparts and issue tariffs to "equalize" those costs. *Id.*, at 401, 409 (internal quotation marks omitted). The statute the Court faced in *Marshall Field & Co.* v. *Clark*, 143 U. S. 649, 681 (1892), spoke similarly. Even when *Federal Energy Administration* v. *Algonquin SNG, Inc.*, 426 U. S. 548, came along in 1976, the Court upheld President Ford's imposition of monetary exactions on a single class of products under a statute that provided at least some guidance about how he should implement the law. *Id.*, at 559. And whether correctly decided or not, that case lies a far step from this one.

Before us, the President insists he may use IEEPA to equalize foreign and domestic duties—or not. He may use it to negotiate with foreign countries—or not. He may set tariffs at 1 percent or 1,000,000 percent. He may target one nation and one product or every nation and nearly every product. And he may change his mind at any time for nearly any reason. At least as I see it, history dating "back to near the Founding," *post*, at 59, does not support the notion that Presidents have traditionally enjoyed so much power. More nearly, history refutes it.[6]

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[6] Beyond the major questions hurdle, the dissent faces another, related one: the nondelegation doctrine. There the problems are just as acute. In recent decades, this Court has employed a relatively lax "intelligible principle" test to police delegations. See *FCC* v. *Consumers' Research*, 606 U. S. 656, 673 (2025); cf. *Gundy* v. *United States*, 588 U. S. 128, 157–159 (2019) (GORSUCH, J., dissenting) (arguing for a more traditional test). But recognizing that even the intelligible principle test poses challenges for it, the dissent contends for an even laxer test yet in cases involving "foreign affairs" and tariffs. *Post*, at 57–61. It's an effort that fails for

IV

That leaves one final camp to consider. JUSTICE THOMAS suggests that Congress may hand over most of its constitutionally vested powers to the President completely and forever. *Post*, at 2–3 (dissenting opinion). On his view, the only powers Congress may not delegate are those that involve "rules setting the conditions for deprivations of life, liberty, or property." *Ibid.* From this rule, it follows that Congress may give all its tariff powers to the President because "[i]mporting is a matter of privilege." *Post*, at 10–11. And, as a result, this case does not implicate any " '"separation of powers"' " concerns at all. *Post*, at 3 (quoting *ante,* at 8).

It's a sweeping theory. One that would require us to reimagine much of our case law addressing Article I's Vesting Clause. And one that presents difficulties of its own.

First, I do not see how JUSTICE THOMAS's theory resolves all " '"separation of powers"' " concerns in this case. *Post*, at 3 (quoting *ante,* at 8). Suppose for argument's sake that Congress *can* delegate its tariff powers to the President as completely as JUSTICE THOMAS suggests. Even then, the question remains whether Congress *has* given the President the tariff authority he claims in this case—or whether the President is seeking to exploit questionable statutory language to aggrandize his own power. See Part I–C, *supra.* Put another way, JUSTICE THOMAS's nondelegation solution does not automatically solve the major questions problem. As we have seen, when an executive official claims Congress has delegated to him some extraordinary power, the major questions doctrine requires him to identify clear statutory authority for its exercise—a standard he

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reasons we have just seen. Even if the nondelegation doctrine should apply differently when congressional legislation and executive actions implicate inherent Article II powers, *Gundy*, 588 U. S., at 159, none of that means it should do so where (as here) the President derives whatever authority he has only from Congress.

must satisfy even if Congress is free to pass to him the power he seeks. *Post*, at 2–3. In fact, this Court has previously applied, with our colleague's assent, the major questions doctrine in a case that appears, under his present view, to involve a power that Congress could delegate wholesale to the President. See *Nebraska*, 600 U. S., at 486–488 (involving the power to cancel federal student loan debts, which on JUSTICE THOMAS's account presumably qualifies as a benefit or privilege, not a right to life, liberty, or property). And, just as the major questions doctrine precluded the executive branch's assertion of power in that case, it does so here.

Second, even when it comes to the nondelegation doctrine, JUSTICE THOMAS's theory raises many questions. I appreciate that the doctrine may apply with less force in certain areas, such as when Congress legislates in a way that implicates one of the President's inherent powers. See Part III–B, *supra*; *Gundy*, 588 U. S., at 159 (GORSUCH, J., dissenting). But JUSTICE THOMAS would go much further. On his telling, the doctrine applies only to Congress's true legislative powers, which he says include only those powers addressing the deprivation of life, liberty, or property. As it turns out, only a small subset of Congress's enumerated powers in Article I, §8, fit that bill. See *post*, at 5–6 (listing the powers to punish counterfeiters, tax "internal[ly]," and regulate interstate commerce). Only those few powers are exclusively vested in Congress and subject to review of any kind under the nondelegation doctrine. All "other kinds of power[s]" enumerated in Article I, §8—including the powers to borrow and spend money, declare war, and regulate foreign trade—are not truly legislative and may be delegated at will. *Post*, at 2. So Congress may hand them off to the President completely and he has no need to worry about legal challenges under even this Court's (relatively lax) nondelegation doctrine. No matter, too, that Congress

might find itself permanently unable to retrieve these powers. See Part I–C, *supra*.

But if all that's true, what do we make of the Constitution's text? Section 1 of Article I vests "[a]ll legislative Powers herein granted" in Congress and no one else. Section 8 proceeds to list those powers in detail and without differentiation. Neither provision speaks of some divide between true legislative powers touching on "life, liberty, or property" that are permanently vested in Congress alone and "other kinds of power[s]" that may be given away and possibly lost forever to the President. *Post*, at 2.

What do we make, too, of what the founders said about Article I both before and after the Constitution's ratification? They regularly referred to powers in Article I, §8—even those that do not touch on life, liberty, or property—as legislative in nature. At the Constitutional Convention, early drafts described the powers to regulate "foreign" commerce, "raise armies," "equip Fleets," "coi[n] . . . money," and "establish post-offices" as "legislative powers." 2 The Records of the Federal Convention of 1787, pp. 142–144 (M. Farrand ed. 1966) (Farrand). James Madison wrote to Congress in 1817 that "[t]he legislative powers vested in Congress are specified and enumerated in the eighth section of the first article of the Constitution." 8 The Writings of James Madison 386 (G. Hunt ed. 1908); see also 1 *id.*, at 112, 133, 381 (noting, before the Constitutional Convention, the "legislative power over captures," and arguing borrowing money is an "exclusive power of Legislation").

Alexander Hamilton spoke similarly. 3 The Works of Alexander Hamilton 479 (H. Lodge ed. 1904) (Lodge) (discussing "[t]he legislative power of borrowing money"); 6 *id.*, at 182 (describing "the legislative power of regulating trade with foreign nations"); 2 *id.*, at 197, 198 (calling of "the legislative kind" and "of a legislative nature" the powers to raise money and troops, "establish rules in all cases of capture by sea or land," "regulate the alloy and value of coin,"

and "make all laws for the government of the army and navy"). So did James Wilson. 1 Collected Works of James Wilson 268 (K. Hall & D. Hall eds. 2007) (describing all the Senate's powers as "legislative powers," with the exception of the powers to try impeachments, concur in treaties, and consent to the appointment of officers, matters addressed outside Art. I, §8).

What do we make as well of early congressional debates? In the Second Congress, for example, the House of Representatives rejected on nondelegation grounds a proposal to give the President a largely unfettered power to establish postal routes, even though doing so hardly would have touched on life, liberty, or property. 3 Annals of Congress 229–242. In the Fifth Congress, four Representatives likewise objected on nondelegation grounds to a bill that authorized the President to raise an army of up to 10,000 men. 8 *id.*, at 1525–1527, 1532, 1535 (remarks of Reps. Nicholas, Gallatin, Baldwin, and McDowell). Though the bill ultimately passed, see Act of May 28, 1798, 1 Stat. 558, it did so apparently because it was deemed not to violate Article I's nondelegation principle—no Member of Congress responded that the principle was wholly inapplicable because the delegated power was not one that involved setting conditions for deprivations of life, liberty, or property. See 8 Annals of Congress 1525–1542.

What are we to do, too, with this Court's nondelegation precedents, which have never turned on JUSTICE THOMAS's view of life, liberty, or property? See *J. W. Hampton, Jr., & Co.*, 276 U. S., at 403, 409 (scrutinizing a delegation to executive officials to set customs duties); *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, 405–406, 422, 433 (1935) (holding unconstitutional a delegation to executive officials to prohibit the transportation of petroleum products in interstate and *foreign* commerce); *National Broadcasting Co.* v. *United States*, 319 U. S. 190, 196, 214–215, 225–226 (1943) (scrutinizing the delegation of authority to regulate the

granting of broadcasting licenses); see also *Sessions* v. *Dimaya*, 584 U. S. 148, 217 (2018) (THOMAS, J., dissenting) ("[I]mpermissible delegations of legislative power violate [the nondelegation] principle, not just delegations that deprive individuals of 'life, liberty, or property'").

Third, even if a distinction between true legislative powers and "other kinds of power[s]" were proper, *post*, at 2, I do not see why the tariff power would fall in the latter category and thus be something Congress could delegate away wholesale, without scrutiny, and forever. JUSTICE THOMAS suggests all that is possible because, at the founding, the tariff power was considered a " 'prerogative right' " of the British King. *Post*, at 11 (quoting N. Gras, Early English Customs System 21 (1918)).

That seems doubtful. Tariffs may have been among the King's prerogative powers during the reign of Edward I. See *id.*, at 20–21; see also *post*, at 11, n. 3 (citing P. Einzig, The Control of the Purse: Progress and Decline of Parliament's Financial Control 65 (1959) (discussing the practices "during the Middle Ages")). But even before the year 1400, Parliament had achieved some "victory over the King in the matter of imposing import duties." *Id.*, at 108–109. And after the Glorious Revolution of 1688, as this Court has put it, Parliament "secured supremacy in fiscal matters." *Consumer Financial Protection Bureau* v. *Community Financial Services Assn. of America, Ltd.*, 601 U. S. 416, 428 (2024) (citing 1 W. Blackstone, Commentaries on the Laws of England 306, 333 (1771)). "By the time of the American Revolution, trade regulation was thus a prime topic of *legislative* concern" in Britain. M. McConnell, The President Who Would Not Be King 217 (2020) (emphasis added); see also J. Chitty, Law of the Prerogatives of the Crown 163 (1820) ("[T]he King does not possess any general common law prerogative with respect to foreign commerce").

More importantly still, whatever the views in Britain may have been, American revolutionaries hardly shared

some universal conviction that all manner of tariffs were a matter of the King's prerogative, or even something Parliament, lacking colonial representatives, could freely impose on them. Though in the mid-1760s some colonists distinguished between " 'internal'" and " 'external' taxation" and "conceded [Parliament's] right to raise revenue through duties on trade," "the inadequacy of [that] much overstrained distinction" soon "became obvious." B. Bailyn, The Ideological Origins of the American Revolution 212–213, 215 (1967). Illustrative of the point, John Dickinson came to "repudiat[e]" the distinction "flatly and formally" in his Letters from a Farmer in Pennsylvania, *id.*, at 215, contending instead that laws aimed at raising revenue, but enacted without representation, were objectionable without "distinction . . . between internal and external taxes," Letters From a Farmer in Pennsylvania 39 (1774). See also *supra*, at 36–37 (recounting colonial objections to the Sugar Act); H. Unger, American Tempest 101 (2011) (observing that the "import duties" in the Townshend Acts helped "incite Americans to rebel"). And, of course, it was duties on foreign tea that triggered the Boston Tea Party. J. Ellis, The Cause 17–18 (2021). Are we really to believe that the patriots that night in Boston Harbor considered the whole of the tariff power some kingly prerogative?

As we have already seen, too, the growing American conviction that the peacetime tariff power is legislative and belongs only to the people's elected representatives was later reflected in both the Constitution and early congressional practice. See Part III–C, *supra*. To that discussion, I would add just this. The Articles of Confederation granted the Confederation Congress authority to make commercial treaties, but no authority to restrain "the *legislative power* of the respective states" to impose "imposts and duties *on foreigners*." Art. IX (emphasis added). At the Constitutional Convention that followed, where the tariff power was transferred to the federal government, delegates likewise

referred to it as a "legislative power." See, *e.g.*, 3 Farrand 615; 2 *id.*, at 142–143. And, during debates over the Jay Treaty, Hamilton explained that he held no doubt that regulating foreign trade and raising money from it was a "legislative power," if one that could be constrained by treaty. 6 Lodge 182, 189–190, 196. Reflecting the same sentiment that helped fuel the Revolution, he asked: "[W]hat legislative power can be more sacred?" *Id.*, at 196.

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For those who think it important for the Nation to impose more tariffs, I understand that today's decision will be disappointing. All I can offer them is that most major decisions affecting the rights and responsibilities of the American people (including the duty to pay taxes and tariffs) are funneled through the legislative process for a reason. Yes, legislating can be hard and take time. And, yes, it can be tempting to bypass Congress when some pressing problem arises. But the deliberative nature of the legislative process was the whole point of its design. Through that process, the Nation can tap the combined wisdom of the people's elected representatives, not just that of one faction or man. There, deliberation tempers impulse, and compromise hammers disagreements into workable solutions. And because laws must earn such broad support to survive the legislative process, they tend to endure, allowing ordinary people to plan their lives in ways they cannot when the rules shift from day to day. In all, the legislative process helps ensure each of us has a stake in the laws that govern us and in the Nation's future. For some today, the weight of those virtues is apparent. For others, it may not seem so obvious. But if history is any guide, the tables will turn and the day will come when those disappointed by today's result will appreciate the legislative process for the bulwark of liberty it is.

SUPREME COURT OF THE UNITED STATES

Nos. 24–1287 and 25–250

LEARNING RESOURCES, INC., ET AL., PETITIONERS
24–1287 *v.*
DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL.

ON WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL., PETITIONERS
25–250 *v.*
V.O.S. SELECTIONS, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

[February 20, 2026]

JUSTICE BARRETT, concurring.

As the principal opinion demonstrates, the most natural reading of the International Emergency Economic Powers Act does not encompass the power to impose tariffs. I write only to address JUSTICE GORSUCH's concurrence regarding the major questions doctrine.

To the extent that JUSTICE GORSUCH attacks the view that "common sense" alone can explain all our major questions decisions, *ante*, at 18–22, he takes down a straw man. I have never espoused that view. Rather, as I explained in my concurrence in *Biden* v. *Nebraska*, 600 U. S. 477, 507 (2023), the major questions doctrine "situates text in context" and is therefore best understood as an ordinary application of textualism. *Id.*, at 511. Textualists—like all those

who use language to communicate—do not interpret words in a vacuum. Instead, we use context, including "[b]ackground legal conventions," "common sense," and "constitutional structure," to ascertain a text's "most natural meaning." *Id.*, at 511–512, 515, 509.

Part of this context, as I have explained, is Article I of the Constitution, which vests Congress with " '[a]ll legislative Powers.'" *Id.*, at 515 (quoting Art. I, §1). Obviously, the Constitution bears on the meaning of a statute enacted pursuant to it. Because Article I grants all legislative powers to Congress, the reasonable interpreter would expect Congress "to make the big-time policy calls itself, rather than pawning them off to another branch." *Nebraska*, 600 U. S., at 515 (BARRETT, J., concurring).[1]

To the extent that JUSTICE GORSUCH also thinks that background legal conventions and constitutional structure inform the most natural reading of a statute, then we may not be very far apart. See *ante*, at 8–12, 14 (concurring opinion). Our only disagreement may be over the level of clarity required before a particular interpretation can be deemed the most natural one. I understand JUSTICE GORSUCH to require Congress always to speak precisely to any major power that it intends to give away. See *ante*, at 12–14, 25–26 (concurring opinion). As I have said before, I think that other, "less obvious" clues can do the trick. See *Nebraska*, 600 U. S., at 514 (BARRETT, J., concurring). I do not see any such clues here; in fact, as the Court explains, the clues we have point in the opposite direction. See, *e.g.*, *ante*, at 8–9 (opinion of ROBERTS, C. J.) (detailing how

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[1] Contrary to JUSTICE GORSUCH's suggestion, this approach to the major questions doctrine does not risk "conflating unenacted legislative intent with the law." *Ante*, at 24, n. 2 (concurring opinion). Rather, like textualism more generally, it looks for "a sort of 'objectified' intent—the intent that a reasonable person would gather from the text of the law, placed alongside the remainder of the *corpus juris*," including the Constitution. A. Scalia, A Matter of Interpretation 17 (1997).

Congress has elsewhere delegated the power to impose tariffs); *ante*, at 14–15 (majority opinion) (stressing that the Government "cannot identify any statute in which the power to regulate includes the power to tax").

At times, though, JUSTICE GORSUCH suggests that the purpose of the major questions doctrine is something other than to ascertain the most natural reading of a statute. For example, he writes that the doctrine serves to prevent "highly resourceful members of the executive branch" from "assum[ing] new power for themselves" because "men are not angels." *Ante*, at 16 (concurring opinion); see *West Virginia* v. *EPA*, 597 U. S. 697, 735 (2022) (GORSUCH, J., concurring) (describing doctrine as a "clear-statement rul[e]" that "operates to protect foundational constitutional guarantees"); *National Federation of Independent Business* v. *OSHA*, 595 U. S. 109, 124–126 (2022) (GORSUCH, J., concurring) (similar). But if the Constitution permits Congress to give the Executive a particular power, who are we to get in the way? Does the Judiciary really protect the Constitution by impeding the constitutional action of another branch? If JUSTICE GORSUCH thinks that we should forgo the most natural reading of a statute because it is preferable for Congress, rather than the President, to make big decisions, that way lies "a lot of trouble" for the textualist. A. Scalia, A Matter of Interpretation 28 (1997) (Scalia).

Strong-form substantive canons—canons instructing a judge to adopt "an inferior-but-tenable reading"—veer beyond interpretation and into policymaking. *Nebraska*, 600 U. S., at 509 (BARRETT, J., concurring). And while the policy may be desirable or even constitutionally inspired, judges should hesitate to impose disciplining rules on Congress. See *ibid.*, n. 2 (explaining that such "prophylactic constraints" are "in tension with the Constitution's structure"). As Justice Scalia lamented, "whether these dice-loading rules are bad or good, there is also the question of where the courts get the authority to impose them. Can we

really just decree that we will interpret the laws that Congress passes to mean less or more than what they fairly say?" Scalia 28–29.

Granted, strong-form canons exist elsewhere in the law. See *Nebraska*, 600 U. S., at 508–509 (BARRETT, J., concurring). I do not propose to abandon these canons, nor have I taken the position that adopting them necessarily exceeds the judicial power. *Id.*, at 509, n. 2. But I am skeptical about adding new ones to the mix. *Ibid.* And while the major questions doctrine has an impressive pedigree as an interpretive principle, this Court has not (yet, anyway) embraced it as a strong-form rule that imposes a " 'clarity tax' " on Congress. *Id.*, at 508.

JUSTICE GORSUCH seems to disagree, pointing to a few late 19th- and early 20th-century cases.[2] See *ante*, at 12–14 (concurring opinion). But these cases, like our modern ones, are consistent with my context-based approach: They focus on ascertaining, not shaping, what the statute in dispute communicates. See, *e.g.*, *ICC* v. *Cincinnati*, *N. O. & T. P. R. Co.*, 167 U. S. 479, 511 (1897) (concluding that Congress "did not intend" to give interstate commission power to set railroad rates); *Siler* v. *Louisville & Nashville R. Co.*, 213 U. S. 175, 196 (1909) (reasoning that "the legislature never intended to and did not in fact" give a state commission power to set maximum railroad rates). I would not treat this evidence as precedent for a judicial flex. JUSTICE GORSUCH proposes to do something new. The innovation is in significant tension with textualism, so I do not support the project.

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[2] He also points to state cases and longstanding corporate law principles. *Ante*, at 8–13 (concurring opinion). While those sources support the existence of a background legal convention that informs a statute's most natural meaning, they are not evidence that this Court—which is bound by the constraints of Article III—has adopted a true clear-statement rule.

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[February 20, 2026]

JUSTICE KAGAN, with whom JUSTICE SOTOMAYOR and JUSTICE JACKSON join, concurring in part and concurring in the judgment.

The Court holds today that the International Emergency Economic Powers Act (IEEPA) does not authorize the President to impose tariffs. I agree with that conclusion, as I do with the bulk of the principal opinion's reasoning. But because I think the ordinary tools of statutory interpretation amply support today's result, I do not join the part of that opinion invoking the so-called major-questions doctrine.

The question that part asks, similar to the one posed in other " 'major questions' cases," is whether the President can identify "clear congressional authorization" for his action—here, to impose tariffs under IEEPA. *Ante,* at 7, 13, 20. The demand is for a clear statement—something more

explicit or specific than the statutory basis that would ordinarily suffice to support executive action. See, *e.g.*, *West Virginia* v. *EPA*, 597 U. S. 697, 721–724, 732 (2022); *Biden* v. *Nebraska*, 600 U. S. 477, 505–506 (2023). The reason for that requirement, according to today's opinion, is that the Executive has claimed an "extraordinary" power—one never asserted before and having large-scale "economic and political significance." *Ante,* at 7, 11; see *ante*, at 7–11.

I objected, in the principal cases cited, to the demand for a special brand of legislative clarity. See *West Virginia*, 597 U. S., at 764–784 (KAGAN, J., dissenting); *Nebraska*, 600 U. S., at 542–550 (KAGAN, J., dissenting). In my view, the Court used its clear-authorization rule in those cases to negate expansive delegations Congress had approved. I explained there that the proper way to interpret a delegation provision is through the standard rules of statutory construction. See *West Virginia*, 597 U. S., at 765–766 (KAGAN, J., dissenting). That means, most concisely stated, reading text in context. More expansively put, it means examining a delegation provision's language, assessing that provision's place in the broader statutory scheme, and applying a "modicum of common sense" about how Congress typically delegates. *Id.*, at 764 (KAGAN, J., dissenting); see *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U. S. 120, 133 (2000). The last of those inquiries includes consideration of whether Congress ever has before, or likely would, delegate the power the Executive asserts—a matter also of import in applying the major-questions doctrine. See *ante,* at 8–10; *Nebraska*, 600 U. S., at 512–514, 517–519 (BARRETT, J., concurring); *id.*, at 546, n. 3 (KAGAN, J., dissenting). In the past, though, I have thought that the Court used that doctrine to override—rather than help discover—the best reading of delegation statutes. See *West Virginia*, 597 U. S., at 756 (KAGAN, J., dissenting); *Nebraska*, 600 U. S., at 543 (KAGAN, J., dissenting).

This case presents more nearly the opposite situation: The use of a clear-statement rule here is unnecessary because ordinary principles of statutory interpretation lead to the same result.[1] It is not just that the Government's arguments fail to satisfy an especially strict test; it is that they fail to satisfy the normal one. Even without a clear-statement rule in the picture, the conclusion follows: IEEPA does not authorize the President to impose tariffs. And indeed, the principal opinion's reasoning well explains why. The rest of this opinion draws on that analysis (I hope without too much rehashing) to demonstrate what I view as the fundamental point: Usual text-in-context interpretation dooms the tariffs the President has imposed. The crucial provision of IEEPA, when viewed in light of the broader statutory scheme and with a practical awareness of how Congress delegates tariff authority, does not give the President the power he wants.

Most important, IEEPA's key phrase—the one the Government relies on—says nothing about imposing tariffs or

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[1] JUSTICE GORSUCH claims not to understand this statement, insisting that I now must be applying the major-questions doctrine, and his own version of it to boot. See *ante*, at 17 (concurring opinion) ("My concurring colleagues all but endorse it today"); *ante*, at 2, 7, 18 (similar). Given how strong his apparent desire for converts, see *ante*, at 2–26, I almost regret to inform him that I am not one. But that is the fact of the matter. I proceed in this case just as I did in *West Virginia* and *Nebraska*: I consider a delegation provision's language, broaden the scope to take in the statutory setting, and apply some common sense about how Congress normally delegates. See *West Virginia* v. *EPA*, 597 U. S. 697, 756–766 (2022) (KAGAN, J., dissenting); *Biden* v. *Nebraska*, 600 U. S. 477, 534–542 (2023) (KAGAN, J., dissenting). Contrary to JUSTICE GORSUCH's suggestion, see *ante*, at 3–7, that conventional method of interpretation will not always favor (or always disfavor) executive officials, given the variety of delegation schemes Congress adopts. I'll let JUSTICE GORSUCH relitigate on his own our old debates about other statutes, unrelated to the one before us. What matters here is only that IEEPA's delegation refutes the Executive's assertion of authority to levy tariffs, without any help from the major-questions doctrine.

taxes. That text authorizes the President, upon finding a foreign threat and declaring an emergency, to "regulate" the "importation" of foreign goods. 50 U. S. C. §1702(a)(1)(B). And the meaning of "regulate," both in common parlance and as Congress uses the word, does not encompass taxing. See *ante,* at 14–15. To "regulate," according to the Government's preferred definition, means to "fix, establish or control; to adjust by rule, method, or established mode; to direct by rule or restriction; to subject to governing principles or laws." Brief for Federal Parties 24 (quoting Black's Law Dictionary 1156 (5th ed. 1979)). Nothing in that definition naturally refers to levying taxes. Nor does Congress ever use the word "regulate" in that way. Hundreds of provisions in the U. S. Code give agencies the authority to "regulate" one thing or another. Yet the Government cannot identify a single one that is understood to grant taxing power. See Tr. of Oral Arg. 30. When Congress wants to delegate that power, it uses a whole different vocabulary—terms like "duty," "tariff," or "surcharge," which do not appear in IEEPA. See *ante,* at 8 (citing representative statutes); see also *ante,* at 19 (discussing, in particular, 19 U. S. C. §1862 (1970 ed.)). And likewise, when Congress means to cover *both* regulatory and taxing powers, it refers to each separately. See *ante*, at 15 (also citing statutes). Of course, Congress knows that taxes can be used for regulatory ends: They can be a means of controlling or adjusting behavior. But Congress still follows the path this Court long ago marked out, and the one most consonant with ordinary meaning, of treating the power to "regulate" trade as "entirely distinct" from the power to "levy taxes." *Gibbons* v. *Ogden*, 9 Wheat. 1, 201–202 (1824); see *ante,* at 15. So in granting only the former, IEEPA excludes the latter: The President has the ability to regulate, but not to impose taxes on, imports.

The surrounding statutory language confirms the point. As the principal opinion explains, "regulate" is one of 9

verbs listed in IEEPA's delegation provision. See *ante,* at 15. (The others are "investigate," "block," "direct," "compel," "nullify," "void," "prevent," and "prohibit." §1702(a)(1)(B).) Those verbs are followed by 11 objects, each describing a distinct sort of transaction involving foreign property—not just "importation," but also "acquisition," "use," "transfer," and so forth. *Ibid.* Combine the verbs and objects in all possible ways, and the statute authorizes 99 actions a President can take to address a foreign threat. And exactly none of the other 98 involves raising revenues. Rather, each enables the President to impose penalties, restrictions, or controls on foreign commerce. See *ante,* at 15. So when the phrase "regulate . . . importation" is invoked to impose quantity or quality limits on bringing foreign goods into the country—for example, by setting quotas or requiring quarantines—the phrase fits well with its 98 neighbors. Just like the rest, it provides a way to constrain or alter various foreign transactions. But when that phrase is invoked to impose tariffs? Then it becomes the odd man out—the only one of 99 permission slips to involve "the core congressional power of the purse." *Ante,* at 8; see *ante,* at 5–6. So even if (contra both conventional and congressional usage) the word "regulate" might refer to taxation in some other (hitherto undiscovered) statutory context, it would not do so in IEEPA.[2]

Likewise, Congress's consistent practice in delegating tariff power refutes the Government's position. As the

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[2] The legislative history of IEEPA offers yet more proof that Congress did not authorize taxation. The Senate Report, in its description of the statute, reduces the 99 authorized actions to the following: the power "to control or freeze property transactions where a foreign interest is involved." S. Rep. No. 95–466, p. 5 (1977). The House Report similarly describes the delegation provision as "authoriz[ing] the President" to "regulate or freeze any property in which any foreign country or a national thereof has any interest." H. R. Rep. No. 95–459, p. 15 (1977). Neither of those descriptions at all suggests that Congress intended to cede its taxing power.

principal opinion details, Title 19 of the U. S. Code includes multiple provisions granting the President authority to levy tariffs. See *ante,* at 8–9. But in each and every instance, Congress has not only used specific language (*e.g.*, "duty" or "surcharge"), see *supra*, at 4, but also imposed tight restraints on the power given. It has capped the tariff 's rate (*e.g.*, 15%); or limited the tariff 's duration (*e.g.*, 150 days); or established strict procedural conditions before the tariff can take effect (*e.g.*, investigations, public hearings, and reports); or all of the above. See *ante,* at 8–9. What Congress has never done in a tariff provision is what the Government claims it did here—conferred power on the President to impose a tariff of any amount, for any time, on only his own say-so. And construing IEEPA to give that unparalleled authority would effectively erase all the carefully confined tariff provisions in Title 19. For any President could then escape the rigors of those laws—could put in place, say, a non-time-limited 100% tariff on all foreign products—by the simple expedient of identifying a foreign threat. That gutting of Title 19's tariff scheme is not what Congress, when delegating power to "regulate" imports, could have meant to accomplish.

Nor has any President until now understood IEEPA to authorize imposing tariffs. Between 1977 (when IEEPA was enacted) and 2024, eight Presidents had the chance to make use of IEEPA's delegation of power. And all chose the same course. They invoked the statute's "regulate importation" provision for a variety of non-tariff purposes. See *ante,* at 10. But they looked elsewhere—to Title 19's provisions—for tariff authority. See *ante,* at 10–11. In other words, each President read the statutes as Congress wrote them, with IEEPA enabling him to regulate imports and Title 19 enabling him—in confined situations—to tax those foreign

goods. None, as far as anyone has suggested, even considered doing otherwise.[3]

For all those reasons, straight-up statutory construction resolves this case for me; I need no major-questions thumb on the interpretive scales. IEEPA gives the President significant authority over transactions involving foreign property, including the importation of goods. But in that generous delegation, one power is conspicuously missing. Nothing in IEEPA's text, nor anything in its context, enables the President to unilaterally impose tariffs. And needless to say, without statutory authority, the President's tariffs cannot stand. See *ante,* at 5–6.

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[3] Presidents followed the same practice, with one quasi-exception, under IEEPA's predecessor statute, the Trading with the Enemy Act (TWEA). Beginning in 1941, TWEA authorized the President, as IEEPA does now, to "regulate . . . importation." 12 U. S. C. §95a(1)(B) (1940 ed., Supp. I). During the next three decades, six Presidents used that delegation for only non-tariff ends, while relying on Title 19 to levy tariffs. In 1971, when President Nixon imposed tariffs in response to a balance-of-payments deficit, he continued in that tradition by invoking two statutes (the Tariff Act of 1930 and Trade Expansion Act of 1962) found in Title 19. See Presidential Proclamation No. 4074, 3 CFR 60 (1971–1975 Comp.). But in defending his act against a legal challenge, the Department of Justice argued that even if the two cited statutes did not authorize the tariffs, TWEA would do so. That after-the-fact claim of authority was upheld in the Court of Customs and Patent Appeals. See *United States* v. *Yoshida Int'l, Inc.*, 526 F. 2d 560, 572, 577–578 (CCPA 1975); *ante,* at 17. The principal opinion well explains why that single lower court decision about TWEA has no bearing on IEEPA's meaning. See *ante,* at 17–18, and n. 5.

SUPREME COURT OF THE UNITED STATES

Nos. 24–1287 and 25–250

LEARNING RESOURCES, INC., ET AL., PETITIONERS
24–1287 *v.*
DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL.

ON WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL., PETITIONERS
25–250 *v.*
V.O.S. SELECTIONS, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

[February 20, 2026]

JUSTICE JACKSON, concurring in part and concurring in the judgment.

I agree with the Court's conclusion that the International Emergency Economic Powers Act (IEEPA) does not provide the President with the power to tariff. Three of my colleagues have reached this result via the major questions doctrine, see *ante,* at 7–13 (opinion of ROBERTS, C. J.)—a framing that asks, in essence, whether Congress "would *likely* have intended" to delegate the authority to tariff to the President through IEEPA. *West Virginia* v. *EPA*, 597 U. S. 697, 730 (2022) (emphasis added); see also *id.*, at 722–723. While probing Congress's intent is the right inquiry, my colleagues speculate needlessly. In my view, the Court

can, and should, consult a statute's legislative history to determine what Congress actually intended the statute to do.

As Congress undertakes the legislative process, congressional committees in the Senate and House often generate official reports that describe Congress's aims for the legislation. See R. Katzmann, Judging Statutes 19–20 (2014) (Katzmann). Indeed, there is evidence that lawmakers themselves pay more attention to these reports than a statute's text to understand the statute's purpose and meaning. A. Gluck & L. Bressman, Statutory Interpretation From the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I, 65 Stan. L. Rev. 901, 965–966, 968–969 (2013); see also Katzmann 37–38. Thus, in contrast to the principal dissent's rejection of Committee Reports as a means of ascertaining a statute's meaning, *post*, at 16, n. 11 (opinion of KAVANAUGH, J.), I think these Senate and House Reports are among the best evidence of what Congress sought to accomplish with its enactments. See Gluck, 65 Stan. L. Rev., at 965, 977–978, 989.

In the cases now before us, that evidence shows that Congress did not intend for IEEPA to authorize the Executive to impose tariffs. Accord, *ante,* at 5, n. 2 (KAGAN, J., concurring in part and concurring in judgment). Instead, Congress intended to delegate to the President the power to freeze and control foreign property transactions.

Four pieces of the relevant legislative record support this conclusion. The first two are the House and Senate Reports that accompanied the 1941 amendment to IEEPA's predecessor statute, the Trading with the Enemy Act (TWEA). First enacted in 1917, TWEA authorized the President to control foreign property during wartime. But some of TWEA's sections delegating this authority had lapsed, and "there [was] doubt as to the effectiveness of other sections." H. R. Rep. No. 1507, 77th Cong., 1st Sess., 2 (1941). Accordingly, Congress amended TWEA in 1941, adding the subsection that includes the "regulate . . . importation"

language on which the President relies today. First War Powers Act, 55 Stat. 839–840. The Reports explained Congress's primary purpose for the 1941 amendment: shoring up the President's ability to control foreign-owned property by maintaining and strengthening the "existing system of foreign property control (commonly known as freezing control)." H. R. Rep. No. 1507, at 2–3; see also S. Rep. No. 911, 77th Cong., 1st Sess., 2 (1941).[1]

When Congress enacted IEEPA in 1977, limiting the circumstances under which the President could exercise his emergency authorities, it kept the "regulate . . . importation" language from TWEA. §203(a)(1)(B), 91 Stat. 1626. The other two relevant pieces of legislative history—the Senate and House Reports that accompanied IEEPA—demonstrate that Congress's intent regarding the scope of this statutory language remained the same. As the Senate Report explained, Congress's sole objective for the "regulate . . . importation" subsection was to grant the President the emergency authority "to control or freeze property transactions where a foreign interest is involved." S. Rep. No. 95–466, p. 5 (1977). The House Report likewise described IEEPA as empowering the President to "regulate or freeze any property in which any foreign country or a national thereof has any interest." H. R. Rep. No. 95–459, p. 15 (1977).

With this evidence of Congress's objective, interpreting the text of IEEPA becomes an easy task. Each of the listed verbs—"investigate, block during the pendency of an investigation, regulate, direct and compel, nullify, void, prevent

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[1] In addition to maintaining the President's "freezing control" authority, Congress also sought to authorize the President to *seize* foreign property and use it to serve the interests of the United States. H. R. Rep. No. 1507, at 3. To this end, the 1941 amendment provided that foreign-owned property "shall vest . . . in such agency or person as may be designated . . . by the President." 55 Stat. 840. Congress did not include this vesting language in IEEPA.

or prohibit," 50 U. S. C. §1702(a)(1)(B)—provides a means by which the President can freeze or control foreign property transactions. See *ante,* at 4–5, and n. 2 (opinion of KAGAN, J.). Tariffs are different in kind. They are a tax on imports; a means of generating revenue from transactions between private parties. See *ante,* at 6 (majority opinion). Because tariffs are not a means by which the President can freeze or control foreign assets, interpreting IEEPA to authorize tariffs would require the Court to override Congress's expressed purpose for including the "regulate . . . importation" language in the statute.

* * *

Like THE CHIEF JUSTICE's opinion, the principal dissent declines the help of legislative history. See *post,* at 16, n. 11 (opinion of KAVANAUGH, J.). The dissent concludes that IEEPA and TWEA are "best understood" as authorizing tariffs, and that any other interpretation would "not make much sense." *Post*, at 24–25, 29.[2] But why would it matter which interpretation *we* think is "best" when Congress has already told us? The legislative history here plainly establishes that Congress understood and intended IEEPA and TWEA to authorize a wholly different type of power: the power to freeze foreign-owned property. And the proper role of the Court is to give effect to Congress's intent, not our own instincts. See *United States* v. *American Trucking Assns., Inc.*, 310 U. S. 534, 542 (1940).

In short, in these cases, the legislative history provides helpful evidence of "what Congress was trying to do" in IEEPA. Katzmann 38. Given that evidence, we need not speculate or, worse, step into Congress's shoes and

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[2] This reasoning appears to follow the Court's relatively recent practice of picking what it deems the best reading of a statute without consideration of Congress's intent. See, *e.g.*, *Stanley* v. *City of Sanford*, 606 U. S. 46, 51–54 (2025); accord, *id.*, at 96–97, and n. 12 (JACKSON, J., dissenting).

formulate our own views about what powers would be best to delegate to the President for use during an emergency. See *ibid.*; J. Hurst, Dealing With Statutes 33 (1982). When Congress tells us why it has included certain language in a statute, the limited role of the courts in our democratic system of government—as interpreters, not lawmakers—demands that we give effect to the will of the people.

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[February 20, 2026]

JUSTICE THOMAS, dissenting.

I join JUSTICE KAVANAUGH's principal dissent in full. As he explains, the Court's decision today cannot be justified as a matter of statutory interpretation. Congress authorized the President to "regulate . . . importation." 50 U. S. C. §1702(a)(1)(B). Throughout American history, the authority to "regulate importation" has been understood to include the authority to impose duties on imports. *Post*, at 9–13, 22–29 (KAVANAUGH, J., dissenting). The meaning of that phrase was beyond doubt by the time that Congress enacted this statute, shortly after President Nixon's highly publicized duties on imports were upheld based on identical language. *Post*, at 14–22. The statute that the President relied on therefore authorized him to impose the duties on imports

at issue in these cases. JUSTICE KAVANAUGH makes clear that the Court errs in concluding otherwise.

I write separately to explain why the statute at issue here is consistent with the separation of powers as an original matter. The Constitution's separation of powers forbids Congress from delegating core legislative power to the President. This principle, known as the nondelegation doctrine, is rooted in the Constitution's Legislative Vesting Clause and Due Process Clause. Art. I, §1; Amdt. 5. Both Clauses forbid Congress from delegating core legislative power, which is the power to make substantive rules setting the conditions for deprivations of life, liberty, or property. Neither Clause prohibits Congress from delegating other kinds of power. Because the Constitution assigns Congress many powers that do not implicate the nondelegation doctrine, Congress may delegate the exercise of many powers to the President. Congress has done so repeatedly since the founding, with this Court's blessing.

The power to impose duties on imports can be delegated.[1] At the founding, that power was regarded as one of many

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[1] I refer to charges on imported goods as "duties," not "tariffs" or "taxes." When the government charged money for importing goods, that charge was historically called a custom or impost, each of which was a kind of "duty." See N. Webster, A Compendious Dictionary of the English Language 75, 152 (1806); Art. I, §10, cl. 2. The word "tariff " primarily referred to the schedule or table listing such duties, not the duties themselves. Webster, Compendious Dictionary, at 305. The word "tax," although sometimes used loosely to refer to all kinds of monetary charges, more often "exclude[d]" duties on imports. R. Natelson, What the Constitution Means by "Duties, Imposts, and Excises"—and "Taxes" (Direct or Otherwise), 66 Case W. Res. L. Rev. 297, 306 (2015).

In fact, although Colonial Americans "staunchly contested efforts by Parliament to 'tax' them," they often "conceded the authority of the British government to regulate commerce through financial exactions," including "prohibitory tariffs." *Ibid.* In the most "widely read" and "universally approved" response to the Stamp Act, E. Morgan & H. Morgan, The Stamp Act Crisis 71 (1953), Daniel Dulany wrote: "A Right to impose an internal Tax on the Colonies, without their Consent for the single

powers over foreign commerce that could be delegated to the President. Power over foreign commerce was not within the core legislative power, and engaging in foreign commerce was regarded as a privilege rather than a right. Early Congresses often delegated to the President power to regulate foreign commerce, including through duties on imports. As I suggested over a decade ago, the nondelegation doctrine does not apply to "a delegation of power to make rules governing private conduct in the area of foreign trade," including rules imposing duties on imports. *Department of Transportation* v. *Association of American Railroads*, 575 U. S. 43, 80–81, n. 5 (2015) (opinion concurring in judgment). Therefore, to the extent that the Court relies on "'separation of powers principles'" to rule against the President, *ante,* at 8 (opinion of ROBERTS, C. J.), it is mistaken.

I

The nondelegation doctrine is rooted in both the Legislative Vesting Clause and the Due Process Clause. The doctrine ensures that "[t]he Legislative [Branch] cannot transfer the Power of Making Laws to any other hands." J. Locke, Two Treatises of Government §141, p. 380 (P. Laslett ed. 1964) (Locke) (emphasis deleted). Importantly,

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Purpose of Revenue, is denied; a Right to regulate their Trade without their Consent is admitted. The Imposition of a Duty, may, in some Instances, be the proper Regulation." Considerations on the Propriety of Imposing Taxes in the British Colonies 34 (2d ed. 1765) (emphasis deleted). Likewise, Benjamin Franklin famously conceded Britain's "right 'of laying duties to regulate commerce,' " but rejected its power to " 'lay internal taxes.' " B. Bailyn, The Ideological Origins of the American Revolution 214 (1967); see also *id.*, at 212 (explaining that colonists denied Britain "all right to tax the colonies," but "conceded to it the right to raise revenue through duties on trade"); E. Nelson, The Royalist Revolution 32 (2014); C. Becker, The Declaration of Independence: A Study in the History of Political Ideas 90 (1922).

however, the nondelegation doctrine applies only to Congress's core legislative power, not to all of its powers.

A

The Legislative Vesting Clause grants Congress alone the federal legislative power. It requires that "[a]ll legislative Powers" granted to the Federal Government "shall be vested in a Congress of the United States." Art. I, §1. It follows that those federal legislative powers cannot be exercised by anyone else, including the President. See *Association of American Railroads*, 575 U. S., at 74 (opinion of THOMAS, J.).

"Legislative power" for purposes of the Vesting Clause means the power to make substantive rules setting the conditions for deprivations of life, liberty, or property. I have described this power as the "core legislative power" to distinguish it from other powers that the Constitution grants Congress. *Id.*, at 80. Core legislative power includes only the power to make "law" in the "Blackstonian sense of generally applicable rules of private conduct," the violation of which results in the deprivation of "core private rights." *Id.*, at 73, 76. These core private rights are the natural rights to life, liberty, and property. See 1 W. Blackstone, Commentaries on the Laws of England 123–136 (1765) (Blackstone); C. Nelson, Adjudication in the Political Branches, 107 Colum. L. Rev. 559, 566–567 (2007).

The nondelegation doctrine is also rooted in the Due Process Clause. That Clause prohibits the Federal Government from depriving any person of "life, liberty, or property, without due process of law." Amdt. 5. The Founders modeled it on chapter 39 of the Magna Carta, which prohibited the deprivation of a free man's private rights "except by the lawful judgment of his peers and by the law of the land." A. Howard, Magna Carta: Text and Commentary 45 (rev. ed. 1998); see *Obergefell* v. *Hodges*, 576 U. S. 644, 723 (2015) (THOMAS, J., dissenting). By the founding, the Magna

Carta was understood to mean that "no subject would be deprived of a private right—that is, a right of life, liberty, or property—except in accordance with 'the law of the land,' which consisted only of statutory and common law." *Association of American Railroads*, 575 U. S., at 72 (opinion of THOMAS, J.) (citing N. Chapman & M. McConnell, Due Process as Separation of Powers, 121 Yale L. J. 1672, 1688 (2012)).

A rule made by someone other than the legislature, such as the King, was not "'the law of the land.'" *Association of American Railroads*, 575 U. S., at 72 (opinion of THOMAS, J.). Chief Justice Coke famously held invalid the King's proclamation prohibiting new buildings in London because the King could not "create any offence" "without Parliament." *Case of Proclamations*, 12 Co. Rep. 74, 74–75, 77 Eng. Rep. 1352, 1353 (K. B. 1611); see *Association of American Railroads*, 575 U. S., at 72 (opinion of THOMAS, J.) (explaining that this principle was associated with chapter 39 of the Magna Carta). When the Founders transplanted the same principle into the Due Process Clause, they ensured that when the government wanted to deprive people of the familiar core private rights of "life, liberty, and property," it could not do so "on the basis of a rule (or a will) not enacted by the legislature." *Id.*, at 75–76.

B

Neither the Legislative Vesting Clause nor the Due Process Clause forbids Congress from delegating its other powers. As this Court put it two centuries ago, although Congress cannot delegate powers that are "strictly and exclusively legislative," it can "certainly delegate" others. *Wayman* v. *Southard*, 10 Wheat. 1, 42–43 (1825) (opinion for the Court by Marshall, C. J.).

Many of Congress's powers fall within the core legislative power subject to the nondelegation doctrine. For example, the Constitution gives Congress the power to regulate

commerce among the States. Art. I, §8, cl. 3. Congress can thus make substantive rules for interstate trade—such as by restricting drug shipments across state lines—punishable with fines or imprisonment. Cf. *Gonzales* v. *Raich*, 545 U. S. 1, 58 (2005) (THOMAS, J., dissenting). Likewise, the Constitution gives Congress many other powers that implicate life, liberty, and property, including the power to provide for the punishment of counterfeiting, Art. I, §8, cl. 6; the power to provide for the punishment of treason, Art. III, §3, cl. 2; and the power to impose internal taxes, Art. I, §8, cl. 1; Amdt. 16. These powers cannot be delegated, as I have repeatedly explained. See, *e.g.*, *Association of American Railroads*, 575 U. S., at 77 (opinion of THOMAS, J.); *Whitman* v. *American Trucking Assns., Inc.*, 531 U. S. 457, 487 (2001) (THOMAS, J., concurring). They cannot be delegated even if Congress delegates them unambiguously. Cf. *ante*, at 8 (opinion of ROBERTS, C. J.).

Congress also has many powers that are not subject to the nondelegation doctrine. "We now think of the powers listed in Article I, Section 8 as quintessentially legislative powers, but many of them were actual, former, or asserted powers of the Crown, which the drafters decided to allocate to the legislative branch." M. McConnell, The President Who Would Not Be King 274 (2020) (McConnell); accord, *Zivotofsky* v. *Kerry*, 576 U. S. 1, 36 (2015) (THOMAS, J., concurring in judgment in part and dissenting in part). These include the powers to raise and support armies, to fix the standards of weights and measures, to grant copyrights, to dispose of federal property, and, as discussed below, to regulate foreign commerce. Art. I, §8; Art. IV, §3. None of these powers involves setting the rules for the deprivation of core private rights. Blackstone called them "prerogative" powers, and sometimes "executive." See 1 Blackstone 242, 245, 255–262, 264–265, 276, 279; 2 *id.*, at 407, 410 (1766); 1 W. Crosskey, Politics and the Constitution in the History of the United States 416, 421–425 (1953); McConnell 274–

275. By one count, 13 of the 29 powers given to Congress in Article I were powers that "Blackstone described as 'executive' powers." 1 Crosskey, Politics and the Constitution, at 428.

For most of American history, the nondelegation doctrine was understood not to apply to these powers. Contra, *ante,* at 42–46 (GORSUCH, J., concurring). "The early congresses felt free to delegate certain powers to President Washington in broad terms." McConnell 333. Thus, the Constitution gives Congress the power to support armies, Art. I, §8, cl. 12, but Congress in 1789 delegated to the President the power to establish regulations for benefits to veterans wounded in the Revolutionary War. See Act of Sept. 29, 1789, ch. 24, 1 Stat. 95. The Constitution gives Congress the power to grant patents, Art. I, §8, cl. 8, but Congress in 1790 delegated to executive officials the power to grant patents in their discretion. See Act of Apr. 10, 1790, ch. 7, §1, 1 Stat. 109–110. The Constitution gives Congress the power to borrow money, Art. I, §8, cl. 2, but Congress in 1790 delegated to the President the power to borrow up to $12 million on behalf of the United States in his discretion. See Act of Aug. 4, 1790, §2, 1 Stat. 139. The Constitution gives Congress the power to raise armies, Art. I, §8, cl. 12, but Congress in 1791 delegated to the President the power to raise an army of 2,000 troops in his discretion. See Act of Mar. 3, 1791, §8, 1 Stat. 223. And, as I explain further below, see *infra*, at 13–15, the Constitution gives Congress the power to regulate foreign commerce, Art. I, §8, cl. 3, but early Congresses often delegated to the President the power to regulate foreign commerce. See, *e.g.*, Act of July 22, 1790, ch. 33, 1 Stat. 137; Act of June 4, 1794, ch. 41, 1 Stat. 372.

These early delegations had one thing in common: They did not implicate the Legislative Vesting Clause or the Due Process Clause. "None of these statutes disturbed natural rights or intruded into the core of the legislative power." McConnell 333; cf. A. Bamzai, Comment, Delegation and

Interpretive Discretion: *Gundy*, *Kisor*, and the Formation and Future of Administrative Law, 133 Harv. L. Rev. 164, 178 (2019). They therefore did not violate the nondelegation doctrine.

The Constitutional Convention seemed to agree with this understanding of delegation. Contra, *ante*, at 42 (GORSUCH, J., concurring). James Madison proposed an amendment clarifying that the President had the power " 'to execute such other powers'" as were " 'delegated by the national Legislature,'" so long as the delegated powers were " '"not Legislative nor Judiciary in their nature." ' " 1 Records of the Federal Convention of 1787, p. 67 (M. Farrand ed. 1966). Thus, in Madison's view, some of Congress's powers were "not Legislative" and could be "delegated" to the President. *Ibid.* Madison's proposal was rejected after others argued that it was unnecessary. *Ibid.* Madison agreed that the purpose of the proposed amendment was only to "prevent doubts and misconstructions." *Ibid.* Nobody disputed that Madison stated the correct scope of the nondelegation doctrine. *Ibid.*; see also McConnell 332 ("[W]e can infer [from Madison's motion] that the framers understood that Congress would be able to delegate its royal prerogative powers back to the President").[2]

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[2] Thus, although many used the word "legislative" in the broader sense to describe powers that should initially belong to the legislature, *ante,* at 42–43 (GORSUCH, J., concurring), the Founders likely understood the Legislative Vesting Clause to refer more narrowly to "core legislative power," *Department of Transportation* v. *Association of American Railroads*, 575 U. S. 43, 80 (2015) (THOMAS, J., concurring in judgment). That understanding accorded with the views of separation-of-powers theorists of the time, who distinguished the three core functions of government from the institutions that would exercise them in any given polity. S. Prakash & M. Ramsey, Foreign Affairs and the Jeffersonian Executive, 89 Minn. L. Rev 1591, 1612–1617 (2005); see 1 B. de Montesquieu, The Spirit of Laws 151–153 (T. Nugent transl., rev. ed. 1899). For nondelegation purposes, therefore, "[t]he key is to distinguish between strictly legislative authority—the power to make rules binding on persons or

II

As a matter of original understanding, historical practice, and judicial precedent, the power to impose duties on imports is not within the core legislative power. Congress can therefore delegate the exercise of this power to the President.

A

Neither of the two constitutional foundations for the nondelegation doctrine forbids Congress from delegating to the President the power to impose duties on imports.

1

The Legislative Vesting Clause provides no basis for applying the nondelegation doctrine to the power to impose duties on imports.

"The 'power over external affairs [is] in origin and essential character different from that over internal affairs.' " *Haaland* v. *Brackeen*, 599 U. S. 255, 356 (2023) (THOMAS, J., dissenting) (quoting *United States* v. *Curtiss-Wright Export Corp.*, 299 U. S. 304, 319 (1936)). Although internal affairs are governed by the domestic law of one sovereign, external affairs implicate the relationship between sovereigns, which is subject to the law of nations. See Locke §§145–148, at 383–384; 1 Blackstone 264; 4 *id.*, at 66–68 (1769); E. de Vattel, The Law of Nations 161–163, 281–289 (J. Chitty ed. 1852) (Vattel). External affairs, then, are not susceptible to being "directed by antecedent, standing, positive Laws" made by one nation. Locke §147, at 384. When a person goes abroad, he must resort to the political branches (and ultimately the military)—rather than the judiciary—for protection, can indebt the executive to foreign nations for his personal misconduct, and can trigger a foreign conflict. See Vattel 161–163, 281–289; 2 F. Wharton,

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property within the nation—and other powers assigned to Congress." McConnell 327.

Digest of International Law §222, pp. 575–576 (2d ed. 1887); see also *id.*, §§189, 213–221, at 432–445, 539–575.

The power to regulate external affairs was accordingly not viewed as within the core legislative power at the founding. See *Zivotofsky*, 576 U. S., at 35–37 (opinion of THOMAS, J.). Blackstone described powers over "intercourse with foreign nations" as "prerogative" powers naturally belonging to the King. 1 Blackstone 245; see *id.*, at 232. Locke agreed that this power "must be lodged" with the "executive." *Zivotofsky*, 576 U. S., at 35 (opinion of THOMAS, J.) (citing Locke §148). Baron de Montesquieu classified all powers "in respect to things dependent on the law of nations" as part of "the executive power." 1 The Spirit of Laws 151 (T. Nugent transl., rev. ed. 1899). The "legislative" power, by contrast, "applied only within the realm." McConnell 214.

The power to regulate external affairs included power over foreign commerce. At the founding, the "external executive power" included " 'the transactions of the state with any other independent state.' " *Zivotofsky*, 576 U. S., at 36 (opinion of THOMAS, J.). In Great Britain, the King had no unilateral legislative power, McConnell 107, but he had much unilateral power over foreign commerce. His power over foreign commerce included the power to "govern foreign trade," *id.*, at 216, and to "prohibit any of his subjects from leaving the realm," 1 Blackstone 261; accord, *East India Co.* v. *Sandys*, Skin. 223, 223–224, 90 Eng. Rep. 103 (K. B. 1684) (describing the "inherent prerogative in the Crown, that none should trade with foreigners without the King's licence"). Thomas Rutherforth's Institutes of Natural Law—"a treatise routinely cited by the Founders," *Zivotofsky*, 576 U. S., at 36 (opinion of THOMAS, J.)—explained that the "external executive power" included "the power of adjusting the rights of a nation in respect of . . . trade." 2 Institutes of Natural Law 55–56 (1756); accord, Locke §146, at 383. The power to impose duties on imports was a conventional method for governing foreign trade. It originated

as a "prerogative right" of the King, N. Gras, Early English Customs System 21 (1918).[3]

2

The Due Process Clause likewise provides no basis for applying the nondelegation doctrine to the power to impose duties on imports. The Due Process Clause protects "rights," not "privileges." *Gutierrez* v. *Saenz*, 606 U. S. 305, 331 (2025) (THOMAS, J., dissenting). Importing is a matter of privilege.

The government can charge money for privileges without depriving a person of property for due-process purposes. The government charges people money every day for a wide range of activities, such as to enter a government park, mail an envelope, apply for a copyright, or file a lawsuit. Because a person has no core private right to engage in these activities, the government is not subject to due-process restraints in setting such charges. The due-process question is not whether a government action " 'raise[s] revenue,' " *ante,* at 6 (majority opinion), but whether it implicates core private rights. *Supra*, at 3–4. Thus, when Congress delegates power to make "regulations" on federal land, the Secretary of Agriculture can set a "charge" for the "privilege of grazing sheep" on that land without thereby "exercis[ing] the legislative power." *United States* v. *Grimaud*, 220 U. S. 506, 522–523 (1911); see also Bamzai, 133 Harv. L. Rev., at 180–182; contra, *ante,* at 8 (opinion of ROBERTS, C. J.). Congress has, consistent with due process, delegated the power to set charges for a wide range of privileges. See 16 U. S. C. §6802 (delegating the power to set fees for entrance to and

[3] See also P. Einzig, The Control of the Purse: Progress and Decline of Parliament's Financial Control 65 (1959) ("[T]he origin of the term 'customs' is that it had been the ancient customary practice of the Crown to levy charges on imports and exports on its own authority"). Parliament took some of that prerogative power away, but delegated it back in broad terms to the King, see *id*., at 65–70, who was still agreed to have no legislative power, McConnell 107–110.

use of federal recreation areas); 17 U. S. C. §1316 (delegating the power to "by regulation set reasonable fees" for applications); 39 U. S. C. §3622 (delegating the power to set postal rates); 28 U. S. C. §1911 ("The Supreme Court may fix the fees to be charged by its clerk").

A person had no core private right to import goods at the founding. On the Founders' understanding, statutes allowing "importation of goods from abroad were thought to create mere privileges rather than core private rights." Nelson, 107 Colum. L. Rev., at 580. Foreign commerce was governed by the law of nations, which is a law of "sovereigns," not of "private individuals." Vattel 285. "[A]ny attempt to introduce foreign goods" without the "expressed allowances" of the sovereign was "a violation of its sovereignty." *Cross* v. *Harrison*, 16 How. 164, 196 (1854). "Every state" had "a right to prohibit the entrance of *foreign merchandises*," including through the imposition of duties on imports. Vattel §§90, 99, at 38, 43. Because "no one had a vested right to import" any "goods from abroad," the imposition of "tariffs" as a condition for importing those goods did not implicate the Due Process Clause any more than when the government charges money for other privileges. Nelson, 107 Colum. L. Rev., at 580.

* * *

The power to impose duties on imports thus does not implicate either of the constitutional foundations for the nondelegation doctrine. Hence, even the strongest critics of delegation, myself included, have recognized that regulations of foreign commerce might not be subject to ordinary nondelegation limitations. See *FCC* v. *Consumers' Research*, 606 U. S. 656, 742, n. 19 (2025) (GORSUCH, J., dissenting) ("[I]t may be . . . that tariffs and domestic taxes present different contexts when it comes to the problem of delegation"); accord, *Association of American Railroads*, 575 U. S., at 80, and n. 5 (opinion of THOMAS, J.). So long as Congress

complies with other constitutional limitations, it can delegate this power.

B

Historical practice and precedent confirm that Congress can delegate the power to impose duties on imports.

1

Since the 1790s, Congress has consistently delegated to the President power over foreign commerce, including the power to impose duties on imports. "'Practically every volume of the United States Statutes'" contains broad delegations to the President in the area of foreign commerce. *Id.*, at 80, n. 5 (quoting *Curtiss-Wright Export Corp.*, 299 U. S., at 324).

The First Congress gave the President the power to "prescribe" "rules and regulations" that would "gover[n]" any person licensed to trade with Indians. 1 Stat. 137. Trade with Indians was regarded as "a matter of external relations." McConnell 333. In delegating this power, Congress did not specify or limit what kinds of regulations the President could impose. Act of July 22, 1790, 1 Stat. 137–138. Pursuant to that broad delegation, the President restricted trading "[d]istilled [s]pirits," required each trader to "give intelligence" to the Government, and subdelegated to his superintendents the power to "assign the limits within which each trader shall trade." 61 Timothy Pickering Papers, Massachusetts Historical Society 4 (Aug. 28, 1790); see also Letter from G. Washington to H. Knox (Aug. 13, 1790), in 6 Papers of George Washington 244–245 (D. Twohig ed. 1996). Any person who violated the President's regulations would owe $1,000 "payable to the President." 1 Stat. 137.

Succeeding early Congresses delegated many more powers over foreign commerce to the President. In 1794, Congress delegated to the President the power to "lay an

embargo on all ships and vessels in the ports of the United States," including ships belonging to Americans, unless Congress was in session. Act of June 4, 1794, 1 Stat. 372. It authorized the President to make "such regulations as the circumstances of the case may require" in exercising that delegated power. *Ibid.* Congress allowed the President to impose the embargo as "in his opinion, the public safety shall so require." *Ibid.* In 1795, Congress delegated to the President the power to "permit the exportation of arms, cannon and military stores, the law prohibiting the exportation of the same to the contrary notwithstanding." Act of Mar. 3, 1795, ch. 53, 1 Stat. 444. In 1798, Congress delegated to the President the power to discontinue "prohibitions and restraints" on commerce with France. Act of June 13, 1798, 1 Stat. 565–566; see also, *e.g.*, Act of Mar. 3, 1817, ch. 39, 3 Stat. 361–362 (delegating to the President the power to discontinue a ban on importation of plaster of Paris). In 1799, Congress delegated to the President the authority to discontinue and to reimpose "restraints and prohibitions" on commerce with France when he "deem[ed] it expedient and consistent with the interest of the United States." Act of Feb. 9, 1799, 1 Stat. 615. And, in 1800, Congress delegated to the President the power to remove a ban on trade with France, and to "re-establish" certain "restraints and prohibitions" when he "deem[ed] it expedient." Act of Feb. 27, 1800, 2 Stat. 9–10.[4]

Congress likewise delegated to the President the power to set duties on imports. In 1815, Congress delegated to the President the power to lower reciprocal duties when he was "satisfied" that other nations' trade practices no longer operated "to the disadvantage of the United States." Act of Mar. 3, 1815, ch. 77, 3 Stat. 224. In 1824, Congress

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[4] JUSTICE GORSUCH's interpretation of two "early congressional debates," *ante*, at 43 (concurring opinion), is thus difficult to reconcile with what early Congresses actually did.

delegated to the President the power to lower and to reimpose duties in response to foreign nations' trade practices. See Act of Jan. 7, 1824, 4 Stat. 2–3. Throughout the early decades of the Republic, Congress continued to delegate to the President similar powers over duties on imports on a regular basis. See, *e.g.*, Act of May 24, 1828, ch. 111, 4 Stat. 308; Act of May 31, 1830, ch. 219, 4 Stat. 425; Act of July 13, 1832, ch. 207, 4 Stat. 578–579. Presidents frequently changed the rates of duties on imports as to various foreign nations pursuant to these delegations.[5]

2

This Court has consistently upheld Congress's delegation of power over foreign commerce, including the power to impose duties on imports.

The Court has long conveyed to Congress that it may "invest the President with large discretion in matters arising out of the execution of statutes relating to trade and commerce with other nations." *Marshall Field & Co.* v. *Clark*, 143 U. S. 649, 691 (1892). Since shortly after the founding, the Court has rejected challenges to delegations of power over foreign commerce. See *Cargo of Brig Aurora* v. *United*

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[5] See, *e.g.*, July 24, 1818, Proclamation of President J. Monroe, in 2 Messages and Papers of the Presidents 606–607 (J. Richardson ed. 1897) (eliminating duties on "goods, wares, and merchandise imported into the United States" as to the Free Hanseatic city of Bremen); see also, *e.g.*, Aug. 1, 1818, Proclamation of President J. Monroe, in 2 *id.*, at 607; May 4, 1820, Proclamation of President J. Monroe, in 2 *id.*, at 642; Aug. 20, 1821, Proclamation of President J. Monroe, in 2 *id.*, at 665–666; Nov. 22, 1821, Proclamation of President J. Monroe, in 2 *id.*, at 666–667; June 7, 1827, Proclamation of President J. Quincy Adams, in 2 *id.*, at 942–943; July 1, 1828, Proclamation of President J. Quincy Adams, in 2 *id.*, at 970–971; May 11, 1829, Proclamation of President A. Jackson, in 3 *id.*, at 1003; June 3, 1829, Proclamation of President A. Jackson, in 3 *id.*, at 1004–1005; Apr. 28, 1835, Proclamation of President A. Jackson, in 3 *id.*, at 1365–1366; Sept. 1, 1836, Proclamation of President A. Jackson, in 3 *id.*, at 1452–1453; June 14, 1837, Proclamation of President M. Van Buren, in 4 *id.*, at 1539.

States, 7 Cranch 382, 386, 387–389 (1813). Even when a "challenged delegation, if it were confined to internal affairs, would be invalid," the Court has upheld the delegation. *Curtiss-Wright Export Corp.*, 299 U. S., at 315, 322. There is a "fundamental" difference, the Court has explained, between "foreign or external affairs" and "domestic or internal affairs." *Id.*, at 315. Thus, "Congress may of course delegate very large grants of its power over foreign commerce to the President," *Chicago & Southern Air Lines, Inc.* v. *Waterman S. S. Corp.*, 333 U. S. 103, 109 (1948), including when it comes to imposing "duties" on imports, *Curtiss-Wright Export Corp.*, 299 U. S., at 325, n. 2.

When Congress has delegated to the President the power to impose duties on imports, this Court has upheld those delegations. In *Clark*, 143 U. S. 649, the Court upheld Congress's delegation to the President of the power to impose duties on nations whose importation policies "he may deem to be reciprocally unequal and unreasonable." *Id.*, at 680. It explained that Congress had "frequently, from the organization of the government to the present time," conferred powers over "trade and commerce" to "the President." *Id.*, at 683. In *J. W. Hampton, Jr., & Co.* v. *United States*, 276 U. S. 394 (1928), the Court upheld a delegation to the President to impose duties as necessary up to statutorily limited rates to make them reciprocal. *Id.*, at 401, 409. And, in *Federal Energy Administration* v. *Algonquin SNG, Inc.*, 426 U. S. 548 (1976), the Court upheld a delegation of the power to impose a universal duty on imported oil. *Id.*, at 555, 558–560.[6]

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[6] The Court has even suggested that the President has inherent peacetime authority to impose duties on imports. After the Mexican-American War ended, executive officials imposed duties on imports at a California port within the United States before Congress had "passed an act to extend the collection of tonnage and import duties to the ports of California." *Cross* v. *Harrison*, 16 How. 164, 190 (1854); see also *id.*, at 192, 194–196. The executive officials unilaterally extended Congress's earlier

Although these cases involved duties on imports, the Court nowhere suggested that a different nondelegation rule applied because the duty was a "tax" or "raise[d] revenue." *Ante*, at 6 (majority opinion) (internal quotation marks omitted).[7]

III

Congress's delegation here was constitutional. The statute at issue in these cases, the International Emergency Economic Powers Act, delegates to the President a wide range of powers over foreign commerce. IEEPA gives the President, on conditions satisfied here, the power to "regulate" foreign commerce, including "importation" of foreign property. 50 U. S. C. §1702(a)(1)(B).

IEEPA's delegation of power to impose duties on imports complies with the nondelegation doctrine. Congress delegated to the President a version of the same power that it has delegated to him in many statutes since the early days of the Republic. See *supra*, at 13–17. Congress limited that delegation to foreign commerce. See §1702(a)(1)(B); see also §1701. In delegating the power to impose duties on imports, it gave the President no core legislative power to make substantive rules setting the conditions for deprivations of life, liberty, or property. Its delegation therefore complied with the constitutional separation of powers and is consistent with centuries of practice and precedent. It did not need to exercise that power itself and did not need to delegate it "unambiguously"—even though, as JUSTICE

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authorized duties to new ports. *Id.*, at 193. Although the Court's reasoning was somewhat opaque, the Court upheld the executive officials' unilateral peacetime duties in part because nobody has a right to "introduce foreign goods" except with the sovereign's "expressed allowances." *Id.*, at 196–197.

[7] In fact, less than a year ago, the Court explicitly rejected "a special nondelegation rule for revenue-raising legislation." *FCC* v. *Consumers' Research*, 606 U. S. 656, 674 (2025).

KAVANAUGH explains, it did. See *post*, at 38–45 (dissenting opinion).

The principal opinion bases its decision on the major questions doctrine. *Ante*, at 7–13 (opinion of ROBERTS, C. J.). In some cases, the Court has used the major questions doctrine as a canon of statutory interpretation because delegations of major powers are unlikely to be subtle. See, *e.g.*, *Whitman,* 531 U. S., at 468; see *ante,* at 8 (opinion of ROBERTS, C. J.); see also *Biden* v. *Nebraska*, 600 U. S. 477, 501–503 (2023). In other cases, the Court has used it to avoid what would have been originally understood as an unconstitutional delegation of legislative power. See, *e.g.*, *West Virginia* v. *EPA*, 597 U. S. 697, 723 (2022); *ante,* at 8 (opinion of ROBERTS, C. J.). In today's cases, neither the statutory text nor the Constitution provide a basis for ruling against the President. I respectfully dissent.

SUPREME COURT OF THE UNITED STATES

Nos. 24–1287 and 25–250

LEARNING RESOURCES, INC., ET AL., PETITIONERS
24–1287 *v.*
DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL., PETITIONERS
25–250 *v.*
V.O.S. SELECTIONS, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

[February 20, 2026]

JUSTICE KAVANAUGH, with whom JUSTICE THOMAS and JUSTICE ALITO join, dissenting.

Acting pursuant to his statutory authority to "regulate . . . importation" under the 1977 International Emergency Economic Powers Act, or IEEPA, the President has imposed tariffs on imports of foreign goods from various countries. The tariffs have generated vigorous policy debates. Those policy debates are not for the Federal Judiciary to resolve. Rather, the Judiciary's more limited role is to neutrally interpret and apply the law. The sole legal question here is whether, under IEEPA, tariffs are a means to "regulate . . . importation." Statutory text, history, and precedent demonstrate that the answer is clearly yes: Like quotas and embargoes, tariffs are a traditional and common tool to regulate importation.

Since early in U. S. history, Congress has regularly authorized the President to impose tariffs on imports of foreign goods. Presidents have often used that authority to obtain leverage with foreign nations, help American manufacturers and workers compete on a more level playing field, and generate revenue for the United States. Numerous laws such as the Trade Expansion Act of 1962 and the Trade Act of 1974 continue to authorize the President to place tariffs on foreign imports in a variety of circumstances, and Presidents have often done so. In recent years, Presidents George W. Bush, Obama, and Biden have all imposed tariffs on foreign imports under those statutory authorities.

President Trump has similarly imposed tariffs, and has done so here under IEEPA. During declared national emergencies, IEEPA broadly authorizes the President to regulate international economic transactions. Most relevant for this case, during those national emergencies, IEEPA grants the President the power to "regulate . . . importation" of foreign goods.

In early 2025, President Trump declared two national emergencies pursuant to the National Emergencies Act. See 50 U. S. C. §1621(a). One emergency concerned drug trafficking into the United States. The other emergency involved trade imbalances with foreign nations that have harmed American manufacturers and workers.

To help address those emergencies, the President drew upon his authority in IEEPA to "regulate . . . importation," and he imposed tariffs on imports from various countries.

The plaintiffs argue and the Court concludes that the President lacks authority under IEEPA to impose tariffs. I disagree. In accord with Judge Taranto's careful and persuasive opinion in the Federal Circuit, I would conclude that the President's power under IEEPA to "regulate . . . importation" encompasses tariffs. As a matter of ordinary meaning, including dictionary definitions and historical

usage, the broad power to "regulate . . . importation" includes the traditional and common means to do so—in particular, quotas, embargoes, and tariffs.

History and precedent confirm that conclusion. In 1971, President Nixon imposed 10 percent tariffs on almost all foreign imports. He levied the tariffs under IEEPA's predecessor statute, the Trading with the Enemy Act, which similarly authorized the President to "regulate . . . importation." The Nixon tariffs were upheld in court.

Moreover, in 1976, a year before IEEPA was enacted, this Court unanimously ruled that a similarly worded statute authorizing the President to "adjust the imports" permitted President Ford to impose monetary exactions on foreign oil imports. See *Federal Energy Administration* v. *Algonquin SNG, Inc.*, 426 U. S. 548 (1976) (*Algonquin*).

For both the Nixon tariffs and the Ford tariffs upheld by this Court in *Algonquin*, the relevant statutory provisions did not specifically refer to "tariffs" or "duties," but instead more broadly authorized the President to "regulate . . . importation" or to "adjust the imports." Therefore, when IEEPA was enacted in 1977 in the wake of the Nixon and Ford tariffs and the *Algonquin* decision, Congress and the public plainly would have understood that the power to "regulate . . . importation" included tariffs. If Congress wanted to exclude tariffs from IEEPA, it surely would not have enacted the same broad "regulate . . . importation" language that had just been used to justify major American tariffs on foreign imports.

Importantly, IEEPA's authorization for the President to impose tariffs did not grant the President any new substantive power. Since the Founding, numerous statutes have authorized—and still do authorize—the President to impose tariffs and other foreign import restrictions. IEEPA merely allows the President to impose tariffs somewhat more efficiently to deal with foreign threats during national emergencies.

Context and common sense buttress that interpretation of IEEPA. The plaintiffs and the Court acknowledge that IEEPA authorizes the President to impose quotas or embargoes on foreign imports—meaning that a President could completely block some or all imports. But they say that IEEPA does not authorize the President to employ the lesser power of tariffs, which simply condition imports on a payment. As they interpret the statute, the President could, for example, block all imports from China but cannot order even a $1 tariff on goods imported from China.

That approach does not make much sense. Properly read, IEEPA does not draw such an odd distinction between quotas and embargoes on the one hand and tariffs on the other. Rather, it empowers the President to regulate imports during national emergencies with the tools Presidents have traditionally and commonly used, including quotas, embargoes, and tariffs.

The Court today nonetheless concludes otherwise and holds that IEEPA does not authorize the President to impose tariffs to deal with the declared drug trafficking and trade deficit emergencies. But the Court's decision is splintered. In today's six-Justice majority, three Justices (JUSTICE SOTOMAYOR, JUSTICE KAGAN, and JUSTICE JACKSON) interpret IEEPA not to authorize tariffs as a matter of ordinary statutory interpretation. I disagree for the reasons noted above and elaborated on at length in this opinion.

Three other Justices (THE CHIEF JUSTICE, JUSTICE GORSUCH, and JUSTICE BARRETT) lean on the major questions canon of statutory interpretation to resolve this case. That important canon requires "clear congressional authorization" for an executive action of major economic and political significance, particularly when the Executive exercises an "unheralded" power. *West Virginia* v. *EPA*, 597 U. S. 697, 722–723 (2022) (quotation marks omitted).

In my view, as I will explain, the major questions canon does not control here for two alternative and independent reasons.

First, the statutory text, history, and precedent constitute "clear congressional authorization" for the President to impose tariffs under IEEPA. In particular, throughout American history, Presidents have commonly imposed tariffs as a means to "regulate . . . importation." So tariffs were not an "unheralded" power when Congress enacted IEEPA in 1977 and authorized the President to "regulate . . . importation" of foreign goods. Therefore, the major questions doctrine is satisfied here. Cf. *Biden* v. *Missouri*, 595 U. S. 87 (2022) (*per curiam*).

Second, in any event, the Court has *never* before applied the major questions doctrine in the foreign affairs context, including foreign trade. Rather, as Justice Robert Jackson summarized and remains true, this Court has always recognized the "'unwisdom of requiring Congress in this field of governmental power to lay down narrowly definite standards by which the President is to be governed.' " *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579, 636, n. 2 (1952) (concurring opinion) (quoting *United States* v. *Curtiss-Wright Export Corp.*, 299 U. S. 304, 321–322 (1936)). In foreign affairs cases, courts read the statute as written and do not employ the major questions doctrine as a thumb on the scale against the President.

Although I firmly disagree with the Court's holding today, the decision might not substantially constrain a President's ability to order tariffs going forward. That is because numerous other federal statutes authorize the President to impose tariffs and might justify most (if not all) of the tariffs at issue in this case—albeit perhaps with a few additional procedural steps that IEEPA, as an emergency statute, does not require. Those statutes include, for example, the Trade Expansion Act of 1962 (Section 232); the Trade Act of 1974 (Sections 122, 201, and

301); and the Tariff Act of 1930 (Section 338). In essence, the Court today concludes that the President checked the wrong statutory box by relying on IEEPA rather than another statute to impose these tariffs.

In the meantime, however, the interim effects of the Court's decision could be substantial. The United States may be required to refund billions of dollars to importers who paid the IEEPA tariffs, even though some importers may have already passed on costs to consumers or others. As was acknowledged at oral argument, the refund process is likely to be a "mess." Tr. of Oral Arg. 153–155. In addition, according to the Government, the IEEPA tariffs have helped facilitate trade deals worth trillions of dollars—including with foreign nations from China to the United Kingdom to Japan, and more. The Court's decision could generate uncertainty regarding those trade arrangements.

In any event, the only issue before the Court today is one of law. In light of the statutory text, longstanding historical practice, and relevant Supreme Court precedents, I would conclude that IEEPA authorizes the President to "regulate . . . importation" by imposing tariffs on foreign imports during declared national emergencies. I therefore respectfully dissent.[1]

I

Before turning to the specifics of IEEPA's text, history, and precedent, I briefly review several fundamental constitutional principles about the roles of the three branches of the U. S. Government with respect to this case.

First, the plaintiffs and their *amici*, echoed by the Court, rhetorically emphasize that Article I, Section 8, of the Constitution assigns Congress, not the President, authority

[1] In this dissent, when I refer to "THE CHIEF JUSTICE's opinion," I am referring to the parts of THE CHIEF JUSTICE's opinion that speak for only three Justices—namely, Parts II–A–2 and III.

over tariffs. *Ante,* at 5. That rhetoric is a red herring in this case because no one disputes the point. Everyone, including the President, agrees that Congress possesses constitutional authority over tariffs.

The important principle here, as everyone also acknowledges, is that Congress may in turn authorize the President to impose tariffs. Cf. *FCC* v. *Consumers' Research*, 606 U. S. 656, 673–675 (2025); *J. W. Hampton, Jr., & Co.* v. *United States*, 276 U. S. 394, 409–410 (1928). Indeed, since the beginning of the Republic, Congress has regularly empowered the President to order tariffs and other foreign import restrictions under various circumstances. As noted above, many current federal laws continue to grant the President expansive tariff authority, including the Trade Expansion Act of 1962 (Section 232); the Trade Act of 1974 (Sections 122, 201, and 301); and the Tariff Act of 1930 (Section 338). Neither the plaintiffs nor the Court has suggested that the numerous laws granting tariff power to the President violate the Constitution's separation of powers.

Second, and relatedly, the President does not claim unilateral authority to impose IEEPA tariffs without congressional authorization or over a congressional prohibition. On the contrary, the President's argument recognizes that, in exercising his statutory tariff power under IEEPA, he must act within the scope of Congress's authorizations and abide by Congress's limitations. And the Executive has further acknowledged that the Judiciary maintains the final word in justiciable cases on whether Congress has authorized the President to impose those tariffs under IEEPA. See *Trump* v. *CASA, Inc.*, 606 U. S. 831, 859–860, n. 18 (2025); cf. *Marbury* v. *Madison*, 1 Cranch 137, 177–178 (1803).

The President here contends only that Congress, by enacting IEEPA in 1977, authorized the President to impose tariffs on foreign imports in declared national

emergencies. To use the familiar vernacular of Justice Robert Jackson in *Youngstown*, the President argues that this case falls into category one, where the President is acting "pursuant to an express or implied authorization of Congress." *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579, 635 (1952) (concurring opinion). The President has not here asserted authority to impose IEEPA tariffs in a peacetime emergency in a *Youngstown* category two or three scenario. *Id.*, at 637–638.[2]

Third, Congress possesses a variety of tools to limit the President's tariffs—directly via new legislation or, perhaps more readily, by not approving annual appropriations necessary for the Executive Branch to continue to implement the tariffs. See *Biden* v. *Nebraska*, 600 U. S. 477, 505 (2023) ("Among Congress's most important authorities is its control of the purse").

Importantly, the House, the Senate, and the President annually approve most appropriations. As a result, each House of Congress and the President independently possesses *de facto* veto power over particular appropriations.[3]

Of course, many different appropriations items are usually considered and packaged together, so the negotiations can be complex. But the point stands: Congress is not a helpless bystander when it comes to the President's exercise of tariff authority under IEEPA. Cf. Ike Skelton National Defense Authorization Act for Fiscal Year 2011, 124 Stat. 4351–4352 (barring Executive from

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[2] Category two applies when "the President acts in absence of either a congressional grant or denial of authority." *Youngstown,* 343 U. S., at 637 (Jackson, J., concurring). Category three occurs when "the President takes measures incompatible with the expressed or implied will of Congress." *Ibid.*

[3] Two technical points for clarity: Given current Senate filibuster rules, a determined *minority* of the Senate could block an appropriation. Also, even over a Presidential veto, two-thirds of both Houses could together approve certain appropriations.

using funds to transfer detainees from Guantanamo into United States); Boland Amendment, 98 Stat. 1935–1936 (1984) (barring certain Executive Branch agencies from providing aid to Contras in Nicaragua).

In Congress, moreover, everything is related to everything else, as the saying goes. Members and Committees of Congress possess substantial tools of leverage over the Executive Branch. Cf. The Federalist No. 51, p. 322 (C. Rossiter ed. 1961) (J. Madison). Congress could, for example, wield its authority over oversight, legislation, confirmations, or appropriations to pressure the President to reduce or eliminate some or all of the IEEPA tariffs.

In light of Congress's appropriations authority and its other robust powers, it is not correct to suggest—as THE CHIEF JUSTICE's opinion today elliptically does, *ante*, at 9—that two-thirds majorities of both Houses of Congress would need to pass new legislation over a Presidential veto in order to limit these IEEPA tariffs or, more generally, to restrict the President's use of IEEPA to impose tariffs.

II

This case presents one straightforward question of statutory interpretation: Does Congress's explicit grant of authority in IEEPA for the President to "regulate . . . importation" of foreign goods in declared national emergencies authorize the President to impose tariffs? The answer is a clear yes.[4]

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[4] The relevant statutory provision provides in full:

"At the times and to the extent specified in section 1701 of this title, *the President may*, under such regulations as he may prescribe, by means of instructions, licenses, or otherwise—

. . . . . .

"(B) investigate, block during the pendency of an investigation, *regulate*, direct and compel, nullify, void, prevent or prohibit, any

A

I begin as always with the statutory text.

In 1941, a few days after Pearl Harbor, Congress first enacted the relevant language, "regulate . . . importation," in an amendment to the 1917 Trading with the Enemy Act, known as TWEA. 55 Stat. 839; 40 Stat. 411. After that 1941 amendment, TWEA authorized the President to "regulate . . . importation" both during wartime and during peacetime national emergencies.

Then, in 1977, Congress split TWEA into two separate statutes. As relevant here, Congress amended TWEA to authorize the President to "regulate . . . importation" during wartime only. 91 Stat. 1625. And Congress enacted a separate statute, IEEPA, that granted the President the power to "regulate . . . importation" during peacetime national emergencies. *Id.*, at 1626.

The relevant IEEPA text authorized the President to "regulate . . . importation" "by means of instructions, licenses, *or otherwise*." *Ibid.*; 50 U. S. C. §1702(a)(1) (emphasis added). As the term "otherwise" indicates, the broadly worded statute did not exclude tariffs or dictate any specific means of regulating importation.[5]

At the time of TWEA's amendment in 1941 and IEEPA's enactment in 1977, the ordinary dictionary meaning of "regulate" was to "control," to "adjust by rule," or to "subject

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acquisition, holding, withholding, use, transfer, withdrawal, transportation, *importation* or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest by any person, or with respect to any property, subject to the jurisdiction of the United States." 50 U. S. C. §1702(a)(1) (emphasis added).

[5] Congress no doubt appreciated that quotas, embargoes, tariffs, and the like can be powerful tools for regulating foreign commerce. Congress calibrated the statute by exempting various categories of goods, meaning that those categories of goods are not subject to tariffs under IEEPA. §1702(b).

to governing principles or laws." Black's Law Dictionary 1156 (5th ed. 1979); see also Black's Law Dictionary 1519 (3d ed. 1933) (same); Webster's Third New International Dictionary 1913 (1976) (defining "regulate" as "to govern or direct according to rule" and "to bring under the control of law or constituted authority"); American Heritage Dictionary 1096 (1969) ("[t]o control or direct according to a rule"; "[t]o adjust in conformity to a specification or requirement").

Imposing tariffs on imports is clearly a way of controlling imports (Black's); governing or directing imports according to rule (Webster's, American Heritage); adjusting imports by rule, method, or established mode (Black's, American Heritage); or more generally subjecting imports to governing principles or laws (Black's). So the dictionary definitions amply demonstrate that tariffs are a means to "regulate . . . importation" of foreign imports.[6]

Consistent with those dictionary definitions and statutory references, tariffs historically have been—and still are—a common means for the United States to regulate importation of foreign goods. See, *e.g.*, Section 338 of the Tariff Act of 1930, 46 Stat. 704–706 (19 U. S. C. §1338); Section 232 of the Trade Expansion Act of 1962, 76 Stat. 877 (19 U. S. C. §1862); Title II of the Trade Act of 1974, 88 Stat. 2011 (19 U. S. C. §2251 *et seq.*); Title III of the Trade Act of 1974, 88 Stat. 2041 (19 U. S. C. §2411 *et seq.*).[7]

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[6] As other statutory authorities textually confirm, moreover, Congress has long understood tariffs to be a tool for regulating imports. For example, Section 350 of the Tariff Act of 1930 refers to "duties and other import restrictions." 19 U. S. C. §§1351(a)(1)(B), (c). And Section 122 of the Trade Act of 1974 uses the phrase "restrict imports" to cover duties. §2132(a). Both statutes take it as a given, therefore, that tariffs are a means of regulating imports.

[7] As the parties and the Court use the terms, "tariffs" and "duties" are synonymous.

In determining the ordinary meaning of "regulate . . . importation," the meaning of the related phrase "regulate commerce" is also instructive. That phrase has long been interpreted to encompass tariffs. Since the Founding, the Constitution's assignment to Congress of the broad power to "regulate" foreign commerce has been understood to include tariffs on foreign imports. See Art. I, §8. As Chief Justice Marshall explained, the "right to *regulate* commerce, *even by the imposition of duties*, was not controverted." *Gibbons* v. *Ogden*, 9 Wheat. 1, 202 (1824) (emphasis added). So too Justice Story: The "power to *regulate* commerce *includes the power of laying duties* to countervail the regulations and restrictions of foreign nations." 2 J. Story, Commentaries on the Constitution of the United States 530 (1833) (emphasis added). And still more Story: To "lay duties" is a "common means of executing the power" to "*regulate* commerce." *Id.*, at 531 (emphasis added). James Madison likewise stated that it cannot "be inferred" that the "power to *regulate* trade does not involve a power to tax it." Letter from J. Madison to J. Cabell, Sept. 18, 1828, in 9 Writings of James Madison 326 (G. Hunt ed. 1910) (emphasis added).

Marshall, Story, and Madison make for a formidable trio. And this Court has long echoed the Marshall-Story-Madison understanding that tariffs "*regulate*" foreign commerce. The "laying of a duty on imports, although an exercise of the taxing power, is also an exercise of the power to *regulate foreign commerce*." *McGoldrick* v. *Gulf Oil Corp.*, 309 U. S. 414, 428 (1940) (emphasis added). And again: Even though "the taxing power is a distinct power and embraces the power to lay duties, it does not follow that duties may not be imposed in the exercise of the power to *regulate commerce*. The contrary is well established."

Board of Trustees of Univ. of Ill. v. *United States*, 289 U. S. 48, 58 (1933) (emphasis added).[8]

The plaintiffs and the Court today seize on the word "regulate" in isolation, and say that it does not encompass the power to tariff. *Ante*, at 14–16. But the relevant statutory phrase is "regulate . . . importation." And we must look to the meaning of the phrase as a whole, as our precedents dictate. See *FCC* v. *AT&T Inc.*, 562 U. S. 397, 406 (2011) ("[T]wo words together may assume a more particular meaning than those words in isolation"). As I have explained, since the Founding, tariffs on foreign imports have been a common means of regulating foreign commerce, including imports. Notably, under the Court's reading of the word "regulate," Marshall, Story, and Madison all erred by concluding that the power to "regulate" foreign commerce includes the power to impose tariffs on foreign imports. That seems dubious.

If the Federal Government's constitutional power to "regulate" foreign commerce includes tariffs (as this Court has repeatedly said), and if the power to "regulate . . . importation" is the power to regulate foreign commerce with respect to imports (as it plainly is), then IEEPA's authorization for the President to "regulate . . . importation" clearly encompasses tariffs. Historical usage and that textual syllogism further buttress the dictionary definitions and help establish that tariffs are a means to regulate importation.[9]

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[8] Importantly, those historical sources also fully demonstrate that the Foreign Commerce Clause, not just the Taxing Clause, authorizes tariffs on foreign imports. See *Board of Trustees of Univ. of Ill.*, 289 U. S., at 58.

[9] The plaintiffs and the Court offer a double-bankshot argument that "regulate . . . importation" cannot include monetary exactions because IEEPA also authorizes the President to "regulate . . . exportation," and imposing duties on exports would violate the Constitution. *Ante,* at 15. But as the Government thoroughly explains, when a statute contains a

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Perhaps even more significantly, when IEEPA was enacted in 1977, Congress and the public clearly would have understood that the phrase "regulate . . . importation" encompassed tariffs. We know as much not only because of the dictionary definitions and the traditional understanding of tariffs as a tool to regulate foreign imports. We also know as much because of tariffs imposed by two Presidents and approved by federal courts, including the Supreme Court, in the years shortly before IEEPA's 1977 enactment.

First, in 1971, President Nixon imposed 10 percent tariffs across the board on virtually all imports from every country in the world. Presidential Proclamation No. 4074, 3 CFR 60–61 (1971–1975 Comp.). Those tariffs were justified under IEEPA's predecessor statute, the Trading with the Enemy Act, or TWEA.[10] Like IEEPA now, TWEA at that time authorized the President to "regulate . . . importation" during national emergencies, as well as wartime. And like IEEPA now, TWEA did not specifically use the words "tariff " or "duty."

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long string of verbs and nouns, each term should be understood in context. The relevant section of IEEPA contains 9 verbs and 11 objects, for a total of 99 combinations. We do not need to construe each word of the statute to ensure that it is perfectly aligned in all 99 pairings. See Reply Brief 17; *Robers* v. *United States*, 572 U. S. 639, 643–644 (2014); *Department of Agriculture Rural Development Rural Housing Service* v. *Kirtz*, 601 U. S. 42, 61 (2024) (We may not "disregard the statute's clear terms" simply because there may be "a valid constitutional defense" to some applications).

[10] President Nixon did not explicitly cite the "regulate . . . importation" language of TWEA when imposing those worldwide tariffs. But that merely reflected a diplomatic nicety given the title of the "Trading with the Enemy Act" and the desire to avoid publicly suggesting that allies were enemies. Once in court, the President openly invoked the "regulate . . . importation" language of TWEA as justification for the tariffs. See *United States* v. *Yoshida Int'l, Inc.*, 526 F. 2d 560, 569–571 (CCPA 1975).

The Nixon tariffs did not fly below the radar. On the contrary, President Nixon announced the worldwide 10 percent tariffs in a primetime address to the Nation on August 15, 1971. He imposed the tariffs as a tool "to make certain that American products will not be at a disadvantage" and that "the product of American labor will be more competitive." Public Papers of the Presidents, Richard Nixon, Aug. 15, 1971, p. 889. President Nixon sought to remove "the unfair edge that some of our foreign competition has," and he declared that when "the unfair treatment is ended, the import tax will end." *Ibid*.

The Nixon tariffs applied to almost all imports of foreign goods into the United States. And the tariffs had no time limit. To be sure, they did not end up lasting forever. But President Nixon terminated them only because the tariffs (as intended) induced major American trading partners to negotiate new agreements. Presidential Proclamation No. 4098, 3 CFR 94 (1971–1975 Comp.).

The Nixon tariffs garnered substantial national and international attention, and were generally popular in Congress. Predictably, however, the tariffs sparked litigation challenges. In 1975, the Court of Customs and Patent Appeals, the predecessor to the Federal Circuit, upheld the Nixon tariffs as a lawful exercise of the President's authority to "regulate . . . importation" under TWEA. *United States* v. *Yoshida Int'l, Inc.*, 526 F. 2d 560, 576, 583–584. The losing plaintiffs did not seek further review in this Court.

Two years later in 1977, when Congress divided TWEA into two, Congress retained that same "regulate . . . importation" language in both laws—in TWEA for wartime and in IEEPA for peacetime national emergencies. In doing so, Members of Congress were plainly aware—after all, how could they not be—that the "regulate . . . importation" language had recently been invoked by the President and interpreted by the courts to encompass tariffs. Indeed, the

House Committee Report noted that the relevant "regulate . . . importation" provision in TWEA "came into play when, on August 15, 1971, President Nixon declared a national emergency with respect to the balance-of-payments crisis and under that emergency imposed a surcharge on imports." H. R. Rep. No. 95–459, p. 5 (1977). The Report further referenced the appeals court's holding in *Yoshida* that TWEA "authorized imposition of duties" because of "the existence of the national emergency." H. R. Rep. No. 95–459, at 5.[11]

The Nixon tariffs persuasively demonstrate that Members of Congress and the public would have understood the phrase "regulate . . . importation" to include tariffs when IEEPA was enacted in 1977. If Congress wanted to exclude tariffs from IEEPA's scope, why would it enact the exact statutory language from TWEA that had just been invoked by the President and interpreted by the courts to cover tariffs? Neither the plaintiffs nor the Court today offers a good answer to that question. Understandably so, because there is no good answer.

The Court tries to dodge the force of the Nixon tariffs by observing that one appeals court's interpretation of "regulate . . . importation" to uphold President Nixon's tariffs does not suffice to describe that interpretation as "well-settled" when IEEPA was enacted in 1977. *Ante*, at 17–18. Fair enough. But that is not the right question. The question is what Members of Congress and the public would have understood "regulate . . . importation" to mean when Congress enacted IEEPA in 1977. See *New Prime Inc.* v. *Oliveira*, 586 U. S. 105, 113 (2019). Given the significant and well-known Nixon tariffs, it is entirely implausible to

[11] I cite the Committee Report not for determining the meaning of IEEPA, but rather to help show as an historical and factual matter that Members of Congress were aware of both the Nixon tariffs and the appeals court decision upholding those tariffs as a tool to "regulate . . . importation."

think that Congress's 1977 re-enactment of the phrase "regulate . . . importation" in IEEPA was somehow meant or understood to exclude tariffs.[12]

Second, if one holds any lingering doubts about Congress's and the public's understanding of the power to "regulate . . . importation" as of 1977, a second episode shortly before IEEPA's enactment should answer them.

In 1975, President Ford imposed significant monetary exactions on foreign imports of oil. Presidential Proclamation No. 4341, 3 CFR 433 (1971–1975 Comp.). He acted under Section 232 of the Trade Expansion Act of 1962. Like TWEA and IEEPA, the relevant provision of Section 232 did not use the word "tariff" or "duty." Rather, Section 232 broadly authorized the President to "adjust the imports" of a product, 19 U. S. C. §1862(b) (1970 ed.)—language akin to the "regulate . . . importation" language in IEEPA and TWEA.

In contrast to the Nixon tariffs, the Ford tariffs on oil imports generated some pushback in Congress. And a group of utility companies and States quickly sued, arguing that the relevant statutory phrase "adjust the imports" did not authorize monetary exactions such as tariffs.

Over a dissent, the D. C. Circuit agreed with the plaintiffs challenging the Ford tariffs. Much like the Court's decision today, the D. C. Circuit in the Ford matter concluded that Congress must explicitly authorize monetary exactions and that the applicable statutory phrase, "adjust the imports," did not do so. *Algonquin SNG,*

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[12] THE CHIEF JUSTICE's opinion also tries to dismiss President Nixon's tariffs as being of "limited amount, duration, and scope." *Ante*, at 10, n. 3. That claim appears incorrect on all three points, as Judge Taranto carefully explained in his Federal Circuit opinion. 149 F. 4th 1312, 1367–1369 (2025) (dissenting opinion). President Nixon imposed 10 percent tariffs on virtually all imports from every country in the world for an unspecified duration. See Presidential Proclamation No. 4074, 3 CFR 60–61 (1971–1975 Comp.).

Inc. v. *Federal Energy Admin.*, 518 F. 2d 1051, 1055 (CADC 1975).

In 1976, the Ford tariffs case came to the Supreme Court. In this Court, the plaintiffs pressed nearly identical arguments (and rhetorical flourishes) as those advanced by the plaintiffs and repeated by the Court in today's case.

The plaintiffs argued that the Ford-imposed monetary exactions involved "the broadest exercise of the tariff power in the history of the American Republic," reminiscent of "George III's stamp tax." Tr. of Oral Arg. in *Federal Energy Administration* v. *Algonquin SNG, Inc.*, O. T. 1975, No. 75–382, p. 26. They contended that the statute's authorization for the President to "adjust the imports" did not allow for such monetary exactions because the statute did "not mention the tariff on its face." *Ibid.* They asserted that this Court had "never implied a tax, never in the history of this Court from language which does not explicitly provide for tax, and here there is no such language, there is no language that mentions a measure of tax nor a method of calculation of tax. There is no such thing." *Id.*, at 33. They echoed the D. C. Circuit's holding that reading the phrase "adjust the imports" to encompass tariffs would be "an anomalous departure" from "the consistently explicit, well-defined manner in which Congress has delegated control over foreign trade and tariffs." *Algonquin*, 518 F. 2d, at 1055. And they claimed that interpreting the statute to include fees "undermines the whole tariff structure of the United States." Tr. of Oral Arg. in *Algonquin*, at 26.

Importantly, the *Algonquin* plaintiffs acknowledged (as do the plaintiffs and the Court in today's case) that the statutory language "adjust the imports" would allow the President to impose quotas and embargoes on foreign imports. See Brief for Respondents in *Algonquin,* No. 75–382, pp. 26–27, and n. 30. So a President could completely block all imports or limit their quantity. But according to the plaintiffs, Congress's "adjust the imports" language

precluded the President from exercising the lesser power of imposing monetary exactions such as tariffs.

The Supreme Court decided the Ford tariffs case in 1976. The Court unanimously reversed the D. C. Circuit and flatly rejected the plaintiffs' arguments. The Court held that the statutory phrase "adjust the imports"—even though it did not include terms such as "tariff," "tax," "duty," or "fee"—granted President Ford the authority to impose not only quotas and embargoes, but also monetary exactions on foreign imports. *Federal Energy Administration* v. *Algonquin SNG, Inc.*, 426 U. S. 548, 561 (1976).

The Court analyzed the statutory text and found "no support in the language of the statute" for the plaintiffs' argument that "adjust the imports" should "be read to encompass only quantitative methods—*i.e.*, quotas—as opposed to monetary methods—*i.e.*, license fees—of effecting such adjustments." *Ibid.* The Court further explained: "Unless one assumes, and we do not, that quotas will always be a feasible method of dealing directly with national security threats posed by the circumstances under which imports are entering the country, limiting the President to the use of quotas would effectively and artificially prohibit him from directly dealing with some of the very problems against which §232(b) is directed." *Id.*, at 561–562 (quotation marks omitted).

In short, according to the unanimous *Algonquin* Court, the statutory text, structure, and logic of Section 232 definitively established that the President's authority to "adjust the imports" encompassed not only quotas and embargoes, but also monetary exactions such as tariffs and fees.

Today's case should follow *a fortiori* from *Algonquin*. No meaningful daylight exists between the statutory phrase "adjust the imports" in Section 232 at issue in *Algonquin* and the phrase "regulate . . . importation" in IEEPA at

issue here. The plaintiffs and the Court in this case do not even try to distinguish "adjust the imports" from "regulate . . . importation." Nor could they. Recall that the dictionary definition of "regulate" includes "*adjust* by rule." Black's Law Dictionary, at 1156 (5th ed. 1979) (emphasis added). To adjust imports is to regulate imports. Indeed, if anything, the phrase "regulate . . . importation" is broader in scope than the phrase "adjust the imports."

So if Section 232's "adjust the imports" includes tariffs—as this Court unanimously concluded in *Algonquin* in 1976 just a year before IEEPA—how can IEEPA's "regulate . . . importation" not include tariffs?

Algonquin's importance for today's case rests not merely on its status as a unanimous on-point Supreme Court statutory precedent—although it is surely significant for that reason as well. The case is especially consequential for present purposes because it helps show the ordinary public and congressional understanding of "regulate . . . importation" in 1977 when Congress enacted IEEPA.

To be clear, the question here is not what individual Members of Congress might have subjectively intended in 1977. The question is the ordinary meaning and understanding of the words that Congress used. Given that the phrase "adjust the imports"—again, in a statutory provision that did not use specific words such as "tariff" or "duty"—was unanimously held by this Court in 1976 to include tariffs, and given that President Nixon had similarly relied on his statutory authority to "regulate . . . importation" to impose 10 percent tariffs on virtually all imports from all countries, could a rational citizen or Member of Congress in 1977 have understood "regulate . . . importation" in IEEPA not to encompass tariffs? I think not. Any citizens or Members of Congress in 1977 who somehow thought that the "regulate . . . importation" language in IEEPA excluded tariffs would have had their heads in the sand.

The Court today tries its best to distinguish *Algonquin* on the ground that Section 232 included "sweeping" language authorizing the President to take "such action" that "he deems necessary," whereas IEEPA does not. *Ante*, at 19. But the *Algonquin* Court did not rely on that language and instead focused on whether the phrase "adjust the imports" included monetary exactions. See 426 U. S., at 561. Moreover, IEEPA itself broadly authorizes the President to "regulate . . . importation" "by means of instructions, licenses, *or otherwise*" in order to "deal with" an "unusual and extraordinary" foreign "threat" to the "national security, foreign policy, or economy of the United States." 50 U. S. C. §§1701(a), 1702(a)(1)(B) (emphasis added). That language is similarly expansive, authorizing the President to employ various tools to "regulate . . . importation." In short, just as the phrase "adjust the imports" includes tariffs, as *Algonquin* held, so too the phrase "regulate . . . importation" includes tariffs.[13]

The Court also attempts to brush aside *Algonquin* by citing an entirely different provision of the Trade Expansion Act—one that was not at issue in *Algonquin*—that expressly refers to a "duty." *Ante*, at 19. But the *Algonquin* Court did not rely on—or even mention—that provision when concluding that the statutory phrase "adjust the imports" includes tariffs. For good reason. That provision, which states that "[n]o action shall be taken" to "decrease or eliminate" an existing "duty or other import restriction," 19 U. S. C. §1862(a) (1970 ed.), concerns only the power to reduce existing tariffs and plainly does not bear on a President's power to *impose* tariffs under Section 232.

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[13] In addition, IEEPA expressly authorizes the President to require licenses. And to obtain a license, a business may need to pay license fees that can be equivalent to tariffs. See §1702(a)(1).

To sum up on the Nixon and Ford tariffs: When enacting IEEPA in 1977, Congress employed the exact language recently invoked by President Nixon to justify 10 percent worldwide tariffs. And IEEPA came fast on the heels of this Court's unanimous 1976 decision in *Algonquin*, which held that substantially similar "adjust the imports" language authorized President Ford's tariffs on oil imports. Importantly, moreover, the statutory provisions authorizing the Nixon and Ford tariffs did not use specific words such as "tariff" or "duty."

The Nixon and Ford tariffs, this Court's decision in *Algonquin*, and the ordinary and historical understanding of tariffs as a means of regulating imports together render it all but impossible to conclude that Congress in 1977 implicitly excluded tariffs when retaining TWEA's "regulate . . . importation" language in IEEPA. If Congress in 1977 wanted to exclude tariffs from the President's IEEPA toolkit, either it would have not retained the phrase "regulate . . . importation," or it would otherwise have made clear in IEEPA that the power to impose tariffs was excluded. Congress did neither.

C

Two additional historical points strongly reinforce that analysis of text and precedent and further demonstrate that "regulate . . . importation" in IEEPA encompasses tariffs.

First, U. S. history from the 1800s through IEEPA's 1977 enactment illustrates how the statute came to incorporate the President's long-recognized authority to impose tariffs during wartime and then also during peacetime national emergencies.

Long before the initial 1917 enactment of the Trading with the Enemy Act, which was IEEPA's predecessor, the President possessed inherent wartime authority to prohibit commercial relations with enemy nations. That inherent

authority included the power to impose tariffs on foreign imports.

For example, during the Mexican-American War in the 1840s, President Polk permitted only limited trade with Mexico, subject to tariffs. Some Members of Congress publicly questioned whether the President possessed that tariff authority. In response, President Polk justified the tariffs on the ground that "the military right to exclude commerce altogether from the ports of the enemy in our military occupation included the minor right of admitting it under prescribed conditions." J. Polk, To the House of Representatives of the United States (Jan. 2, 1849), in 6 Compilation of the Messages and Papers of the Presidents 2522, 2523 (J. Richardson ed. 1897).

In 1854, the Supreme Court agreed with President Polk's view, stating: "No one can doubt" that the President, as "commander-in-chief of our naval force," possessed the authority to "regulate import duties." *Cross* v. *Harrison*, 16 How. 164, 189–190.

In 1862, President Lincoln partially lifted an existing blockade against the Confederate States during the Civil War. Like President Polk, he then permitted limited trade, subject to a monetary fee. A group of cotton sellers later sued, arguing that the fee "was essentially a tax and not authorized by any act of Congress, which alone had the power to impose taxes." *Hamilton* v. *Dillin*, 21 Wall. 73, 81 (1875). The Supreme Court rejected that argument, holding that there was "no question" that requiring a monetary fee to trade with the Confederate States was part of "the war power of the United States government." *Id.*, at 86–87. The existence of war meant "a suspension of commercial intercourse between the opposing sections of the country," so if "such a course of dealing were to be permitted at all, it would necessarily be upon such conditions as the government chose to prescribe." *Id.*, at 87.

And in 1898, during the Spanish-American War, President McKinley imposed duties "upon the occupation of any forts and places in the Philippine Islands." *Lincoln* v. *United States*, 197 U. S. 419, 428 (1905) (quotation marks omitted). This Court subsequently recognized those McKinley duties as a lawful wartime measure. *Id.*, at 427–428.

Why does that wartime history matter? Because when Congress first enacted the Trading with the Enemy Act in 1917 during World War I, it statutorily codified some of the President's longstanding inherent wartime powers over foreign trade, which included the power to tariff. See Trading with the Enemy Act, ch. 106, 40 Stat. 411; see also Brief for Professor Aditya Bamzai as *Amicus Curiae* 16–19, 26–27. For the duration of World War I, TWEA authorized the President, when he found "the public safety so requires," to make it unlawful "to import into the United States" from any "named" country certain goods "except at such time or times, and under such regulations or orders, and subject to such limitations and exceptions as the President shall prescribe." §11, 40 Stat. 422–423.

In 1933, during the Great Depression and five days after President Franklin Roosevelt took office, Congress expanded TWEA to apply not only in wartime, but also during a "national emergency" declared by the President. 48 Stat. 1.

Eight years later, in 1941, a few days after Pearl Harbor, Congress again amended TWEA's language by more succinctly providing that the President may "regulate" certain transactions, including "importation," under TWEA during war or "any other period of national emergency declared by the President." 55 Stat. 839.

So as of 1941—and from then to 1977—TWEA expressly authorized the President to "regulate . . . importation" both during wartime and during peacetime national emergencies. Historically, Presidents had regulated

importation by imposing tariffs, as the Polk, Lincoln, and McKinley tariffs illustrated. So TWEA from 1941 to 1977 was best understood to authorize tariffs. See Brief for Professor Aditya Bamzai as *Amicus Curiae* 27–28.

During that period, as I have discussed at length above, President Nixon in 1971 imposed 10 percent tariffs on almost all imports of foreign goods and relied on TWEA's "regulate . . . importation" language to justify them. Those tariffs were upheld in court.

Then, in 1977, Congress amended TWEA and divided it into two statutes. TWEA retained the President's power to "regulate . . . importation," but only during wartime. The newly enacted second law, IEEPA, also retained the power to "regulate . . . importation," and it would apply during periods of declared national emergencies. As this Court has previously recognized, IEEPA was "directly drawn" from TWEA, and the relevant authorities are essentially the same. *Dames & Moore* v. *Regan*, 453 U. S. 654, 671, 672–673 (1981).

Therefore, IEEPA's specific language—"regulate . . . importation"—was not new statutory text when Congress enacted IEEPA in 1977. Far from it. Beginning in 1941, TWEA had already authorized the President to "regulate . . . importation" of foreign goods in wartime and national emergencies. And the earlier Polk, Lincoln, and McKinley examples, as well as the later Nixon example, demonstrated that the power to "regulate . . . importation" historically encompassed tariffs as well as quotas and embargoes.

The plaintiffs and the Court today assert that wartime precedents do not govern peacetime. But Congress modeled IEEPA on TWEA precisely so that the President could continue to exercise certain wartime authorities such as quotas, embargoes, and tariffs during peacetime national emergencies as well. Congress first explicitly extended that wartime power to national emergencies in 1933, during the

Franklin Roosevelt Administration. Cf. *New State Ice Co.* v. *Liebmann*, 285 U. S. 262, 306 (1932) (Brandeis, J., dissenting) (The Great Depression was "an emergency more serious than war"). And Congress has continued to authorize the President to exercise that power in both wartime and peacetime emergencies.

In short, Congress in 1977 enacted the same "regulate . . . importation" language that had long been understood to encompass tariffs.

Second, contrary to the tenor of the plaintiffs' and the Court's arguments here, it would not have been at all unusual or surprising for Congress, when enacting IEEPA in 1977, to authorize the President to impose tariffs. Since the early days of the Republic, Congress has regularly granted the President the power to regulate foreign trade, including via tariffs.

A few examples: In 1810, Congress authorized the President to prohibit imports from Great Britain or France if either nation violated the neutral commerce of the United States. *Cargo of Brig Aurora* v. *United States*, 7 Cranch 382, 382–384, 388 (1813); 2 Stat. 606.

In 1890, Congress granted the President the power to impose import duties in response to duties imposed by other countries on American exports. *Marshall Field & Co.* v. *Clark*, 143 U. S. 649, 680–681 (1892); 26 Stat. 612.

In 1922, Congress empowered the President to levy import duties under certain conditions. *J. W. Hampton, Jr., & Co.* v. *United States*, 276 U. S. 394, 400–402 (1928); 42 Stat. 941.

In 1930, Congress enacted Section 338 of the Tariff Act, which authorizes the President to impose tariffs when he finds that "any foreign country places any burden or disadvantage upon the commerce of the United States." 19 U. S. C. §1338(d); 46 Stat. 705.

In 1962, Congress authorized the President in Section 232 of the Trade Expansion Act to "adjust the imports" of a

foreign good that threatens to impair national security. §1862(c)(1)(A); 76 Stat. 877.

In 1974, under Section 201 of the Trade Act, Congress granted the President the power to "take all appropriate and feasible action within his power," including imposing a "duty" on imports that, according to the U. S. International Trade Commission, have caused or threatened "serious injury" to a domestic industry. §§2251(a), 2253(a)(1)(A), (3)(A); 88 Stat. 2014–2015.

So too, Section 301 authorizes the President to direct the U. S. Trade Representative to "impose duties" on countries engaging in unfair trade practices. §§2411(a), (c)(1)(B); 88 Stat. 2041–2042.

And Section 122 of the Act grants the President the power to impose a "temporary import surcharge" to "deal with large and serious United States balance-of-payment deficits." §2132(a)(1)(A); 88 Stat. 1987–1988.

Those many statutes definitively establish that Congress, since near the Founding, has delegated to the President broad power to impose tariffs on foreign imports. See also *ante,* at 13–15 (THOMAS, J., dissenting). So it would hardly have been unusual or surprising for Congress to have granted tariff power to the President during wartime and peacetime national emergencies, as it did in TWEA and IEEPA.

To be sure, given those other statutes that authorize the President to impose tariffs on foreign imports, one might reasonably ask: Why did the President need distinct tariff authority under IEEPA during peacetime emergencies—or, for that matter, under TWEA during wartime?

The basic answer is that IEEPA is an emergency statute that allows the President to impose tariffs somewhat more quickly, as would be expected in a declared national emergency. Similarly, in wartime, TWEA allows the President to impose tariffs more rapidly.

But critically, TWEA and IEEPA do not authorize the President to exercise some new substantive power. Rather, they authorize the President to exercise a commonly granted power—tariffs—more efficiently than under the many ordinary tariff statutes.

The plaintiffs and the Court assert that interpreting IEEPA to authorize tariffs would in effect evade specific limits on tariffs in certain other tariff statutes. But as Judge Taranto explained in the Federal Circuit, Congress in IEEPA understandably afforded the President more flexibility to act during declared emergencies, just as Congress had done in TWEA for wartime since 1917. See 149 F. 4th 1312, 1363–1366 (2025) (dissenting opinion).

Moreover, IEEPA is not a blank check. IEEPA contains its own limits, including the requirement that the tariffs deal with an unusual and extraordinary foreign threat, 50 U. S. C. §1701(b); a default 1-year limit on emergencies, §1622(d); an enumerated list of exceptions, §1702(b); and comprehensive congressional reporting requirements, §1703. And as noted above, each House of Congress possesses a variety of tools to revoke, limit, or influence a President's IEEPA or TWEA tariffs.

Relatedly, it is also not surprising that the many ordinary tariff statutes expressly refer to "tariffs," "duties," and the like, while IEEPA and TWEA do not. As Judge Taranto astutely explained, "Congress in those statutes was overwhelmingly focused on tariff issues," whereas "Congress in IEEPA (as in TWEA) was focused on the subject of emergencies and giving plainly broad emergency authority regarding foreign property." 149 F. 4th, at 1364 (dissenting opinion).

In sum, in authorizing the President to "regulate . . . importation," IEEPA embodies an "eyes-open congressional grant of broad emergency authority in this foreign-affairs realm, which unsurprisingly extends beyond authorities available under non-emergency laws, and Congress

confirmed the understood breadth by tying IEEPA's authority to particularly demanding procedural requirements for keeping Congress informed." *Id.*, at 1348.

D

Finally, all of that text, history, and precedent is further reinforced by two compelling pieces of context.

First, interpreting IEEPA to exclude tariffs creates nonsensical textual and practical anomalies. The plaintiffs and the Court do not dispute that the President can act in declared emergencies under IEEPA to impose quotas or even total embargoes on all imports from a given country. But the President supposedly cannot take the far more modest step of conditioning those imports on payment of a tariff or duty.

Textually, however, if quotas and embargoes are a means to regulate importation, how are tariffs not a means to regulate importation? Nothing in the text supports such an illogical distinction.

And it does not make much sense to think that IEEPA allows the President in a declared national emergency to, for example, shut off all or most imports from China, but not to impose even a $1 tariff on imports from China. As Judge Taranto forcefully pointed out in the Federal Circuit, tariffs are "just a less extreme, more flexible tool for pursuing the same objective of controlling the amount or price of imports that, after all, could be barred altogether." 149 F. 4th, at 1363 (dissenting opinion). All of that explains why this Court in *Algonquin* definitively rejected such a strange slice-and-dice approach to the President's statutory power to "adjust" imports. If quotas and embargoes are authorized, so are tariffs.

In short, whether through prohibiting imports via embargoes or regulating the quantity of imports through quotas or regulating the price of imports with tariffs, Congress granted the President flexibility in declared

national emergencies to take various actions affecting imports of foreign goods. The plaintiffs and the Court have no coherent textual or commonsensical explanation for why a rational Congress would, in such a momentous and carefully considered statute as IEEPA, grant the President the power to impose quotas and embargoes, but not tariffs, on foreign imports during emergencies.

Second, IEEPA was not debated and passed in a vacuum in 1977—it was enacted around the same time that Congress significantly *constrained* executive power in multiple ways in the wake of Watergate and Vietnam. The list of major new statutory restrictions on Presidential power enacted in the 1970s is long and extraordinary, with lasting effects to the present day.[14]

And Congress, during that comprehensive examination and recalibration of government power, did not overlook TWEA and the President's emergency authorities. Led by Senators Church and Mathias, Congress carefully studied the President's emergency authorities, including TWEA. Then, in 1976 and 1977, Congress enacted a variety of legislation to tighten up the President's emergency powers, including by passing a new National Emergencies Act that cabined the President's authority to declare emergencies by setting forth various procedural requirements.

Yet when enacting IEEPA in 1977, Congress continued to grant the President the power to "regulate . . . importation"

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[14] See, *e.g.*, Ethics in Government Act of 1978, 92 Stat. 1824, reenacted at 5 U. S. C. §13101 *et seq.*; Inspector General Act of 1978, 92 Stat. 1101, reenacted at 5 U. S. C. §401 *et seq.*; Presidential Records Act of 1978, 92 Stat. 2523, as amended, 44 U. S. C. §2201 *et seq.*; Federal Advisory Committee Act, 86 Stat. 770, as amended, 5 U. S. C. §1001 *et seq.*; Foreign Intelligence Surveillance Act of 1978, 92 Stat. 1783, as amended, 50 U. S. C. §1801 *et seq.*; Congressional Budget and Impoundment Control Act of 1974, 88 Stat. 297, as amended, 2 U. S. C. §621 *et seq.*; 1974 Amendments to the Freedom of Information Act, 88 Stat. 1561, as amended, 5 U. S. C. §552; War Powers Resolution, 87 Stat. 555, 50 U. S. C. §1541 *et seq.*

in declared national emergencies—a power that the President had possessed since 1941 under TWEA and that had recently been invoked by President Nixon to justify his 1971 tariffs. In IEEPA (and TWEA) in 1977, Congress consciously balanced concerns about expansive exercises of emergency powers against the necessity of equipping the President with tools to address exigencies that are difficult if not impossible to foresee. That broader congressional context—general skepticism and scaling back of executive power combined with re-enactment of the familiar "regulate . . . importation" language in IEEPA—strongly indicates that Congress said what it meant and meant what it said when it enacted IEEPA and continued to authorize the President to "regulate . . . importation" during national emergencies.

III

In an ordinary statutory interpretation case, I am confident that a majority of this Court would flatly reject the plaintiffs' exceedingly weak statutory arguments and would hold that IEEPA's authorization for the President to "regulate . . . importation" during national emergencies includes the power to impose tariffs.

Notably, the Court today does not claim that the phrase "regulate . . . importation" on its own excludes tariffs as a matter of ordinary statutory meaning. Only three Members of the Court, JUSTICE SOTOMAYOR, JUSTICE KAGAN, and JUSTICE JACKSON, do so.

THE CHIEF JUSTICE's opinion in Part II–A–2, which is joined only by JUSTICE GORSUCH and JUSTICE BARRETT, instead relies on the major questions doctrine. The major questions doctrine is an important canon of statutory interpretation that the Court has applied in a number of significant cases over the last 45 years. See *Industrial Union Dept., AFL–CIO* v. *American Petroleum Institute*, 448 U. S. 607, 645 (1980) (plurality opinion).

Justice Scalia articulated the canonical statement of the major questions doctrine: "We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance.' " *Utility Air Regulatory Group* v. *EPA*, 573 U. S. 302, 324 (2014) (quoting *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U. S. 120, 160 (2000)); see also *Alabama Assn. of Realtors* v. *Department of Health and Human Servs.*, 594 U. S. 758, 764 (2021) (*per curiam*); *National Federation of Independent Business* v. *OSHA*, 595 U. S. 109, 117 (2022) (*per curiam*); *Biden* v. *Nebraska*, 600 U. S. 477, 507 (2023); cf. *West Virginia* v. *EPA*, 597 U. S. 697, 723 (2022).

Stated otherwise, in cases where the Executive Branch takes an action of major economic and political significance, it must "point to 'clear congressional authorization' for the power it claims." *Ibid.* (quoting *Utility Air*, 573 U. S., at 324).

The requirement of "*clear* congressional authorization" for executive actions of major economic and political significance is "grounded in two overlapping and reinforcing presumptions: (i) a separation of powers-based presumption against the delegation of major lawmaking authority from Congress to the Executive Branch, and (ii) a presumption that Congress intends to make major policy decisions itself, not leave those decisions to agencies." *United States Telecom Assn.* v. *FCC*, 855 F. 3d 381, 419 (CADC 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc) (citation omitted). As this Court later recounted in *West Virginia*, "both separation of powers principles and a practical understanding of legislative intent make us reluctant to read into ambiguous statutory text the delegation claimed to be lurking there." 597 U. S.,

at 723 (quotation marks omitted).[15] The doctrine guards "against unintentional, oblique, or otherwise unlikely delegations of the legislative power." *NFIB*, 595 U. S., at 125 (GORSUCH, J., concurring).[16]

I agree that this case involves an executive action of major economic and political significance—which is typically the trigger for requiring "clear congressional authorization." But in my respectful view, THE CHIEF JUSTICE's opinion's application of the major questions doctrine in this case is incorrect for two alternative and independent reasons. First, the statutory text, history, and precedent constitute "clear congressional authorization" for the President to impose tariffs as a means to "regulate . . . importation." Second, and in the alternative, the major questions doctrine does not apply in the foreign affairs context. In the foreign affairs realm, courts recognize that Congress often deliberately grants flexibility and discretion to the President to pursue America's interests. In that context, courts therefore engage in "routine" textualist statutory interpretation—reading the text as written—and do not employ the major questions doctrine as a thumb on the scale against the President. *West Virginia*, 597 U. S., at 724.

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[15] The major questions doctrine has also been analogized to, among other things, the mischief rule, the absurdity doctrine, common sense, and context. See, *e.g.*, S. Bray, The Mischief Rule, 109 Geo. L. J. 967, 1011 (2021) (doctrine "has an essential similarity with the mischief rule"); *Biden* v. *Nebraska*, 600 U. S. 477, 511 (2023) (BARRETT, J., concurring) (context, common sense).

[16] I have long been, and fully remain, a strong proponent of the major questions doctrine. See *United States Telecom*, 855 F. 3d, at 418–426 (opinion of Kavanaugh, J.); *Loving* v. *IRS*, 742 F. 3d 1013, 1021 (CADC 2014); *Coalition for Responsible Regulation, Inc.* v. *EPA*, No. 9–1322 (CADC, Dec. 20, 2012), pp. 9–10 (Kavanaugh, J., dissenting from denial of rehearing en banc).

A

1

Because the major questions doctrine demands "clear congressional authorization," this Court has repeatedly recognized that the doctrine is "distinct" from "routine statutory interpretation." *West Virginia*, 597 U. S., at 724 (quotation marks omitted). Importantly, therefore, the doctrine applies—and makes a meaningful difference—only in cases where the Executive's "reading of a statute" "would, under more ordinary circumstances, be upheld." *Ibid.* (quotation marks omitted); see also *id.*, at 740, 742, n. 3 (GORSUCH, J., concurring); M. Sohoni, The Major Questions Quartet, 136 Harv. L. Rev. 262, 272–276 (2022).

To properly set up the inquiry: A major questions issue arises when: (i) the Executive relies on the text of a generally worded statute to exercise a specific power of major economic and political significance; (ii) the generally worded statute does not *explicitly* mention the specific major power, but (iii) the asserted major power falls within the generally worded text of the statute such that the Executive's assertion of that power "would, under more ordinary circumstances, be upheld," *West Virginia*, 597 U. S., at 724 (majority opinion) (quotation marks omitted).[17]

The question then is whether the generally worded statute supplies "clear congressional authorization" for the Executive to exercise that specific—but not explicitly mentioned—major power. Here, for example, does the generally worded statutory authorization for the President to "regulate . . . importation" clearly authorize the President to impose tariffs?

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[17] Of course, if the major power does not fall within the generally worded text as a matter of ordinary statutory interpretation, the major questions doctrine is not implicated or necessary to apply because the Government's statutory argument fails to begin with.

The requirement of "clear congressional authorization" is easy enough to state. But how do we apply it? How do we decide in a particular case whether a generally worded statute actually constitutes "clear congressional authorization" for a major power that otherwise falls within the general terms?

For starters, and critically, the Court has repeatedly emphasized that the major questions doctrine is not a magic words requirement. In other words, the doctrine does not require an explicit reference to the specific major power itself. As the Court's cases amply demonstrate, the major questions doctrine does not "forc[e] Congress to delegate in highly specific terms." *Biden* v. *Nebraska*, 600 U. S., at 516 (BARRETT, J., concurring) (quotation marks omitted).

Rather than require magic words (such as the words "tariff " or "duty" here), the Court's cases have focused on four somewhat overlapping factors or considerations in order to assess whether a generally worded statute constitutes "clear congressional authorization" for the specific major power.[18]

First, the major questions doctrine's most prominent work has been to ensure that the Executive cannot suddenly seize on an old and generally worded statute to exercise a power of great economic and political significance when that power would not reasonably have been understood at the time of enactment to fall within that generally worded statute. See *West Virginia*, 597 U. S., at 720–735; *Brown & Williamson*, 529 U. S., at 159–161. As the Court has said: "When an agency claims to discover in a long-extant statute an unheralded power to regulate a

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[18] Both JUSTICE GORSUCH and JUSTICE BARRETT have likewise read the Court's precedents to identify those same four factors, as they explained in their incisive separate opinions in *West Virginia* v. *EPA* and *Biden* v. *Nebraska*, respectively. See 597 U. S. 697, 746–749 (2022) (GORSUCH, J., concurring) (referring to the four "telling clues"); 600 U. S., at 517–520 (BARRETT, J., concurring); see also *ante,* at 27 (GORSUCH, J., concurring).

significant portion of the American economy, we typically greet its announcement with a measure of skepticism." *Utility Air*, 573 U. S., at 324 (citation and quotation marks omitted); *West Virginia*, 597 U. S., at 748 (GORSUCH, J., concurring).

The doctrine thus precludes an agency's attempt to effectuate "a fundamental revision of the statute." *MCI Telecommunications Corp.* v. *American Telephone & Telegraph Co.*, 512 U. S. 218, 231 (1994). Stated otherwise, an "agency's attempt to deploy an old statute focused on one problem to solve a new and different problem" may be "a warning sign that it is acting without clear congressional authority." *West Virginia*, 597 U. S., at 747 (GORSUCH, J., concurring). The Court's skepticism about major executive action in those scenarios has been heightened when Congress has "conspicuously and repeatedly declined to enact" legislation that would have authorized the executive action in question. *Id.*, at 724 (majority opinion).

A prototypical example occurred when OSHA, in order to justify a nationwide COVID–19 vaccine mandate for workers, relied "on a statutory provision that was adopted 40 years before the pandemic and that focused on conditions specific to the workplace." *Id.*, at 747 (GORSUCH, J., concurring). Another example arose when EPA invoked "newfound authority to regulate" emissions from "millions of small sources—including retail stores, offices, apartment buildings, shopping centers, schools, and churches." *Utility Air*, 573 U. S., at 328. Yet another happened when the CDC tried to impose an eviction moratorium for rental housing through an "unprecedented" assertion of its authority to regulate public health. *Alabama Assn. of Realtors*, 594 U. S., at 765.

Second, courts examine the "agency's past interpretations of the relevant statute." *West Virginia*, 597 U. S., at 747 (GORSUCH, J., concurring). The Executive's "track record can be particularly probative" in the major

questions context. *Biden* v. *Nebraska*, 600 U. S., at 519 (BARRETT, J., concurring).

A "contemporaneous and long-held Executive Branch interpretation of a statute is entitled to some weight." *West Virginia*, 597 U. S., at 747 (GORSUCH, J., concurring) (quotation marks omitted). Just "as established practice may shed light on the extent of power conveyed by general statutory language, so the want of assertion of power by those who presumably would be alert to exercise it, is equally significant in determining whether such power was actually conferred." *Id.*, at 725 (majority opinion) (quotation marks omitted).

The *NFIB* Court therefore found it critical that "OSHA, in its half century of existence, has never before adopted a broad public health regulation of this kind" under the statute that the agency sought to invoke as authority for the vaccine mandate. 595 U. S., at 119. Likewise, in *Brown & Williamson*, the FDA had "repeatedly and consistently assert[ed] that it lacks jurisdiction under the FDCA to regulate tobacco products." 529 U. S., at 156. And in *West Virginia*, EPA had not "previously interpreted the relevant provision to confer on it such vast authority" to transform American industry. 597 U. S., at 749 (GORSUCH, J., concurring).

Third, courts assess whether "there is a mismatch between an agency's challenged action and its congressionally assigned mission and expertise," *id.,* at 748 (GORSUCH, J., concurring)—in other words, whether an agency is trying to regulate "outside its wheelhouse," *Biden* v. *Nebraska*, 600 U. S., at 518 (BARRETT, J., concurring).

In the *NFIB* case, OSHA, which is empowered to "set *workplace* safety standards, not broad public health measures," mandated COVID–19 vaccines. 595 U. S., at 117. In *Alabama Assn. of Realtors*, the CDC—a public health agency—attempted to regulate housing. 594 U. S., at 763–765. In *Gonzales* v. *Oregon*, the Attorney General

sought to assert authority over the drugs used in physician-assisted suicide. 546 U. S. 243, 267–268 (2006).

All of those cases involved serious mismatches between the agency's usual regulatory activities and its asserted major power.

Fourth, the Court looks at whether the relevant statutory language used to justify the Executive's exercise of a major power is "oblique," "elliptical," or "cryptic." *West Virginia*, 597 U. S., at 746–747 (GORSUCH, J., concurring) (alterations and quotation marks omitted). As the Court has often said, Congress does not "hide elephants" in statutory "mouseholes." *Whitman* v. *American Trucking Assns., Inc.*, 531 U. S. 457, 468 (2001).

In *MCI Telecommunications Corp.*, for example, the Court refused to allow the FCC to eliminate rate regulation and fundamentally overhaul the telecommunications industry based on a "subtle" provision that merely permitted the FCC to "modify" rate-filing requirements. 512 U. S., at 231 (quotation marks omitted). In *Brown & Williamson*, the Court rejected the FDA's attempt to regulate the tobacco industry based on a "cryptic" statutory provision that referred to "safety." 529 U. S., at 160 (quotation marks omitted). In *Gonzales*, the Court said that Congress would not have granted the Attorney General the power to regulate physician-assisted suicide through "oblique" statutory language. 546 U. S., at 267. And in *West Virginia*, the Court found it unlikely that Congress would have granted major power to reshape the energy industry in a "previously little-used backwater" of the statute. 597 U. S., at 730.

2

So in this case we must apply those four factors in order to determine whether Congress, when it afforded the President the power to "regulate . . . importation," clearly authorized the President to impose tariffs. As I see it, those

factors show that Congress clearly authorized tariffs in IEEPA when it empowered the President to "regulate . . . importation."

First, unlike the OSHA vaccine mandate in *NFIB* or the greenhouse gas regulation in *Utility Air*, for example, the President here is not exercising an "unheralded" or "newfound authority" based on a "long-extant" statute—that is, exercising a power that was unanticipated or unforeseen when Congress enacted IEEPA's "regulate . . . importation" language in 1977.

On the contrary, as was fully explained above, the tariff authority exercised here is not remotely "unheralded." To recap: Any citizen or Member of Congress who paid the least bit of attention in 1977 would have readily understood that the President's authority to "regulate . . . importation" encompassed the power to tariff. There are the dictionary definitions and the historical usage and practice. And among other things, just a few years before IEEPA, that "regulate . . . importation" language was invoked by President Nixon and judicially approved to sustain his 10 percent worldwide tariffs. President Ford then implemented significant tariffs using substantially similar "adjust the imports" statutory language, and this Court unanimously upheld President Ford's tariffs in *Algonquin*.

So IEEPA's grant of authority to the President to impose tariffs in order to regulate importation is not "unheralded" or "newfound." That authority was plain as day in 1977.[19]

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[19] The Court downplays the significance of the prominent Nixon and Ford tariffs. *Ante,* at 17–19 (majority opinion); *ante,* at 27–28, 39 (GORSUCH, J., concurring). But the Nixon and Ford examples, as well as *Algonquin*, are critical for a proper and full understanding of the meaning of "regulate . . . importation" when Congress enacted IEEPA in 1977. We cannot ignore or diminish that history. THE CHIEF JUSTICE's opinion and JUSTICE GORSUCH's concurrence also say that no President since 1977 has invoked IEEPA to impose tariffs. *Ante,* at 10 (opinion of ROBERTS, C. J.); *ante,* at 27–28 (GORSUCH, J., concurring). But since

Second, the President is not interpreting the "regulate . . . importation" language in IEEPA differently from how past Presidents have interpreted it. At least as far as the briefing and arguments in this case have disclosed, no Presidential Administration since the enactment of the "regulate . . . importation" language in TWEA in 1941 or since its re-enactment in IEEPA in 1977 has interpreted the statute to exclude the power to impose tariffs. Moreover, before IEEPA's enactment, President Nixon imposed tariffs based on the same "regulate . . . importation" language. And in 1975, President Ford invoked authority to "adjust the imports" in order to similarly impose monetary exactions. In addition—if more is needed—Marshall, Story, Madison, and this Court have all long recognized that the power to regulate foreign commerce includes tariffs.

The current President's reading of IEEPA follows from and is entirely consistent with those past interpretations—making his position nothing like, for example, FDA's when it changed its longstanding position that it lacked the authority to regulate cigarettes, *Brown & Williamson,* 529 U. S., at 159–160, or OSHA's when it implemented a vaccine requirement even though it had "never before adopted a broad public health regulation of this kind," *NFIB*, 595 U. S., at 119.

When, as here, "established practice," *West Virginia*, 597 U. S., at 725 (quotation marks omitted), and the Executive's "track record," *Biden* v. *Nebraska*, 600 U. S., at 519

1977, Presidents have imposed numerous tariffs under non-emergency tariff statutes—including Section 232, which like IEEPA also does not explicitly reference tariffs or taxes. The fact that recent Presidents have not often had occasion under the National Emergencies Act to declare national emergencies in which tariffs would help "deal with" the specific emergency at issue does not mean that Presidents have now lost the authority exercised by President Nixon to impose tariffs. IEEPA was not designed as a use-it-or-lose-it source of emergency authority.

(BARRETT, J., concurring), convincingly show that the general statutory language has long been understood to cover the specific power asserted by the Executive, that record should all but resolve the matter for major questions purposes.

Third, there is no mismatch: The power to tariff falls squarely within the President's wheelhouse. From the Founding, as THE CHIEF JUSTICE's opinion today acknowledges, numerous other statutes have afforded—and still do afford—the President broad power to impose tariffs. *Ante,* at 8–9. This case is entirely different, therefore, from our prior major questions cases, where, for example, the CDC attempted to impose an eviction moratorium, *Alabama Assn. of Realtors*, 594 U. S., at 763–765; OSHA sought to implement a nationwide vaccine mandate, *NFIB*, 595 U. S., at 117–120; the FDA tried to regulate cigarettes, *Brown & Williamson*, 529 U. S., at 159–161; and the Attorney General attempted to regulate physician-assisted suicide, *Gonzales*, 546 U. S., at 267–268. Presidents imposing tariffs—whether pursuant to inherent wartime authority, pursuant to TWEA and IEEPA's "regulate . . . importation" language, pursuant to Section 232's "adjust the imports" text, or pursuant to the many other tariff statutory authorities—is hardly an unusual occurrence in our Nation's history or in recent times. For example, Presidents George W. Bush, Obama, and Biden all imposed tariffs pursuant to congressional authorization. There is no mismatch between the tariff power and the President's "mission and expertise." *West Virginia*, 597 U. S., at 748 (GORSUCH, J., concurring).

Fourth, the President is not relying on oblique, elliptical, or cryptic language. This case does not involve "elephants in mouseholes." *Whitman*, 531 U. S., at 468. This case instead involves an elephant (tariffs) in a statutory elephant hole (the power to "regulate . . . importation" to deal with foreign threats in national emergencies). IEEPA

was a major and thoroughly studied statute carefully crafted to grant the President a suite of powerful tools, including to "regulate . . . importation," and thereby allow him to respond swiftly to national emergencies and to help America respond to crises. Since its enactment, Presidents have invoked IEEPA more than 70 times to deal with emergencies and threats from the September 11, 2001, al Qaeda attacks to Iran to North Korea, and many others. See Congressional Research Service, The International Emergency Economic Powers Act: Origins, Evolution, and Use 18–32 (2025).

By 1977, moreover, it was well-known that tariffs on foreign imports—along with even more powerful tools such as quotas and embargoes—were a common way to "regulate . . . importation." IEEPA thus bears zero resemblance to the paradigmatic "previously little-used backwater" statutory provision that cannot support significant executive actions. *West Virginia*, 597 U. S., at 730.

All of that makes this case dramatically different from—really, the opposite of—the major questions cases where the Court has ruled against the Government. The text, the history, the context, and the precedent all point strongly to the conclusion that as of 1977, tariffs were a well-recognized means of regulating importation, like quotas and embargoes.

As Judge Taranto persuasively summarized, this case bears none of the hallmarks of past major questions cases where the Court found a lack of clear congressional authorization for the Government's asserted major power. IEEPA's "facial breadth in an emergency context makes the straightforward application of the statute's words hardly unheralded, and if a more specific herald is needed, it is present in the [Nixon] 1971 proclamation, *Yoshida CCPA*, and subsequent congressional adoption of the relevant language in 1977." 149 F. 4th 1312, 1376 (CA Fed. 2025) (dissenting opinion) (citations omitted). IEEPA seeks "to

provide flexibility in the tools available to the President to address the unusual and extraordinary threats specified in a declared national emergency. This is not an 'ancillary,' 'little used backwater' provision, or a delegation outside the recipient's wheelhouse." *Ibid.* (citation omitted).

This Court's recent decision in *Biden* v. *Missouri*, 595 U. S. 87 (2022) (*per curiam*), strongly supports the President's position here. That case involved a challenge to President Biden's COVID–19 vaccine requirement for millions of healthcare workers. The executive action there, too, was undoubtedly major. But the Court *upheld* the Government's vaccine mandate based on a general statutory authorization for HHS to impose safety requirements for healthcare facilities—notwithstanding the lack of explicit statutory reference to vaccines. *Id.*, at 90–96. In doing so, the Court emphasized that state vaccination requirements were common for healthcare workers and that the Federal Government regularly required healthcare workers to take various safety precautions. *Id.*, at 94–95. Notably, the Court upheld the vaccine mandate even though (as the dissenters pointed out) the *Federal* Government had not traditionally imposed such vaccine requirements on healthcare workers. See *id.*, at 104 (THOMAS, J., dissenting).

The clarity of the congressional authorization in today's case is far stronger than in *Biden* v. *Missouri*. The Nixon and Ford tariffs, the *Algonquin* decision, and the President's longstanding authority to regulate trade and impose tariffs establish—much more comprehensively and clearly than in *Biden* v. *Missouri*—that the President is not claiming some "unheralded power" that represents a "transformative expansion" of his authority. *Utility Air*, 573 U. S., at 324.

Because the Court upheld the Executive's exercise of a major power in *Biden* v. *Missouri*, it follows that the Court

today should likewise uphold the President's assertion of a major power here. Like cases should be treated alike.

In response to all of that, THE CHIEF JUSTICE's opinion clings to its primary argument in this case—that a statute must use the word "tariff " or "duty" or "tax" or the like to authorize tariffs on foreign imports. But this Court has repeatedly emphasized that the major questions doctrine is not a magic words requirement. THE CHIEF JUSTICE's opinion identifies no case that has demanded such specificity. And in *Algonquin*, this Court unanimously and squarely rejected the same argument that the statutory provision must specifically mention "tariffs" or "duties" or "taxes" for the President to impose tariffs on foreign imports. Under THE CHIEF JUSTICE's opinion, the Nixon and Ford tariffs would also have been unlawful. So too might other tariffs imposed under the longstanding Section 232 tariff statute, which broadly authorizes the President to "adjust the imports" of a foreign good without mentioning "tariffs" or "taxes." And so would tariffs imposed in wartime under TWEA's authority to "regulate . . . importation."[20]

THE CHIEF JUSTICE's opinion's approach to the major questions doctrine is a magic-words test under another name—in contravention of our precedents that make clear that Congress need not use magic words or "highly specific"

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[20] Under the Court's decision today, the President's authority to impose tariffs under TWEA during wartime is presumably now gone given that TWEA has the same "regulate . . . importation" language, 50 U. S. C. §4305(b)(1)(B)—unless the Court thinks that the statutory text somehow means one thing in TWEA and another in IEEPA, which would be historically inaccurate and textually unsupportable. One might think that the Court's opinion would also mean that tariffs cannot be imposed under Section 232, which authorizes the President to "adjust the imports." After all, that statutory provision likewise does not refer to "tariffs," duties," "taxes," "fees," or the like. But in *Algonquin*, the Court read Section 232 to authorize tariffs. I assume that the Court today does not intend to overrule *Algonquin*.

terms. *Biden* v. *Nebraska*, 600 U. S., at 516 (BARRETT, J., concurring) (quotation marks omitted).[21]

In previous cases, the Court has looked at the four factors to determine whether there is "clear congressional authorization" precisely because the major questions canon has no magic words requirement. If magic words or the equivalent were necessary, that would be the only factor. And the Court would not need the four factors that the Court has consistently applied.[22]

In sum, under the major questions doctrine as the Court has applied it, this should be a straightforward case. Congress supplied clear authorization for the President to impose tariffs under IEEPA.

B

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Second, there is an alternative and independent reason why the major questions doctrine does not apply here: This is a foreign affairs case.

A plethora of statutes in the U. S. Code grant the Executive the power to act in foreign affairs. And most of the important actions that "presidents take today, including in foreign affairs, rest at least in part on statutory

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[21] Taken at face value, moreover, the Court's major questions analysis would presumably also preclude Presidents from imposing quotas under IEEPA. Quotas are justified under the same "regulate . . . importation" language. How could the Court distinguish quotas from tariffs for major questions purposes? After all, quotas can be of even greater economic and political significance than tariffs.

[22] In his concurrence, JUSTICE GORSUCH opines that the phrase "monetary exactions on foreign imports" would constitute clear congressional authorization, but that the phrase "regulate . . . importation" does not. *Ante,* at 30. But if the phrase "regulate . . . importation" has historically and commonly encompassed "monetary exactions on foreign imports"—as it has—and if the four major questions factors taken together support the Executive—as they do—then I cannot agree with the line that JUSTICE GORSUCH is drawing between those two formulations.

authorization." C. Bradley & J. Goldsmith, Foreign Affairs, Nondelegation, and the Major Questions Doctrine, 172 U. Pa. L. Rev. 1743, 1745 (2024).

Yet this Court has *never* before applied the major questions doctrine—or anything resembling it—to a foreign affairs statute. I would not make this case the first.

Rather, in the foreign affairs context, this Court has interpreted statutes as written, with respect for the primacy of Congress's and the President's roles in foreign affairs and without using the major questions doctrine as a thumb on the scale against the President. See, *e.g.*, *Department of Navy* v. *Egan*, 484 U. S. 518, 529–530 (1988). That deeply rooted textualist approach to interpreting foreign affairs statutes is nothing new. What is new and rather extraordinary is the approach embodied in THE CHIEF JUSTICE's opinion for three Justices, which would extend the major questions doctrine into the foreign affairs realm for the first time.

Recall that the major questions doctrine is based on two overlapping foundations: "separation of powers principles and a practical understanding of legislative intent." *West Virginia*, 597 U. S., at 723.

With respect to separation of powers, the major questions doctrine serves to reinforce the nondelegation doctrine. But in the foreign affairs realm, the Court has recognized that Congress often broadly delegates authority to the Executive. From the Founding, numerous foreign affairs statutes "authorizing action by the President in respect of subjects affecting foreign relations" either "leave the exercise of the power to his unrestricted judgment, or provide a standard far more general than that which has always been considered requisite with regard to domestic affairs." *United States* v. *Curtiss-Wright Export Corp.*, 299 U. S. 304, 324 (1936); *Department of Transportation* v. *Association of American Railroads*, 575 U. S. 43, 80, n. 5 (2015) (THOMAS, J., concurring in judgment). The reason

for those broad delegations is simple and obvious: If "success" for America's foreign affairs "aims" is to be "achieved, congressional legislation . . . must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved." *Curtiss-Wright*, 299 U. S., at 320. Stated otherwise, "Congress—in giving the Executive authority over matters of foreign affairs—must of necessity paint with a brush broader than that it customarily wields in domestic areas." *Zemel* v. *Rusk*, 381 U. S. 1, 17 (1965).

As Justice Robert Jackson summarized, the Court's nondelegation cases—consistent with the "unbroken legislative practice which has prevailed almost from the inception of the national government," *Curtiss-Wright*, 299 U. S., at 322—have "recognized internal and external affairs as being in separate categories, and held that the strict limitation upon congressional delegations of power to the President over internal affairs does not apply with respect to delegations of power in external affairs." *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579, 636, n. 2 (1952) (concurring opinion); see *Curtiss-Wright*, 299 U. S., at 319–322; *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, 422 (1935).

As Justice Jackson further noted, the Court's precedents recognize the "'unwisdom of requiring Congress in this field of governmental power to lay down narrowly definite standards by which the President is to be governed.' " *Youngstown*, 343 U. S., at 636, n. 2 (concurring opinion) (quoting *Curtiss-Wright*, 299 U. S., at 321–322).

If the major questions doctrine is designed in part to protect nondelegation principles, but the nondelegation doctrine does not play a substantial role in foreign affairs cases (as the Court has held), then it follows that courts should not employ the major questions doctrine to put a thumb on the scale against the President when interpreting

foreign affairs statutes. Rather, as Justice Robert Jackson stated, courts should interpret those statutes as written.

Relatedly, to the extent that the major questions doctrine is designed to reflect a "practical understanding of legislative intent," *West Virginia*, 597 U. S., at 723, the doctrine appropriately plays no role in "national security or foreign policy contexts, because the canon does not reflect ordinary congressional intent in those areas." *FCC* v. *Consumers' Research*, 606 U. S. 656, 706 (2025) (KAVANAUGH, J., concurring). In the foreign affairs realm, Congress "has good reason to—and intends to—authorize many executive branch actions related to foreign affairs in broad or general terms." Bradley & Goldsmith, 172 U. Pa. L. Rev., at 1793.

Congress ordinarily seeks "to give the President substantial authority and flexibility to protect America and the American people." *Consumers' Research*, 606 U. S., at 706–707 (KAVANAUGH, J., concurring). After all, the President exercises the "vast share of responsibility for the conduct of our foreign relations." *American Ins. Assn.* v. *Garamendi*, 539 U. S. 396, 414 (2003) (quotation marks omitted). So Congress "often" gives the President "a degree of discretion." *Curtiss-Wright*, 299 U. S., at 320. That "unbroken legislative practice" from the Founding means that courts interpreting statutes in the foreign affairs field should assume that Congress meant what it said. *Id.*, at 322.

Stated otherwise, "if the major questions doctrine turns on a contextual inquiry into likely congressional intent, it is likely for a variety of reasons to have less purchase in the foreign affairs area." Bradley & Goldsmith, 172 U. Pa. L. Rev., at 1790.

To be clear, Congress of course maintains the ultimate power over how broadly or narrowly to write statutes in the foreign policy and national security contexts. For example, Congress can write foreign affairs statutes narrowly.

Indeed, even for wartime powers, Congress rarely gives the President a "blank check." *Hamdi* v. *Rumsfeld*, 542 U. S. 507, 536 (2004) (plurality opinion). And when Congress writes a narrow foreign affairs statute, this Court has enforced those statutory limits as written. Cf. *Hamdan* v. *Rumsfeld*, 548 U. S. 557, 593–595 (2006); *id.*, at 638–639 (Kennedy, J., concurring in part).

Moreover, when it does legislate more broadly, Congress sometimes claws back the statutory authorization by rescinding or amending overbroad statutes, or by restricting previously granted Presidential power through the leverage it possesses over appropriations, new legislation, or confirmations. See, *e.g.*, Foreign Intelligence Surveillance Act of 1978, 92 Stat. 1783; Military Commissions Act of 2006, 120 Stat. 2600, as amended, 10 U. S. C. §948a *et seq.*; Case-Church Amendment, Pub. L. 93–50, §307, 87 Stat. 129. Either House of Congress alone, through the appropriations process, can insist on certain limits as a condition of approving funding. At the end of the day, given the appropriations power, Congress holds the cards.

In short, in the foreign affairs context, this Court has *never* before super-imposed the major questions doctrine (or any similar canon or principle) onto ordinary statutory interpretation to place a thumb on the scale against the President. Rather, the Court interprets the relevant statutes according to their text, with respect for Congress's and the President's central roles in the foreign policy and national security fields.

2

This tariffs case plainly falls into the foreign affairs category. IEEPA "directly and expressly relate[s] to foreign affairs." Bradley & Goldsmith, 172 U. Pa. L. Rev., at 1796. And like quotas and embargoes, tariffs regulate the goods

that are imported into the country from foreign nations. The tariffs do not apply to goods produced in America.

Moreover, tariffs on foreign imports are significant tools of foreign policy and national security, whether imposed under IEEPA, TWEA, Section 232, Section 122, Section 201, Section 301, or Section 338. They are often used to "advance foreign policy goals, or as negotiating leverage in trade negotiations." Congressional Research Service, U. S. Tariff Policy: Overview 1 (2025). Like other economic tools, tariffs can "serve as a 'bargaining chip' to be used by the President when dealing with a hostile country," *Dames & Moore* v. *Regan*, 453 U. S. 654, 673 (1981)—or to incentivize a change in behavior by allies, partners, or enemies. Cf. *Association of American Railroads*, 575 U. S., at 80 (opinion of THOMAS, J.) (embargo statute "involved the external relations of the United States"); *Gundy* v. *United States*, 588 U. S. 128, 170–171 (2019) (GORSUCH, J., dissenting).

With respect to foreign trade specifically, Congress often "invest[s] the President with large discretion in matters arising out of the execution of statutes relating to trade and commerce with other nations." *Marshall Field & Co.* v. *Clark*, 143 U. S. 649, 691 (1892). Since the Founding, that longstanding practice has included tariff statutes: Congress has granted the President expansive power over tariffs and foreign trade. *Ante,* at 13–17 (THOMAS, J., dissenting). And this Court has uniformly rejected challenges to tariffs imposed by Presidents under those statutory authorities. *E.g.*, *Federal Energy Administration* v. *Algonquin SNG, Inc.*, 426 U. S. 548, 558–560 (1976); *J. W. Hampton, Jr., & Co.* v. *United States*, 276 U. S. 394, 409 (1928); *Marshall Field*, 143 U. S., at 690–694; *Cargo of Brig Aurora* v. *United States*, 7 Cranch 382, 386–388 (1813).

As Professors Bradley and Goldsmith well summarized, there is a "settled practice of about a century of the executive branch exercising emergency powers in many important contexts pursuant to the broadly worded IEEPA

and its predecessor, the Trading with the Enemy Act. And there is an even longer practice, dating to the Founding, of presidents exercising trade-related sanctions authority pursuant to broadly worded statutes. Notably, the Court has already suggested in both of these contexts that one should expect Congress to, in effect, paint with a broad brush." 172 U. Pa. L. Rev., at 1796–1797.

As with tariffs on foreign imports historically, the IEEPA tariffs on foreign imports at issue in this case implicate foreign affairs. According to the Government, the President has leveraged the IEEPA tariffs into trade deals with major trading partners including China, the United Kingdom, and Japan, among other countries. The Government says that the tariffs have helped make certain foreign markets more accessible to American businesses and have contributed to trade deals with foreign nations worth trillions of dollars.

Moreover, consistent with history and the traditional uses of tariffs, the President "is exercising his IEEPA authority in connection with highly sensitive negotiations he is conducting to end the conflict between the Russian Federation and Ukraine." Decl. of M. Rubio in No. 25–1812 (CA Fed., Aug. 29, 2025), p. 3. To that end, on August 6, 2025, the President imposed tariffs on India for "directly or indirectly importing Russian Federation oil." Exec. Order No. 14329, 90 Fed. Reg. 38701 (2025). And on February 6, 2026, the President reduced the tariffs on India because, according to the Government, India had "committed to stop directly or indirectly importing Russian Federation oil." Exec. Order No. 14384, 91 Fed. Reg. 6501 (2026).

To be sure, most foreign affairs and national security actions—whether war, international agreements, trade deals, or tariffs—lead to significant domestic ramifications within the United States. And this case is no exception. Nonetheless, in the foreign affairs field, courts interpret statutes as written, with appropriate respect to Congress and the President and without a major questions doctrine

weight on the scale against the President. See *Youngstown*, 343 U. S., at 636, n. 2 (Jackson, J., concurring).

Lest there be any remaining doubt that the major questions doctrine does not apply to tariffs on foreign imports, recall again this Court's decision in *Algonquin*. That case involved significant tariffs imposed by President Ford on oil imports. The relevant statute granted the President the authority to "adjust the imports." 19 U. S. C. §1862(b) (1970 ed.). The Court upheld the tariffs by interpreting the statute as written. Neither the major questions doctrine—nor anything resembling that doctrine—played a role in that case.

In short, "Presidential actions pursuant to broad congressional authorizations related to foreign affairs often have long historical pedigrees that can in various ways inform congressional intent to approve the actions in question. To the extent that this is so in particular instances, *the major questions doctrine's clear authorization requirement does not apply*." Bradley & Goldsmith, 172 U. Pa. L. Rev., at 1794 (emphasis added).

So it is here: Presidents "have long been granted substantial discretion over tariffs." *Id.*, at 1759, n. 90. This Court has never before applied the major questions doctrine to a statute authorizing the President to take action with respect to foreign affairs in general or tariffs in particular. And it should not do so today.

THE CHIEF JUSTICE's opinion's reliance on the major questions doctrine in this foreign affairs case is a first—a novel and unprecedented use of the major questions doctrine to invalidate Presidential action taken pursuant to congressional authorization in the foreign affairs area. I firmly disagree with that use of the major questions doctrine here. In the foreign affairs context, including tariffs, the longstanding rule is simple: Interpret the

statute as written, not with a thumb on the scale against the President.[23]

3

Related precedent further demonstrates that the major questions doctrine has not traditionally applied in the national security or foreign policy contexts. Consider two prominent examples.

First, in *Hamdi* v. *Rumsfeld*, 542 U. S. 507, this Court considered the 2001 Authorization for Use of Military Force, which Congress passed and President George W. Bush signed on September 18, 2001, in the wake of the al Qaeda attacks on the United States. The law broadly

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[23] In his thoughtful concurrence, JUSTICE GORSUCH agrees that the major questions doctrine often does not apply to foreign affairs statutes, but in his view it does not apply only when the President also has inherent or independent Article II power. *Ante*, at 30–31. THE CHIEF JUSTICE's opinion for three Justices also gestures at that position. See *ante,* at 12–13. I see some analytical and practical problems with that approach.

First, as JUSTICE GORSUCH elsewhere notes, the major questions doctrine serves in part to reinforce nondelegation principles. Yet as I have explained, the Court's nondelegation cases from the Founding to the present—including numerous cases involving tariffs—have "recognized internal and external affairs as being in separate categories, and held that the strict limitation upon congressional delegations of power to the President over internal affairs does not apply with respect to delegations of power in external affairs." *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579, 636, n. 2 (1952) (Jackson, J., concurring); see also *United States* v. *Curtiss-Wright Export Corp.*, 299 U. S. 304, 319–322 (1936); *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, 422 (1935). In those cases, the Court has not further subdivided the foreign affairs power in the manner that JUSTICE GORSUCH now suggests.

Second, terms such as "inherent" or "independent" in this context continue to be "used, often interchangeably and without fixed or ascertainable meanings." *Youngstown*, 343 U. S., at 647 (Jackson, J., concurring); see also *id.*, at 637. So it would be both novel and jurisprudentially chaotic to try to now create a new approach tying the applicability of the major questions canon in the foreign affairs context to such uncertain triggers.

empowered the President to use "all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks" that occurred on September 11, 2001. Authorization for Use of Military Force, 115 Stat. 224 (Sept. 18, 2001).

In *Hamdi*, the Government militarily detained in the United States an American citizen who had taken up arms with the Taliban. 542 U. S., at 510–511. The plaintiff Hamdi argued, among other things, that the AUMF generally authorized the use of force but did not specifically authorize military detention, at least detention of American-citizen enemy combatants in the United States. See *id.*, at 515–517. He contended that his military detention was therefore illegal.

In the principal opinion by Justice O'Connor, the Court rejected Hamdi's statutory argument, explaining that it was "of no moment that the AUMF does not use specific language of detention." *Id.*, at 519. Rather, because "detention to prevent a combatant's return to the battlefield is a fundamental incident of waging war, in permitting the use of 'necessary and appropriate force,' Congress has clearly and unmistakably authorized detention in the narrow circumstances considered here." *Ibid.*

Consider the similarities between *Hamdi* and this case. Both involve major questions of foreign affairs. *Hamdi* involved U. S. military detention of an American citizen in America, pursuant to a generally worded authorization for use of military force. This case involves tariffs on foreign goods imported into America pursuant to a generally worded authorization to regulate importation. Detention is a traditional incident of the President's delegated power to wage war. See *id.*, at 518. Tariffs are a traditional incident of the President's delegated power to regulate imports and foreign commerce. In *Hamdi*, the Court said that as a matter of history, practice, and precedent, the AUMF's

general authorization for the use of military force clearly encompassed detention of enemy combatants. *Id.*, at 518–522. Here, as a matter of history, practice, and precedent, IEEPA's general authorization for regulation of importation likewise clearly encompasses tariffs on foreign imports.

Second, in 1981 in *Dames & Moore*, 453 U. S. 654, the Court did not apply the major questions doctrine, even though the Court had recently applied that principle in a significant domestic policy case. Cf. *Industrial Union Dept., AFL–CIO* v. *American Petroleum Institute*, 448 U. S. 607 (1980) (plurality opinion).

The *Dames & Moore* case arose in the wake of the Iran hostage crisis where Iran held more than 50 American hostages at the U. S. Embassy in Iran for more than 14 months. As one part of the ultimate settlement of the hostage crisis with Iran, President Reagan suspended claims by U. S. nationals against Iran that were pending in American courts. *Dames & Moore*, 453 U. S., at 666. The President did so under IEEPA and the Hostage Act. *Id.*, at 675.

There can be little doubt that the question of suspending American citizens' claims against Iran was one of major economic and political significance. And the Court further recognized that the case touched "fundamentally upon the manner in which our Republic is to be governed." *Id.*, at 659. Yet the Court did not require "clear congressional authorization" for the President's exercise of that authority to suspend the Americans' claims against Iran.

On the contrary, the Court openly acknowledged that the relevant statutes—IEEPA and the Hostage Act—did not provide clear or "specific authorization" for the President to suspend those claims. *Id.*, at 677. The Court nonetheless concluded that the "general tenor of Congress' legislation in this area"—combined with Congress's longstanding acquiescence to the President's practice of settling claims—

supported the President's suspension of those claims. *Id.*, at 678. Congress's "general tenor" and acquiescence are of course far less than the "clear congressional authorization" that THE CHIEF JUSTICE's opinion today newly demands for the President's tariffs.

Again, consider the similarities between *Dames & Moore* and this case. *Dames & Moore* involved complicated questions of foreign policy and national security. The statutes in *Dames & Moore* were generally worded and did not specifically authorize suspension of claims. But Presidents had historically exercised a similar power. See *id.*, at 677–682. Here, we likewise have a generally worded statutory authorization to "regulate . . . importation." And Presidents have historically imposed tariffs.

If IEEPA permitted the President to lawfully suspend claims in *Dames & Moore*—despite the Court's transparent acknowledgment that the actual statutory text did not clearly authorize the President's actions—then surely IEEPA's authorization to "regulate . . . importation" easily justifies these tariffs.

THE CHIEF JUSTICE's opinion would chart a new course for the major questions doctrine, extending it for the first time deep into the foreign affairs sphere. If the Court had applied the major questions doctrine in *Hamdi* and *Dames & Moore*, those two landmark cases almost certainly would have been decided differently. So today's opinion marks a significant change. Will the Court apply the major questions doctrine in the foreign affairs context again in the future? Or is this a ticket good for one day and one train only? Time will tell. But in the meantime, the decision could engender significant uncertainty over the Executive's exercise of statutory authority in the foreign affairs realm.

As the *Hamdi* and *Dames & Moore* examples demonstrate, applying the major questions doctrine in the foreign policy and national security contexts in the past would have seriously hindered the President's ability to

exercise power granted by Congress to achieve important foreign policy and national security objectives for America. And if applied in the foreign affairs context in the future, it could impair Presidents' vital statutory authorities with respect to foreign policy and national security.[24]

* * *

Having said all of that on foreign affairs, I reiterate that the major questions doctrine—even if it applies in this foreign affairs context—does not defeat major executive actions that are *clearly authorized* by Congress. See Bradley & Goldsmith, 172 U. Pa. L. Rev., at 1790–1791. And as explained in Part III–A above, in IEEPA Congress clearly authorized the President to impose tariffs to "regulate . . . importation" in national emergencies. In other words, even if the major questions doctrine applies in the foreign affairs context exactly as it does in domestic affairs, the President should still prevail in this case.

IV

Finally, no Member of the Court today relies on the nondelegation doctrine. But the plaintiffs briefly raise such an argument, and I will therefore briefly address it. The

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[24] What is the status going forward of the major questions doctrine in foreign affairs cases? Only three Justices (at most) today suggest that the major questions doctrine should apply in the foreign affairs context—THE CHIEF JUSTICE, JUSTICE GORSUCH, and JUSTICE BARRETT. I doubt that the major questions doctrine analysis in THE CHIEF JUSTICE's opinion for those three Justices is controlling for future cases as a matter of precedent under the *Marks* rule. See *Marks* v. *United States*, 430 U. S. 188, 193 (1977). That is because three Justices (JUSTICE SOTOMAYOR, JUSTICE KAGAN, and JUSTICE JACKSON) do not recognize the major questions doctrine at all. *Ante,* at 1–2 (KAGAN, J., concurring in part and concurring in judgment). And this dissent would not apply it in the foreign affairs context. So it appears that six Justices would not apply it in the foreign affairs context. In my view, the question of whether or how the major questions doctrine applies in foreign affairs cases remains at least an open question.

argument is unavailing for many of the reasons already noted in the major questions analysis above. This Court has repeatedly rejected constitutional challenges to congressional delegations to the President in the foreign affairs area, including delegations of tariff authority.

For matters of foreign affairs and national security, the Court has traditionally recognized that Congress "must of necessity paint with a brush broader than that it customarily wields in domestic areas." *Zemel* v. *Rusk*, 381 U. S. 1, 17 (1965). And to reiterate, numerous statutes "'authorizing action by the President in respect of subjects affecting foreign relations'" "'either leave the exercise of the power to his unrestricted judgment, or provide a standard far more general than that which has always been considered requisite with regard to domestic affairs.'" *Department of Transportation* v. *Association of American Railroads*, 575 U. S. 43, 80, n. 5 (2015) (THOMAS, J., concurring in judgment) (quoting *United States* v. *Curtiss-Wright Export Corp.*, 299 U. S. 304, 324 (1936)). Therefore, as JUSTICE THOMAS has explained, the Court's precedents establish that "the Constitution grants the President a greater measure of discretion in the realm of foreign relations." *Association of American Railroads*, 575 U. S., at 80, n. 5; see *Curtiss-Wright Export Corp.*, 299 U. S., at 319–322; *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, 422 (1935).

Justice Robert Jackson likewise noted the "'unwisdom of requiring Congress in this field of governmental power to lay down narrowly definite standards by which the President is to be governed.'" *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579, 636, n. 2 (1952) (concurring opinion) (quoting *Curtiss-Wright*, 299 U. S., at 321–322). As such, the "strict limitation upon congressional delegations of power to the President over internal affairs does not apply with respect to delegations of power in

external affairs." *Youngstown*, 343 U. S., at 636, n. 2 (concurring opinion).

Because statutes that "involv[e] the external relations of the United States" do not trigger the same kind of delegation concerns as purely domestic ones, *Association of American Railroads*, 575 U. S., at 80 (opinion of THOMAS, J.), the Court has regularly upheld delegations of power to the President in the national security and foreign policy realms. See, *e.g.*, *Curtiss-Wright*, 299 U. S., at 319–322; *Loving* v. *United States*, 517 U. S. 748, 771–774 (1996). Indeed, if a strict nondelegation doctrine applied in those areas, numerous statutes—including many authorizations for use of military force in the Nation's history—would have been unconstitutional delegations of authority to the President. See Authorization for Use of Military Force, 115 Stat. 224 (Sept. 18, 2001) ("[T]he President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001").

As to tariffs in particular: Broad delegations of tariff authority to the President have been in the heartland of permissible delegations upheld by this Court. Congress may, without running afoul of the Constitution, "invest the President with large discretion in matters arising out of the execution of statutes relating to trade and commerce with other nations." *Marshall Field & Co.* v. *Clark*, 143 U. S. 649, 691 (1892). Congressional delegations of tariffs and other foreign trade authorities to the President date back to near the Founding. And this Court has uniformly rejected nondelegation challenges to statutes delegating that authority to the President. *E.g.*, *Federal Energy Administration* v. *Algonquin SNG, Inc.*, 426 U. S. 548, 558–560 (1976); *J. W. Hampton, Jr., & Co.* v. *United States*, 276 U. S. 394, 409 (1928); *Marshall Field*, 143 U. S., at 690–694;

Cargo of Brig Aurora v. *United States*, 7 Cranch 382, 386–388 (1813).

This Court's decision in *Algonquin* is again instructive. There, the Court held that Section 232 did not constitute an unconstitutional delegation. 426 U. S., at 558–560. The Court found it sufficient that the President could act "only" to the extent "he deems necessary to adjust the imports" of an article such that it "will not threaten to impair the national security." *Id.*, at 559 (quotation marks omitted).

To be clear, I am not suggesting that there is no nondelegation doctrine in the foreign affairs realm. But the Court has consistently recognized that the doctrine affords more flexibility to Congress and the President in that area to deal with the complex foreign relations issues and national security threats facing America. See *Association of American Railroads*, 575 U. S., at 80, n. 5 (opinion of THOMAS, J.); *Youngstown*, 343 U. S., at 636, n. 2 (Jackson, J., concurring); *Curtiss-Wright*, 299 U. S., at 319–322; *Panama Refining*, 293 U. S., at 422.

In all events, for purposes of this Court's nondelegation precedents, IEEPA sufficiently constrains the President's authority to declare an emergency and impose tariffs. See *J. W. Hampton*, 276 U. S., at 409; *FCC* v. *Consumers' Research*, 606 U. S. 656, 673–675, 681–691 (2025). The President may exercise the authorities in IEEPA "only" "to deal with an unusual and extraordinary threat" that "has its source in whole or substantial part outside the United States" and "with respect to which a national emergency has been declared." 50 U. S. C. §1701. Congress placed numerous limits on IEEPA, including a default 1-year time limit, an enumerated list of exceptions, and comprehensive congressional reporting requirements. See §§1622(d), 1702(b), 1703.

It is also useful to underscore the extraordinary nature of the plaintiffs' nondelegation argument here. The plaintiffs' submission would mean that these tariffs would be

unlawful *even if* IEEPA explicitly authorized tariffs. Unlike their statutory and major questions doctrine arguments, their nondelegation argument is *not* based on a lack of an explicit reference to "tariffs" or "duties" or the like. Their nondelegation argument instead goes much further and would require very specific congressional directions to the President on when and under what circumstances he could impose tariffs and how high those tariffs could be. The plaintiffs' theory would have dramatic consequences and likely wipe out many of the existing tariff statutes that have long been upheld by this Court, as well as TWEA. And if the tariff authority here is unlawful, so too are most if not all IEEPA authorities such as asset freezes, embargoes, and quotas. And it would not stop there. The plaintiffs' nondelegation theory would threaten various other national security and foreign affairs statutes that similarly grant substantial discretion to the President. The Court today thankfully does not go down that road.[25]

V

The overarching theme of the Court's opinion is that tariffs are not a clear means to "regulate . . . importation" and that Congress was therefore required to use the word "tariff," "duty," or the like in IEEPA in 1977 if it wanted to authorize tariffs on foreign imports. But that conclusion

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[25] Some last points for completeness: The plaintiffs also raise two other arguments that the Court today does not address or rely on. First, they argue that Section 122, a non-emergency tariff statute that addresses trade deficits, implicitly displaces IEEPA's tariff authority. Second, they argue that the tariffs here do not deal with an "unusual and extraordinary threat" as to which a national emergency has been declared. In my view, those arguments are insubstantial, as Judge Taranto persuasively explained in the Federal Circuit. See 149 F. 4th 1312, 1359–1361, 1371–1375 (2025) (dissenting opinion). Because the Court today does not address or rely on them, I will not discuss them further here. Finally, I agree with footnote 1 of the Court's opinion regarding jurisdiction. *Ante,* at 5, n. 1.

contravenes text, history, and precedent. To summarize: *Algonquin* in 1976 unanimously held the opposite. The Nixon and Ford tariffs were based on statutory provisions that did not use the word "tariff" or "duty." There is a long tradition of Presidents imposing tariffs as a means of regulating importation and commerce. The predecessor Trading with the Enemy Act has long been understood to authorize tariffs during wartime as a means to "regulate . . . importation," even though it does not use the word "tariff" or "duty." The history of the Polk, Lincoln, and McKinley tariffs shows that tariffs are a means of regulating importation. Marshall, Story, and Madison stated that tariffs are a means of regulating foreign commerce. The dictionary definitions and ordinary usage establish that tariffs are a means of regulating importation.

All of that and much more, in my view, overwhelmingly establish that IEEPA clearly authorizes the President to impose tariffs.

That said, with respect to tariffs in particular, the Court's decision might not prevent Presidents from imposing most if not all of these same sorts of tariffs under other statutory authorities. For example, Section 122 of the Trade Act of 1974 permits the President to impose a "temporary import surcharge" to "deal with large and serious United States balance-of-payments deficits." 19 U. S. C. §2132(a). Section 201 of the Trade Act of 1974 provides that, if the International Trade Commission determines an article is being imported in such quantities that it is "a substantial cause of serious injury, or the threat thereof, to the domestic industry producing an article like or directly competitive with the imported article," the President may take "appropriate and feasible action," including imposing a "duty." §§2251(a), 2253(a)(3)(A). Section 301 of the Trade Act of 1974 authorizes the President through a subordinate officer to "impose duties" if he determines that "an act, policy, or practice of a foreign country" is "unjustifiable and

burdens or restricts United States commerce." §§2411(a)–(c). Section 338 of the Tariff Act of 1930 permits the President to impose tariffs when he finds that "any foreign country places any burden or disadvantage upon the commerce of the United States." §1338(d). And Section 232 of the Trade Expansion Act of 1962 authorizes the President to, after receiving a report from the Secretary of Commerce, "adjust the imports of [an] article and its derivatives so that such imports will not threaten to impair the national security." §1862(c)(1)(a).

So the Court's decision is not likely to greatly restrict Presidential tariff authority going forward. But the Court's decision is likely to generate other serious practical consequences in the near term. One issue will be refunds. Refunds of billions of dollars would have significant consequences for the U. S. Treasury. The Court says nothing today about whether, and if so how, the Government should go about returning the billions of dollars that it has collected from importers. But that process is likely to be a "mess," as was acknowledged at oral argument. Tr. of Oral Arg. 153–155. A second issue is the decision's effect on the current trade deals. Because IEEPA tariffs have helped facilitate trade deals worth trillions of dollars—including with foreign nations from China to the United Kingdom to Japan, the Court's decision could generate uncertainty regarding various trade agreements. That process, too, could be difficult.

* * *

The tariffs at issue here may or may not be wise policy. But as a matter of text, history, and precedent, they are clearly lawful. I respectfully dissent.

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Legal Sidebar

Supreme Court Overrules *Chevron* Framework

June 28, 2024

In what has the potential to be one of the most consequential decisions in federal administrative law, the Supreme Court on June 28, 2024, overruled *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, in a pair of cases, *Loper Bright Enterprises v. Raimondo* and *Relentless Inc. v. Department of Commerce* (collectively *Loper*). The *Chevron* doctrine—named for the case that articulated it—required federal courts to defer to a federal agency's reasonable interpretation of ambiguous statutory provisions the agency administers.

For the better part of four decades, *Chevron* has been one of the foundational decisions in administrative law, governing the relationship between agencies and courts in matters of statutory interpretation and acting as a backdrop against which Congress has legislated. As one scholar put it: *Chevron* "is the most talked about, most written about, most cited administrative law decision of the Supreme Court. Ever." For the past decade or so, however, *Chevron* has come under increasing fire from some corners of the federal judiciary and legal academia. Once cited often and approvingly by a majority of Supreme Court Justices, *Chevron* has recently fallen into desuetude at the Court. Over the past several terms, the Court has declined to apply or even cite *Chevron* in cases where it may once have governed. Other methods of statutory interpretation, such as the major questions doctrine, appear to have displaced *Chevron*, at least in some instances. *Chevron*'s absence at the Court has not gone unnoticed, with several Justices commenting on *Chevron*'s absence as evidence that it should be overruled.

Against this backdrop, the Court explicitly overruled *Chevron*, holding that the *Chevron* framework violates Section 706 of the Administrative Procedure Act (APA). Section 706 requires courts to "decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action." The majority held that the APA's command required courts to exercise their own independent judgment on the meaning of a federal statute, but *Chevron* required courts to defer to reasonable agency interpretations of an ambiguous statute. That deference requirement, the Court held, abdicated the judiciary's foundational function to "say what the law is." Although the petitioners in *Loper* also challenged *Chevron* on constitutional grounds, the majority's opinion did not address those arguments.

The *Chevron* Framework

The *Chevron* framework required a court to defer to an executive agency's interpretation of an ambiguous statute that it administers so long as the agency's interpretation was reasonable. The framework's

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namesake 1984 Supreme Court case, *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, set out a two-step process for determining whether a court must defer to an agency's statutory interpretation.

The *Chevron* framework typically applied if Congress has given an agency the general authority to make rules with the force of law. If a court determined that *Chevron* applied, at step one it would use the traditional tools of statutory construction to determine whether Congress directly addressed the precise issue before the court. If the statute was clear on its face with respect to the issue before the court, the court was to implement Congress's stated intent. If the court concluded instead that a statute was silent or ambiguous with respect to the specific issue, the court then proceeded to *Chevron*'s second step. At step two, courts were required to defer to an agency's reasonable interpretation of the statute regardless of whether the court would adopt that interpretation on its own were it to have reviewed the statute without the benefit of an agency's interpretation. The *Chevron* framework rested on several related assumptions, including (1) that statutory ambiguity indicates a congressional delegation of interpretive authority, (2) that agencies have more expertise than courts to interpret the statutes they administer, and (3) that agencies are politically accountable and therefore have more claim to make policy than courts.

The *Loper* Decision

The Court in *Loper* took specific aim at Chevron's first presumption—that statutory ambiguities indicate implicit delegation of interpretive authority to the agency. The majority explained that presumptions can be salutary, but only where they approximate reality. *Chevron*'s presumption, the Court explained, does not approximate reality, "because '[a]n ambiguity is simply not a delegation of law-interpreting power. *Chevron* confuses the two.'" Instead, the Court held that, when confronted with a statutory ambiguity, a court should not defer to an agency's interpretation but instead should do its "ordinary job of interpreting statutes, with due respect for the views of the Executive Branch." The views of the executive branch may, in the words of the 1944 Supreme Court case *Skidmore v. Swift & Co.*, have the "power to persuade, if lacking the power to control."

The Court based its decision on Section 706 of the APA which requires courts to interpret all questions of law in challenges to agency actions. Section 706, the Court held, codified existing practice at the time of its enactment in 1946, and although some cases at the time had applied deference doctrines in cases evaluating agency interpretations of law, they were outliers. Rather, courts at that time assumed their role to be the final interpreters of the meaning of federal law.

The majority's frequent reference to *Skidmore* and use of language from that decision suggests that, going forward, the Court expects lower courts to look to *Skidmore* to guide their consideration of an agency's preferred interpretation of an ambiguous statute. *Skidmore* gave its name to a much weaker form of deference that does not require courts to defer to agencies. The *Skidmore* case itself laid out a list of factors for courts to consider when determining whether an agency's interpretation commands the "power to persuade." Under *Skidmore*, courts

> consider that the rulings, interpretations and opinions of [an agency], while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.

Skidmore, however, has received far less attention from the courts than *Chevron* has and may need additional development by the courts to refine its application.

In holding that the judiciary, not agencies, are to resolve statutory ambiguities, the majority explained that the Framers understood "the complexity of objects, . . . the imperfection of the human faculties, and the

simple fact that no language is so copious as to supply words and phrases for every complex idea," yet still expected politically insulated judges to exercise independent legal judgment in resolving statutory ambiguities. While ambiguities in statutes surely exist, the majority acknowledged, statutes have one "best" reading that courts can discover by applying the traditional tools of statutory interpretation. The majority further explained that courts do that all the time when reviewing statutes that an agency has not yet interpreted. In the Court's view, there is no reason for courts to abdicate their duty when an agency is involved. Undercutting another one of *Chevron*'s presumptions (that ambiguities call for agency expertise), the majority reasoned that statutory ambiguities do not call for policy expertise or draw judges into making policy—they call for the exercise of legal judgment. This distinction exists because, the majority stressed, courts, not agencies, have expertise in interpreting statutes and have done so for centuries.

Although the Court overruled *Chevron*, it appears to have preserved the holdings in cases that were decided pursuant to the *Chevron* framework prior to *Loper*. In the briefing of the case and during oral argument, the litigants and some of the justices discussed the fate of cases decided at *Chevron* step two. As explained above, at *Chevron* step two, a court must defer to an agency's reasonable interpretation of an ambiguous statute. In such cases, a court has not made a specific ruling on what the statute means—it has left that determination to an agency in light of the court's finding at step one that the statute is ambiguous. At oral argument, some of the Justices questioned the litigants about whether these step two decisions would still be considered binding if *Chevron* were overruled. Counsel for the petitioners argued that overruling *Chevron* would not disturb these cases because what the court had found at step two was that an agency's interpretation was "lawful." The Court appears to have adopted this argument in its opinion, holding that "we do not call into question prior cases that relied on the *Chevron* framework. The holdings of those cases that specific agency actions are lawful—including the Clean Air Act holding of *Chevron* itself—are still subject to statutory stare decisis despite our change in interpretive methodology." Despite the Court's holding, questions are likely to remain about whether agencies can change statutory interpretations that were found to be "reasonable" or "lawful" under step two.

The Dissent

The dissent, penned by Justice Kagan and joined by Justices Sotomayor and Jackson (the latter only with respect to the *Relentless* case), defended the *Chevron* framework on grounds that largely track those that supported the continued application of *Chevron* for the last four decades. *Chevron*, Justice Kagan wrote, is part of "warp and woof of modern government" and "reflects what Congress would want"—politically accountable expert agencies making policy, not judges. Justice Kagan, providing examples, explained that regulatory statutes often contain ambiguities or gaps (sometimes purposefully so) that cannot be resolved without the exercise of some kind of policymaking expertise that the courts simply do not have. Justice Kagan reasoned that statutes with such ambiguities or gaps have not fixed any "best" meaning at the time of enactment, and accordingly there is no law for a court to find using its tools of statutory construction. The judiciary's role, Justice Kagan articulated, is only to ensure that an agency's interpretation is a reasonable one, to ensure that courts stay out of policymaking. This limited role for courts, Justice Kagan stressed, is one of judicial "humility," recognizing that agencies have a better claim to democratic legitimacy and more expertise in making policy than courts. In other words, she explained, "agencies often know things about a statute's subject matter that courts could not hope to." Courts, Justice Kagan explained, can "muddle through" when asked to determine the meaning of an ambiguous statute, but compared to an agency that Congress has entrusted to administer a statute that may deal with technical subjects like wildlife regulation or medical drugs and devices, it is reasonable to believe Congress would prefer the agency to have interpretive authority.

Considerations for Congress

The *Loper* opinion rested on an interpretation of the APA—not the Constitution. Although the petitioners argued that *Chevron* violated Article III of the Constitution, the majority's opinion did not reach that issue. As a result, the Court left open the possibility that Congress could amend the APA or enact a standalone statute to codify some form of deference. Nonetheless, some commentators have argued that codifying *Chevron* would violate Article III. In their view Article III, like the APA, requires that the judiciary have final authority over the meaning of federal law—"to say what the law is" in the words of the seminal 1803 case *Marbury v. Madison*. By relying at times on *Marbury*—a case interpreting Article III—the majority's opinion appears to cast doubt on the Congress's ability to codify *Chevron*-like deference.

The decision, however, appears to leave open Congress's authority to expressly delegate interpretive authority to agencies. The Court held: "That is not to say that Congress cannot or does not confer discretionary authority on agencies. Congress may do so, subject to constitutional limits, and it often has." The Court cited examples where Congress had conferred discretion on an agency to interpret statutory terms or "to regulate subject to the limits imposed by a term or phrase that leaves agencies with flexibility . . . such as appropriate or reasonable." Accordingly, Congress may still be able to confer interpretive authority on agencies so long as it does so expressly.

Author Information

Benjamin M. Barczewski
Legislative Attorney

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Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.,* 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

SEVEN COUNTY INFRASTRUCTURE COALITION ET AL. *v.* EAGLE COUNTY, COLORADO, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23–975. Argued December 10, 2024—Decided May 29, 2025

Under federal law, new railroad construction and operation must first be approved by the U. S. Surface Transportation Board. 49 U. S. C. §10901. In 2020, the Seven County Infrastructure Coalition applied to the Board for approval of an 88-mile railroad line connecting Utah's oil-rich Uinta Basin to the national freight rail network, facilitating the transportation of crude oil to refineries along the Gulf Coast. As part of its project review, the Board prepared an environmental impact statement (EIS) that addressed significant environmental effects of the project and identified feasible alternatives that could mitigate those effects, as required by the National Environmental Policy Act (NEPA). The Board issued a draft EIS and invited public comment. After holding six public meetings and collecting more than 1,900 comments, the Board prepared a 3,600-page EIS that analyzed numerous impacts of the railway's construction and operation. Relevant here, the EIS noted, but did not fully analyze, the potential environmental effects of increased upstream oil drilling in the Uinta Basin and increased downstream refining of crude oil. The Board subsequently approved the railroad line, concluding that the project's transportation and economic benefits outweighed its environmental impacts. Petitions challenging the Board's action were filed in the D. C. Circuit by a Colorado county and several environmental organizations. The D. C. Circuit found "numerous NEPA violations arising from the EIS." 82 F. 4th 1152, 1196. Specifically, the D. C. Circuit held that the Board impermissibly limited its analysis of the environmental effects from upstream oil drilling and downstream oil refining projects, concluding that those effects were reasonably foreseeable impacts that the EIS should have analyzed more extensively. Based on the deficiencies it

found in the EIS, the D. C. Circuit vacated both the EIS and the Board's final approval order.

Held: The D. C. Circuit failed to afford the Board the substantial judicial deference required in NEPA cases and incorrectly interpreted NEPA to require the Board to consider the environmental effects of upstream and downstream projects that are separate in time or place from the Uinta Basin Railway. Pp. 6–22.

(a) NEPA ensures that agencies and the public are aware of the environmental consequences of certain proposed infrastructure projects. As a purely procedural statute, NEPA "does not mandate particular results, but simply prescribes the necessary process" for an agency's environmental review of a project. *Robertson* v. *Methow Valley Citizens Council*, 490 U. S. 332, 350. Some federal courts reviewing NEPA cases have assumed an aggressive role in policing agency compliance with NEPA, and have not applied NEPA with the judicial deference demanded by the statutory text and the Court's cases.

When, as here, a party argues that an agency action was arbitrary and capricious due to a deficiency in an EIS, the "only role for a court" is to confirm that the agency has addressed environmental consequences and feasible alternatives as to the relevant project. *Strycker's Bay Neighborhood Council, Inc.* v. *Karlen*, 444 U. S. 223, 227. Further, the adequacy of an EIS is relevant only to the question of whether an agency's final decision (here, to approve the railroad project) was reasonably explained.

Judicial deference in NEPA cases extends to an agency's determination of what details are relevant in an EIS. While NEPA requires an EIS to be "detailed," 42 U. S. C. §4332(2)(C), and the meaning of "detailed" is a legal question, see *Loper Bright Enterprises* v. *Raimondo*, 603 U. S. 369, 391–392, what details need to be included in any given EIS is a factual determination for the agency. The textual focus of NEPA is the "proposed action"—the project at hand—not other separate projects. §4332(2)(C). Courts should defer to agencies' discretionary decisions about where to draw the line when considering indirect environmental effects and whether to analyze effects from other projects separate in time or place. See *Department of Transportation* v. *Public Citizen*, 541 U. S. 752, 767. In sum, when assessing significant environmental effects and feasible alternatives for purposes of NEPA, an agency will invariably make a series of fact-dependent, context-specific, and policy-laden choices about the depth and breadth of its inquiry—and also about the length, content, and level of detail of the resulting EIS. Courts should afford substantial deference and should not micromanage those agency choices so long as they fall within a broad zone of reasonableness. Even a deficient EIS does not necessarily require vacating an agency's project approval, absent reason to

believe that the agency might disapprove the project if it added more to the EIS. Cf. 5 U. S. C. §706. Pp. 6–15.

(b) Contrary to the D. C. Circuit's NEPA analysis, the Board's determination that its EIS need not evaluate possible environmental effects from upstream and downstream projects separate from the Uinta Basin Railway complied with NEPA's procedural requirements, particularly NEPA's textually mandated focus on the "proposed action" under agency review. While indirect environmental *effects* of the project itself may fall within NEPA's scope even if they might extend outside the geographical territory of the project or materialize later in time, the fact that the project might foreseeably lead to the construction or increased use *of a separate project* does not mean the agency must consider that separate project's environmental effects. See *Public Citizen*, 541 U. S., at 767. This is particularly true where, as here, those separate projects fall outside the agency's regulatory authority. Pp. 15–21.

(c) NEPA does not allow courts, "under the guise of judicial review" of agency compliance with NEPA, to delay or block agency projects based on the environmental effects of other projects separate from the project at hand. *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U. S. 519, 558. Pp. 21–22.

82 F. 4th 1152, reversed and remanded.

KAVANAUGH, J., delivered the opinion of the Court, in which ROBERTS, C. J., and THOMAS, ALITO, and BARRETT, JJ., joined. SOTOMAYOR, J., filed an opinion concurring in the judgment, in which KAGAN and JACKSON, JJ., joined. GORSUCH, J., took no part in the consideration or decision of the case.

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SUPREME COURT OF THE UNITED STATES

No. 23–975

SEVEN COUNTY INFRASTRUCTURE COALITION, ET AL., PETITIONERS *v.* EAGLE COUNTY, COLORADO, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[May 29, 2025]

JUSTICE KAVANAUGH delivered the opinion of the Court.

Some 55 years ago, Congress passed and President Nixon signed the National Environmental Policy Act, known as NEPA. For certain infrastructure projects that are built, funded, or approved by the Federal Government, NEPA requires federal agencies to prepare an environmental impact statement, or EIS. The EIS must address the significant environmental effects of a proposed project and identify feasible alternatives that could mitigate those effects.

NEPA was the first of several landmark environmental laws enacted by Congress in the 1970s. Subsequent statutes included the Clean Air Amendments of 1970, the Clean Water Act of 1972, and the Endangered Species Act of 1973, among others.

Unlike those later-enacted laws, however, NEPA imposes no substantive environmental obligations or restrictions. NEPA is a purely procedural statute that, as relevant here, simply requires an agency to prepare an EIS—in essence, a report. Importantly, NEPA does not require the agency to weigh environmental consequences in any particular way.

Rather, an agency may weigh environmental consequences as the agency reasonably sees fit under its governing statute and any relevant substantive environmental laws.

Simply stated, NEPA is a procedural cross-check, not a substantive roadblock. The goal of the law is to inform agency decisionmaking, not to paralyze it.

In this case, the U. S. Surface Transportation Board considered a proposal by a group of seven Utah counties for the construction and operation of an approximately 88-mile railroad line in northeastern Utah. Under federal law, the Board determines whether to approve construction of new railroad lines. The railroad line here would connect Utah's oil-rich Uinta Basin—a rural territory roughly the size of the State of Maryland—to the national rail network. By doing so, the new railroad line would facilitate the transportation of crude oil from Utah to refineries in Louisiana, Texas, and elsewhere. And the project would bring significant economic development and jobs to the isolated Uinta Basin by better connecting the Basin to the national economy.

For that proposed 88-mile Utah railroad line, the Board prepared an extraordinarily lengthy EIS, spanning more than 3,600 pages of environmental analysis. The Board's EIS addressed the environmental effects of the railroad line. But the U. S. Court of Appeals for the D. C. Circuit nonetheless faulted the EIS for not sufficiently considering the environmental effects of projects separate from the railroad line itself—primarily, the environmental effects that could ensue from (i) increased oil drilling upstream in the Uinta Basin and (ii) increased oil refining downstream along the Gulf Coast of Louisiana and Texas.

On that basis, the D. C. Circuit vacated the Board's EIS and the Board's approval of the 88-mile railroad line. As a result, construction still has not begun even though the Board approved the project back in December 2021.

We reverse. First, the D. C. Circuit did not afford the

Board the substantial judicial deference required in NEPA cases. Second, the D. C. Circuit ordered the Board to address the environmental effects of projects separate in time or place from the construction and operation of the railroad line. But NEPA requires agencies to focus on the environmental effects of the project at issue. Under NEPA, the Board's EIS did not need to address the environmental effects of upstream oil drilling or downstream oil refining. Rather, it needed to address only the effects of the 88-mile railroad line. And the Board's EIS did so.

I

Under federal law, new railroad construction and operation must first be approved by the U. S. Surface Transportation Board. 49 U. S. C. §10901. After receiving an application for a new railroad line, the Board issues a public notice and initiates an agency proceeding to review the proposal; alternatively, the Board may streamline approval through a statutory exemption process. §§10101, 10502, 10901. In addition, for covered projects, NEPA compels the Board to prepare an environmental impact statement, or EIS.

In 2020, the Seven County Infrastructure Coalition—a group of seven Utah counties—applied to the Board for approval of an 88-mile railroad line in northeastern Utah. The new railroad line would connect the Uinta Basin with the interstate freight rail network—and via that network, to refineries in Louisiana, Texas, and other destinations.

The Uinta Basin contains significant quantities of crude oil and other fossil fuels. The Uinta Basin Railway would provide oil producers a more efficient option for transporting oil out of the Basin to refineries. As of now, oil from the Basin is carried by trucks that must navigate mountain passes on narrow roads, a difficult and slow journey in any season.

The Board's environmental review of the Uinta Basin

Railway followed standard NEPA procedures. In October 2020, the Board issued a draft EIS and invited public comment. During the public comment period, the Board held six public meetings and collected more than 1,900 comments. In August 2021, the Board published its final EIS.

All told, the Board's final EIS clocked in at more than 3,600 pages. The EIS identified and analyzed numerous "significant and adverse impacts that could occur as a result" of the railroad line's construction and operation—including disruptions to local wetlands, land use, and recreation. App. 121; see *id.*, at 94–105, 121–126, 206–347. The EIS likewise addressed several "minor impacts," such as air pollution and big-game movement around the construction site. *Id.*, at 126; see *id.*, at 126–134, 251–259, 309–325.

The EIS also noted, but did not fully analyze, the potential effects of increased upstream oil drilling in the Uinta Basin and increased downstream refining of crude oil carried by the railroad. *Id.*, at 135, 348–482, 511–516, 520–534, 539–543.

As to the environmental effects of upstream oil drilling, the EIS explained why further analysis of those "potential future, as yet unplanned, oil and gas development projects" was not needed. *Id.*, at 520. To begin with, the project at issue was an 88-mile railroad line, not an oil well or a drilling permit in the Uinta Basin. Moreover, the Board possesses "no authority or control over potential future oil and gas development" in the Basin. *Id.*, at 522. Future projects would be "subject to the approval processes of other federal, state, local, and tribal agencies." *Ibid.* In any event, the environmental effects of future oil and gas development in the Basin are "speculative" and attenuated from the project at hand. *Id.*, at 525; see *id.*, at 525–527 (citing *Department of Transportation* v. *Public Citizen*, 541 U. S. 752, 767–768, 770 (2004)).

As for the environmental effects of downstream oil refining projects, the Board recognized that "trains originating on the proposed rail line would transport crude oil to markets in other regions of the United States," such as Louisiana and Texas, and that oil refining (and the associated effects on the environment) could increase in those locations as a result. App. 477; see *id.*, at 477–482. But the identity of specific destinations "would depend on the ability and willingness of refineries in other markets to receive rail cars carrying Uinta Basin crude oil and process the oil in their refineries." *Id.*, at 477. Moreover, the Board "would have no role in approving or regulating the production, refining, or use" of Uinta Basin crude oil. *Id.*, at 540–541. So the Board did not fully evaluate the effects of additional oil refining along the Gulf Coast.

In December 2021, a few months after issuing the final EIS, the Board approved the construction and operation of the Uinta Basin Railway. Recognizing that "rail construction projects are in the public interest," the Board concluded that the new railroad line would "have substantial transportation and economic benefits," and that those benefits outweighed the environmental impacts identified in the EIS. App. to Pet. for Cert. 121a, 119a; see *id.*, at 118a–121a.

In the wake of the Board's final approval, a Colorado county and several environmental organizations sued by filing petitions for review in the U. S. Court of Appeals for the D. C. Circuit.

The D. C. Circuit found "numerous NEPA violations arising from the EIS." *Eagle Cty.* v. *Surface Transp. Bd.*, 82 F. 4th 1152, 1196 (2023). In the court's view, the Board "failed" to take "the requisite 'hard look' at all of the environmental impacts of the Railway." *Id.*, at 1175.

Specifically, the Court of Appeals held that the Board impermissibly limited its analysis of upstream and downstream projects. The court concluded that the

environmental effects from oil drilling in the Uinta Basin and oil refining along the Gulf Coast were " 'reasonably foreseeable impacts' " that the EIS should have analyzed more extensively. *Id.*, at 1177. The court rejected the Board's argument that those effects would arise from other projects (upstream oil drilling, downstream oil refining, and the like) that are separate from the current project and regulated by other agencies. *Id.*, at 1177–1180 (citing *Sierra Club* v. *FERC*, 867 F. 3d 1357, 1372–1375 (CADC 2017) (*Sabal Trail*)).

Based on the deficiencies it found in the EIS, the Court of Appeals vacated the EIS and the Board's final approval order. 82 F. 4th, at 1196. The Coalition and the Uinta Basin Railway sought review in this Court, and we granted certiorari. 602 U. S. ___ (2024).

II

For certain infrastructure projects that are built, funded, or approved by the Federal Government, NEPA requires federal agencies to prepare an environmental impact statement, or EIS, identifying significant environmental effects of the projects, as well as feasible alternatives. The law ensures that the agency and the public are aware of the environmental consequences of proposed projects. Properly applied, NEPA helps agencies to make better decisions and to ensure good project management.

Importantly, however, NEPA is purely procedural. In ultimately deciding whether to build, fund, or approve a project, an "agency is not constrained by NEPA from deciding that other values outweigh the environmental costs." *Robertson* v. *Methow Valley Citizens Council*, 490 U. S. 332, 350 (1989). Otherwise stated, NEPA "does not mandate particular results, but simply prescribes the necessary process" for an agency's environmental review of a project. *Ibid.*; see *Department of Transportation* v. *Public Citizen*, 541 U. S. 752, 756–757 (2004); *Marsh* v. *Oregon*

Natural Resources Council, 490 U. S. 360, 370–372 (1989); *Baltimore Gas & Elec. Co.* v. *Natural Resources Defense Council, Inc.*, 462 U. S. 87, 97–98 (1983); *Strycker's Bay Neighborhood Council, Inc.* v. *Karlen*, 444 U. S. 223, 227–228 (1980); *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U. S. 519, 558 (1978); *Kleppe* v. *Sierra Club*, 427 U. S. 390, 410, n. 21 (1976).[1]

Here, the Board's EIS evaluated the environmental effects of the proposed 88-mile railroad line in Utah's rural Uinta Basin. But the D. C. Circuit, following Circuit precedent applying NEPA, concluded that the EIS did not sufficiently address the reasonably foreseeable environmental impacts of increased upstream oil drilling in the Uinta Basin, as well as the environmental effects of

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[1] As it was phrased at the time of the Board's EIS (before a 2023 amendment to the statute, see n. 3, *infra*), NEPA directed federal agencies to

> "include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—
>
> "(i) the environmental impact of the proposed action,
>
> "(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
>
> "(iii) alternatives to the proposed action,
>
> "(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
>
> "(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.
>
> "Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved." §102(2)(C), 83 Stat. 853, as amended, 42 U. S. C. §4332(2)(C) (2018).

increased downstream oil refining along the Gulf Coast. 82 F. 4th, at 1196.

As we will explain, we disagree with the D. C. Circuit's decision on two grounds. First, the court did not afford the Board the substantial judicial deference required in NEPA cases. Second, the court incorrectly interpreted NEPA to require the Board to consider the environmental effects of upstream and downstream projects that are separate in time or place from the Uinta Basin Railway.

A

Since the early 1970s, federal courts have reviewed NEPA cases. Over time, some courts have assumed an aggressive role in policing agency compliance with NEPA. Other courts have adopted a more restrained approach. In light of the continuing confusion and disagreement in the Courts of Appeals over how to handle NEPA cases, we think it important to reiterate and clarify the fundamental principles of judicial review applicable in those cases. As we will explain, the central principle of judicial review in NEPA cases is deference.[2]

As a general matter, when an agency interprets a statute, judicial review of the agency's interpretation is *de novo*. See *Loper Bright Enterprises* v. *Raimondo*, 603 U. S. 369, 391–392 (2024). But when an agency exercises discretion

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[2] Some have debated whether Congress and the President in 1970 actually intended or anticipated judicial review of agency compliance with NEPA. See R. Lazarus, The National Environmental Policy Act in the U.S. Supreme Court: A Reappraisal and a Peek Behind the Curtains, 100 Geo. L. J. 1507, 1515 (2012) (describing the history). In any event, an early D. C. Circuit case concluded that an agency's compliance with NEPA was judicially reviewable. See *Calvert Cliffs' Coordinating Comm., Inc.* v. *U. S. Atomic Energy Comm'n*, 449 F. 2d 1109 (1971). And this Court's cases have treated NEPA compliance as judicially reviewable. That said, courts must conduct their review with significant deference to the agency. When reviewing compliance with NEPA, "courts are to play only a limited role." *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U. S. 519, 558 (1978).

granted by a statute, judicial review is typically conducted under the Administrative Procedure Act's deferential arbitrary-and-capricious standard. Under that standard, a court asks not whether it agrees with the agency decision, but rather only whether the agency action was reasonable and reasonably explained. See *Motor Vehicle Mfrs. Assn. of United States, Inc.* v. *State Farm Mut. Automobile Ins. Co.*, 463 U. S. 29, 43 (1983); *FCC* v. *Prometheus Radio Project*, 592 U. S. 414, 423 (2021).

When a party argues that an agency action was arbitrary and capricious due to a deficiency in an EIS, the reviewing court must account for the fact that NEPA is a *purely procedural statute*. Under NEPA, an agency's only obligation is to prepare an adequate report. "NEPA requires no more." *Strycker's Bay Neighborhood Council*, 444 U. S., at 228. Unlike a plethora of other federal environmental statutes (such as the Clean Air Act, the Clean Water Act, etc.), NEPA imposes no *substantive* constraints on the agency's ultimate decision to build, fund, or approve a proposed project. So when reviewing an agency's EIS, "the only role for a court" is to confirm that the agency has addressed environmental consequences and feasible alternatives as to the relevant project. *Id.*, at 227; see *Vermont Yankee*, 435 U. S., at 551, 555. Because an EIS is only one input into an agency's decision and does not itself require any particular substantive outcome, the adequacy of an EIS is relevant only to the question of whether an agency's final decision (here, to approve the railroad) was reasonably explained.

In short, when determining whether an agency's EIS complied with NEPA, a court should afford substantial deference to the agency.

In practice, judicial deference in NEPA cases can take several forms. For example, NEPA says that the EIS should be "detailed." 42 U. S. C. §4332(2)(C). Of course, the meaning of "detailed" is a question of law to be decided by

a court. *Loper Bright*, 603 U. S., at 391–392. But what details need to be included in any given EIS? For the most part, that question does not turn on the meaning of "detailed"—instead, it "involves primarily issues of fact." *Marsh*, 490 U. S., at 377. The agency is better equipped to assess what facts are relevant to the agency's own decision than a court is. As a result, "agencies determine whether *and to what extent* to prepare an EIS based on the usefulness of any new potential information to the decisionmaking process." *Public Citizen*, 541 U. S., at 767 (emphasis added). So the question of whether a particular report is detailed enough in a particular case itself requires the exercise of agency discretion—which should not be excessively second-guessed by a court. Brevity should not be mistaken for lack of detail. A relatively brief agency explanation can be reasoned and detailed; an EIS need not meander on for hundreds or thousands of pages. So courts should not insist on length as a prerequisite for finding an EIS to be detailed.[3]

The EIS also must identify significant environmental impacts and feasible alternatives. But there too, an agency exercises substantial discretion. An agency must make predictive and scientific judgments in assessing the relevant impacts (what are the likely impacts; do they rise to the level of "significant"?) and alternatives (what are the

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[3] Indeed, federal law now strictly *prohibits* an agency's EIS from going on endlessly. In 2023, two years after the Board issued its final EIS for the Uinta Basin Railway, Congress passed and President Biden signed an Act amending NEPA meaningfully titled the "Building United States Infrastructure through Limited Delays and Efficient Reviews Act of 2023." Pub. L. 118–5, Div. C, Tit. III, §321, 137 Stat. 38–39. Under that BUILDER Act, an EIS "shall not exceed 150 pages" and must be completed in "2 years" or less. *Id.*, at 41–42 (42 U. S. C. §§4336a(e)(1)(A), (g)(1)(A)). That Act strongly reinforces the basic principles that NEPA, correctly interpreted, already embodied but that have been too often overlooked. The analysis in this opinion thus applies to NEPA as amended by the BUILDER Act.

potential alternatives; are they really "feasible"?). As this Court has said, "the term 'alternatives' is not self-defining," and "[c]ommon sense" should be brought to bear. *Vermont Yankee*, 435 U. S., at 551. Black-letter administrative law instructs that when an agency makes those kinds of speculative assessments or predictive or scientific judgments, and decides what qualifies as significant or feasible or the like, a reviewing court must be at its "most deferential." *Baltimore Gas & Elec.*, 462 U. S., at 103; see *Marsh*, 490 U. S., at 378; *State Farm*, 463 U. S., at 43.

In preparing an EIS, an agency also must determine the scope of the environmental effects that it will address. The textual focus of NEPA is the "proposed action"—that is, the project at hand. 42 U. S. C. §4332(2)(C) (2018). The agency therefore will obviously seek to assess significant effects from the project at issue. But how far will the agency go in considering the indirect effects that might occur outside the area of the immediate project—for example, due to emissions or run off from the project carried elsewhere by air or water? And will the agency evaluate the environmental effects from other future or geographically separate projects that may be initiated (or expanded) as a result of or in the wake of the current project? And what if another agency also possesses regulatory authority over a related project?

In analyzing those scope questions, it is critical to disaggregate the agency's role from the court's role. So long as the EIS addresses environmental effects from the project at issue, courts should defer to agencies' decisions about where to draw the line—including (i) how far to go in considering indirect environmental effects from the project at hand and (ii) whether to analyze environmental effects from other projects separate in time or place from the project at hand. On those kinds of questions, as this Court has often said, agencies possess discretion and must have broad latitude to draw a "manageable line." *Public Citizen*,

541 U. S., at 767 (quoting *Metropolitan Edison Co.* v. *People Against Nuclear Energy*, 460 U. S. 766, 774, n. 7 (1983)).

To tie all of this together: When assessing significant environmental effects and feasible alternatives for purposes of NEPA, an agency will invariably make a series of fact-dependent, context-specific, and policy-laden choices about the depth and breadth of its inquiry—and also about the length, content, and level of detail of the resulting EIS. Courts should afford substantial deference and should not micromanage those agency choices so long as they fall within a broad zone of reasonableness. As the Court has emphasized on several occasions, and we doubly underscore again today, "inherent in NEPA . . . is a 'rule of reason,' which ensures that agencies determine whether and to what extent to prepare an EIS based on the usefulness of any new potential information to the decisionmaking process." *Public Citizen*, 541 U. S., at 767. A reviewing court may not "substitute its judgment for that of the agency as to the environmental consequences of its actions." *Kleppe*, 427 U. S., at 410, n. 21.

Some courts have strayed and not applied NEPA with the level of deference demanded by the statutory text and this Court's cases. Those decisions have instead engaged in overly intrusive (and unpredictable) review in NEPA cases. Those rulings have slowed down or blocked many projects and, in turn, caused litigation-averse agencies to take ever more time and to prepare ever longer EISs for future projects.

The upshot: NEPA has transformed from a modest procedural requirement into a blunt and haphazard tool employed by project opponents (who may not always be entirely motivated by concern for the environment) to try to stop or at least slow down new infrastructure and construction projects. Some project opponents have invoked NEPA and sought to enlist the courts in blocking or delaying even those projects that otherwise comply with

all relevant substantive environmental laws. Indeed, certain project opponents have relied on NEPA to fight even clean-energy projects—from wind farms to hydroelectric dams, from solar farms to geothermal wells. See, *e.g.*, Brief for Chamber of Commerce of the United States of America, et al. as *Amici Curiae* 19–20.

All of that has led to more agency analysis of separate projects, more consideration of attenuated effects, more exploration of alternatives to proposed agency action, more speculation and consultation and estimation and litigation. Delay upon delay, so much so that the process sometimes seems to "borde[r] on the Kafkaesque." *Vermont Yankee*, 435 U. S., at 557. Fewer projects make it to the finish line. Indeed, fewer projects make it to the starting line. Those that survive often end up costing much more than is anticipated or necessary, both for the agency preparing the EIS and for the builder of the project. And that in turn means fewer and more expensive railroads, airports, wind turbines, transmission lines, dams, housing developments, highways, bridges, subways, stadiums, arenas, data centers, and the like. And that also means fewer jobs, as new projects become difficult to finance and build in a timely fashion.

A 1970 legislative acorn has grown over the years into a judicial oak that has hindered infrastructure development "under the guise" of just a little more process. *Id.*, at 558. A course correction of sorts is appropriate to bring judicial review under NEPA back in line with the statutory text and common sense. *Id.*, at 525. Congress did not design NEPA for *judges* to hamstring new infrastructure and construction projects. On the contrary, as this Court has stressed, courts should and "must defer to 'the informed discretion of the responsible federal agencies.'" *Marsh*, 490 U. S., at 377.

Critically, as the Government and the Coalition explained at oral argument, courts not only must defer to

the agency's reasonable choices regarding the scope and contents of the EIS, but also must keep in mind that review of an agency's EIS is not the same thing as review of the agency's final decision concerning the project. See Tr. of Oral Arg. 31–32, 70–71. That, too, follows from NEPA's status as a purely procedural statute. The ultimate question is not whether an EIS in and of itself is inadequate, but whether the agency's final decision was reasonable and reasonably explained. Review of an EIS is only one component of that analysis. Even if an EIS falls short in some respects, that deficiency may not necessarily require a court to vacate the agency's ultimate approval of a project, at least absent reason to believe that the agency might disapprove the project if it added more to the EIS. Cf. 5 U. S. C. §706. For example, in a case like this one, even if the EIS drew the line on the effects of separate upstream or downstream projects too narrowly, that mistake would not necessarily require a court to vacate the agency's approval of the railroad project. Cf. *Vermont Yankee*, 435 U. S., at 558.[4]

In other words, as this Court has said before, NEPA does not authorize a court to " 'interject itself within the area of discretion . . . as to the choice of the action to be taken'" by the agency. *Strycker's Bay Neighborhood Council*, 444 U. S., at 227–228 (quoting *Kleppe*, 427 U. S., at 410, n. 21). NEPA's procedural mandate helps "to insure a fully informed and well-considered decision, not necessarily a decision the judges of the Court of Appeals or this Court

[4] When, unlike this case, an agency *denies* approval of a project, the denied applicant may ordinarily challenge the denial under the APA or the relevant agency's governing statute. The denied applicant may argue, among other things, that the agency acted unreasonably in denying approval by weighing environmental consequences too heavily in light of the agency's governing statute and other relevant factors, or perhaps that the agency erred because the governing statute did not allow the agency to weigh environmental consequences at all. NEPA does not alter those judicial inquiries.

would have reached had they been members of the decisionmaking unit of the agency." *Vermont Yankee*, 435 U. S., at 558.

The "role of a court in reviewing the sufficiency of an agency's consideration of environmental factors is a limited one." *Id.*, at 555. The bedrock principle of judicial review in NEPA cases can be stated in a word: Deference.

B

Even apart from failing to afford sufficient deference to the Surface Transportation Board, the D. C. Circuit's decision was mistaken on the merits under NEPA. The D. C. Circuit erroneously required the Board to address environmental effects from projects that are separate in time or place from the 88-mile railroad project at hand—that is, effects from potential future projects or from geographically separate projects. Moreover, those separate projects fall outside the Board's authority and would be initiated, if at all, by third parties.

In its EIS, the Board determined that upstream oil drilling in the Uinta Basin and downstream oil refining along the Gulf Coast were separate from the construction and operation of the 88-mile railroad line. The Board's EIS explained that the "proposed rail line and any future oil and gas development projects are not two phases of a single action," but "separate, independent projects." App. 523. Those other projects, the Board reasoned, should not be considered "part of the proposed action assessed in the EIS." *Ibid.* The Board concluded that its EIS need not evaluate the possible environmental effects from separate upstream or downstream projects.[5]

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[5] Even though not mandated by NEPA to do so, the Board did identify some of the potential effects and marginal risks from projects separate from the 88 miles of additional railroad track in rural Utah. See, *e.g.*, App. 354–358 (forecasting the number of oil wells that could be added in the Uinta Basin as a result of increased production spurred by the new

The Board's approach complied with NEPA and this Court's longstanding NEPA precedents. Importantly, the textually mandated focus of NEPA is the "proposed action"—that is, the project at hand—not other future or geographically separate projects that may be built (or expanded) as a result of or in the wake of the immediate project under consideration. 42 U. S. C. §4332(2)(C) (2018); see *Aberdeen & Rockfish R. Co.* v. *Students Challenging Regulatory Agency Procedures (SCRAP)*, 422 U. S. 289, 322–324 (1975); *Kleppe*, 427 U. S., at 398–402. Therefore, when the effects of an agency action arise from a separate project—for example, a possible future project or one that is geographically distinct from the project at hand—NEPA does not require the agency to evaluate the effects of that separate project.

To be clear, the environmental *effects* of the project at issue may fall within NEPA even if those *effects* might extend outside the geographical territory of the project or might materialize later in time—for example, run-off into a river that flows many miles from the project and affects fish populations elsewhere, or emissions that travel downwind and predictably pollute other areas. Those so-called indirect effects can sometimes fall within NEPA, as the Government explained at oral argument. See Tr. of Oral Arg. 59–63.

But if the project at issue might lead to the construction or increased use *of a separate project*—for example, a housing development that might someday be built near a highway—the agency need not consider the environmental effects *of that separate project*. To put it in legal terms, the

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railway); *id.*, at 420–423, 539–542 (evaluating effects from increased oil refining along the Gulf Coast). The Board should not necessarily earn bonus points for studying more than NEPA demanded. But it should definitely not receive a failing grade just because its 3,600-page EIS was less thorough in analyzing the effects from other projects than the Court of Appeals might have preferred.

separate project breaks the chain of proximate causation between the project at hand and the environmental effects of the separate project. See *Public Citizen*, 541 U. S., at 767 (citing *Metropolitan Edison,* 460 U. S., at 774, and n. 7). The effects from a separate project may be factually foreseeable, but that does not mean that those effects are relevant to the agency's decisionmaking process or that it is reasonable to hold the agency responsible for those effects. Cf. *Public Citizen*, 541 U. S., at 766–767. In those circumstances, "the causal chain is too attenuated." *Metropolitan Edison,* 460 U. S., at 774. In other words, there is no "'reasonably close causal relationship' " between the project at hand and the environmental effects of those other projects. *Public Citizen*, 541 U. S., at 767 (quoting *Metropolitan Edison,* 460 U. S., at 774).

Moreover, and importantly, the Board here possesses no regulatory authority over those separate projects. The Board does not regulate oil drilling, oil wells, oil and gas leases, or oil refineries. The Board approves railroad lines. See 49 U. S. C. §§10101, 10901. Other agencies possess authority to regulate those separate projects and their environmental effects. As this Court stated in one of the more important sentences in the NEPA canon, "where an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency cannot be considered a legally relevant 'cause' of the effect." *Public Citizen*, 541 U. S., at 770. In other words, agencies are not required to analyze the effects of projects over which they do not exercise regulatory authority. For that reason as well, there is no "'reasonably close causal relationship' " between the 88-mile railroad project at hand and the environmental effects of the separate oil drilling and oil refining projects. *Id.*, at 767 (quoting *Metropolitan Edison*, 460 U. S., at 774); see also *Robertson*, 490 U. S., at 350–353; *Vermont Yankee*, 435 U. S., at 550–551, 558.

To be sure, NEPA mandates that an agency "consult

with" other agencies as appropriate. 42 U. S. C. §4332(2)(C). But there is a vast difference between, for example, an agency's consulting with the Forest Service to determine the effects of a railroad line that would pass through a national forest and an agency's asking another agency to assess how 88 miles of additional track in rural Utah would contribute to emissions or climate change along the Gulf Coast. Indeed, "no rule of reason worthy of that title would require an agency to prepare an EIS" addressing effects from another project that is separate in time or place from the project at hand—particularly when it would require the agency to speculate about the effects of a separate project that is outside its regulatory jurisdiction. *Public Citizen*, 541 U. S., at 767–768 (citing *Aberdeen & Rockfish R. Co.*, 422 U. S., at 325).

In this case, the Uinta Basin Railway was the relevant project. NEPA therefore required the Board to consider the environmental effects of that 88-mile railroad line's construction and operation. To the extent that the new 88-mile railroad line could disrupt the habitat of protected species, or the new rail embankments could cause soil erosion into local bodies of water, or trains on the new line could pollute the air, NEPA dictated that the Board evaluate those effects. And consistent with NEPA, the Board here *did* comprehensively evaluate those effects, including via consultation with other agencies. As the D. C. Circuit itself recognized, the Board explained that "construction and operation of the Railway" would affect "water resources, air quality, [and] special status species like the greater sage-grouse." 82 F. 4th, at 1168. But nothing in NEPA required the Board to go further and study environmental impacts from upstream or downstream projects separate in time or place from the 88-mile railroad line's construction and operation.

Under NEPA, it also bears emphasis, a mere "'but for' causal relationship is insufficient to make an agency

responsible for a particular effect." *Public Citizen*, 541 U. S., at 767. Likewise, the fact that other projects might foreseeably be built or expanded in the wake of the current project does not, by itself, make the agency responsible for addressing the environmental effects of those other projects. The agency may draw what it reasonably concludes is a "'manageable line'"—one that encompasses the effects of the project at hand, but not the effects of projects separate in time or place. *Ibid.* (quoting *Metropolitan Edison*, 460 U. S., at 774, n. 7). True, a new airport may someday lead to a new stretch of highway; a new pipeline to a new power plant; a new housing development to a new subway stop. But the environmental effects of the project at hand constitute NEPA's textual focus. An agency need not assess the environmental effects of other separate projects simply because those projects (and effects) might not materialize but for the project at hand, or are in some sense foreseeable.

Simply stated, a court may not invoke but-for causation or mere foreseeability to order agency analysis of the effects of every project that might somehow or someday follow from the current project. See *Public Citizen*, 541 U. S., at 767–768; *Metropolitan Edison*, 460 U. S., at 774–775. NEPA calls for the agency to focus on the environmental effects of the project itself, not on the potential environmental effects of future or geographically separate projects. A relatively modest infrastructure project should not be turned into a scapegoat for everything that ensues from upstream oil drilling to downstream refinery emissions. As Justice Rehnquist underscored in *Vermont Yankee*, NEPA is not a "game" where project objectors can engage in "unjustified obstructionism"—here, for example, by raising a slew of remote effects that they think " 'ought to be' considered." 435 U. S., at 553–554.

To be sure, in certain circumstances, other projects may be interrelated and close in time and place to the project at

hand—a residential development next door to and built at the same time as a ski resort, for example. See, *e.g.*, *Robertson*, 490 U. S., at 338–340. The question then is whether that is a single project within the authority of the agency in question. There may be a gray area in defining the project at hand. Even in those circumstances, however, a court's review still must remain deferential, as we explained in Part II–A above. In other words, even if the reviewing court in such a case might think that NEPA would support drawing a different line, a court should defer to an agency so long as the agency drew a reasonable and " 'manageable line.' " *Public Citizen*, 541 U. S., at 767 (quoting *Metropolitan Edison*, 460 U. S., at 774, n. 7). All of that is to again underscore that a difference may exist between what an agency should do as a matter of good policy and best practices under NEPA, and what a reviewing court may subsequently order an agency to do under NEPA.

In this case, in any event, the NEPA question is not close. The Board did not need to evaluate potential environmental impacts of the separate upstream and downstream projects. As to other projects upstream, the EIS rightly explained that the environmental consequences of future oil drilling in the Basin are distinct from construction and operation of the railroad line. App. 525–527. As for other projects downstream, the Board likewise correctly explained that any environmental effects from highly regulated oil refineries along the Gulf Coast are well outside the scope of the 88-mile railroad project in rural Utah. *Id.*, at 420–423, 539–542.[6]

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[6] In addition, inherent in Board approval of railroad lines is the understanding that any new freight railroad may transport different kinds of cargo over an approved line—from corn to cars to coal and the like. See Brief for Association of American Railroads as *Amicus Curiae* 2, 8–9. As common carriers, railroads subject to the Board's jurisdiction are required to provide "transportation or service on reasonable request"

An agency may decline to evaluate environmental effects from separate projects upstream or downstream from the project at issue. *Public Citizen*, 541 U. S., at 770. Here, the Board's EIS concluded that the "proposed rail line and any future oil and gas development projects are not two phases of a single action," but "separate, independent projects." App. 523. So the Board concluded that they need not be considered "part of the proposed action assessed in the EIS." *Ibid.* Absolutely correct.

* * *

In deciding cases involving the American economy, courts should strive, where possible, for clarity and predictability. Some courts' NEPA decisions have fallen short of that objective. The proper judicial approach for NEPA cases is straightforward: Courts should review an agency's EIS to check that it addresses the environmental effects of the project at hand. The EIS need not address the effects of separate projects. In conducting that review, courts should afford substantial deference to the agency as to the scope and contents of the EIS.

Plaintiffs' policy objections to this 88-mile Utah railroad may or may not be persuasive. But neither "the language nor the history of NEPA suggests that it was intended to give citizens a general opportunity to air their policy objections to proposed federal actions. The political process, and not NEPA, provides the appropriate forum in which to air policy disagreements." *Metropolitan Edison*, 460 U. S.,

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to any person or commodity. 49 U. S. C. §§11101(a), 10102(9). Railroad lines approved by the Board cannot decline to provide "common carrier" transport based on the product or commodity to be carried. §11101(a). For that additional reason, the EIS here correctly explained that the Board was "not required to analyze impacts related to the destinations or end uses of any such products or commodities" transported by the 88-mile railroad line, including Uinta Basin crude oil. App. 422; see *Department of Transportation* v. *Public Citizen*, 541 U. S. 752, 766–770 (2004).

at 777. Citizens may not enlist the federal courts, "under the guise of judicial review" of agency compliance with NEPA, to delay or block agency projects based on the environmental effects of other projects separate from the project at hand. *Vermont Yankee*, 435 U. S., at 558.

We reverse the judgment of the Court of Appeals and remand the case for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE GORSUCH took no part in the consideration or decision of this case.

SUPREME COURT OF THE UNITED STATES

No. 23–975

SEVEN COUNTY INFRASTRUCTURE COALITION, ET AL., PETITIONERS *v.* EAGLE COUNTY, COLORADO, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[May 29, 2025]

JUSTICE SOTOMAYOR, with whom JUSTICE KAGAN and JUSTICE JACKSON join, concurring in the judgment.

The National Environmental Policy Act improves agency decisionmaking by requiring agencies to consider environmental impacts for which their decisions would be responsible. I agree with the Court that the Surface Transportation Board would not be responsible for the harms caused by the oil industry, even though the railway it approved would deliver oil to refineries and spur drilling in the Uinta Basin. I reach that conclusion because, under its organic statute, the Board had no authority to reject petitioners' application on account of the harms third parties would cause with products transported on the proposed railway. The majority takes a different path, unnecessarily grounding its analysis largely in matters of policy. Accordingly, I write separately to explain why the result in this case follows inexorably from our precedent.

I

A

The Uinta Basin spans thousands of square miles across northwestern Utah and Colorado. Bookended by the Uinta Mountains in the north and the Roan Cliffs in the south,

the Basin is hard to access and has few residents. The Basin, however, contains "'extensive deposits of valuable minerals,' " including large reserves of "waxy crude," a form of petroleum known for its thick consistency at ambient temperatures. 82 F. 4th 1152, 1165–1166 (CADC 2023). For over a decade, oil producers have transported this oil out of the Basin in heated tanker trucks, to be sold to refineries in Utah and beyond.

Petitioners, the Seven County Infrastructure Coalition and the Uinta Basin Railway, LLC, plan to build a railway connecting the Uinta Basin with the Union Pacific Railroad Company station in Kyune, Utah, and from there to the national rail network. As the Coalition recognizes, "the Railway's predominant and expected primary purpose would be" to enable Basin oil producers to transport, with greater ease and in greater quantities, waxy crude to refineries in the Gulf Coast. *Ibid.* Nearly all the waxy crude transported by train out of the Uinta Basin would continue its travels over the Union Pacific track from Kyune to Denver, which runs through Eagle County, Colorado, and closely abuts the Colorado River.

B

No person may "construct an additional railroad line" or "provide transportation over . . . an extended or additional railroad line" without a certificate of approval from the Surface Transportation Board. 49 U. S. C. §10901(a). Applicants can file a formal application for such a certificate, §10901(c), or they can seek approval through an abbreviated exemption process, §10502(a). In either case, the Act expresses a clear presumption in favor of approving railways. See *ibid.* (exemptions must be granted "to the maximum extent" consistent with law); §10901(c) (the Board "shall" issue a certificate "unless" inconsistent with public convenience and necessity).

In May 2020, petitioners requested permission to build

the Railway by way of the exemption procedure. Because the proposed railway constitutes a "major Federal action significantly affecting" the environment, the National Environmental Policy Act (NEPA) required the Board to prepare a "detailed" statement addressing its environmental impacts. 42 U. S. C. §4332(C). The Board conditionally approved petitioners' request based on the Railway's " 'transportation merits,'" but it deferred a final decision pending the results of its environmental review. Surface Transportation Board, Office of Environmental Analysis, Uinta Basin Railway Final Environmental Impact Statement S–2, n. 2 (Aug. 2021) (Final EIS).

After soliciting public comment, the Board completed its environmental impact statement on August 6, 2021.[1] App. to Pet. for Cert. 76a. The statement recognized that "between 3.68 and 10.52 trains" would travel daily on the proposed new railway, which would be used "primarily to transport crude oil from the Basin to markets across the United States." Final EIS 1–4. Consistent with its obligations under NEPA, the Board discussed the comparative environmental merits of alternative railway routes as well as the environmental consequences common to all alternatives. Among other things, the Board analyzed the Railway's likely impact on the Basin's natural environment and the impacts increased freight traffic from the Railway would have on the existing Union Pacific line running through Eagle County.

Of particular relevance here, the Board recognized that "[r]efiners would refine the crude oil transported by the proposed rail line into various fuels," which in turn would be

[1] The final statement consisted of a 600-page report accompanied by supporting appendixes and responses to the public comments. See www.uintabasinrailwayeis.com (Board-created website containing the complete EIS and all related documentation); cf. *ante,* at 2, 4, 15, n. 5, 22 (asserting that the EIS spanned more than 3,600 pages of analysis).

combusted, causing an increase in greenhouse-gas emissions. *Id.*, at 3.15–35. Depending on market conditions, the Board estimated that increased oil production made possible by the Railway would cause greenhouse-gas emissions equivalent to between 0.04 and 0.1 percent of the global total. *Id.*, at 3.15–36. (By way of comparison, Sweden and Ireland are each responsible for about 0.1 percent of global emissions.[2]) Although the Board recognized the "massive deleterious impacts" of climate change, it explained that it was "not required to analyze impacts related to the destinations or end uses of " products transported on proposed rail lines. *Ibid.* After all, the Board explained, "railroads have a common carrier obligation to carry all commodities, including hazardous materials, upon reasonable request," meaning the Board cannot control the products "transported on the proposed rail line." *Ibid.* (citing 49 U. S. C. §11101 and *Riffin* v. *STB*, 733 F. 3d 340, 345–347 (CADC 2013)). For that reason, the Board did not consider in further detail the effects of increased drilling for oil in the Basin, or increased refining of oil in the Gulf Coast.

After completing this analysis, the Board issued a decision approving the railway. With respect to the anticipated increase in oil production, the Board again concluded that it had "no authority or jurisdiction over development of oil and gas in the Basin nor any authority to control or mitigate the impacts of any such development." App. to Pet. for Cert. 108a. Board member Oberman dissented. In his view, the Board did have "the power to deny construction approval based on weighing all of the environmental impacts that will arise from oil and gas development in the Basin," particularly because the Railway's " 'entire purpose'" would be to stimulate such production. *Id.*, at 124a.

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[2] See European Commission, Emissions Database for Global Atmospheric Research Report 2024 (last accessed May 7, 2025), https://edgar.jrc.ec.europa.eu/report_2024#emissions_table.

C

Several environmental groups filed a petition for review of the Board's decision to approve the railway, arguing principally that the Board should have further considered the consequences of increased oil drilling and refining that the Railway's construction would enable. Eagle County separately petitioned for review of the Board's decision, alleging that the Board's environmental analysis was deficient because it ignored or underestimated the Railway's impacts, through increased rail traffic, on the County and the nearby Colorado River. Petitioners intervened in support of the Board's decision.

The D. C. Circuit rejected several claims no longer at issue here, but it sided with the challengers on others. With regard to the environmental respondents' challenge, the court held that the Board should have more carefully considered the deleterious environmental effects of increased oil production made possible by the Railway's construction. 82 F. 4th, at 1180. Among other things, the court explained, the Board should have "estimate[d] the emissions or other environmental impacts" of oil refining as localized for the "specific regions that will receive the oil based on expected train traffic." *Id.*, at 1179. The court rejected the Board's argument "that it lacks authority to prevent, control, or mitigate those developments." *Id.,* at 1180. Instead, in the D. C. Circuit's view, the Board's statutory obligation to consider whether the Railway would serve the "'public convenience and necessity'" encompassed "reasonably foreseeable environmental harms," including those resulting from the increase in oil production on the Gulf Coast. *Ibid.*

Moving to the County's claims, the D. C. Circuit agreed the Board's analysis of the Railway's effect on the Union Pacific track and the Colorado River contained serious, unexplained errors and omissions. The court further concluded that the Board had failed to comply with several

other statutory requirements unrelated to NEPA. Accordingly, the D. C. Circuit vacated the Board's decision and remanded it to the agency for further proceedings.

Petitioners asked this Court to review only one part of the D. C. Circuit's decision: whether NEPA required the Board to study the environmental impacts of oil wells and refineries that lie outside the Board's regulatory authority. Pet. for Cert. i. This Court granted review to decide that question.

II

A

NEPA requires agencies to prepare and publish a "detailed statement" reviewing the environmental impact of any major federal action. 42 U. S. C. §4332. That "action-forcing" requirement serves dual purposes, ensuring both that an agency considers a project's environmental consequences before deciding whether to approve it, and rendering the agency publicly accountable for environmental harms it decides to tolerate. See *Robertson* v. *Methow Valley Citizens Council*, 490 U. S. 332, 349–350 (1989). The point, as this Court has recognized, is not merely that an agency produce a report but "that environmental concerns be integrated into the very process of decision-making." *Andrus* v. *Sierra Club*, 442 U. S. 347, 350 (1979); see also *Kleppe* v. *Sierra Club*, 427 U. S. 390, 409–410 (1976); *Robertson*, 490 U. S., at 350. In that way, NEPA's procedural requirements advance Congress's aim that the Federal Government "use all practicable means [to ensure] that the Nation may . . . fulfill the responsibilities of each generation as trustee of the environment for succeeding generations." §4331(b)(1).

Because NEPA's central aim is to improve agency decisionmaking, an agency need not consider every conceivable environmental consequence of a proposed federal action. Rather, agencies need only analyze environmental impacts

for which their decision would be (at least in part) "responsible," a requirement akin to "the familiar doctrine of proximate cause from tort law." *Metropolitan Edison Co.* v. *People Against Nuclear Energy*, 460 U. S. 766, 774, and n. 7 (1983). An agency is not responsible for environmental impacts it could not lawfully have acted to avoid, either through mitigation or by disapproving the federal action. See *Department of Transportation* v. *Public Citizen*, 541 U. S. 752, 770 (2004). Nor is an agency responsible for impacts that, though technically avoidable, are so causally attenuated from or ancillary to the agency's statutorily assigned tasks that it could not reasonably have been expected to consider them as part of its decisionmaking process. *Metropolitan Edison*, 460 U. S., at 774. Together these limitations serve to keep the scope of the agency's review targeted to environmental impacts it is well positioned to address.

Precedent makes these abstract principles concrete. In *Public Citizen*, this Court evaluated the Federal Motor Carrier Safety Administration's environmental analysis of regulations establishing an application process for Mexican motor carriers who wanted to operate in the United States. 541 U. S., at 758–763. The application system itself had only minimal environmental impacts (related to anticipated roadside inspections of the Mexican trucks and buses). Yet the agency developed it at the direction of the President, who had decided to lift a long-running moratorium on Mexican carriers' operation in the United States following the system's completion. *Id.*, at 760. Thus, promulgation of the agency's regulations would enable a substantial influx of new trucking, which in turn would have major environmental implications.

This Court concluded that, though the agency's regulations would be a "but-for" cause of the new trucking, it did not need to consider the related environmental impacts because it had "no authority to prevent" them. *Id.,* at 766–

767. After all, the decision to lift the moratorium had been the President's, not the agency's, and the agency could not lawfully refuse to issue its regulations in order to block the President's decision. *Id.*, at 761. The agency had no means to prevent, and thus was not responsible for, the consequences of lifting the moratorium. Hence NEPA did not require it to analyze those consequences.

The Court's decision in *Metropolitan Edison* illustrates the companion principle: Some environmental impacts are connected to an agency action by way of so "attenuated" a causal chain that the agency may reasonably dismiss them as ancillary to its decision. 460 U. S., at 774. In *Metropolitan Edison*, the Court considered whether the Nuclear Regulatory Commission had to analyze not only the risk that a proposed nuclear plant would cause an accident, but also the psychological concern nearby residents might experience when they learned about that risk. *Ibid.* Although the psychological concern would be "caused by" the nuclear plant, the Court held that NEPA did not require the agency to consider it. *Id.*, at 774–775. That makes sense: Preventing nuclear accidents is a core element of the Commission's statutory task; preventing psychological distress is not. See *id.*, at 776 (noting that "psychiatric expertise" is "not otherwise relevant to [the agency's] congressionally assigned functions"). Because the agency could reasonably disregard psychological distress in deciding whether to approve a power plant, it could disregard that risk in its environmental analysis as well.

As these cases show, the dual limitations on an agency's duty to consider information under NEPA yield a "'rule of reason,' which ensures that agencies determine whether and to what extent to prepare an EIS based on the usefulness of any new potential information to the decisionmaking process." *Public Citizen*, 541 U. S., at 767 (quoting *Marsh* v. *Oregon Natural Resources Council*, 490 U. S. 360,

373–374 (1989)). NEPA requires consideration of environmental impacts only if such consideration would result in information on which the agency could act.

B

Consistent with these principles, judicial review of an agency's environmental impact statement involves a two-step analysis. First, courts must consider the grounds on which an agency may rely under its organic statute to modify (by mitigation) or reject a proposed federal action. If the organic statute precludes consideration of a particular issue, the agency may set it aside for purposes of its NEPA review as well. That is the rule of *Public Citizen*.[3]

Second, if an agency decided not to review an environmental impact because (in its judgment) the impact was too causally attenuated from the question at hand, courts must ask whether the agency "acted arbitrarily" in doing so. *Kleppe*, 427 U. S., at 412. That deferential standard of review is appropriate here, as it is across substantive areas of administrative law, because "[a]gencies . . . have 'unique expertise,' often of a scientific or technical nature, relevant to applying a regulation 'to complex or changing circumstances.'" *Kisor* v. *Wilkie*, 588 U. S. 558, 571 (2019) (plurality opinion). Thus, as the majority points out, agencies often are "better equipped to assess what facts are relevant to the[ir] . . . own decision than a court is." *Ante*, at 10; cf. *Loper Bright Enterprises* v. *Raimondo*, 603 U. S. 369, 456 (2024) (KAGAN, J., dissenting) ("[A]gencies often know things about a statute's subject matter that courts could not hope to").[4]

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[3] It follows from this rule that the proper scope of an agency's NEPA review depends in part on the nature of the agency's statutory authority. The greater an agency's authority to consider and prevent environmental impacts in its decisionmaking process, the greater its duty under NEPA to consider those impacts, and vice versa.

[4] Of course, that point applies equally when an agency decides that an environmental impact is relevant to its decision.

This case provides no occasion to consider the second step because the question presented is resolved at the first. The Board twice decided it lacked authority to reject railway applications on account of the ways in which third parties would use the products "transported on the proposed rail line." Final EIS 3.15–36; App. to Pet. for Cert. 108a ("Here, the Board has no authority or jurisdiction over development of oil and gas in the Basin nor any authority to control or mitigate the impacts of any such development"). Each time, the agency cited *Public Citizen* to justify its decision not to analyze further the environmental effects of oil drilling and refining made possible by the Railway. See Final EIS 3.15–36; App. to Pet. for Cert. 108a.

Review of the Board's organic statute, the Interstate Commerce Commission Termination Act, confirms the Board's understanding of the scope of its review. "As common carriers, railroads subject to the Board's jurisdiction are required to provide 'transportation or service on reasonable request' to any person or commodity." *Ante,* at 20, n. 6 (quoting 49 U. S. C. §11101(a)). In addition, the Act contains a clear presumption in favor of approving new railways. See *supra*, at 3. And of the 15 statutory policies the Board must consider in the exemption process, not one concerns the anticipated use of commodities that will be transported on the proposed railway. See §§10101(1)–(15). Unlike the Board, meanwhile, other entities do have authority "to approve oil and gas development projects" and to regulate the effects of refining. See Brief for Federal Respondents 19. All this suggests, as the Board concluded, that the Board could not have rejected petitioners' application in order to prevent the harmful effects of oil drilling and refining.[5] Short of rejecting the Railway entirely, moreover, the

[5] The D. C. Circuit came to the opposite conclusion because it viewed the Board's authority to license railroad construction based on the " 'public convenience and necessity' " as encompassing the effects of oil drilling and refining enabled by the Railway. 82 F. 4th 1152, 1180 (2023). That

common carrier mandate prevented the Board from mitigating, by limiting the transport of crude oil, the Railway's spurring of the oil industry. See §11101(a).

The environmental respondents concede that the Board correctly understood the scope of its decisionmaking authority. See Tr. of Oral Arg. 84–85. Instead, they argue that the Board should have analyzed even environmental impacts it could not lawfully prevent. Yet *Public Citizen* squarely forecloses that position. See *supra*, at 9–10. Even a foreseeable environmental effect is outside of NEPA's scope if the agency could not lawfully decide to modify or reject the proposed action on account of it. NEPA thus did not require the Board to consider the effects of oil drilling and refining.

* * *

Under NEPA, agencies must consider the environmental impacts for which their decisions would be responsible. Here, the Board correctly determined it would not be responsible for the consequences of oil production upstream or downstream from the Railway because it could not lawfully consider those consequences as part of the approval process. For that reason, I concur in the Court's judgment reversing the D. C. Circuit's holding requiring the Board to consider in further detail harms caused by the oil industry.

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phrase, however, must be read "with a view to [its] place in the overall statutory scheme." *Davis* v. *Michigan Dept. of Treasury*, 489 U. S. 803, 809 (1989). Here, the Board's organic statute contains clear indicators, most significantly the common carrier mandate, that the Board's authority does not extend so far.

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.,* 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

TRUMP, PRESIDENT OF THE UNITED STATES, ET AL. *v.* CASA, INC., ET AL.

ON APPLICATION FOR PARTIAL STAY

No. 24A884. Argued May 15, 2025—Decided June 27, 2025*

Plaintiffs (respondents here)—individuals, organizations, and States—filed three separate suits to enjoin the implementation and enforcement of President Trump's Executive Order No. 14160. See Protecting the Meaning and Value of American Citizenship, 90 Fed. Reg. 8449. The Executive Order identifies circumstances in which a person born in the United States is not "subject to the jurisdiction thereof" and is thus not recognized as an American citizen. The plaintiffs allege that the Executive Order violates the Fourteenth Amendment's Citizenship Clause, §1, and §201 of the Nationality Act of 1940. In each case, the District Court entered a "universal injunction"—an injunction barring executive officials from applying the Executive Order to *anyone*, not just the plaintiffs. And in each case, the Court of Appeals denied the Government's request to stay the sweeping relief. The Government argues that the District Courts lacked equitable authority to impose universal relief and has filed three nearly identical emergency applications seeking partial stays to limit the preliminary injunctions to the plaintiffs in each case. The applications do not raise—and thus the Court does not address—the question whether the Executive Order violates the Citizenship Clause or Nationality Act. Instead, the issue the Court decides is whether, under the Judiciary Act of 1789, federal courts have equitable authority to issue universal injunctions.

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*Together with No. 24A885, *Trump, President of the United States, et al.* v. *Washington et al.*, and No. 24A886, *Trump, President of the United States, et al.* v. *New Jersey et al.*, also on applications for partial stays.

Syllabus

Held: Universal injunctions likely exceed the equitable authority that Congress has given to federal courts. The Court grants the Government's applications for a partial stay of the injunctions entered below, but only to the extent that the injunctions are broader than necessary to provide complete relief to each plaintiff with standing to sue. Pp. 4–26.

(a) The issue raised by these applications—whether Congress has granted federal courts authority to universally enjoin the enforcement of an executive order—plainly warrants this Court's review. On multiple occasions, and across administrations, the Solicitor General has asked the Court to consider the propriety of this expansive remedy. As the number of universal injunctions has increased over the years, so too has the importance of the issue. Pp. 4–5.

(b) The Government is likely to succeed on the merits of its claim that the District Courts lacked authority to issue universal injunctions. See *Nken* v. *Holder*, 556 U. S. 418, 434 (holding that for a stay application to be granted, the applicant must make a strong showing of likelihood of success on the merits). The issuance of a universal injunction can be justified only as an exercise of equitable authority, yet Congress has granted federal courts no such power. The Judiciary Act of 1789 endowed federal courts with jurisdiction over "all suits . . . in equity," §11, 1 Stat. 78, and still today, this statute "is what authorizes the federal courts to issue equitable remedies," S. Bray & E. Sherwin, Remedies 442. This Court has held that the statutory grant encompasses only those sorts of equitable remedies "traditionally accorded by courts of equity" at our country's inception. *Grupo Mexicano de Desarrollo, S. A.* v. *Alliance Bond Fund, Inc.*, 527 U. S. 308, 319.

Universal injunctions are not sufficiently "analogous" to any relief available in the court of equity in England at the time of the founding. *Grupo Mexicano*, 527 U. S., at 318–319. Equity offered a mechanism for the Crown "to secure justice where it would not be secured by the ordinary and existing processes of law." G. Adams, The Origin of English Equity, 16 Colum. L. Rev. 87, 91. This "judicial prerogative of the King" thus extended to "those causes which the ordinary judges were incapable of determining." 1 J. Pomeroy, Equity Jurisprudence §31, p. 27. Eventually, the Crown instituted the "practice of delegating the cases" that "came before" the judicial prerogative "to the chancellor for his sole decision." *Id.*, §34, at 28. The "general rule in Equity [was] that all persons materially interested [in the suit] [were] to be made parties to it." J. Story, Commentaries on Equity Pleadings §72, p. 74 (Story). Injunctions were no exception; there were "sometimes suits to restrain the actions of particular officers against particular plaintiffs." S. Bray, Multiple Chancellors: Reforming the National Injunction, 131 Harv. L. Rev. 417, 425 (Bray, Multiple Chancellors). Of importance

here, suits in equity were brought by and against individual parties, and the Chancellor's remedies were generally party specific. See *Iveson* v. *Harris*, 7 Ves. 251, 257, 32 Eng. Rep. 102, 104 ("[Y]ou cannot have an injunction except against a party to the suit"). In sum, under longstanding equity practice in England, there was no remedy "remotely like a national injunction." Bray, Multiple Chancellors 425.

Nor did founding-era courts of equity in the United States chart a different course. If anything, the approach traditionally taken by federal courts cuts *against* the existence of such a sweeping remedy. Consider *Scott* v. *Donald*, where the plaintiff successfully challenged the constitutionality of a law on which state officials had relied to confiscate alcohol that the plaintiff kept for personal use. See 165 U. S. 107, 109 (statement of case); *id.*, at 111–112 (opinion of the Court). Although the plaintiff sought an injunction barring enforcement of the law against both himself and anyone "whose rights [were] infringed and threatened" by it, the Court permitted only relief benefitting the named plaintiff. *Id.*, at 115–117. In the ensuing decades, the Court consistently rebuffed requests for relief that extended beyond the parties. See, *e.g.*, *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113, 123; *Frothingham* v. *Mellon*, decided with *Massachusetts* v. *Mellon*, 262 U. S. 447, 487–489.

The Court's early refusals to grant relief to nonparties are consistent with the party-specific principles that permeate the Court's understanding of equity. "[N]either declaratory nor injunctive relief," the Court has said, "can directly interfere with enforcement of contested statutes or ordinances except with respect to the particular federal plaintiffs." *Doran* v. *Salem Inn, Inc.*, 422 U. S. 922, 931. In fact, universal injunctions were conspicuously nonexistent for most of the Nation's history. Their absence from 18th and 19th century equity practice settles the question of judicial authority.

While "equity is flexible," *Grupo Mexicano*, 527 U. S., at 322, the Court's precedent emphasizes that its "flexibility is confined within the broad boundaries of traditional equitable relief." *Ibid.* Because the universal injunction lacks a historical pedigree, it falls outside the bounds of a federal court's equitable authority under the Judiciary Act. Pp. 5–11.

(c) Respondents' counterarguments are unavailing. Pp. 11–21.

(1) In an effort to satisfy *Grupo Mexicano*'s historical test, respondents claim that universal injunctions are the modern equivalent of the decree resulting from a "bill of peace"—a form of group litigation in the Court of Chancery. Respondents contend that the existence of this historic equitable device means that federal courts have the equitable authority to issue universal injunctions under the Judiciary Act. The analogy, however, does not work. True, "bills of peace allowed

[courts of equity] to adjudicate the rights of members of dispersed groups without formally joining them to a lawsuit through the usual procedures." *Arizona* v. *Biden*, 40 F. 4th 375, 397 (Sutton, C. J., concurring). Unlike universal injunctions, however, which reach *anyone* affected by executive or legislative action, bills of peace involved a "group [that] was small and cohesive." Bray, Multiple Chancellors 426. And unlike universal injunctions, which bind only the parties to the suit, decrees resulting from a bill of peace "would bind all members of the group, whether they were present in the action or not." 7A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure §1751, at 10.

The bill of peace lives in modern form, but not as the universal injunction. It is instead analogous to the modern class action—which, in federal court, is governed by Rule 23 of the Federal Rules of Civil Procedure. See *ibid.* Rule 23 requires numerosity (such that joinder is impracticable), common questions of law or fact, typicality, and representative parties who adequately protect the interests of the class. Fed. Rule Civ. Proc. 23(a). The requirements for a bill of peace were virtually identical. See 7A Wright, Federal Practice and Procedure §1751, at 10 and n. 4. By forging a shortcut to relief that benefits parties and nonparties alike, universal injunctions impermissibly circumvent Rule 23's procedural protections. Pp. 12–15.

(2) Respondents contend that universal injunctions—or at least *these* universal injunctions—are simply an application of the principle that a court of equity may fashion a remedy that awards complete relief. But "complete relief" is not synonymous with "universal relief." It is a narrower concept, long embraced in the equitable tradition, that allows courts to "administer complete relief *between the parties*." *Kinney-Coastal Oil Co.* v. *Kieffer*, 277 U. S. 488, 507 (emphasis added). To be sure, party-specific injunctions sometimes "advantag[e] nonparties," *Trump* v. *Hawaii*, 585 U. S 667, 717 (THOMAS, J., concurring), but they do so only incidentally.

Here, prohibiting enforcement of the Executive Order against the child of an individual pregnant plaintiff will give that plaintiff complete relief: Her child will not be denied citizenship. And extending the injunction to cover everyone similarly situated would not render *her* relief any more complete. So the individual and associational respondents are wrong to characterize the universal injunction as simply an application of the complete-relief principle. The inquiry is more complicated for the state respondents, because the relevant injunction does not purport to directly benefit nonparties. Instead, the District Court for the District of Massachusetts decided that a universal injunction was necessary to provide the States *themselves* complete re-

lief. As the States see it, their harms—financial injuries and the administrative burdens flowing from citizen-dependent benefits programs—cannot be remedied without a blanket ban on the enforcement of the Executive Order. Children often move across state lines or are born outside their parents' State of residence. Given the cross-border flow, the States say, a "patchwork injunction" would prove unworkable for the provision of certain federally funded benefits. The Government retorts that even if the injunction is designed to benefit only the States, it is "more burdensome than necessary to redress" their asserted harms, see *Califano* v. *Yamasaki*, 442 U. S. 682, 702, and that narrower relief is appropriate. The Court declines to take up these arguments in the first instance. The lower courts should determine whether a narrower injunction is appropriate, so we leave it to them to consider these and any related arguments. Pp. 15–19.

(3) Respondents defend universal injunctions as a matter of policy; the Government advances policy arguments running the other way. As with most questions of law, the policy pros and cons are beside the point. Under the Court's well-established precedent, see *Grupo Mexicano*, 527 U. S., at 319, because universal injunctions lack a founding-era forebear, federal courts lack authority to issue them. Pp. 19–21.

(d) To obtain interim relief, the Government must show that it is likely to suffer irreparable harm absent a stay. *Nken*, 556 U. S., at 434–435. When a federal court enters a universal injunction against the Government, it "improper[ly] intru[des]" on "a coordinate branch of the Government" and prevents the Government from enforcing its policies against nonparties. *INS* v. *Legalization Assistance Project of Los Angeles County Federation of Labor*, 510 U. S. 1301, 1306 (O'Connor, J., in chambers); see also *Maryland* v. *King*, 567 U. S. 1301, 1303 (ROBERTS, C. J., in chambers) (" '[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury' " (alteration in original)). The Court's practice also demonstrates that an applicant need not show it will prevail on the underlying merits when it seeks a stay on a threshold issue. See, *e.g.*, *Gutierrez* v. *Saenz*, 603 U. S. __; *OPM* v. *AFGE*, 604 U. S. __. The Government here is likely to suffer irreparable harm from the District Courts' entry of injunctions that likely exceed the authority conferred by the Judiciary Act. And the balance of equities does not counsel against awarding the Government interim relief: A partial stay will cause no harm to respondents because they will remain protected by the preliminary injunctions to the extent necessary and appropriate to afford them complete relief. Pp. 24–26.

(e) When a court concludes that the Executive Branch has acted unlawfully, the answer is not for the court to exceed its power, too. The

Syllabus

Government's applications for partial stays of the preliminary injunctions are granted, but only to the extent that the injunctions are broader than necessary to provide complete relief to each plaintiff with standing to sue. P. 26.

Applications for partial stays granted.

BARRETT, J., delivered the opinion of the Court, in which ROBERTS, C. J., and THOMAS, ALITO, GORSUCH, and KAVANAUGH, JJ., joined. THOMAS, J., filed a concurring opinion, in which GORSUCH, J., joined. ALITO, J., filed a concurring opinion, in which THOMAS, J., joined. KAVANAUGH, J., filed a concurring opinion. SOTOMAYOR, J., filed a dissenting opinion, in which KAGAN and JACKSON, JJ., joined. JACKSON, J., filed a dissenting opinion.

SUPREME COURT OF THE UNITED STATES

No. 24A884

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL. *v.* CASA, INC., ET AL.

ON APPLICATION FOR PARTIAL STAY

No. 24A885

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL. *v.* WASHINGTON, ET AL.

ON APPLICATION FOR PARTIAL STAY

No. 24A886

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL. *v.* NEW JERSEY, ET AL.

ON APPLICATION FOR PARTIAL STAY

[June 27, 2025]

JUSTICE BARRETT delivered the opinion of the Court.

The United States has filed three emergency applications challenging the scope of a federal court's authority to enjoin Government officials from enforcing an executive order. Traditionally, courts issued injunctions prohibiting executive officials from enforcing a challenged law or policy only against the plaintiffs in the lawsuit. The injunctions before us today reflect a more recent development: district courts asserting the power to prohibit enforcement of a law or policy against *anyone*. These injunctions—known as "universal injunctions"—likely exceed the equitable authority that

Congress has granted to federal courts.[1] We therefore grant the Government's applications to partially stay the injunctions entered below.

I

The applications before us concern three overlapping, universal preliminary injunctions entered by three different District Courts. See 763 F. Supp. 3d 723 (Md. 2025), appeal pending, No. 25–1153 (CA4); 765 F. Supp. 3d 1142 (WD Wash. 2025), appeal pending, No. 25–807 (CA9); *Doe* v. *Trump*, 766 F. Supp. 3d 266 (Mass. 2025), appeal pending, No. 25–1170 (CA1). The plaintiffs—individuals, organizations, and States—sought to enjoin the implementation and enforcement of President Trump's Executive Order No. 14160.[2] See Protecting the Meaning and Value of American Citizenship, 90 Fed. Reg. 8449 (2025). The Executive Order identifies circumstances in which a person born in the United States is not "subject to the jurisdiction thereof" and

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[1] Such injunctions are sometimes called "nationwide injunctions," reflecting their use by a single district court to bar the enforcement of a law anywhere in the Nation. But the term "universal" better captures how these injunctions work. Even a traditional, parties-only injunction can apply beyond the jurisdiction of the issuing court. *Steele* v. *Bulova Watch Co.*, 344 U. S. 280, 289 (1952) (When "exercising its equity powers," a district court "may command persons properly before it to cease or perform acts outside its territorial jurisdiction"). The difference between a traditional injunction and a universal injunction is not so much *where* it applies, but *whom* it protects: A universal injunction prohibits the Government from enforcing the law against *anyone*, anywhere. H. Wasserman, "Nationwide" Injunctions Are Really "Universal" Injunctions and They Are Never Appropriate, 22 Lewis & Clark L. Rev. 335, 338 (2018).

[2] The Government does not dispute—nor could it—that the individual plaintiffs have standing to sue. But it argues that the States lack third-party standing because their claims rest exclusively on the rights of individuals. Application for Partial Stay of Injunction in No. 24A884, pp. 28–32. It also challenges the District Courts' authority to grant relief to the organizations' members who are not identified in the complaints. See *id.*, at 22. We do not address these arguments.

is thus not recognized as an American citizen. See *ibid.* Specifically, it sets forth the "policy of the United States" to no longer issue or accept documentation of citizenship in two scenarios: "(1) when [a] person's mother was unlawfully present in the United States and the person's father was not a United States citizen or lawful permanent resident at the time of said person's birth, or (2) when [a] person's mother's presence in the United States was lawful but temporary, and the person's father was not a United States citizen or lawful permanent resident at the time of said person's birth." *Ibid.* The Executive Order also provides for a 30-day ramp-up period. During that time, the order directs executive agencies to develop and issue public guidance regarding the order's implementation. See *id.*, at 8449–8450.

The plaintiffs filed suit, alleging that the Executive Order violates the Fourteenth Amendment's Citizenship Clause, §1, as well as §201 of the Nationality Act of 1940, 54 Stat. 1138 (codified at 8 U. S. C. §1401). In each case, the District Court concluded that the Executive Order is likely unlawful and entered a universal preliminary injunction barring various executive officials from applying the policy to *anyone* in the country. And in each case, the Court of Appeals denied the Government's request to stay the sweeping relief. See 2025 WL 654902 (CA4, Feb. 28, 2025); 2025 WL 553485 (CA9, Feb. 19, 2025); 131 F. 4th 27 (CA1 2025).

The Government has now filed three nearly identical applications seeking to partially stay the universal preliminary injunctions and limit them to the parties. See Application for Partial Stay of Injunction in No. 24A884; Application for Partial Stay of Injunction in No. 24A885; Application for Partial Stay of Injunction in No. 24A886.[3] The applications do not raise—and thus we do not address—the question whether the Executive Order violates

[3] Because the applications are materially identical, we cite only the application in No. 24A884 throughout the rest of the opinion.

the Citizenship Clause or Nationality Act. The issue before us is one of remedy: whether, under the Judiciary Act of 1789, federal courts have equitable authority to issue universal injunctions.

II

The question whether Congress has granted federal courts the authority to universally enjoin the enforcement of an executive or legislative policy plainly warrants our review, as Members of this Court have repeatedly emphasized. See, *e.g.*, *McHenry* v. *Texas Top Cop Shop*, 604 U. S. ___, ___ (2025) (GORSUCH, J., concurring in grant of stay) (slip op., at 1) ("I would . . . take this case now to resolve definitively the question whether a district court may issue universal injunctive relief"); *Labrador* v. *Poe*, 601 U. S. ___, ___–___ (2024) (GORSUCH, J., joined by THOMAS and ALITO, JJ., concurring in grant of stay) (slip op., at 7–8) ("[T]he propriety of universal injunctive relief [is] a question of great significance that has been in need of the Court's attention for some time"); *Griffin* v. *HM Florida-ORL, LLC*, 601 U. S. ___, ___ (2023) (statement of KAVANAUGH, J., joined by BARRETT, J., except as to footnote 1, respecting denial of application for stay) (slip op., at 3) (Universal injunctions present "an important question that could warrant our review in the future"); *Trump* v. *Hawaii*, 585 U. S. 667, 713 (2018) (THOMAS, J., concurring) ("If [universal injunctions'] popularity continues, this Court must address their legality"). On multiple occasions, and across administrations, the Solicitor General has asked us to consider the propriety of this expansive remedy. See, *e.g.*, Application for Stay of Injunction in *McHenry* v. *Texas Top Cop Shop*, *Inc.*, O. T. 2024, No. 24A653 (Biden administration); Brief for Petitioners in *Trump* v. *Hawaii*, O. T. 2017, No. 17–965 (first Trump administration).

It is easy to see why. By the end of the Biden administration, we had reached "a state of affairs where almost every

major presidential act [was] immediately frozen by a federal district court." W. Baude & S. Bray, Comment, Proper Parties, Proper Relief, 137 Harv. L. Rev. 153, 174 (2023). The trend has continued: During the first 100 days of the second Trump administration, district courts issued approximately 25 universal injunctions. Congressional Research Service, J. Lampe, Nationwide Injunctions in the First Hundred Days of the Second Trump Administration 1 (May 16, 2025). As the number of universal injunctions has increased, so too has the importance of the issue.

III

A

The Government is likely to succeed on the merits of its argument regarding the scope of relief. See *Nken* v. *Holder*, 556 U. S. 418, 434 (2009) (holding that for a stay application to be granted, the applicant must make " 'a strong showing that [it] is likely to succeed on the merits' "). A universal injunction can be justified only as an exercise of equitable authority, yet Congress has granted federal courts no such power.[4]

The Judiciary Act of 1789 endowed federal courts with jurisdiction over "all suits . . . in equity," §11, 1 Stat. 78, and still today, this statute "is what authorizes the federal courts to issue equitable remedies," S. Bray & E. Sherwin, Remedies 442 (4th ed. 2024). Though flexible, this equitable authority is not freewheeling. We have held that the statutory grant encompasses only those sorts of equitable remedies "traditionally accorded by courts of equity" at our country's inception. *Grupo Mexicano de Desarrollo, S. A.* v. *Alliance Bond Fund, Inc.*, 527 U. S. 308, 319 (1999); see also, *e.g.*, *Payne* v. *Hook*, 7 Wall. 425, 430 (1869) ("The equity jurisdiction conferred on the Federal courts is the same

[4] Our decision rests solely on the statutory authority that federal courts possess under the Judiciary Act of 1789. We express no view on the Government's argument that Article III forecloses universal relief.

that the High Court of Chancery in England possesses").[5] We must therefore ask whether universal injunctions are sufficiently "analogous" to the relief issued " 'by the High Court of Chancery in England at the time of the adoption of the Constitution and the enactment of the original Judiciary Act.'" *Grupo Mexicano*, 527 U. S., at 318–319 (quoting A. Dobie, Handbook of Federal Jurisdiction and Procedure 660 (1928)).

The answer is no: Neither the universal injunction nor any analogous form of relief was available in the High Court of Chancery in England at the time of the founding. Equity offered a mechanism for the Crown "to secure justice where it would not be secured by the ordinary and existing processes of law." G. Adams, The Origin of English Equity, 16 Colum. L. Rev. 87, 91 (1916). This "judicial prerogative of the King" thus extended to "those causes which the ordinary judges were incapable of determining." 1 J. Pomeroy, Equity Jurisprudence §31, p. 27 (1881). Eventually, the Crown instituted the "practice of delegating the cases" that "came before" the judicial prerogative "to the chancellor for his sole decision." *Id.*, §34, at 28. This "became the common mode of dealing with such controversies." *Ibid.*

Of importance here, suits in equity were brought by and against individual parties. Indeed, the "general rule in Equity [was] that all persons materially interested [in the suit] [were] to be made parties to it." J. Story, Commentaries on Equity Pleadings §72, p. 74 (2d ed. 1840) (Story). Injunctions were no exception; there were "sometimes suits

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[5] See also *Guaranty Trust Co.* v. *York*, 326 U. S. 99, 105 (1945) ("[T]he federal courts [have] no power that they would not have had in any event when courts were given 'cognizance,' by the first Judiciary Act, of suits 'in equity' "); *Boyle* v. *Zacharie & Turner*, 6 Pet. 648, 658 (1832) ("[T]he settled doctrine of this court is, that the remedies in equity are to be administered, not according to the state practice, but according to the practice of courts of equity in the parent country").

to restrain the actions of *particular* officers against *particular* plaintiffs." S. Bray, Multiple Chancellors: Reforming the National Injunction, 131 Harv. L. Rev. 417, 425 (2017) (Bray, Multiple Chancellors) (emphasis added). And in certain cases, the "Attorney General could be a defendant." *Ibid.* The Chancellor's remedies were also typically party specific. "As a general rule, an injunction" could not bind one who was not a "party to the cause." F. Calvert, Suits in Equity 120 (2d ed. 1847); see also *Iveson* v. *Harris*, 7 Ves. 251, 257, 32 Eng. Rep. 102, 104 (1802) ("[Y]ou cannot have an injunction except against a party to the suit"). Suffice it to say, then, under longstanding equity practice in England, there was no remedy "remotely like a national injunction." Bray, Multiple Chancellors 425.

Nor did founding-era courts of equity in the United States chart a different course. See 1 Pomeroy, Equity Jurisprudence §41, at 33–34. If anything, the approach traditionally taken by federal courts cuts *against* the existence of such a sweeping remedy. Consider *Scott* v. *Donald*, where the plaintiff successfully challenged the constitutionality of a law on which state officials had relied to confiscate alcohol that the plaintiff kept for personal use. See 165 U. S. 107, 109 (1897) (statement of case); *id.*, at 111–112 (opinion of the Court). Although the plaintiff sought an injunction barring enforcement of the law against both himself and anyone else "whose rights [were] infringed and threatened" by it, this Court permitted only a narrower decree between "the parties named as plaintiff and defendants in the bill." *Id.*, at 115–117.[6]

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[6] Though the principal dissent claims otherwise, we do not treat *Scott* as "dispositive." *Post*, at 28 (opinion of SOTOMAYOR, J.). Under *Grupo Mexicano de Desarrollo, S. A.* v. *Alliance Bond Fund, Inc.*, 527 U. S. 308 (1999), the lack of a historical analogue is dispositive. *Scott* simply illustrates that as late as 1897, this Court adhered to a party-specific view of relief. And while the principal dissent relies on *Smyth* v. *Ames*, 169 U. S. 466, 518 (1898), as a counterexample to *Scott*, see *post*, at 28 (opinion of

In the ensuing decades, we consistently rebuffed requests for relief that extended beyond the parties. See, *e.g.*, *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113, 123 (1940) ("The benefits of [the court's] injunction" improperly extended "to bidders throughout the Nation who were not parties to any proceeding, who were not before the court[,] and who had sought no relief"); cf. *Frothingham* v. *Mellon*, decided with *Massachusetts* v. *Mellon*, 262 U. S. 447, 487–489 (1923) (concluding that the Court lacked authority to issue "preventive relief" that would apply to people who "suffe[r] in some indefinite way in common with people generally"); Bray, Multiple Chancellors 433 (explaining that the *Frothingham* analysis "intertwines concepts of equity, remedies, and the judicial power"). As Justice Nelson put it while riding circuit, "[t]here is scarcely a suit at law, or in equity, . . . in which a general statute is interpreted, that does not involve a question in which other parties are interested." *Cutting* v. *Gilbert*, 6 F. Cas. 1079, 1080 (No. 3,519) (CC SDNY 1865). But to allow all persons subject to the statute to be treated as parties to a lawsuit "would confound the established order of judicial proceedings." *Ibid.*

Our early refusals to grant relief to nonparties are consistent with the party-specific principles that permeate our understanding of equity. "[N]either declaratory nor injunctive relief," we have said, "can directly interfere with enforcement of contested statutes or ordinances except with respect to the particular federal plaintiffs." *Doran* v. *Salem Inn, Inc.*, 422 U. S. 922, 931 (1975); see also *Gregory* v. *Stetson*, 133 U. S. 579, 586 (1890) ("It is an elementary principle

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SOTOMAYOR, J.), it is unclear why. Even supporters of the universal injunction recognize that "the decree [that *Smyth*] affirmed did not reach beyond the parties." M. Sohoni, The Lost History of the "Universal" Injunction, 133 Harv. L. Rev. 920, 939 (2020); *Smyth*, 169 U. S., at 476–477 (statement of case) (quoting circuit court order that enjoined state officials from enforcing the statute "against *said* railroad companies" (emphasis added)).

that a court cannot adjudicate directly upon a person's right without having him either actually or constructively before it. This principle is fundamental"); Baude, 137 Harv. L. Rev., at 168 (noting the "party-specific understanding of what equitable remedies do").

In fact, universal injunctions were not a feature of federal-court litigation until sometime in the 20th century. See Bray, Multiple Chancellors 448–452 (discussing various rationales for the birth of the universal injunction); see also Application in No. 24A884, at 17–18. The D. C. Circuit issued what some regard as the first universal injunction in 1963. See *Wirtz* v. *Baldor Elec. Co.*, 337 F. 2d 518, 535 (enjoining the Secretary of Labor "with respect to the entire [electric motors and generators] industry," not just the named plaintiffs to the lawsuit).[7] Yet such injunctions remained rare until the turn of the 21st century, when their use gradually accelerated. See Bray, Multiple Chancellors 439–443 (referencing *Flast* v. *Cohen*, 392 U. S. 83 (1968), and *Harlem Valley Transp. Assn.* v. *Stafford*, 360 F. Supp. 1057 (SDNY 1973)). One study identified approximately 127 universal injunctions issued between 1963 and 2023.

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[7] There is some dispute about whether *Wirtz* was the first universal injunction. Professor Mila Sohoni points to other possible 20th-century examples, including *West Virginia Bd. of Ed.* v. *Barnette*, 319 U. S. 624 (1943), *Pierce* v. *Society of Sisters*, 268 U. S. 510 (1925), and *Lewis Publishing Co.* v. *Morgan*, 229 U. S. 288 (1913). See M. Sohoni, 133 Harv. L. Rev., at 943; Brief for Professor Mila Sohoni as *Amica Curiae* 3; see also *post*, at 21 (opinion of SOTOMAYOR, J.). But see M. Morley, Disaggregating the History of Nationwide Injunctions: A Response to Professor Sohoni, 72 Ala. L. Rev. 239, 252–256 (2020) (disputing these examples). Regardless, under any account, universal injunctions postdated the founding by more than a century—and under *Grupo Mexicano*, equitable authority exercised under the Judiciary Act must derive from founding-era practice. 527 U. S., at 319. It also bears emphasis that none of these cases addresses the propriety of universal relief. Like a "drive-by-jurisdictional rulin[g]," implicit acquiescence to a broad remedy "ha[s] no precedential effect." *Steel Co.* v. *Citizens for Better Environment*, 523 U. S. 83, 91 (1998).

See District Court Reform: Nationwide Injunctions, 137 Harv. L. Rev. 1701, 1705 (2024). Ninety-six of them—over three quarters—were issued during the administrations of President George W. Bush, President Obama, President Trump, and President Biden. *Ibid.*

The bottom line? The universal injunction was conspicuously nonexistent for most of our Nation's history. Its absence from 18th- and 19th-century equity practice settles the question of judicial authority.[8] See *Grupo Mexicano*, 527 U. S., at 318–319. That the absence continued into the 20th century renders any claim of historical pedigree still more implausible. Even during the "deluge of constitutional litigation that occurred in the wake of *Ex parte Young*, throughout the *Lochner* Era, and at the dawn of the New Deal," universal injunctions were nowhere to be found. M. Morley, Disaggregating the History of Nationwide Injunctions: A Response to Professor Sohoni, 72 Ala. L. Rev. 239, 252 (2020) (footnotes omitted). Had federal courts believed themselves to possess the tool, surely they would not have let it lay idle.

Faced with this timeline, the principal dissent accuses us of "misunderstand[ing] the nature of equity" as being "fr[ozen] in amber . . . at the time of the Judiciary Act." *Post*, at 29 (opinion of SOTOMAYOR, J.). Not so. We said it before, see *supra*, at 5, and say it again: "[E]quity is flexible." *Grupo Mexicano*, 527 U. S., at 322. At the same time, its "flexibility is confined within the broad boundaries of

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[8] The principal dissent faults us for failing to identify a single founding-era case in which this Court held that universal injunctions exceed a federal court's equitable authority. See *post*, at 29 (opinion of SOTOMAYOR, J.). But this absence only bolsters our case. That this Court had no occasion to reject the universal injunction as inconsistent with traditional equity practice merely demonstrates that no party even bothered to ask for such a sweeping remedy—because no court would have entertained the request. Cf. *Grupo Mexicano*, 527 U. S., at 332 ("[E]quitable powers conferred by the Judiciary Act of 1789 did not include the power to create remedies previously unknown to equity jurisprudence").

traditional equitable relief."[9] *Ibid.* A modern device need not have an exact historical match, but under *Grupo Mexicano*, it must have a founding-era antecedent. And neither the universal injunction nor a sufficiently comparable predecessor was available from a court of equity at the time of our country's inception. See *id.*, at 333. Because the universal injunction lacks a historical pedigree, it falls outside the bounds of a federal court's equitable authority under the Judiciary Act.[10] See *id.*, at 318–319.

B

Respondents raise several counterarguments, which the principal dissent echoes. First, they insist that the universal injunction has a sufficient historical analogue: a decree resulting from a bill of peace. Second, they maintain that

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[9] Notwithstanding *Grupo Mexicano*, the principal dissent invokes *Ex parte Young*, 209 U. S. 123 (1908), as support for the proposition that equity can encompass remedies that have "no analogue in the relief exercised in the English Court of Chancery," because *Ex parte Young* permits plaintiffs to "obtain plaintiff-protective injunctions against Government officials," and the English Court of Chancery "could not enjoin the Crown or English officers," *post*, at 30 (opinion of SOTOMAYOR, J.). But contrary to the principal dissent's suggestion, *Ex parte Young* does not say—either explicitly or implicitly—that courts may devise novel remedies that have no background in traditional equitable practice. Historically, a court of equity could issue an antisuit injunction to prevent an officer from engaging in tortious conduct. *Ex parte Young* justifies its holding by reference to a long line of cases authorizing suits against state officials in certain circumstances. See 209 U. S., at 150–152 (citing, *e.g.*, *Osborn* v. *Bank of United States*, 9 Wheat. 738 (1824); *Governor of Georgia* v. *Madrazo*, 1 Pet. 110 (1828); and *Davis* v. *Gray*, 16 Wall. 203 (1873)). Support for the principal dissent's approach is found not in *Ex parte Young*, but in Justice Ginsburg's partial dissent in *Grupo Mexicano*, which eschews the governing historical approach in favor of "[a] dynamic equity jurisprudence." 527 U. S., at 337 (opinion concurring in part and dissenting in part).

[10] Nothing we say today resolves the distinct question whether the Administrative Procedure Act authorizes federal courts to vacate federal agency action. See 5 U. S. C. §706(2) (authorizing courts to "hold unlawful and set aside agency action").

universal injunctions are consistent with the principle that a court of equity may fashion complete relief for the parties. Third, they argue that universal injunctions serve important policy objectives.

1

In an effort to satisfy *Grupo Mexicano*'s historical test, respondents claim that universal injunctive relief *does* have a founding-era forebear: the decree obtained on a "bill of peace," which was a form of group litigation permitted in English courts. See Opposition to Application in No. 24A884 (*CASA*), pp. 30–31; see also Brief for Professor Mila Sohoni as *Amica Curiae* 6–8. This bill allowed the Chancellor to consolidate multiple suits that involved a "common claim the plaintiff could have against multiple defendants" or "some kind of common claim that multiple plaintiffs could have against a single defendant." Bray, Multiple Chancellors 426; see *How* v. *Tenants of Bromsgrove*, 1 Vern. 22, 23 Eng. Rep. 277 (1681) (suit by a lord against his tenants collectively); *Brown* v. *Vermuden*, 1 Ch. Ca. 283, 22 Eng. Rep. 802 (1676), and *Brown* v. *Vermuden*, 1 Ch. Ca. 272, 22 Eng. Rep. 796 (1676) (suit by a parson against lead miners in a parish, who named four of their members to defend the suit in a representative capacity). Universal injunctions are analogous to this traditional equitable device, respondents say, so federal courts have authority under the Judiciary Act to issue them.

The analogy does not work. True, "bills of peace allowed [courts of equity] to adjudicate the rights of members of dispersed groups without formally joining them to a lawsuit through the usual procedures." *Arizona* v. *Biden*, 40 F. 4th 375, 397 (CA6 2022) (Sutton, C. J., concurring); see Story §§120–135 (discussing representative suits). Even so, their use was confined to limited circumstances. See 7A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure §1751, p. 10, and n. 4 (4th ed. 2021) (citing *Adair* v.

New River Co., 11 Ves. 429, 32 Eng. Rep. 1154 (Ch. 1803)). Unlike universal injunctions, which reach *anyone* affected by legislative or executive action—no matter how large the group or how tangential the effect—a bill of peace involved a "group [that] was small and cohesive," and the suit did not "resolve a question of legal interpretation for the entire realm." Bray, Multiple Chancellors 426. And unlike universal injunctions, which bind only the parties to the suit, decrees obtained on a bill of peace "would bind all members of the group, whether they were present in the action or not." 7A Wright, Federal Practice and Procedure §1751, at 10; see *Smith* v. *Swormstedt*, 16 How. 288, 303 (1854) (When "a court of equity permits a portion of the parties in interest to represent the entire body . . . the decree binds all of them the same as if all were before the court"); see also Story §120 ("[I]n most, if not in all, cases of this sort, the decree obtained upon such a Bill will ordinarily be held binding upon all other persons standing in the same predicament"). As Chief Judge Sutton aptly put it, "[t]he domesticated animal known as a bill of peace looks nothing like the dragon of nationwide injunctions." *Arizona*, 40 F. 4th, at 397 (concurring opinion).

The bill of peace lives in modern form, but not as the universal injunction. It evolved into the modern class action, which is governed in federal court by Rule 23 of the Federal Rules of Civil Procedure. 7A Wright, Federal Practice and Procedure §1751, at 10 ("It was the English bill of peace that developed into what is now known as the class action"); see *Hansberry* v. *Lee*, 311 U. S. 32, 41 (1940) ("The class suit was an invention of equity"). And while Rule 23 is in some ways "more restrictive of representative suits than the original bills of peace," *Rodgers* v. *Bryant*, 942 F. 3d 451, 464 (CA8 2019) (Stras, J., concurring), it would still be recognizable to an English Chancellor. Rule 23 requires numerosity (such that joinder is impracticable), common questions of law or fact, typicality, and representative parties

who adequately protect the interests of the class. Fed. Rule Civ. Proc. 23(a). The requirements for a bill of peace were virtually identical. See 7A Wright, Federal Practice and Procedure §1751, at 10, and n. 4 (citing *Adair*, 11 Ves. 429, 32 Eng. Rep. 1154). None of these requirements is a prerequisite for a universal injunction.

Rule 23's limits on class actions underscore a significant problem with universal injunctions. A "'properly conducted class action,'" we have said, "can come about in federal courts in just one way—through the procedure set out in Rule 23." *Smith* v. *Bayer Corp.*, 564 U. S. 299, 315 (2011); Fed. Rule Civ. Proc. 23(a) ("One or more members of a class may sue or be sued as representative parties on behalf of all members *only if* " Rule 23(a)'s requirements are satisfied (emphasis added)). Yet by forging a shortcut to relief that benefits parties and nonparties alike, universal injunctions circumvent Rule 23's procedural protections and allow " 'courts to "create *de facto* class actions at will." ' " *Smith*, 564 U. S., at 315 (quoting *Taylor* v. *Sturgell*, 553 U. S. 880, 901 (2008)). Why bother with a Rule 23 class action when the quick fix of a universal injunction is on the table? Cf. *Grupo Mexicano*, 527 U. S., at 330–331 ("Why go through the trouble of complying with local attachment and garnishment statutes when this all-purpose prejudgment injunction is available?"). The principal dissent's suggestion that these suits *could* have satisfied Rule 23's requirements simply proves that universal injunctions are a class-action workaround. *Post*, at 25–26 (opinion of SOTOMAYOR, J.).

The taxpayer suit is a similarly inadequate historical analogy. Contra, *post*, at 24–25. In a successful taxpayer suit, a court would enjoin the collection of an unlawful tax against "taxpayers joined as co-plaintiffs, or by one taxpayer suing on behalf of himself and all others similarly situated." 1 Pomeroy, Equity Jurisprudence §260, at 277. To be sure, some state courts would occasionally "enjoin the

enforcement and collection" of taxes against an "entire community," even when a "single taxpayer su[ed] on his own account." *Id.*, at 277–278. But the practice of extending relief "with respect to any taxpayer" was not adopted by state courts until the mid-19th century, and even then, not all states were willing to provide such sweeping relief. See Bray, Multiple Chancellors 427. This post-founding practice of some state courts thus sheds minimal light on federal courts' equitable authority under the Judiciary Act. What is more, in *Frothingham*, we refused to allow a single taxpayer to challenge a federal appropriations act. 262 U. S., at 486–487. That counsels against placing much, if any, reliance on taxpayer suits as justification for the modern universal injunction.

2

Respondents contend that universal injunctions—or at least *these* universal injunctions—are consistent with the principle that a court of equity may fashion a remedy that awards complete relief. See Opposition to Application in No. 24A884 (*CASA*), at 22–25; Opposition to Application in No. 24A885 (*Washington*), pp. 28–32; Opposition to Application in No. 24A886 (*New Jersey*), pp. 31–39. We agree that the complete-relief principle has deep roots in equity. But to the extent respondents argue that it justifies the award of relief to nonparties, they are mistaken.[11]

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[11] JUSTICE JACKSON, for her part, thinks the "premise" that universal injunctions provide relief to nonparties is "suspect" because, in her view, "[n]onparties may *benefit* from an injunction, but only the plaintiff gets *relief*." *Post*, at 8–9, n. 2 (dissenting opinion). The availability of contempt proceedings suggests otherwise. Consider the civil contempt context. Under "traditional principles of equity practice," courts may "impos[e] civil contempt sanctions to 'coerce [a] defendant into compliance' with an injunction." *Taggart* v. *Lorenzen*, 587 U. S. 554, 560 (2019) (quoting *United States* v. *Mine Workers*, 330 U. S. 258, 303–304 (1947)). Generally, civil contempt proceedings occur between the original parties to the lawsuit. See *Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418,

"Complete relief" is not synonymous with "universal relief." It is a narrower concept: The equitable tradition has long embraced the rule that courts generally "may administer complete relief *between the parties*." *Kinney-Coastal Oil Co.* v. *Kieffer*, 277 U. S. 488, 507 (1928) (emphasis added). While party-specific injunctions sometimes "advantag[e] nonparties," *Trump*, 585 U. S., at 717 (THOMAS, J., concurring), they do so only incidentally.

Consider an archetypal case: a nuisance in which one neighbor sues another for blasting loud music at all hours of the night. To afford the plaintiff complete relief, the court has only one feasible option: order the defendant to turn her music down—or better yet, off. That order will necessarily benefit the defendant's surrounding neighbors too; there is no way "to peel off just the portion of the nuisance that harmed the plaintiff." *Rodgers*, 942 F. 3d, at 462 (Stras, J., concurring); see A. Woolhandler & C. Nelson, Does History Defeat Standing Doctrine? 102 Mich. L. Rev. 689, 702 (2004). But while the court's injunction might have the *practical effect* of benefiting nonparties, "that benefit [is] merely incidental." *Trump*, 585 U. S., at 717 (THOMAS, J., concurring); see also 3 J. Pomeroy, Equity Jurisprudence §1349, pp. 380–381 (1883).[12] As a matter of law, the injunc-

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444–445 (1911). But a federal court's "power in civil contempt proceedings is determined by the requirements of full remedial relief" to "effect compliance with its decree." *McComb* v. *Jacksonville Paper Co.*, 336 U. S. 187, 193–194 (1949). And "[w]hen an order grants relief for a nonparty," as is the case with universal injunctions,"the procedure for enforcing the order is the same as for a party." Fed. Rule Civ. Proc. 71; see, *e.g.*, *Zamecnik* v. *Indiana Prairie School Dist. No. 204*, 636 F. 3d 874, 879 (CA7 2011). So a nonparty covered by a universal injunction is likely to reap both the practical benefit and the formal relief of the injunction. See M. Smith, Only Where Justified: Toward Limits and Explanatory Requirements for Nationwide Injunctions, 95 Notre Dame L. Rev. 2013, 2019 (2020).

[12]There may be other injuries for which it is all but impossible for

tion's protection extends only to the suing plaintiff—as evidenced by the fact that only the plaintiff can enforce the judgment against the defendant responsible for the nuisance. If the nuisance persists, and another neighbor wants to shut it down, she must file her own suit.[13]

The individual and associational respondents are therefore wrong to characterize the universal injunction as simply an application of the complete-relief principle. Under this principle, the question is not whether an injunction offers complete relief to *everyone* potentially affected by an allegedly unlawful act; it is whether an injunction will offer complete relief *to the plaintiffs before the court*. See *Califano* v. *Yamasaki*, 442 U. S. 682, 702 (1979) ("[I]njunctive relief should be no more burdensome to the defendant than necessary to provide complete relief *to the plaintiffs*" (emphasis added)). Here, prohibiting enforcement of the Executive Order against the child of an individual pregnant plaintiff will give that plaintiff complete relief: Her child will not be denied citizenship. Extending the injunction to cover all other similarly situated individuals would not render *her* relief any more complete.

The complete-relief inquiry is more complicated for the state respondents, because the relevant injunction does not purport to directly benefit nonparties. Instead, the District Court for the District of Massachusetts decided that a uni-

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courts to craft relief that is complete *and* benefits only the named plaintiffs. See, *e.g.*, *Shaw* v. *Hunt*, 517 U. S. 899 (1996) (racially gerrymandered congressional maps).

[13] The new plaintiff might be able to assert nonmutual offensive issue preclusion. See *Parklane Hosiery Co.* v. *Shore*, 439 U. S. 322, 331–332 (1979) (setting forth prerequisites for applying the doctrine). But nonmutual offensive issue preclusion is unavailable against the United States. *United States* v. *Mendoza*, 464 U. S. 154, 155 (1984). That universal injunctions end-run this rule is one of the Government's objections to them.

versal injunction was necessary to provide the States *themselves* with complete relief. See 766 F. Supp. 3d, at 288.[14] The States maintain that the District Court made the right call. See Opposition to Application in No. 24A886 (*New Jersey*), at 31–39.

As the States see it, their harms—financial injuries and the administrative burdens flowing from citizen-dependent benefits programs—cannot be remedied without a blanket ban on the enforcement of the Executive Order. See, *e.g.*, *id.*, at 9–11. Children often move across state lines or are born outside their parents' State of residence. *Id.*, at 31, 35. Given the cross-border flow, the States say, a "patchwork injunction" would prove unworkable, because it would require them to track and verify the immigration status of the parents of every child, along with the birth State of every child for whom they provide certain federally funded benefits. *Ibid.*

The Government—unsurprisingly—sees matters differently. It retorts that even if the injunction is designed to benefit only the States, it is "more burdensome than necessary to redress" their asserted harms. *Califano*, 442 U. S., at 702. After all, to say that a court *can* award complete relief is not to say that it *should* do so. Complete relief is not a guarantee—it is the maximum a court can provide. And in equity, "the broader and deeper the remedy the plaintiff wants, the stronger the plaintiff 's story needs to be." S. Bray & P. Miller, Getting into Equity, 97 Notre Dame L. Rev. 1763, 1797 (2022). In short, "[t]he essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case." *Hecht Co.* v. *Bowles*, 321 U. S. 321, 329

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[14] The District Court for the Western District of Washington acknowledged the state respondents' complete-relief argument but primarily granted a universal injunction on the basis that the "extreme nature of the equities . . . alone warrant[ed] nationwide relief." 765 F. Supp. 3d 1142, 1153 (2025).

(1944).

Leaning on these principles, the Government contends that narrower relief is appropriate. For instance, the District Court could forbid the Government to apply the Executive Order within the respondent States, including to children born elsewhere but living in those States. Application in No. 24A884, at 23. Or, the Government says, the District Court could direct the Government to "treat covered children as eligible for purposes of federally funded welfare benefits." *Ibid.* It asks us to stay the injunction insofar as it sweeps too broadly.

We decline to take up these arguments in the first instance. The lower courts should determine whether a narrower injunction is appropriate; we therefore leave it to them to consider these and any related arguments.

3

Respondents also defend universal injunctions as a matter of policy. They argue that a universal injunction is sometimes the only practical way to quickly protect groups from unlawful government action. See Opposition to Application in No. 24A884 (*CASA*), at 26–27; see also A. Frost, In Defense of Nationwide Injunctions, 93 N. Y. U. L. Rev. 1065, 1090–1094 (2018) (suggesting that universal injunctions are appropriate when not all interested individuals can come quickly to court); *post*, at 37–39 (SOTOMAYOR, J., dissenting). Respondents also contend that universal injunctions are an appropriate remedy to preserve equal treatment among individuals when the Executive Branch adopts a facially unlawful policy. Opposition to Application in No. 24A884 (*CASA*), at 25–27; cf. *post*, at 22 (SOTOMAYOR, J., dissenting). And they suggest that forcing plaintiffs to proceed on an individual basis can result in confusion or piecemeal litigation that imposes unnecessary costs on courts and others. See Opposition to Application in No. 24A885 (*Washington*), at 31–32; Frost, 93 N. Y. U.

L. Rev., at 1098–1101; see also *post*, at 31 (SOTOMAYOR, J., dissenting). So, they insist, universal injunctions must be permitted for the good of the system.

The Government advances policy arguments running the other way. Echoing Chief Judge Sutton, the Government asserts that avoiding a patchwork enforcement system is a justification that "lacks a limiting principle and would make nationwide injunctions the rule rather than the exception" for challenges to many kinds of federal law. *Arizona*, 40 F. 4th, at 397 (concurring opinion). It stresses—as the principal dissent also observes—that universal injunctions incentivize forum shopping, since a successful challenge in one jurisdiction entails relief nationwide. See Application in No. 24A884, at 19–20; see also *post*, at 22 (opinion of SOTOMAYOR, J.). In a similar vein, the Government observes that universal injunctions operate asymmetrically: A plaintiff must win just one suit to secure sweeping relief. But to fend off such an injunction, the Government must win everywhere. See Application in No. 24A884, at 19–20; see also *post*, at 22–23 (opinion of SOTOMAYOR, J.) (acknowledging this concern).[15] Moreover, the Government contends, the practice of universal injunctions means that highly consequential cases are often decided in a "fast and furious" process of " 'rushed, high-stakes, [and] low-information'" decisionmaking. *Labrador*, 601 U. S., at (slip op., at 12) (GORSUCH, J., concurring in grant of stay). When a district court issues a universal injunction, thereby halting the enforcement of federal policy, the Government says that it has little recourse but to proceed to the court of appeals for an emergency stay. The loser in the court of

[15] The Government contrasts this with class actions. A judgment in a Rule 23 class action (favorable or not) binds the whole class—so if the defendant wins, it is protected from future suits. But because an adverse ruling on a request for universal relief lacks this preclusive effect, plaintiffs can continue to file in different forums until they find a court willing to award such relief.

appeals will then seek a stay from this Court. See Application in No. 24A884, at 20. This process forces courts to resolve significant and difficult questions of law on a highly expedited basis and without full briefing. See *ibid.*[16]

The upshot: As with most disputed issues, there are arguments on both sides. But as with most questions of law, the policy pros and cons are beside the point. Under our well-established precedent, the equitable relief available in the federal courts is that "traditionally accorded by courts of equity" at the time of our founding. *Grupo Mexicano*, 527 U. S., at 319. Nothing like a universal injunction was available at the founding, or for that matter, for more than a century thereafter. Thus, under the Judiciary Act, federal courts lack authority to issue them.

C

The principal dissent focuses on conventional legal terrain, like the Judiciary Act of 1789 and our cases on equity. JUSTICE JACKSON, however, chooses a startling line of attack that is tethered neither to these sources nor, frankly, to any doctrine whatsoever. Waving away attention to the limits on judicial power as a "mind-numbingly technical query," *post*, at 3 (dissenting opinion), she offers a vision of

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[16] Acknowledging these problems, the principal dissent admits that "[t]here may be good reasons not to issue universal injunctions in the typical case." *Post*, at 23 (opinion of SOTOMAYOR, J.). This concession, while welcome, is inconsistent with the position that the universal injunction is a "nothing to see here" extension of the kind of decree obtained on a bill of peace. Neither the principal dissent nor respondents have pointed to any evidence that such decrees presented any of the universal injunction's systemic problems or that they were reserved for situations in which the defendant's conduct was "patently unconstitutional" and risked "exceptional" harm. *Post*, at 22–23. It is precisely because the universal injunction is a new, potent remedy that it poses new, potent risks. Our observation in *Grupo Mexicano* rings true here: "Even when sitting as a court in equity, we have no authority to craft a 'nuclear weapon' of the law." 527 U. S., at 332.

the judicial role that would make even the most ardent defender of judicial supremacy blush. In her telling, the fundamental role of courts is to "order everyone (including the Executive) to follow the law—full stop." *Post*, at 2; see also *post*, at 10 ("[T]he function of the courts—both in theory and in practice—necessarily includes announcing what the law requires in . . . suits for the benefit of all who are protected by the Constitution, not merely doling out relief to injured private parties"); see also *post*, at 11, n. 3, 15. And, she warns, if courts lack the power to "require the Executive to adhere to law universally," *post*, at 15, courts will leave a "gash in the basic tenets of our founding charter that could turn out to be a mortal wound," *post*, at 12.

Rhetoric aside, JUSTICE JACKSON's position is difficult to pin down. She might be arguing that universal injunctions are appropriate—even required—whenever the defendant is part of the Executive Branch. See, *e.g.*, *post*, at 3, 10–12, 16–18. If so, her position goes far beyond the mainstream defense of universal injunctions. See, *e.g.*, Frost, 93 N. Y. U. L. Rev., at 1069 ("Nationwide injunctions come with significant costs and should never be the default remedy in cases challenging federal executive action"). As best we can tell, though, her argument is more extreme still, because its logic does not depend on the entry of a universal injunction: JUSTICE JACKSON appears to believe that the reasoning behind *any* court order demands "universal adherence," at least where the Executive is concerned. *Post*, at 2 (dissenting opinion). In her law-declaring vision of the judicial function, a district court's opinion is not just persuasive, but has the legal force of a judgment. But see *Haaland* v. *Brackeen*, 599 U. S. 255, 294 (2023) ("It is a federal court's judgment, not its opinion, that remedies an injury"). Once a single district court deems executive conduct unlawful, it has stated what the law requires. And the Executive must conform to that view, ceasing its enforcement of the

law against anyone, anywhere.[17]

We will not dwell on JUSTICE JACKSON's argument, which is at odds with more than two centuries' worth of precedent, not to mention the Constitution itself. We observe only this: JUSTICE JACKSON decries an imperial Executive while embracing an imperial Judiciary.

No one disputes that the Executive has a duty to follow the law. But the Judiciary does not have unbridled authority to enforce this obligation—in fact, sometimes the law prohibits the Judiciary from doing so. See, *e.g.*, *Marbury* v. *Madison*, 1 Cranch 137 (1803) (concluding that James Madison had violated the law but holding that the Court lacked jurisdiction to issue a writ of mandamus ordering him to follow it). But see *post*, at 15 (JACKSON, J., dissenting) ("If courts do not have the authority to require the Executive to adhere to law universally, . . . compliance with law sometimes becomes a matter of Executive prerogative"). Observing the limits on judicial authority—including, as relevant here, the boundaries of the Judiciary Act of 1789—is required by a judge's oath to follow the law.

JUSTICE JACKSON skips over that part. Because analyzing the governing statute involves boring "legalese," *post*, at 3, she seeks to answer "a far more basic question of enormous practical significance: May a federal court in the

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[17] Think about what this position means. If a judge in the District of Alaska holds that a criminal statute is unconstitutional, can the United States prosecute a defendant under that statute in the District of Maryland? Perhaps JUSTICE JACKSON would instinctively say yes; it is hard to imagine anyone saying no. But why, on JUSTICE JACKSON's logic, does it not violate the rule of law for the Executive to initiate a prosecution elsewhere? See *post*, at 2 (dissenting opinion). Among its many problems, JUSTICE JACKSON's view is at odds with our system of divided judicial authority. See, *e.g.*, this Court's Rule 10(a) (identifying conflict in the decisions of the courts of appeals as grounds for granting certiorari). It is also in considerable tension with the reality that district court opinions lack precedential force even vis-à-vis other judges in the same judicial district. See *Camreta* v. *Greene*, 563 U. S. 692, 709, n. 7 (2011).

United States of America order the Executive to follow the law?" *Ibid.* In other words, it is unecessary to consider whether Congress has constrained the Judiciary; what matters is how the Judiciary may constrain the Executive. JUSTICE JACKSON would do well to heed her own admonition: "[E]veryone, from the President on down, is bound by law." *Ibid.* That goes for judges too.

IV

Finally, the Government must show a likelihood that it will suffer irreparable harm absent a stay. *Nken*, 556 U. S., at 434–435. When a federal court enters a universal injunction against the Government, it "improper[ly] intru[des]" on "a coordinate branch of the Government" and prevents the Government from enforcing its policies against nonparties. *INS* v. *Legalization Assistance Project of Los Angeles County Federation of Labor*, 510 U. S. 1301, 1306 (1993) (O'Connor, J., in chambers). That is enough to justify interim relief.

The principal dissent disagrees, insisting that "it strains credulity to treat the Executive Branch as irreparably harmed" by these injunctions, even if they are overly broad. *Post*, at 17 (opinion of SOTOMAYOR, J.); see also Opposition to Application in No. 24A884 (*CASA*), at 16–20. That is so, the principal dissent argues, because the Executive Order is unconstitutional. Thus, "the Executive Branch has no right to enforce [it] against anyone." *Post*, at 15.

The principal dissent's analysis of the Executive Order is premature because the birthright citizenship issue is not before us.[18] And because the birthright citizenship issue is

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[18] The dissent worries that the Citizenship Clause challenge will never reach this Court, because if the plaintiffs continue to prevail, they will have no reason to petition for certiorari. And if the Government keeps losing, it will "ha[ve] no incentive to file a petition here . . . because the outcome of such an appeal would be preordained." *Post*, at 42 (opinion of SOTOMAYOR, J.). But at oral argument, the Solicitor General acknowledged that challenges to the Executive Order are pending in multiple

not before us, we take no position on whether the dissent's analysis is right. The dissent is wrong to say, however, that a stay applicant cannot demonstrate irreparable harm from a threshold error without also showing that, at the end of the day, it will prevail on the underlying merits. That is not how the *Nken* factors work. See 556 U. S., at 434. For instance, when we are asked to stay an execution on the grounds of a serious legal question, we ask whether the capital defendant is likely to prevail on the merits of the issue before us, not whether he is likely to prevail on the merits of the underlying suit. See, *e.g.*, *Gutierrez* v. *Saenz*, 603 U. S. __ (2024) (granting application for a stay based on a question implicating the prisoner's standing to attempt to access DNA testing). The same is true when an applicant seeks a stay in other contexts. See, *e.g.*, *OPM* v. *AFGE*, 604 U. S. __ (2025) (granting application for stay because the organizational plaintiffs' allegations were "insufficient to support [their] standing"). So too here.

The question before us is whether the Government is likely to suffer irreparable harm from the District Courts' entry of injunctions that likely exceed the authority conferred by the Judiciary Act. The answer to that question is yes. See *Coleman* v. *Paccar Inc.*, 424 U. S. 1301, 1307–1308 (1976) (Rehnquist, C. J., in chambers); *Trump* v. *International Refugee Assistance Project*, 582 U. S. 571, 578–579 (2017) (*per curiam*); see also *Maryland* v. *King*, 567 U. S. 1301, 1303 (2012) (ROBERTS, C. J., in chambers) ("'[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury'" (alteration in original)). And

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circuits, Tr. of Oral Arg. 50, and when asked directly "When you lose one of those, do you intend to seek cert?", the Solicitor General responded, "yes, absolutely." *Ibid.* And while the dissent speculates that the Government would disregard an unfavorable opinion from this Court, the Solicitor General represented that the Government will respect both the judgments and the opinions of this Court. See *id.*, at 62–63.

the balance of equities does not counsel against awarding the Government interim relief: Partial stays will cause no harm to respondents because they will remain protected by the preliminary injunctions to the extent necessary and appropriate to afford them complete relief.

* * *

Some say that the universal injunction "give[s] the Judiciary a powerful tool to check the Executive Branch." *Trump*, 585 U. S., at 720 (THOMAS, J., concurring) (citing S. Amdur & D. Hausman, Nationwide Injunctions and Nationwide Harm, 131 Harv. L. Rev. Forum 49, 51, 54 (2017); S. Malveaux, Class Actions, Civil Rights, and the National Injunction, 131 Harv. L. Rev. Forum, 56, 57, 60–62 (2017)). But federal courts do not exercise general oversight of the Executive Branch; they resolve cases and controversies consistent with the authority Congress has given them. When a court concludes that the Executive Branch has acted unlawfully, the answer is not for the court to exceed its power, too.

The Government's applications to partially stay the preliminary injunctions are granted, but only to the extent that the injunctions are broader than necessary to provide complete relief to each plaintiff with standing to sue. The lower courts shall move expeditiously to ensure that, with respect to each plaintiff, the injunctions comport with this rule and otherwise comply with principles of equity. The injunctions are also stayed to the extent that they prohibit executive agencies from developing and issuing public guidance about the Executive's plans to implement the Executive Order. Consistent with the Solicitor General's representation, §2 of the Executive Order shall not take effect until 30 days after the date of this opinion. See Tr. of Oral Arg. 55.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 24A884

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ON APPLICATION FOR PARTIAL STAY

No. 24A885

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No. 24A886

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL. *v.* NEW JERSEY, ET AL.

ON APPLICATION FOR PARTIAL STAY

[June 27, 2025]

JUSTICE THOMAS, with whom JUSTICE GORSUCH joins, concurring.

The Court today holds that federal courts may not issue so-called universal injunctions. I agree and join in full. As the Court explains, the Judiciary Act of 1789—the statute that " 'authorizes the federal courts to issue equitable remedies' "—does not permit universal injunctions. *Ante,* at 5. It authorizes only those remedies traditionally available in equity, and there is no historical tradition allowing courts to provide "relief that extend[s] beyond the parties." *Ante,* at 5–11. That conclusion is dispositive: As I have previously explained, "[i]f district courts have any authority to issue

universal injunctions," it must come from some specific statutory or constitutional grant. *Trump* v. *Hawaii*, 585 U. S. 667, 713–714 (2018) (concurring opinion). But, the Judiciary Act is the only real possibility, and serious constitutional questions would arise even if Congress purported to one day allow universal injunctions. See *id.*, at 714, n. 2; see also *United States* v. *Texas*, 599 U. S. 670, 693–694 (2023) (GORSUCH, J., concurring in judgment).

I write separately to emphasize the majority's guidance regarding how courts should tailor remedies specific to the parties. Courts must not distort "the rule that injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Califano* v. *Yamasaki*, 442 U. S. 682, 702 (1979). Otherwise, they risk replicating the problems of universal injunctions under the guise of granting complete relief.

As the Court recognizes, the complete-relief principle operates as a ceiling: In no circumstance can a court award relief beyond that necessary to redress the plaintiffs' injuries. See *ante,* at 18 ("Complete relief is not a guarantee—it is the maximum a court can provide"). This limitation follows from both Article III and traditional equitable practice. Because Article III limits courts to resolving specific "Cases" and "Controversies," see U. S. Const., Art. III, §2, it requires that any remedy "be tailored to redress the plaintiff 's particular injury." *Gill* v. *Whitford*, 585 U. S. 48, 73 (2018). And, equitable remedies historically operated on a plaintiff-specific basis. *Ante,* at 6–9. Accordingly, any "remedy must of course be limited to the inadequacy that produced the injury in fact that the plaintiff has established." *Lewis* v. *Casey*, 518 U. S. 343, 357 (1996).

Courts therefore err insofar as they treat complete relief as a mandate. Some judges have read our precedents to suggest that courts should provide plaintiffs whatever remedy is necessary to give them complete relief. See, *e.g.*,

Mock v. *Garland*, 75 F. 4th 563, 587 (CA5 2023) ("[I]njunctions should be crafted to 'provide complete relief to the plaintiffs' "); Z. Siddique, Nationwide Injunctions, 117 Colum. L. Rev. 2095, 2106 (2017) ("[C]ourts . . . tailor their injunctions to provide complete relief to the parties—no less and no more"). But, that reading misunderstands the complete-relief principle.

This principle reflects the equitable "rule that courts generally 'may administer complete relief between the parties.' " *Ante,* at 16 (emphasis deleted). It is an important "aim of the law of remedies . . . to put the plaintiff in her rightful position." S. Bray, Multiple Chancellors: Reforming the National Injunction, 131 Harv. L. Rev. 417, 466 (2017) (Bray). But, "to say that a court *can* award complete relief is not to say that it *should* do so." *Ante,* at 18. And, in some circumstances, a court *cannot* award complete relief.

As the Court today affirms, any relief must fall within traditional limits on a court's equitable powers. See *ante,* at 5–6 (citing *Grupo Mexicano de Desarrollo, S. A.* v. *Alliance Bond Fund, Inc.*, 527 U. S. 308, 319 (1999); *Payne* v. *Hook*, 7 Wall. 425, 430 (1869)). Courts must ask whether the relief plaintiffs seek "was traditionally accorded by courts of equity." *Grupo Mexicano*, 527 U. S., at 319. And, they must ensure that any injunctions comport with both the complete-relief principle and other "principles of equity." *Ante,* at 26. For example, courts may need to weigh considerations such as equity's concern "with justice . . . also for the defendant." Bray 468; see H. McClintock, Handbook of the Principles of Equity 78 (2d ed. 1948). In some cases, traditional equitable limits will require courts and plaintiffs to make do with less than complete relief.

This Court's decision in *Frothingham* v. *Mellon*, decided with *Massachusetts* v. *Mellon*, 262 U. S. 447 (1923), exemplifies this constraint. Appellant Frothingham sought to "enjoin the execution of a federal appropriation act" on the

grounds that the Act exceeded the Government's authority and that its execution would improperly increase her tax burden. *Id.*, at 479, 486. On a maximalist view of the complete-relief principle, Frothingham would have been entitled to a national injunction had her claim been meritorious. After all, "a prohibition on using *her* tax money for the [statute] would have been wholly ineffectual" in remedying the injury caused by unlawful federal spending, given "the fungibility of money": The Government would still have been free to execute the statute, so long as it labeled the underlying funds as coming from other taxpayers. Bray 431. A court thus would have needed to enjoin all spending under the statute to provide effective relief. But, this Court rejected Frothingham's request for such an injunction as beyond "the preventive powers of a court of equity." 262 U. S., at 487. Among other reasons, it emphasized that an individual taxpayer's "interest in the moneys of the Treasury" was "comparatively minute and indeterminable," and that the petitioner had not suffered any "direct injury" but rather was "suffer[ing] in some indefinite way in common with people generally." *Id.*, at 487–488.*

To be sure, "[w]hat counts as complete relief " can be a difficult question. Bray 467. Many plaintiffs argue that only sweeping relief can redress their injuries. And, I do not dispute that there will be cases requiring an "indivisible remedy" that incidentally benefits third parties, Tr. of Oral Arg., 14–15, such as "[i]njunctions barring public nuisances," *Hawaii*, 585 U. S., at 717 (THOMAS, J., concurring). But, such cases are by far the exception.

An indivisible remedy is appropriate only when it would be "all but impossible" to devise relief that reaches only the plaintiffs. *Ante,* at 16–17, n. 12. Such impossibility is a

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*Although courts now treat *Frothingham* primarily as a case about taxpayer standing, its analysis in fact "intertwine[d] concepts of equity, remedies, and the judicial power." Bray 430–433; see *ante,* at 8.

high bar. For example, the Court today readily dispatches with the individual and associational respondents' position that they require a universal injunction, notwithstanding their argument that a "plaintiff-specific injunction" would be difficult to administer and would subject the associations' members to the burden of having "to identify and disclose to the government" their membership. Tr. of Oral Arg. 141–142. As the Court recognizes, "prohibiting enforcement of the Executive Order against the child of an individual pregnant plaintiff " is all that is required to "give that plaintiff complete relief." *Ante,* at 17. Courts may not use the complete-relief principle to revive the universal injunction.

* * *

For good reason, the Court today puts an end to the "increasingly common" practice of federal courts issuing universal injunctions. *Hawaii*, 585 U. S., at 713 (THOMAS, J., concurring). The Court also makes clear that the complete-relief principle provides a ceiling on federal courts' authority, which must be applied alongside other "principles of equity" and our holding that universal injunctions are impermissible. *Ante,* at 26. Lower courts should carefully heed this Court's guidance and cabin their grants of injunctive relief in light of historical equitable limits. If they cannot do so, this Court will continue to be "dutybound" to intervene. *Hawaii*, 585 U. S., at 721 (THOMAS, J., concurring).

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ON APPLICATION FOR PARTIAL STAY

[June 27, 2025]

JUSTICE ALITO, with whom JUSTICE THOMAS joins, concurring.

I join the opinion of the Court but write separately to note two related issues that are left unresolved and potentially threaten the practical significance of today's decision: the availability of third-party standing and class certification.

First, the Court does not address the weighty issue whether the state plaintiffs have third-party standing to assert the Citizenship Clause claims of their individual residents. See *ante*, at 2, n. 2; see also *ante*, at 26 ("The Government's applications to partially stay the preliminary

injunctions are granted, but only to the extent that the injunctions are broader than necessary to provide complete relief to each plaintiff *with standing to sue*" (emphasis added)). Ordinarily, "a litigant must assert his or her own legal rights and interests, and cannot rest a claim to relief on the legal rights or interests of third parties." *Powers* v. *Ohio*, 499 U. S. 400, 410 (1991). In limited circumstances, however, the Court has permitted a party to assert the rights of a third party. Admittedly, the Court has not pinned down the precise circumstances in which third-party standing is permissible. See *Lexmark Int'l, Inc.* v. *Static Control Components, Inc.*, 572 U. S. 118, 127, n. 3 (2014). And commentators have emphasized the need for "greater doctrinal coherence." C. Bradley & E. Young, Unpacking Third-Party Standing, 131 Yale L. J. 1, 7 (2021) (Bradley & Young).

But at a minimum, we have said that a litigant seeking to assert the legal rights or interests of others must demonstrate ordinary Article III standing for itself *and* answer the additional "threshold question whether [it has] standing to raise the rights of others." *Kowalski* v. *Tesmer*, 543 U. S. 125, 129 (2004). But see *FDA* v. *Alliance for Hippocratic Medicine*, 602 U. S. 367, 398 (2024) (THOMAS, J., concurring). This latter requirement, as we have explained, entails a showing that the litigant has a "close relationship" to the right holder and that there is some "'hindrance'" to the right holder's ability to "protect his own interests." *Kowalski*, 543 U. S., at 130 (quoting *Powers*, 499 U. S., at 411). So long as third-party standing doctrine remains good law, federal courts should take care to apply these limitations conscientiously, including against state plaintiffs. That is especially so in cases such as these, in which the parties claiming third-party standing (*i.e.*, the States) are not directly subject to the challenged policy in the relevant respect and face, at most, collateral injuries. See Bradley & Young 56–60.

Today's decision only underscores the need for rigorous and evenhanded enforcement of third-party-standing limitations. The Court holds today that injunctive relief should generally extend only to the suing plaintiff. See *ante*, at 16–17. That will have the salutary effect of bringing an end to the practice of runaway "universal" injunctions, but it leaves other questions unanswered. Perhaps most important, when a State brings a suit to vindicate the rights of individual residents and then procures injunctive relief, does the injunction bind the defendant with respect to all residents of that State? If so, States will have every incentive to bring third-party suits on behalf of their residents to obtain a broader scope of equitable relief than any individual resident could procure in his own suit. Left unchecked, the practice of reflexive state third-party standing will undermine today's decision as a practical matter.

Second, today's decision will have very little value if district courts award relief to broadly defined classes without following "Rule 23's procedural protections" for class certification. *Ante*, at 14. The class action is a powerful tool, and we have accordingly held that class "certification is proper only if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied." *Wal-Mart Stores, Inc.* v. *Dukes*, 564 U. S. 338, 350–351 (2011) (internal quotation marks omitted). These requirements are more than "a mere pleading standard," *id.*, at 350, and a hasty application of Rule 23 of the Federal Rules of Civil Procedure can have drastic consequences, creating "potential unfairness" for absent class members and confusion (and pressure to settle) for defendants. *General Telephone Co. of Southwest* v. *Falcon*, 457 U. S. 147, 161 (1982). Recognizing these effects, Congress took the exceptional step of authorizing interlocutory review of class certification. See Fed. Rule Civ. Proc. 23(f).

Putting the kibosh on universal injunctions does nothing to disrupt Rule 23's requirements. Of course, Rule 23 may

permit the certification of nationwide classes in some discrete scenarios. But district courts should not view today's decision as an invitation to certify nationwide classes without scrupulous adherence to the rigors of Rule 23. Otherwise, the universal injunction will return from the grave under the guise of "nationwide class relief," and today's decision will be of little more than minor academic interest.

* * *

Lax enforcement of the requirements for third-party standing and class certification would create a potentially significant loophole to today's decision. Federal courts should thus be vigilant against such potential abuses of these tools. I do not understand the Court's decision to reflect any disagreement with these concerns, so I join its decision in full.

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ON APPLICATION FOR PARTIAL STAY

[June 27, 2025]

JUSTICE KAVANAUGH, concurring.

The plaintiffs here sought preliminary injunctions against enforcement of the President's Executive Order on birthright citizenship. The District Courts granted *universal* preliminary injunctions—that is, injunctions prohibiting enforcement of the Executive Order against anyone. Under the Court's holding today, district courts issuing injunctions under the authority afforded by the Judiciary Act of 1789 may award only plaintiff-specific relief. I join the Court's careful and persuasive opinion, which will bring needed clarity to the law of remedies.

To be sure, in the wake of the Court's decision, plaintiffs

who challenge the legality of a new federal statute or executive action and request preliminary injunctive relief may sometimes seek to proceed by class action under Federal Rule of Civil Procedure 23(b)(2) and ask a court to award preliminary classwide relief that may, for example, be statewide, regionwide, or even nationwide. See *ante*, at 13–14; *A. A. R. P.* v. *Trump*, 605 U. S. ___, ___ (2025) (*per curiam*) (slip op., at 7); *Califano* v. *Yamasaki*, 442 U. S. 682, 701–703 (1979). And in cases under the Administrative Procedure Act, plaintiffs may ask a court to preliminarily "set aside" a new agency rule. 5 U. S. C. §706(2); see, *e.g.*, *West Virginia* v. *EPA*, 577 U. S. 1126 (2016); see also *Corner Post, Inc.* v. *Board of Governors*, 603 U. S. 799, 826–843 (2024) (KAVANAUGH, J., concurring).[1]

But importantly, today's decision will require district courts to follow proper legal procedures when awarding such relief. Most significantly, district courts can no longer award preliminary nationwide or classwide relief except when such relief is legally authorized. And that salutary development will help bring substantially more order and discipline to the ubiquitous preliminary litigation over new federal statutes and executive actions.

I write separately simply to underscore that this case focuses on only one discrete aspect of the preliminary litigation relating to major new federal statutes and executive actions—namely, what *district courts* may do with respect to those new statutes and executive actions in what might be called "the interim before the interim." Although district courts have received much of the attention (and criticism) in debates over the universal-injunction issue, those courts generally do not have the last word when they grant or deny preliminary injunctions. The

[1] In addition, as the Court notes, an injunction granting complete relief to plaintiffs may also, as a practical matter, benefit nonparties. *Ante*, at 15–19.

courts of appeals and this Court can (and regularly do) expeditiously review district court decisions awarding or denying preliminary injunctive relief. The losing party in the district court—the defendant against whom an injunction is granted, or the plaintiff who is denied an injunction—will often go to the court of appeals to seek a temporary stay or injunction. And then the losing party in the court of appeals may promptly come to this Court with an application for a stay or injunction. This Court has therefore often acted as the ultimate decider of the interim legal status of major new federal statutes and executive actions. See, *e.g.*, *Ohio* v. *EPA*, 603 U. S. 279 (2024); *Danco Laboratories, LLC* v. *Alliance for Hippocratic Medicine*, 598 U. S. ____ (2023); *National Federation of Independent Business* v. *OSHA*, 595 U. S. 109 (2022) (*per curiam*); *Alabama Assn. of Realtors* v. *Department of Health and Human Servs.*, 594 U. S. 758 (2021) (*per curiam*); see also *Labrador* v. *Poe*, 601 U. S. ___, ___–___ (2024) (KAVANAUGH, J., concurring in grant of stay) (slip op., at 2–3).

After today's decision, that order of operations will not change. In justiciable cases, this Court, not the district courts or courts of appeals, will often still be the ultimate decisionmaker as to the interim legal status of major new federal statutes and executive actions—that is, the interim legal status for the several-year period before a final decision on the merits.

I

The Court's decision today focuses on the "interim before the interim"—the preliminary relief that district courts can award (and courts of appeals can approve) for the generally *weeks-long* interim before this Court can assess and settle the matter for the often *years-long* interim before a final decision on the merits. To appreciate the broader context surrounding today's decision, it is important to understand

this Court's role in preliminary litigation of this sort.

The basic scenario in these kinds of applications to this Court is by now familiar. Congress passes a major new statute, or the Executive Branch issues a major new rule or executive order. The litigation over the legality of the new statute or executive action winds its way through the federal courts. And that litigation may meander on for many months or often years before this Court can issue a final ruling deciding the legality of the new statute or executive action.

In the meantime, various plaintiffs may seek preliminary injunctions, sometimes in many different district courts. And a government defendant against whom a preliminary injunction is granted (or a plaintiff who is denied a preliminary injunction) may seek a temporary stay or injunction in the court of appeals and then in this Court.

That preliminary-injunction litigation—which typically takes place at a rapid-fire pace long before the merits litigation culminates several years down the road—raises a question: What should the *interim* legal status of the significant new federal statute or executive action at issue be during the several-year period before this Court's final ruling on the merits?

That interim-status question is itself immensely important. The issue of whether a major new federal statute or executive action "is enforceable during the several years while the parties wait for a final merits ruling . . . raises a separate question of extraordinary significance to the parties and the American people." *Labrador* v. *Poe*, 601 U. S. ___, ___–___ (2024) (KAVANAUGH, J., concurring in grant of stay) (slip op., at 2–3).

The interim-status issue in turn raises two other critical questions: Should there be a *nationally uniform* answer on the question of whether a major new federal statute or executive action can be legally enforced in the often years-long interim period until this Court reaches a final decision

on the merits? If so, *who decides* what the nationally uniform interim answer is?

First, in my view, there often (perhaps not always, but often) should be a nationally uniform answer on whether a *major* new federal statute, rule, or executive order can be enforced throughout the United States during the several-year interim period until its legality is finally decided on the merits.

Consider just a few of the major executive actions that have been the subject of intense preliminary-injunction or other pre-enforcement litigation in the past 10 years or so, under Presidents of both political parties. They range from travel bans to birthright citizenship, from the Clean Power Plan to student loan forgiveness, from the OSHA vaccine mandate to the service of transgender individuals in the military, from Title IX regulations to abortion drugs. And the list goes on. Those executive actions often are highly significant and have widespread effects on many individuals, businesses, governments, and other organizations throughout the United States.

Often, it is not especially workable or sustainable or desirable to have a patchwork scheme, potentially for several years, in which a major new federal statute or executive action of that kind applies to some people or organizations in certain States or regions, but not to others. The national reach of many businesses and government programs, as well as the regular movement of the American people into and out of different States and regions, would make it difficult to sensibly maintain such a scattershot system of federal law.

Second, if one agrees that the years-long interim status of a highly significant new federal statute or executive action should often be uniform throughout the United States, who decides what the interim status is?

The answer typically will be this Court, as has been the case both traditionally and recently. This Court's actions

in resolving applications for interim relief help provide clarity and uniformity as to the interim legal status of major new federal statutes, rules, and executive orders. In particular, the Court's disposition of applications for interim relief often will effectively settle, *de jure* or *de facto*, the interim legal status of those statutes or executive actions nationwide.

The decision today will not alter this Court's traditional role in those matters. Going forward, in the wake of a major new federal statute or executive action, different district courts may enter a slew of preliminary rulings on the legality of that statute or executive action. Or alternatively, perhaps a district court (or courts) will grant or deny the functional equivalent of a universal injunction—for example, by granting or denying a preliminary injunction to a putative nationwide class under Rule 23(b)(2), or by preliminarily setting aside or declining to set aside an agency rule under the APA.

No matter how the preliminary-injunction litigation on those kinds of significant matters transpires in the district courts, the courts of appeals in turn will undoubtedly be called upon to promptly grant or deny temporary stays or temporary injunctions in many cases.

And regardless of whether the district courts have issued a series of individual preliminary rulings, or instead have issued one or more broader classwide or set-aside preliminary rulings, the losing parties in the courts of appeals will regularly come to this Court in matters involving major new federal statutes and executive actions.[2]

If there is no classwide or set-aside relief in those kinds of nationally significant matters, then one would expect a flood of decisions from lower courts, after which the losing

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[2] By statute, some litigation may start in a court of appeals or three-judge district court and then come directly to this Court.

parties on both sides will probably inundate this Court with applications for stays or injunctions.[3] And in cases where classwide or set-aside relief has been awarded, the losing side in the lower courts will likewise regularly come to this Court if the matter is sufficiently important.

When a stay or injunction application arrives here, this Court should not and cannot hide in the tall grass. When we receive such an application, we must grant or deny.[4] And when we do—that is, when this Court makes a decision on the interim legal status of a major new federal statute or executive action—that decision will often constitute a form of precedent (*de jure* or *de facto*) that provides guidance throughout the United States during the years-long interim period until a final decision on the merits.

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[3] That scenario explains why it would not make much sense for this Court to apply different standards to (i) an application for an injunction and (ii) an application for a stay of an injunction. See, *e.g.*, *Tandon* v. *Newsom*, 593 U. S. 61, 64 (2021) (*per curiam*) (applying the usual stay standard to an application for an injunction).

Suppose a district court in Circuit A enjoins a new executive action. And the court of appeals in Circuit A then declines to stay the injunction. Meanwhile, a district court in Circuit B does not enjoin that new executive action, and the court of appeals in Circuit B also declines to enjoin it. Both cases come to this Court on applications for interim relief—one seeking a stay of injunction and one seeking an injunction. It would not be particularly rational to deny a stay and leave the injunction in place in Circuit A, and then to turn around and deny an injunction in Circuit B on account of a purportedly higher standard for this Court to grant injunctions rather than stays. The standards should mesh so that this Court can ensure uniformity without regard to the happenstance of how various courts of appeals and district courts ruled.

[4] To obtain an interim stay or injunction, "an applicant must show (1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial" of the application. *Hollingsworth* v. *Perry*, 558 U. S. 183, 190 (2010) (*per curiam*); see *Tandon*, 593 U. S., at 64. The Court may also consider (4) the "balance" of "the equities" and "relative harms" to the parties. *Hollingsworth*, 558 U. S., at 190.

II

It is sometimes suggested, however, that this Court should adopt a policy of presumptively denying applications for stays or injunctions—even applications involving significant new federal statutes or executive actions—regardless of which way the various lower courts have ruled. That suggestion is flawed, in my view, because it would often leave an unworkable or intolerable patchwork of federal law in place. And even in cases where there is no patchwork—for example, because an application comes to us with a single nationwide class-action injunction—what if this Court thinks the lower court's decision is wrong? On student loan forgiveness or the Clean Power Plan or mifepristone or the travel bans, for example? Should we have a rule of presumptively denying relief, thereby allowing erroneous injunctions (or erroneous denials of injunctions) of major new statutes and executive actions to remain in place for several years, and thus severely harming the Government and would-be beneficiaries of (or regulated parties under) those new statutes and executive actions? I think not. And this Court's actions over the years reflect that the Court thinks not.

Unless and until this Court grants or denies an application for stay or injunction, tremendous uncertainty may surround the interim legal status of the new federal statute or executive action throughout the country. The statute or executive action may be in effect in some places but not others, for some businesses but not others, for some Americans but not others. That temporary geographic, organizational, and individual variation in federal law might not warrant this Court's intervention in run-of-the-mill cases—which is why it makes sense that this Court denies applications for interim relief when the Court is unlikely to later grant certiorari. See *Does 1–3* v. *Mills*, 595 U. S. __, __ (2021) (BARRETT, J., concurring in denial of application for injunctive relief). But in cases involving

major new federal statutes or executive actions, uniformity is often essential or at least sensible and prudent. In those kinds of cases, disuniformity—even if only for a few years or less—can be chaotic. And such chaos is not good for the law or the country.

One of this Court's roles, in justiciable cases, is to resolve major legal questions of national importance and ensure uniformity of federal law. So a default policy of off-loading to lower courts the final word on whether to green-light or block major new federal statutes and executive actions for the several-year interim until a final ruling on the merits would seem to amount to an abdication of this Court's proper role.

Some might object that this Court is not well equipped to make those significant decisions—namely, decisions about the interim status of a major new federal statute or executive action—on an expedited basis. But district courts and courts of appeals are likewise not perfectly equipped to make expedited preliminary judgments on important matters of this kind. Yet they have to do so, and so do we. By law, federal courts are open and can receive and review applications for relief 24/7/365. See 28 U. S. C. §452 ("All courts of the United States shall be deemed always open for the purpose of filing proper papers . . . and making motions and orders"). And this Court has procedural tools that can help us make the best possible interim decision in the limited time available—administrative stays, additional briefing, *amicus* briefs, oral argument, certiorari before judgment, and the like. On top of that, this Court has nine Justices, each of whom can (and does) consult and deliberate with the other eight to help the Court determine the best answer, unlike a smaller three-judge court of appeals panel or one-judge district court. And this Court also will have the benefit of the prior decisions in the case at hand from the court of appeals and the district court.

Some might argue that preliminary disputes over the

legality of major new statutes and executive actions can draw this Court into difficult or controversial matters earlier than we might like, as distinct from what happens on our slower-moving merits docket. That is an understandable concern. But when it comes to the interim status of major new federal statutes and executive actions, it is often important for reasons of clarity, stability, and uniformity that this Court be the decider. And Members of the Court have life tenure so that we can make tough calls without fear or favor. As with the merits docket, the Court's role in resolving applications for interim relief is to neutrally referee each matter based on the relevant legal standard. Avoiding controversial or difficult decisions on those applications is neither feasible nor appropriate.

Some might also worry that an early or rushed decision on an application could "lock in" the Court's assessment of the merits and subtly deter the Court from later making a different final decision. But in deciding applications for interim relief involving major new statutes or executive actions, we often have no choice but to make a preliminary assessment of likelihood of success on the merits; after all, in cases of that sort, the other relevant factors (irreparable harm and the equities) are often very weighty on both sides. See *Labrador* v. *Poe*, 601 U. S. __, __–___ (2024) (KAVANAUGH, J., concurring in grant of stay) (slip op., at 3–4). Moreover, judges strive to make the correct decision based on current information notwithstanding any previous assessment of the merits earlier in the litigation. It is not uncommon to think and decide differently when one knows more. This Court has done so in the past, see *West Virginia Bd. of Ed.* v. *Barnette*, 319 U. S. 624 (1943), and undoubtedly will continue to do so in the future.

To reiterate, this Court should not insert itself into run-of-the-mill preliminary-injunction cases where we are not likely to grant certiorari down the road. But determining the nationally uniform *interim* legal status for several years

of, say, the Clean Power Plan or Title IX regulations or mifepristone rules is a role that the American people appropriately expect this Court—and not only the courts of appeals or district courts—to fulfill.

* * *

The volume of preliminary-injunction and other pre-enforcement litigation over new federal laws and executive actions coming to this Court has been growing in recent years. That trend is in part the result of the increasing number of major new executive actions by recent Presidential administrations (of both political parties) that have had difficulty passing significant new legislation through Congress. Meanwhile, applications for stays or injunctions in capital-punishment cases, election disputes, and other time-sensitive matters (including numerous COVID–19-related disputes in the few years beginning in 2020) have also continued to come to this Court on a steady basis, as they traditionally have.

Although the volume of applications has increased, the Court's responsibility for deciding consequential applications for stays or injunctions is not new. See, *e.g.*, *West Virginia* v. *EPA*, 577 U. S. 1126 (2016) (temporarily enjoining Clean Power Plan); *Purcell* v. *Gonzalez*, 549 U. S. 1 (2006) (*per curiam*) (vacating injunction pending appeal regarding state voter ID law); *Rubin* v. *United States*, 524 U. S. 1301 (1998) (Rehnquist, C. J., in chambers) (denying stay pending certiorari of order enforcing subpoenas to Secret Service agents regarding their observations of the President); *Schlesinger* v. *Holtzman*, 414 U. S. 1321 (1973) (Marshall, J., in chambers) (staying District Court's injunction that had ordered a halt to bombing in Cambodia); *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579, 584, 589 (1952) (after expedited oral argument, affirming District Court's preliminary injunction that proscribed seizure of steel mills by government); cf.

Rosenberg v. *United States*, 346 U. S. 273, 283–285 (1953) (vacating stay of execution of the Rosenbergs).

Today's decision on district court injunctions will not affect this Court's vitally important responsibility to resolve applications for stays or injunctions with respect to major new federal statutes and executive actions. Deciding those applications is not a distraction from our job. It is a critical part of our job. With that understanding, I join the Court's opinion in full.

SUPREME COURT OF THE UNITED STATES

No. 24A884

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL. *v.* CASA, INC., ET AL.

ON APPLICATION FOR PARTIAL STAY

No. 24A885

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL. *v.* WASHINGTON, ET AL.

ON APPLICATION FOR PARTIAL STAY

No. 24A886

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL. *v.* NEW JERSEY, ET AL.

ON APPLICATION FOR PARTIAL STAY

[June 27, 2025]

JUSTICE SOTOMAYOR, with whom JUSTICE KAGAN and JUSTICE JACKSON join, dissenting.

Children born in the United States and subject to its laws are United States citizens. That has been the legal rule since the founding, and it was the English rule well before then. This Court once attempted to repudiate it, holding in *Dred Scott* v. *Sandford*, 19 How. 393 (1857), that the children of enslaved black Americans were not citizens. To remedy that grievous error, the States passed in 1866 and Congress ratified in 1868 the Fourteenth Amendment's Citizenship Clause, which enshrined birthright citizenship in

the Constitution. There it has remained, accepted and respected by Congress, by the Executive, and by this Court. Until today.

It is now the President who attempts, in an Executive Order (Order or Citizenship Order), to repudiate birthright citizenship. Every court to evaluate the Order has deemed it patently unconstitutional and, for that reason, has enjoined the Federal Government from enforcing it. Undeterred, the Government now asks this Court to grant emergency relief, insisting it will suffer irreparable harm unless it can deprive at least some children born in the United States of citizenship. See Protecting the Meaning and Value of American Citizenship, Exec. Order No. 14160, 90 Fed. Reg. 8849 (2025).

The Government does not ask for complete stays of the injunctions, as it ordinarily does before this Court. Why? The answer is obvious: To get such relief, the Government would have to show that the Order is likely constitutional, an impossible task in light of the Constitution's text, history, this Court's precedents, federal law, and Executive Branch practice. So the Government instead tries its hand at a different game. It asks this Court to hold that, no matter how illegal a law or policy, courts can never simply tell the Executive to stop enforcing it against anyone. Instead, the Government says, it should be able to apply the Citizenship Order (whose legality it does not defend) to everyone except the plaintiffs who filed this lawsuit.

The gamesmanship in this request is apparent and the Government makes no attempt to hide it. Yet, shamefully, this Court plays along. A majority of this Court decides that these applications, of all cases, provide the appropriate occasion to resolve the question of universal injunctions and end the centuries-old practice once and for all. In its rush to do so the Court disregards basic principles of equity as well as the long history of injunctive relief granted to nonparties.

No right is safe in the new legal regime the Court creates. Today, the threat is to birthright citizenship. Tomorrow, a different administration may try to seize firearms from law-abiding citizens or prevent people of certain faiths from gathering to worship. The majority holds that, absent cumbersome class-action litigation, courts cannot completely enjoin even such plainly unlawful policies unless doing so is necessary to afford the formal parties complete relief. That holding renders constitutional guarantees meaningful in name only for any individuals who are not parties to a lawsuit. Because I will not be complicit in so grave an attack on our system of law, I dissent.

I

The majority ignores entirely whether the President's Executive Order is constitutional, instead focusing only on the question whether federal courts have the equitable authority to issue universal injunctions. Yet the Order's patent unlawfulness reveals the gravity of the majority's error and underscores why equity supports universal injunctions as appropriate remedies in this kind of case. As every conceivable source of law confirms, birthright citizenship is the law of the land.

A

The Citizenship Clause provides that "[a]ll persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." U. S. Const., Amdt. 14, §1. That means what it says. Nestled in the Fourteenth Amendment alongside the Equal Protection Clause, the Citizenship Clause does not discriminate on the basis of race, sex, ethnicity, religion, or, importantly here, parentage. It refers instead to "[a]ll persons born or naturalized in the United States." *Ibid.*

Besides birth, there is only one condition: that one be

"subject to the jurisdiction" of the United States. Yet that condition too leaves no room for ambiguity. To be "subject to the jurisdiction" of the United States means simply to be bound to its authority and its laws. See N. Webster, An American Dictionary of the English Language 732 (C. Goodrich & N. Porter eds. 1865) (defining jurisdiction as the "[p]ower of governing or legislating," or "the power or right of exercising authority"). As the Government would presumably concede, virtually everyone born in the United States and present in its territory is subject to its authority and its laws. After all, "[t]he jurisdiction of the nation within its own territory is necessarily exclusive and absolute." *Schooner Exchange* v. *McFaddon,* 7 Cranch 116, 136 (1812) (Marshall, C. J., for the Court). Once a citizen of another nation steps onto United States soil, she is (with narrow exception) "amenable to the jurisdiction" of the United States. *Id*., at 144. That is why "no plausible distinction with respect to Fourteenth Amendment 'jurisdiction' can be drawn between resident aliens whose entry into the United States was lawful, and resident aliens whose entry was unlawful." *Plyler* v. *Doe*, 457 U. S. 202, 211, n. 10 (1982).

Few constitutional questions can be answered by resort to the text of the Constitution alone, but this is one. The Fourteenth Amendment guarantees birthright citizenship.

B

Unsurprisingly given the clarity of the Citizenship Clause's text, every other source of interpretation confirms this conclusion. Consider, first, its history. Long before the Fourteenth Amendment, and indeed before the founding, the common-law rule of *jus soli* (literally, right of the soil) governed English citizenship. That rule rendered a person's birthplace determinative of her citizenship status. Thus, "the children of aliens, born . . . in England," generally were "natural-born subjects, and entitled to all the privileges of such." 1 W. Blackstone, Commentaries on the

Laws of England 361–362 (1765); see also H. Broom & G. Denman, Constitutional Law Viewed in Relation to Common Law 31 (2d ed. 1885) (describing *Calvin's Case* (1608), which established that "[e]very one born within the dominions of the King of England . . . is . . . entitled to enjoy all the rights and liberties of an Englishman").

That English common-law rule carried over to the United States after the founding. Shortly after the Constitution's ratification, James Madison observed that "it [was] an established maxim that birth is a criterion of allegiance," *i.e.*, of citizenship. 1 Annals of Cong. 404 (1789). Birth, he explained, could convey citizenship in two ways: either through "place" (under the "right of the soil" principle) or through "parentage" (as for one born to United States citizens). *Ibid.* "[B]ut, in general," Madison explained, "place is the most certain criterion" and "it is what applies in the United States." *Ibid.* Mere decades later, Justice Story wrote that "[n]othing is better settled . . . than the doctrine that the children even of aliens born in a country . . . are subjects by birth." *Inglis* v. *Trustees of Sailor's Snug Harbour in City of New York*, 3 Pet. 99, 164 (1830). Well before the Fourteenth Amendment, then, it was the undisputed "law of the United States [that] every person born within the dominions and allegiance of the United States, whatever were the situation of his parents, is a natural born citizen." *Lynch* v. *Clarke*, 1 Sand. Ch. 583, 663 (N. Y. Ch. 1844).

Though the law was clear, the Nation did not always live up to its promise. Infamously, this Court departed from the birthright citizenship principle in *Dred Scott*, 19 How. 393, holding that the children of enslaved black Americans "are not included, and were not intended to be included, under the word 'citizens' in the Constitution." *Id.*, at 404. Following the Civil War, the Reconstruction Congress corrected that grave error. Section 1 of the Civil Rights Act of 1866, 14 Stat. 27, declared that "all persons born in the United

States and not subject to any foreign power" would be "citizens of the United States." The Fourteenth Amendment's guarantee of birthright citizenship followed two years later.

The lawmakers who ratified the Fourteenth Amendment understood that it would extend citizenship to all children born here, regardless of parental citizenship. Indeed, some objected to its passage on those grounds, complaining that it would permanently extend citizenship to immigrants who "invade [state] borders" and "settle as trespassers." Cong. Globe, 39th Cong., 1st Sess., 2891 (1866). Proponents agreed, if not with the anti-immigrant sentiment, that the Clause would extend citizenship to the children of immigrants. For example, Senator Conness of California (one of the Amendment's lead supporters) confirmed on the floor "that the children born here of Mongolian parents shall be declared by the Constitution of the United States to be entitled to civil rights and to equal protection before the law." *Id.*, at 2892. "We have declared that by law" in the Civil Rights Act, he explained, and "now it is proposed to incorporate the same provision in the fundamental instrument of the nation." *Id.*, at 2891. Not one Senator disagreed with this understanding of the Clause.

In the end, "[t]he Citizenship Clause was no legal innovation." J. Ho, Defining "American": Birthright Citizenship and the Original Understanding of the 14th Amendment, 9 Green Bag 2d 367, 369 (2006); see also *id.*, at 368 ("Birthright citizenship is guaranteed by the Fourteenth Amendment. That birthright is protected no less for children of undocumented persons than for descendants of *Mayflower* passengers"). "It simply restored the longstanding English common law doctrine of *jus soli*" abrogated by *Dred Scott*. Ho, 9 Green Bag 2d, at 369; see also M. Ramsey, Originalism and Birthright Citizenship, 109 Geo. L. J. 405, 472 (2020) (The "central purpose" of the Citizenship Clause "was, of course, to overrule *Dred Scott*").

C

Following the ratification of the Fourteenth Amendment, this Court confirmed the Amendment's plain meaning in *United States* v. *Wong Kim Ark*, 169 U. S. 649 (1898). At issue was the citizenship of Wong Kim Ark, a young California resident born in San Francisco to Chinese immigrant parents. *Id.*, at 652. When Wong returned to California from a trip to China, a custom's collector denied him entry on the sole ground that he was not a citizen of the United States. *Id.*, at 653.

This Court held that "[t]he Fourteenth Amendment affirms the ancient and fundamental rule of citizenship by birth within the territory." *Id.*, at 693. As the President does today, the Government in *Wong Kim Ark* rested its case on the Clause's sole qualifier. Wong was not subject to the jurisdiction of the United States, the Government claimed, because at birth his parents were aliens in the United States who were "subjects of the emperor of China," thus making Wong a subject of the emperor of China as well. *Id.*, at 652–653. This Court squarely rejected that attempt to limit the Citizenship Clause's reach. Instead, it held, the "'subject to the jurisdiction'" qualifier excludes only "children born of alien enemies in hostile occupation, and children of diplomatic representatives of a foreign State," *id.*, at 682, "with the single additional exception of children of members of the Indian tribes owing direct allegiance to their several tribes," *id.*, at 693.[1]

[1] The first two exceptions "ha[d] already been shown, by the law of England and by our own law, from the time of the first settlement of the English colonies in America, [to be] recognized exceptions to the fundamental rule of citizenship by birth within the country." *Wong Kim Ark*, 169 U. S., at 682. The additional exception for certain children born to Indian tribe members reflected the country's historical understanding that Indian tribes were "*quasi* foreign nations" within the physical boundaries of the United States. See Cong. Globe, 39th Cong., 1st Sess.,

That holding conclusively settled any remaining dispute over the Citizenship Clause's meaning. Since then, all three branches of Government have unflinchingly adhered to it.

This Court, for one, has repeatedly reaffirmed *Wong Kim Ark*'s holding. Notwithstanding legislation purporting to render Japanese persons "ineligible" for citizenship, we held in *Morrison* v. *California*, 291 U. S. 82 (1934), that a child with Japanese parents "is a citizen of the United States if he was born within the United States." *Id.*, at 85. The Court recognized the same rule even during World War II, when individuals of Japanese ancestry were subject to curfew and exclusion orders. See *Hirabayashi* v. *United States*, 320 U. S. 81, 96–97 (1943). So too has the Court recognized that the child of parents unlawfully present in the United States "is, of course, an American citizen by birth." *United States ex rel. Hintopoulos* v. *Shaughnessy*, 353 U. S. 72, 73 (1957). The same is true of children whose parents gained admission into the United States by unlawful means. See, *e.g.*, *INS* v. *Errico*, 385 U. S. 214, 215–216 (1966); *INS* v. *Rios-Pineda*, 471 U. S. 444, 446 (1985).

Congress, for its part, has also reaffirmed the principles of birthright citizenship by enshrining it in a federal statute. Section 201 of the Nationality Act of 1940 provides that all those "born in the United States, and subject to the jurisdiction thereof," "shall be nationals and citizens of the United States at birth." 8 U. S. C. §1401(a); see also *Taggart* v. *Lorenzen*, 587 U. S. 554, 560 (2019) (recognizing

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2890 (1866). Treaties between many tribes and the Federal Government, at the time, ensured that it was the tribe, and not the United States Government, that had "prescriptive and law enforcement authority" over tribal members. M. Ramsey, Originalism and Birthright Citizenship, 109 Geo. L. J. 405, 443–444 (2020); see *id.*, at 442–444. Congress eventually extended birthright citizenship to tribal members born in the United States in 1924. See Indian Citizenship Act of 1924, ch. 233, 43 Stat. 253, 8 U. S. C. §1401(b). These exceptions are not at issue in these cases.

"longstanding interpretive principle" that if statutory term " 'is "obviously transplanted from another legal source," it "brings the old soil with it" ' ").

For at least the last century, the Executive Branch has adhered to the same principle. When Congress proposed to reaffirm birthright citizenship in the 1940 Nationality Act, cabinet officials described it as "a statement of the common-law rule, which has been in the United States from the beginning of its existence." House Committee on Immigration and Naturalization, Nationality Laws of the United States, 76th Cong., 1st Sess., 7 (Comm. Print 1939). Indeed, the Government concedes even now that the Executive Branch has recognized the vitality of birthright citizenship "at least back to World War II, if not earlier." App. to Opposition to Application in No. 24A886, p. 323a. That explains, among other things, why the Social Security Administration and the Department of State have long accepted proof of one's birthplace as proof of citizenship. See 44 Fed. Reg. 10369, 10371 (1979); 20 CFR §§422.107(d), 422.103(c)(2) (2024); 22 CFR §§51.40, 51.42 (2024).

Some decades ago, the Office of Legal Counsel was asked to respond to a House bill that would have denied birthright citizenship to " 'children born in the United States to parents who are not citizens or permanent resident aliens.'" 19 Op. OLC 340, 341 (1995). The answer well summed up the state of the law: This "office grapples with many difficult and close issues of constitutional law. The lawfulness of this bill is not among them. This legislation is unquestionably unconstitutional." *Ibid.*

II

A

Undeterred by the Constitution, history, Supreme Court precedent, federal law, and longstanding Executive Branch practice, President Donald J. Trump issued Executive Order No. 14160 on the day of his inauguration that purported

to redefine American citizenship. The Order declares that United States citizenship does not extend to persons who are born to a mother unlawfully present in the United States, or lawfully present on a temporary basis, and a father who is neither a citizen nor lawful permanent resident. *Ibid.* It further prohibits federal agencies from issuing citizenship documentation to such persons or accepting state documentation to that effect, and it directs a slew of federal officials to conform agency regulations to the Order. *Id.*, at 8449–8450. The prohibition, according to the Order, applies "only to persons who are born within the United States after 30 days from the date of th[e] order." *Id.*, at 8449.

B

Shortly after the President issued the Citizenship Order, several groups of plaintiffs (together, respondents) challenged the Order in Federal District Courts in Maryland, Massachusetts, and Washington. Respondents include: a group of pregnant women[2] whose children will not be United States citizens under the terms of the Citizenship Order; two immigrants-rights organizations with thousands of members across the country who are likely to give birth to children who would also be denied citizenship under the Order; and 22 States, the District of Columbia, and the city of San Francisco. In their respective suits, respondents asserted that the Citizenship Order violates the Fourteenth Amendment and §1401(a).

Respondents also sought a preliminary injunction barring enforcement of the Citizenship Order during the pendency of the litigation. If allowed to go into effect, they said, the policy would inflict irreparable harm on their children

[2] Two of these women seek to represent a class of pregnant women and children residing in Washington State, who are affected by the Citizenship Order. See Complaint in No. 2:25–cv–00127 (WD Wash., Feb. 4, 2025), ECF Doc. 106. The District Court has yet to rule on the certification of that putative class.

(and their members' children) by denying them "enjoyment of the full privileges, rights, and benefits that come with U. S. citizenship," and rendering them vulnerable to unlawful deportation before the Courts could adjudicate their constitutional claim. Complaint in No. 8:25–cv–00201 (D Md., Jan. 21, 2025), p. 6, ¶12; see also Complaint in No. 2:25–cv–00127 (WD Wash., Feb. 4, 2025), ECF Doc. 106, pp. 33–36, ¶¶120–139 (Washington Complaint).

As for the States, they attested that enforcement of the Citizenship Order would cost them millions of dollars in federal funding and impose significant administrative burdens. The States "administer numerous programs for the benefit of their residents, including for newborns and young children, some of whom are wards of the plaintiff States who are entitled to care by statute." *Id.*, at 23, ¶79. Those social welfare programs include ones provided for by state law, as well as ones established by federal law, such as Medicaid and the Children's Health Insurance Program: Several of them "are funded in part by federal dollars, with federal funding frequently tied to the citizenship and immigration status of the individuals served." *Ibid.* By stripping some children within the States of their citizenship, the Order would reduce the States' federal funding, "forc[ing the States] to bear significantly increased costs to operate and fund programs that ensure the health and well-being of their residents." *Id.*, at 6, ¶8, 4–5, ¶6; see also Opposition to Application in No. 24A886 (New Jersey), pp. 9–11; Complaint in No. 1:25–cv–10139 (D Mass., Jan. 21, 2025), pp. 23–42, ¶¶121–201. Relatedly, because the States must verify the citizenship status of the individuals they serve, the States alleged that the Citizenship Order would force them to expend significant sums to "modif[y] their . . . operational structures and administration" to account for the changes in citizenship. Washington Complaint 6, ¶8; see also Opposition to Application in No. 24A886 (New Jersey), at 9–11.

All three District Courts preliminarily enjoined enforcement of the Citizenship Order. Each court determined that the Citizenship Order was likely unlawful, that respondents were likely to face irreparable harm without an injunction, and that the equities and public interest cut decisively in respondents' favor. See 763 F. Supp. 3d 723, 727, 744–745 (Md. 2025); 765 F. Supp. 3d 1142, 1152–1153 (WD Wash. 2025); *Doe* v. *Trump*, 766 F. Supp. 3d 266, 274, 285–287 (Mass. 2025).

The District Courts further determined that only injunctions blocking the Citizenship Order's enforcement nationwide would completely redress respondents' injuries. For the organizational plaintiffs, the Maryland District Court explained that those plaintiffs have " 'over 680,000 members . . . who reside in all 50 U.S. states'" and "hundreds of them expect to give birth soon." 763 F. Supp. 3d, at 746. The Washington District Court found that "a geographically limited injunction would be ineffective" for the state plaintiffs "as it would not completely relieve [the States] of the Order's financial burden(s)." 765 F. Supp. 3d, at 1153. For one thing, that court explained, the constant flow of people moving in and out of various States meant some children born to noncitizen parents in a nonplaintiff State would later reside in a plaintiff State. Once there, those children (under state law) would be eligible for state benefits. Yet due to the Citizenship Order, the plaintiff States would no longer receive federal funding to support those benefits. In addition, the plaintiff States would have to create an entirely new administrative and recordkeeping system to accommodate children who were not citizens under the Order and born in a nonplaintiff State. So if the District Court allowed birthright citizenship to continue for children born in the plaintiff States, but not in any other State, that would not completely redress the States' financial injury. *Ibid.*

For identical reasons, the Massachusetts District Court

also found that the state plaintiffs' injuries could be redressed only by a universal injunction. See 766 F. Supp. 3d, at 288 ("The harms [the States] have established stem from the [Order's] impact on the citizenship status—and the ability to discern or verify such status—for any child located or seeking various services within their jurisdiction").

The Government filed motions to stay the injunctions in three separate Courts of Appeals. Nowhere did the Government contest the District Courts' uniform holdings that the Citizenship Order likely violated the Constitution. Instead, it challenged only the scope of the ordered relief, arguing that the injunctions should be narrowed to block the Order's enforcement against only the individual persons named in the complaints.

All three appellate courts denied the Government's request and left the preliminary injunctions intact. See 131 F. 4th 27 (CA1 2025); 2025 WL 654902 (CA4, Feb. 28, 2025); 2025 WL 553485 (CA9, Feb. 19, 2025). The Fourth Circuit, which reviewed the preliminary injunction issued to the organizational plaintiffs, concluded that "[t]he district court . . . carefully explained why an injunction limited to the parties—including organizations with hundreds of thousands of members nationwide—would be unworkable in practice and thus fail to provide complete relie[f] to the plaintiffs." 2025 WL 654902, *1. The First and Ninth Circuits left undisturbed the Massachusetts and Washington District Courts' respective determinations that only universal injunctions would fully redress the States' injuries. See 131 F. 4th, 42–43; 2025 WL 553485, *1.

On March 13, the Government filed emergency applications with this Court requesting partial stays of the three preliminary injunctions of the Citizenship Order. The Government renews its contention that the injunctions must be narrowed to benefit only formal parties in these cases.

III

In partially granting the Government's remarkable request, the Court distorts well-established equitable principles several times over. A stay, this Court has said, "'is not a matter of right,'" but rather "'an exercise of judicial discretion.'" *Nken* v. *Holder*, 556 U. S. 418, 433 (2009). For centuries, courts have "close[d] the doors" of equity to those "tainted with inequitableness or bad faith relative to the matter in which [they] seek relief." *Precision Instrument Mfg. Co.* v. *Automotive Maintenance Machinery Co.*, 324 U. S. 806, 814 (1945). Yet the majority throws the doors of equity open to the Government in a case where it seeks to undo a fundamental and clearly established constitutional right. The Citizenship Order's patent unlawfulness is reason enough to deny the Government's applications.

The Government also falls well short of satisfying its burden to show that it will likely suffer irreparable harm absent a stay and that it will likely succeed on the merits of its challenge to the scope of the injunctions. *Nken*, 556 U. S., at 434–435. The Executive Branch has respected birthright citizenship for well over a century, and it advances no plausible reason why maintaining the status quo while the litigation proceeds would cause it irrevocable harm. Nor could it, for the Constitution and federal law prohibit the enforcement of the Citizenship Order.

For all that, moreover, the Government is not even correct on the merits of universal injunctions. To the contrary, universal injunctions are consistent with long-established principles of equity, once respected by this Court. What is more, these cases do not even squarely present the legality of universal injunctions. That is because, even if the majority were right that injunctions can only offer "complete relief *to the plaintiffs before the court*," *ante,* at 17, each of the lower courts here correctly determined that the nationwide relief they issued was necessary to remedy respondents' in-

juries completely. So even ignoring the traditional stay factors and accepting the majority's view of the merits, there is no reason to grant relief in these cases.

A

It is a bedrock principle that parties who request a stay must show they will likely suffer irreparable harm absent such relief. Indeed, "[t]he authority to grant stays has historically been justified by the perceived need 'to prevent irreparable injury to the parties or to the public' pending review." *Nken*, 556 U. S., at 432 (quoting *Scripps-Howard Radio, Inc.* v. *FCC*, 316 U. S. 4, 9 (1942)). Thus, an apparent likelihood of success on the merits never suffices on its own to justify this Court's intervention: Our emergency docket is not a mechanism for an expedited appeal. Accordingly, "this Court can avoid delving into the merits" "[i]f the [applicant does not] demonstrat[e] an irreparable injury." *Labrador* v. *Poe*, 601 U. S. ___, ___ (2024) (KAVANAUGH, J., concurring in grant of stay) (slip op., at 3); contra, *ante*, at 8–11 (KAVANAUGH, J., concurring).

What grave harm does the Executive face that prompts a majority of this Court to grant it relief? The answer, the Government says, is the inability to enforce the Citizenship Order against nonparties. For the majority, that answer suffices. See *ante,* at 24 ("When a federal court enters a universal injunction against the Government, it 'improper[ly] intrude[s]' on 'a coordinate branch of the Government' and prevents the Government from enforcing its policies against nonparties").

The problem, however, is that the Executive Branch has no right to enforce the Citizenship Order against anyone. As the Executive itself once put it, the Order is "unquestionably unconstitutional." *Supra*, at 9. It defies logic to say that maintaining a centuries-long status quo for a few months longer will irreparably injure the Government. See *Starbucks Corp.* v. *McKinney*, 602 U. S. 339, 345–346

(2024) (The "purpose" of equitable relief " 'is merely to preserve the relative positions of the parties until a trial on the merits can be held' "). The President's "mandate . . . to exercise his executive power," *Myers* v. *United States*, 272 U. S. 52, 123 (1926), in any event, does not permit him to rewrite the Constitution or statutory provisions at a whim. By forging ahead and granting relief to the Government anyway, this Court endorses the radical proposition that the President is harmed, irreparably, whenever he cannot do something he wants to do, even if what he wants to do is break the law.

The majority claims that it can sidestep "analysis of the Executive Order" altogether because (in its view) every overbroad injunction necessarily causes irreparable harm sufficient to warrant emergency intervention. *Ante,* at 24. Yet where a purportedly overbroad injunction orders the Government to do only what this Court has expressly held it is required to do, it is hard to see how it could cause any harm. At oral argument, the Government conceded it was bound to follow this Court's precedent. See Tr. of Oral Arg. 62–63. This Court's precedent establishes beyond a shade of doubt that the Executive Order is unconstitutional. See *supra*, at 3–9. Thus, by enjoining the Government from violating settled law, the District Courts' orders do not cause the Government any harm.

The majority's contrary position is self-refuting. Suppose an executive order barred women from receiving unemployment benefits or black citizens from voting. Is the Government irreparably harmed, and entitled to emergency relief, by a district court order universally enjoining such policies? The majority, apparently, would say yes.

Nothing in this Court's precedents supports that result. It turns one of the " 'most critical' factors we must consider in deciding whether to grant a stay" into a box-checking exercise whenever the relevant enjoined action is an executive one. *Trump* v. *International Refugee Assistance Project*, 582

U. S. 571, 584 (2017) (THOMAS, J., concurring in part and dissenting in part). Even accepting that "[a]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury," *Maryland* v. *King*, 567 U. S. 1301, 1303 (2012) (ROBERTS, C. J., in chambers), that democratic consideration cuts against the Government in these cases. Through the ratification of the Fourteenth Amendment, Congress and the States constitutionalized birthright citizenship. Congress also codified birthright citizenship in §1401(a). It is thus the Citizenship Order, not the District Courts' injunctions, that prevents the "'effectuat[ion]' " of a constitutional amendment and repeals a " 'statut[e] enacted by representatives of [the American] people.'" *Id.*, at 1303.

Simply put, it strains credulity to treat the Executive Branch as irreparably harmed by injunctions that direct it to continue following settled law. "All the officers of the government, from the highest to the lowest, are creatures of the law and are bound to obey it." *United States* v. *Lee*, 106 U. S. 196, 220 (1882); but see *Trump* v. *United States*, 603 U. S. 593 (2024). The injunctions do no more harm to the Executive than the Constitution and federal law do.

B

A majority of this Court nonetheless rushes to address the merits of the Government's applications, holding that universal injunctions "likely exceed the equitable authority that Congress has granted to federal courts." *Ante,* at 1–2. A majority that has repeatedly pledged its fealty to "history and tradition" thus eliminates an equitable power firmly grounded in centuries of equitable principles and practice. By stripping all federal courts, including itself, of that power, the Court kneecaps the Judiciary's authority to stop the Executive from enforcing even the most unconstitutional policies. That runs directly counter to the point of equity: empowering courts to do complete justice, including

through flexible remedies that have historically benefited parties and nonparties alike.

1

A brief recounting of equity's history demonstrates the majority's grave error. The American legal system grew out of English law, which had two primary judicial institutions: the common-law courts and equity courts. Equity courts arose because of the inflexibility of the common-law system; their purpose was to look beyond formal writs and provide remedies where the common law gave inadequate relief. In Blackstone's words, equity was meant "to give remedy in cases where none before was administered." 3 Commentaries on the Laws of England, at 50.

Adaptability has always been a hallmark of equity, especially with regard to the scope of its remedies. While common-law courts were "compelled to limit their inquiry to the very parties in the litigation before them," equity courts could "adjust the rights of all, however numerous," and "adapt their decrees to all the varieties of circumstances, which may arise, and adjust them to all the peculiar rights of all the parties in interest." J. Story, Commentaries on Equity Jurisprudence §28, pp. 27–28 (2d ed. 1839). After all, equity's "constant aim" was "to do complete justice." J. Story, Commentaries on Equity Pleadings §72, p. 74 (2d ed. 1840). Accordingly, equity courts could "decid[e] upon and settl[e] the rights of all persons interested in the subject-matter of the suit, so that the performance of the decree of the Court may be perfectly safe to those, who are compelled to obey it, and also, that future litigation may be prevented." *Ibid*.

For equity courts, injunctions were "manifestly indispensable for the purposes of social justice in a great variety of cases." Story, Commentaries on Equity Jurisprudence §959a, at 227. Unlike this Court, then, those courts "constantly decline[d] to lay down any rule which shall limit

their power and discretion as to the particular cases, in which such injunctions shall be granted, or withheld." *Ibid.* Justice Story underscored the "wisdom in this course": Equity courts needed flexibility to craft injunctions for particular cases, as it was "impossible to foresee all the exigencies of society which may require their aid and assistance to protect rights or redress wrongs." *Ibid.*

In their pursuit of complete justice, equity courts could award injunctive and other equitable relief to parties and nonparties alike. For centuries, they did so through what was known as "bills of peace." If a plaintiff or group of plaintiffs filed such a bill, an English court could use a single case to settle disputes affecting whole communities, for "the inherent jurisdiction of equity" included the power "to interfere for the prevention of a multiplicity of suits." 1 J. Pomeroy, Equity Jurisprudence §260, p. 278 (1881). Bills of peace issued in cases "'where the parties [were] very numerous, and the court perceive[d] that it [would] be almost impossible to bring them all before the court; or where the question is of general interest, and a few may sue for the benefit of the whole.'" *Ortiz* v. *Fibreboard Corp.*, 527 U. S. 815, 832 (1999) (quoting *West* v. *Randall*, 29 F. Cas. 718, 722 (No. 17,424) (CC RI 1820) (Story, J.)). In such cases, a court could "grant [equitable relief] without making other persons parties," instead considering them "quasi parties to the record, at least for the purpose of taking the benefit of the decree, and of entitling themselves to other equitable relief, if their rights [were] jeopard[iz]ed." *Id.*, at 723.

Early American courts embraced bills of peace and extended their logic to cases "which [were] not technically 'bills of peace,' but '[were] analogous to,' or 'within the principle' of such bills." 1 Pomeroy, Equity Jurisprudence §269, at 293. One example was taxpayer suits, which allowed courts to enjoin universally the enforcement of a challenged tax. Sometimes, such suits were filed "by any number of taxpayers joined as co-plaintiffs, or by one taxpayer suing

on behalf of himself and all others similarly situated." *Id.*, at 277. But taxpayer suits were not always representative in nature: Even "a single taxpayer suing on his own account," if victorious, could enjoin the collection of a tax against anyone. *Ibid.* Individual plaintiffs, moreover, could secure an order "to set aside and annul any and every illegal public official action . . . whereby a debt . . . would be unlawfully created." *Ibid.* By allowing "complete and final relief [to] be given to an entire community by means of one judicial decree," American courts (like their English counterparts) spared nonparties and themselves from the burden of "an indefinite amount of separate litigation." *Id.*, at 278.

Federal courts have also exercised equitable authority to enjoin universally federal and state laws for more than a century. For instance, before deciding the constitutionality of a new federal law in *Lewis Publishing Co.* v. *Morgan*, 229 U. S. 288 (1913), this Court entered an order blocking the law's enforcement against parties and nonparties. See M. Sohoni, The Lost History of the "Universal" Injunction, 133 Harv. L. Rev. 920, 944–946 (2020). In *Lewis*, two newspaper publishers challenged as unconstitutional a federal law requiring publishers to file with the Postmaster General twice-yearly disclosures about their editorial board membership, corporate ownership, and subscribership. Sohoni, 133 Harv. L. Rev., at 944. After the District Court upheld the law and authorized a direct appeal to the Supreme Court, one of the publishers moved for a restraining order. The proposed order sought relief not only for the publisher who filed it, but asked the Court to " 'restrai[n]'" the Postmaster General and other federal officials from enforcing the law against " '*appellant and other newspaper publishers*.' " *Id.*, at 946. This Court readily agreed, see *Journal of Commerce and Commercial Bulletin* v. *Burleson*, 229 U. S. 600, 601 (1913) (*per curiam*), even as it would have sufficed

for the movant publishers' sake to enjoin the Act's enforcement against them alone pending their appeal.

In *Pierce* v. *Society of Sisters*, 268 U. S. 510 (1925), too, this Court affirmed a universal injunction of Oregon's compulsory public schooling law. See Sohoni, 133 Harv. L. Rev., at 959–962. Two private school owners challenged that law in a suit against the Governor of Oregon and other state officials. "The plaintiffs did not sue on behalf of a represented group or class; they sued for themselves, alleging that the law was an unconstitutional interference with their property rights." *Id.*, at 959. Yet a three-judge federal court awarded them a universal injunction. See *id.*, at 960–961. This Court, in affirming that relief, twice described it as "appropriate." *Pierce*, 268 U. S., at 530, 533. The Court understood that the injunction it affirmed would provide relief to nonparties, commenting that such relief was necessary because enforcing the Act would result not only in the "destruction of appellees' primary schools," but would also destroy "perhaps all other private primary schools for normal children within the State of Oregon." *Id.*, at 534.

Cases like *Lewis* and *Pierce* were not outliers. Throughout the early 20th century, federal courts granted universal injunctions even when a narrower remedy would have sufficed to redress the parties' injuries. See, *e.g.*, *West Virginia Bd. of Ed.* v. *Barnette*, 319 U. S. 624, 642 (1943) (affirming an injunction that shielded the plaintiff class of Jehovah's Witnesses, and any other children with religious scruples, from complying with a state law requiring children to salute the American flag); see also Sohoni, 133 Harv. L. Rev., at 943–993 (collecting cases). It is certainly true that federal courts have granted more universal injunctions of federal laws in recent decades. But the issuance of broad equitable relief intended to benefit parties and nonparties has deep roots in equity's history and in this Court's precedents.

The universal injunctions of the Citizenship Order fit

firmly within that tradition. The right to birthright citizenship is "clear," the Citizenship Order is an " 'illegal act,' " and without the " 'preventive process of injunction,'" the right will be " 'irreparably injured.' " *Arthur* v. *Oakes*, 63 F. 310, 328 (CA7 1894) (Harlan, J.) (describing standard for when an injunction should issue). It would be "'almost impossible,'" moreover, " 'to bring all [affected individuals] before the court,' " *Ortiz*, 527 U. S., at 832, justifying the use of one suit to settle the issue of the Citizenship Order's constitutionality for all affected persons. See 1 Pomeroy, Equity Jurisprudence §260, at 450–451. Complete justice, the "constant aim" of equity, Story, Commentaries on Equity Pleadings §72, at 74, demands a universal injunction: " 'the only remedy which the law allows to prevent the commission'" of a flagrantly illegal policy. *Arthur*, 63 F., at 328. The District Courts, by granting such relief, appropriately "settle[d] the rights of all persons interested in the subject-matter" of these suits, binding the Government so as to prevent needless "future litigation." Story, Commentaries on Equity Pleadings §72, at 74.

Of course, as a matter of equitable discretion, courts may often have weighty reasons not to award universal relief. Among other things, universal injunctions can prevent different district and appellate courts from considering the same issues in parallel, forestalling the legal dialogue (or "percolation") the federal system uses to answer difficult questions correctly. Not so here, however, because the Citizenship Order is patently unconstitutional under settled law and a variety of district and appellate courts have reviewed the issue. So too can universal injunctions encourage forum shopping, by allowing preferred district judges in a venue picked by one plaintiff to enjoin governmental policies nationwide. They also operate asymmetrically against the Government, giving plaintiffs a litigation advantage: To halt Government action everywhere, a plaintiff must win

only one universal injunction across many potential lawsuits. Yet this is not a scenario where granting universal relief will encourage forum shopping or give plaintiffs the upper hand. Quite the opposite: By awarding universal relief below, the District Courts just ordered the Government to do everywhere what any reasonable jurist would order the Government to do anywhere.

There may be good reasons not to issue universal injunctions in the typical case, when the merits are open to reasonable disagreement and there is no claim of extraordinary and imminent irreparable harm.[3] See Story, Commentaries on Equity Jurisprudence §959a, at 227 ("[Injunctive relief] ought . . . to be guarded with extreme caution, and applied only in very clear cases"); cf. *ante,* at 13 ("[The] use [of bills of peace] was confined to limited circumstances"). The universal injunctions in these cases, however, are more than appropriate. These injunctions, after all, protect newborns from the exceptional, irreparable harm associated with losing a foundational constitutional right and its immediate benefits. They thus honor the most basic value of our constitutional system: They keep the Government within the bounds of law. *Marbury* v. *Madison*, 1 Cranch 137, 163 (1803).

2

The majority's contrary reasoning falls flat. The majority starts with the Judiciary Act of 1789, which gives federal courts jurisdiction over "all suits . . . in equity." §11, 1 Stat. 78. In the majority's telling, universal injunctions are inconsistent with equity jurisdiction because they are not "sufficiently 'analogous' to the relief ' "exercised by the High

[3] These prudential considerations, however, have nothing to do with whether universal injunctions are consistent with historical equitable principles and practice. Contra *ante,* at 21, n. 16; but cf. *ante,* at 21 ("[T]he policy pros and cons [of universal injunctions] are beside the point").

Court of Chancery in England at the time of the adoption of the Constitution and the enactment of the original Judiciary Act." ' " *Ante,* at 6 (quoting *Grupo Mexicano de Desarrollo, S. A.* v. *Alliance Bond Fund, Inc.*, 527 U. S. 308, 318–319 (1999)). In reaching that ahistorical result, the Court claims that the English Chancellor's remedies were "typically" party specific, and emphasizes that party-specific principles have permeated this Court's understanding of equity. *Ante,* at 6–9.

The majority's argument stumbles out the gate. As the majority must itself concede, injunctions issued by English courts of equity were "typically," but not always, party specific. *Ante,* at 7. After all, bills of peace, for centuries, allowed English courts to adjudicate the rights of parties not before it, and to award remedies intended to benefit entire affected communities. Taxpayer suits, too, could lead to a complete injunction of a tax, even when only a single plaintiff filed suit.

The majority seeks to distinguish bills of peace from universal injunctions by urging that the former (but not the latter) typically applied to small and cohesive groups and were representative in nature. See *ante,* at 13. Yet those are distinctions without a difference. Equity courts had the flexibility to "adapt their decrees to all the varieties of circumstances, which may arise, and adjust them to all the peculiar rights of all the parties in interest." Story, Commentaries on Equity Jurisprudence §28, at 28. There is no equitable principle that caps the number of parties in interest. Indeed, in taxpayer suits, a single plaintiff could get the relief of "annul[ling] any and every kind of tax or assessment" that applied to an entire "county, town, or city."

1 Pomeroy, Equity Jurisprudence §260, at 277.[4] "[T]he inherent jurisdiction of equity to interfere for the prevention of a multiplicity of suits," moreover, is what empowered common law courts to issue bills of peace. *Id.*, at 450–451 (4th ed. 1918). That is why early American courts understood taxpayer suits, in which even a "single taxpayer suing on his own account" and not on behalf of others could secure a total injunction, to be a natural extension of a bill of peace. *Id.*, at 277 (1881).[5]

It is also unclear why " 'cohesive[ness]'" or "representative[ness]" would preclude even those universal injunctions that, like here, benefit a discrete and cohesive group. *Ante,* at 13. The Citizenship Order itself applies only to a subset group of newborn children: that is, children born to a mother unlawfully or temporarily present, and a father who

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[4] *Massachusetts* v. *Mellon*, 262 U. S. 447 (1923), which addressed a taxpayer's standing to challenge a federal appropriation, did not consider how broadly a court could enjoin Government action and is therefore not to the contrary. *Id.*, at 488; contra, *ante,* at 15.

[5] The majority asserts that taxpayer suits are an "inadequate historical analogy" for a universal injunction, *ante,* at 14, but cannot dispute their essential similarity: By providing relief to an entire affected community, both do more than merely redress a plaintiff 's injuries. Instead, the majority says that single-plaintiff, nonrepresentative taxpayer suits cannot be proper "historical" analogues because they trace only back to the "mid-19th century." See *ibid.* Yet the same is true of plaintiff-protective injunctions against federal and state government officials, an equitable remedy the majority embraces by reference to "a long line of cases authorizing suits against State officials in certain circumstances" that range from the cusp of the mid-19th century to the late mid-19th century. *Ante,* at 11, n. 9. In any event, early American courts deemed taxpayer suits " 'analogous to,' [and] 'within the principle of' . . . bills [of peace],' " 1 Pomeroy, Equity Jurisprudence §269, at 293, which trace back to the equitable practice of the English Chancery Court, *ante,* at 12. Nor is it clear why it matters that individual taxpayer suits occurred in state courts, or that those courts did not always award the broad injunctions available to them. Contra, *ante,* at 15. The relevant question is simply whether a court of equity could award injunctive relief to nonparties. The answer to that question is, obviously, yes.

is neither a citizen nor lawful permanent resident. Those mothers and fathers share "not only [a common] interest in the question, but one in common in the subject-matter of th[is] suit." *Scott* v. *Donald*, 165 U. S. 107, 116 (1897). Nor is there any doubt that at least the individual respondents adequately represent the injunction's beneficiaries: Like all affected parents, they "are necessarily interested in obtaining the relief sought" to preserve their children's citizenship. *Emmons* v. *National Mut. Bldg. & Loan Assn. of NY*, 135 F. 689, 691 (CA4 1905) (explaining the "well-known doctrine of equity jurisprudence" that " 'the relief sought by [a plaintiff]' " must be " 'beneficial to those whom he undertakes to represent' " (quoting 1 R. White, F. Nichols, & H. Garrett, Daniell's Chancery Practice 243 (6th Am. ed. 1894))). What was true of bills of peace is thus true of these universal injunctions and universal injunctions generally, too: Both allow courts to "'adjudicate the rights of members of dispersed groups without formally joining them to a lawsuit through the usual procedures.'" *Ante,* at 13.

That bills of peace bear some resemblance to modern day Federal Rule of Civil Procedure 23 class actions does not mean they cannot also be a historical analogue to the universal injunction. Contra, *ante,* at 13 ("The bill of peace lives in modern form" as the "modern class action . . . governed in federal court by Rule 23," "not as the universal injunction"). In the majority's view, Rule 23 class actions, but not universal injunctions, would "be recognizable to an English Chancellor" because the limitations on class actions mirror those that applied to bills of peace. *Ante,* at 14 (Rule 23 "requires numerosity (such that joinder is impracticable), common questions of law or fact, typicality, and representative parties who adequately protect the interests of the class"); cf. *supra*, at 25 (explaining why the universal injunctions in these cases are consistent with those limits). To the extent that English Chancellors would care about the differences between Rule 23 and universal injunctions,

the majority provides absolutely no reason to conclude they would think the former permissible and not the latter. To the contrary, unlike the Court today, the English Chancery Court recognized that principles of equity permit granting relief to nonparties. The history of bills of peace makes that apparent, particularly because they went beyond what Rule 23 permits. See *ante,* at 13–14 ("[T]he modern Rule 23 is in some ways 'more restrictive of representative suits than the original bills of peace'"). They are thus a common ancestor to both class actions and universal injunctions.

In any event, nothing in Rule 23 purports to supplant or modify federal courts' equitable authority under the Judiciary Act to grant relief to nonparties, nor could it. Contra, *ante,* at 14. The majority frets that universal injunctions, if permissible, will empower federal courts to create *de facto* class actions at will, thereby circumventing Rule 23's procedural protections. *Ibid*. Those concerns, however, have not been borne out in reality. Rule 23 has coexisted with universal injunctions against the Government for decades. Universal injunctions also cannot supplant the paradigm form of class actions, which seek money damages. In all events, to the extent the majority's concern has any teeth, reviewing courts are already well equipped to safeguard Rule 23's procedural protections. If there is a genuine lack of clarity as to the lawfulness of challenged Government action, district courts may well abuse their discretion by reflexively issuing universal injunctions where a Rule 23 class action would be more appropriate. See *Ashcroft* v. *American Civil Liberties Union*, 542 U. S. 656, 664 (2004) (standard of review for preliminary injunctions is " 'abuse of discretion' ").

The majority next insists that the practice of "founding-era courts of equity in the United States" cuts against universal injunctions, and that this Court "consistently rebuffed requests for relief that extended beyond the parties." *Ante*, at 8. The majority's account is irreconcilable with

early American bills of peace and the history of taxpayer suits. It further contradicts this Court's practice, in cases like *Lewis*, *Pierce*, and *Barnette*, of affirming and granting universal injunctions even when narrower, plaintiff-focused injunctions would have offered complete relief to the parties. See *supra*, at 20–21. The majority instead focuses on one case from 1897, in which this Court "permitted only a narro[w] decree between 'the parties named as plaintiff and defendants in the bill,' " *ante,* at 7 (quoting *Scott*, 165 U. S., at 117), over others, including from the same period, doing just the opposite. The majority offers no principled basis to deem the question resolved by a single case from 1897 while cases just a few years later charted a different course. Indeed, if the relevant inquiry turns on "founding-era practice," then there is no reason why a case from 1897 should be dispositive. *Ante,* at 9, n. 7.

In the majority's telling, *Scott* merely "illustrates that as late as 1897, this Court adhered to a party-specific view of relief." *Ante,* at 7–8, n. 6. Nothing in *Scott*, however, dictates that equitable relief must always be party specific. To the contrary, just one year after *Scott*, the Court endorsed the opposite view: "Only a court of equity," the Court explained, "is competent to . . . determine, once for all and without a multiplicity of suits, matters that affect not simply individuals, but the interests of the entire community." *Smyth* v. *Ames*, 169 U. S. 466, 518 (1898); see also *id*., at 517 ("[T]he circuit court of the United States, sitting in equity, can make a comprehensive decree covering the whole ground of controversy, and thus avoid the multiplicity of suits that would inevitably arise under the statute").[6]

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[6] Regardless of the actual decree the *Smyth* court approved, see *ante,* at 7–8, n. 6, its analysis clearly reveals that the Court understood equity to permit broad relief intended to benefit parties and nonparties alike. That is why this Court later approved or granted universal injunctions

The majority does not identify a single case, from the founding era or otherwise, in which this Court held that federal courts may never issue universal injunctions or broad equitable relief that extends to nonparties. That is to be expected, given the historical support for such relief and its use in bills of peace and taxpayer suits.

Most critically, the majority fundamentally misunderstands the nature of equity by freezing in amber the precise remedies available at the time of the Judiciary Act. Even as it declares that "'[e]quity is flexible,'" *ante,* at 11, the majority ignores the very flexibility that historically allowed equity to secure complete justice where the rigid forms of common law proved inadequate. Indeed, "[i]n th[e] early times [of the common law] the chief juridical employment of the chancellor must have been in devising new writs, directed to the courts of common law, to give remedy in cases where none before was administered." 3 Blackstone, Commentaries on the Laws of England, at 50. Adaptability has thus always been at the equity's core. Hence why equity courts "constantly decline[d] to lay down any rule which shall limit their power and discretion as to the particular cases, in which such injunctions shall be granted, or withheld." Story, Commentaries on Equity Jurisprudence §959(a), at 227. The Judiciary Act of 1789 codified equity itself, not merely a static list of remedies.

Historical analogues are no doubt instructive and provide important guidance, but requiring an exact historical match for every equitable remedy defies equity's purpose. Equity courts understood the "wisdom" in keeping injunctive relief flexible, for it was "impossible to foresee all the exigencies of society which may require their aid and assistance to protect rights or redress wrongs." *Ibid.* Of course,

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in *Lewis*, *Pierce*, and *Barnette* without "address[ing] the propriety of universal relief." *Ante,* at 9, n. 7. See also *Lewis Publishing Co.* v. *Morgan*, 229 U. S. 288 (1913); *Pierce* v. *Society of Sisters*, 268 U. S. 510 (1925); *West Virginia Bd. of Ed.* v. *Barnette*, 319 U. S. 624 (1943).

in assessing whether a remedy falls within federal courts' equity jurisdiction under the Judiciary Act, this Court has asked "[w]hether the relief . . . was traditionally accorded by courts of equity." *Grupo Mexicano,* 527 U. S., at 319. *Grupo Mexicano*, however, does not dictate the level of generality for that historical inquiry, and general principles of equity that themselves existed at the founding militate against requiring a near exact match as the majority does. Cf. *United States* v. *Rahimi*, 602 U. S. 680, 692 (2024) ("The law must comport with the principles underlying the Second Amendment, but it need not be a 'dead ringer' or a 'historical twin' ").

Indeed, equitable relief in the United States has evolved in one respect to protect rights and redress wrongs that even the majority does not question: Plaintiffs today may obtain plaintiff-protective injunctions against Government officials that block the enforcement of unconstitutional laws, relief exemplified by *Ex parte Young*, 209 U. S. 123 (1908). That remedy, which traces back to the equity practice of mid-19th century courts, finds no analogue in the relief exercised in the English Court of Chancery, which could not enjoin the Crown or English officers. See *supra*, at 24, n. 4; see also Sohoni, 133 Harv. L. Rev., at 928, 1002–1006; see also R. Fallon, D. Meltzer, & D. Shapiro, Hart and Wechsler's The Federal Courts and the Federal System 958–959 (5th ed. 2003) (noting that, in *Young*, "the threatened conduct of the defendant would not have been an actionable wrong at common law" and that the "principle [in *Young*] has been easily absorbed in suits challenging *federal* official action"). Under the majority's rigid historical test, however, even plaintiff-protective injunctions against

patently unlawful Government action should be impermissible.[7] Such a result demonstrates the folly of treating equity as a closed system, rather than one designed to adapt to new circumstances.

The relative absence of universal injunctions against the United States before the late 20th century, moreover, reflects constitutional and procedural limitations on judicial power, not equitable ones. Brief for Legal Historians in No. 24A884 as *Amici Curiae* 13–16. Until the enactment of the Amendments to the Administrative Procedure Act in 1976, sovereign immunity barred most suits against the Federal Government. *Id.*, at 14–15 (citing G. Sisk, Litigation With the Federal Government §4.10(b), p. 339 (2016)). Officer suits against Cabinet officials before that point, moreover, could be brought only in Washington, D. C., due to limits on personal jurisdiction and venue that existed at the time. Brief for Legal Historians in No. 24A884 as *Amici Curiae* 15–16. The later emergence of universal injunctions against the United States followed the removal of those barriers and the expansion of federal actions and laws. The rise of universal injunctions therefore represents equity's essential adaptation to modern governance.

It is a "common expression . . . that Courts of Equity delight to do justice, and not by halves." Story, Commentaries on Equity Pleadings §72, at 74. The majority, however, delights to do justice by piecemeal. Its decision to strip the federal courts of the authority to issue universal injunctions of even flagrantly unlawful Government action represents a grave and unsupported diminution of the judicial power of equity. Centuries ago, Chief Justice Marshall warned that "[i]f the legislatures of the several states may, at will,

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[7] The majority's expressed support for such injunctions is thus irreconcilable with its view that equitable remedies must be very closely " 'analogous' to the relief ' "exercised by the High Court of Chancery in England at the time of the adoption of the Constitution and the enactment of the original Judiciary Act." ' " *Ante,* at 6.

annul the judgments of the courts of the United States, and destroy the rights acquired under those judgments, the constitution itself becomes a solemn mockery." *United States* v. *Peters*, 5 Cranch 115, 136 (1809). The Court should have heeded that warning today.

C

Even the majority's view of the law cannot justify issuance of emergency relief to the Government in these cases, for the majority leaves open whether these particular injunctions may pass muster under its ruling. Indeed, the lower courts issued the challenged injunctions consistent with an equitable principle that even the majority embraces: Courts may award an equitable remedy when it is "necessary to provide complete relief to the plaintiffs." *Califano* v. *Yamasaki*, 442 U. S. 682, 702 (1979). As the majority recounts, "[t]he equitable tradition has long embraced the rule that courts generally 'may administer complete relief between the parties.' " *Ante,* at 16 (quoting *Kinney-Coastal Oil Co.* v. *Kieffer*, 277 U. S. 488, 507 (1928); emphasis deleted).[8]

So too does the Court recognize that, in some cases, complete relief will require a broad remedy that necessarily benefits nonparties. See *ante,* at 17, n. 13 ("There may be other injuries for which it is all but impossible for courts to craft relief that is both complete *and* benefits only the named plaintiffs"); see also *Gill* v. *Whitford*, 585 U. S. 48, 66–67 (2018) ("[T]he only way to vindicate an individual plaintiff 's right to an equally weighted vote [is] through a wholesale 'restructuring of the geographical distribution of seats in a state legislature'"). Hence the majority's nui-

[8] That explains the majority's bottom line, in which it declares that the Government's applications are "granted, but only to the extent that the injunctions are broader than necessary to provide complete relief to each plaintiff with standing to sue." *Ante*, at 27.

sance hypothetical: If a plaintiff sues her neighbor for playing loud music at night, a court can order the neighbor to turn off the music at night, even if doing so will naturally benefit other neighbors who are not parties to the suit. See *ante,* at 16–17.

The majority need not resort to hypotheticals, however, because the very injunctions in these cases were necessary to give respondents complete relief. Indeed, each District Court found that a universal injunction was the only feasible option to redress fully respondents' injuries. See 763 F. Supp. 3d, at 746 (concluding that "[o]nly a nationwide injunction will provide complete relief to the plaintiffs" because the organizational plaintiffs have "'over 680,000 members . . . who reside in all 50 U.S. states and several U.S. territories'" and " '[h]undreds or even thousands'" of those members " 'will give birth to children in the United States over the coming weeks and months'" (alterations in original)); 765 F. Supp. 3d, at 1153 ("[A] geographically limited injunction would be ineffective, as it would not completely relieve [the plaintiff States] of the Order's financial burden(s)"); 766 F. Supp. 3d, at 288 (explaining that "injunctive relief limited to the State plaintiffs [would be] inadequate" because it would "fai[l] in providing complete relief to the State plaintiffs").

Recognizing as much, the majority retreats to the view that, even if a court "*can* award complete relief," it "*should* [not] do so" reflexively. *Ante,* at 18; see also *ibid.* ("Complete relief is not a guarantee—it is the maximum a court can provide"); *ante,* at 2 (opinion of THOMAS, J.) (suggesting courts "err insofar as they treat complete relief as a mandate"). Even so, the Court never suggests that the District Courts in these cases should not have awarded relief to the parties that completely remedied their alleged injuries. Nor could it. The majority recognizes that "in equity, 'the broader and deeper the remedy the plaintiff wants, the stronger the plaintiff's story needs to be.'" *Ante,* at 18–19.

Here, respondents paired their respective requests for complete relief with the strongest story possible: Without such relief, an executive order that violates the Constitution, federal law, Supreme Court precedent, history, and over a century of Executive Branch practice would infringe upon their constitutional rights or cause them to incur significant financial and administrative costs.

Perhaps that is why the majority leaves open the possibility that the District Courts, in these cases, could have granted at least respondent States a nationwide injunction consistent with the notion of "complete relief." The majority recognizes, correctly, that the Massachusetts District Court "decided that a universal injunction was necessary to provide the States *themselves* with complete relief." *Ante,* at 18.[9] And the majority does not dispute the basis for those decisions: "Children often move across state lines or are born outside their parents' State of residence," and "th[is] cross-border flow" would make an injunction protecting only children born in the party States "unworkable." *Ante,* 18. A narrower injunction would "require [the States] to track and verify the immigration status of the parents of every child, along with the birth State of every child for whom they provide certain federally funded benefits." *Ante*, at 18. Unrebutted record evidence bears this out and shows that the Citizenship Order would irreparably harm the States, even if it does not apply to children born within their boundaries. The Court does not contend otherwise. That should be the end of the matter.

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[9] In the majority's telling, the Washington District Court "acknowledged the state respondents' complete relief argument but primarily granted a universal injunction" based on its weighing of the equities. See *ante,* at 18, n. 14. Not so. That court carefully explained why "a geographically limited injunction would be ineffective, as it would not completely relieve [the States] of the Order's financial burden(s)." 765 F. Supp. 3d 1142, 1153–1154 (2025). A narrower injunction, it explained, would be "unworkable" and would itself likely impose new "recordkeeping and administrative burden[s]" on the States. *Id.*, at 1154.

Nevertheless, the majority suggests that the District Courts might consider, after this Court hands down its decision, whether some alternative narrower injunction would provide the States complete relief. See *ibid.* What would such an injunction look like, and would it be feasible? The Court does not say. The majority does note, but takes no position on, two narrower injunctions the Government claims would still give complete relief to the States: an order prohibiting the Government from enforcing the Citizenship Order in respondent States, including as to state residents born elsewhere; or an order directing the Government to treat children covered by the Citizenship Order as eligible for federally funded welfare benefits when those children reside in a respondent State. See *ibid.* (citing Application for Partial Stay of Injunction in No. 24A884, p. 23).

As an initial matter, the Government never raised those narrower injunctions to the District Courts, meaning it forfeited them. That is what the First Circuit expressly held, 131 F. 4th, at 43 ("declining to consider" those alternatives because they were "raised for [the] first time . . . in support of stay pending appeal of preliminary injunction"), and the majority does not dispute the point. It is true that plaintiffs seeking a preliminary injunction bear the burden of making "a clear showing that [they are] entitled to such relief." *Winter* v. *Natural Resources Defense Council, Inc.*, 555 U. S. 7, 22 (2008). The States met that burden, however: They presented what is still uncontroverted evidence that an injunction applicable only to children born within their borders would give them less than complete relief. Accordingly, it was reasonable for the District Courts to fashion the remedies that they did, for they were "not obligated to undertake the task of chiseling from the government's across-the-board [Executive Order] a different policy the government never identified, endorsed, or defended." *J. D.* v. *Azar*, 925 F. 3d 1291, 1336 (CADC 2019) (*per curiam*).

Those proffered alternatives, moreover, are unworkable

on their face. Each would require creating a two-tiered scheme in which the Government's recognition of some children's citizenship status or eligibility for federally funded benefits would change based on whether a child resides in one of respondent States at any given moment. That scheme would have to operate, somehow, without imposing an administrative burden on respondent States or disrupting their receipt of federal funds to which they are entitled. "[T]he regular movement of the American people into and out of different States . . . would make it difficult to sensibly maintain such a scattershot system." *Ante,* at 5 (opinion of KAVANAUGH, J.).

Such a system would also be incompatible with federal law. Some statutes, like those governing Medicaid and Supplemental Nutrition Assistance Program (SNAP) benefits, require States to give benefits only to applicants with a Social Security number and to use those numbers for certain administrative purposes. See, *e.g.*, 7 U. S. C. §2025(e); 42 U. S. C. §1320b–7(a)(1). States could not comply with those laws under the Government's alternative injunctions because children covered by the Citizenship Order in nonparty States would still be treated as noncitizens at birth. Thus, when some of those children later move to one of respondent States, they would lack Social Security numbers. No matter how it is done, discarding the nationwide status quo of birthright citizenship would result in chaos.

What is more, the principle of complete relief does not require courts to award only the absolute narrowest injunction possible. To conclude otherwise would eviscerate the "discretion and judgment" that is integral to the crafting of injunctive relief. *International Refugee Assistance Project*, 582 U. S., at 579. Indeed, equitable relief "[t]raditionally . . . has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs." *Brown* v. *Board of Education*, 349 U. S. 294, 300 (1955) (footnote omitted). That is

why the court in the majority's nuisance hypothetical can "order the defendant to turn her music down," or to turn it "off," even though the latter is technically more burdensome on the defendant than necessary to give the plaintiff complete relief. *Ante,* at 16.

Accordingly, the District Courts appropriately determined that the "only one feasible option" that would give complete relief to the States was a universal injunction. See *ibid.* Clearly, the majority is asking the lower courts themselves to explain what is patently obvious about the Government's proposed injunctions and any others that can be imagined.

Inexplicably, however, the Court declares that, for the associational and individual respondents, injunctions enjoining the Government from enforcing the Citizenship Order against them (and only them) would have sufficed. See *ante,* at 17–18. In fashioning equitable relief, however, courts must take into account "'what is workable.' " *North Carolina* v. *Covington*, 581 U. S. 486, 488 (2017) (*per curiam*). Just like the injunction that the majority blesses in the context of its nuisance-suit hypothetical, which will bestow a peaceful night upon the plaintiff 's neighbors even when the plaintiff is not herself at home, the preliminary injunction for the associational and individual respondents reflects what is practicable. As the Maryland District Court found, "'hundreds or even thousands'" of the associational respondents' members, who reside in all 50 States, " 'will give birth to children in the United States over the coming weeks and months.'" 763 F. Supp. 3d, at 746. Theoretically, it might be possible for a court to fashion an injunction that runs to each of the thousands of expectant mothers in that group. But see *ante,* at 5 (opinion of KAVANAUGH, J.) ("Often, it is not especially workable or sustainable or desirable to have a patchwork scheme . . . in which a major new federal statute or executive action . . . applies to some people or organizations in certain States or

regions, but not to others"). Yet anything less than a nationwide injunction creates a risk that the Government, inadvertently or intentionally, will enforce the Citizenship Order against some of the plaintiffs' children before this Court rules definitively on the Order's lawfulness.

A narrower injunction would necessarily task "[t]hose [responsible for] determining a baby's citizenship status . . . with [correctly] confirming [biological] parentage, the citizenship or immigration status of both [biological] parents, and membership in specific organizations." Opposition to Application for Partial Stay of Injunction in No. 24A884, p. 24. That, in turn, would "impose an enormous burden on expecting parents, membership organizations, government employees at all levels, and hospital staff," increasing the risk of mistake. *Ibid.* The risk of noncompliance is also particularly stark here, where the challenged action itself reflects an utter disregard for settled precedent, and given the Government's repeated insistence that it need not provide notice to individuals before their sudden deportations. See, *e.g.*, *A. A. R. P.* v. *Trump*, 605 U. S. ___, ___ (2025) (*per curiam*) (slip op., at 2); *Department of Homeland Security* v. *D. V. D.*, 606 U. S. ___, ___ (2025) (SOTOMAYOR, J., dissenting) (slip op., at 15). The majority does not identify a narrower alternative that is both practical and mitigates that risk.

At the very least, there is no reason to think that the District Court abused its discretion in deciding that only a nationwide injunction could protect the plaintiffs' fundamental rights. See *Ashcroft*, 542 U. S., at 664 (setting forth the standard of review). "Crafting a preliminary injunction," after all, "is an exercise of discretion and judgment, often dependent as much on the equities of a given case as the substance of the legal issues it presents." *International Refugee Assistance Project*, 582 U. S., at 579. Applying deferential abuse-of-discretion review, the Fourth Circuit emphasized that the "[t]he district court . . . carefully

explained why an injunction limited to the parties—including organizations with hundreds of thousands of members nationwide—would be unworkable in practice and thus fail to provide complete relie[f] to the plaintiffs." 2025 WL 654902, *1. The majority gives no justification for deeming the District Court's reasoned assessment an abuse of discretion.

D

The equities and public interest weigh decisively against the Government. For all of the reasons discussed, the Citizenship Order is patently unconstitutional. To allow the Government to enforce it against even one newborn child is an assault on our constitutional order and antithetical to equity and public interest. Cf. *Salazar* v. *Buono*, 559 U. S. 700, 714–715 (2010) (plurality opinion) ("'[A] court must never ignore . . . circumstances underlying [equitable relief] lest the decree be turned into an "instrument of wrong"'"). Meanwhile, newborns subject to the Citizenship Order will face the gravest harms imaginable. If the Order does in fact go into effect without further intervention by the District Courts, children will lose, at least for the time being, "a most precious right," *Kennedy* v. *Mendoza-Martinez*, 372 U. S. 144, 159 (1963), and "cherished status" that "carries with it the privilege of full participation in the affairs of our society," *Knauer* v. *United States*, 328 U. S. 654, 658 (1946). Affected children also risk losing the chance to participate in American society altogether, unless their parents have sufficient resources to file individual suits or successfully challenge the Citizenship Order in removal proceedings. Indeed, the Order risks the "creation of a substantial 'shadow population' " for covered children born in the United States who remain here. *Plyler*, 457 U. S., at 218. Without Social Security numbers and other documentation, these children will be denied critical public services, like SNAP and Medicaid, and lose the ability to engage fully in

civic life by being born in States that have not filed a lawsuit. Worse yet, the Order threatens to render American-born children stateless, a status "deplored in the international community" for causing "the total destruction of the individual's status in organized society." *Trop* v. *Dulles*, 356 U. S. 86, 101–102 (1958) (plurality opinion). That threat hangs like a guillotine over this litigation.

The Order will cause chaos for the families of all affected children too, as expecting parents scramble to understand whether the Order will apply to them and what ramifications it will have. If allowed to take effect, the Order may even wrench newborns from the arms of parents lawfully in the United States, for it purports to strip citizenship from the children of parents legally present on a temporary basis. See 90 Fed. Reg. 8449. Those newborns could face deportation, even as their parents remain lawfully in the country. In light of all these consequences, there can be no serious question over where the equities lie in these cases.

IV

The Court's decision is nothing less than an open invitation for the Government to bypass the Constitution. The Executive Branch can now enforce policies that flout settled law and violate countless individuals' constitutional rights, and the federal courts will be hamstrung to stop its actions fully. Until the day that every affected person manages to become party to a lawsuit and secures for himself injunctive relief, the Government may act lawlessly indefinitely.

Not even a decision from this Court would necessarily bind the Government to stop, completely and permanently, its commission of unquestionably unconstitutional conduct. The majority interprets the Judiciary Act, which defines the equity jurisdiction for all federal courts, this Court included, as prohibiting the issuance of universal injunctions (unless necessary for complete relief). What, besides equity, enables this Court to order the Government to cease

completely the enforcement of illegal policies? The majority does not say. So even if this Court later rules that the Citizenship Order is unlawful, we may nevertheless lack the power to enjoin enforcement as to anyone not formally a party before the Court. In a case where the Government is acting in open defiance of the Constitution, federal law, and this Court's holdings, it is naive to believe the Government will treat this Court's opinions on those policies as "*de facto*" universal injunctions absent an express order directing total nonenforcement. *Ante*, at 6 (opinion of KAVANAUGH, J.).

Indeed, at oral argument, the Government refused to commit to obeying any court order issued by a Federal Court of Appeals holding the Citizenship Order unlawful (except with respect to the plaintiffs in the suit), even within the relevant Circuit. Tr. of Oral Arg. 61–63. To the extent the Government cannot commit to compliance with Court of Appeals decisions in those Circuits, it offers no principled reason why it would treat the opinions of this Court any differently nationwide. Thus, by stripping even itself of the ability to issue universal injunctions, the Court diminishes its role as "the ultimate decider of the interim [and permanent] legal status of major new federal statutes and executive actions." *Ante*, at 3 (opinion of KAVANAUGH, J.).

There is a serious question, moreover, whether this Court will ever get the chance to rule on the constitutionality of a policy like the Citizenship Order. Contra, *ante*, at 6 (opinion of KAVANAUGH, J.) ("[T]he losing parties in the courts of appeals will regularly come to this Court in matters involving major new federal statutes and executive actions"). In the ordinary course, parties who prevail in the lower courts generally cannot seek review from this Court, likely leaving it up to the Government's discretion whether a petition will

be filed here.[10] These cases prove the point: Every court to consider the Citizenship Order's merits has found that it is unconstitutional in preliminary rulings. Because respondents prevailed on the merits and received universal injunctions, they have no reason to file an appeal. The Government has no incentive to file a petition here either, because the outcome of such an appeal would be preordained. The Government recognizes as much, which is why its emergency applications challenged only the scope of the preliminary injunctions.

Even accepting that this Court will get the opportunity to "ac[t] as the ultimate decider" of patently unlawful policies, *ante,* at 3 (opinion of KAVANAUGH, J.), and that the Executive Branch will treat this Court's opinions as *de facto* universal injunctions,[11] it is still necessary for the lower courts to have the equitable authority to issue universal injunctions, too. As JUSTICE KAVANAUGH notes, it can take, at a minimum, "*weeks*" for an application concerning a major

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[10] On rare occasion, this Court has permitted a party who prevailed in the lower courts nonetheless to obtain this Court's review of a legal question. See, *e.g.*, *Camreta* v. *Greene*, 563 U. S. 692, 698 (2011) (allowing a government official who prevailed on grounds of qualified immunity to challenge an underlying adverse constitutional ruling). Those exceptions have no relevance here, however, because there is no adverse determination for respondents to challenge.

[11] The majority insists that the constitutionality of the Citizenship Order will come before this Court eventually and that, when it does, the Government will obey this Court's resulting opinion with respect to all newborn children. *Ante,* at 25, n. 18. Why? The majority is sure that the Government will honor its oral-argument promises to " 'seek cert'" when it " 'lose[s] one of ' " its pending appeals and to "respect both the judgments and opinions of this Court." *Ibid.* (quoting Tr. of Oral Arg. 50). The majority's certainty that the Government will keep its word is nothing short of a leap of faith, given that the Government has adopted a plainly unconstitutional policy in defiance of this Court's precedent and then gamed the system to stymie this Court's consideration of the policy's merits. In any event, the Government's promise is cold comfort to the many children whose parents do not file a lawsuit and whose citizenship status remains in flux pending this Court's review.

new policy to reach this Court. *Ibid.* In the interim, the Government may feel free to execute illegal policies against nonparties and cause immeasurable harm that this Court may never be able to remedy. Indeed, in these cases, there is a serious risk the Government will seek to deport newborns whose parents have not filed suit if all the injunctions are narrowed on remand. That unconscionable result only underscores why it is necessary, in some cases, for lower courts to issue universal injunctions.

Fortunately, in the rubble of its assault on equity jurisdiction, the majority leaves untouched one important tool to provide broad relief to individuals subject to lawless Government conduct: Rule 23(b)(2) class actions for injunctive relief. That mechanism may provide some relief, but it is not a perfect substitute for a universal injunction. First, a named plaintiff must incur the higher cost of pursuing class relief, which will involve, at a minimum, overcoming the hurdle of class certification. "'[D]emonstrating th[e] prerequisites'" of numerosity, commonality and typicality and the adequacy of the named plaintiff to represent the class " 'is difficult and time consuming and has been getting harder as a result of recent court decisions and federal legislation.' " *Chicago* v. *Barr*, 961 F. 3d 882, 917 (CA7 2020) (quoting A. Frost, In Defense of Nationwide Injunctions, 93 N. Y. U. L. Rev. 1065, 1096 (2018); alterations in original). " 'Courts have heightened the evidentiary standard for class certification' " as well, " 'requiring hearings and sometimes significant amounts of evidence on the merits of the class before certifying the class.' " 961 F. 3d, at 917. In recent years, moreover, "'courts have started to deny class certification if they think there has been a flaw in class definition,' " sometimes "'without first allowing the plaintiffs to amend that definition in response to the court's concerns.' " *Ibid.* What is more, "'defendants can seek interlocutory review of a court's decision to certify a class, adding further delay and expense to the certification process.'" *Ibid.*

Hence why some " 'describ[e] the class certification process as a "drawn-out procedural bog," which comes with significant expense and delay for the would be class member.' " *Ibid.* Indeed, at oral argument, the Government refused to concede that a class could be certified to challenge the Citizenship Order and promised to invoke Rule 23's barriers to stop it. See Tr. of Oral Arg. 31–32.

Nevertheless, the parents of children covered by the Citizenship Order would be well advised to file promptly class-action suits and to request temporary injunctive relief for the putative class pending class certification. See *A. A. R. P.*, 605 U. S., at ___ (slip op., at 7); *Califano*, 442 U. S., at 701–703; see also *ante,* at 1–2 (opinion of KAVANAUGH, J.) (recognizing that lower courts, in some circumstances, can "award preliminary classwide relief that may . . . be statewide, regionwide, or even nationwide"). For suits challenging policies as blatantly unlawful and harmful as the Citizenship Order, moreover, lower courts would be wise to act swiftly on such requests for relief and to adjudicate the cases as quickly as they can so as to enable this Court's prompt review.

* * *

The rule of law is not a given in this Nation, nor any other. It is a precept of our democracy that will endure only if those brave enough in every branch fight for its survival. Today, the Court abdicates its vital role in that effort. With the stroke of a pen, the President has made a "solemn mockery" of our Constitution. *Peters*, 5 Cranch, at 136. Rather than stand firm, the Court gives way. Because such complicity should know no place in our system of law, I dissent.

SUPREME COURT OF THE UNITED STATES

No. 24A884

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL. *v.* CASA, INC., ET AL.

ON APPLICATION FOR PARTIAL STAY

No. 24A885

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL. *v.* WASHINGTON, ET AL.

ON APPLICATION FOR PARTIAL STAY

No. 24A886

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL. *v.* NEW JERSEY, ET AL.

ON APPLICATION FOR PARTIAL STAY

[June 27, 2025]

JUSTICE JACKSON, dissenting.

I agree with every word of JUSTICE SOTOMAYOR's dissent. I write separately to emphasize a key conceptual point: The Court's decision to permit the Executive to violate the Constitution with respect to anyone who has not yet sued is an existential threat to the rule of law.

It is important to recognize that the Executive's bid to vanquish so-called "universal injunctions" is, at bottom, a request for this Court's permission to engage in unlawful behavior. When the Government says "do not allow the lower courts to enjoin executive action universally as a remedy for unconstitutional conduct," what it is actually saying

is that the Executive wants to continue doing something that a court has determined violates the Constitution—please allow this. That is some solicitation. With its ruling today, the majority largely grants the Government's wish. But, in my view, if this country is going to persist as a Nation of laws and not men, the Judiciary has no choice but to deny it.

Stated simply, what it means to have a system of government that is bounded by law is that everyone is constrained by the law, no exceptions. And for that to actually happen, courts must have the power to order everyone (including the Executive) to follow the law—full stop. To conclude otherwise is to endorse the creation of a zone of lawlessness within which the Executive has the prerogative to take or leave the law as it wishes, and where individuals who would otherwise be entitled to the law's protection become subject to the Executive's whims instead.

The majority cannot deny that our Constitution was designed to split the powers of a monarch between the governing branches to protect the People. Nor is it debatable that the role of the Judiciary in our constitutional scheme is to ensure fidelity to law. But these core values are strangely absent from today's decision. Focusing on inapt comparisons to impotent English tribunals, the majority ignores the Judiciary's foundational duty to uphold the Constitution and laws of the United States. The majority's ruling thus not only diverges from first principles, it is also profoundly dangerous, since it gives the Executive the go-ahead to sometimes wield the kind of unchecked, arbitrary power the Founders crafted our Constitution to eradicate. The very institution our founding charter charges with the duty to ensure universal adherence to the law now requires judges to shrug and turn their backs to intermittent lawlessness. With deep disillusionment, I dissent.

I

To hear the majority tell it, this suit raises a mind-numbingly technical query: Are universal injunctions "sufficiently 'analogous' to the relief issued 'by the High Court of Chancery in England at the time of the adoption of the Constitution and the enactment of the original Judiciary Act' " to fall within the equitable authority Congress granted federal courts in the Judiciary Act of 1789? *Ante*, at 6. But that legalese is a smokescreen. It obscures a far more basic question of enormous legal and practical significance: May a federal court in the United States of America order the Executive to follow the law?

A

To ask this question is to answer it. In a constitutional Republic such as ours, a federal court has the power to order the Executive to follow the law—and it must. It is axiomatic that the Constitution of the United States and the statutes that the People's representatives have enacted govern in our system of government. Thus, everyone, from the President on down, is bound by law. By duty and nature, federal courts say what the law is (if there is a genuine dispute), and require those who are subject to the law to conform their behavior to what the law requires. This is the essence of the rule of law.

Do not take my word for it. Venerated figures in our Nation's history have repeatedly emphasized that "[t]he essence of our free Government is 'leave to live by no man's leave, underneath the law'—to be governed by those impersonal forces which we call law." *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579, 654 (1952) (R. Jackson, J., concurring). "Our Government is fashioned to fulfill this concept so far as humanly possible." *Id.*, at 654–655. Put differently, the United States of America has " 'a government of laws and not of men.' " *Cooper* v. *Aaron*, 358 U. S. 1, 23 (1958) (Frankfurter, J., concurring) (quoting *United States*

v. *Mine Workers*, 330 U. S. 258, 307 (1947) (Frankfurter, J., concurring in judgment)); see also, *e.g.*, Mass. Const., pt. 1, Art. XXX (1780), in 3 Federal and State Constitutions 1893 (F. Thorpe ed. 1909) (J. Adams); *Marbury* v. *Madison*, 1 Cranch 137, 163 (1803) (Marshall, C. J., for the Court); *United States* v. *Dickson*, 15 Pet. 141, 162 (1841) (Story, J., for the Court).

That familiar adage is more than just mere "'rhetorical flourish.' " *Cooper*, 358 U. S., at 23. It is "'the rejection in positive terms of rule by fiat, whether by the fiat of governmental or private power.'" *Ibid.* Indeed, "constitutionalism has one essential quality: it is a legal limitation on government; it is the antithesis of arbitrary rule; its opposite is despotic government, the government of will instead of law." C. McIlwain, *Constitutionalism*: Ancient and Modern 21–22 (rev. ed. 1947); see also *id.*, at 21 ("All constitutional government is by definition limited government").

Those who birthed our Nation limited the power of government to preserve freedom. As they knew all too well, "constant experience shows us that every man invested with power is apt to abuse it, and to carry his authority as far as it will go." Montesquieu, The Spirit of Laws, in 38 Great Books of the Western World 69 (T. Nugent transl., R. Hutchins ed. 1952). But the Founders reasoned that the vice of human ambition could be channeled to prevent the country from devolving into despotism—ambition could be "made to counteract ambition." The Federalist No. 51, p. 322 (C. Rossiter ed. 1961) (J. Madison). If there were, say, a Constitution that divided power across institutions "in such a manner as that each may be a check on the other," then it could be possible to establish Government by and for the People and thus stave off autocracy. *Ibid.*; see also *Myers* v. *United States*, 272 U. S. 52, 293 (1926) (Brandeis, J., dissenting) ("The doctrine of the separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power").

Through such separated institutions, power checks power. See Montesquieu, The Spirit of Laws, at 69. Our system of institutional checks thus exists for a reason: so that "the private interest of every individual may be a sentinel over the public rights." The Federalist No. 51, at 322.

B

The distribution of power between the Judiciary and the Executive is of particular importance to the operation of a society governed by law. Made up of " 'free, impartial, and independent' " judges and justices, the Judiciary checks the political branches of Government by explaining what the law is and "securing obedience" with it. *Mine Workers*, 330 U. S., at 308, 312 (opinion of Frankfurter, J.); see *Marbury*, 1 Cranch, at 177. The federal courts were thus established "not only to decide upon the controverted rights of the citizens as against each other, but also upon rights in controversy between them and the government." *United States* v. *Lee*, 106 U. S. 196, 220 (1882).

Quite unlike a rule-of-kings governing system, in a rule-of-law regime, nearly "[e]very act of government may be challenged by an appeal to law." *Cooper*, 358 U. S., at 23 (opinion of Frankfurter, J.). In this country, the Executive does not stand above or outside of the law. Consequently, when courts are called upon to adjudicate the lawfulness of the actions of the other branches of Government, the Judiciary plays "an essential part of the democratic process." *Mine Workers*, 330 U. S., at 312. Were it otherwise—were courts unable or unwilling to command the Government to follow the law—they would "sanctio[n] a tyranny" that has no place in a country committed to "well-regulated liberty and the protection of personal rights." *Lee*, 106 U. S., at 221. It is law—and " 'Law alone' "—that " 'saves a society from being rent by internecine strife or ruled by mere brute power however disguised.' " *Cooper*, 358 U. S., at 23 (quoting *Mine Workers*, 330 U. S., at 308).

The power to compel the Executive to follow the law is particularly vital where the relevant law is the Constitution. When the Executive transgresses an Act of Congress, there are mechanisms through which Congress can assert its check against the Executive unilaterally—such as, for example, asserting the power of the purse. See K. Stith, Congress' Power of the Purse, 97 Yale L. J. 1343, 1360 (1988) (describing Congress's ability to "regulat[e] executive branch activities by limitations on appropriations"). But when the Executive violates the Constitution, the only recourse is the courts. Eliminate that check, and our government ceases to be one of "limited powers." *Gregory* v. *Ashcroft*, 501 U. S. 452, 457 (1991). After all, a limit that "do[es] not confine the perso[n] on whom [it is] imposed" is no limit at all. *Marbury*, 1 Cranch, at 176.[1]

II

With that background, we can now turn to this suit and

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[1] These foundational separation-of-powers principles are, of course, the doctrinal underpinnings of the observations I make in Parts II and III, *infra*. If my point is "difficult to pin down," *ante*, at 22, that could be due to the majority's myopic initial framing—it casts today's emergency applications as being solely about the scope of judicial authority, while ignoring (or forgetting) the concomitant expansion of executive power that results when the equitable remedial power of judges is needlessly restricted. Or perhaps the culprit is the majority's threshold decision to rest its holding solely on the Judiciary Act, *ante*, at 5, n. 4, thereby facilitating its convenient sidestepping of the startling constitutional implications that follow from blanket limitations on the Judiciary's response to the Executive's lawlessness. Whatever the source of the majority's confusion, there is no question that its statutory holding restricting the traditional equitable power of federal courts to craft a suitable remedy for established (or likely) constitutional violations has significant ramifications for the separation of powers and for constitutional rights more broadly. JUSTICE SOTOMAYOR thoroughly explains why restricting judges in this manner is legally and historically unfounded. My goal is to highlight the myriad ways in which the majority's newly minted no-universal-injunctions limitation also subverts core constitutional norms and is fundamentally incompatible with the rule of law.

focus on the ways in which the majority's ruling undermines our constitutional system. JUSTICE SOTOMAYOR has laid out the relevant facts, see *ante*, at 9–13 (dissenting opinion), and I will not repeat what she has said. It suffices for my purposes to reiterate that, before these applications arrived here, three District Courts had concluded that Executive Order No. 14160—which attempts to alter the Constitution's express conferral of citizenship on all who are born in this Nation, Amdt. 14, §1—likely violates the Constitution. Those courts each thus enjoined the Executive from enforcing that order anywhere, against anyone. See 763 F. Supp. 3d 723 (Md. 2025), appeal pending, No. 25–1153 (CA4); 765 F. Supp. 3d 1142 (WD Wash. 2025), appeal pending, No. 25–807 (CA9); *Doe* v. *Trump*, 766 F. Supp. 3d 266 (Mass. 2025), appeal pending, No. 25–1170 (CA1). Three Courts of Appeals then declined to upset these injunctions during the pendency of the Government's appeals. See 2025 WL 654902 (CA4, Feb. 28, 2025); 2025 WL 553485 (CA9, Feb. 19, 2025); 131 F. 4th 27 (CA1 2025).

The majority now does what none of the lower courts that have considered Executive Order No. 14160 would do: It allows the Executive's constitutionally dubious mandate to go into effect with respect to anyone who is not already a plaintiff in one of the existing legal actions. Notably, the Court has *not* determined that any of the lower courts were *wrong* about their conclusion that the executive order likely violates the Constitution—the Executive has not asked us to rule on the lawfulness of Executive Order No. 14160. But the majority allows the Executive to implement this order (which lower courts have so far uniformly declared likely unconstitutional) nonetheless.

Given the critical role of the Judiciary in maintaining the rule of law, see Part I, *supra*, it is odd, to say the least, that the Court would grant the Executive's wish to be freed from the constraints of law by prohibiting district courts from ordering complete compliance with the Constitution. But the

majority goes there. It holds that, even assuming that Executive Order No. 14160 violates the Constitution, federal courts lack the power to prevent the Executive from continuing to implement that unconstitutional directive.

As I understand the concern, in this clash over the respective powers of two coordinate branches of Government, the majority sees a power grab—but not by a presumably lawless Executive choosing to act in a manner that flouts the plain text of the Constitution. Instead, to the majority, the power-hungry actors are . . . (wait for it) . . . the district courts. See *ante*, at 1 (admonishing district courts for daring to "asser[t] the power" to order the Executive to follow the law universally). In the majority's view, federal courts only have the power to "afford the plaintiff complete relief" in the cases brought before them; they can do nothing more. *Ante*, at 16. And the majority thinks a so-called universal injunction—that is, a court order requiring the Executive to follow the law across the board and not just with respect to the plaintiff—"grant[s] relief to nonparties." See *ante*, at 6–8. Therefore, the majority reasons, issuing such orders exceeds district courts' authority. See *ante*, at 21.

So many questions arise.[2] The majority's analysis is fully

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[2] Although I will not spend much space discussing it here, the majority's primary premise—that universal injunctions "grant relief to nonparties"—is suspect. When a court issues an injunction (universal or otherwise), it does so via an order that governs the relationship between the plaintiff and the defendant. Fed. Rule Civ. Proc. 65(d). That order provides the plaintiff with *relief*: If the plaintiff believes that the defendant has violated the court's order, she may come back to court, injunction in hand, and demand enforcement or compensation through the mechanism of civil contempt. See *Longshoremen* v. *Philadelphia Marine Trade Assn.*, 389 U. S. 64, 75 (1967) (recognizing that an "injunction" is "an equitable decree compelling obedience under the threat of contempt"). As the majority recognizes, nonparties may benefit from an injunction a court issues in a plaintiff's case. See *ante*, at 16. But that does not mean those incidental beneficiaries have received relief—"the injunction's pro-

interrogated, and countered, in JUSTICE SOTOMAYOR's dissent. My objective is to expose the core conceptual fallacy underlying the majority's reasoning, which, to me, also tends to demonstrate why, and how, today's ruling threatens the rule of law.

The pillar upon which today's ruling rests is the majority's contention that the remedial power of the federal courts is limited to granting "complete relief" to the parties. *Ante*, at 15–16. And the majority's sole basis for that prop-

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tection" (*i.e.*, the ability to seek contempt) "extends only to the suing plaintiff." *Ante*, at 17.

An injunction prohibiting the Executive from acting unlawfully operates precisely the same way. Such an injunction may benefit nonparties as a practical matter—but only the named plaintiffs have the right to return to the issuing court and seek contempt, if the Executive fails to comply. See *Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418, 444–445 (1911) ("Proceedings for civil contempt are between the original parties"); *Buckeye Coal & R. Co.* v. *Hocking Valley R. Co.*, 269 U. S. 42, 48–49 (1925) (holding that a nonparty injured by the defendant's noncompliance with an injunction could not enforce the injunction); cf. *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U. S. 723, 750 (1975) ("[A] consent decree is not enforceable directly or in collateral proceedings by those who are not parties to it even though they were intended to be benefited by it"). So, the majority's concern that universal injunctions inappropriately grant "relief" to nonparties is incorrect. Nonparties may *benefit* from an injunction, but only the plaintiff gets *relief*.

Federal Rule of Civil Procedure 71 is not to the contrary. Contra, *ante*, at 15, n. 11. At most, that rule and the cases the majority cites suggest that, in certain narrow circumstances, a nonparty for whose benefit an injunction was issued may be able to go to the issuing court and seek contempt. But "the precise contours of Rule 71 . . . remain unclear," *Beckett* v. *Air Line Pilots Assn.*, 995 F. 2d 280, 287–288 (CADC 1993), and courts have largely recognized that, to the extent nonparty enforcement of an injunction is available, the nonparty must stand in a close relationship to the plaintiff or have been specifically named in the injunction. See *United States* v. *American Soc. of Composers, Authors, and Publishers*, 341 F. 2d 1003, 1008 (CA2 1965) (nonparty could not enforce injunction where it was "not . . . named in the judgment" even though it was "indirectly or economically benefited by the decree").

osition is the practice of the High Court of Chancery in England. *Ante*, at 6–7. But this cramped characterization of the Judiciary's function is highly questionable when it comes to suits against the Executive. That is, even if the majority is correct that courts in England at the time of the founding were so limited—and I have my doubts, see *ante*, at 18–20 (SOTOMAYOR, J., dissenting)—why would courts in *our* constitutional system be limited *in the same way*?

The Founders of the United States of America squarely rejected a governing system in which the King ruled all, and all others, including the courts, were his subordinates. In our Constitution-centered system, the People are the rulers and we have the rule of law. So, it makes little sense to look to the relationship between English courts and the King for guidance on the power of our Nation's Judiciary vis-à-vis its Executive. See The Federalist No. 69, at 416 (A. Hamilton) (explaining how the President differs from the King, including because "[t]he person of the King of Great Britain is sacred and inviolable; there is no constitutional tribunal to which he is amenable"). Indeed, it is precisely because the law constrains the Government in our system that the Judiciary's assignment is so broad, per the Constitution. Federal courts entertain suits against the Government claiming constitutional violations. Thus, the function of the courts—both in theory and in practice—necessarily includes announcing what the law requires in such suits for the benefit of all who are protected by the Constitution, not merely doling out relief to injured private parties.

Put differently, the majority views the Judiciary's power through an aperture that is much too small, leading it to think that the *only* function of our courts is to provide "complete relief" to private parties. Sure, federal courts do that, and they do it well. But they *also* diligently maintain the rule of law itself. When it comes to upholding the law, federal courts ensure that all comers—*i.e.*, everyone to whom

the law applies and over whom the court has personal jurisdiction (including and perhaps especially the Executive)—know what the law is and, most important, follow it.[3]

III

Still, upon reading the Court's opinion, the majority's foundational mistake in mischaracterizing the true scope and nature of a federal court's power might seem only marginally impactful. Indeed, one might wonder: Why all the fuss? After all, the majority recognizes that district courts can still issue universal injunctions in some circumstances. See *ante*, at 16–18. It even acknowledges that the lower

[3] No one is saying that the reasoning of a district court's opinion, on its own, "has the legal force of a judgment," *ante*, at 22; of course it does not. The real issue today's applications raise is whether district-court opinions are entitled to respect while litigation over the lawfulness of the defendant's conduct is ongoing. As I have explained, the majority's key move is to start by assuming that the remedial power of federal courts is quite narrow (*i.e.*, it is only appropriately exercised to grant "complete relief" to the parties). *Ante*, at 5–11, 16. The majority forgets (or ignores) that federal courts also make pronouncements of law and issue orders compelling compliance if violations are identified. Then, having zeroed in on solely the courts' plaintiff-specific-remedies function, the majority unsurprisingly insists that a district court cannot respond to the Executive's decision to violate the law universally by issuing an order compelling universal cessation of the Executive's unlawful behavior. This kind of broad injunction is merely one tool in a judge's kit of remedial options—one that is directly responsive to the court's duty to uphold the law and the Executive's decision to consciously violate it—and it is no more or less binding than any of the district court's other determinations. So, rather than disdainfully securing permission to disregard the district court's opinion and continue engaging in unlawful conduct vis-à-vis anyone who is not the plaintiff, an enjoined Executive that believes the district court was wrong to conclude that its behavior is unlawful has a rule-of-law-affirming response at the ready: It can seek expedited review of the merits on appeal. District courts themselves also have the flexibility to stay their injunctions pending appeal, if that is requested and the circumstances demand it. But rather than permit lower courts to adapt their remedies to the particulars of a given case, the majority today ties judges' hands, requiring them to acquiesce to executive lawlessness in every situation.

courts may reimpose the same universal injunctions at issue in *these* cases, if the courts find on remand that doing so is necessary to provide complete relief to the named plaintiffs. See *ante*, at 19. From the standpoint of outcomes, that's all welcome news. But, as I explain below, from the perspective of constitutional theory and actual practice, disaster looms.

What I mean by this is that our rights-based legal system can only function properly if the Executive, and everyone else, is *always* bound by law. Today's decision is a seismic shock to that foundational norm. Allowing the Executive to violate the law at its prerogative with respect to anyone who has not yet sued carves out a huge exception—a gash in the basic tenets of our founding charter that could turn out to be a mortal wound. What is more, to me, requiring courts themselves to provide the dagger (by giving their *imprimatur* to the Executive Branch's intermittent lawlessness) makes a mockery of the Judiciary's solemn duty to safeguard the rule of law.

A

Do remember: The Executive has not asked this Court to determine whether Executive Order No. 14160 complies with the Constitution. Rather, it has come to us seeking the right to continue enforcing that order *regardless—i.e.*, even though six courts have now said the order is likely unconstitutional. What the Executive wants, in effect, is for this Court to bless and facilitate its desire to operate in two different zones moving forward: one in which it is required to follow the law (because a particular plaintiff has secured a personal injunction prohibiting its unlawful conduct), and another in which it can choose to violate the law with respect to certain people (those who have yet to sue).

In the first zone, law reigns. For the named plaintiffs in the suits before us, for example, the lower courts' determi-

nation that Executive Order No. 14160 is likely unconstitutional and cannot be implemented has teeth. Per the courts' orders, the Executive is prohibited from denying citizenship to the offspring of the named plaintiffs. See *ante*, at 26 (leaving the injunctions in place to the extent "necessary to provide complete relief to each plaintiff with standing to sue"). Within this zone, the courts' rule of decision—that Executive Order No. 14160 is likely unconstitutional—applies.

But with its ruling today, the majority endorses the creation of a second zone—one in which that rule of decision has no effect. In this zone, which is populated by those who lack the wherewithal or ability to go to court, all bets are off. There is no court-issued mandate requiring the Executive to honor birthright citizenship in compliance with the Constitution, so the people within this zone are left to the prerogatives of the Executive as to whether their constitutional rights will be respected. It does not matter what six federal courts have said about Executive Order No. 14160; those courts are powerless to make the Executive stop enforcing that order altogether. In effect, then, that powerlessness creates a void that renders the Constitution's constraints irrelevant to the Executive's actions. Of course, the Executive *might* choose to follow the law in this zone as well—but that is left to its discretion. And the Solicitor General has now confirmed that, in the absence of a personal injunction secured by a particular plaintiff, this Executive's view is that compliance with lower court rulings on matters of constitutional significance is optional.[4]

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[4] The Solicitor General said that quiet part out loud by baldly asserting that the Executive reserves the right to defy Circuit precedent. Tr. of Oral Arg. 33–34, 60–61. Although he further suggested that the administration would abide by precedent from *this* Court in future similar cases, *id.*, at 35, 63, even that seems to be a matter of prerogative, as there is no inherent limit to the limited-scope-of-authority logic that underlies today's holding, see *ante*, at 41 (SOTOMAYOR, J., dissenting). The

I am not the first to observe that a legal system that operates on two different tracks (one of which grants to the Executive the prerogative to disregard the law) is anathema to the rule of law.[5] Thus, the law-free zone that results from this Court's near elimination of universal injunctions is not an unfamiliar archetype. Also eerily echoing history's horrors is the fact that today's prerogative zone is unlikely to impact the public in a randomly distributed manner. Those in the good graces of the Executive have nothing to fear; the new prerogative that the Executive has to act unlawfully will not be exercised with respect to *them*. Those who accede to the Executive's demands, too, will be in the clear. The wealthy and the well connected will have little difficulty securing legal representation, going to court, and obtaining injunctive relief in their own name if the Executive violates their rights.

Consequently, the zone of lawlessness the majority has now authorized will disproportionately impact the poor, the

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Executive's less-than-sterling record of compliance with Supreme Court rulings to date casts further doubt on this compliance claim; as JUSTICE SOTOMAYOR has explained, the Executive Order at issue here seems to squarely violate at least one—and perhaps five—of our bedrock precedents. See *ante*, at 7–9 (dissenting opinion).

[5] See E. Fraenkel, The Dual State, pp. xiii, 3, 71 (1941) (describing the way in which the creation of a "Prerogative State" where the Executive "exercises unlimited arbitrariness . . . unchecked by any legal guarantees" is incompatible with the rule of law); see also J. Locke, Second Treatise of Civil Government 13 (J. Gough ed. 1948) ("[F]reedom of men under government is to have a standing rule to live by, common to every one of that society . . . and not to be subject to the . . . arbitrary will of another man"); The Federalist No. 26, p. 169 (C. Rossiter ed. 1961) (A. Hamilton) (contrasting the monarch's "prerogative" with the emergence of "liberty"); *Myers* v. *United States*, 272 U. S. 52, 295 (1926) (Brandeis, J., dissenting) ("[P]rotection of the individual . . . from the arbitrary or capricious exercise of power [is] an essential of free government"); *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579, 641 (1952) (R. Jackson, J., concurring) (observing that our Constitution—which embodies the rule of law—does not grant to the Executive the "prerogative exercised by George III").

uneducated, and the unpopular—*i.e.*, those who may not have the wherewithal to lawyer up, and will all too often find themselves beholden to the Executive's whims. This is yet another crack in the foundation of the rule of law, which requires "equality and justice in its application." *Papachristou* v. *Jacksonville*, 405 U. S. 156, 171 (1972). In the end, though, everyone will be affected, because it is law's evenhanded application—"to minorities as well as majorities, to the poor as well as the rich"—that "holds society together." *Ibid.*

The majority "skips over" these consequences. *Ante*, at 23. No one denies that the power of federal courts is limited—both by the Constitution and by Congress. But the majority seems to forget (or ignores) that the Constitution and Congress also limit the power of the Executive. In addition, it is indisputable that the Executive's power to leverage physical force in a manner that directly threatens to deprive people of life, liberty, or property creates uniquely harmful risks when unconstrained by law. But the majority today roots its holding in a purported statutory limitation, not a constitutional one. *Ante*, at 5, n. 4. And, as I have explained, our Constitution gives federal courts the authority to order the Executive to stop acting unlawfully. See Part I, *supra*. To the extent Congress has attempted to strip federal courts of that power via the Judiciary Act (and, to be clear, I do not think it has, for the reasons JUSTICE SOTOMAYOR discusses, see *ante*, at 23–31), it is powerless to do so.

The bottom line is this: If courts do not have the authority to require the Executive to adhere to law universally, a dual-track system develops in which courts are ousted as guardians in some situations and compliance with law sometimes becomes a matter of executive prerogative. But "[t]here can be no free society without law administered through an independent judiciary." *Mine Workers*, 330 U. S., at 312 (opinion of Frankfurter, J.). "If one man"—

even a very important man, and even a democratically elected man—"can be allowed to determine for himself what is law, every man can. That means first chaos, then tyranny." *Ibid.*

B

This leads me to another potentially destructive aspect of today's decision—the Court's dismissive treatment of the solemn duties and responsibilities of the lower courts. Sworn judicial officers must now put on blinders and take a see-no-evil stance with respect to harmful executive conduct, even though those same officials have already announced that such conduct is likely unconstitutional. Yes, certain named plaintiffs have brought particular lawsuits seeking protection of their legal rights. But their claim is that Executive Order No. 14160 violates the Constitution. If the court agrees with them, why on Earth must it permit that unconstitutional government action to take effect at all?

I have already explained why the majority's answer—because the court is powerless to do anything but give "complete relief " to those parties—is wrong in terms of the actual scope of federal courts' authority. See Part I, *supra.* I now observe that this response also erroneously suggests that a court does something wrongful when it imposes a universal injunction in a single plaintiff 's lawsuit—akin to giving a windfall to those who do not deserve the law's protection because *they* have not sued. *Ante*, at 8–9, 12–15. This way of conceptualizing universal injunctions mistakes that remedy for the unearned spoils of particular adversarial engagements, rather than a necessary tool employed to defend the Constitution by reinforcing pre-existing rights.

Here is what I mean. Our Constitution indisputably con-

fers individual rights that operate as unequivocal protections against government action.[6] Thus, a constrained Executive—*i.e.*, one who is bound by the Constitution not to violate people's rights—is a public benefit, guaranteed to all from the start, without regard to the nature or existence of any particular enforcement action.[7] Properly understood, then, when the Executive violates those pre-existing rights in a nonparticularized manner, a universal injunction merely restores what the People were always owed; that remedy does *not* improperly distribute an unearned benefit to those who did not have the temerity to secure it for themselves by filing a lawsuit.

Or consider it the other way: When a court is prevented from enjoining the Executive universally after the Executive establishes a universal practice of stripping people's constitutional rights, anyone who is entitled to the Constitution's protection but will instead be subjected to the Executive's whims is improperly divested of their inheritance. The Constitution is flipped on its head, for its promises are essentially nullified.[8] So, rather than having a governing

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[6] See, *e.g.*, Amdt. 1 (prohibiting the government from preventing the "free exercise" of religion or "abridging the freedom of speech"); Amdt. 2 (prohibiting the government from infringing on the right "to keep and bear Arms"); Amdt. 4 (prohibiting the government from conducting "unreasonable searches and seizures"); Amdt. 5 (prohibiting the government from depriving persons of "life, liberty, or property, without due process of law").

[7] In this way of framing the issue, nonparties are more than mere "incidental" beneficiaries of universal injunctions that require the Executive to respect constitutional rights. See n. 2, *supra*. Rather, the very concept of constitutional rights makes the People *intended* beneficiaries of the constraints that the Constitution imposes on executive action.

[8] Again, the law binds the Executive from the outset in our constitutional scheme, for the benefit of all. See Part I, *supra*. Thus, a lawsuit is merely the vehicle that invokes the Judiciary's power to check the Executive by enforcing the law. The topsy-turvy scheme the majority creates today gets those well-established norms exactly backward: The law disappears as an initial constraint on the Executive, and apparently only

system characterized by protected rights, the default becomes an Executive that can do whatever it wants to whomever it wants, unless and until each affected individual affirmatively invokes the law's protection.

A concrete example helps to illustrate why this turnabout undermines the rule of law. Imagine an Executive who issues a blanket order that is blatantly unconstitutional—demanding, say, that any and all of its political foes be summarily and indefinitely incarcerated in a prison outside the jurisdiction of the United States, without any hearing or chance to be heard in court. Shortly after learning of this edict, one such political rival rushes into court with his lawyer, claims the Executive's order violates the Constitution, and secures an injunction that prohibits the Executive from enforcing that unconstitutional mandate. The upshot of today's decision is that, despite that rival's success in persuading a judge of the unconstitutional nature of the Executive's proclamation, the court's ruling and injunction can *only* require the Executive to shelve any no-process incarceration plan that targets *that particular individual* (the named plaintiff); the Executive can keep right on rounding up its other foes, despite the court's clear and unequivocal pronouncement that the executive order is unlawful.

The majority today says that, unless and until the other political rivals seek and secure their own personal injunctions, the Executive can carry on acting unconstitutionally with respect to each of them, as if the Constitution's due process requirement does not exist. For those who get to court in time, their right not to be indefinitely imprisoned without due process will be protected. But if they are unable to sue or get to the courthouse too late, the majority says, oh well, there is nothing to be done, despite the fact

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exists if a particular plaintiff files a particular lawsuit in a particular court, claiming his (particular) entitlement.

that their detention without due process is plainly prohibited by law.

A Martian arriving here from another planet would see these circumstances and surely wonder: "*what good is the Constitution, then*?" What, really, is this system for protecting people's rights if it amounts to *this*—placing the onus on the victims to invoke the law's protection, and rendering the very institution that has the singular function of ensuring compliance with the Constitution powerless to prevent the Government from violating it? "Those things Americans call constitutional rights seem hardly worth the paper they are written on!"

These observations are indictments, especially for a Nation that prides itself on being fair and free. But, after today, that is where we are. What the majority has done is allow the Executive to nullify the statutory and constitutional rights of the uncounseled, the underresourced, and the unwary, by prohibiting the lower courts from ordering the Executive to follow the law across the board. Moreover, officers who have sworn an oath to uphold the law are now required to allow the Executive to blatantly violate it. Federal judges pledge to support and defend the Constitution of the United States against all enemies, foreign or domestic. 5 U. S. C. §3331. They do *not* agree to permit unconstitutional behavior by the Executive (or anyone else). But the majority forgets (or ignores) this duty, eagerly imposing a limit on the power of courts that, in essence, prevents judges from doing what their oaths require.[9]

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[9] The majority highlights a number of policy concerns that some say warrant restriction of the universal-injunction remedy. *Ante*, at 20–21. In my view, those downsides pale in comparison to the consequences of forcing federal courts to acquiesce to executive lawlessness. Moreover, and in any event, the various practical problems critics have identified are largely overblown. For example, while many accuse universal injunctions of preventing percolation, the facts of this very suit demonstrate otherwise: Three different District Courts each considered the merits of Executive Order No. 14160, and appeals are now pending in

I view the demise of the notion that a federal judge can order the Executive to adhere to the Constitution—full stop—as a sad day for America. The majority's unpersuasive effort to justify this result makes it sadder still. It is the responsibility of each and every jurist to hold the line. But the Court now requires judges to look the other way after finding that the Executive is violating the law, shamefully permitting unlawful conduct to continue unabated.

Today's ruling thus surreptitiously stymies the Judiciary's core duty to protect and defend constitutional rights. It does this indirectly, by preventing lower courts from telling the Executive that it has to stop engaging in conduct that violates the Constitution. Instead, now, a court's power to prevent constitutional violations comes with an asterisk—a court can make the Executive cease its unconstitutional conduct **but* only with respect to the particular plaintiffs named in the lawsuit before them, leaving the Executive free to violate the constitutional rights of anyone and everyone else.

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three Courts of Appeals. See *supra*, at 7. Other prudential concerns are better addressed in more targeted ways, such as by changing venue rules to prevent forum or judge shopping, or by encouraging lower courts to expedite their review, thereby teeing the merits up for this Court as quickly as possible.

That is not to say that universal injunctions can or should be issued in every case; a court must always fit its remedy to the particular case before it, and those particulars may caution against issuing universal relief in certain instances. See *ante*, at 22–23 (SOTOMAYOR, J., dissenting). But the Court today for the first time ever adopts a blanket authority-diminishing rule: It declares that courts do not have the power to exercise their equitable discretion to order the Executive to completely cease acting pursuant to an unlawful directive (unless doing so is necessary to provide complete relief to a given plaintiff). And, again, this very suit illustrates why that bright line rule goes much too far. As JUSTICE SOTOMAYOR emphasizes, multiple courts have recognized that Executive Order No. 14160 is "patently unconstitutional under settled law," and those courts thus issued the relief necessary to "protect newborns from the exceptional, irreparable harm associated with losing a foundational constitutional right and its immediate benefits." *Ibid.*

* * *

Make no mistake: Today's ruling allows the Executive to deny people rights that the Founders plainly wrote into our Constitution, so long as those individuals have not found a lawyer or asked a court in a particular manner to have their rights protected. This perverse burden shifting cannot coexist with the rule of law. In essence, the Court has now shoved lower court judges out of the way in cases where executive action is challenged, and has gifted the Executive with the prerogative of sometimes disregarding the law. As a result, the Judiciary—the one institution that is solely responsible for ensuring our Republic endures as a Nation of laws—has put both our legal system, and our system of government, in grave jeopardy.

"The accretion of dangerous power does not come in a day." *Youngstown*, 343 U. S., at 594 (opinion of Frankfurter, J.). But "[i]t does come," "from the generative force of unchecked disregard of the restrictions that fence in even the most disinterested assertion of authority." *Ibid.* By needlessly granting the Government's emergency application to prohibit universal injunctions, the Court has cleared a path for the Executive to choose law-free action at this perilous moment for our Constitution—right when the Judiciary should be hunkering down to do all it can to preserve the law's constraints. I have no doubt that, if judges must allow the Executive to act unlawfully in some circumstances, as the Court concludes today, executive lawlessness will flourish, and from there, it is not difficult to predict how this all ends. Eventually, executive power will become completely uncontainable, and our beloved constitutional Republic will be no more.

Perhaps the degradation of our rule-of-law regime would happen anyway. But this Court's complicity in the creation of a culture of disdain for lower courts, their rulings, and the law (as they interpret it) will surely hasten the downfall

of our governing institutions, enabling our collective demise. At the very least, I lament that the majority is so caught up in minutiae of the Government's self-serving, finger-pointing arguments that it misses the plot. The majority forgets (or ignores) that "[w]ith all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law, and that the law be made by parliamentary deliberations." *Id.*, at 655 (opinion of R. Jackson, J.). Tragically, the majority also shuns this prescient warning: Even if "[s]uch institutions may be destined to pass away," "it is the duty of the Court to be last, not first, to give them up." *Ibid.*

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IN FOCUS

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Farm Bill Primer: Trade and Export Promotion Programs

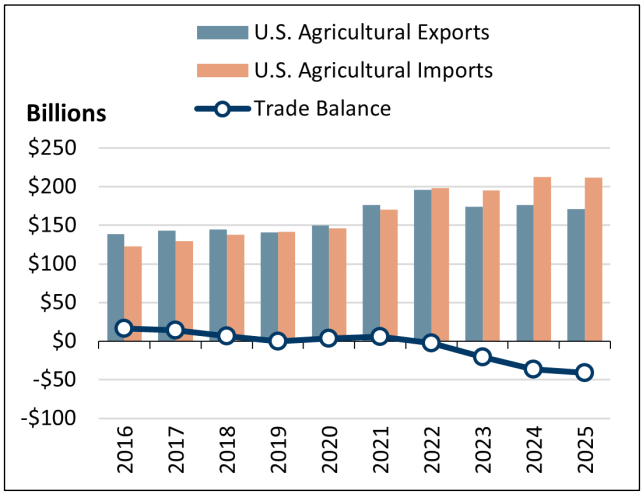
Agricultural exports are significant to farmers and the U.S. economy. With the productivity of U.S. agriculture growing faster than domestic demand, farmers and agriculturally oriented firms rely on export markets to sustain prices and revenue. The trade title of the Agriculture Improvement Act of 2018 (2018 farm bill; P.L. 115-334) authorized export market development programs and export credit guarantee programs from FY2019 to FY2023 to expand foreign markets for U.S. farmers and food manufacturers. Subsequent legislation extended the authorizations through FY2026 (P.L. 119-37). These market expansion programs derive their statutory authorities from the Agricultural Trade Act of 1978 (P.L. 95-501), as amended. The trade title of the 2018 farm bill also includes international food assistance programs and international technical assistance and exchange programs and provisions, which are not addressed in this In Focus.

Trade Situation Overview

In 2025, U.S. food and agricultural exports totaled $171 billion, and U.S. imports totaled $212 billion, resulting in a trade deficit of $41 billion (**Figure 1**) according to U.S. Department of Agriculture (USDA) data. Bulk commodities, such as corn, soybeans, wheat, cotton, and rice, are the leading U.S. farm exports. Leading consumer-oriented exports include tree nuts, dairy, meat and poultry, fruits, and vegetables. In 2025, about 50% of U.S. agricultural exports were destined for the top four U.S. export markets: Mexico, Canada, the European Union, and Japan.

Figure 1. Value of U.S. Agricultural Trade

Figure is interactive in the HTML version of this report.



Source: CRS from USDA's Global Agricultural Trade System data. Data are not adjusted for inflation. Trade balance constructed as imports subtracted from exports.

The U.S. agricultural trade surplus peaked at $40.1 billion in 2011. It has since fallen and was a trade deficit in 2019 and between 2022 and 2025. Many attribute the rise in U.S. food and agricultural imports to increasing domestic demand for imported, consumer-oriented goods such as fruits, vegetables, alcoholic beverages, beef, and coffee products.

Trade Provisions in the Farm Bill

The trade title of a farm bill generally contains reauthorizations and amendments for agricultural export programs and other trade-related provisions.

Export Market Development Programs

Export promotion programs are authorized under a single Agricultural Trade Promotion and Facilitation (ATPF) umbrella program administered by USDA. Programs are authorized to receive mandatory funding of $255 million annually through FY2026, as extended (7 U.S.C. §5623, P.L. 119-37).

- **Market Access Program (MAP)** provides cost-sharing of overseas marketing and promotional activities that help build commercial markets for U.S. agricultural exports (no less than $200 million per year).
- **Foreign Market Development (FMD) Cooperator Program** funds projects that address long-term opportunities to reduce foreign import constraints or expand export growth opportunities (no less than $34.5 million per year).
- **E. (Kika) de la Garza Emerging Markets Program** provides cost-sharing for technical assistance to support generic U.S. agricultural exports (no more than $8 million per year).
- **Technical Assistance for Specialty Crops** funds projects addressing sanitary and phytosanitary (SPS) and technical trade barriers to U.S. specialty crop exports ($9 million per year).
- **Priority Trade Fund** supports activities to access, develop, maintain, and expand markets for U.S. agricultural exports ($3.5 million per year).

The farm bill authorizes USDA to fund MAP and FMD activities in Cuba, which otherwise would be prohibited (7 U.S.C. §5623(f)(4)).

Export Credit Guarantee Programs

The farm bill authorizes $1 billion in export credit guarantees annually through FY2026, as extended, for

exports to emerging markets (7 U.S.C. §5622 note, P.L. 119-37). Additionally, $5.5 billion is available annually with no funding expiration date (7 U.S.C. §5641(b)). Export credit guarantees are carried out under two programs.

- **GSM-102 Program** provides credit guarantees to finance commercial U.S. agricultural exports mainly to developing countries.
- **Facility Guarantee Program** provides payment guarantees to improve or establish agriculture-related facilities in emerging markets.

Under these programs, the Commodity Credit Corporation (CCC) provides payment guarantees on commercial financing and assumes the risk of default on payments by the foreign purchasers on loans to facilitate U.S. exports.

Other Export-Related Provisions

The farm bill authorizes appropriations for the Biotechnology and Agricultural Trade Program with discretionary funding of $2 million through FY2026, as extended (7 U.S.C. §5679, P.L. 119-37). The program funds grants for public and private sector projects that address nontariff regulatory barriers (e.g., SPS) to U.S. agricultural exports.

Administrative Actions

For FY2024 and FY2025, USDA allocated $300 million annually for a new export promotion program called the Regional Agricultural Promotion Program (RAPP). In November 2025, USDA announced $285 million in funding availability for the America First Trade Promotion Program (AFTPP), a new export promotion program that runs through FY2028 and operates under RAPP regulations (7 C.F.R. §1489). AFTPP and RAPP are authorized and funded by the CCC Charter Act (15 U.S.C. §714c(f)).

USDA uses the same CCC authority to fund the Quality Samples Program (QSP), which promotes U.S. agricultural products. QSP is annually funded at $2.5 million.

FY2025 Budget Reconciliation Law

The FY2025 budget reconciliation law (P.L. 119-21) is to provide USDA $285 million annually from mandatory CCC funding for a supplemental agricultural trade promotion program indefinitely starting in FY2027 (7 U.S.C. §5623a).

Issues and Options

As Congress considers a next farm bill and issues related to U.S. agricultural trade promotion, it may evaluate, reauthorize, modify, or end existing programs or establish new programs and initiatives. Congress may also evaluate U.S. agricultural trade policy and objectives.

Export Promotion Programs. Critics of export promotion programs claim the programs provide federal support for activities that private firms could otherwise fund. Supporters claim the programs keep U.S. agricultural products competitive overseas, diversify market opportunities, help generate additional farm income, and increase farm and food sector jobs. Some U.S. agricultural trade and producer groups have sought increased funding for export promotion and market development programs.

Trade Policy. Some U.S. government officials and industry stakeholders have expressed interest in addressing certain policies of U.S. trading partners that may be impeding U.S. agricultural exports; others seek to address foreign export and import competition. The Office of the U.S. Trade Representative's (USTR's) annual *National Trade Estimate Report on Foreign Trade Barriers* for 2026 highlights a range of tariff and nontariff trade barriers.

Overview of H.R. 7567 Trade Provisions

In the 119th Congress, the trade title of H.R. 7567, the 2026 farm bill that Congress has begun work on, addresses some of the issues mentioned above. Several provisions in H.R. 7567 incorporate aspects of stand-alone bills on export promotion and agricultural trade policy (e.g., H.R. 1086, H.R. 2322/S. 1119, and H.R. 5620).

H.R. 7567 would nearly double mandatory CCC funding for ATPF programs beginning in FY2027 for a total of $500 million and further increase to $533 million annually for FY2028 through FY2031. Another provision would create an FMD subprogram that would address infrastructure deficiencies in foreign markets that could damage U.S. agricultural exports. The bill would repeal the export program established by P.L. 119-21 and repeal the provision prohibiting MAP from assisting the U.S. mink industry (7 U.S.C. §5623 note).

H.R. 7567 would require USDA and USTR to negotiate with foreign governments to ensure the right to use common names for U.S. agricultural and food products in foreign markets that might otherwise be prohibited due to geographical indication protections. Another provision would establish an interagency agricultural trade enforcement task force to identify agricultural trade barriers that are "vulnerable to dispute settlement" under trade agreements and to enforce trade agreement violations, with a particular focus on India's agricultural subsidies. The bill also would create an interagency working group to monitor and assess trade-related information on seasonal and perishable fruits and vegetables and coordinate on trade actions and investigations.

The trade title in H.R. 7567 also proposes reporting requirements. For example, the Government Accountability Office would be required to submit a report to Congress on policy options for USDA to support the competitiveness of U.S. seafood producers in global and domestic markets. Other provisions would require USDA along with USTR to submit a report to Congress on how potential changes to or termination of the United States-Mexico-Canada Agreement may affect U.S. agriculture and a report on the effect on U.S. beef and cattle markets due to changes to U.S. tariff-rate quotas on Argentine beef imports.

Benjamin Tsui, Analyst in Agricultural Policy

IF12155

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Next Farm Bill Primer Series

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CRS REPORT
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Introduction

This report constitutes a guide to a series of two-page "primers" examining the various programs and policies that comprise periodic omnibus legislation on farm and food policy, commonly known as "the farm bill." The President signed the 2018 farm bill, the Agriculture Improvement Act of 2018 (P.L. 115-334), into law on December 20, 2018. The 2018 farm bill generally authorizes programs for five years. Congress enacted a one-year extension in November 2023 for 2024 (P.L. 118-22, Division B, §102) and a second one-year extension in December 2024 to cover FY2025 and the 2025 crop year (P.L. 118-158, Division D). Many farm bill programs will expire in 2025 unless Congress extends their authorization through a new farm bill or other legislation.

The 2018 farm bill authorized a broad array of programs and policies across 12 titles that define much of the federal government's role in the agricultural sector. It also established the parameters for key domestic and foreign nutrition assistance programs. The 2018 farm bill authorizes a wide range of agriculture and food programs and policies that address commodity support; conservation; trade; foreign and domestic nutrition assistance; farm credit and rural development; research, extension, and education; forestry; energy; horticulture; crop insurance; and livestock-related matters, among others

There are 23 primers summarized in this report and organized under descriptive headings rather than by farm bill titles to facilitate accessibility for those who are not familiar with the 2018 farm bill. The concept behind these primers is to provide relevant information on key programs and policy initiatives authorized by the 2018 farm bill in a concise format that serves as a quick reference resource for Members of Congress and congressional staff. To this end, the primers describe many of the leading programs and policies within the 2018 farm bill. They also identify some of the higher-profile policy issues that may arise as Congress engages in the process of writing a new farm bill and highlight some policy options that Congress could consider as it undertakes this task. The titles of the primers are hyperlinked for easy access.

The primers listed herein also identify CRS subject matter analysts and provide references to related CRS reports for those who want to explore a specific topic area within the 2018 farm bill in greater depth or who seek additional analysis on an individual program or policy. For an overview of the entire 2018 farm bill, see CRS Report R45525, *The 2018 Farm Bill (P.L. 115-334): Summary and Side-by-Side Comparison*. For a history of farm bill legislation, see CRS Report R45210, *Farm Bills: Major Legislative Actions, 1965-2024*. For a discussion of the consequences of farm bill expiration, see CRS Report R47659, *Expiration of the 2018 Farm Bill and Extension for 2025*. For analysis of the farm bill markup in 2024, see CRS Report R48167, *The 2024 Farm Bill: H.R. 8467 Compared with Current Law*.

This report summarizes the farm bill primers listed below. The headings of the summaries contain hyperlinks to the full CRS In Focus products.

- *Farm Bill Primer: What Is the Farm Bill?*
- *Farm Bill Primer: Budget Dynamics*
- *Farm Bill Primer: Programs Without Baseline Beyond FY2024*
- *Farm Bill Primer: Animal Disease Management and Prevention*
- *Farm Bill Primer: Farm Safety Net Programs*
- *Farm Bill Primer: PLC and ARC Farm Support Programs*
- *Farm Bill Primer: MAL and LDP Farm Support Programs*
- *Farm Bill Primer: Support for Cotton*
- *Farm Bill Primer: Support for the Dairy Industry*

- *Farm Bill Primer: Federal Crop Insurance Program*
- *Farm Bill Primer: Disaster Assistance*
- *Farm Bill Primer: Conservation Title*
- *Farm Bill Primer: Energy Title*
- *Farm Bill Primer: Forestry Title*
- *Farm Bill Primer: Horticulture Title and Related Provisions*
- *Farm Bill Primer: Selected Hemp Industry Issues*
- *Farm Bill Primer: Beginning and Underserved Producers*
- *Farm Bill Primer: Support for Native Agricultural Producers*
- *Farm Bill Primer: SNAP and Nutrition Title Programs*
- *Farm Bill Primer: Agricultural Research and Extension*
- *Farm Bill Primer: USDA Support for Aquaculture Operations*
- *Farm Bill Primer: Rural Development Title*
- *Farm Bill Primer: Rural Broadband Provisions*
- *Farm Bill Primer: Trade and Export Promotion Programs*

Overview and Budget

CRS In Focus IF12047, *Farm Bill Primer: Background and Status*, by Jim Monke and Megan Stubbs

This CRS In Focus provides an overview of the multiyear, omnibus legislation known as the farm bill. In particular, it describes the breadth of agriculture and nutrition policy that the farm bill authorizes while providing a brief history of the evolution of the farm bill to the present day. It further reviews estimated costs of the 2018 farm bill by title at the time of enactment and an updated estimate of the budget baseline for mandatory programs for a next farm bill. The House markup of a farm bill in 2024 is discussed in the context of current issues.

CRS In Focus IF12233, *Farm Bill Primer: Budget Dynamics*, by Jim Monke

Congress may consider a new farm bill in 2025 because provisions authorized in the 2018 farm bill (P.L. 115-334) begin expiring at the end of FY2025. From a budgetary perspective, many farm bill programs are assumed to continue. This report discusses the two types of funding—mandatory spending and discretionary authorizations—and the implications of each for farm bill budgeting and program continuity. Farm bill programs have nearly $1.4 trillion of mandatory funding available for the next 10 years. The In Focus also addresses supplemental funding in recent years, which may influence policy expectations for a new farm bill.

CRS In Focus IF12115, *Farm Bill Primer: Programs Without a Budget Baseline*, by Jim Monke

In preparation for a next farm bill, Congress may consider a subset of 21 programs in the 2018 farm bill that do not have a budget baseline for funding beyond FY2024. This In Focus identifies these 21 programs, which received a total of $906 million of mandatory funding during the five years (FY2019-FY2023) of the 2018 farm bill and $177 million in FY2024 for the first one-year extension. The second one-year extension for FY2025 did not provide additional funding for these programs. Programs that receive mandatory funding do not require annual discretionary appropriations. Reauthorizing farm bill programs without baseline would have a positive score (cost) and therefore would likely need to be offset by reductions elsewhere.

Animal Health

CRS In Focus IF12934, *Farm Bill Primer: Animal Disease Management and Prevention*, by Lia Biondo

Animal agriculture accounts for about half of the total value of U.S. agricultural products. The current highly pathogenic avian influenza outbreak illustrates how animal diseases can be costly to control, disrupt domestic supply and international trade of animal products, and affect human health. USDA's Animal and Plant Health Inspection Service (APHIS) is responsible for protecting and improving animal health in the United States. Congress provides APHIS approximately $400 million annually to administer several programs to prevent and respond to animal disease. This CRS In Focus describes those APHIS programs and identifies selected issues of potential interest to Congress.

Commodity Programs and Farm Support

CRS In Focus IF12218, *Farm Bill Primer: Farm Safety Net Programs*, by Stephanie Rosch

The so-called federal "farm safety net" is a collection of programs administered by the U.S. Department of Agriculture (USDA) that provide risk protection and income support to farmers in the United States who experience natural disasters, adverse growing conditions, and/or low market prices. Farm safety net programs fall into three categories: the federal crop insurance program (FCIP), standing agricultural disaster programs, and agricultural commodity support programs. The FCIP and standing agricultural disaster programs are permanently authorized under various laws. The commodity support programs are authorized through the 2025 crop year.

CRS In Focus IF12114, *Farm Bill Primer: PLC and ARC Farm Support Programs*, by Stephanie Rosch

The Price Loss Coverage (PLC) and the Agriculture Risk Coverage (ARC) programs provide income support to producers of certain eligible commodities. The amount of support varies by commodity and from year-to-year based on program enrollments and market conditions. These programs are authorized through the 2025 crop year. The 2018 farm bill reauthorized these programs with relatively minor changes that expanded support available to producers. This CRS In Focus addresses significant features of these programs and identifies selected issues that Congress could consider as it debates a next farm bill.

CRS In Focus IF12140, *Farm Bill Primer: MAL and LDP Farm Support Programs*, by Stephanie Rosch

The Marketing Assistance Loan (MAL) program has been a significant feature of U.S. farm policy since the 1930s. The MAL program provides loans to farmers that are collateralized by eligible stored commodities and provides price support to borrowers when market prices drop below levels specified in statute. Congress has authorized the Loan Deficiency Payment (LDP) program since the 1980s. The LDP program provides payments to farmers eligible to receive price support under the MAL program. Farmers must meet eligibility requirements for these programs and cannot receive both MAL and LDP benefits for the same commodity. These programs are authorized through the 2025 crop year.

CRS In Focus IF12195, *Farm Bill Primer: Support for Cotton*, by Stephanie Rosch

The United States is the world's third-largest cotton producer and the leading cotton exporter, accounting for nearly one-third of global trade in raw cotton. Between 2000 and 2020, U.S. cotton production decreased by more than 15%, and U.S. textile mill usage decreased by more than 80%. Title I of the 2018 farm bill reauthorized commodity support for domestic producers of cotton, including support that had been previously eliminated in the Agricultural Act of 2014 (2014 farm bill; P.L. 113-79). Titles I and XII of the 2018 farm bill reauthorized support for domestic users of cotton for various periods. Certain programs are authorized through the 2025 crop year. In addition, the Secretary of Agriculture has taken measures, outside of the farm bill programs, to support cotton producers.

CRS In Focus IF12202, *Farm Bill Primer: Support for the Dairy Industry*, by Christine Whitt

The 2018 farm bill provides support to the dairy industry through a variety of programs. The Dairy Margin Coverage (DMC), enacted in the 2018 farm bill, is the primary program that provides income support to milk producers. The DMC allows milk producers to buy a guaranteed margin—calculated as the all milk price minus feed costs—for their milk production. Each year, participating dairy producers choose a margin coverage level and the share of their milk production history to cover. They receive DMC payments for months in which the margin is triggered based on USDA's calculation of the milk-feed margin. This program is authorized through December 31, 2025.

CRS In Focus IF12201, *Farm Bill Primer: Federal Crop Insurance Program*, by Stephanie Rosch

The federal crop insurance program (FCIP) helps make insurance coverage available to farmers from private sector insurers to help mitigate potential financial consequences of adverse growing and market conditions. USDA regulates the policies offered and subsidizes the premiums that farmers pay in order to encourage farmer participation in the program. Premium subsidies covered about 60% of the total premium on average for all policies sold in 2024. Since its inception in 1938, the FCIP has grown from an ancillary program with low participation to a central pillar of federal farm support, with more than 543 million acres and $192 billion in crop and livestock value insured in 2024. The FCIP is permanently authorized, but Congress has modified it in various ways in periodic farm bills.

CRS In Focus IF12101, *Farm Bill Primer: Disaster Assistance*, by Christine Whitt

A number of federal programs help agricultural producers recover from the effects of natural disasters, including federal crop insurance, the Noninsured Crop Disaster Assistance Program, livestock and fruit tree disaster programs, and emergency disaster loans. All programs are permanently authorized, and most receive "such sums as necessary" through mandatory spending authority. As such, these programs did not require reauthorization in the 2018 farm bill.

Conservation

CRS In Focus IF12024, *Farm Bill Primer: Conservation Title*, by Megan Stubbs

The conservation title of a farm bill generally contains a number of reauthorizations, amendments, and new programs that encourage farmers and ranchers to implement resource-conserving practices on private land. Starting in 1985, farm bills have addressed a broader range of topics as "conservation." Conservation programs administered by USDA can be grouped into the following categories based on similarities: working land programs, land retirement programs, easement programs, partnership programs, conservation compliance, and other overarching provisions.

Energy

CRS In Focus IF10639, *Farm Bill Primer: Energy Title*, by Kelsi Bracmort

The 2018 farm bill contains 12 titles that address agricultural and food programs and Title IX, the energy title. The 2018 farm bill was the fourth farm bill to contain an energy title. The energy title is primarily focused on support for renewable energy—particularly agriculture-related energy, energy efficiency, and bioproducts (e.g., cleaning supplies). This In Focus summarizes the 2018 farm bill energy title, including mandatory versus discretionary funding amounts, as a basis for informing discussions on a next farm bill while identifying issues that Congress could consider as part of that process.

Forestry

CRS In Focus IF12054, *Farm Bill Primer: Forestry Title*, by Anne A. Riddle

Forest management generally, as well as forest research and forestry assistance, is often considered by the agriculture committees in Congress. Although most forestry programs are permanently authorized, forestry is often addressed in the periodic farm bills to reauthorize many agriculture programs. The 2018 farm bill included a separate forestry title, and this In Focus summarizes some of the forestry provisions addressed in the 2018 farm bill and related issues that Congress may debate as it considers a next farm bill.

Horticulture, Specialty Crops, and Organic Farming

CRS In Focus IF12017, *Farm Bill Primer: Horticulture Title and Related Provisions*, by Renée Johnson

The 2018 farm bill reauthorized and expanded funding for many of the existing USDA programs supporting fruits, vegetables, and other specialty crops while providing support for many locally sourced products (not limited to crops) and hemp cultivation. Support for these sectors is not limited to the horticulture title; it is also contained within other farm bill titles, covering a range of programs administered by USDA. This In Focus provides an overview of selected 2018 farm bill provisions and issues for a next farm bill related to specialty crops, organically produced and locally sourced products, and hemp.

CRS In Focus IF12278, *Farm Bill Primer: Hemp Industry Support and Regulation*, by Renée Johnson

The 2018 farm bill legalized hemp by removing *hemp* from the definition of marijuana in the Controlled Substances Act. It also directed USDA to create a framework to regulate hemp cultivation under federal law and facilitate commercial cultivation, processing, marketing, and sale of hemp and hemp-derived products. Other 2018 farm bill provisions made hemp producers eligible for federal crop insurance and agricultural research programs. A number of hemp stakeholders are advocating for additional changes via a next farm bill, such as relaxing some USDA regulatory requirements and reducing the Drug Enforcement Administration's role in regulating hemp.

New, Beginning, Underserved, and Veteran Farmers and Ranchers

CRS In Focus IF12096, *Farm Bill Primer: Beginning and Underserved Producers*, by Jim Monke

Beginning farmers and ranchers—generally defined as having operated a farm or ranch for no more than 10 years—comprise a significant part of the U.S. agricultural sector. They contribute to rural and non-rural economies and are considered to be critical given ongoing concerns about the aging U.S. farm population, the "disappearing middle" (i.e., mid-sized farms both in terms of farm numbers and value of sales), and general trends toward increasing consolidation and fewer, larger farms. The 2018 farm bill reauthorized and expanded programs administered by USDA that support new farmers and ranchers. These programs targeted new farmers within specific farm demographic groups based on age, race, and gender, as well as socially disadvantaged (underserved) farmers and farmers who are military veterans.

CRS In Focus IF12160, *Farm Bill Primer: Support for Tribal Food and Agriculture*, by Jim Monke

In 2017, Native agricultural producers accounted for 2% of all U.S. producers. The 2018 farm bill (P.L. 115-334) expanded federal farm program support for Native agricultural producers and tribal communities. Congress further enhanced community and economic development for tribes in the Indian Community Economic Enhancement Act of 2020 (P.L. 116-261) and provided additional support for historically underserved agricultural producers, including Native producers, in the American Rescue Plan Act of 2021 (P.L. 117-2).

Nutrition Assistance

CRS In Focus IF12255, *Farm Bill Primer: SNAP and Nutrition Title Programs*, by Randy Alison Aussenberg and Kara Clifford Billings

The nutrition title of a farm bill typically reauthorizes a number of nutrition or domestic food assistance programs, including the Supplemental Nutrition Assistance Program (SNAP, formerly the Food Stamp Program). These programs were reauthorized by the 2018 farm bill and extended by P.L. 118-22. They are authorized through September 30, 2025. In a subsequent farm bill's nutrition title, policymakers might revisit 2018 debates and decisions and consider new challenges and questions, including temporary changes made during the COVID-19 pandemic.

Research, Extension, and Related Matters

CRS In Focus IF12023, *Farm Bill Primer: Agricultural Research and Extension*, by Eleni G. Bickell

The research title addresses research, extension, and education at land-grant universities and other nonfederal institutions, as well as departmental policies, programs, and research within USDA. Most of the research title programs require annual discretionary appropriations; a few programs receive mandatory spending. This In Focus provides background information and discusses selected 2018 farm bill provisions and issues for a next farm bill related to agricultural research, extension, and education, including funding.

CRS In Focus IF12275, *Farm Bill Primer: USDA Support for Aquaculture Operations*, by Eleni G. Bickell

Aquaculture facilities that grow aquatic animal and plant species in controlled or selected environments are generally eligible for the same support from USDA that is available to all U.S. farmers, ranchers, and producers. The 2018 farm bill reauthorized and expanded provisions specifically related to USDA's aquaculture research and assistance programs. Aquaculture producers are also eligible for other USDA competitive grants available to all U.S. agricultural producers. Aquaculture stakeholders have identified a number of policy recommendations in support of the industry, some of which Congress could address in a next farm bill.

Rural Development

CRS In Focus IF12038, *Farm Bill Primer: Rural Development Title*, by Lisa S. Benson

Omnibus farm bills are the major modern legislative vehicle for addressing many rural development issues. Since 1973, omnibus farm bills have included a rural development title, which has included USDA Rural Development programs focused on rural utility systems (i.e., water, waste disposal, electricity, and broadband), rural business, and rural housing. The USDA Rural Business-Cooperative Service, USDA Rural Utilities Service, and USDA Rural Housing Service administer these programs. Most USDA Rural Development programs rely on discretionary funding, which Congress authorizes in farm bills and funds through the annual appropriations process.

CRS In Focus IF12041, *Farm Bill Primer: Rural Broadband Provisions*, by Lisa S. Benson

Congress has included provisions addressing rural broadband (i.e., high-speed internet access) in the rural development title of omnibus farm bills since 2002. The 2018 farm bill amended and reauthorized many of the rural broadband programs administered by USDA. This In Focus provides background information on USDA rural broadband programs and an overview of selected rural broadband provisions in the 2018 farm bill and identifies some issues that Congress could consider as it debates a next farm bill.

Trade and Export Promotion

CRS In Focus IF12155, *Farm Bill Primer: Trade and Export Promotion Programs*, by Benjamin Tsui

Agricultural exports are significant to farmers and the U.S. economy. With the productivity of U.S. agriculture growing faster than domestic demand, farmers and agriculturally oriented firms rely on export markets to sustain prices and revenue. The trade title of the 2018 farm bill (P.L. 115-334) authorizes programs to expand foreign markets for U.S. farmers and food manufacturers through export market development programs and export credit guarantee programs. These programs are authorized through FY2025.

Author Information

Jim Monke, Coordinator
Specialist in Agricultural Policy

Megan Stubbs, Coordinator
Specialist in Agricultural Conservation and Natural Resources Policy

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Retaliatory Tariffs on U.S. Agriculture and USDA's Responses: Frequently Asked Questions

May 27, 2025

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R48548

May 27, 2025

Benjamin Tsui
Analyst in Agricultural Policy

Stephanie Rosch
Analyst in Agricultural Policy

SUMMARY

In 2025, the Trump Administration imposed several rounds of tariffs against trading partners under the under the International Emergency Economic Powers Act (IEEPA) and Section 232 of the Trade Expansion Act of 1962, commonly referred as "Section 232." The first IEEPA tariffs targeting Canada, the People's Republic of China, and Mexico were in response to what President Trump identified as the "failures" of the three countries to address issues such as drug and human trafficking and transnational crime. Subsequently, under IEEPA, the Trump Administration imposed a 10% tariff on most trading partners, imposed additional tariffs on China, and proposed country-specific "reciprocal tariffs" addressing bilateral trade deficits. The Trump Administration also expanded steel and aluminum tariffs and imposed new tariffs on automobile and automobile parts under Section 232.

In response to these U.S. tariffs, some countries have imposed or announced potential retaliatory tariffs on U.S. goods, including U.S. agricultural products. In March 2025, Canada imposed retaliatory tariffs that included U.S. agricultural goods. In March 2025, China imposed retaliatory tariffs that included U.S. agricultural goods and, in April 2025, further increased tariffs on all U.S. goods. In May 2025, China temporarily decreased its retaliatory tariffs on U.S. goods following an agreement with the United States. In April 2025, the European Union released a list of U.S. products targeted for retaliatory tariffs effective June 2025.

During the first Trump Administration, beginning in 2018, certain trading partners imposed retaliatory tariffs on U.S. agricultural products in response to tariffs imposed by the United States. In response to the retaliatory tariffs, the U.S. Department of Agriculture (USDA) used administrative authorities to provide approximately $25.7 billion in direct income support payments to farmers, for purchases for agricultural commodities, and in additional support for trade promotion activities.

This report discusses frequently asked questions about retaliatory tariffs on U.S. agriculture and USDA's response to the retaliatory tariffs since 2018. It addresses the agricultural context of recent tariff actions by the United States and subsequent retaliatory tariffs by trading partners, what retaliatory tariffs were imposed on U.S. agriculture in 2018 and 2019 and their effects on trade flows for select agricultural commodities, rationales why foreign trading partners target U.S. agricultural products for retaliation, and the agricultural provisions of the U.S.-China Phase One Agreement. The report also discusses the 2018 and 2019 USDA responses to retaliatory tariffs and the views of these responses.

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Introduction

In March 2025, Canada and the People's Republic of China (hereinafter China) imposed retaliatory tariffs on a range of U.S. exports, including agricultural products, in response to U.S. tariffs imposed in February and March 2025 under the International Emergency Economic Powers Act (IEEPA; 50 U.S.C. §§1701 et seq.).[1] The U.S. tariffs were a response to what President Trump identified as "failures" on the part of Canada, China, and Mexico to address issues such as drug and human trafficking and transnational crimes.[2] Many Members of Congress have an interest in the impact that foreign retaliatory tariffs have on the U.S. agricultural and food sectors, which rely on export markets for additional revenue and economic activity. In addition to the February and March 2025 IEEPA tariffs, the United States has taken other tariff actions that faced retaliatory or threats of retaliatory tariffs on U.S. agricultural exports.

In 2018 and 2019, during the first Trump Administration, China, the European Union (EU), Canada, Mexico, Turkey, and India responded to U.S. tariff actions with retaliatory tariffs on U.S. imports that included agricultural products. In response, the U.S. Department of Agriculture (USDA) used administrative authorities to distribute about $25.7 billion through three programs that, respectively, provided direct income support payments to farmers, purchased agricultural commodities, and supported trade promotion activities. In April 2025, Secretary of Agriculture Brooke Rollins indicated that it would take months to determine whether payments for producers are needed in response to retaliatory tariffs but that USDA is "setting up the infrastructure" to address trade damages.[3]

This report addresses some frequently asked questions (FAQs) grouped into four categories: background, trade actions in 2025, trade actions in 2018-2023, and USDA's response to retaliatory tariffs.

Background

What Are Tariffs?

Tariffs are taxes or duties levied on imported goods. Foreign retaliatory tariffs on U.S. exports make U.S. goods less competitive in foreign markets compared to goods not subject to tariffs, such as substitutable goods produced in the foreign country and goods from other suppliers. Tariffs on agricultural products are commonly applied either at an ad valorem basis (i.e., a

[1] For purposes of this report, *agricultural product* refers to the U.S. Department of Agriculture's (USDA's) definition, which follows the World Trade Organization's (WTO's) definition. The WTO's definition includes most food products but excludes those such as seafood and forestry products. For more information about U.S. tariff authorities and policies in general and the International Emergency Economic Powers Act (IEEPA), see CRS Report R48435, *Congressional and Presidential Authority to Impose Import Tariffs*; CRS In Focus IF11030, *U.S. Tariff Policy: Overview*; CRS Report R45618, *The International Emergency Economic Powers Act: Origins, Evolution, and Use*; and CRS Insight IN11129, *The International Emergency Economic Powers Act (IEEPA), the National Emergencies Act (NEA), and Tariffs: Historical Background and Key Issues*.

[2] Executive Order 14193 of February 1, 2025, "Imposing Duties to Address the Flow of Illicit Drugs Across Our Northern Border," 90 *Federal Register* 9113, February 7, 2025; Executive Order 14194 of February 1, 2025, "Imposing Duties to Address the Situation at Our Southern Border," 90 *Federal Register* 9117, February 7, 2025; and Executive Order 14195 of February 1, 2025, "Imposing Duties to Address the Synthetic Opioid Supply Chain in the People's Republic of China," 90 *Federal Register* 9121, February 7, 2025.

[3] Secretary Rollins is quoted in Marcia Brown, "'We Just Haven't Seen Anything Like This': Farmers Brace for Trump's Trade War," *Politico*, April 4, 2025; see also Andy Castillo, "USDA Says Farm Impact of New Tariffs Unknown Until Fall," *Farm Progress*, April 4, 2025.

percentage of the value of the imported goods) or at a specific basis (i.e., assessed at a fixed amount of money per unit of an imported good).

What Agricultural Products Does the United States Export and Import?

The United States is one of the top exporters of agricultural products in the world, with exports totaling $176.0 billion in 2024. Exports account for about 20% of total U.S. agricultural and food production by value.[4] The USDA Foreign Agricultural Service groups agricultural products into three broad categories:

- Bulk: raw and unprocessed commodities sold in large quantities that are mostly used as inputs (e.g., corn, wheat, cotton, soybeans)
- Intermediate: processed commodities used as inputs in the manufacturing of other products (e.g., soybean meal, ethanol, vegetable oils, essential oils, hides and skins)
- Consumer oriented: a larger collection of agricultural and food products for consumers and retailers (e.g., fruits, vegetables, meat, poultry, dairy, alcoholic beverages)

Bulk commodities are the leading U.S. farm exports. In 2024, over 60% of U.S. agricultural exports by value were to Mexico, Canada, China, the EU, and Japan.

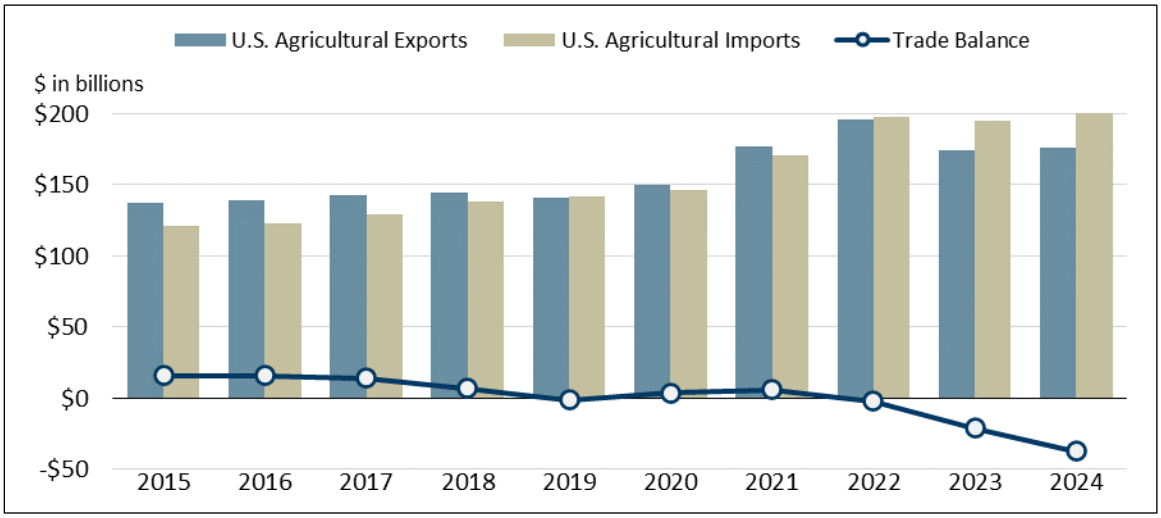
The share of U.S. production that is exported varies by year and type of agricultural product. On average, for the past decade on a quantity basis, for bulk commodities, the United States exported 15% of corn, 46% of rice, 47% of soybeans and wheat, 55% of sorghum, and 84% of cotton produced. For meat products, about 11% of beef and veal, 16% of chicken meat, and 23% of swine meat produced were exported.[5] For tree nuts, the United States exported on average nearly 70% of almonds and walnuts and 64% of pistachios produced. For fresh fruits, the United States exported on average 5% of tangerines/mandarins, 17% of apples, 19% of cherries, and 33% of table grapes produced.

In 2024, the United States imported $213.0 billion in agricultural products, which provided U.S. consumers more choice, variety, and product availability year-round as well as increased competition for certain U.S. producers. Leading imports included fruits, vegetables, vegetable oils, alcoholic beverages (e.g., distilled spirits, wine, beer), beef, and coffee. The top sources of U.S. agricultural imports were Mexico, Canada, and the EU, which accounted for 60% of total agricultural imports. Comparing the value of U.S. agricultural trade exports with imports reveals that the U.S. agricultural trade surplus peaked at $40.1 billion in 2011 and has since fallen, becoming trade deficits in 2019, 2022, 2023, and 2024. In 2024, the agricultural trade deficit was $37.0 billion. See **Figure 1** for U.S. agricultural trade trends in the past decade. See **Table 1** and **Table 2** for trade statistics for the top five U.S. agricultural export markets and top five U.S. agricultural import suppliers for the past decade.

[4] USDA, Economic Research Service (ERS), "U.S. Agricultural Trade – U.S. Agricultural Trade at a Glance," January 7, 2025, https://www.ers.usda.gov/topics/international-markets-us-trade/us-agricultural-trade/us-agricultural-trade-at-a-glance.

[5] Calculated by CRS from USDA production, supply, and distribution quantity data at USDA, Foreign Agricultural Service (FAS), "PSD Online," https://apps.fas.usda.gov/psdonline/app/index.html#/app/home.

Figure 1. Value of U.S. Agricultural Exports and Imports, 2015-2024



Source: Figure created by CRS using U.S. Census Bureau international trade data via U.S. Department of Agriculture (USDA), Foreign Agricultural Service (FAS), "Global Agricultural Trade System Online: GATS Home," https://apps.fas.usda.gov/gats/default.aspx. See Bulk, Intermediate, and Consumer-Oriented Harmonized System-10 (BICO-10) groupings.

Notes: Data are not adjusted for inflation. Trade balance is calculated as imports subtracted from exports.

Table 1. U.S. Agricultural Exports to Top Five Markets, 2015 to 2024

In Billions of Dollars (nominal)

Trading Partner	2015	2016	2017	2018	2019	2020	2021	2022	2023	2024
Mexico	17.9	18.0	18.8	19.3	19.4	18.3	25.5	28.5	28.4	30.3
Canada	22.2	21.4	21.7	22.0	21.9	22.3	25.3	28.7	28.4	28.4
China	20.4	21.7	19.6	9.2	13.9	26.4	32.8	38.1	28.8	24.7
EU-27	11.0	10.2	10.5	12.5	10.8	10.4	11.0	12.3	12.6	12.8
Japan	11.6	11.4	12.1	13.1	12.0	11.7	14.2	14.7	11.9	12.0
Rest of world	54.2	56.2	60.1	68.5	63.1	60.5	67.9	73.4	64.1	67.8
World total	**137.2**	**138.9**	**142.9**	**144.7**	**141.1**	**149.7**	**176.6**	**195.7**	**174.2**	**176.0**

Source: CRS from USDA, Global Agricultural Trade System (GATS) data (BICO-10).

Notes: Data are not just adjusted for inflation. Values may not sum to totals shown because of rounding. EU-27 = the European Union customs union and its 27 member countries.

Table 2. U.S. Agricultural Imports from Top Five Suppliers, 2015 to 2024

In Billions of Dollars (nominal)

Trading Partner	2015	2016	2017	2018	2019	2020	2021	2022	2023	2024
Mexico	22.2	24.1	25.9	27.5	30.2	32.9	38.0	43.3	45.4	48.6
Canada	22.4	22.2	22.9	23.7	24.4	25.3	31.2	37.5	40.1	41.0
EU-27	22.8	23.6	25.1	27.1	28.4	27.4	32.0	35.8	32.9	36.4
Brazil	4.0	3.8	3.9	3.9	4.1	4.0	4.7	6.2	6.2	7.9
China	4.3	4.3	4.5	4.9	3.7	3.8	4.1	4.7	4.7	5.8
Rest of world	45.4	44.6	46.9	50.8	50.8	52.7	60.6	70.6	65.6	73.2
World total	**121.1**	**122.6**	**129.2**	**138.0**	**141.6**	**146.3**	**170.6**	**198.2**	**194.8**	**213.0**

Source: CRS from USDA, GATS data (BICO-10).

Notes: Data are not just adjusted for inflation. Values may not sum to totals shown because of rounding. EU-27 = the European Union customs union and its 27 member countries.

All states export agricultural products, but a fraction of states account for the majority of farm export sales. For calendar year 2023, USDA estimated that over half of total U.S. agricultural exports based on value came from the eight leading agricultural exporting states, which were California, Iowa, Illinois, Minnesota, Nebraska, Texas, Indiana, and Missouri.[6]

Why Would Trading Partners Target U.S. Agricultural Products with Retaliatory Tariffs?

Foreign governments may target U.S. agricultural products for any of several reasons. The United States is one of the largest exporters of agricultural products, and these products represent a large target for retaliation for many trading partners. The value of agricultural products exported to U.S. trading partners that imposed retaliatory tariffs on U.S. agricultural products during the first Trump Administration was more than $76 billion in 2017.

Another reason U.S. trading partners may target U.S. agriculture is because agricultural commodities may be sourced globally from multiple suppliers. Trading partners could source agricultural imports from suppliers other than the United States. Australia, Brazil, Canada, and the EU are examples of major agricultural exporters that compete with the United States for foreign markets.

Retaliating trade partners may consider U.S. domestic politics when determining tariff targets, choosing products from specific regions or states to maximize political pressure. For example, some observers assert that bourbon whiskey was targeted in the 2018 retaliatory tariffs because it was produced in the then-Senate Majority Leader's home state of Kentucky.[7]

[6] USDA, ERS, "State Agricultural Trade Data," January 9, 2025, https://www.ers.usda.gov/data-products/state-agricultural-trade-data.

[7] Thiemo Fetzer and Carlo Schwarz, "Tariffs and Politics: Evidence from Trump's Trade Wars," *The Economic Journal*, vol. 131, no. 636 (May 2021), pp. 1717-1741; and Rob Gillie, "Canada Announces Billions in Retaliatory Tariffs Against US," Associated Press, June 30, 2018.

2025 Trade Actions

What U.S. Trade Actions Precipitated Retaliatory Tariffs in 2025?

Beginning in 2025, the United States has imposed tariffs under IEEPA and Section 232 of the Trade Expansion Act of 1962 (19 U.S.C. §1862), commonly referred as "Section 232."[8] These trade actions provoked foreign retaliatory tariffs that targeted U.S. agriculture as well as other sectors of the U.S. economy. The United States has also proposed additional trade actions under these and other statutory authorities that, if implemented, may lead to further retaliatory actions from U.S. trading partners.

International Emergency Economic Powers Act (IEEPA) Tariffs

Addressing Drug Trafficking and Illegal Immigration

On February 1, 2025, President Trump signed three executive orders imposing tariffs of 25% on imports from Canada (with a lower 10% tariff on energy resources) and Mexico, and a 10% tariff on imports from China, all beginning February 4, 2025.[9] These executive orders cited IEEPA as the underlying authority to impose tariffs. The executive orders cited the "failure" of the three governments in addressing issues such as drug trafficking and other criminal activities. On February 3, President Trump issued executive orders delaying the duties until March 4, citing steps taken by Canada and Mexico to address U.S. concerns on illegal migration and illicit drugs.[10] On March 3, President Trump increased the tariff on imports from China from 10% to 20% effective March 4, stating that China had not adequately addressed the illicit drug crisis.[11]

On March 6, President Trump issued executive orders further amending the original February 1 executive orders for Canada and Mexico by not imposing the additional 25% duties on goods that claim and qualify for preferential treatment under the U.S.-Mexico-Canada Agreement (USMCA) and lowering tariffs for potash imports to 10%.[12] Potash, the main source of potassium in

[8] For more background, see CRS Report R45618, *The International Emergency Economic Powers Act: Origins, Evolution, and Use*; CRS Report R48549, *Presidential 2025 Tariff Actions: Timeline and Status*; CRS Insight IN11129, *The International Emergency Economic Powers Act (IEEPA), the National Emergencies Act (NEA), and Tariffs: Historical Background and Key Issues*; CRS Infographic IG10012, *The International Emergency Economic Powers Act (IEEPA) and the National Emergencies Act: Key Facts*; and CRS Insight IN12519, *Expanded Section 232 Tariffs on Steel and Aluminum*. For more information about U.S.-China tariff actions, see CRS In Focus IF12990, *U.S.-China Tariff Actions Since 2018: An Overview*.

[9] Executive Order 14193 of February 1, 2025, "Imposing Duties to Address the Flow of Illicit Drugs Across Our Northern Border," 90 *Federal Register* 9113, February 7, 2025; Executive Order 14194 of February 1, 2025, "Imposing Duties to Address the Situation at Our Southern Border," 90 *Federal Register* 9117, February 7, 2025; and Executive Order 14195 of February 1, 2025, "Imposing Duties to Address the Synthetic Opioid Supply Chain in the People's Republic of China," 90 *Federal Register* 9121, February 7, 2025. For more information about U.S.-Canada relations and the IEEPA tariffs, see CRS Insight IN12533, *U.S.-Canada Relations amid Tariffs Under the International Emergency Economic Powers Act*.

[10] Executive Order 14197 of February 3, 2025, "Progress on the Situation at Our Northern Border," 90 *Federal Register* 9183, February 10, 2025; and Executive Order 14198 of February 3, 2025, "Progress on the Situation at Our Southern Border," 90 *Federal Register* 9185, February 10, 2025.

[11] Executive Order 14228 of March 3, 2025, "Further Amendment to Duties Addressing the Synthetic Opioid Supply Chain in the People's Republic of China," 90 *Federal Register* 11463, March 7, 2025.

[12] Executive Order 14231 of March 6, 2025, "Amendment to Duties to Address the Flow of Illicit Drugs Across Our Northern Border," 90 *Federal Register* 11785, March 11, 2025; and Executive Order 14232 of March 6, 2025, "Amendment to Duties to Address the Flow of Illicit Drugs Across Our Southern Border," 90 *Federal Register* 11787, March 11, 2025.

fertilizer, is a key input for U.S. farmers. The United States imports about 97% of its potash fertilizer used each year, with Canada accounting for about 85% of imports by quantity.[13] U.S. tariff rates on fertilizer are generally duty-free, including under the United States' USMCA tariff schedule.[14]

China (in February) and Canada (in March) initiated World Trade Organization (WTO) dispute consultations with the United States in response to the IEEPA tariff actions.[15] In the March 24-25, 2025, WTO Committee on Agriculture meeting, Canada questioned whether the United States had considered the negative effects of the tariffs on factors such as food security, economic growth, agricultural sector supply chains, and inflation for food prices.[16] For more information about the WTO and the Agreement on Agriculture, see the text box below.

What Is the World Trade Organization and Agreement on Agriculture?

The World Trade Organization (WTO) is an international organization that administers the rules and agreements negotiated among its members to eliminate trade barriers and govern trade. The WTO provides for a "common institutional framework" to address multilateral trade relations among WTO members and to facilitate trade agreement negotiations, resolve trade disputes, administer trade rules, monitor trade policies, and provide technical assistance. The United States was a leading force behind the WTO's establishment in 1995.

As part of the results of the multilateral negotiations that established the WTO, several agreements covering trade in goods were agreed to among negotiating members. The WTO Agreement on Agriculture's main objective is to "reform agricultural trade so that it is closer to competitive market conditions." Under the Agreement on Agriculture, national agricultural policies—including domestic farm support, agricultural export subsidies, and restrictive import controls—were placed under a multilaterally agreed-upon set of disciplines. WTO members agreed to reform their domestic agricultural support policies, increase access to imports, and reduce export subsidies. The agreement also established a Committee on Agriculture. The Committee on Agriculture oversees and monitors the implementation of the agreement and provides a forum for members to consult with each other on agricultural trade issues as well as raise and address questions related to the agreement.

Source: WTO, *The WTO Agreements Series: Agriculture*, 3rd ed. (WTO, 2016).

Note: For more background on the WTO, see CRS In Focus IF10002, *World Trade Organization*.

"Reciprocal Tariffs" Addressing Trade Deficits

On April 2, 2025, President Trump signed an executive order imposing additional tariffs of 10% on most imports from most U.S. trading partners effective April 5, 2025, and additional country-specific tariffs on 57 trading partners effective April 9, 2025.[17] The April 2 executive order also

[13] Potassium fertilizer usage data from USDA, FAS, "Global Fertilizer Dashboard," September 10, 2024, https://www.fas.usda.gov/data/visualization-global-fertilizer-trade-dashboard. Potassium fertilizer import data from USDA, FAS, Global Agricultural Trade System Online, "Foreign Agricultural Trade of the United States" product grouping.

[14] United States International Trade Commission, "Chapter 31: Fertilizers," in *Harmonized Tariff Schedule (2025)*, March 14, 2025, https://hts.usitc.gov/; and Office of the U.S. Trade Representative (USTR), "Tariff Schedule of the United States," agreement between the United States of America, the United Mexican States, and Canada, July 1, 2020.

[15] WTO, "DS633: United States—Additional Tariff Measures on Goods from China," https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds633_e.htm; and WTO, "DS634:United States—Additional Import Duties on Goods from Canada," https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds634_e.htm.

[16] WTO, "View Question & Answer," in *Agriculture Information Management System*, accessed March 17, 2025, https://agims-qna.wto.org/public/Pages/en/ViewQnA_Validated.aspx?officialID=111129&caller=https://agims-qna.wto.org/public/Pages/en/SearchResult.aspx.

[17] Executive Order 14257 of April 2, 2025, "Regulating Imports with a Reciprocal Tariff to Rectify Trade Practices That Contribute to Large and Persistent Annual United States Goods Trade Deficits," 90 *Federal Register* 15041, April 7, 2025. A list of the country-specific tariffs (inclusive of the 10% imposed on most other trading partners) can be found at https://www.whitehouse.gov/wp-content/uploads/2025/04/Annex-I.pdf.

cited IEEPA as the underlying authority to impose tariffs. The executive order declared a national emergency due to

> underlying conditions, including a lack of reciprocity in our bilateral trade relationships, disparate tariff rates and [nontariff] barriers, and U.S. trading partners' economic policies that suppress domestic wages and consumption, as indicated by large and persistent annual U.S. goods trade deficits.[18]

The April 2 executive order's additional tariffs do not apply to Canada or Mexico. If the February 1 executive orders that imposed the drug-trafficking and illegal-immigration-related IEEPA tariffs on both countries are terminated, then both countries' imports would face a 12% tariff as a result of the April 2 executive order. The April 2 executive order excludes some key agricultural inputs such as potash, peat, veterinary vaccines, and certain pesticides.[19] Tariffs on China are cumulative to previous tariffs imposed. On April 8, 2025, President Trump signed an executive order increasing the "reciprocal tariff" on China from the original 34% to 84% effective April 10 in response to China's April 4 announcement of 34% retaliatory tariffs that went into effect April 10.[20] On April 9, President Trump signed another executive order raising the "reciprocal tariffs" on China to 125% effective April 10 in response to the April 9 announcement by China that it was increasing its retaliatory tariffs from 34% to 84% effective April 10.[21] See "China's Retaliatory Tariffs" for further background.

The April 9 executive order also suspended the country-specific tariffs effective April 10 until July 9, 2025, a total of 90 days. The additional 10% tariff for most trading partners is still in effect.

The Trump Administration applied a novel methodology to calculate the tariffs imposed in accordance with the April 2 executive order. Although the April 2 executive order cites nontariff barriers, including technical barriers to trade (TBT) and "sanitary and phytosanitary [SPS] measures that unnecessarily restrict trade without furthering safety objectives," as factors contributing to the persistent U.S. trade deficit, the methodology of calculating the country-specific "reciprocal tariffs" is not based on estimates of tariff and nontariff barriers implemented by countries on U.S.-specific or broader categories of products.[22] Instead, the "reciprocal tariff" calculations are based on the 2024 bilateral trade deficit with a country divided by the 2024 value of that country's imports into the United States, divided by two, making the assumption that the resulting tariff rate would "offset" any tariff and nontariff policies applied by the foreign country.[23] Many economists have questioned both the use of this methodology to calculate

[18] Executive Order 14257 of April 2, 2025, "Regulating Imports with a Reciprocal Tariff to Rectify Trade Practices That Contribute to Large and Persistent Annual United States Goods Trade Deficits."

[19] Oliver Ward, "Some Key Ag Inputs Exempt from Sweeping New Duties," April 4, 2025; and Ryan Hanrahan, "Key Ag Inputs Exempt from New Reciprocal Tariffs," *Farm Policy News*, April 7, 2025. A full list of products exempt from the April 2 tariffs can be found at https://www.whitehouse.gov/wp-content/uploads/2025/04/Annex-II.pdf.

[20] Executive Order 14259 of April 8, 2025, "Amendment to Reciprocal Tariffs and Updated Duties as Applied to Low-Value Imports from the People's Republic of China," 90 *Federal Register* 15509, April 14, 2025.

[21] Executive Order 14266 of April 9, 2025, "Modifying Reciprocal Tariff Rates to Reflect Trading Partner Retaliation and Alignment," 90 *Federal Register* 15625, April 15, 2025.

[22] USTR, "Reciprocal Tariff Calculations," accessed May 27, 2025, https://ustr.gov/sites/default/files/files/Issue_Areas/Presidential%20Tariff%20Action/Reciprocal%20Tariff%20Calculations.pdf. *Technical barriers to trade (TBT) measures* are related to mandatory compliance with regulatory requirements, voluntary standards, and conformity assessment procedures required by regulations or standards. *Sanitary and phytosanitary (SPS) measures* are laws, regulations, standards, and procedures that governments enforce to protect human, animal, or plant life or health.

[23] USTR, "Reciprocal Tariff Calculations," accessed April 4, 2025, https://ustr.gov/issue-areas/reciprocal-tariff-calculations.

country-specific tariffs and the Administration's claim that the tariff rates capture barriers to U.S. exports.[24] In the past, USDA's Economic Research Service (ERS) and other researchers have estimated the tariff equivalent of TBT and SPS measures for specific agricultural products or product groups, such as in a 2015 study on nontariff measures between the United States and EU.[25]

On May 12, 2025, the United States and China issued a joint statement that reduced U.S. "reciprocal tariffs" to 10% and China's retaliatory tariffs to the "reciprocal tariffs" to 10% effective May 14 for 90 days.[26]

Section 232 Steel, Aluminum, and Automotive Tariffs

On February 10, 2025, President Trump issued proclamations effective March 12, 2025, that modified tariffs on steel and aluminum, authorized under Section 232 of the Trade Expansion Act of 1962.[27] These tariffs were originally imposed during the first Trump Administration. The changes included eliminating country exemptions from tariffs negotiated during the Biden and first Trump Administrations. Effective April 4, 2025, certain beer products as aluminum derivative products were added to the list of imports subject to a Section 232 tariff of 25%.[28]

[24] Glenn Kessler, "Trump White House Cited Economists for Its Tariff Formula. They Pan It," *Washington Post*, April 4, 2025; Robert Farley and D'Angelo Gore, "Fact Check: Trump's Misleading Tariff Chart," *Roll Call*, April 4, 2025; Peter Foster and Sam Fleming, "Donald Trump Baffles Economists with Tariff Formula," *Financial Times*, April 3, 2025; Kevin Corinth and Stan Veuger, "President Trump's Tariff Formula Makes No Economic Sense. It's Also Based on an Error," American Enterprise Institute, April 4, 2025; Brent Neiman, "The Trump White House Cited My Research to Justify Tariffs. It Got It All Wrong," *New York Times*, April 7, 2025; Anjali V. Bhatt, "PIIE Experts React to Trump's Tariffs Announced April 2," Peterson Institute for International Economics, April 3, 2025; and Alan Cole, "Trump's Reciprocal Tariff Calculations Are Nonsense, Will Punish Mutually Beneficial Trade," Tax Foundation, April 3, 2025.

[25] Shawn Arita et al., *Estimating the Effects of Selected Sanitary and Phytosanitary Measures and Technical Barriers to Trade on U.S.-EU Agricultural Trade*, USDA, ERS, November 10, 2015. Other examples of studies estimating tariff equivalents on on-tariff measures include Olivier Cadot et al., *Estimating Ad Valorem Equivalents of Non-Tariff Measures: Combining Price-Based and Quantity-Based Approaches*, Organisation for Economic Co-operation and Development (OECD), OECD Trade Policy Papers No. 215, May 16, 2018; Xin Ning and Jason H. Grant, "New Estimates on the Ad-Valorem Equivalents of SPS Measures: Evidence from Specific Trade Concerns," selected paper prepared for presentation at the International Agricultural Trade Research Consortium's 2019 Annual Meeting, Washington, DC, December 2019; and Rui Mao et al., "Economic and Environmental Impacts of Agricultural Non-Tariff Measures: Evidence Based on *Ad Valorem* Equivalent Estimates," *International Food and Agribusiness Management Review*, vol. 26, no. 3 (2023), pp. 379-396.

[26] White House, "Joint Statement on U.S.-China Economic and Trade Meeting in Geneva," May 12, 2025, https://www.whitehouse.gov/briefings-statements/2025/05/joint-statement-on-u-s-china-economic-and-trade-meeting-in-geneva/.

[27] Proclamation 10896 of February 10, 2025, "Adjusting Imports of Steel into the United States," 90 *Federal Register* 9817, February 18, 2025; and Proclamation 10895 of February 10, 2025, "Adjusting Imports of Aluminum into the United States," 90 *Federal Register* 9807, February 18, 2025. For more information on Section 232 steel and aluminum tariffs, see CRS Insight IN12519, *Expanded Section 232 Tariffs on Steel and Aluminum*.

[28] Department of Commerce, Bureau of Industry and Security, "Implementation of Duties on Aluminum Derivatives Beer and Empty Aluminum Cans Pursuant to Proclamation 10895 Adjusting Imports of Aluminum into the United States," 90 *Federal Register* 14786, April 2025; and U.S. Customs and Border Protection (CBP), *Cargo Systems Messaging Service # 64639013—Guidance: Section 232 Additional Aluminum Derivative Products*, April 3, 2025, https://content.govdelivery.com/bulletins/gd/usdhscbp-3da5025?wgt_ref=usdhscbp_widget_2. CBP indicated that beer classified under the Harmonized Tariff Schedule of the United States not in glass containers would be subject to the 25% tariff under Section 232.

Separately, on March 26, 2025, President Trump announced Section 232 tariffs on U.S. imports of automobiles effective April 3 and certain automobile parts effective May 3.[29]

Some U.S. trading partners, such as Canada and the EU, announced retaliatory tariffs in response to Section 232 steel, aluminum, and automotive tariffs. To date, only the EU retaliatory tariffs have stated plans to target U.S. agricultural exports.[30]

What Retaliatory Tariffs Have Been Imposed on U.S. Agriculture in 2025?

In 2025, Canada, China, and the EU announced and/or imposed retaliatory tariffs that targeted U.S. agriculture.[31]

Canada's Retaliatory Tariffs

On March 4, 2025, Canada implemented retaliatory tariffs of 25% on select U.S. imports in response to the IEEPA tariffs on Canadian imports that went into effect the same day.[32] According to analysis of 2024 Canadian import statistics, these tariffs targeted approximately $5.9 billion in U.S. agricultural goods.[33] By value, about 90% of the U.S. products facing retaliatory tariffs were consumer-oriented goods, including coffee, tea, orange juice, alcoholic beverages (i.e., beer, wine, distilled spirits), pasta, fruits (e.g., oranges, peaches), vegetables (e.g., tomatoes, preserved cucumbers), pecans, poultry, sausages, condiments (e.g., ketchup, mayonnaise, soy sauce), confections, dairy products (e.g., whey, cheese, milk), and tobacco products.

Canada announced its intention to implement a second round of tariffs on a proposed list of additional U.S. goods to be subject to a 25% tariff.[34] Products proposed for additional retaliation include meat (e.g., beef, pork, poultry), additional dairy products (e.g., butter, cheese), baked goods (e.g., toasted bread, waffles), nonbeverage ethanol, additional fruits (e.g., apples, cherries, strawberries), additional vegetables (e.g., onions, asparagus, lettuce), and tree nuts (e.g., almonds, walnuts).

Mexico's Retaliatory Tariffs

President of Mexico Claudia Sheinbaum reportedly planned to announce tariff and nontariff measures in response to the IEEPA tariffs on March 9 but instead held a "festival" to celebrate the

[29] Proclamation 10908 of March 26, 2025, "Adjusting Imports of Automobiles and Automobile Parts into the United States," 90 *Federal Register* 14705, April 3, 2025. For more background, see CRS Insight IN12545, *Section 232 Automotive Tariffs: Issues for Congress*.

[30] In May 2025, the United Kingdom and India notified the WTO of a proposed increase in tariffs on U.S. imports in response to the U.S. Section 232 steel and aluminum tariffs. Similarly, Japan notified the WTO of a proposed increase in tariffs on U.S. imports in response to the U.S. Section 232 tariffs on steel, aluminum, automobiles, and automobile parts. Neither country has released a list of products targeted for retaliation nor imposed retaliatory tariffs.

[31] For more background, see CRS Report R48549, *Presidential 2025 Tariff Actions: Timeline and Status*.

[32] Government of Canada, "List of Products from the United States Subject to 25 Per Cent Tariffs Effective March 4, 2025," March 4, 2025, https://www.canada.ca/en/department-finance/news/2025/03/list-of-products-from-the-united-states-subject-to-25-per-cent-tariffs-effective-march-4-2025.html. Canada originally planned to implement retaliatory tariffs on February 4, 2025, but delayed for another month after the United States delayed its 25% tariffs on Canada.

[33] CRS calculations from Trade Data Monitor and Statistics Canada.

[34] Government of Canada, "Notice of Intent to Impose Countermeasures in Response to United States Tariffs on Canadian Goods," March 7, 2025, https://www.canada.ca/en/department-finance/programs/consultations/2025/notice-intent-impose-countermeasures-response-united-states-tariffs-on-canadian-goods.html.

suspension of U.S. tariffs.[35] On March 7, President Sheinbaum stated that Mexico "would like to avoid imposing reciprocal tariffs" on U.S. goods and continue its dialogue with the United States but also would not rule out retaliatory tariffs.[36]

China's Retaliatory Tariffs

On February 10, China imposed retaliatory tariffs on certain U.S. goods in response to the 10% IEEPA tariffs on imports from China. These included a 10% tariff on U.S. agricultural machinery.[37] On March 10, China imposed additional tariffs of 10% or 15% in response to the United States' March 3 announcement of a 10% increase of tariffs on imported goods from China.[38] These tariffs included mostly agricultural products. According to 2024 import statistics of China, these tariffs targeted about $21.2 billion worth of U.S. agricultural imports.[39] By value, about 80% of the products facing retaliatory tariffs are bulk commodities, such as soybeans, cotton, sorghum, wheat, corn, and pulses. Consumer-oriented products targeted for retaliatory tariffs include beef, pork, poultry, dairy products (e.g., milk albumin, ice cream, cheese), fruit (e.g., cherries, oranges, apples), and tree nuts (e.g., pistachios, almonds, walnuts). Most of these products had faced retaliatory tariffs imposed by China during the first Trump Administration.

On April 4, 2025, in response to the United States' 34% IEEPA "reciprocal tariff" on imports from China, China announced an additional 34% tariff on all U.S. goods effective April 10.[40] On April 9, following the U.S. announcement that the "reciprocal tariff" on imports from China was increasing from 34% to 84%, China announced that it was increasing its original additional 34% tariff on U.S. goods to 84% effective April 10.[41] On April 11, China further increased tariffs on U.S. goods from 84% to 125% effective April 12 in response to the United States' April 10 increase of "reciprocal tariffs" on imports from China from 84% to 125%.[42] On May 12, 2025,

[35] Fabiola Sánchez, "Tens of Thousands of Mexicans Rally with President to Celebrate US Decision to Delay Tariffs," Associated Press, March 9, 2025.

[36] Government of Mexico, "Versión estenográfica. Conferencia de prensa de la presidenta Claudia Sheinbaum Pardo del 7 de abril de 2025 [Stenographic Version. Press Conference of President Claudia Sheinbaum Pardo]," April 7, 2025, https://www.gob.mx/presidencia/articulos/version-estenografica-conferencia-de-prensa-de-la-presidenta-claudia-sheinbaum-pardo-del-7-de-abril-de-2025?idiom=es; and Raul Cortes and Kylie Madry, "Mexico Seeks to Avoid Retaliatory Tariffs Against US, but Not Ruling Them Out," Reuters, April 7, 2025.

[37] Ministry of Finance of the People's Republic of China, "国务院关税税则委员会关于对原产于美国的部分进口商品加征关税的公告 [Announcement of the Customs Tariff Commission of the State Council on Imposing Additional Tariffs on Certain Imported Goods from the United States]," February 4, 2025, https://www.mof.gov.cn/zhengwuxinxi/caizhengxinwen/202502/t20250204_3955222.htm. For more information about U.S.-China tariff actions, see CRS In Focus IF12990, *U.S.-China Tariff Actions Since 2018: An Overview*.

[38] Ministry of Finance of the People's Republic of China, "国务院关税税则委员会关于对原产于美国的部分进口商品加征关税的公告 [Announcement of the Customs Tariff Commission of the State Council on Imposing Additional Tariffs on Certain Imported Goods from the United States]," March 4, 2025, https://gss.mof.gov.cn/gzdt/zhengcefabu/202503/t20250304_3959228.htm.

[39] CRS calculations from Trade Data Monitor and China Customs Statistics.

[40] Ministry of Finance of the People's Republic of China, "国务院关税税则委员会关于对原产于美国的进口商品加征关税的公告 [Announcement of the Customs Tariff Commission of the State Council on Imposing Additional Tariffs on Imported Goods from the United States]," April 4, 2025, https://gss.mof.gov.cn/gzdt/zhengcefabu/202504/t20250404_3961451.htm.

[41] Ministry of Finance of the People's Republic of China, "国务院关税税则委员会关于调整对原产于美国的进口商品加征关税措施的公告 [Announcement of the Customs Tariff Commission of the State Council on Adjusting Tariff Measures on Imported Goods from the United States]," April 9, 2025, https://gss.mof.gov.cn/gzdt/zhengcefabu/202504/t20250409_3961684.htm.

[42] Ministry of Finance of the People's Republic of China, "国务院关税税则委员会关于调整对原产于美国的进口商

(continued...)

China and the United States issued a joint statement that reduced China's retaliatory tariffs to the U.S. "reciprocal tariffs" to 10%, while the United States reduced its "reciprocal tariffs" to 10% effective May 14, 2025, for 90 days.[43] See ""Reciprocal Tariffs" Addressing Trade Deficits" for further background.

European Union Retaliatory Tariffs

On March 12, 2025, the EU announced that it would allow the suspension of its 2018 and 2020 tariff countermeasures against the United States to lapse on April 1, in response to U.S. steel and aluminum tariffs.[44] These tariffs targeted about $1.3 billion worth of U.S. agricultural imports, according to 2024 EU import data.[45] Whiskey products, which were targeted with a 50% tariff, accounted for nearly half of the value of targeted imports. Other products targeted included corn, rice, tobacco products, peanut butter, cranberries, kidney beans, and peanut butter, all of which were subject to a 25% tariff, and essential oils, subject to a 10% tariff.

Additionally, the EU announced that it would gather information from stakeholders to determine which additional U.S. imports to target with tariffs.[46] Proposed additional targets include agricultural products such as poultry, beef, tree nuts, alcoholic beverages (e.g., beer, wine), dairy products, fruits, and vegetables.[47]

On March 20, the European Commissioner for Trade and Economic Security announced that the EU would postpone the first set of tariffs set to be imposed on April 1 to mid-April.[48] The commissioner explained that the EU is considering aligning the timing of the two sets of countermeasures to consult with EU member states on both lists simultaneously in light of proposed additional U.S. tariffs for April 2.

On April 7, 2025, President of the European Commission Ursula von der Leyen stated that the EU is ready to negotiate with the United States and offered "zero-for-zero tariffs for industrial goods."[49] In past trade negotiations, agriculture has been a contentious issue between the two trading partners because of key differences in agricultural regulatory issues (e.g., EU

品加征关税措施的公告 [Announcement of the Customs Tariff Commission of the State Council on Adjusting Additional Tariff Measures on Imported Goods from the United States]," April 11, 2025, https://gss.mof.gov.cn/gzdt/zhengcefabu/202504/t20250411_3961823.htm.

[43] Ministry of Commerce of the People's Republic of China, "中美日内瓦经贸会谈联合声明 [Joint Statement on China-U.S. Economic and Trade Meeting in Geneva]," May 12, 2025, https://www.mofcom.gov.cn/xwfb/ldrhd/art/2025/art_8055948aadb5450598bf73d1aae6828e.html.

[44] European Commission (EC), "Commission Responds to Unjustified US Steel and Aluminium Tariffs with Countermeasures," March 12, 2025, https://ec.europa.eu/commission/presscorner/detail/en/ip_25_740.

[45] CRS calculations from Trade Data Monitor and Eurostat.

[46] EC, "Information Gathering Notice Under Regulation (EU) No 654/2014 on the New US Tariffs on Steel and Aluminium Products, and Possible EU Rebalancing Measures in Response," March 12, 2025, https://policy.trade.ec.europa.eu/consultations/information-gathering-notice-under-regulation-eu-no-6542014-new-us-tariffs-steel-and-aluminium_en.

[47] EC, "EU Countermeasures on US Steel and Aluminium Tariffs Explained," March 11, 2025, https://ec.europa.eu/commission/presscorner/api/files/document/print/en/qanda_25_750/QANDA_25_750_EN.pdf.

[48] EC, "Remarks by Commissioner Šefčovič at the Joint Hearing of the Committee on International Trade on Trade Relations with the United States and a Structured Dialogue," March 20, 2025, https://ec.europa.eu/commission/presscorner/api/files/document/print/en/speech_25_840/SPEECH_25_840_EN.pdf.

[49] EC, "Press Statement by President von der Leyen with Norwegian Prime Minister Støre," April 7, 2025, https://ec.europa.eu/commission/presscorner/api/files/document/print/en/statement_25_996/STATEMENT_25_996_EN.pdf.

biotechnology approval process, use of growth promotants in U.S. meat production, and geographical indications).[50]

On April 10, following the 90-day postponement of the United States' country-specific "reciprocal tariffs," President von der Leyen announced a hold for 90 days on retaliatory tariffs that were set to go into effect April 15.[51] On April 14, the EU released a list of U.S. products to be subject to retaliatory tariffs and suspended all planned tariff measures until July 14, 2025.[52] Bulk commodities targeted include soybeans, corn, durum wheat, and rice. Consumer-oriented products targeted include almonds, beef, processed cranberries, tobacco products, cranberry and orange juices, spices, peanut butter, dried egg yolk, bakery goods and pasta, and ice cream. Tariff rates for agricultural products listed are 25%, except for essential oils, which would face a 10% tariff. The EU-proposed tariffs targeted about $5.3 billion worth of U.S. agricultural products, according to 2024 EU import data.[53]

On May 8, 2025, the EU launched a public consultation on a list of U.S. agricultural and industrial imports that would be subject to retaliatory tariffs.[54] The consultation is in response to U.S. "reciprocal tariffs" and U.S. tariffs on automobiles and certain automobile parts.

2018 Through 2023 Trade Actions

What Retaliatory Tariffs Were Imposed on U.S. Agriculture in 2018 and 2019?

In response to U.S. tariff actions in 2018, certain trading partners of the United States responded with retaliatory tariffs on U.S. goods, including agricultural products.[55] In April 2018, China responded to U.S. Section 232 steel and aluminum tariffs with retaliatory tariffs on certain U.S. imports, including agricultural products (e.g., fruit, ginseng, pork, tree nuts, wine). In June 2018, Mexico, the EU, and Turkey responded to Section 232 tariffs with retaliatory tariffs. The agricultural products targeted included pork products, cheese, apples, potatoes, cranberries, and whiskey by Mexico; corn, rice, sweet corn, kidney beans, certain breakfast cereals, peanut butter, orange juice, cranberry juice, whiskey, cigars, tobacco products, and essential oils by the EU; and tree nuts, rice, and tobacco by Turkey. In July 2018, Canada responded with retaliatory tariffs on U.S. products, including dairy, poultry, and beef products; coffee, chocolate, sugar, and

[50] For more background about U.S.-European Union agricultural trade relations, see CRS Report R47095, *U.S.-EU Trade Relations*; and CRS Report R46241, *U.S.-EU Trade Agreement Negotiations: Trade in Food and Agricultural Products*.

[51] EC, "Statement by President von der Leyen," April 10, 2025, https://ec.europa.eu/commission/presscorner/api/files/document/print/en/statement_25_1036/STATEMENT_25_1036_EN.pdf; and EC, "Commission Proposal to Impose Trade Countermeasures Against US Obtains Necessary Support from EU Member States," April 9, 2025, https://ec.europa.eu/commission/presscorner/api/files/document/print/en/statement_25_1025/STATEMENT_25_1025_EN.pdf.

[52] EC, "EU Pauses Countermeasures Against US Tariffs to Allow Space for Negotiations," April 14, 2025, https://ec.europa.eu/commission/presscorner/detail/en/ip_25_1058. The EU originally planned to implement tranches of retaliatory tariffs effective April 15, May 16, and December 1, 2025, prior to the April 14 postponement announcement.

[53] CRS calculations from Trade Data Monitor and Eurostat.

[54] EC, "Commission Consults on Possible Countermeasures and Readies WTO Litigation in Response to US Tariffs," May 8, 2025, https://ec.europa.eu/commission/presscorner/api/files/document/print/en/ip_25_1149/IP_25_1149_EN.pdf.

[55] For background, see CRS Report R45903, *Retaliatory Tariffs and U.S. Agriculture*; and CRS Report R45929, *China's Retaliatory Tariffs on U.S. Agriculture: In Brief*.

confectionery; prepared food products; condiments; bottled water; and whiskies. India imposed retaliatory tariffs in June 2019 targeting U.S. chickpeas, almonds, walnuts, apples, and lentils.

Separate from the Section 232 tariffs and retaliatory tariffs, the United States also imposed tariffs on China under Title III of the Trade Act of 1974 (19 U.S.C. §§2411-2420), commonly referred as "Section 301," starting in July 2018. Between 2018 and 2019, the United States and China imposed several rounds of tariffs and retaliatory tariffs. Nearly all U.S. agricultural products faced retaliatory tariffs. In September 2019, China announced a tariff exclusion list for certain U.S. products subject to Section 301 retaliatory tariffs, including agricultural products such as alfalfa and whey for feed use.[56] In February 2020, China announced a tariff exclusion process for Chinese companies impacted by the Section 301 retaliatory tariffs on U.S. imports.[57]

According to one analysis, during the 2018/2019 trade conflict, agricultural products accounted for 68% of China's Section 232 retaliation, 22% of China's Section 301 retaliation, 33% of the EU's retaliation, 20% of Canada's retaliation, 79% of Mexico's retaliation, nearly 20% of Turkey's retaliation, and 61% of India's retaliation.[58]

In May 2019, the United States removed Section 232 tariffs on Canada and Mexico, and in turn, Canada and Mexico removed retaliatory tariffs on the United States to facilitate the ratification of USMCA.[59]

Following an October 2021 agreement between the United States and the EU on the Section 232 tariffs, the EU suspended retaliatory tariffs that included U.S. agricultural products from January 2022 to the end of December 2023, and later extended the suspension to the end of March 2025.[60] The EU postponed imposing retaliatory tariffs in order to assess the planned U.S. April 2, 2025, "reciprocal tariffs" announcement and postponed again in response to the U.S. 90-day pause of country-specific "reciprocal tariffs."[61] EU retaliatory tariffs are suspended until July 14, 2025. See "European Union Retaliatory Tariffs" for further background.

The United Kingdom (UK) suspended Section 232 retaliatory tariffs effective June 2022.[62] The UK inherited the original EU retaliatory tariffs when the UK separated from the EU customs union in January 2021.

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[56] USDA, FAS, *Outcome of Batch One of China's Tariff Exclusion Process*, GAIN Report CH19061, September 18, 2019, https://apps.fas.usda.gov/newgainapi/api/Report/DownloadReportByFileName?fileName=Outcome%20of%20Batch%20One%20of%20China%E2%80%99s%20Tariff%20Exclusions%20Process%20_Beijing_China%20-%20Peoples%20Republic%20of_9-17-2019.

[57] USDA, FAS, *China Announces a New Round of Tariff Exclusions*, GAIN Report CH2020-0017, February 26, 2020, https://apps.fas.usda.gov/newgainapi/api/Report/DownloadReportByFileName?fileName=China%20Announces%20a%20New%20Round%20of%20Tariff%20Exclusions_Beijing_China%20-%20Peoples%20Republic%20of_02-18-2020.

[58] Jason H. Grant et al., "Agricultural Exports and Retaliatory Trade Actions: An Empirical Assessment of the 2018/2019 Trade Conflict," *Applied Economic Perspectives and Policy*, vol. 43, no. 2 (June 2021), p. 18.

[59] Ana Swanson and Dan Bilefsky, "United States Reaches Deal to Lift Metal Tariffs on Canada and Mexico," *New York Times*, May 17, 2019.

[60] EC, "EU Prolongs Tariff Suspension for US Products Related to the Steel and Aluminium Dispute," December 19, 2023, https://ec.europa.eu/commission/presscorner/api/files/document/print/en/ip_23_6713/IP_23_6713_EN.pdf.

[61] EC, "EU Countermeasures on US Steel and Aluminium Tariffs Explained," March 11, 2025, https://ec.europa.eu/commission/presscorner/api/files/document/print/en/qanda_25_750/QANDA_25_750_EN.pdf; and EC, "EU Pauses Countermeasures Against US Tariffs to Allow Space for Negotiations," April 14, 2025, https://ec.europa.eu/commission/presscorner/detail/en/ip_25_1058.

[62] Government of the United Kingdom, "UK and US Resolve Steel and Aluminium Tariffs Issue," March 22, 2022, https://www.gov.uk/government/news/uk-and-us-resolve-steel-and-aluminium-tariffs-issue.

In September 2023, India removed retaliatory tariffs on U.S. almonds, apples, chickpeas, lentils, and walnuts following a June 2023 resolution between the United States and India that terminated six nonagricultural WTO disputes.[63]

Were U.S. Agricultural Exports Affected by Retaliatory Tariffs?

The retaliatory tariffs were one of many factors that influenced agricultural exports. **Table 3** displays U.S. agricultural exports to retaliating and non-retaliating trading partners from 2017 to 2020 in nominal values. Although China, Canada, Mexico, the EU, and Turkey imposed retaliatory tariffs in the spring and summer of 2018, total U.S. agricultural exports from 2017 compared to 2018 increased by 1%. While exports to China declined by 53%, other U.S. agricultural export markets (e.g., the EU, Vietnam, South Korea, Egypt) saw an increase of exports that offset the decline in exports to China. The total value of U.S. agricultural exports declined in 2019 and 2020 relative to 2018 levels and remained similar to 2017 levels. Although foreign tariffs impact the competitiveness of U.S. agricultural exports in relation to other foreign suppliers, other factors may contribute to U.S. trade flows because of unique dynamics of specific commodities. This section provides a snapshot of select major U.S. agricultural exports between 2017 and 2020 that were impacted by retaliatory tariffs, to illustrate the role of tariffs and nontariff factors on agricultural trade flows.

Table 3. U.S. Agricultural Exports to Retaliating and Non-Retaliating Trading Partners, 2017 to 2020

In Billions of Dollars (nominal)

Trading Partner	2017	2018	2019	2020
U.S. exports to retaliating trading partners				
China	19.6	9.2	13.9	26.4
Canada	21.7	22.0	21.9	22.3
Mexico	18.8	19.3	19.4	18.3
EU-28	12.4	14.5	12.6	12.1
India	1.9	1.8	2.1	1.7
Turkey	1.8	1.5	1.3	1.2
U.S. exports to non-retaliating trading partners	66.7	76.4	69.9	67.6
Total U.S. agricultural exports	**142.9**	**144.7**	**141.1**	**149.7**

Source: CRS from USDA, GATS data (BICO-10).

Notes: Data are not just adjusted for inflation. Values may not sum to totals shown because of rounding. EU-28 = the European Union customs union and its 28 member countries, which included the United Kingdom until it left in January 2021.

Soybeans

Table 4 presents annual total U.S. soybean exports from 2017 to 2020, broken down by major markets (i.e., China, the EU, Mexico, and Egypt) and the rest of the world combined. China imposed retaliatory tariffs on U.S. soybeans starting in 2018, which is reflected in a 74% decline

[63] USDA, FAS, *Success Story – India Cuts Retaliatory Tariffs on US Almonds-Apples-Walnuts-Chickpeas-Lentils*, GAIN Report IN2023-0066, September 12, 2023 and USTR, "United States Announces Major Resolution on Key Trade Issues with India," June 22, 2023.

in exports by value in 2018 compared to 2017. Between 2009 and 2017, nearly 60% of U.S. soybean exports by value on average were destined for China. Other U.S. trading partners such as the EU, Mexico, and Egypt increased imports of U.S. soybeans but not at levels to replace the shortfall from the decline of China's imports. USDA attributed the increased imports of U.S. soybeans from trading partners other than China to factors such as more competitive prices of U.S. soybeans following China's retaliatory tariffs, Brazil-sourced soybeans commanding a price premium, and tighter supplies from Argentina because of drought.[64] Another factor that may have affected China's imports for soybeans from the United States and other suppliers was dampened demand for animal feed because of the spread of African swine fever in China beginning in the summer of 2018 and the culling of 750,000 to 1.1 million swine.[65]

Table 4. U.S. Soybean Exports, 2017 to 2020

In Millions of Dollars (nominal)

Trading Partner	2017	2018	2019	2020
China	12,224.4	3,119.2	8,004.9	14,065.7
EU-28	1,636.7	3,077.5	1,953.2	1,970.8
Mexico	1,574.2	1,818.0	1,878.1	1,879.8
Egypt	364.5	1,163.5	994.7	1,486.2
Rest of world	5,656.5	7,879.8	5,862.8	6,113.7
Total U.S. soybean exports	**21,456.3**	**17,058.1**	**18,693.6**	**25,516.2**

Source: CRS from USDA, GATS data (BICO-10).

Notes: Data are not adjusted for inflation. Values may not sum to totals shown because of rounding. EU-28 = the European Union customs union and its 28 member countries, which included the United Kingdom until it left in January 2021.

Corn

Annual total U.S. corn exports from 2017 to 2020 are displayed in **Table 5**, broken down by select markets and the rest of the world. China and the EU imposed tariffs on U.S. corn in 2018. In 2018, EU imports initially surged prior to the imposition of June 2018 retaliatory tariffs and dwindled afterward, which resulted in a total of about $320 million of U.S. corn exported to the EU in 2018, which dropped to about $510,000 in 2019. U.S. corn exports to China also saw declines in 2018 and 2019 compared to 2017. Historically, U.S. corn exports to China varied from year to year even before the implementation of retaliatory tariffs. The United States has cited past issues affecting U.S. corn market access into China, including China's biotechnology policy, policy in liquidating domestic corn stocks, and lack of transparency in how China administers its tariff-rate quota for corn (as well as rice and wheat).[66] According to USDA, multiple factors

[64] USDA, FAS, *EU-28: Oilseeds and Products Update – Lowest Rapeseed Crop in Over a Decade*, GAIN Report AU1907, September 12, 2019; USDA, FAS, *Mexico: Oil Seeds and Products Annual: Lack of Supports to Slow Oilseed Production, While Meal and Oil Remain Stable*, GAIN Report MX9014, April 1, 2019; and USDA, FAS, *Egypt: Oilseeds and Products Annual 2019: U.S. Soybean Exports to Egypt Skyrocket, Volume Likely to Continue Through 2020*, GAIN Report EG19004, March 31, 2019.

[65] Stephen Morgan et al., *The Economic Impacts of Retaliatory Tariffs on U.S. Agriculture*, USDA, ERS, January 2022, p. 25; and Fred Gale et al., *How China's African Swine Fever Outbreaks Affected Global Pork Markets*, USDA, ERS, November 2023, p. 12.

[66] USTR, *2019 Report to Congress on China's WTO Compliance*, March 2020, p. A-69; and USTR, *2022 Report to Congress on China's WTO Compliance*, February 2023, pp. 31-32. Tariff-rate quotas (TRQs) are two-tiered (continued...)

contributed to the decline in U.S. corn exports in 2019, including higher U.S. prices due to reduced production and strong domestic use for feed and ethanol, and export competition from Argentina, Brazil, and Ukraine.[67] In 2020, U.S. corn exports to China increased 2,136% from the previous year following the U.S.-China Phase One Agreement and China's exclusions for Section 301 retaliatory tariffs on agricultural products.[68]

Table 5. U.S. Corn Exports, 2017 to 2020

In Millions of Dollars (nominal)

Trading Partner	2017	2018	2019	2020
Mexico	2,645.5	3,060.8	2,735.9	2,685.2
Japan	2,163.4	2,813.0	2,011.2	1,855.5
China	142.0	50.2	55.5	1,240.5
Colombia	784.7	927.3	682.5	879.2
South Korea	705.4	1,355.7	358.7	548.1
EU-28	113.2	319.8	0.5	0.4
Rest of world	2,576.4	3,945.5	1,826.4	2,037.1
Total U.S. corn exports	**9,130.6**	**12,472.4**	**7,670.6**	**9,245.9**

Source: CRS from USDA, GATS data (BICO-10).

Notes: Data are not just adjusted for inflation. Values may not sum to totals shown because of rounding. EU-28 = the European Union customs union and its 28 member countries, which included the United Kingdom until it left in January 2021.

Tree Nuts

Table 6 displays U.S. tree nut exports, broken down by top export markets in addition to Turkey and the rest of the world. Starting in mid-2018, China and Turkey imposed retaliatory tariffs on U.S. tree nuts (e.g., almonds, cashews, pistachios, walnuts). In June 2019, India imposed retaliatory tariffs on U.S. almonds and walnuts. Generally, from 2017 to 2020, U.S. exports of tree nuts by value increased yearly despite the imposition of retaliatory tariffs. USDA attributed strong domestic demand in China and India for tree nuts as driving U.S. export growth.[69] Other factors that favored U.S. tree nut export growth were the United States' share in world production and trade, particularly for almonds and walnuts, as well as a steep drop-off in Iranian pistachio production and exports because of a weather shock in marketing year 2018/2019.[70] Despite Turkey's retaliatory tariffs, the United States was still a major source of almond and walnut imports for Turkey but with decreasing market share after 2018.[71]

applications of tariffs for an imported product. A specified quantity of imports (in-quota) enters the importing country at a reduced tariff rate. Imports that exceed the quantity (out-of-quota or over-quota) typically face higher tariffs.

[67] USDA, FAS, *2019 United States Agricultural Export Yearbook*, July 22, 2020, pp. 5-6.

[68] USDA, FAS, *2020 United States Agricultural Export Yearbook*, April 5, 2021, p. 6; and USDA, FAS, *China: Grain and Feed Annual*, GAIN Report CH2020-0048, April 6, 2020.

[69] USDA, FAS, *2019 United States Agricultural Export Yearbook*, pp. 27-28; and USDA, FAS, *2020 United States Agricultural Export Yearbook*, pp. 29-30.

[70] USDA, FAS, *2019 United States Agricultural Export Yearbook*, p. 28; and USDA, FAS, *2020 United States Agricultural Export Yearbook*, p. 30; and USDA, FAS, *Tree Nuts: World Markets and Trade*, February 2019.

[71] USDA, FAS, *Turkey: Tree Nuts Annual*, GAIN Report TU2020-0031, September 23, 2020.

Table 6. U.S. Tree Nut Exports, 2017 to 2020

In Millions of Dollars (nominal)

Trading Partner	2017	2018	2019	2020
EU-28	2,707.2	2,768.5	3,114.9	2,877.8
India	738.0	662.5	823.2	913.6
China	242.9	328.3	605.4	747.2
Canada	642.7	695.8	697.4	738.2
Turkey	308.4	278.9	340.4	249.8
Rest of world	3,840.0	3,781.3	3,493.2	2,873.0
Total U.S. tree nut exports	**8,479.4**	**8,515.5**	**9,074.5**	**8,399.6**

Source: CRS from USDA, GATS data (BICO-10).

Notes: Data are not just adjusted for inflation. Values may not sum to totals shown because of rounding. EU-28 = the European Union customs union and its 28 member countries, which included the United Kingdom until it left in January 2021.

Pork

Table 7 displays U.S. pork and pork product exports, broken down by the top five export markets and the rest of the world. China and Mexico imposed tariffs on U.S. pork and pork product exports in mid-2018, with Mexico lifting tariffs in mid-2019. U.S. pork exports to China dropped 14% by value between 2017 and 2018. In 2019, U.S. pork exports to China rebounded despite the retaliatory tariffs, which USDA attributes to decreased domestic pork production in China caused by African swine fever outbreaks.[72] U.S. pork exports to Mexico declined 13% by value from 2017 to 2018, while Canada gained market share in 2018.[73] Despite Mexico lifting its tariffs, U.S. pork exports declined from 2018 to 2020, which USDA attributes to strong domestic production, a weak Mexican economy, and depreciation of the peso.[74]

[72] USDA, FAS, *China: Livestock and Products Annual*, GAIN Report CH2019-0205, August 7, 2020; Fred Gale et al., *How China's African Swine Fever Outbreaks Affected Global Pork Markets*, pp. 20-21; and Frank Kyekyeku Nti et al., "Impact of Retaliatory Tariffs on the U.S. Pork Sector," *Choices* (Quarter 4, 2019).

[73] USDA, FAS, *Mexico: Livestock and Products Annual: Higher Pork Consumption Drives Production as Mexico Increases Exports of Pork and Beef*, GAIN Report MX9027, August 15, 2019; and Frank Kyekyeku Nti et al., "Impact of Retaliatory Tariffs on the U.S. Pork Sector."

[74] USDA, FAS, *2019 United States Agricultural Export Yearbook*, p. 17; and USDA, FAS, *2020 United States Agricultural Export Yearbook*, p. 17.

Table 7. U.S. Pork and Pork Product Exports, 2017 to 2020

In Millions of Dollars (nominal)

Trading Partner	2017	2018	2019	2020
China	662.3	570.9	1,300.2	2,279.8
Japan	1,625.9	1,630.5	1,523.4	1,622.9
Mexico	1,514.1	1,310.7	1,278.4	1,162.3
Canada	792.8	764.8	801.8	854.0
South Korea	475.1	670.3	592.9	452.6
Rest of world	1,415.0	1,455.4	1,454.8	1,347.8
Total U.S. pork and pork products	**6,485.1**	**6,402.8**	**6,951.5**	**7,719.6**

Source: CRS from USDA, GATS data (BICO-10).

Notes: Data are not just adjusted for inflation. Values may not sum to totals shown because of rounding.

Were U.S. Farm Sector Sales Affected by Retaliatory Tariffs?

The retaliatory tariffs were one of many factors that influenced U.S. farm sector sales. The farm sector earns revenue from the sales of crops, livestock, and animal products. The total value of these commodities was approximately $370 billion in 2017, $372 billion in 2018, $369 billion in 2019, and $368 billion in 2020 (**Table 8**). Compared to 2017 levels, the total value of crops, livestock, and animal products sold was approximately $1.6 billion higher in 2018, $1.1 billion lower in 2019, and $2.9 billion lower in 2020.

Table 8.Value of Crops, Livestock, and Animal Products Sold, 2017 to 2020

In Billions of Dollars (nominal)

Commodity Type	2017	2018	2019	2020
Crops				
Cotton	$7.57	$7.48	$6.82	$6.81
Feed crops	$53.92	$57.29	$58.42	$57.52
Food grains	$11.20	$12.13	$11.51	$11.78
Fruits and nuts	$30.59	$29.35	$29.19	$27.83
Oil crops	$41.09	$39.47	$36.22	$43.84
Tobacco	$1.38	$1.22	$0.96	$0.82
Vegetables and melons	$20.50	$18.70	$19.11	$21.06
All other crops	$28.62	$30.35	$31.53	$32.83
Livestock and animal products				
Dairy products	$37.94	$35.24	$40.55	$40.36
Cattle and calves	$66.94	$67.18	$66.19	$63.32
Hogs	$21.04	$20.77	$21.76	$19.16
Miscellaneous livestock	$6.86	$6.94	$7.06	$7.00
Poultry and eggs	$42.79	$45.96	$40.00	$35.17
Total	**$370.44**	**$372.07**	**$369.32**	**$367.50**

Source: CRS calculations using USDA, Economic Research Service, "Farm Income and Wealth Statistics—Value Added by the U.S. Agricultural Sector, 2016-2025F," updated February 2025, https://data.ers.usda.gov/reports.aspx?ID=4047.

Notes: Feed crops include barley, corn, hay, oats, and grain sorghum. Food grains include rice, rye, and wheat. Dairy products includes milk.

While the total value of crops, livestock, and animal products sold remained relatively level from 2017 to 2020, sales were variable for all categories of commodities over this period. In 2018, the value of feed grains, food grains, cattle and calves, poultry and eggs, and all other crops increased relative to 2017 levels; the total value of other agricultural commodities sold declined in 2018 relative to 2017 levels (**Table 8**). In 2019, the value of feed grains, food grains, all other crops, dairy, hogs, and miscellaneous livestock increased relative to 2017 levels, while the total value for other agricultural commodities declined relative to 2017 levels.

Changes in market prices between 2017 and 2020 contributed to the changes in the values of commodities sold each year. For example, retaliatory tariffs imposed in 2018 targeted specific agricultural commodities, including almonds, fresh sweet cherries, corn, cotton, hogs, milk, sorghum, soybeans, and wheat. Compared to 2017, 2018 marketing year average prices were higher for corn, upland cotton, sorghum, and wheat and lower for the other targeted commodities (**Table 9**). Compared to 2017, 2019 marketing year average prices were higher for corn, milk, and sorghum and lower for the other targeted commodities. Compared to 2017, 2020 marketing year average prices were higher for fresh sweet cherries, corn, milk, sorghum, soybeans, and wheat and lower for the other targeted commodities.

Table 9. Marketing Year Average Prices for Selected Agricultural Commodities, 2017 to 2020

In Dollars per Unit (Nominal)

Commodity	Unit	2017	2018	2019	2020
Almonds	Pound	$2.53	$2.50	$2.45	$1.71
Cherries (fresh sweet)	Ton	$2.06	$1.83	$1.93	$2.92
Corn	Bushel	$3.36	$3.61	$3.56	$4.53
Cotton (extra long staple)	Pound	$1.39	$1.15	$1.06	$1.19
Cotton (upland)	Pound	$0.69	$0.70	$0.60	$0.66
Hogs	Hundredweight	$53.10	$50.20	$51.40	$46.90
Milk	Hundredweight	$17.69	$16.28	$18.65	$18.16
Sorghum	Hundredweight	$5.75	$5.82	$5.96	$9.00
Soybeans	Bushel	$9.33	$8.48	$8.57	$10.80
Wheat	Bushel	$4.72	$5.16	$4.58	$5.05

Source: CRS using USDA, National Agricultural Statistics Service, "Quick Stats," accessed March 14, 2025.

What Were the Economic Losses to the U.S. Agricultural Sector from Retaliatory Tariffs in 2018 and 2019?

Various studies have estimated losses to the U.S. agricultural sector associated with retaliatory tariffs; these studies employ different methodologies and provide differing estimates of losses

attributable to retaliatory tariffs.[75] Estimates of economic losses made by USDA's Office of the Chief Economist (OCE) in 2018 and 2019 had extra significance for policymakers as they were used to inform USDA's responses to retaliatory tariffs in 2018 and 2019 (see "USDA's Response to Retaliatory Tariffs").[76]

USDA OCE estimated that the 2018 economic losses were between $11 billion and $12 billion.[77] According to USDA figures reported by the Government Accountability Office (GAO), $10.2 billion of the estimated $11 billion to $12 billion were for losses to almonds, fresh sweet cherries, corn, cotton, dairy, hogs, sorghum, soybeans, and wheat.[78] According to USDA figures reported by GAO, USDA OCE estimated that the 2019 economic losses for agricultural and related commodities were approximately $16.9 billion.[79]

In January 2022, USDA ERS published updated estimates of trade losses. ERS reported estimates of approximately $27 billion in trade losses between July 2018 and December 2019.[80] ERS reported that China's retaliatory tariffs reduced the value of U.S. agricultural trade by approximately $25.7 billion, and retaliatory tariffs imposed by other countries reduced the value of U.S. agricultural trade by approximately $1.5 billion. ERS reported estimated annualized losses for some commodities, including $9.35 billion for soybeans, $854 million for sorghum, $646 million for pork, $618 million for fruits, $391 million for dairy, $366 million for cotton, $309 million for wheat, $219 million for tree nuts, $198 million for corn, and $46 million for rice.

USDA OCE estimated economic losses in 2018 and 2019 by projecting hypothetical scenarios of world trade that could have occurred had retaliatory tariffs not been imposed on U.S. agricultural products. USDA OCE made those projections before data on actual exports were available for the year as part of USDA's efforts to "craft a short-term relief strategy to protect agricultural producers" in accordance with Presidential directives.[81] Updating such projections with subsequently available data suggests that USDA OCE may have overestimated trade losses in 2018 and 2019. Actual agricultural exports were approximately $145 billion in 2018 and approximately $141 billion in 2019 (**Table 3**). These values compare to agricultural exports in 2015, 2016, and 2017 of $137 billion, $139 billion, and $143 billion, respectively. USDA's

[75] See, for example, USDA, ERS, *The Economic Impacts of Retaliatory Tariffs on U.S. Agriculture*, ERR-304, January 2022.

[76] USDA, *Cost Benefit Analysis: Market Facilitation Program*, July 24, 2018; USDA, "USDA Announces Support for Farmers Impacted by Unjustified Retaliation and Trade Disruption," press release, May 23, 2019; USDA Office of the Chief Economist (OCE), *Trade Damage Estimation for the Market Facilitation Program and Food Purchase and Distribution Program*, September 13, 2018; and USDA OCE, *Trade Damage Estimation for the 2019 Market Facilitation Program and Food Purchase and Distribution Program*, August 22, 2019.

[77] USDA, "USDA Assists Farmers Impacted by Unjustified Retaliation," press release, July 24, 2018, https://www.usda.gov/about-usda/news/press-releases/2018/07/24/usda-assists-farmers-impacted-unjustified-retaliation. In the press release, USDA stated that they were authorizing "up to $12 billion in programs, which is in line with the estimated $11 billion impact of the unjustified retaliatory tariffs on U.S. agricultural goods."

[78] CRS calculations using data in GAO, "Appendix III: 2018 MFP and 2019 MFP Trade Damage Estimate and Payment Methodologies," in *USDA Market Facilitation Program: Stronger Adherence to Quality Guidelines Would Improve Future Economic Analyses*, GAO-22-468, November 2021, https://www.gao.gov/assets/gao-22-468.pdf.

[79] CRS calculations using data in GAO, "Appendix III: 2018 MFP and 2019 MFP Trade Damage Estimate and Payment Methodologies," in *USDA Market Facilitation Program: Stronger Adherence to Quality Guidelines Would Improve Future Economic Analyses*. Related commodities included distiller's dried grains with solubles, ethanol, peanut butter, infant formula, ice cream, casein, and lactose.

[80] USDA, ERS, *The Economic Impacts of Retaliatory Tariffs on U.S. Agriculture*, ERR-304, January 2022.

[81] USDA, "USDA Assists Farmers Impacted by Unjustified Retaliation," press release, July 24, 2018.

estimated economic losses imply that USDA effectively projected agricultural exports in 2018 and 2019 to be approximately $157 billion in the absence of retaliatory tariffs.[82]

USDA ERS reported estimated trade losses for 2018 and 2019 at levels similar to USDA OCE's estimates. To calculate these estimated trade losses, USDA ERS used estimates published in an academic study with a different methodology than had been used by USDA OCE in 2018 and 2019.[83] This methodology is one of many that are commonly used in the academic literature to estimate economic losses from retaliatory tariffs. Other commonly used methodologies may estimate different losses. For example, a different academic study found that total 2018 and 2019 economic losses for soybeans were $3.2 billion;[84] USDA OCE estimated soybean losses at $3.6 billion for 2018 alone.[85] That study found that USDA overcompensated the agricultural sector by $5.4 billion for soybean losses in 2018 and 2019.[86]

Methods used to estimate trade losses from retaliatory tariffs can produce different estimates depending on the data used. USDA OCE produced estimates in 2018 after spring planting was complete but before 2018 commodities were harvested. In 2019, USDA OCE produced estimates before farmers had finished spring planting. USDA OCE acted at those times in support of the Administration's goal of providing expedited assistance to farmers who experienced trade disruptions with major export markets. Some policymakers may agree with the Administration's decision to provide expedited assistance to farmers in 2018 and 2019. Other policymakers may question the need for expedited assistance in 2018 and 2019 given the availability of other farm support programs.[87]

In addition, methods used to estimate trade losses can produce different estimates depending on the assumptions applied. In their 2021 analysis of the Market Facilitation Program (MFP), GAO found that USDA OCE's 2018 estimates of economic losses "used a justifiable baseline" to model what trade would have been in the absence of retaliatory tariffs.[88] GAO also found that USDA OCE's 2019 estimates of economic losses "used baselines that did not best represent what trade would be absent the retaliatory tariffs, and that increased trade damage estimates." In their response to GAO's 2021 analysis, USDA OCE stated that

> [t]he draft report's finding that the 2019 baseline is not representative and increased trade damage estimates does not take into account that the decision on what is the appropriate baseline depends on the policy goals and that there is not one single most representative baseline. OCE provided alternatives that reflected different options based on the direction of senior USDA decision makers under the previous administration and selection of the baseline was part of the program design and not made by OCE.[89]

[82] CRS calculations. Actual 2018 trade of $145 billion plus $12 billion in estimated trade losses is $157 billion. Actual 2019 trade of $141 billion plus $16 billion in estimated trade losses is $157 billion.

[83] USDA ERS used estimated product-specific changes in the value of exports as published in Jason H. Grant et al., "Agricultural Exports and Retaliatory Trade Actions: An Empirical Assessment of the 2018/2019 Trade Conflict," *Applied Economic Perspectives and Policy*, vol. 43, no. 2 (June 2021).

[84] Michael Adjemian et al., "Estimating the Market Effect of a Trade War: The Case of Soybean Tariffs," *Food Policy*, vol. 105 (December 2021).

[85] USDA, *Cost Benefit Analysis: Market Facilitation Program*, July 24, 2018.

[86] Michael Adjemian et al., "Estimating the Market Effect of a Trade War: The Case of Soybean Tariffs."

[87] For background on other farm support programs, see CRS In Focus IF12218, *Farm Bill Primer: Farm Safety Net Programs*.

[88] GAO, *USDA Market Facilitation Program: Stronger Adherence to Quality Guidelines Would Improve Future Economic Analyses*.

[89] GAO, "Appendix VIII: Comments from the Department of Agriculture," in *USDA Market Facilitation Program: Stronger Adherence to Quality Guidelines Would Improve Future Economic Analyses*, p. 86.

USDA OCE also noted that their 2018 and 2019 economic analyses adhered to departmental and Office of Management and Budget requirements for economic analyses. Some policymakers may support USDA's senior decisionmakers' reliance on USDA OCE to estimate economic losses in order to be timely and responsive to decisionmakers' requirements. Other policymakers may support the use of independent feedback on USDA OCE's economic analyses used to inform USDA policymaking.

What Were the U.S.-China Phase One Agreement Provisions for Agriculture?

In January 2020, President Trump and China's Vice Premier Liu He signed the "Economic and Trade Agreement Between the Government of the United States of America and the Government of the People's Republic of China" (U.S.-China Phase One Agreement) to reduce U.S.-China trade tensions that escalated in 2018 when the United States imposed several rounds of tariffs on imports from China under Section 232 of the Trade Expansion Act of 1962 and Section 301 of the Trade Act of 1974 authorities.[90] The Phase One Agreement included purchase commitments of U.S. imports by China of no less than $12.5 billion and $19.5 billion above a 2017 baseline in agricultural and seafood products total for 2020 and 2021, respectively.[91] Other provisions in the agreement included China abiding by its WTO obligations by improving its tariff-rate quota administration for wheat, corn, and rice and greater transparency of its domestic support programs.[92] China also agreed to implement a "transparent, predictable, efficient, science- and risk-based regulatory process" for evaluating and authorizing agricultural biotechnology products. The agreement contains SPS-measures-related provisions to facilitate trade for agricultural and food products. Additionally, in March 2020, China implemented a new Section 301 retaliatory tariff exclusion process for imported U.S. agricultural products, although this was not directly associated with the Phase One Agreement.[93] Prior to the March 2020 exclusion process, only certain enumerated products were considered for tariff exclusions.

U.S. export and China's import data show that China did not meet its purchase commitments of U.S. agricultural and seafood products listed in the Phase One Agreement for the years 2020 and 2021, falling short by an estimated total of $13.1 billion (based on U.S. trade data) or $18.1 billion (based on China's trade data) over the two years.[94] Subsequent reports from the Office of

[90] For background, see CRS In Focus IF12125, *Section 301 and China: The U.S.-China Phase One Trade Deal*; and CRS In Focus IF11412, *U.S.-China Phase I Deal: Agriculture*. For the agreement text and agriculture-related fact sheets of the U.S.-China Phase One Agreement, see USDA, FAS, "China Phase One Agreement," https://www.fas.usda.gov/topics/china-phase-one-agreement.

[91] The U.S.-China Phase One Agreement does not explicitly state the 2017 baseline amount. The agreement specifies that both U.S. and Chinese trade data will be used to determine whether the purchase commitment provisions have been implemented. The 2017 baseline amount of approximately $20.9 billion is based on CRS calculations from Trade Data Monitor and U.S. Census Bureau data of U.S. agricultural and seafood product exports to China identified in Annex 6.1 of the U.S.-China Phase One Agreement. The 2017 baseline amount would be approximately $24.1 billion based on CRS calculations from Trade Data Monitor and China Customs Statistics' import data of U.S. agricultural and seafood products. For background on differences in U.S. and China's trade data, see CRS Report RS22640, *What's the Difference?—Comparing U.S. and Chinese Trade Data*.

[92] Separate from and prior to the Phase One Agreement, the United States initiated and won two WTO disputes against China's administration of its TRQs for wheat, corn, and rice and agricultural domestic support policies for rice and wheat. TRQs are two-tiered applications of tariffs for an imported product. A specified quantity of imports (in-quota) enters into the importing country at a reduced tariff rate. Imports that exceed the quantity (out-of-quota or over-quota) typically face higher tariffs.

[93] USDA, FAS, *China Announces a New Round of Tariff Exclusions*, GAIN Report CH2020-0017, February 26, 2020.

[94] CRS calculations from Trade Data Monitor, U.S. Census Bureau, and China Customs Statistics data.

the U.S. Trade Representative assert that China did not fully implement its obligations under the Phase One Agreement, including provisions related to agricultural trade.[95]

USDA's Response to Retaliatory Tariffs

How Did USDA Respond to Retaliatory Tariffs in 2018 and 2019?

In response to foreign trade retaliation targeting U.S. agricultural products in 2018 and 2019, the Secretary of Agriculture used the authorities and funds of the Commodity Credit Corporation (CCC) to provide additional assistance to the farm sector.[96] USDA made available up to $12.0 billion in CCC funding in 2018 and up to $16.0 billion in CCC funding in 2019. USDA determined how much funding to make available each year on the basis of its modeling of economic losses resulting from foreign countries imposing retaliatory tariffs (see "What Were the Economic Losses to the U.S. Agricultural Sector from Retaliatory Tariffs in 2018 and 2019?").

The funds made available in 2018 and 2019 were distributed through three ad hoc programs: the Market Facilitation Program (MFP), the Food Purchase and Distribution Program (FPDP), and the Agricultural Trade Promotion Program (ATP). These programs provided direct income support payments to farmers, purchased agricultural commodities, and supported trade promotion activities, respectively. Support from MFP, FPDP, and ATP supplemented direct income support, commodity purchases, and trade promotion activities authorized by the farm bill and other legislation.[97]

The bulk of the CCC funds were distributed through MFP (**Table 10**). MFP made direct payments to producers of eligible crops, dairy, and hogs. USDA made significant changes to MFP between the first and second rounds of funding, including expanding the commodities eligible for support, increasing payment limits for producers, and shifting from commodity-specific payments to county-specific payments, among other changes.[98]

[95] See USTR, *2024 National Trade Estimate Report on Foreign Trade Barriers*, March 2024, pp. 51-60; and USTR, *2024 Report to Congress on China's WTO Compliance*, January 2025.

[96] For background on the authorities and funds of the Commodity Credit Corporation, see CRS Report R44606, *The Commodity Credit Corporation (CCC)*.

[97] For additional background on income support authorized through the farm bill, see CRS In Focus IF12218, *Farm Bill Primer: Farm Safety Net Programs*. For additional background on USDA's commodity purchasing authorities, see CRS In Focus IF12193, *Farm and Food Support Under USDA's Section 32 Account*. For additional background on trade promotion authorized through the farm bill, see CRS In Focus IF12155, *Farm Bill Primer: Trade and Export Promotion Programs*.

[98] For background on the implementation of MFP in 2018 and 2019, see CRS Report R45310, *Farm Policy: USDA's 2018 Trade Aid Package*; CRS Report R45865, *Farm Policy: USDA's 2019 Trade Aid Package*; and CRS In Focus IF11289, *Farm Policy: Comparison of 2018 and 2019 Market Facilitation Programs*.

Table 10. Funds Available and Program Outlays for USDA Programs Responding to Retaliatory Tariffs

In Millions of Dollars

Program	Funds Available	Program Outlays
USDA trade assistance announced in 2018		
Market Facilitation Program	$10,600	$8,617
Food Purchase and Distribution Program	$1,200	$1,100
Agricultural Trade Promotion Program	$200	$200
2018 subtotal	**$12,000**	**$9,917**
USDA trade assistance announced in 2019		
Market Facilitation Program	$14,500	$14,368
Food Purchase and Distribution Program	$1,400	$1,264
Agricultural Trade Promotion Program	$100	$100
2019 subtotal	**$16,000**	**$15,732**
Grand total	**$28,000**	**$25,650**

Sources: Compiled by CRS using USDA, "USDA Assists Farmers Impacted by Unjustified Retaliation," press release, July 24, 2018, https://www.usda.gov/about-usda/news/press-releases/2018/07/24/usda-assists-farmers-impacted-unjustified-retaliation; USDA, "USDA Announces Details of Assistance for Farmers Impacted by Unjustified Retaliation," press release, August 27, 2018; USDA, "USDA Launches Second Round of Trade Mitigation Payments," press release, December 17, 2018; USDA, "USDA Announces Details of Support Package for Farmers," press release, July 25, 2019; USDA, *USDA Explanatory Notes – Agricultural Marketing Service*, 2022; USDA, Agriculture Marketing Service, "Food Purchase and Distribution Program," https://www.ams.usda.gov/selling-food-to-usda/trade-mitigation-programs; USDA, Office of Inspector General, *Oversight of the Agricultural Trade Promotion Program*, Audit Report 07601-0001-24, August 2022; and Government Accountability Office (GAO), *USDA Market Facilitation Program: Oversight of Further Supplemental Assistance for Farmers Could Be Improved*, GAO-22-104259, February 2022.

Note: Values in the "program outlays" column do not sum to total shown because of rounding applied by CRS.

How Were Market Facilitation Program Funds Distributed?

USDA allocated $25.1 billion for the Market Facilitation Program (MFP) and outlaid approximately $23.0 billion in MFP payments. According to GAO, USDA distributed 2018 MFP payments to 582,596 farms (excluding farms in Puerto Rico) and 2019 MFP payments to 643,965 farms (including farms in Puerto Rico).[99] The average 2018 MFP payment per farm was $14,791 in 2018 and the average 2019 MFP payment per farm was $22,312. In each year, payments varied across farms depending on the commodities produced on the farm, the way 2018 and 2019 MFP payments were structured, and other factors.

MFP payments were available to producers of certain crops and livestock commodities. Eligible livestock commodities for 2018 and 2019 MFP payments included dairy and hogs. Eligible crops varied for 2018 and 2019 MFP, with more commodities of each type eligible for 2019 MFP payments compared to those eligible for 2018 MFP payments. In each year, more than 90% of

[99] GAO, *USDA Market Facilitation Program: Oversight of Further Supplemental Assistance for Farmers Could Be Improved*, GAO-22-104259, January 2022. GAO's report does not discuss 2018 payments to farmers in the U.S. territories in 2018 or 2019 payments to farmers in the U.S. territories excluding Puerto Rico.

MFP payments were distributed to producers of non-specialty crops (**Table 11**).[100] Livestock commodities received about 4% of total MFP payments each year, and specialty crops received about 1% of 2018 MFP payments and 2% of 2019 MFP payments.

Table 11. Distribution of Market Facilitation Program Payments, by Commodity Type

In Millions of Dollars

Commodity Type	2018 MFP Payments	2019 MFP Payments	Total
Non-specialty crops	$8,194	$13,529	$21,723
Livestock commodities	$351	$566	$917
Specialty crops	$72	$274	$346
Total	**$8,617**	**$14,368**	**$22,986**

Source: CRS calculations using GAO, *USDA Market Facilitation Program: Oversight of Further Supplemental Assistance for Farmers Could Be Improved*, GAO-22-104259, January 2022.

Notes: MFP = Market Facilitation Program. Non-specialty crops eligible for 2018 MFP payments were corn, cotton, sorghum, soybeans, and wheat. Non-specialty crops eligible for 2019 MFP payments were alfalfa hay, barley, canola, chickpeas (large and small), corn, cotton (extra long staple and upland), crambe, dried beans, dry peas, flaxseed, lentils, millet, mustard seed, oats, peanuts, rapeseed, rice (long grain, medium grain, and temperate japonica), rye, safflower, sesame seed, sorghum, soybeans, sunflower seed, triticale, and wheat. Livestock commodities eligible for 2018 and 2019 MFP payments were hogs and dairy. Specialty crops eligible for 2018 MFP payments were shelled almonds and fresh sweet cherries. Specialty crops eligible for 2019 MFP payments were almonds, cranberries, cultivated ginseng, fresh grapes, fresh sweet cherries, hazelnuts, macadamia nuts, pecans, pistachios, and walnuts.

In 2018, MFP made payments separately for each commodity.[101] According USDA, about 82% of 2018 MFP payments were for soybeans, 6% for cotton, and 3% each for sorghum and wheat (**Table 12**). Corn, dairy, and hogs each received about 2% of total payments. Fresh sweet cherries and shelled almonds each received less than 1% of total payments.

Table 12. Distribution of 2018 Market Facilitation Program Payments

Commodity	Payment (in $ million)	Share of Total
Corn	$133.52	2%
Cotton	$484.08	6%
Dairy	$182.35	2%
Fresh sweet cherries	$42.69	< 1%
Hogs	$155.59	2%
Shelled almonds	$21.92	< 1%

[100] Statute defines specialty crops as fruits and vegetables, tree nuts, dried fruits, and horticulture and nursery crops (including floriculture) (7 U.S.C. §1621 note). For additional background on specialty crops, see CRS In Focus IF11317, *2018 Farm Bill Primer: Specialty Crops and Organic Agriculture*; and CRS In Focus IF12017, *Farm Bill Primer: Horticulture Title and Related Provisions*.

[101] In 2018, the Market Facilitation Program (MFP) had payment limits of $125,000 for non-specialty crops, $125,000 for specialty crops, and $125,000 for animal products (dairy and hogs). The maximum possible payment for a producer of all three types of commodities was $375,000. Eligibility for 2018 MFP was restricted to (1) applicants whose average adjusted gross income (AGI) was less than $900,000 and (2) applicants whose AGI exceeded $900,000 and at least 75% of the AGI was derived from farming, ranching, or forestry-related activities.

Commodity	Payment (in $ million)	Share of Total
Sorghum	$244.56	3%
Soybeans	$7,069.34	82%
Wheat	$241.62	3%
Total	$8,575.65	**100%**

Source: CRS calculations using USDA *Report to House and Senate Committees on Appropriations and Agriculture*, October 31, 2019.

Notes: USDA reported outlays for 2018 Market Facilitation Program (MFP) payments of approximately $8.576 billion as of October 31, 2019. As of January 2022, program outlays were $8.617 billion. Equivalent data by commodity for the 2019 MFP are not available.

For 2019 MFP for non-specialty crops, USDA made payments separately by county. All non-specialty crops within a county received a common payment rate that varied across counties from $15 per acre to $150 per acre. Payments for non-specialty crops were capped at $250,000.[102]

According to GAO, USDA chose to change its payment calculations to avoid distorting farmers' planting decisions in 2019.[103] County-specific payment rates meant that compensation for the same commodity varied by county. For example, GAO found that corn producers in the Midwest received $61 per acre on average, while corn producers in the South received $69 per acre on average. GAO concluded that USDA's use of the new methodology resulted in 2019 MFP payments that exceeded USDA's estimated trade damages for corn and were less than USDA's estimated trade damages for soybeans, sorghum, and cotton.[104]

For specialty crops, dairy, and livestock, USDA calculated 2019 MFP payments by commodity, similar to its 2018 method. Maximum payments were capped at $250,000 total for all specialty crops and $250,000 total for dairy and hogs. GAO concluded that USDA's use of a single payment rate for tree nuts resulted in 2019 MFP payments that exceeded USDA's estimated trade damages for almonds and pecans and were less than USDA's estimated trade damages for hazelnuts, macadamia nuts, pistachios, and walnuts.[105]

How Were Food Purchase and Distribution Program Funds Distributed?

USDA allocated $2.6 billion for the Food Purchase and Distribution Program (FPDP) and outlaid more than $2.3 billion on purchased commodities. Approximately 136 vendors were awarded

[102] In 2019, MFP had payment limits of $250,000 for non-specialty crops, $250,000 for specialty crops, and $250,000 for animal products (dairy and hogs). The maximum possible payment for a producer of all three types of commodities was $750,000. Eligibility for 2019 MFP was restricted to (1) applicants whose average AGI was less than $900,000 and (2) applicants whose AGI exceeded $900,000 and at least 75% of the AGI was derived from farming, ranching, or forestry-related activities.

[103] GAO, *USDA Market Facilitation Program: Stronger Adherence to Quality Guidelines Would Improve Future Economic Analyses*.

[104] GAO, *USDA Market Facilitation Program: Stronger Adherence to Quality Guidelines Would Improve Future Economic Analyses*.

[105] GAO, *USDA Market Facilitation Program: Stronger Adherence to Quality Guidelines Would Improve Future Economic Analyses*.

contracts under 2018 FPDP.[106] USDA has not released the number of vendors awarded contracts for 2019 FPDP.

Most of the commodities purchased were distributed to states for further distribution to food banks and food pantries that participate in The Emergency Food Assistance Program.[107] Other recipients eligible to receive FPDP commodities included states, for use in the Commodity Supplemental Foods Program; tribes that operate the Food Distribution Program on Indian reservations; and the National School Lunch Program.[108] Additionally, if domestic feeding programs were unable to use commodities purchased through FPDP, USDA had the option to distribute surplus commodities to approved nonprofit entities for distribution to low-income individuals.[109]

Data on actual FPDP purchases in 2018 or 2019 are not available. USDA announced targets for FPDP purchases in 2018 and 2019 (**Table 13**). The selection of targeted commodities varied in 2018 and 2019. In some instances, USDA targeted FPDP purchases of commodities that were also eligible for MFP payments. For example, FPDP targeted $919.70 million worth of dairy products and pork in 2018 and 2019. Producers of milk and hogs also received $917 million in 2018 MFP and 2019 MFP payments (**Table 11**). USDA ceased targeting FPDP purchases for some commodities that were also made eligible for MFP payments in 2019. USDA targeted 12 commodities—cranberries, grapes, hazelnuts, kidney beans, lentils, macadamia nuts, navy beans, peas, pecans, pistachios, rice, and walnuts—for 2018 FPDP purchases but not for 2019 FPDP purchases; these commodities were ineligible for 2018 MFP payments and eligible for 2019 MFP payments. USDA has not provided data that would allow for comparison of the amount of support provided from FPDP and MFP separately for each these commodities. Total FPDP targeted purchases for specialty crops were $390.42 million in 2018 and $282.60 million in 2019 ($673.02 million total). Total 2018 MFP and 2019 MFP payments for specialty crops were $346 million (**Table 11**).

Table 13. Food Purchase and Distribution Program Targeted Commodities, 2018 and 2019

In Millions of Dollars

Commodity	2018 Targeted Purchases	2019 Targeted Purchases	Total
Apples	$93.40	$88.00	$181.40
Apricots	$0.20	$0.10	$0.30
Beef	$14.80	$151.00	$165.80
Blueberries	$1.70	$5.00	$6.70
Citrus	$83.70	$104.00	$187.70
Cranberries	$32.80	$0.00	$32.80
Dairy products	$84.90	$68.00	$152.90

[106] USDA, "Report to House and Senate Committees on Appropriations and Agriculture," October 31, 2019.

[107] USDA, Agricultural Marketing Service, "Food Purchase and Distribution Program," https://www.ams.usda.gov/selling-food-to-usda/trade-mitigation-programs.

[108] USDA, "USDA Announces Details of Support Packaged for Farmers," press release, July 25, 2019.

[109] On July 29, 2019, USDA published a final rule creating the Expanded Domestic Commodity Donation Program, which allowed for disposal of surplus commodities acquired as part of USDA's trade mitigation response to outlets not currently used in existing USDA Food and Nutrition Service programs.

Commodity	2018 Targeted Purchases	2019 Targeted Purchases	Total
Figs	$0.02	$0.10	$0.12
Grapes	$48.20	$0.00	$48.20
Hazelnuts	$2.10	$0.00	$2.10
Kidney beans	$14.20	$0.00	$14.20
Lamb	$0.00	$17.00	$17.00
Lentils	$1.80	$0.00	$1.80
Macadamia nuts	$7.70	$0.00	$7.70
Navy beans	$18.00	$0.00	$18.00
Onions	$0.00	$0.40	$0.40
Peanut butter	$12.30	$0.00	$12.30
Pears	$1.40	$4.00	$5.40
Peas	$11.80	$0.00	$11.80
Pecans	$16.00	$0.00	$16.00
Pistachios	$85.20	$0.00	$85.20
Plums/prunes	$18.70	$22.00	$40.70
Pork	$558.80	$208.00	$766.80
Potatoes	$44.50	$22.00	$66.50
Poultry	$0.00	$432.00	$432.00
Processed foods	$0.00	$200.00	$200.00
Raisins	$0.00	$24.00	$24.00
Rice	$48.10	$0.00	$48.10
Strawberries	$1.50	$2.00	$3.50
Sweet corn	$2.40	$11.00	$13.40
Walnuts	$34.60	$0.00	$34.60
Total	**$1,238.82**	**$1,358.60**	**$2,597.42**

Source: CRS calculations using USDA, "USDA Announces Details of Assistance for Farmers Impacted by Unjustified Retaliation," press release, August 27, 2018; and USDA, "USDA Announces Details of Support Packaged for Farmers," press release, July 25, 2019.

Notes: Citrus includes grapefruit, lemons, limes, oranges, and orange juice. Processed foods include canned tomatoes, pasta, prepared cereals, soups and broths, tomato sauces, and other products. Cranberries, grapes, hazelnuts, kidney beans, lentils, macadamia nuts, navy beans, peas, pecans, pistachios, rice, and walnuts were purchased in 2018 but were not eligible in 2019.

USDA administered FPDP under the rules of USDA's Commodity Procurement Program and required commodities supplied to be sourced from American producers on American farms. For FPDP, the USDA Office of Inspector General (OIG) found no reportable issues related to the type and quantify of commodities purchased but did find reportable issues related to verifying the domestic origin of purchased commodities and other aspects of contract management.[110] In

[110] USDA, Office of Inspector General, *Food Purchase and Distribution Program*, Audit Report 01601-0003-41, August 2023.

response to a congressional directive, USDA noted that six vendors awarded contracts under 2018 FPDP had substantial foreign ownership but that the products purchased for the 2018 FPDP were "100 percent domestically produced and processed."[111] In 2018, the six foreign-owned vendors supplied approximately $459 million in pork, $107 million in potatoes, $1.8 million in blueberries, and $1.4 million in strawberries.

How Were Agricultural Trade Promotion Program Funds Distributed?

USDA allocated $300 million for the Agricultural Trade Promotion Program (ATP) and spent $300 million on trade promotion activities. ATP provided cost-share funds to 59 organizations that support activities to develop new markets for U.S. agricultural and agriculture-related products (e.g., forestry and seafood products).[112] ATP-eligible activities included consumer advertising, public relations, point-of-sale demonstrations, participation in trade fairs and exhibits, market research, and technical assistance. ATP participants were required to contribute 10% for generic promotion activities and 50% for branded promotion activities.[113]

ATP was similar to the Market Access Program (MAP) authorized through the farm bill, which receives annual appropriations of $200 million.[114] Using results from prior analyses of MAP, an academic study estimated that these additional ATP funds could expand U.S. agricultural exports by $8.5 billion and U.S. farm sector cash receipts by $4.8 billion.[115]

USDA OIG audited ATP in 2022. USDA OIG found that USDA awarded funding to applicants "who may not have been the most meritorious based on the announced criteria and program regulations."[116] USDA OIG said they were "unable to attest to the merits of the 59 ATP grants awarded [by USDA Foreign Agricultural Service] in fiscal year (FY) 2019, totaling $300 million."

How Have Agricultural Stakeholders and Oversight Agencies Assessed USDA's Response to Retaliatory Tariffs Imposed in 2018 and 2019?

USDA's ad hoc programs in response to retaliatory tariffs on U.S. agricultural products provided support to the agricultural sector with the goals of increasing farm incomes, increasing domestic

[111] USDA, "Report to House and Senate Committees on Appropriations and Agriculture," October 31, 2019, p. 15. Section 119 of the Continuing Appropriations Act, 2020, and Health Extenders Act of 2019 (P.L. 116-59) required the Secretary of Agriculture to provide an accounting of commodity purchases from substantially foreign-owned companies or their subsidiaries, among other provisions.

[112] For a list of Agricultural Trade Promotion Program (ATP) awardees, see USDA, FAS, "ATP Funding Allocations," https://www.fas.usda.gov/programs/agricultural-trade-promotion-program-atp/atp-funding-allocations.

[113] USDA, Commodity Credit Corporation, "Agricultural Trade Promotion Program," 83 *Federal Register* 4417, August 30, 2018.

[114] For additional background on farm-bill-funded trade promotion programs, see CRS In Focus IF12155, *Farm Bill Primer: Trade and Export Promotion Programs*.

[115] Gary Williams, "The Overlooked Agricultural Trade Promotion Program of the USDA Trade Aid Packages," *Choices* (Quarter 4, 2019).

[116] USDA Office of Inspector General, *Oversight of the Agricultural Trade Promotion Program*, Audit Report 07601-0001-24, August 2022, https://usdaoig.oversight.gov/sites/default/files/reports/2024-11/07601000124FRredactedpublic.pdf.

prices through purchases of agricultural commodities, and diversifying export markets. Farmers reported that MFP helped them manage cash flow on their operations.[117]

In response to congressional requests, GAO published analyses of MFP in 2020, 2021, and 2022.[118] In their 2021 analysis, GAO found that USDA OCE's 2018 estimates of economic losses "used a justifiable baseline" to model what trade would have been in the absence of retaliatory tariffs. GAO also found that USDA OCE's 2019 estimates of economic losses "used baselines that did not best represent what trade would be absent the retaliatory tariffs, and that increased trade damage estimates."[119] GAO also found that USDA's methodology for calculating 2019 MFP payments "addressed some limitations of its 2018 methodology but resulted in (1) producers of the same nonspecialty crop (such as corn and soybeans) being paid differently in different counties, and (2) total payments for a nonspecialty crop different from USDA's estimate of trade damage to the crop."

In their response to GAO's 2021 analysis, USDA OCE stated that

> [t]he draft report's finding that the 2019 baseline is not representative and increased trade damage estimates does not take into account that the decision on what is the appropriate baseline depends on the policy goals and that there is not one single most representative baseline. OCE provided alternatives that reflected different options based on the direction of senior USDA decision makers under the previous administration and selection of the baseline was part of the program design and not made by OCE.[120]

USDA OCE also noted that their 2018 and 2019 economic analyses adhered to departmental and Office of Management and Budget requirements for economic analyses.

In their 2022 analysis, GAO found that USDA's compliance methodology for MFP was not designed to identify high-risk payments for auditing.[121] GAO noted that USDA conducted multiple compliance reviews for MFP eligibility requirements and that the reviews identified significant improper payments in 2018 and 2019. GAO found that the review of 2018 MFP payments was "limited in its usefulness for several reasons" and that USDA discontinued its review of 2019 MFP payments because of competing agency priorities.

USDA OIG audited FPDP in 2023. USDA OIG found no reportable issues related to the type and quantity of commodities purchased but did find reportable issues related to verifying the domestic origin of purchased commodities and other aspects of contract management.[122]

USDA OIG audited ATP in 2022. USDA OIG found that USDA awarded funding to applicants "who may not have been the most meritorious based on the announced criteria and program

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[117] See, for example, witness testimony provided to the House Committee on Agriculture Subcommittee on Livestock and Foreign Agriculture during the hearing "U.S. Agricultural Trade: Stakeholder Perspectives" on March 10, 2020, https://democrats-agriculture.house.gov/uploadedfiles/116-33_-_42601.pdf.

[118] GAO, *USDA Market Facilitation Program: Information on Payments for 2019*, GAO-20-700R, August 2020; GAO, *USDA Market Facilitation Program: Stronger Adherence to Quality Guidelines Would Improve Future Economic Analyses*; and GAO, GAO-22-104259, *USDA Market Facilitation Program: Oversight of Further Supplemental Assistance for Farmers Could Be Improved*, January 2022.

[119] GAO, *USDA Market Facilitation Program: Stronger Adherence to Quality Guidelines Would Improve Future Economic Analyses*.

[120] GAO, "Appendix VIII: Comments from the Department of Agriculture," *USDA Market Facilitation Program: Stronger Adherence to Quality Guidelines Would Improve Future Economic Analyses*, p. 86.

[121] GAO, GAO-22-104259, *USDA Market Facilitation Program: Oversight of Further Supplemental Assistance for Farmers Could Be Improved*, January 2022.

[122] USDA, Office of Inspector General, *Food Purchase and Distribution Program*, Audit Report 01601-0003-41, August 2023.

regulations."[123] USDA OIG said they were "unable to attest to the merits of the 59 ATP grants awarded by [USDA Foreign Agricultural Service] in fiscal year (FY) 2019, totaling $300 million."

For More Information

Congressional staff seeking additional information on any of the key terms, concepts, and answers to the FAQs in this report may contact the authors and/or refer to CRS reports on trade authorities, agricultural trade, and farm support in general, which have been identified in the relevant sections above.

Author Information

Benjamin Tsui
Analyst in Agricultural Policy

Stephanie Rosch
Analyst in Agricultural Policy

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[123] USDA, Office of Inspector General, *Oversight of the Agricultural Trade Promotion Program*, Audit Report 07601-0001-24, August, 2022.

IEEPA Tariffs Challenged in Supreme Court (published 10.16.25)

Introduction

On August 29, a federal appeals court **ruled** that the International Emergency Economic Powers Act (IEEPA) does not provide the Trump Administration authority to impose retaliatory tariffs. In its ruling, the appeals court held that President Trump exceeded the authority granted by the IEEPA when he signed five Executive Orders imposing tariffs on "nearly all goods from nearly every country in the world." The court's ruling permitted the Trump Administration to appeal the judgment to the United States Supreme Court, which agreed to hear arguments during the first week of November. Trump is the first and only President to rely on the IEEPA to implement tariffs, so this case will cover new ground. With the challenged tariffs playing a large role in international trade, the outcome of this case will certainly impact U.S. agricultural markets. This article will discuss the background of the case, the decision of the appeals court, and what comes next.

Background

The IEEPA was established in 1977 to grant the President the authority to exercise a variety of economic powers in response to a declared national emergency, while also limiting other economic powers granted to the President by earlier statutes like the Trading with the Enemy Act (TWEA). Functionally, the IEEPA allows the President to "investigate, regulate, or prohibit any transactions in foreign exchange." **50 U.S.C. §1702(a) (1977)**. However, the President's authority under the IEEPA is available only "to deal with any unusual and extraordinary threat . . . if the President declares a national emergency with respect to such threat." **50 U.S.C. §1701(a) (1977)**.

In January of this year, President Trump **declared** a national emergency at the U.S.- Mexico Border, citing national security concerns. This national emergency was later expanded to include Canada and China. Executive Orders Nos. **14193**, **14194**, **14195**, **14257**, and **14266** imposed tariffs on Mexico, Canada, and China in response to these national emergencies. The tariffs instituted by these executive orders are referred to in the court's opinion as the "Trafficking and Reciprocal Tariffs." The Trump Administration cited the President's IEEPA authority to regulate foreign trade in the event of a national emergency as the legal basis for instituting the tariffs. At issue in ***V.O.S. Selections, Inc. v. Trump,* No. 2025-1812 (Fed. Cir. 2025)**, are the five Executive Orders issued by President Trump to impose trade duties on foreign trading partners.

The Case

On April 14, 2025, a group of five businesses **filed suit** in the Court of International Trade (CIT), challenging the reciprocal tariffs instituted by President Trump following the declared national emergency. In the complaint, the plaintiffs alleged that the IEEPA did not grant President Trump the authority to levy the challenged tariffs. The complaint asserted that the authority to impose tariffs, "must be granted clearly and unmistakably" and not "through some implication so vague and indeterminate that it went unnoticed by every other President for nearly five decades."

The plaintiffs additionally claimed that even if the IEEPA did confer this authority to the President, then it is an unconstitutional delegation of legislative authority. On this point, the plaintiffs alleged that interpreting the IEEPA as allowing the challenged tariffs would constitute a "sweeping delegation of legislative power." According to the complaint, this "sweeping delegation" would violate the nondelegation doctrine, which exists to prevent Congress from giving its legislative power to entities not vested with such authority under the Constitution. At the CIT, the court **held** that the IEEPA did not authorize these tariffs and that the challenged orders would be permanently enjoined. Because the CIT found that the IEEPA did not authorize the tariffs, the CIT did not address whether it was an unconstitutional delegation of authority. The government appealed that decision to the U.S. Court of Appeals for the Federal Circuit.

On appeal, the court limited its discussion to "whether the Trafficking and Reciprocal Tariffs imposed by the Challenged Executive Orders are authorized by IEEPA." The court **held** that they were not. In reaching this conclusion, the appeals court relied on the text of the IEEPA, the IEEPA's history, and similar trade statutes. The court held that the IEEPA's authority, which permits the President to "regulate . . . importation," does not include the ability to impose sweeping tariffs. The court noted that the IEEPA does not include the word "tariff" or any of its synonyms like "tax" or "duty." However, in a variety of other statutes that do confer tariff authority on the President, Congress has used "clear and precise terms to delegate tariff power."

The court reasoned that the history and purpose of the IEEPA conflicted with President Trump's tariffs. The court pointed out that since the IEEPA was enacted, "not once before has a President asserted his authority . . . to impose tariffs." The court noted that the IEEPA was specifically enacted to "cabin the President's authority" and further reasoned that, "it seems unlikely that Congress intended, in enacting IEEPA, to depart from its past practice and grant the President unlimited authority to impose tariffs." This, coupled with the explicit grants of authority found in similar statutes, led the court to conclude that, "whenever Congress intends to delegate to the President the authority to impose tariffs, it does so

explicitly." Because the court found that IEEPA did not authorize these tariffs, the court did not address whether IEEPA violated the nondelegation doctrine.

Moving Forward

Despite finding that the IEEPA did not authorize the tariffs implemented by President Trump, the appeals court declined to affirm the CIT's decision to overturn and block the challenged tariffs. For now, the challenged tariffs will stand. In reaching this decision, the court relied on **Trump v. CASA, Inc., 606 U.S. 831 (2025).** There, the Supreme Court **held** that the injunctions sought were "broader than necessary to provide complete relief to each plaintiff with standing to sue." Rather than granting the injunction, the Supreme Court in **CASA** instructed the lower courts to "move expeditiously to ensure that, with respect to each plaintiff, the injunctions comport with this rule and otherwise comply with principles of equity."

The appeals court here took the same approach. On sending the decision back to the CIT for further review, the appeals court instructed the CIT to "consider in the first instance whether its grant of a universal injunction comports with the standards outlined by the Supreme Court in *CASA.*" This refusal to grant the injunctions have preserved the tariffs and will allow the Trump Administration to continue collecting tariff revenue for the time being. The government has appealed the CIT's decision to the Supreme Court, which decided to hear the case.

At the Supreme Court, **two questions** have been presented for review. First, whether the IEEPA allows a President to institute tariffs after declaring a national emergency. Second, if IEEPA authorizes the tariffs, whether the statute unconstitutionally delegates legislative authority to the President, a question that was left unanswered in the lower courts. The Trump Administration has urged the Supreme Court to hear the case and issue a decision quickly. In a document published on September 9, the Supreme Court **granted** a motion to expedite the case and set oral arguments for November 5, 2025.

The Supreme Court's decision will have major political and economic implications, regardless of the outcome. Siding with the President would likely allow further tariffs to be enacted under the IEEPA and would expand the statute's authority for future administrations. Siding with the plaintiffs would likely result in the challenged tariffs being completely vacated. Given the impacts of the tariffs so far, this option would have a major effect on the U.S. economy. A final decision is not likely to come soon, but the outcome of this case will have major implications for the U.S. agriculture industry.

Overview of Recent Ag Trade Announcements (published 11.20.25)

Background

Following President Trump's three-leg journey across Asia in October of 2025, the White House has released details of new trade agreements that seek to increase U.S. agricultural exports. Additionally, agreements executed earlier this year with the United Kingdom (U.K.) and the European Union (E.U.) mark a similar attempt to increase exports to various European nations. This article will briefly discuss the details of the various trade developments announced by the White House throughout 2025.

Mutual Responsibilities & Consequences

It is important to note that the trade deals discussed below are still preliminary and in some cases are merely agreed upon "frameworks" meant to guide negotiations as they progress. As a result, they are not (and are not yet intended to be) binding on either country. Given the unpredictability of international trade, the final agreements could potentially vary greatly from these initial framework agreements, depending on future negotiations.

Article I of the Constitution gives Congress the exclusive power to "regulate commerce with foreign nations." In the past, when the President exercised their power to negotiate trade agreements, they were considered "congressional-executive agreements" and would ultimately require Congress' approval under trade promotion authority (TPA) enacted by Congress. However, the most recent TPA authority expired in 2021, creating uncertainty in whether foreign trade agreements would require congressional authorization. For example, when President Biden executed the Indo-Pacific Economic Framework for Prosperity (IPEF), no agreements under this trade deal were submitted to Congress for approval.

With the expiration of the TPA, it is unclear whether President Trump's "framework agreements" will require Congressional approval, creating yet another area of uncertainty in the future of these agreements. The Congressional Research Service has recently published a report that may be helpful for more information on the interplay between executive and legislative authority.

China

Following a meeting in South Korea between President Trump and Chinese President Xi Jinping, the White House published details of a new trade deal agreed upon by the U.S. and China. In a fact sheet recently published on the White House website, the trade deal is referred to as a "historic agreement" that will "open China's market to U.S. soybeans and other agricultural exports." The trade deal stipulates that China will suspend its retaliatory

tariffs implemented throughout 2025. These include tariffs on U.S. chicken, wheat, corn, cotton, sorghum, soybeans, pork, beef, aquatic products, fruits, vegetables, and dairy products. Further, China has agreed to purchase at least 12 million metric tons of U.S. soybeans during the final two months of 2025. China has also committed to purchase at least 25 million metric tons of U.S. soybeans in 2026, 2027, and 2028. Finally, China has agreed to resume purchasing U.S. sorghum, hardwood, and softwood logs.

China is a major purchaser of U.S. soy, so this can have a significant impact on production and market values. For example, in 2024 China purchased 26.81 million metric tons of U.S. soybeans. Between January and May of 2025, before trade tensions escalated, figures **indicate** China had imported 6 million metric tons of U.S. Soybeans. It has been **reported** by the USDA that since the summit in South Korea, China has purchased 792,000 metric tons of U.S. soybeans.

As of the time of writing, China **has not** publicly issued a confirmation of its commitment to purchase the specified amounts of U.S. soybeans. However, in regards to some other components of the deal, China has **confirmed** its suspension of its retaliatory tariffs on U.S. imports. It will, however, leave in place a 13% tariff on imported U.S. soybeans.

Japan

During the trip to Asia, President Trump met with Japan's Prime Minister Sanae Takaichi to reconfirm the Framework Agreement entered by the U.S. and Japan on July 22, 2025. The framework contained provisions intended to bolster agricultural trade between the U.S. and Japan. Details of this agreement were outlined in an **Executive Order** signed by President Trump on September 4, 2025, titled "Implementing the United States-Japan Agreement." The Executive Order states that Japan will be "working toward an expedited implementation of a 75 percent increase of United States rice procurements within the Minimum Access rice scheme." Additionally, Japan will be investing $8 billion per year towards "purchases of United States agricultural goods, including corn, soybeans, fertilizer, bioethanol (including for sustainable aviation fuel)." Japan has reconfirmed its commitments in a recently published **Joint Statement** between Japan and the U.S..

The United Kingdom

On May 8, 2025 President Trump and Prime Minister Keir Starmer **announced** the U.S.-UK Economic Prosperity Deal (EPD). Per the **general terms** of this agreement, the United Kingdom will be removing its 20% tariff on U.S. beef exports, which currently impacts beef exports within a quota of 1,000 metric tons. The U.K. has also agreed to create a preferential duty-free quota of 13,000 metric tons for U.S. beef. A preferential-duty free agreement is a form of trade agreement that allows products to be imported with reduced

import costs and fees. The trade deal between the U.S. and the U.K. also stipulates that the two nations will "commit to working together to improve market access for agricultural products." However, the trade deal does not go into detail on how exactly market access will be improved. An **update** recently published by the U.K. government states, "We will execute the legislative process to create a preferential duty-free quota for US beef of 13,000 metric tonnes (MT) per calendar year." Similar to the above agreements, at this point this is a voluntary and mutual decision, rather than a binding legal commitment.

The E.U.

On July 27, 2025, President Trump **announced** a new "Framework Agreement" with the E.U.. The **Framework Agreement** stipulates that the E.U. provide preferential market access for U.S. agricultural goods including tree nuts, dairy products, fresh and processed fruits and vegetables, processed foods, planting seeds, soybean oil, and pork and bison meat. Like the agreement with the U.K., this trade deal states that the E.U. and U.S. "commit to work together to address non-tariff barriers affecting trade in food and agricultural products" which includes "streamlining requirements for sanitary certificates for pork and dairy products." In a **Joint Statement** between the U.S. and the E.U., the Framework Agreement is referred to as "a first step in a process that can be further expanded over time to cover additional areas and continue to improve market access and increase their trade and investment relationship."

Malaysia

On October 26, 2025, the U.S. and Malaysia executed the "**Agreement on Reciprocal Trade**." According to a **fact sheet** published by the Office of the U.S. Trade Representative, Malaysia has committed to provide significant preferential market access for U.S. agricultural products. This includes dairy, horticultural products, poultry, pork, rice, and fuel ethanol. Malaysia has also committed to address "non-tariff" barriers to U.S. agricultural exports. To accomplish this, Malaysia has pledged to: (1) recognize the U.S. food safety system for U.S. meat, poultry, and dairy products; (2) streamline halal certification of U.S. food and agricultural products; (3) open market access for U.S. sorghum; and (4) adopt regionalization approaches to facilitate U.S. exports of pork and poultry. Malaysia has confirmed these commitments via a **Joint Statement** between the U.S. and Malaysia. According to that joint statement, the two nations will "undertake domestic formalities in advance of the Agreement entering into force." The agreement is additionally confirmed in a **post** by the National Trade Promotion Agency of Malaysia, which claims the agreement "strengthens regulatory certainty and supply-chain resilience through deeper cooperation in trade facilitation."

Cambodia

On the same day that the Malaysia agreement was formalized, a **new trade agreement** with Cambodia was also announced. Under this agreement, Cambodia has agreed to eliminate tariffs on all U.S. food and agricultural product imports. Further, the agreement contains language indicating Cambodia's intent to promote the importation of U.S. agricultural products. Specifically, Cambodia says it will recognize U.S. regulatory oversight, U.S. sanitary and phytosanitary measures, and accept certificates issued by U.S. regulatory authorities for food and agricultural products. U.S. **sanitary and phytosanitary measures** are a set of testing and inspection methods used to ensure the safety of agricultural products. This language in the trade agreement indicates that when importing U.S. agricultural products, Cambodia will defer to safety determinations already made by U.S. regulatory agencies. This, in theory, should reduce non-tariff barriers to trade between the U.S. and Cambodia. While this agreement is not yet finalized, the two countries **have committed** to "undertake domestic formalities" to make it so.

Ongoing Negotiations

The negotiations discussed in this section are even more nebulous, as they are merely attempts to negotiate the terms of a potential agreement. However, they are still an indication that the following countries are at least at the negotiating table with the U.S.

Indonesia and the U.S. are still negotiating details of a trade deal that was first discussed in a **joint statement** issued on July 22, 2025. Per the joint statement, Indonesia would eliminate "approximately 99 percent" of tariff barriers currently placed on a "full range" of imported U.S. food and agricultural products. The proposed agreement also stipulates that the U.S. and Indonesia will cooperate to exempt U.S. food and agricultural products from all import licensing regimes, provide Fresh Food of Plant Origin designation for all applicable U.S. plant products, and to recognize listing of all U.S. meat, poultry, and dairy facilities. The joint statement provides that Indonesia will also accept certificates issued by U.S. regulatory authorities.

Further, the U.S. and Vietnam have announced a **framework** for a trade agreement, but are still in the process of finalizing details of a more comprehensive agreement. The framework states that Vietnam will provide preferential market access for "substantially all" U.S. agricultural exports to Vietnam.

On October 26, 2025, the White House posted a **joint statement** discussing an agreed-upon framework for a new trade deal between the U.S. and Thailand. The framework states that Thailand will eliminate tariff barriers on "approximately 99 percent of goods" covering a full range of U.S. food and agricultural products. Similar to other agreements, the U.S. and

Thailand trade deal would require Thailand to accept safety certifications of food and agricultural products issued by U.S. regulatory authorities. This joint statement also "takes note" of "the forthcoming commercial deals between U.S. and Thai companies" for the purchase of U.S. feed corn, soybean meal, and dried distiller grains with solubles at an estimated 2.6 billion dollars per year.

Finally, on November 14, 2025, the White House published a **fact sheet** outlining the framework for new U.S. trade deals with Switzerland and Liechtenstein. Negotiations are ongoing, but a recently published **press release** indicates that Switzerland and Liechtenstein have in fact signed a "non-binding memorandum of understanding" with the U.S. At this time, only the "non-binding memorandum of understanding" has been signed, so the specific details of the agreement have not been finalized and may be subject to change. Per the fact sheet, this new trade deal will "lock in the largest expansion ever of U.S. exporter access to Swiss markets, creating new opportunities for U.S. manufacturers, farmers, ranchers, fishermen, and other producers." To accomplish this expansion, Switzerland and Liechtenstein will remove "a range of tariffs" on U.S. agriculture products including fresh and dried nuts, fish and seafood, and fruits. Additionally, Switzerland will establish tariff rate quotas for American poultry, beef, and bison. Finally, the fact sheet discusses Switzerland and Liechtenstein's intent to address non-tariff barriers which have historically prevented certain U.S. goods from being imported. To remove these barriers, the nations will address "restrictive measures" on U.S. poultry and attempt to streamline requirements for U.S. dairy products.

Conclusion

Trade relationships between countries are complicated. Until binding agreements are reached, negotiations may continue. While more time will be needed to determine the ultimate impact, the language recognizes the importance of international trade to U.S. agriculture and indicates an intent to improve exports of U.S. agricultural products.

Supreme Court Vacates IEEPA Tariffs (published 3.5.26)

Introduction

In January 2025, President Trump declared national emergencies at the U.S. borders, citing an influx of "poisonous fentanyl" and "the extraordinary threat posed by illegal aliens". According to the Trump Administration, these emergencies authorized the President to impose tariffs under the International Emergency Economic Powers Act (IEEPA). IEEPA grants the President authority to undertake specific economic actions in response to a national emergency. Using IEEPA, the Trump Administration imposed tariffs on Mexico, Canada, and China. These tariffs were challenged in federal courts and ultimately struck down by the Supreme Court on February 20, 2026, in *Learning Resources, Inc. v. Trump*. To learn more about the IEEPA tariffs and the Court's decision, click here.

Following that decision, certain questions remained unanswered. Will there be refunds for the IEEPA tariffs? How will those refunds be issued? Will the Trump Administration impose new tariffs, and if so, how? Recent developments have provided some clarity on these issues and what importers can expect moving forward. This article will discuss refunds, new tariffs implemented by the Trump Administration, and an investigation by the United States Trade Representative that could potentially lead to new tariffs.

Refunds & The CAPE System

Reportedly, approximately $133.5 billion was collected on IEEPA tariffs by December 2025. With those tariffs now vacated by the Supreme Court, American importers are seeking refunds. Because the Court's decision did not mention refunds, importers were left uncertain about whether refunds would be issued. Recent developments at the Court of International Trade (CIT) have provided some clarity, but background is needed to understand those actions.

When a good that is subject to tariffs enters the United States, one of two collection processes applies: formal and informal entries. Formal entry is required when the value of imported goods exceeds $2,500. In a formal entry, the importer must pay the estimated tariff rate and post a bond with Customs and Border Protection (CBP). CBP later calculates the final tariff rate. This is known as "liquidation." Under federal law, liquidation must occur within one year of the entry. Informal entries generally do not require a bond and are considered liquidated once the importer pays the estimated tariffs.

Under the Tariff Act of 1930, the Secretary of the Treasury is authorized to offer tariff refunds when "it is ascertained on liquidation or reliquidation . . . that more money has been deposited or

paid as duties than was required by law." In those situations, refunds are required if the discrepancy exceeds $20.00. Additionally, refunds may be mandated after a court orders reliquidation.

On March 4, 2026 the Court of International Trade (CIT) issued an order stating that, "all importers of record whose entries were subject to IEEPA duties are entitled to benefit from the *Learning Resources* decision." To facilitate this, the CIT ordered that any liquidated entries "for which liquidation is not final" be reliquidated without regard to the IEEPA tariffs. Unliquidated entries were likewise ordered to be liquidated. In other words, the CIT ordered CBP to pretend as if the IEEPA tariffs never existed and begin issuing refunds. As discussed above, liquidation is a crucial step in the refund process, as it determines the amount owed by the importer.

On March 6, the CIT issued a subsequent order temporarily suspending CBP's obligation to issue refunds, after CBP indicated it needed additional time to liquidate or reliquidate all entries. CBP asserted that the "volume of entries" made each year prevent it from being able to "affirmatively review and liquidate each entry." CBP is still responsible for collecting and liquidating all non-IEEPA tariffs, which seems to have initially caused CBP to doubt its ability to comply with the CIT's order. However, CBP then filed a subsequent declaration which outlined its plans to implement a new online system to process IEEPA refunds.

CBP plans to implement the Consolidated Administration and Processing of Entries (CAPE) claims portal. According to CBP, CAPE will be a web-based resource allowing importers and brokers to submit IEEPA refund requests. CAPE will use information submitted by importers to determine refund eligibility. If eligible, tariff rates will be liquidated or reliquidated "as if the IEEPA duties had never been declared." After liquidation or reliquidation, CAPE will automatically issue refunds to eligible importers. It is important to note that CAPE is not yet finalized. Accordingly, CBP will be implementing a phased development of CAPE, with basic system functionality being activated first. To ensure eligibility for refunds, importers must first enroll in the Automated Clearing House (ACH) program. ACH is a system used by CBP to process and transmit electronic credit and debit transfers and will be used to distribute IEEPA refunds. For more information on the CAPE system, click here.

Refunds have been a looming issue since the Court's decision in *Learning Resources*. Given the amount collected under the IEEPA tariffs, many U.S. importers are likely seeking to recover refunds. When the Court did not address refunds in its opinion, those importers were left with uncertainty. However, with its introduction of the CAPE system, CBP has provided at least one potential avenue for producer refunds under IEEPA.

Section 122 Tariffs

On February 20, 2026, President Trump announced a new 10% global tariff rate under Section 122 of the Trade Act of 1974 (Section 122). The initial announcement came the same day the Supreme Court invalidated the IEEPA tariffs. Since its enactment, no tariffs had previously been implemented under Section 122. Because no tariffs have been imposed under Section 122 before, many importers may be unclear about Section 122's purpose and how it relates to the newly announced tariffs.

Section 122 was implemented to address "fundamental international payments problems." More specifically, Section 122 allows the president to impose tariffs to: 1) deal with large and serious United States balance-of-payments deficits; 2) prevent an imminent and significant depreciation of the dollar in foreign exchange markets; or 3) cooperate with other countries in correcting an international balance-of-payments disequilibrium.

A balance-of-payments refers to a record detailing all transactions made between a country's entities and international trading partners. It includes a current account, a capital account, and a financial account. The current account tracks a nation's trade of goods and services, its earnings on foreign investments, and its foreign money transfers. The capital account covers transactions in foreign financial institutions and central bank reserves. The financial account records deposits, ownership of investment securities, and direct investment between U.S. residents and foreign entities. A balance-of-payments deficit means that the United States is sending more money out than it is taking in.

Unlike IEEPA, Section 122 explicitly grants the President authority to impose tariffs. However, Section 122 also places limitations on any tariffs enacted under its authority. To address one of the above-mentioned payments problems, the President may enact a temporary tariff. The tariff cannot exceed 150 days, unless approved by Congress. 19 U.S.C. § 2132(a)(3). The tariff rate may not exceed 15% *ad valorem*. An *ad valorem* tariff is calculated based on the total value of the goods, rather than their quantity or weight. In other words, the tariff may not exceed 15% of the total value of the imported goods. Section 122 requires that the tariff rate be applied "consistently with the principle of nondiscriminatory treatment." 19 U.S.C. § 2132(d)(1). This means that the rate must generally apply equally to all countries. However, when a country has "large or persistent balance-of-payments surpluses," the President may target them specifically.

Using the authority granted by Section 122, the Trump Administration announced a 10% *ad valorem* import duty on articles being imported into the United States. The administration asserts that the Section 122 tariffs are necessary to correct "a large and serious balance-of-payments deficit." The announcement explains that the United States is currently in an overall account deficit and running a deficit in each component of the current account. To support this claim, the Trump Administration asserts that: 1) the annual U.S. goods trade deficit reached 40% during 2024; 2) the U.S. made less on exported capital and labor than other countries made by exporting capital

and labor to the U.S. and; 3) more money is currently being transferred out of the United States than is being transferred in. According to the announcement, these issues "endanger U.S. economic and national security."

The announcement additionally lists certain exemptions from the Section 122 tariff rate. The exemptions include but are not limited to: certain critical minerals; natural resources unavailable in the United States; beef, tomatoes, and oranges; pharmaceuticals; certain electronics; certain aerospace products; and informational materials. Additionally, goods traded according to the agreement between the United States, Mexico, and Canada will be exempted. As discussed above, the Section 122 tariffs face a 150-day statutory-limit, which could potentially be extended by Congress. This means that the tariffs could at least be active until July 20, 2026.

The Section 122 tariffs have already faced legal challenges. A coalition of twenty-four states filed a lawsuit challenging the Section 122 tariffs on March 5, 2026. The suit, filed in the CIT, argues that Section 122 does not authorize the Trump Administration's tariffs. The complaint argues that a trade deficit is not a balance-of-payments deficit, and therefore Section 122 does not apply. According to the states, the administration is "contorting" the term balance-of-payments and "cherry-picking only the negative components." They argue that when foreign capital and financial investments into the United States are included, the actual balance-of-payments is only 0.2% of the United States' gross domestic product, which the states characterize as "essentially a rounding error." The states claim that Section 122 does not authorize tariffs based on a trade deficit and that the administration cannot "redefine" the term balance-of-payments to justify the Section 122 tariffs. The plaintiffs conclude by requesting the CIT to declare the Section 122 tariffs unlawful, vacate them, and order refunds of tariffs already collected.

Whether the Section 122 tariffs will survive this challenge remains to be seen. As of the time of writing, the tariffs have been in effect for just over a month, and many questions remain unanswered. Section 122 imposes a 150-day limit, but Congress could extend that period. Even if Congress were to extend the deadline, the tariffs could be overturned by the courts. Further, President Trump has indicated that the rate will be increased to 15%. Whether Section 122 authorized the recent tariffs is an issue for the federal courts to decide, which could take some time.

Potential Section 301 Tariffs

On March 17, 2026, the Office of the United States Trade Representative (USTR) initiated an investigation of foreign countries under Section 301 of the Trade Act of 1974 (Section 301). According to a USTR press release, the investigation focuses on "acts, policies, and practices of various economies" related to structural excess capacity in manufacturing sectors. Structural excess capacity occurs when production capacity exceeds domestic and global demand. The USTR

claims that this excess capacity will lead to "overproduction and large or persistent trade surpluses, as well as underutilized and unused capacity, in manufacturing sectors." According to the USTR, this poses "a serious challenge to U.S. efforts to re-shore supply chains and provide good-paying jobs for American workers." While the USTR has explained why it launched the investigation, many may still be unclear about how Section 301 works and what could come next.

Section 301, at its core, is designed to address "unfair" foreign trade policies and enforce international trade agreements. Section 301 applies when the USTR determines that "the rights of the United States under any trade agreement are being denied." Section 301 also applies when "an act, policy, or practice of a foreign country violates, or is inconsistent with, the provisions of, or otherwise denies benefits to the United States under, any trade agreement, or is unjustifiable and burdens or restricts United States commerce."

A Section 301 investigation can be initiated by the USTR itself or by a private party. Private parties must file a petition describing the unfair trade practice and how it is harming the U.S. economy. Once filed, the USTR has 45 days to decide whether to begin a formal investigation. The USTR must publish a notice in the Federal Register when self-initiating an investigation. The USTR is also required to seek public comment on proposed actions. For non-trade agreement investigations, a final determination will generally be issued 12 months after an investigation begins.

If the USTR finds through investigation that a country has violated a trade agreement or implemented an act, policy, or practice that is unjustifiable, Section 301 authorizes certain actions. Most notably, the USTR may impose tariffs. Under Section 301 the USTR is authorized to impose duties or "other import restrictions" on the goods of a foreign country for "such time as the Trade Representative determines appropriate."

The USTR announced that it has self-initiated a Section 301 investigation. The USTR will investigate China, the European Union, Singapore, Switzerland, Norway, Indonesia, Malaysia, Cambodia, Thailand, Korea, Vietnam, Taiwan, Bangladesh, Mexico, Japan, and India for the above-mentioned structural excess capacity concerns. If the USTR determines that the policies or practices of the countries under investigation are actionable under Section 301, it may act under the statute, including imposing tariffs.

This is a broad investigation, and it will likely be some time before any official action is announced. However, any actions taken could have significant economic consequences. Individuals interested in submitting a public comment on the investigation may do so here. The deadline to submit written comments is April 15, 2026.

Conclusion

In the aftermath of the *Learning Resources* decision, many questions remained unanswered. However, some answers have emerged in the weeks since. While not finalized, the CAPE system may provide an avenue for importers seeking IEEPA refunds. Despite ongoing legal challenges, President Trump's Section 122 tariffs suggest that tariffs remain a central part of the administration's trade strategy. This is further reinforced by the USTR's decision to initiate a broad Section 301 investigation against U.S. trading partners. It remains to be seen what the investigation will ultimately find and what actions may follow. Regardless, importers and consumers should stay informed about these developments and monitor further changes in U.S. trade policy.

To learn more about the IEEPA tariffs, click here.

To read the full text of the Trade Act of 1974, click here.

To learn more about enrolling in the ACH program, click here.

Federal Court Strikes Down 2019 & 2024 ESA Regulations (published 4.16.26)

On March 30, 2026, a federal court in California issued a ruling to overturn several Endangered Species Act ("ESA") regulations adopted by the Trump administration in 2019 and the Biden administration in 2024. The plaintiffs in ***Ctr. for Biological Diversity v. U.S. Dep't of Interior*, No. 24-cv-04651 (N.D. Cal. Mar. 30, 2026)** challenged six rules in total with the court ultimately concluding that four violated the statutory text of the ESA. Earlier this year, the United States Fish and Wildlife Service ("FWS") together with the National Marine Fisheries Service ("NMFS") proposed a slate of new ESA regulations intended to restore the rules established under the first Trump administration. While those rules have yet to be finalized, it is possible that the recent court ruling may offer some insight into how courts may ultimately treat those regulations.

ESA Overview

The ESA was enacted in 1973 for the purpose of conserving species at risk of extinction and the habitats upon which those species depend. 16 U.S.C. § 1531(b). The statute is jointly administered by FWS and NMFS (collectively, "the Services") which are responsible for creating and maintaining a list of species that are classified as either "threatened" or "endangered" depending on the level of risk those species face. 16 U.S.C. § 1533. Once a species is added to that list, it becomes protected under the ESA.

When the Services list a species for protection under the ESA, they must also designate critical habitat for the species. 16 U.S.C. § 1533(a)(3)(A)(i). The ESA defines critical habitat as specific geographical areas which are "occupied by the species, at the time it is listed […] on which are found those physical or biological features essential to the conservation of the species" or areas which are not occupied by the species at the time of listing but the Services have determined are "essential for the conservation of the species." 16 U.S.C. § 1532 (5)(A).

Along with requiring the Services to list species under the ESA and designate critical habitat for those species, the ESA also requires all other federal agencies to consult with the Services to avoid harming listed species or designated critical habitat. Specifically, the ESA requires each federal agency to ensure that any action it "authorize[s], fund[s], or carrie[s] out" is "not likely to jeopardize the continued existence of any [listed] species or result in the destruction or adverse modification of" critical habitat. 16 U.S.C. § 1536(a)(2). To initiate this process, the agency taking action will determine whether its action "may affect" listed species. 50 C.F.R. § 402.13. If the agency concludes that its action "may affect" a listed species, it must reach out to the Services to determine whether the action is

"likely to adversely affect" the species. 50 C.F.R. § 402.13 If so, then the Services must engage in formal consultation, a process which requires the consulting Service to prepare a document known as a Biological Opinion ("BiOp"). 50 C.F.R. § 402.13 The BiOp will evaluate more thoroughly the expected impacts of the agency's action and if it concludes that the action is likely to jeopardize the continued existence of a protected species or result in the destruction or adverse modification of critical habitat, it must also include mitigation measures the agency can take to avoid causing such negative impacts. 50 C.F.R. § 402.13. When making a determination about the impacts an agency action may have on listed species, the Services must base their conclusions on "the best scientific and commercial data available." 16 U.S.C. § 1536(a)(2).

Background to the Case

Since 2019, the ESA has experienced several rounds of regulatory changes. In August 2019, the Services issued final rules to change the procedures related to the listing of species under the ESA and the consultation process between the Services and other federal agencies. A closer look at those changes is available here. The plaintiffs in *Ctr. for Biological Diversity v. U.S. Dep't of Interior* filed a lawsuit to challenge those 2019 regulations. However, following a change in Presidential administration, the court sent the matter back to the Services for review, bringing that lawsuit to an end. In 2024, the Services adopted new regulations which, according to the plaintiffs, resolved some of their concerns with the 2019 regulations but ultimately retained certain issues while introducing others. More information on the 2024 regulatory changes can be found here.

After the new regulations were finalized in 2024, the plaintiffs filed the current lawsuit to challenge six specific provisions that had been either introduced in 2019 and retained in 2024 or introduced for the first time in 2024. Following another change in Presidential administration in 2025, the Services sought to have the case either paused or dismissed, citing another round of updated ESA regulations that had been proposed in 2025 which the Services expect to finalize before the end of 2026. However, the court concluded that neither pausing or dismissing the case would be appropriate, noting that it would be better for the court to "provide the [Services] with its reading" before the new regulations are final so that the Services can take into account any "problems" the court might find.

Many of the regulatory changes proposed in 2025 were identical to those that had been made in 2019 before being modified in 2024. Although various lawsuits were filed to challenge the 2019 rules, they were largely paused or dismissed after the Services announced that they would revisit those regulations following the transition from the Trump administration to the Biden administration. For that reason, no court ever fully considered whether the 2019 rules complied with the ESA. The recent decision in *Ctr. for Biological*

Diversity v. U.S. Dep't of Interior represents the first time a court has considered the legality of those regulations and may provide some insight into how the rules proposed in 2025 may be viewed by courts after they are finalized.

Recent Court Decision

The plaintiffs in *Ctr. for Biological Diversity v. U.S. Dep't of Interior* asked the court to review six ESA regulations and consider whether they violated the statutory requirements of the ESA. Four of those regulations are related to the consultation process while the other two are concerned with the designation of critical habitat. Of those six, the court found that four violated the ESA and should be overturned. The other two were upheld.

"Effects of the Action"

During agency consultation with the Services, the ESA requires the Services to evaluate the effects of the agency action on listed species and critical habitat to determine whether jeopardy of a species or the destruction or adverse modification of critical habitat is likely to occur. 16 U.S.C. § 1536. Before 2019, the ESA regulations defined "effects of the action" as "the direct and indirect effects of an action on the species or critical habitat." 50 C.F.R. § 402.02 (2018). The 2019 rules changed the definition of "effects of the action" to "all consequences to listed species or critical habitat that are caused by the proposed action" and clarified that a "consequence is caused by the proposed action if it would not occur but for the proposed action and it is reasonably certain to occur." 50 C.F.R. § 402.02 (2019). The Services left this definition in place when it amended the regulations in 2024.

The plaintiffs argue that this violates the ESA's requirement that the Services rely on the best scientific data available when considering the impacts an agency's action may have on listed species and that it the phrase "reasonably certain to occur" conflicts with the ESA requirement that the Services consider whether jeopardy of a species is "likely" to occur. The court agreed with the plaintiffs on both arguments. First, the court concluded that the 2019 rule violates the ESA's "best available data" requirement because the ESA "imposes a mandatory duty on the Services to analyze the likelihood of jeopardy or harm to habitat using the best available data." According to the court, the best scientific data available may not be the same as impacts that are "reasonably certain to occur." Next, the court concluded that the provision of the 2019 regulation that requires the Services to only consider those impacts to species and habitat which are "reasonably certain to occur" is contrary to the ESA requirement that Services consider whether jeopardy of a species or harm to habitat is "likely." Because what is "likely" may not necessarily include what is "reasonably certain to occur," the court held that this regulation violated the ESA and should be overturned.

Consideration of Mitigation Measures

When drafting a BiOp, the ESA regulations require the Services to take into account "any beneficial actions" taken or proposed to be taken by the action agency. 50 C.F.R. § 402.14(g)(8). The purpose of this rule is to ensure that the Services consider any activities that are beneficial to listed species that the consulting agency plans to include as part of its proposed action when determining what the impacts of that action could be to protected wildlife. In 2019, the Services amended the ESA rules to clarify that the Services should take such beneficial activities into consideration without "any additional demonstration of binding plans." 50 C.F.R. § 402.14(g)(8). In other words, the 2019 rules require the Services to give proposed beneficial activities the same consideration as any other portion of the agency action even if the agency has not committed to carrying out those activities.

The plaintiffs argued that this violates the ESA's requirement that the Services "insure" against jeopardy of listed species by "forcing them to consider amorphous, non-binding mitigation plans in making no-jeopardy findings." In it's opinion, the court agreed with the plaintiffs, concluding that the 2019 rule violated the ESA because it does not satisfy the statutory requirement that the Services "insure" against harm to species or habitat. According to the court, the ESA requires beneficial activities to be excluded from consideration unless they are binding.

Definition of "Destruction or Adverse Modification"

Under the ESA, the Services must "insure" that federal agency actions will not cause jeopardy to listed species or "destruction or adverse modification" to designated critical habitat. 16 U.S.C. § 1536(a)(2). Prior to 2019, the ESA regulations defined "destruction or adverse modification" as "a direct or indirect alteration that appreciably diminishes the value of critical habitat for the conservation of a listed species." 50 C.F.R. § 402.02 (2018). In 2019, that definition was amended to "a direct or indirect alteration that appreciably diminishes the value of critical habitat *as a whole* for the conservation of a listed species." 50 C.F.R. § 402.02 (2019). That definition was retained in the 2024 regulations.

The plaintiffs argue that introducing the language "as a whole" violates the ESA by replacing the statutory requirement to avoid all destruction or adverse modification of critical habitat with a regulatory provision that allows at least some destruction or adverse modification of critical habitat. The court agreed, concluding that the text of the ESA "prohibits adverse modification entirely" and that the 2019 rule violated that requirement by permitting at least some adverse modification to critical habitat.

Duty to Request Reinitiation of Consultation

Before 2024, the ESA regulations concerning agency consultation required both the agency taking action or the consulting Service to request reinitiation of consultation under certain circumstances. 50 C.F.R. § 402.16(a) (2023). In 2024, the Services amended their regulations so that only the agency taking action is required to request reinitiation of consultation. The plaintiffs claim that the Services unlawfully rescinded their duty to request reinitiation of consultation, arguing that the Services failed to provide adequate reasons to support amending the regulations. In 2024, the Services stated that they were amending the regulation to clarify that only the action agency has the authority and responsibility to initiate or reinitiation consultation. The court was not persuaded by that reasoning. According to the court, while the text of the ESA does not allow the Services to compel any federal agency to engage in consultation, nothing in the pre-2024 rule gave the Services that authority. The rule required the Services to request reinitiation in certain circumstances but did not grant the Services the authority to require the federal agency to reinitiate consultation. Because the Services failed to provide a persuasive reason for changing a rule that had been in place for 25 years, the court found the change to be unlawfully arbitrary and concluded that it should be overturned.

Rules Upheld

Finally, the court considered the last two regulations challenged by the plaintiffs. While the court overturned the first four regulations it considered, it upheld the last two after concluding that they did not violate the ESA.

The ESA defines "threated species" as "any species which is likely to become an endangered species within the foreseeable future[.]" 16 U.S.C. § 1532(20). Before 2024, the ESA regulations required the Services to defined "foreseeable future" as extending "only so far into the future as the Services can reasonably determine that both the future threats and the species' responses to those threats are likely." 50 C.F.R. § 424.11(d) (2023). In 2024, the Services amended that definition to "as far into the future as the Services can make reasonably reliable predictions about the threats to the species and the species' responses to those threats." 50 C.F.R. § 424.11(d) (2025). In making this change, the Services replaced language requiring that they "reasonably determine" that threats to a species are "likely" with language that the Services make "reasonably reliable predictions" about those same threats. The plaintiffs argued that the new language contradicts the ESA requirement that the Services base their conclusions on the "best available data," but the court disagreed. In its ruling, the court concluded that the two phrases "appear synonymous" and that to determine whether an effect is "likely" requires making a "reliable prediction" about that effect. Because the court determined that the pre-2024 rule and the amended rule are functionally equivalent, it concluded that the rule should be upheld.

Finally, the court considered the plaintiffs' challenge to an ESA regulation concerning the designation of critical habitat. The text of the ESA requires the Services to designate critical habitat at the same time it lists a species "to the maximum extent prudent and determinable." 16 U.S.C. § 1533(a)(3). Before 2024, the ESA regulations identified two limited circumstances where designating critical habitat at the same time a species is listed would not be prudent and determinable. In 2024, the Services modified the regulation to include two other circumstances where designating critical habitat would not be necessary. The plaintiffs argue that the new rule violates the ESA by unlawfully expanding the conditions under which the Services may find that designating critical habitat is not prudent and determinable. However, the court disagreed, citing previous court decisions which held that the Services could only make a not-prudent finding with respect to critical habitat would be beneficial to the species. Because the two additional circumstances outlined in the 2024 ruling described situations where reaching a not-prudent finding would be beneficial to the species, the court found that the regulation complied with the ESA and should be upheld.

Going Forward

Since 2019, the ESA has seen several rounds of regulatory updates. So far, this is the first time a court has reviewed any of the updated rules on the merits to consider whether they comply with the statutory requirements of the ESA. In 2025, the Services launched a new round of regulatory changes, many of which mirror the changes made in 2019. While those rules have yet to be finalized, the ruling in *Ctr. for Biological Diversity v. U.S. Dep't of Interior* may offer some insight into how courts will treat those regulations once they are final. For those who are regulated under the ESA, remaining informed on regulatory changes is helpful to understand how the law will be implemented going forward.

To view the court's decision in *Ctr. for Biological Diversity v. U.S. Dep't of Interior*, click here.

To view the text of the ESA, click here.

For more NALC resources on the ESA, click here.

Supreme Court Agrees to Hear Pesticide Preemption Lawsuit (published 1.27.26)

The United States Supreme Court has announced that it will hear oral arguments in *Durnell v. Monsanto*, a case filed by a Missouri plaintiff who claims that exposure to the herbicide Roundup and its active ingredient glyphosate caused him to develop non-Hodgkin's lymphoma. The case is one of thousands that have been filed over the last decade against Monsanto Company (now owned by Bayer) by plaintiffs who claim that using Roundup caused them to develop cancer and that Monsanto failed to warn consumers about the alleged health risk. For its part, Bayer has argued that the state law claims raised by plaintiffs in these cases are preempted by federal pesticide law and should be dismissed. After years of litigation, that question will now be presented to the Supreme Court. However, the Court rules in this case will have an impact not only on ongoing litigation involving Roundup and glyphosate but may set a precedent for lawsuits involving other pesticide products.

Background: Roundup Lawsuits and *Durnell*

Roundup is one of the most widely used herbicides in the United States. It was developed in the 1970s and has been available in the United States for decades. Glyphosate, the active ingredient in Roundup, was first approved by the Environmental Protection Agency ("EPA") since 1974. Roundup is used both in agricultural and non-agricultural settings. Since the 1990s, Roundup has been an essential part of Monsanto's Roundup Ready system which paired use of the herbicide with glyphosate-resistant crop seeds to allow direct applications during the growing seasons. Commercial formulations of Roundup have been used in home and municipal landscaping for years.

Since 2015, tens of thousands of lawsuits have been filed against Bayer by plaintiffs claiming that the use of Roundup caused them to develop cancer. These cases have been filed in state courts and raise what products liability claims that arise out of state law, specifically the civil tort of failure to warn. In response, Bayer has argued that federal pesticide law preempts state law products liability claims and that such claims should be dismissed. While only a handful of the cases filed against Bayer have gone to trial, juries and judges alike have been split on the issue. While some juries have issued verdicts in favor of Bayer, finding that the pesticide manufacturer complied with the law and is not liable for a plaintiff's injuries, others have returned verdicts in favor of the plaintiffs and awarded damages in amounts exceeding $2 billion. Similarly, of the three circuit courts that have been asked to determine whether federal pesticide law preempts the plaintiffs' state law claims, the Third Circuit has held that the claims are preempted while the Ninth and Eleventh Circuits have held that they are not.

The plaintiff in *Durnell* originally filed his lawsuit against Bayer in 2019. He filed his case in state court in Missouri where he lives and where Monsanto is headquartered. Like other plaintiffs in pesticide liability cases, the plaintiff in *Durnell* raised several state law products liability claims including failure to warn. At trial, the jury concluded that Monsanto had failed to warn the plaintiff of possible health risks of using Roundup and awarded him $1.25 million. Bayer appealed that verdict to the Missouri Court of Appeals which affirmed the jury order and held that the plaintiff's failure to warn claim was not preempted by federal law. Bayer then attempted to appeal that ruling to the Missouri Supreme Court which declined to hear the case. Now, the matter comes before the United States Supreme Court.

Arguments Before the Supreme Court

Both the plaintiff and Bayer have made arguments to the Supreme Court that have become familiar to those keeping up with how pesticide liability cases have evolved in recent years. Each argument focuses on the text of the Federal Insecticide, Rodenticide, and Fungicide Act ("FIFRA") and a previous Supreme Court case to either support or refute the argument that federal pesticide law preempts state law claims of failure to warn.

FIFRA is the primary federal law regulating pesticide use in the United States. Under FIFRA, a pesticide cannot be sold or distributed in the United States until it has been approved for use by the Environmental Protection Agency ("EPA"). To approve a pesticide, EPA must determine that the product will not cause "unreasonable adverse effects" on the environment when used as intended. 7 U.S.C. § 136a(c)(5)(C). FIFRA defines "unreasonable adverse effects" as "any unreasonable risk to man or the environment, taking into account the economic, social, and environmental costs and benefits of the use of any pesticide[.]" 7 U.S.C. § 136(bb). To meet this standard, EPA will assess the human health impacts of pesticides it is seeking to register, including assessing the carcinogenicity of the product and its active ingredients.

Along with providing for the registration of pesticide products, FIFRA also describes the authority that states have to regulate approved pesticides. Under FIFRA, a state may "regulate the sale or use of any federally registered pesticide[.]" 7 U.S.C. § 136v(a). However, FIFRA also provides that states "shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from" those required by federal law. 7 U.S.C. § 136v(b). In other words, while FIFRA allows states to regulate the sale and use of federally registered pesticides, it does not allow states to set requirements for the labeling or packaging of a registered pesticide that differs from the labeling and packaging approved by EPA. Additionally, FIFRA prohibits the sale and distribution of any pesticide which is "misbranded." 7 U.S.C. § 136j(a)(1)(E). Under FIFRA, a pesticide is

considered misbranded if its label does not include a warning statement which may be necessary to protect health and the environment. 7 U.S.C. § 136(q)(1)(G).

Failure to warn is a type of civil tort that is typically raised in products liability cases. As with most civil torts, failure to warn arises out of state law and is enforced at the state level. When a plaintiff raises a claim of failure to warn, they are not arguing that a product they used was defective, but rather that the product manufacturer failed to provide adequate warnings or instructions about the safe use of the product. To succeed on failure to warn, a plaintiff will generally need to demonstrate two things. First, that the manufacturer did not adequately warn consumers about a particular risk, and second that the risk was either known or knowable in light of the best available knowledge at the time the product was manufactured and distributed.

In the past, the Supreme Court has only once addressed FIFRA's prohibition on states to impose labeling requirements that differ from those approved by EPA and how it interacts with products liability claims that arise under state law. In ***Bates v. Dow Agrosciences LLC*, 544 U.S. 431**, the Supreme Court held that a pesticide labeling requirement imposed by state law would be preempted by FIFRA if the requirement is "in addition to or different from" the labeling and packaging requirements imposed under FIFRA. The Court noted that a state law requiring a pesticide label to include the word "DANGER" when its federally registered label is required to include the word "CAUTION" would be preempted by FIFRA. However, the Court also noted that a state requirement for pesticide labeling would not be preempted if it was "equivalent to, and fully consistent with, FIFRA's misbranding provisions."

In appealing *Durnell* to the Supreme Court, Bayer asked the Court to consider whether FIFRA preempts the plaintiff's state law failure to warn claim. Bayer argues that the claim is preempted. It first cites FIFRA's requirement that states may not require a pesticide's label to bear language that is "in addition to or different from" federal labeling requirements. According to Bayer, the only way it could fully resolve the plaintiff's claims would be to amend the label for Roundup products sold in Missouri to include a cancer warning which is not required by the federal label. Not only does the federal label for Roundup not include a cancer warning, but Bayer also notes that EPA has never made a finding that either Roundup or glyphosate are carcinogenic to humans. Relying on the ruling in *Bates*, Bayer argues that the plaintiff's failure to warn claims should be preempted because to resolve them, Bayer would be required to put a cancer warning on its Roundup labels which would differ from the labeling language required under federal law.

The plaintiff argues exactly the opposite. According to the plaintiff, his failure to warn claims are not preempted by FIFRA because they run parallel to FIFRA's misbranding

provisions. Also relying on *Bates*, the plaintiff in *Durnell* argues that Supreme Court precedent has already established that a state law products liability claim will not be preempted by FIFRA if it is equivalent to and consistent with FIFRA's prohibition on the sale of misbranded pesticides. According to the plaintiff, his failure to warn claim is consistent with FIFRA's misbranding prohibitions because FIFRA considers a pesticide to be misbranded if it does not include a warning necessary to protect health and the claim of failure to warn was raised to argue that Bayer failed to provide a necessary health warning to users of Roundup. Because failure to warn raises a claim that is consistent with FIFRA's misbranding provisions, the plaintiff asks the Supreme Court to rule that the claim is not preempted.

While these arguments directly mirror claims raised by Bayer and other plaintiffs in other cases involving federal preemption of failure to warn claims in pesticide liability cases, *Durnell* adds a twist that slightly differentiates it from those cases. Unlike other plaintiffs, the plaintiff in *Durnell* asserts that his failure to warn claims were not brought over the labels affixed to each individual unit of Roundup, but rather to the marketing materials that Monsanto used to advertise Roundup in the 1990s and 2000s. The plaintiff claims that he bought and used Roundup based on commercials and print advertising that stated using Roundup was completely safe and featured people applying Roundup while wearing only tee shirts and shorts. Because FIFRA applies only to pesticide labeling, not marketing materials, the plaintiff argues that his lawsuit differs from previous litigation where the question of whether FIFRA preempts failure to warn has been raised. Bayer maintains that there is no difference between *Durnell* and prior preemption cases because it would still need to update labels for units of Roundup sold in the state of Missouri to include a cancer warning to fully redress the plaintiff's claim.

Going Forward

As of the publication of this article, the Supreme Court has not scheduled a date to hear oral arguments in *Durnell*. It is not yet clear when a final ruling in the case can be expected. Whatever the outcome, whether the Court agrees with the plaintiff and finds that FIFRA does not preempt the state law claim of failure to warn or sides with Bayer and finds that FIFRA does preempt such claims, the final decision in this lawsuit will affect not only the thousands of currently pending pesticide liability cases but is also likely to affect any such lawsuits filed in the future. While the bulk of pesticide liability cases filed over the last decade have involved Roundup and glyphosate, other pesticides such as paraquat and chlorpyrifos have also been the focus of such lawsuits. Despite settling thousands of pesticide liability lawsuits, Bayer still has thousands more actively pending against it. The

company has indicated that if the matter is not resolved, it could threaten the future availability of Roundup for agricultural uses.

Although it is too early to predict how the Supreme Court will rule, prior to agreeing to hear *Durnell*, the Court asked the federal government to weigh in. In December, the Solicitor General filed an amicus brief both urging the Supreme Court to take up the case and clarifying that the federal government believes that FIFRA preempts the plaintiff's failure to warn case.

The National Agricultural Law Center will provide in-depth updates as this case proceeds.

To view Bayer's petition to the Supreme Court, click here.

To view the plaintiff's response, click here.

To view the Solicitor General's amicus brief, click here.

For more information on pesticide liability lawsuits from the National Agricultural Law Center, click here.

WOTUS Update: EPA & Corps Propose New Definition (published 12.02.25)

On November 17, 2025, the Environmental Protection Agency ("EPA") together with the United States Army Corps of Engineers ("the Corps") announced a proposed rule to redefine the term "waters of the United States" under the Clean Water Act ("CWA"). The intent of the proposal is to bring the definition of waters of the United States, commonly referred to as WOTUS, in line with the United States Supreme Court 2023 decision ***Sackett v. EPA*, 566 US 120 (2023)**. This proposal marks the sixth time since 2015 that the regulatory definition of WOTUS has changed and is likely to prompt litigation after it is formally finalized. The proposal has been published the Federal Register and is currently open for public comment through January 5, 2026.

Background CWA, Current WOTUS Rule, and *Sackett*

The CWA of 1972 is the leading federal water pollution statute in the United States. The purpose of the Act is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). To achieve this goal, the CWA has established permitting programs to limit the amount of pollution discharged into waters and wetlands. Under the National Pollution Elimination System ("NPDES") program, it is illegal for anyone to discharge a pollutant from a discernable, concrete source into "navigable waters" without first receiving a permit from EPA. 33 U.S.C. § 1342. Similarly, the 404 permitting program prohibits the discharge of "dredged or fill material" into "navigable waters" without a permit from the Corps. 33 U.S.C. § 1344. Crucially, both the NPDES and 404 permitting programs cover activities that occur within "navigable waters." Although the term "navigable waters" is a legal term of art which is generally understood to refer to waters which can be used to facilitate interstate or foreign commerce, the CWA defines the term as "waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7). However, the CWA does not define the term "waters of the United States." Instead, it has been left up to EPA and the Corps to define the term.

In the decades since the CWA was passed, crafting a lasting definition of WOTUS has been a struggle for the agencies and courts, and the formal regulatory definition has changed several times. A full timeline of the different definitions of WOTUS is available here. Most recently, the definition of WOTUS was revised in 2023, first through a finalized rulemaking conducted by EPA during the Biden administration, and then again following the Supreme Court's ruling in *Sackett v. EPA*. Under the initial 2023 final rule, the definition of WOTUS included five categories of waters: (1) traditional navigable waters that could be used in interstate for foreign commerce, the territorial seas, and interstate waters including interstate wetlands; (2) impoundments of waters otherwise identified as WOTUS; (3) tributaries of traditionally navigable waters or impoundments that met either the relatively

permanent standard or significant nexus test articulated by the Supreme Court in ***Rapanos v. US*, 547 US 715 (2006)**; (4) wetlands adjacent to any WOTUS with "adjacent" understood to mean neighboring, bordering, or contiguous; and (5) all other lakes, ponds, streams, and wetlands that satisfied either the relatively permanent standard or significant nexus test. Further information on the initial 2023 WOTUS definition can be found here.

The initial 2023 WOTUS rule fully incorporated both the relatively permanent standard and the significant nexus test which stem from the Supreme Court's decision in *Rapanos v. US*. In that case, the Supreme Court was asked to consider the degree to which wetlands could be included in the definition of WOTUS. The Court was unable to reach a majority opinion, instead issuing a plurality opinion and a concurring opinion. The plurality opinion articulated the relatively permanent standard which would extend the definition of WOTUS to those waters which are "relatively permanent, standing or continuously flowing" and then to those wetlands which share a "continuous surface connection" with such waters. The concurring opinion, on the other hand, crafted the significant nexus test which extended the WOTUS jurisdiction to those wetlands that share a "significant nexus," with a water that is already recognized as a WOTUS. A significant nexus would exist if a wetland "significantly affect[s] the chemical, physical, and biological integrity" with a recognized WOTUS.

Weeks after the first 2023 definition of WOTUS was finalized, the Supreme Court released its decision in *Sackett v. EPA*. Like in *Rapanos v. US*, the Court in *Sackett v. EPA* was asked to consider to what extent wetlands should be included in the WOTUS definition. Specifically, the plaintiffs specifically asked the Supreme Court to formally overturn the significant nexus test and adopt the relatively permanent standard. Ultimately, the Court did just that, concluding that the term "waters" in "waters of the United States" refers to "only those relatively permanent, standing or continuously flowing bodies of water […] described in ordinary parlance as streams, oceans, river, and lakes" and to wetlands that are "indistinguishable" from such waters due to a continuous surface connection.

Following the Supreme Court's decision in *Sackett v. EPA*, EPA issued what is known as the Conforming Rule to revise the WOTUS definition in light of the Court's ruling. Issued in August 2025, the Conforming Rule cut references to the significant nexus test from the WOTUS definition and clarified that the word "adjacent" with respect to adjacent wetlands meant "having a continuous surface connection." The rule also noted that only those tributaries of navigable waters which satisfy the relatively permanent standard would be considered WOTUS. To learn more about the Conforming Rule, click here.

When the Trump administration took office in 2025, it announced an intention to revisit numerous environmental regulations, including the definition of WOTUS. After holding a

series of listening sessions with stakeholders across the county, EPA and the Corps have released their latest proposal to redefine the term.

Proposed WOTUS Definition

According to EPA, its latest WOTUS proposal has two primary goals: to bring the definition in line with *Sackett v. EPA* and to provide more clarity to landowners and the public as to which waters fall under the CWA's permitting jurisdiction. To that end, it is proposing to include five categories of waters in the definition of WOTUS and is introducing new definitions intended to clarify when a water is relatively permanent and what constitutes a continuous surface connection.

Under the proposal, the following categories of waters would be considered WOTUS:

(1) Traditionally navigable waters which may be used to facilitate interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide and the territorial seas.
(2) Impoundments of waters otherwise identified as WOTUS.
(3) Tributaries of traditionally navigable waters which are relatively permanent, standing or continuously flowing.
(4) Wetlands adjacent to a traditionally navigable water or tributary.
(5) Lakes and ponds that do not fall into the above categories but which are relatively permanent, standing or continuously flowing and share a continuous surface connection with a traditionally navigable water or tributary.

Importantly, the proposal would not include interstate waters as a category of WOTUS. This is a departure from previous WOTUS definitions, almost all of which have included interstate waters as WOTUS. These categories also differ from previous WOTUS definitions by specifying that waters which fall under category five must not only be relatively permanent but must also share a continuous surface connection with a traditionally navigable water or tributary to be considered WOTUS. Under past definitions, the continuous surface connection standard was applied only to wetlands.

Along with making changes to the categories of waters considered WOTUS, the proposed rule also includes new definitions for the terms "relatively permanent," "continuous surface connection," and "tributary." Under the proposed rule, "relatively permanent" would be defined as "standing or continuously flowing bodies of surface water that are standing or continuously flowing year-round or at least during the wet season." EPA notes that "the wet season" would refer to a predictable and extended period of time when surface water is present in a geographical feature in response to an annual wet season when precipitation is greater than average. However, that would not include what are

known as “ephemeral waters” which are geographic features that contain surface water only in direct response to precipitation. Under this definition of relatively permanent, a river which periodically dries out in the late summer months, but which flows during the winter and spring after increased rain and snowmelt could be considered a WOTUS, while a creek that is dry most of the time and flows only after a heavy rain would likely not be considered a WOTUS.

The proposed rule would define “continuous surface connection” as “having surface water at least during the wet season and abutting (*i.e.*, touching) a jurisdictional water.” EPA clarifies that this definition presents a two-pronged test which requires a wetland or waterbody to both: (1) abut, as in directly touch, a traditionally navigable water or tributary; and (2) have surface water at least during the wet season. Wetlands or waters with a sub-surface connection to a recognized WOTUS – meaning connected to a WOTUS by water that is not on the surface but is not deep enough underground to be considered groundwater – would not be considered a WOTUS under this definition. Additionally, EPA notes that CWA permitting jurisdiction would only be extended to the portion of a wetland which retains surface water at least during the wet season.

Finally, the proposal would define “tributary” as “a body of water with relatively permanent flow, a bed and bank, that connects to a downstream traditional navigable water or the territorial seas, either directly or through one or more waters or features that convey relatively permanent flow.” Under this definition, a tributary to a traditionally navigable water that has a discernable bank and bed, and which has surface water at least during the wet season could be considered a WOTUS. However, a water without a bank and bed, such as a grassed waterway, would likely not be considered a WOTUS even if it held surface water year-round.

Besides defining what a WOTUS is, the proposal also strengthens language describing what a WOTUS is not. Particularly relevant to agriculture, the proposal would strengthen existing exclusions for prior converted cropland. The term “prior converted cropland” comes from the Wetland Conservation provisions of the 1985 Farm Bill, better known as Swampbuster. Prior converted cropland refers to wetland areas which were converted to agricultural land capable of producing a crop prior to December 23, 1985. Although prior converted cropland is currently excluded from the definition of WOTUS, the proposed rule would clarify that such land would only lose that exclusion and become subject to CWA jurisdiction if it were abandoned and reverted to a wetland that met the definition of “adjacent wetland” under WOTUS.

Next Steps

The proposed rule was published in the Federal Register on November 20, 2025, formally initiating a period of public comment that is currently set to end on January 5, 2026. While public comments may address any part of the proposal, EPA is specifically requesting comment on the following: whether WOTUS should be limited to only traditionally navigable waters and those wetlands that share a continuous surface connection with such waters; whether "relatively permanent" should include only those waters that contain surface water year-round instead of waters that contain surface water at least during an annual wet season; and whether a wetland must have a continuous surface connection with a navigable water or tributary year-round to be considered a WOTUS.

After the period of public comment concludes, EPA and the Corps will review the comments it receives before drafting and issuing a final rule. Once the rule becomes finalized, it is very likely that it will be challenged in court. Since 2015, all final regulations defining WOTUS have led to lengthy legal battles that often result in separate WOTUS definitions being applied across the country as the court cases proceed. Importantly, the last time a court was asked to consider whether the regulatory definition of WOTUS complied with the text of the CWA, the doctrine of *Chevron* deference was still the law of the land. Under *Chevron* deference, courts were instructed to defer to agency interpretations of ambiguous statutory language so long as the interpretation was reasonable. However, in 2024, the Supreme Court overturned *Chevron* deference in its landmark decision ***Loper Bright Enters. v. Raimondo*, 603 US 369 (2024)**. According to the Supreme Court, judges should not defer to agency statutory interpretations but should themselves state what the law is. This means that judges asked to consider whether a future WOTUS definition complies with the CWA may rely on judicial interpretations of the statute rather than agency interpretations.

The new proposed WOTUS definition has kicked off another cycle of attempting to define a crucial, but ambiguous term that determines when someone needs a CWA permit and when they do not. Whether the final definition will satisfy EPA's goals of crafting a durable definition remains to be seen.

To view the proposed WOTUS rule and learn how to submit a comment, click here.

To view the current definition of WOTUS, click here.

To view the text of *Sackett v. EPA*, click here.

To view the text of the CWA, click here.

For more CWA resources from the National Agricultural Law Center, click here.

Preliminary Injunction Halts Enforcement of West Virginia's Food Dye Ban (published 2.3.26)

On December 23, 2025, a District Judge in the Southern District of West Virginia ruled that the state is temporarily prohibited from enforcing its synthetic food dye ban while the law is being challenged in court. This law, enacted as HB 2354 and codified at W. Va. Code § 16-7-2, 4; 18-5D-3A, is being challenged by the International Association of Color Manufacturers (IACM). While the litigation remains ongoing, this article will discuss the court's most recent ruling.

Background on HB 2354

In 2025, West Virginia enacted HB 2354, a bill that addressed synthetic color dyes. Specifically, this bill was two-fold and included both a provision banning the use of certain synthetic color dyes statewide and prohibiting foods with these ingredients from being included in a "meal served in a school nutrition program." The bill had a two-step implementation scheme with the school portion going into effect last year, and the statewide ban going into effect in 2028.

The statewide ban portion included language that declared foods with ingredients that are "poisonous or injurious" to health to be adulterated. W. Va. Code § 16-7-2(b)(7). This language is followed by an enumerated list of "poisonous or injurious" ingredients that includes, "butylated hydroxyanisole, propylparaben, FD&C Blue No.1, FD&C Blue No.2, FD&C Green No.3, FD&C Red No. 3, FD&C Red No. 40, FD&C Yellow No. 5, and FD&C Yellow No. 6." In West Virginia, adulterated foods are prohibited from being sold and violators are guilty of a misdemeanor and will be fined upon conviction. W. Va. Code § 16-7-4. However, this law includes an exception for sellers of foods with the enumerated ingredients if the seller makes less than $5,000 in aggregate of food per month. This portion of the law is set to go into effect on January 1, 2028.

The second part of the law, codified at W. Va. Code § 18-5D-3A, bans the following color dyes from being served in school nutrition program meals – Red Dye No. 3, Red Dye No. 40, Yellow Dye No. 5, Yellow Dye No. 6, Blue Dye No. 1, Blue Dye No. 2, and Green Dye No. 3. This provision did not prohibit the sale of food items with these ingredients as part of a school fundraiser off school premises or on school premises at least one-half hour after the end of the school day. The school meal portion of the law went into effect on August 1, 2025.

Background of color additives

The Food and Drug Administration (FDA) defines color additives as "a dye, pigment or other substance, which is capable of imparting color when added or applied to a food, drug, or cosmetic to the human body." They are distinguished from food additives by the Federal Food, Drug and Cosmetic Act (FDCA), and must be approved by FDA before they can be used in food. Color additives are classified into two categories – naturally occurring and synthetic. A synthetic color dye is manmade and is required by the FDA to be certified as safe before it is included in food. While a naturally occurring color additive must also be approved by the FDA before it is used, it is exempted from the safety certification process that synthetic dyes must undergo.

There are nine synthetic color dyes approved for use in foods by the FDA – three of which the agency is in the process of revoking. The approval for the nine can be found at 21 CFR § 74.101-706. Seven of the nine approved synthetic dyes are included in the enumerated list of prohibited ingredients in West Virginia's law. The other two enumerated ingredients are not classified as color additives by the FDA. Butylated hydroxyanisole is classified as a food additive, and propylparaben is an ingredient classified under the "Generally Recognized As Safe" pathway. To learn more about the federal government's current color dye scheme, click here to read NALC article "FDA Announces Plan to 'Phase Out' Synthetic Dyes."

The Case

Two months after the school meal provision of HB 2354 went into effect, the trade association, International Association of Color Manufacturers (IACM), challenged its constitutionality. IACM has been the singular association "representing the interests of the color additives industry, both natural and synthetics," since 1972. Its members include manufacturers, producers, and users in the color industry. The case is *International Association of Color Manufacturers v. Singh.*

In its complaint, IACM is claiming HB 2354's unconstitutionality in three ways. First, IACM claims the law is a violation of the Equal Protection Clause because it "targeted color additives without any rational basis for finding that they are . . . unsafe in any way." Second, they claim the law is a prohibited bill of attainder that "singl[es] out for prohibition and criminal sanction the named color additives" without a proper judicial proceeding. Last, the complaint claims that the law is unconstitutionally vague in violation of the Due Process Clause.

This litigation is ongoing, and the merits of IACM's challenge remain undecided. However, this article will further discuss a recent decision in the case – the Judge's ruling on IACM's request for a preliminary injunction.

A preliminary injunction is a motion that may be granted before or during a trial with the goal of preserving the status quo before a final judgement. For a preliminary injunction to be issued, a plaintiff must satisfy four factors: 1) that the plaintiff is likely to succeed on the merits, 2) that he is likely to suffer irreparable harm unless the injunction is issued, 3) that the balance of equities tips in his favor, and 4) that an injunction is in the public interest. However, when the defendant is the government, the last two factors are combined.

Success on the Merits

The Court first looked at IACM's three claims to see if they would be likely to succeed on the merits. For the equal protection claim, the Court determined that IACM was not likely to succeed because "there was at least a debatable question regarding the safety of the named color additives" brought before the West Virginia legislature. An equal protection claim arises from the Fourteenth Amendment to the U.S. Constitution and provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of law." Specifically, this clause requires equal treatment for individuals in similar situations. However, unless a law burdens a fundamental right or a suspect class, it will be upheld if "it bears a rational relation to some legitimate end." Through looking at the legislative history, the Court determined that enough discussion about the potential safety risks of color additives occurred to create a rational basis for HB 2354's enactment.

Next, the Court determined that IACM was also unlikely to succeed on their bill of attainder claim. An unconstitutional bill of attainder occurs when a legislative act singles out an individual or narrow group of people for punishment without a judicial proceeding. There are three elements that must be met for a legislative act to be considered a bill of attainder: 1) the law must impose punishment, 2) it must target specific individuals or identifiable groups, and 3) it must do so in a manner that bypasses judicial protections. Here, the Court found that HB 2354 is not an unconstitutional bill of attainder. The Court determined that the law applies to anyone who adulterates food, and not just the specific manufacturers or users of the enumerated color additives. Further, the Court found the bill does not impose punishment without judicial protection because it includes language that clarifies a punishment will not be levied until after conviction.

Last, the Court looks to IACM's claim of unconstitutional vagueness and determines that IACM would be successful. Specifically, the Court finds that HB 2354 is unconstitutionally vague because it fails to define "poisonous and injurious" and does not prohibit other color additives not included in the enumerated list from being classified as such. The doctrine of void for vagueness applies when a statute fails to "give a person of ordinary intelligence adequate notice of what conduct is prohibited" or does not "include sufficient standards to prevent arbitrary and discriminatory enforcement." Manning v. Caldwell for City of

Roanoke, 930 F.3d 264, 272 (4th Cir. 2019). Thus, a statute that does not clearly state what actions it is prohibiting would be considered vague because it does not give adequate notice to the public and might lead to unfair enforcement.

Here, along with its lack of definition for poisonous or injurious, the Court took issue with the following language in HB 2354, "poisonous or injurious to the health, *including* butylated hydroxyanisole, propylparaben, FD&C Blue No. 1 . . ." (emphasis added). In particular, the Court found that a failure to define "poisonous or injurious" paired with the insertion of a "nonexclusive" enumerated list of FDA-approved color additives would "leave the door open for arbitrary enforcement." In other words, the Court believes HB 2354 is vague because it does not make clear what color additives would be classified as "poisonous and injurious." Further, since there is no standard that clarifies which color additives are prohibited, additional color additives could be considered "poisonous and injurious" without the public having adequate notice.

Though this ruling analyzed the claims of IACM and made assertions of their likely outcomes, it is not a ruling on the merits. However, a ruling like this is often an indicator of the direction a judge might go later when the merits are actually being decided.

Irreparable Harm

Next, the Court looked at a preliminary injunction's second factor, irreparable harm. For an injunction to succeed, the person seeking it must prove that it is likely to suffer irreparable harm in its absence. Harm that cannot be fully rectified by the trial's final judgement is considered irreparable, and economic harms will only be deemed irreparable if they are unrecoverable. Here, the Court finds that IACM has made sufficient showing that its members will suffer irreparable economic harm if this injunction fails. The Court specifies that the uncertainty surrounding HB 2354, because of its likely unconstitutional vagueness, is sufficient to establish irreparable harm. The Court explains that IACM's members would suffer harm if they spent significant resources changing their processes, updating equipment, or developing new products for a law that is likely unconstitutional.

Balance of Equities and Public Interest

Last, the court considers the third and fourth factors of a preliminary injunction – the balance of equities and public interest. In a case where the defendant is the government, these two factors are merged, thus the Court analyzes them together. The goal of a preliminary injunction is to "keep the status quo," and this factor will consider if the hardships imposed on the plaintiff outweighs the public's interest in having the law enforced. Here, the Court determines that it would be unfair to require IACM's members to comply with HB 2354 given that it is likely unconstitutional. Further, because the statewide

ban portion of HB 2354 is not yet being enforced by West Virginia's Department of Health, the Court believes that granting this injunction will not harm the public and will not disturb the status quo.

Impacts of the injunction

Because of the factors discussed, the Court grants IACM the preliminary injunction. This means that while the litigation remains ongoing, West Virginia's Department of Health will not be able to enforce the statewide ban portion of HB 2354. However, the Court notes in a footnote of its decision that the injunction will not apply to the school meal portion of the law. They make clear that this distinction is because IACM only "demonstrated that Section 16-7-2(b)(7)," the statewide ban portion, "is likely unconstitutionally vague." Thus, the West Virginia Board of Education will be permitted to continue enforcing the school meal portion of the law.

Conclusion

This case remains ongoing, and at this time, no trial date has been set. As more state legislatures consider passing similar legislation to West Virginia's, it is likely that this will not be the only litigation pertaining to the matter. To stay up to date on this case and the actions of state legislatures nationwide, click here to subscribe to NALC's biweekly newsletter, "The Feed."

Texas Food Law Litigation Updates: Part 2 (published 3.3.26)

Though 2026 is young, the year has already seen a few interesting judicial rulings related to food law coming out of the state of Texas. Specifically, courts in the Western District of Texas have issued two decisions on preliminary injunctions – granting one and denying the other. This article is the second in a two-part series covering recent litigation updates in Texas. The first article can be read here.

Cell-cultured Protein Ban

The first case involves a challenge to a Texas law that sought to temporarily ban the sale of "cell-cultured proteins" in Texas. SB 261, passed in the 2025 Texas legislative session, defined cell-cultured protein as "a food product derived from harvesting animal cells and artificially replicating those cells in a growth medium to produce tissue." Per the law, the prohibition on selling cell-cultured meat went into effect on September 1, 2025, and will last until September 1, 2027. The law is codified into the Texas code at Tex. Health & Safety Code §§ 431.002(5-a), 431.02105(a). Texas is one of seven states to have passed a ban on the sale of cell-cultured meat. To learn more about other state alternative protein laws, click here to view NALC's Alternative Protein Laws State Compilation.

The day after SB 261 went into effect, it was challenged in court. The plaintiffs are Wild Type, Inc. d/b/a Wildtype (Wildtype) and UPSIDE Foods, Inc. (Upside) – two companies based out of California who produce and sell cultivated meat. Wildtype produces cultivated salmon, and Upside produces cultivated chicken. The plaintiffs claim that SB 261 violates the Dormant Commerce Clause and the Supremacy Clause of the US Constitution.

January 2026 Ruling

On January 16, 2026, the court heard oral arguments on a number of motions in this case. Following the arguments, the court orally ruled on all motions; however, it also released an order explaining the decisions. The motions that were heard included Defendant Garza's Motion to Dismiss for Lack of Jurisdiction; Defendants Paxton, Young, and Shuford's Motion to Dismiss for Lack of Jurisdiction and for Failure to State a Claim; and Plaintiffs' Motion for Preliminary Injunction. Specifically, the judge granted Defendant Garza's Motion to Dismiss and Granted in-part the Motion to Dismiss from Defendants Paxton, Young, and Shuford. This means that Defendant Garza, the County Attorney for Travis County, will no longer be a party in this case. As for the other defendants, the court granted in-part their motion to dismiss. This means that while it dismissed part of the claims against them, the case will still be allowed to continue on some of the Plaintiff's claims. Specifically, the court dismissed Upside's claims that SB 261 is preempted by the federal poultry laws, but found

that both plaintiffs may still bring their claim that SB 261 violated the Dormant Commerce Clause.

In determining these rulings, the court specifically looked to Upside's claim that the Poultry Product Inspection Act (PPIA) preempted SB 261. The PPIA is the federal law that "regulates the processing, inspection, distribution, labeling, and sale of poultry products sold in interstate commerce," and it is administered by the US Department of Agriculture's (USDA) Food Safety and Inspection Service (FSIS). Specifically, the PPIA includes an express preemption clause that states "requirements within the scope of this chapter with respect to premises, facilities and operations of any official establishment which are in addition to, or different than those made under this chapter may not be imposed by any State."

Express preemption claims will be evaluated by looking to the scope of the express preemption clause and determining if the challenged state law falls within the scope. Here, the court determined that the scope of the PPIA's express preemption claim extended to food safety activities and any behaviors that would cause the adulteration of a product. Under that standard, the court finds that SB 261 does not fall within the scope of the PPIA's clause because SB 261 is a "complete sales ban" that has no impact on food safety nor behaviors that might adulterate a chicken product. Thus, the court found that the PPIA would not preempt SB 261 and that claim should be dismissed.

Last, the court turned to the Plaintiff's motion for a preliminary injunction. In making this motion, Upside and Wildtype were asking the court to prohibit Texas from enforcing this law while the litigation is ongoing. A preliminary injunction will have four elements: 1) moving party must show they are likely to succeed on the merits, 2) that they will suffer irreparable harm unless the injunction is issued, 3) that the balance of equities tips in their favor, and 4) that an injunction is in the public interest. Here, the court determined that the Plaintiffs do not meet the irreparable harm element because Plaintiff's do not have significant "contractual business already in place in Texas." Additionally, the court finds that it would not be in the balance of equities to grant this preliminary injunction for two companies with very little business in Texas. Further, since two of the four elements are not met, the court declines the opportunity to analyze all four and denies the preliminary injunction.

Effect of the ruling

The court's decision to deny plaintiff's motion for preliminary injunction does not mean the case is resolved, nor is it a determination on the case's merits. This decision's effect is that the state of Texas will have the ability to enforce the ban on cell-cultured proteins while the litigation remains ongoing. Further, because of the court's decision to deny Defendants

Paxton, Young, and Shuford's motion to dismiss against the Dormant Commerce Clause claim, the case will continue on that claim. However, Upside and Wildtype have appealed the denial of a preliminary injunction to the 5th Circuit. While it remains unclear at this time how the 5th Circuit will rule, it is likely that no judgement on the merits will occur until the preliminary injunction issue is first settled.

MAHA Law

Also, in its 2025 legislative session, Texas passed SB 25, which has been referred to as Texas' "MAHA bill." This name is referencing the fact that many of the policy changes included in this legislation are aligned with priorities of the "Make America Healthy Again" movement. This law includes a section that requires food manufacturers to bear a particular disclosure statement if their food product contains any of 44 listed ingredients. Tex. Health & Safety Code § 431.0815. Specifically, the disclosure must say, "WARNING: This product contains an ingredient that is not recommended for human consumption by the appropriate authority in Australia, Canada, the European Union, or the United Kingdom." This portion of SB 25 will not go into effect until January 1, 2027, and its scope is limited to food product labels developed or copyrighted after the effective date. To learn more about the legislation itself, click here to read NALC article "'MAHA' Movement: New Texas and Louisiana Laws."

On December 5, 2025, a group of nonprofit associations that represent food and beverage manufacturers brought a lawsuit challenging the constitutionality of SB 25's labeling provision. Specifically, the plaintiffs make four claims 1) that SB 25's labeling requirement is a violation of the First Amendment, 2) that it is preempted by federal law, 3) that it is unconstitutionally vague, and 4) that it violates the Dorman Commerce Clause.

Like the litigation on Texas' cell-cultured meat ban, this case remains ongoing. However, the court recently published an order that ruled on the plaintiff's request for a preliminary injunction. As previously mentioned, a preliminary injunction is a pretrial motion that can order a party to cease or begin doing a specific action. For a preliminary injunction to be successful, the moving party must satisfy four elements: 1) that they are likely to succeed on the merits, 2) that they will suffer irreparable harm unless the injunction is issued, 3) that the balance of equities tips in their favor, and 4) that an injunction is in the public interest.

Likelihood of Success on the Merits

To determine if the first element of a preliminary injunction is met, the court first looked to see if plaintiffs would be likely to succeed on their claim that SB 25's labeling requirement violates the First Amendment. The First Amendment of the US Constitution prohibits laws

that abridge the freedom of speech and includes protections against content-based regulations. A content-based regulation is one that will compel a particular message and require an individual or entity to alter the content of their speech. These laws are presumed to be unconstitutional unless the government can prove "they are narrowly tailored to serve compelling state interests" under the standard of strict scrutiny.

Here, the court notes that SB 25 compels the manufacturers of foods and beverages to convey a word-for-word, government-scripted message on their food labels. As a result, the court finds that strict scrutiny is likely to be the standard applied. When strict scrutiny is applied, the burden shifts, and now the government must prove that its actions were constitutional (as opposed to the plaintiffs having to show that the actions were unconstitutional). The court noted that the government failed to meet its burden, instead focusing almost entirely on a different argument. Because the government did not meet its burden under that analysis, if the strict scrutiny standard is applied, the statute would be unconstitutional on First Amendment grounds.

Instead, the government primarily focused its argument on a claim that the court should consider the case under the intermediate scrutiny argument. Intermediate scrutiny would be applied here if a court classified SB 25's labeling provision as commercial speech rather than content-based regulation. While the court does not assess whether it is commercial speech or content-based here, it walks SB 25 through an intermediate scrutiny analysis by applying the four-part test established in *Central Hudson Gas & Electric Corporation v. Public Service Commission of New York*, 447 U.S. 557 (1980). It's four elements include 1) is the speech misleading or does it concern unlawful activity, 2) is there a substantial government interest, 3) does the regulation advance the government interest asserted, and 4) is it narrowly tailored to achieve the interest.

Here, the court determines that there is a substantial government interest in promoting the consumption of better food ingredients by citizens of Texas. However, the court does not believe that SB 25's labeling provision asserts this interest in a "narrowly tailored" way. It finds there are less restrictive ways Texas could accomplish this goal. As an example, the court states that Texas could have conducted a public advertising campaign warning of these dangers. Thus, the four elements of *Central Hudson* are not met, and the court determines SB 25's labeling provision would likely not pass intermediate scrutiny. Since the court found that the provision would likely not pass either a strict scrutiny or intermediate scrutiny evaluation, it concludes that the plaintiffs have shown a substantial likelihood of success on their First Amendment claim.

Before moving on to the other elements though, the court also evaluates the likelihood of success on plaintiff's vagueness and preemption claims. Both of these claims are related

to a portion of SB 25's labeling provision that would make the provision ineffective if the US Food and Drug Administration or the USDA issued a law or regulation that prohibited the use, imposed conditions of use, or determined the safety of one of the 44 listed ingredients. Tex. Health & Safety Code § 431.0817. The court determines that plaintiffs have not shown they are likely to succeed on their vagueness challenge because they have not produced enough evidence to show that food or beverage manufacturers would be unclear on what triggers the preemption clause. Further, the court finds that the plaintiffs would likely not succeed on their claim that SB 25's labeling provision is preempted by *current* federal laws because neither the Food, Drug, and Cosmetics Act nor the Nutrition Labeling and Education Act "directly conflict" with the Texas law. Though the court finds that success on the merits is not likely with the claims of vagueness and preemption, the first element of a preliminary injunction is met through the likelihood of success on the First Amendment claim.

Irreparable Harm

Next, the court looked to the second factor of a preliminary injunction, irreparable harm. To meet this element, the person seeking a preliminary injunction must prove they are likely to suffer irreparable harm if the law is enforced. In cases involving the First Amendment, courts recognize that the loss of free speech constitutes an irreparable injury, even if the injury only occurs for a short period of time. Here, since the court found it was likely that plaintiffs would succeed on their First Amendment claim, the court determines that irreparable harm is satisfied. Thus, the second element of a preliminary injunction is met.

Balance of Equities and Public Interest

Last, the court looked to the third and fourth elements of a preliminary injunction. In cases where the government is the defendant, these two factors merge. This element will consider whether the hardships imposed on the moving party outweigh the public's interest the law's enforcement. Here, since the hardship suffered is a likely infringement upon First Amendment freedoms, the court determines that this outweighs any public interest in SB 25's enforcement. Accordingly, the court finds that the third and fourth factors of a preliminary injunction are met.

Effects of the ruling

Since the four factors were satisfied, the court grants the plaintiffs a preliminary injunction and the state of Texas will be prohibited from enforcing the labeling provisions of SB 25 while the litigation is ongoing. A decision on a preliminary injunction is not a ruling on the merits, but might be an indicator of the direction a court might go in the future. A trial date has not yet been set for this case, and it currently sits in the discovery phase of the lawsuit.

Conclusion

Since neither of the court's most recent rulings on SB 261 or SB 25 were final judgements, there will likely continue to be noteworthy updates in both cases. To stay up-to-date on these lawsuits and other issues related to food law, click here to subscribe to NALC's biweekly newsletter, "The Feed."

'MAHA' Movement: Defining Ultra-processed Foods (published 10.21.25)

This month California Governor Gavin Newsom signed AB 1264 into law. This landmark legislation creates a statutory definition of ultra-processed foods (UPF) and makes California the first state in the nation to ban certain UPFs from being served in schools. AB 1264's enactment follows recent announcements from the US Department of Agriculture (USDA) and the Food and Drug Administration (FDA) that the federal agencies are collaborating to create a definition for UPFs. This article will discuss both the California law and compare it with another popular food classification system.

Background of UPFs and NOVA

The new California enactment is the first time UPFs have been officially defined by law. This is noteworthy because there is no otherwise universally accepted definition of UPF, whether in law or in science. However, there are several food classification systems that attempt to define it. The system most applied in scientific literature is called Nova, the Portuguese translation for the word "new." Nova was created by researchers at the University of Sao Paulo, Brazil in the format of a 2010 publication titled, "A new classification of foods based on the extent and purpose of their processing." It expanded on work published the year before by Brazilian epidemiologist Carlos Monteiro, a collaborator on the Nova publication, in which Monteiro first termed the phrase UPF. The 2010 publication extended the concept of UPFs into the Nova system and further classified foods into three categories based on "the extent and purpose of the industrial processing applied to them."

In 2019, Monteiro further expanded Nova in a publication for the UN Decade of Nutrition. Now, Nova recognizes four categories of food. The categories include unprocessed or minimally processed; processed culinary ingredients; processed foods; and UPFs. Unprocessed or minimally processed includes edible parts of plants or animals, fungi, algae and water. Food can be still be classified in this category if it underwent minimal processing such as roasting, boiling, non-alcoholic fermentation, or pasteurization. Processed culinary ingredients include oils, butter, lard, sugar, and salt. These are substances that are derived from group 1 foods or else from nature by processes like pressing, refining, grinding, milling, and drying. Processed foods are foods that are made by adding a group 2 substance to a group 1 food and are generally recognized as modified versions of the group 1 food. This could include canned vegetables, tinned fish preserved in oil, whole fruit preserved in syrup, and most freshly baked breads. Under the Nova system, UPFs are defined as "formulations made mostly or entirely from substances derived from foods and additives, with little if any intact group 1 food." Examples of UPF food under the

Nova system include soft drinks, sweet or savory packaged snacks, and pre-prepared frozen dishes.

As mentioned before, Nova is not the only food classification system that defines UPFs, but it was the first and is the most applied in scientific literature. Food and Agriculture Organization of the United Nations' publication titled "Ultra-processed foods, diet quality, and health using the NOVA classification system" contains a helpful chart in Annex 1 that outlines some of the different systems.

California's AB 1264

With a goal of making school meals healthier, California enacted AB 1264. This law, along with creating a legal definition for UPFs, prohibits certain foods meeting the definition from being served in California's public schools. This is the first time a state has both sought to statutorily define UPFs and ban their use in schools. However, this is not the first time California has passed landmark legislation related to the ingredients of food served in schools. In 2024, California was the first state to prohibit the sale of food and beverages containing synthetic color additives in schools. In 2025, several states passed similar legislation, many of whom did so under the mantle of "Make America Healthy Again" (MAHA). Though the California initiatives were not enacted under the "MAHA" mantle, AB 1264, in a way similar to the synthetic dye ban, might serve as a model for how other states attempt to define UPFs. To learn more about California's school synthetic dye prohibition, click here to read NALC article "State Food Laws Enacted in 2024." To lean more about other state "MAHA" actions, click here to read NALC article, "'MAHA' Movement: New Texas and Louisiana Laws."

Definition of UPFs

Along with defining UPFs, AB 1264 bans certain foods that meet that definition from being served in school meals. Specifically, the law bans "restricted school foods" and "UPFs of concern" from being served in elementary, middle, or high schools after July 1, 2035. The classification of foods as being "restricted school foods" or "UPFs of concern" depends on whether the foods meet the definition of UPFs laid out in the California law. Thus, to understand which foods are prohibited, this article will first discuss California's definition of UPFs.

AB 1264 will codify the following definition of UPFs at Cal. Health & Safety Code § 104661. UPFs are food or beverages that contain:

- A substance available in FDA's Substances Added to Food database that has a FDA-defined technical effect, and

- *Either* 1) high amounts of saturated fat, sodium, or added sugar, *or* 2) a non-nutritive sweetener

FDA's Substances Added to Food is a searchable database that includes many of the types of ingredients regulated by the FDA. For example, the database includes food additives, color additives, and Generally Recognized as Safe substances that are listed in FDA regulations. California's new UPF definition applies to a substance found in the database that is designed to have any of the following technical effects, surface-active agents; stabilizers and thickeners; propellants, aerating agents, and gases; colors and coloring adjuncts; emulsifiers and emulsifier salts; flavoring agents and adjuvants (excluding spices and other natural seasonings and flavorings); flavor enhancers (excluding spices and other natural seasonings and flavorings); and nonnutritive sweeteners. The definitions of these technical effects can be found in 21 CFR § 170.3(o).

To meet the UPF definition, a food or beverage must contain one of the substances with a defined technical effect and contain *either* 1) high amounts of saturated fats, sodium, or added sugar *or* 2) a nonnutritive sweeter. Specifically, the law defines a product with a high amount of saturated fat as a food or beverage deriving 10 percent or greater of its total energy from saturated fat. Similarly, high sodium food or beverages contain a ratio equal to or greater than 1:1 milligrams of sodium to calories. Finally, added sugar products meeting the definition include food or beverages with at least 10 percent of total energy derived from added sugars. Thus, under California's UPF definition, a food containing a substance with a defined technical effect that derives 12 percent of its total energy from added sugars would be a UPF.

Further, California's definition would also include a food that contains 1) a substance with a defined technical effect and 2) a non-nutritive sweetener. A non-nutritive sweetener is defined as a substance with less than 2 percent of the caloric value of sucrose per equivalent unit of sweetening capacity. 21 CFR § 170.3(o)(19). California lists several examples of a non-nutritive sweetener including sucralose, steviol glycosides, and lactitol.

The law clarifies that raw agricultural commodities, unprocessed locally grown or raised agricultural products, minimally processed prepared foods, class 1 milk, alcoholic beverages, medical foods, infant formula, and commodity foods specifically made available by the USDA do not qualify as UPFs. Additionally, the law explains that salt, sodium chloride, spices or other natural seasonings or flavorings, nor natural color additives "shall not by themselves cause a food or beverage to be categorized as a UPF."

"Minimally processed prepared foods" is defined in Cal. Food & Agri. Code § 49015(a)(4) as food that prepared using 1) traditional processes to make food edible, to preserve it, or to

make it safe for human consumption, or 2) physical processes that do not fundamentally alter the raw product or that only separate a whole, intact food into component parts. Traditional processes could include smoking, roasting, freezing, drying, and fermenting. Physical processes could include grinding meat, separating eggs, and pressing fruits to produce juice. Thus, under California law, foods that undergo these processes do not meet the standard of "ultra-processed."

Examples of UPFs

Using California's definition, this article will evaluate the following foods and beverages to determine if they would classify as UPFs.

- Goldfish – Pepperidge Farm's Goldfish backed snack crackers would be considered a UPF because the product contains 1) Riboflavin, a database substance that functions as a color or coloring adjunct and flavor enhancer, and 2) has a 250mg of sodium and 140 calories – a ration greater than 1:1.
- Dino Nuggets – Tyson Foods' Frozen (chicken) Dino Nuggets would be considered a UPF under the California standard because the product contains food starch, a stabilizer or thickener, a high amount of sodium with 430mg of sodium and 210 calories.
- Mac & Cheese – Based on the nutrition facts of Kraft's Original Mac & Cheese Macaroni and Cheese Dinner, it would qualify as an UPF. The ingredient list contains Sodium Triphosphate, a substance designed as an emulsifier or emulsifier salt, and contains greater than a 1:1 sodium to calorie ratio with 530mg of sodium and 220 calories in a serving.
- Corn Dogs – Based on the nutrition facts of State Fair's Classic Corn Dogs, this food would qualify as an UPF. The product contains Sodium Diacetate which is a substance designed as a flavoring agent and adjuvant, and the product contains more than 10% of total energy from saturated fat.
- Gatorade – The lemon-lime flavor of Gatorade would qualify as a UPF because it contains 1) FD&C Yellow 5, a substance designed to function as a color or coloring adjunct, and 2) more than 10% of its total energy from added sugars.
- Apple Juice – Mott's 100% Original Apple Juice would not meet the California definition of a UPF because as juice produced from the pressing of a fruit, it falls under the "minimally processed prepared food" exception. However, regardless of the exception, it would still not be a UPF because it does not meet the definition's two-part test. While the apple juice contains ascorbic acid, a substance designed to function as a stabilizer or thickener, it has 0 percent added sugars and saturated

fats, has a sodium to calorie ratio under 1:1, and does not contain a non-nutritive sweetener.

Prohibiting specific UPFs from schools

Along with creating a definition for UPFs, the California law also prohibits "restricted school foods" and "UPFs of concern" from being served in schools. UPFs of concern include food that 1) meets the law's outlined UPF definition and 2) is classified as "of concern" through regulations adopted by the California Department of Public Health (CDPH). Restricted school foods are defined very broadly by the law as a food or beverage that contains one or more of the listed substances with a defined technical effect and is also restricted from service or sale in schools via CDPH regulations.

The law directs the CDPH to define both UPFs of concern and restricted school foods after considering several factors. Seven factors are listed in the law and include questions like, "whether the substance or group of substances are banned or restricted in other state, federal, or international jurisdictions due to concerns about adverse health consequences," "whether the food has been modified to be high in saturated fat, added sugar, or salt," and "whether the food meets the requirements of [FDA's] final rule . . . titled 'Food Labeling: Nutrient Content Claims; Definition of Healthy.'" CDPH's consideration of the listed factors must be "guided by a rigorous examination of available reputable peer-reviewed scientific evidence" and must be completed by June 1, 2028. By July 1, 2029 schools must begin to phase out both restricted school foods and UPFs of concern, and by July 1, 2032 a vendor shall not offer restricted school foods or UPFs of concern to a school.

CDPH is required to review the regulations and update definitions every five years. Additionally, the law creates reporting requirements for vendors of food products sold to a school. The vendor reporting requirements will go into place on February 1, 2028 and must be submitted yearly until February 1, 2032.

CA vs Nova

California's definition of UPFs is different from the standard created in Nova because it outlines tangible characteristics that a food must possess to be classified as a UPF. For instance, California's definition classifies food as an UPF is it contains a specific substance with a defined technical effect or if it contains a certain amount of added sugars. Conversely, Nova categorizes food based on a broad spectrum of the type and extent of processing it underwent. However, Nova is vague about what level of processing crosses into the UPF threshold. For example, in the UN Decade of Nutrition article UPFs are classified as those with "additives that imitate or enhance the sensory qualities of foods." However, the article also blurs the line between UPFs and processed foods by stating that

"additives in UPFs include some also used in processed foods, such as preservatives, antioxidants and stabilizers." While Nova is a helpful tool in categorizing foods into four groups, it is not a nuanced definition like the California law.

Federal Agencies Seek to Define UPFs

The timing of the enactment of AB 1264 is significant because the USDA and FDA are currently collaborating to establish a definition of UPFs. On July 23, 2025, the agencies published a press release announcing a joint Request for Information to "gather information and data to help establish a federally recognized uniform definition for UPFs." This initiative follows statements in the Make Our Children Healthy Again Assessment, published by the Make America Healthy Again Commission, that UPF overconsumption is one of the driving factors of what the assessment calls the "childhood chronic disease crisis." The agencies have not indicated that they plan to prohibit UPFs in school meals, as California has done, but they have stated a uniform definition will "allow for consistency in research and policy." The RFI is publicly available for comments until Oct. 23, 2025.

Though California's law and the state's initiative is not categorized under the mantle of "MAHA," its enactment might have an effect on the definition USDA and FDA create. Further, as other state legislatures begin their 2026 sessions in the upcoming months, they might model California's law in their own UPF definitional attempts.

To learn more about the FDA's Final "Healthy" Rule, click here to read NALC article "FDA Releases Final 'Healthy' Rule."

Solar Smarts for Landowners: An Overview

By Rusty Rumley

While not a new subject, solar leasing is a topic that will garner increased attention because of the additional funds from the Inflation Reduction Act (IRA) becoming available at the beginning of 2023. The IRA incentivizes the adoption of solar through several mechanisms such as the 30% solar tax credit for installing solar on a residence, but the primary one affecting solar leasing on a commercial scale is the 30% business investment tax credit. This credit is expected to spur demand for more commercial solar projects over the next decade and landowners can expect to be approached by representatives of these future projects for leasing opportunities.

What is a solar lease?

The typical commercial solar lease is where an outside party approaches a landowner to negotiate placing solar panels, substations, power lines, roads and other necessary infrastructure on their property for a significant period of time (twenty-five to thirty-five years with optional extensions are common) for a specified rental rate per acre per year or with some form of revenue sharing much like a royalty payment for an oil or gas lease.

These leases tend to be complicated and due to the length of the lease it is important to have an experienced attorney look over any potential contract before signing. While the leases tend to be long, twenty to forty pages is not uncommon, there are some clauses that need to be reviewed carefully.

Typical Clauses and Things to be Aware of in Solar Leases

Different companies use different lease agreements; however, there are similarities between the various contracts. Understanding these clauses can help when consulting with an experienced attorney about potential lease options.

Signing a lease agreement does not guarantee a solar lease.

Signing a solar lease guarantees that the solar developer has the option to go forward with the construction of a solar project, but it does not guarantee that they will build it. Solar companies may approach many landowners and sign lease agreements that lock the landowner into an initial agreement where the solar company can gather data and decide which site will best fit their needs. During the initial period the landowner typically has to grant them access to the property and refrain from signing any other agreements that might interfere with the solar lease. If by the end of the initial period the company has not started construction then the agreement typically expires, the landowner is able to keep any payments that have already been made, and the landowner can sign new lease agreements with other solar companies.

Income from the Solar Lease

What have your neighbors been offered? Many leases have a confidentiality clause, but those are typically only binding after the contract has been signed. Rental rates can vary dramatically so researching current rates is critical before signing a solar lease. Another issue this often not thought of is how will your rental rate increase over time? Remember that these agreements can last for

more than three decades. The revenue you receive might be adequate in 2023, but will that same sum be a fair rental rate in 2037? Escalation clauses address this issue by building into the agreement an orderly increase in the rental rate over the life of the lease agreement.

Property taxes

Property that is assessed and tax as agricultural property generally has a lower property tax rate than residential or commercial property. If a solar project is developed on your property then a county assessor may determine that the property is in commercial energy production rather than agricultural production which could significantly increase your annual property tax. This should be an area that is addressed in a lease agreement. Does the solar company pay the increase in taxes due to the solar development or will the landowner bear this cost?

Liability for Damage to the Solar Equipment

What about protecting the solar panels and other equipment on the leased property? Some leases make the landowner liable for any damages to equipment on the leased property. Can you guarantee that nobody will damage the equipment? Many solar projects construct fencing around the perimeter and it may be prudent to make the company responsible for any damage that occurs on their leased property.

Decommissioning the Project

Solar projects can easily last twenty-five to thirty-five years; however, at some point the project will no longer be economically viable. Who will pay for cleanup at the end of the lease period? Many contracts are silent as to which party bears the cost of removing the solar equipment and restoring the land to its prior condition. A good lease agreement should specify which party will be responsible for decommissioning the project and some ever require the solar company to establish a bond to pay for cleanup at termination. A lawyer can be extremely helpful in negotiating these types of arrangements.

Conclusion

There are numerous things that a landowner should think about before signing a solar lease and this article covers some of the important things to consider. Having an experienced attorney go through the lease is crucial because the time to negotiate is before signing the contract. For more information on the subject of solar leases click **here**.

To read the Inflation Reduction Act of 2022, click **here**.

To read Understanding Solar Energy Agreements by Shannon Ferrell, click **here**.

To read about Land Use Conflicts between Wind and Solar Renewable Energy and Agricultural Uses, click **here**.

Solar Leasing for Landowners: Payment Structures

Rusty Rumley

Senior Staff Attorney

&

Grace Henson

Research Fellow

Solar leasing is the practice of renting tracts of land to install solar panels and infrastructure to generate electricity from sunlight. The typical commercial solar lease is where an outside party approaches a landowner to negotiate placing solar panels, substations, power lines, roads and other necessary infrastructure on their property for a significant period of time (twenty-five to thirty-five years with optional extensions are common) for a specified rental rate per acre per year or with some form of revenue sharing much like a royalty payment for an oil or gas lease.

Because landowners and solar companies are free to negotiate terms, the clauses and terms vary greatly from lease to lease. However, there are several common clauses that all leases contain. Available commercial solar leases were gathered and analyzed to create this blog series about common clauses and to layout the variety of terms within those common clauses. The following post details common components of the payment structure of solar leases.

Common Payment Structures

Solar companies establish payment structures in their proposed lease agreements, and this is typically one of the first sections that a landowner will review. Many solar companies exist across the country resulting in diverse payment structures. While most lease agreements will vary, there are some common approaches that most companies follow. A very common approach to solar leases is to divide the lease into separate phases and pay different rates or through different calculations according to the phase of the solar lease. Some leases may pay a fixed rate based on the potential megawatts of power that the project could generate or even pay a royalty payment of some percentage of the power actually produced while many leases pay a fixed amount per acre per year. Other factors, such as state laws can also impact lease agreements. For example, both Tennessee and Florida statutorily require solar

lease agreements to include statements of the lease's compensation structure.[1] It is critical to carefully examine the lease and understand what compensation you are entitled to either during the life of the lease or if payment depends on the current phase of the lease agreement.

Simple Payment Structure

Simple payment structures may focus on one phase, such as the production phase, to compensate the property owner. For example, one lease agreement we reviewed requires payment based on the potential amount of energy produced:

> "… the annual rent of Seventy-five hundred dollars ($7,500) per megawatt (AC) of Installed Power (as defined herein) payable to Landlord, in advance, in annual installments."

This type of payment structure exposes the landowner to a major potential risk. Not all lease agreements turn into a completed solar project. There may be years after signing the initial agreement before a final decision on a project is made. Will the landowner be compensated for this time period? Simple payment structures may not take into account the time and complexity of building a solar project, so landowners need to ensure that they are adequately compensated for what they provide even if the project is never completed.

Payments Based on Lease Phases

Solar leases, and the developments themselves, are complicated projects that will take years to start producing power. It is common to break up lease agreements into different phases and the compensation methods and amount for the phases may differ dramatically. Common phases are the option phase, the construction phase, the operations phase and the decommissioning phase. Lease agreements may use some, or all, of the phases above. Exact names may differ from lease to lease, but the practical effects are similar.

The Option Phase

An option phase is the time period between the signing of the agreement and the beginning of the construction phase. Some of these phases can be as short as six months, while others may last for years. During the option phase, most leases contain no guarantee that the leased land will actually be used for a solar project.

[1] *See* Tenn. Code Ann. § 66-9-204; *see also* Fla. Stat. § 520.23 (2023).

The company may enter into contracts with several landowners while they decide which land to initiate their project on. The company will also need to sort out many practical issues such as permits, loans, power purchase agreements and a myriad of other things necessary for a successful solar project. Because rental payments in the future are unknown, it is beneficial to require rent payments during the option period. Example:

> "As consideration for the Option, during the Option Period, Grantee shall pay to Landowner option payments (collectively, the "Option Payments" and each an "Option Payment") in the amount of (i) US $2,500 (the "Initial Option Payment"), due and payable on the date that is forty-five (45) days after the Effective Date and (ii) thereafter, US $625 per calendar quarter, due and payable on the first day of the applicable calendar quarter."

Construction Phase

This phase of construction typically begins when they start bringing in construction equipment and materials and will last until solar project is actively producing power. During the option phase there may be minimal disruption to the landowner's use of their property, but during the construction phase the landowner may have very limited access to a significant portion of their property. Payments for this phase tend to be more substantial than the payments from the option phase because of the loss of access to the property. Examples:

- Payment is to begin when construction begins, and payment is to be made per acre.
- Landowner shall be paid $20,000 annually during Construction period.

Operations Phase

This phase begins when the construction is complete and the project begins producing power commercially. This phase can last for decades and ends when the project goes into the decommissioning phase. It is important to carefully review the contract to see how long it can last. Many contracts also include language where a specified period of time is guaranteed (20 years) and the company is entitled to extend this phase at their own discretion (company has an option to extend the agreement by five or ten years at their sole discretion). Payment calculations during the operations phase can also vary substantially. Many contracts pay on a per acre per year basis, but other contracts are paid on installed megawatts or a royalty payment based on the actual amount of power generated. Because of the length of this phase in the lease it is a common practice build in an escalation clause to keep up with inflation. Examples:

- $2,200 per acre of Easement Area per year during the Operations Period, escalating at a rate of 2% per annum.
- …$1,000 per acre per year for the Rent Payment of the leased property. Starting on the third (3rd) anniversary of the first Rent Payment Date, and for each annual anniversary thereafter, the annual Rent shall be increased by three percent (3%) over the Rent otherwise then in effect.

Decommissioning Phase

This phase begins at the end of the operations phase and, hopefully, concludes when all of the solar project infrastructure has been removed from the property and the premises has been returned to the state that it was in before the construction phase began. Many older agreements do not address the decommissioning phase and landowners may need to negotiate for payment and additional security to ensure proper decommissioning. Because of the length of these leases the original parties that signed the agreement may no longer be available (or the project could be sold to another company) so it is critical to document each party's responsibilities in the contract. One common approach to ensure that funds are available to pay for decommissioning is to require a bond from the solar company that can cover cleanup at the end of the lease. It also may be a wise idea to have payments for the property to continue through the decommissioning phase to incentivize the company to move forward. Example:

- Rental Payment of $1,500 per acre per year shall continue until all solar infrastructure has been removed from the premises at the conclusion of the agreement.

Conclusion

Overall, it is important that the solar lease agreement accurately encapsulates the terms agreed on by the parties. It is important to have an attorney that is knowledgeable about solar leases to thoroughly review the agreement for the landowner because once the contract is signed it is very difficult to make any changes. The long lease period means that anything left out of the agreement is something that the landowner, and potentially their heirs, will have to deal with for years to come.

To see more articles in this series click here.

To read the Inflation Reduction Act of 2022, click **here**.

To read the Farmland Owner's Guide to Solar Leasing, click here.
To read Understanding Solar Energy Agreements, click here.

Solar Smarts for Landowners: Property Owner Rights/Use

Rusty Rumley, Senior Staff Attorney

Grace Henson, Research Fellow

Solar leasing is the practice installing solar panels on large areas of land leased from a third party to generate electricity from sunlight. Commercial solar leasing is a topic that has garnered increasing attention because of the high rental rates in many areas of the country. Large-scale commercial solar leases include several unique aspects that make them differ from the typical residential solar contract. Because landowners and solar companies are free to enter a contract containing whatever terms the parties agree on, the clauses and terms vary greatly from lease to lease. However, there are several common clauses that many leases contain. We gathered and analyzed many available commercial solar leases to create this blog series about the most common clauses and layout the variety of terms found within those common clauses. The following post details common clauses involving the landowner's rights and use of the land during the lease; however, it is important to have an attorney thoroughly review any contract before it is signed. To read the overview post on Solar Smarts for Landowners click here.

Access and Use of the Property Clauses

Land carries an intrinsic value for farmers that is often difficult to put into words. Protecting the land and farming land that is not being used under a solar lease is often a priority when negotiating any lease. This makes it important to consider whether the lease agreement significantly limits the landowner's access to, or use of, their property. Many leases contain an "owner access" or property use restriction clause that specifies what actions can be taken by both the solar developer and the landowner. Having clear expectations from both sides of the agreement can limit potential conflicts in the future. In our research, some solar leases may adequately address many of these issues while others are lacking in detail. If there are specific uses and activities that the landowner wishes to continue, the lease agreement should expressly include those rights before anything is signed. Below are sample clauses from various solar leases that we have selected to use as examples as well as commentary about the clauses:

- Landlord shall not make any material changes to the property that would impact the soil quality of the Easement area or block the sunlight.

This clause provides very little guidance to the lease parties and is written entirely in favor of the solar developer. What impacts soil quality and what should be avoided to not block sunlight? Adding clear expectations with specific descriptions of prohibited activities would help to clarify this clause. The landowner will also want assurances on how they can continue to use their property in a way that does not violate the lease agreement. These issues will be addressed as we look at different clauses. Example two:

- "During the Development Term, owner shall have the right to continue to use the Property for agricultural, ranching, timber harvesting, and/or other reasonable purposes so long as the Property is maintained substantially in accordance with its current condition and in compliance with all applicable laws."

This clause allows the property owner to continue using the property for normal farming activities during the development term of the lease. It is important to note that this clause only applies to the development term, not the entire lease. Once construction begins the landowner will lose access to some property but notice that the exact property at issue is not described in this clause. To learn more about the different phases of a solar lease read our guide to Understanding Solar Energy Agreements here.

If a landowner wishes to retain rights to use the land in these ways throughout the entirety of the lease term, the lease agreement should reflect that and include a similar clause applicable to the construction and operation terms. One issue that frequently arises is that due to the nature of the construction phase, the project may need more of the land than when the project moves into the operation phase. The solar developer will need extra space to store equipment and supplies during the construction phase, and the landowner should make sure that they will be compensated for this additional temporary usage. During this phase the landowner is unlikely to be able to continue farming this property. Because the development phase can take years to complete the landowner would like to be able to farm their property in the meantime and receive sufficient notice before the solar lease moves into the construction phase. For pasture this notice may be short, but for row crops the landowner should negotiate for a longer notice period so that they do not lose

a growing crop. Regardless of the notice period, it is important to include language specifying damages when a solar lease moves into the construction phase.

A lease may also include an owner access clause that specifies the process to be followed for the landowner to access the leased premises.

For example:

- "During the Construction and Operation Term and any Extended Term with respect to any Property, Owner shall have the right to reasonably access such Property at reasonable intervals and at reasonable times and upon at least forty-eight hours' prior advance written notice to Lessee to inspect such Property. Any such access shall not materially interfere with Lessee's use of such Property for Solar Energy Purposes and occupancy of such Property in any manner."

This clause clarifies the steps to be taken for the landowner to access the property and also places a restriction on the actions taken by the landowner while on the property. The property owner may want to inspect their property to make sure that the property is being taken care of, but this is also a potentially dangerous place to be with either construction equipment during the construction phase or dangerous amounts of electricity during the operation term so the solar developer will want to protect themselves as well.

Ultimately, a solar lease also grants access to the land to many individuals who are likely strangers to the landowner. Employees from the solar company, maintenance workers, and others will be accessing the land over the course of several decades. This is likely unfamiliar to rural landowners and can cause additional stress and impose increased liability. A lease may specifically limit what can be grown on the land (timber is typically prohibited since it may create shade), what can be built on the land (barns, houses or other structures that could create shade) and other uses, such as hunting rights, may be restricted or significantly limited.

It is important to negotiate the access and usage of the property that the landowner will feel comfortable with before signing any agreement. Once the agreement is signed then it is very difficult to change the agreement in the future.

Maintenance of the Property

Most leases establish which party is responsible for maintenance of the property. Some leases require the tenant to maintain the property, while others hold the landowner responsible for keeping the land in proper order.

For example:

- "Landlord shall maintain its property adjacent to the Leased Premises in good condition and state of repair to avoid interference with Tenant's use of the Leased Premises and the Easement. Landlord shall not construct or permit to be constructed structures or plant or permit to be planted trees adjacent to the Leased Premises that will impede solar access to Solar Farm."
- Landlord shall maintain the property in a good condition, including the property in the immediate vicinity of the System.
- Operator (tenant) shall maintain the property in a neat and clean condition. Operator shall repair any cattle guards, fences, or gates damaged in connection to the Operator's activities on the property.

Many solar agreements split the duty for maintenance of the property. The solar developer is often responsible for the property that is being actively used by the project (this land is almost aways fenced in to limit access) and the property owner is responsible for maintaining the property outside the fence. Many solar developers will also reserve the right to maintain land immediately outside of the project so that they can cut down vegetation that could create shade or a fire hazard. Specifying responsibilities between the parties can make relations better over the life of the lease agreement.

Conclusion

A property owner should consider how the lease terms impact their ability to use their land. Issues such as use of the surrounding land and maintenance of the property may seem like far away concepts during the lease negotiation, but the terms created during these negotiations will dictate how the land will be used and maintained for decades to come.

To read other articles in the Solar Smarts for Landowners series click **here.**

To read Understanding Solar Energy Agreements by Shannon Ferrell, click **here**.

To read about Land Use Conflicts between Wind and Solar Renewable Energy and Agricultural Uses, click **here**.

Solar Smarts for Landowners: Miscellaneous Clauses

Solar leasing is the practice of installing solar panels on large areas of land leased from a third party to generate electricity from sunlight. Commercial solar leasing is a topic that has garnered increasing attention because of the high rental rates in many areas of the country. Large-scale commercial solar leases include several unique aspects that make them differ from the typical residential solar contract. Because landowners and solar companies are free to enter a contract containing whatever terms the parties agree on, the clauses and terms vary greatly from lease to lease. However, there are several common clauses that many leases contain. We gathered and analyzed many available commercial solar leases to create this blog series about the most common clauses and layout the variety of terms found within those common clauses. The following post details common clauses regarding miscellaneous topics such as assignment/subleasing provisions, confidentiality clauses, binding arbitration clauses, insurance requirements, and oil, gas, and mineral rights.

Assignment/Subleasing

Most, if not all, of these leases include a clause that allows the developer to assign, transfer, or sublease their interest in the property without the consent of the landowner. Some leases require limited or no notice to sublease or assign the developer's interest to another party. Landowners may be able to negotiate for more notice on an assignment or sublease, but it is doubtful that the developer will forego this ability. Solar leases are long-term contracts that can last for decades and developers will want, or need, the flexibility to transfer the project to another party. What does this practically mean for the landowner? Other than negotiating for more notice potentially, this type of clause illustrates the importance of capturing the full agreement in writing. A landowner may have a wonderful relationship with the initial developer, but subsequent operators may not be so accommodating. The landowner's success in navigating future challenges with the solar company depends on the language that is negotiated before the lease is executed.

Confidentiality Clauses

Solar companies often ask that landowners not discuss the details of their agreements with their neighbors or nearby landowners. Some leases specifically include confidentiality clauses that prohibit either party from disclosing to a third party the financial details of the agreement, especially during the option period. Landowners are also often prohibited from revealing the lessee's product design,

methods of operation and construction to any third party. These clauses are included to protect the unique features of a solar company's business model from competing companies and potentially in negotiating different pay rates with different neighbors. There are several different issues that landowners and their attorneys should be aware of with confidentiality clauses.

First, this does not stop the landowner from seeking legal advice on the lease. In fact, a landowner may be able to use this clause to negotiate with the developer on paying some, or all, of the landowner's attorney fees for reviewing the lease because they are creating legal liability for the landowner. In some parts of the country developers may be willing to reimburse attorney fees for the landowners and not in other parts, but it is an issue that your attorney should explore.

Second, the landowner should be able to consult with other people such as family members, accountants, tenants and lenders before signing the agreement as the contract needs to be executed for the confidentiality clause in the lease to come into force. Some developers may have other types of documents, such as Non-Disclosure Agreements (NDAs), that are introduced earlier in the negotiations and those agreements should be carefully reviewed by the landowner's attorney before they are signed.

It is important to be aware of any confidentiality requirements in your agreement to avoid liability for breach of contract.

Arbitration and Venue

Ideally, lease agreements would sufficiently encapsulate the agreement of the parties, and the parties would not have any issues that lead to disputes. However, no contract can address all potential problems that may arise during a lease that is likely to last more than a quarter of a century. Leases often include arbitration clauses that require parties to resolve any disputes through binding arbitration rather than in court. Before entering a lease agreement that requires arbitration, a landowner should consider whether they are willing to surrender their right to have the case heard in court. These binding arbitration clauses are often more favorable to the solar companies because a landowner is much more likely to win a jury trial in his or her hometown against a large solar corporation.

Here is an example of a binding arbitration clause:

> "Any Dispute that is not settled to their mutual satisfaction within the applicable notice or cure periods provided in this Agreement shall be settled by arbitration between the Parties."

Venue, or forum selection, is another clause that your attorney should carefully review. Venue clauses decide the location where a contract dispute will be litigated. If the solar lease does not specify where venue should occur, then the default answer is where the breach of contract happened. This is usually going to be the county or parish where the solar lease is located which typically favors the landowner. Developers that do not have an arbitration clause will usually want to have any court actions held in a location that is more favorable to them. The landowner's attorney should carefully review these sections of the agreement to fully protect the landowner's interests as much as practicable in case of a later dispute.

Insurance/Indemnification

It is important to ensure that, in the case of an accident that causes loss, both parties are protected. The most common lease requires the developer to maintain an insurance policy that covers injury to person and property. These clauses typically include a minimum policy amount. For example, a $2 million minimum for each individual occurrence and $5 million in umbrella liability insurance. This requirement ensures that the solar developer will be able to pay for any damages that arise from its actions or injuries on the property.

Additionally, landowners are subject to premises liability and owe a certain duty of care to those who enter their land. This duty of care would extend to employees of the solar company, maintenance workers, and any other individual who enters the land in relation to the solar project. Solar leases should include indemnity clauses in which the developer agrees to indemnify and hold harmless the landowner for any losses caused by injury to another person or piece of property. This is important because it is possible that an accident may occur in the 30+ year span these agreements typically last, and the landowner does not want to be held liable for personal injury in relation to the project. Some early solar leases have indemnity clauses that protect the developer at the landowner's expense and those should be avoided whenever possible. The landowner should not be held responsible if, for example, teenagers shoot at solar panels from the road and cause damage. A well drafted lease will put the risk of liability on the developer since they are the ones with control over that property during the life of the solar lease.

Mineral Rights and Solar Leases

It is very common in some states that both mineral developments (usually oil and gas exploration) and solar development are happening in the same area at the

same time. Solar developers will want the exclusive right to use the property for their solar project and may ask landowners for some form of assurance in the lease that they will have sole rights to the property. This may not be something that the landowner can guarantee. People that own the surface estate (the landowners) may not own the mineral estate (the valuable minerals underneath the surface) if those rights have been severed. In many states the mineral estate is the dominant estate over the surface estate, and they may use a "reasonable amount" of the surface as necessary to extract their minerals. This means that if the landowner has only the surface rights to their property, then they cannot, and should not, guarantee that the solar developer will have exclusive rights to the surface because they cannot exclude a mineral owner from extracting those minerals. With modern drilling techniques there is more flexibility on where the wellhead can be located, but the landowner should not agree to clauses that they may not be able to honor. Developers in states with active mineral exploration should be aware of this issue; however, the landowner's attorney should also seek to minimize the risk by recognizing this risk in the lease agreement.

Conclusion

Ultimately, landowners and solar companies may include any clauses they wish in a lease agreement. It is best to enter into a comprehensive agreement that addresses all material issues and topics in order to protect both the landowner and the developer. Any term that is written in the lease is enforceable against both parties, and it will be more difficult, if not impossible to enforce terms that are not included in the written agreement. Landowners spend much of their time looking at the payment clause of a solar lease, but the other miscellaneous clauses can impact the overall success of the lease agreement.

To read other articles in the Solar Smarts for Landowners series click **here**.

To read Understanding Solar Energy Agreements by Shannon Ferrell, click **here**.

To read about Land Use Conflicts between Wind and Solar Renewable Energy and Agricultural Uses, click **here**.

IEEPA Tariffs Challenged in Supreme Court (published 10.16.25)

Introduction

On August 29, a federal appeals court **ruled** that the International Emergency Economic Powers Act (IEEPA) does not provide the Trump Administration authority to impose retaliatory tariffs. In its ruling, the appeals court held that President Trump exceeded the authority granted by the IEEPA when he signed five Executive Orders imposing tariffs on "nearly all goods from nearly every country in the world." The court's ruling permitted the Trump Administration to appeal the judgment to the United States Supreme Court, which agreed to hear arguments during the first week of November. Trump is the first and only President to rely on the IEEPA to implement tariffs, so this case will cover new ground. With the challenged tariffs playing a large role in international trade, the outcome of this case will certainly impact U.S. agricultural markets. This article will discuss the background of the case, the decision of the appeals court, and what comes next.

Background

The IEEPA was established in 1977 to grant the President the authority to exercise a variety of economic powers in response to a declared national emergency, while also limiting other economic powers granted to the President by earlier statutes like the Trading with the Enemy Act (TWEA). Functionally, the IEEPA allows the President to "investigate, regulate, or prohibit any transactions in foreign exchange." **50 U.S.C. §1702(a) (1977)**. However, the President's authority under the IEEPA is available only "to deal with any unusual and extraordinary threat . . . if the President declares a national emergency with respect to such threat." **50 U.S.C. §1701(a) (1977)**.

In January of this year, President Trump **declared** a national emergency at the U.S.- Mexico Border, citing national security concerns. This national emergency was later expanded to include Canada and China. Executive Orders Nos. **14193**, **14194**, **14195**, **14257**, and **14266** imposed tariffs on Mexico, Canada, and China in response to these national emergencies. The tariffs instituted by these executive orders are referred to in the court's opinion as the "Trafficking and Reciprocal Tariffs." The Trump Administration cited the President's IEEPA authority to regulate foreign trade in the event of a national emergency as the legal basis for instituting the tariffs. At issue in ***V.O.S. Selections, Inc. v. Trump,* No. 2025-1812 (Fed. Cir. 2025)**, are the five Executive Orders issued by President Trump to impose trade duties on foreign trading partners.

The Case

On April 14, 2025, a group of five businesses filed suit in the Court of International Trade (CIT), challenging the reciprocal tariffs instituted by President Trump following the declared national emergency. In the complaint, the plaintiffs alleged that the IEEPA did not grant President Trump the authority to levy the challenged tariffs. The complaint asserted that the authority to impose tariffs, "must be granted clearly and unmistakably" and not "through some implication so vague and indeterminate that it went unnoticed by every other President for nearly five decades."

The plaintiffs additionally claimed that even if the IEEPA did confer this authority to the President, then it is an unconstitutional delegation of legislative authority. On this point, the plaintiffs alleged that interpreting the IEEPA as allowing the challenged tariffs would constitute a "sweeping delegation of legislative power." According to the complaint, this "sweeping delegation" would violate the nondelegation doctrine, which exists to prevent Congress from giving its legislative power to entities not vested with such authority under the Constitution. At the CIT, the court held that the IEEPA did not authorize these tariffs and that the challenged orders would be permanently enjoined. Because the CIT found that the IEEPA did not authorize the tariffs, the CIT did not address whether it was an unconstitutional delegation of authority. The government appealed that decision to the U.S. Court of Appeals for the Federal Circuit.

On appeal, the court limited its discussion to "whether the Trafficking and Reciprocal Tariffs imposed by the Challenged Executive Orders are authorized by IEEPA." The court held that they were not. In reaching this conclusion, the appeals court relied on the text of the IEEPA, the IEEPA's history, and similar trade statutes. The court held that the IEEPA's authority, which permits the President to "regulate . . . importation," does not include the ability to impose sweeping tariffs. The court noted that the IEEPA does not include the word "tariff" or any of its synonyms like "tax" or "duty." However, in a variety of other statutes that do confer tariff authority on the President, Congress has used "clear and precise terms to delegate tariff power."

The court reasoned that the history and purpose of the IEEPA conflicted with President Trump's tariffs. The court pointed out that since the IEEPA was enacted, "not once before has a President asserted his authority . . . to impose tariffs." The court noted that the IEEPA was specifically enacted to "cabin the President's authority" and further reasoned that, "it seems unlikely that Congress intended, in enacting IEEPA, to depart from its past practice and grant the President unlimited authority to impose tariffs." This, coupled with the explicit grants of authority found in similar statutes, led the court to conclude that, "whenever Congress intends to delegate to the President the authority to impose tariffs, it does so

explicitly." Because the court found that IEEPA did not authorize these tariffs, the court did not address whether IEEPA violated the nondelegation doctrine.

Moving Forward

Despite finding that the IEEPA did not authorize the tariffs implemented by President Trump, the appeals court declined to affirm the CIT's decision to overturn and block the challenged tariffs. For now, the challenged tariffs will stand. In reaching this decision, the court relied on **Trump v. CASA, Inc., 606 U.S. 831 (2025).** There, the Supreme Court held that the injunctions sought were "broader than necessary to provide complete relief to each plaintiff with standing to sue." Rather than granting the injunction, the Supreme Court in **CASA** instructed the lower courts to "move expeditiously to ensure that, with respect to each plaintiff, the injunctions comport with this rule and otherwise comply with principles of equity."

The appeals court here took the same approach. On sending the decision back to the CIT for further review, the appeals court instructed the CIT to "consider in the first instance whether its grant of a universal injunction comports with the standards outlined by the Supreme Court in *CASA.*" This refusal to grant the injunctions have preserved the tariffs and will allow the Trump Administration to continue collecting tariff revenue for the time being. The government has appealed the CIT's decision to the Supreme Court, which decided to hear the case.

At the Supreme Court, two questions have been presented for review. First, whether the IEEPA allows a President to institute tariffs after declaring a national emergency. Second, if IEEPA authorizes the tariffs, whether the statute unconstitutionally delegates legislative authority to the President, a question that was left unanswered in the lower courts. The Trump Administration has urged the Supreme Court to hear the case and issue a decision quickly. In a document published on September 9, the Supreme Court granted a motion to expedite the case and set oral arguments for November 5, 2025.

The Supreme Court's decision will have major political and economic implications, regardless of the outcome. Siding with the President would likely allow further tariffs to be enacted under the IEEPA and would expand the statute's authority for future administrations. Siding with the plaintiffs would likely result in the challenged tariffs being completely vacated. Given the impacts of the tariffs so far, this option would have a major effect on the U.S. economy. A final decision is not likely to come soon, but the outcome of this case will have major implications for the U.S. agriculture industry.

Overview of Recent Ag Trade Announcements (published 11.20.25)

Background

Following President Trump's three-leg journey across Asia in October of 2025, the White House has released details of new trade agreements that seek to increase U.S. agricultural exports. Additionally, agreements executed earlier this year with the United Kingdom (U.K.) and the European Union (E.U.) mark a similar attempt to increase exports to various European nations. This article will briefly discuss the details of the various trade developments announced by the White House throughout 2025.

Mutual Responsibilities & Consequences

It is important to note that the trade deals discussed below are still preliminary and in some cases are merely agreed upon "frameworks" meant to guide negotiations as they progress. As a result, they are not (and are not yet intended to be) binding on either country. Given the unpredictability of international trade, the final agreements could potentially vary greatly from these initial framework agreements, depending on future negotiations.

Article I of the Constitution gives Congress the exclusive power to "regulate commerce with foreign nations." In the past, when the President exercised their power to negotiate trade agreements, they were considered "congressional-executive agreements" and would ultimately require Congress' approval under trade promotion authority (TPA) enacted by Congress. However, the **most recent TPA authority** expired in 2021, creating uncertainty in whether foreign trade agreements would require congressional authorization. For example, when President Biden executed the Indo-Pacific Economic Framework for Prosperity (IPEF), no agreements under this trade deal were submitted to Congress for approval.

With the expiration of the TPA, it is unclear whether President Trump's "framework agreements" will require Congressional approval, creating yet another area of uncertainty in the future of these agreements. The Congressional Research Service has recently published a **report** that may be helpful for more information on the interplay between executive and legislative authority.

China

Following a meeting in South Korea between President Trump and Chinese President Xi Jinping, the White House published details of a new trade deal agreed upon by the U.S. and China. In a **fact sheet** recently published on the White House website, the trade deal is referred to as a "historic agreement" that will "open China's market to U.S. soybeans and other agricultural exports." The trade deal stipulates that China will suspend its retaliatory

tariffs implemented throughout 2025. These include tariffs on U.S. chicken, wheat, corn, cotton, sorghum, soybeans, pork, beef, aquatic products, fruits, vegetables, and dairy products. Further, China has agreed to purchase at least 12 million metric tons of U.S. soybeans during the final two months of 2025. China has also committed to purchase at least 25 million metric tons of U.S. soybeans in 2026, 2027, and 2028. Finally, China has agreed to resume purchasing U.S. sorghum, hardwood, and softwood logs.

China is a major purchaser of U.S. soy, so this can have a significant impact on production and market values. For example, in 2024 China purchased 26.81 million metric tons of U.S. soybeans. Between January and May of 2025, before trade tensions escalated, figures **indicate** China had imported 6 million metric tons of U.S. Soybeans. It has been **reported** by the USDA that since the summit in South Korea, China has purchased 792,000 metric tons of U.S. soybeans.

As of the time of writing, China **has not** publicly issued a confirmation of its commitment to purchase the specified amounts of U.S. soybeans. However, in regards to some other components of the deal, China has **confirmed** its suspension of its retaliatory tariffs on U.S. imports. It will, however, leave in place a 13% tariff on imported U.S. soybeans.

Japan

During the trip to Asia, President Trump met with Japan's Prime Minister Sanae Takaichi to reconfirm the Framework Agreement entered by the U.S. and Japan on July 22, 2025. The framework contained provisions intended to bolster agricultural trade between the U.S. and Japan. Details of this agreement were outlined in an **Executive Order** signed by President Trump on September 4, 2025, titled "Implementing the United States-Japan Agreement." The Executive Order states that Japan will be "working toward an expedited implementation of a 75 percent increase of United States rice procurements within the Minimum Access rice scheme." Additionally, Japan will be investing $8 billion per year towards "purchases of United States agricultural goods, including corn, soybeans, fertilizer, bioethanol (including for sustainable aviation fuel)." Japan has reconfirmed its commitments in a recently published **Joint Statement** between Japan and the U.S..

The United Kingdom

On May 8, 2025 President Trump and Prime Minister Keir Starmer **announced** the U.S.-UK Economic Prosperity Deal (EPD). Per the **general terms** of this agreement, the United Kingdom will be removing its 20% tariff on U.S. beef exports, which currently impacts beef exports within a quota of 1,000 metric tons. The U.K. has also agreed to create a preferential duty-free quota of 13,000 metric tons for U.S. beef. A preferential-duty free agreement is a form of trade agreement that allows products to be imported with reduced

import costs and fees. The trade deal between the U.S. and the U.K. also stipulates that the two nations will "commit to working together to improve market access for agricultural products." However, the trade deal does not go into detail on how exactly market access will be improved. An **update** recently published by the U.K. government states, "We will execute the legislative process to create a preferential duty-free quota for US beef of 13,000 metric tonnes (MT) per calendar year." Similar to the above agreements, at this point this is a voluntary and mutual decision, rather than a binding legal commitment.

The E.U.

On July 27, 2025, President Trump **announced** a new "Framework Agreement" with the E.U.. The **Framework Agreement** stipulates that the E.U. provide preferential market access for U.S. agricultural goods including tree nuts, dairy products, fresh and processed fruits and vegetables, processed foods, planting seeds, soybean oil, and pork and bison meat. Like the agreement with the U.K., this trade deal states that the E.U. and U.S. "commit to work together to address non-tariff barriers affecting trade in food and agricultural products" which includes "streamlining requirements for sanitary certificates for pork and dairy products." In a **Joint Statement** between the U.S. and the E.U., the Framework Agreement is referred to as "a first step in a process that can be further expanded over time to cover additional areas and continue to improve market access and increase their trade and investment relationship."

Malaysia

On October 26, 2025, the U.S. and Malaysia executed the "**Agreement on Reciprocal Trade**." According to a **fact sheet** published by the Office of the U.S. Trade Representative, Malaysia has committed to provide significant preferential market access for U.S. agricultural products. This includes dairy, horticultural products, poultry, pork, rice, and fuel ethanol. Malaysia has also committed to address "non-tariff" barriers to U.S. agricultural exports. To accomplish this, Malaysia has pledged to: (1) recognize the U.S. food safety system for U.S. meat, poultry, and dairy products; (2) streamline halal certification of U.S. food and agricultural products; (3) open market access for U.S. sorghum; and (4) adopt regionalization approaches to facilitate U.S. exports of pork and poultry. Malaysia has confirmed these commitments via a **Joint Statement** between the U.S. and Malaysia. According to that joint statement, the two nations will "undertake domestic formalities in advance of the Agreement entering into force." The agreement is additionally confirmed in a **post** by the National Trade Promotion Agency of Malaysia, which claims the agreement "strengthens regulatory certainty and supply-chain resilience through deeper cooperation in trade facilitation."

Cambodia

On the same day that the Malaysia agreement was formalized, a **new trade agreement** with Cambodia was also announced. Under this agreement, Cambodia has agreed to eliminate tariffs on all U.S. food and agricultural product imports. Further, the agreement contains language indicating Cambodia's intent to promote the importation of U.S. agricultural products. Specifically, Cambodia says it will recognize U.S. regulatory oversight, U.S. sanitary and phytosanitary measures, and accept certificates issued by U.S. regulatory authorities for food and agricultural products. U.S. **sanitary and phytosanitary measures** are a set of testing and inspection methods used to ensure the safety of agricultural products. This language in the trade agreement indicates that when importing U.S. agricultural products, Cambodia will defer to safety determinations already made by U.S. regulatory agencies. This, in theory, should reduce non-tariff barriers to trade between the U.S. and Cambodia. While this agreement is not yet finalized, the two countries **have committed** to "undertake domestic formalities" to make it so.

Ongoing Negotiations

The negotiations discussed in this section are even more nebulous, as they are merely attempts to negotiate the terms of a potential agreement. However, they are still an indication that the following countries are at least at the negotiating table with the U.S.

Indonesia and the U.S. are still negotiating details of a trade deal that was first discussed in a **joint statement** issued on July 22, 2025. Per the joint statement, Indonesia would eliminate "approximately 99 percent" of tariff barriers currently placed on a "full range" of imported U.S. food and agricultural products. The proposed agreement also stipulates that the U.S. and Indonesia will cooperate to exempt U.S. food and agricultural products from all import licensing regimes, provide Fresh Food of Plant Origin designation for all applicable U.S. plant products, and to recognize listing of all U.S. meat, poultry, and dairy facilities. The joint statement provides that Indonesia will also accept certificates issued by U.S. regulatory authorities.

Further, the U.S. and Vietnam have announced a **framework** for a trade agreement, but are still in the process of finalizing details of a more comprehensive agreement. The framework states that Vietnam will provide preferential market access for "substantially all" U.S. agricultural exports to Vietnam.

On October 26, 2025, the White House posted a **joint statement** discussing an agreed-upon framework for a new trade deal between the U.S. and Thailand. The framework states that Thailand will eliminate tariff barriers on "approximately 99 percent of goods" covering a full range of U.S. food and agricultural products. Similar to other agreements, the U.S. and

Thailand trade deal would require Thailand to accept safety certifications of food and agricultural products issued by U.S. regulatory authorities. This joint statement also "takes note" of "the forthcoming commercial deals between U.S. and Thai companies" for the purchase of U.S. feed corn, soybean meal, and dried distiller grains with solubles at an estimated 2.6 billion dollars per year.

Finally, on November 14, 2025, the White House published a **fact sheet** outlining the framework for new U.S. trade deals with Switzerland and Liechtenstein. Negotiations are ongoing, but a recently published **press release** indicates that Switzerland and Liechtenstein have in fact signed a "non-binding memorandum of understanding" with the U.S. At this time, only the "non-binding memorandum of understanding" has been signed, so the specific details of the agreement have not been finalized and may be subject to change. Per the fact sheet, this new trade deal will "lock in the largest expansion ever of U.S. exporter access to Swiss markets, creating new opportunities for U.S. manufacturers, farmers, ranchers, fishermen, and other producers." To accomplish this expansion, Switzerland and Liechtenstein will remove "a range of tariffs" on U.S. agriculture products including fresh and dried nuts, fish and seafood, and fruits. Additionally, Switzerland will establish tariff rate quotas for American poultry, beef, and bison. Finally, the fact sheet discusses Switzerland and Liechtenstein's intent to address non-tariff barriers which have historically prevented certain U.S. goods from being imported. To remove these barriers, the nations will address "restrictive measures" on U.S. poultry and attempt to streamline requirements for U.S. dairy products.

Conclusion

Trade relationships between countries are complicated. Until binding agreements are reached, negotiations may continue. While more time will be needed to determine the ultimate impact, the language recognizes the importance of international trade to U.S. agriculture and indicates an intent to improve exports of U.S. agricultural products.

Supreme Court Vacates IEEPA Tariffs (published 3.5.26)

Introduction

In January 2025, President Trump declared national emergencies at the U.S. borders, citing an influx of "poisonous fentanyl" and "the extraordinary threat posed by illegal aliens". According to the Trump Administration, these emergencies authorized the President to impose tariffs under the International Emergency Economic Powers Act (IEEPA). IEEPA grants the President authority to undertake specific economic actions in response to a national emergency. Using IEEPA, the Trump Administration imposed tariffs on Mexico, Canada, and China. These tariffs were challenged in federal courts and ultimately struck down by the Supreme Court on February 20, 2026, in *Learning Resources, Inc. v. Trump*. To learn more about the IEEPA tariffs and the Court's decision, click here.

Following that decision, certain questions remained unanswered. Will there be refunds for the IEEPA tariffs? How will those refunds be issued? Will the Trump Administration impose new tariffs, and if so, how? Recent developments have provided some clarity on these issues and what importers can expect moving forward. This article will discuss refunds, new tariffs implemented by the Trump Administration, and an investigation by the United States Trade Representative that could potentially lead to new tariffs.

Refunds & The CAPE System

Reportedly, approximately $133.5 billion was collected on IEEPA tariffs by December 2025. With those tariffs now vacated by the Supreme Court, American importers are seeking refunds. Because the Court's decision did not mention refunds, importers were left uncertain about whether refunds would be issued. Recent developments at the Court of International Trade (CIT) have provided some clarity, but background is needed to understand those actions.

When a good that is subject to tariffs enters the United States, one of two collection processes applies: formal and informal entries. Formal entry is required when the value of imported goods exceeds $2,500. In a formal entry, the importer must pay the estimated tariff rate and post a bond with Customs and Border Protection (CBP). CBP later calculates the final tariff rate. This is known as "liquidation." Under federal law, liquidation must occur within one year of the entry. Informal entries generally do not require a bond and are considered liquidated once the importer pays the estimated tariffs.

Under the Tariff Act of 1930, the Secretary of the Treasury is authorized to offer tariff refunds when "it is ascertained on liquidation or reliquidation . . . that more money has been deposited or

paid as duties than was required by law." In those situations, refunds are required if the discrepancy exceeds $20.00. Additionally, refunds may be mandated after a court orders reliquidation.

On March 4, 2026 the Court of International Trade (CIT) issued an order stating that, "all importers of record whose entries were subject to IEEPA duties are entitled to benefit from the *Learning Resources* decision." To facilitate this, the CIT ordered that any liquidated entries "for which liquidation is not final" be reliquidated without regard to the IEEPA tariffs. Unliquidated entries were likewise ordered to be liquidated. In other words, the CIT ordered CBP to pretend as if the IEEPA tariffs never existed and begin issuing refunds. As discussed above, liquidation is a crucial step in the refund process, as it determines the amount owed by the importer.

On March 6, the CIT issued a subsequent order temporarily suspending CBP's obligation to issue refunds, after CBP indicated it needed additional time to liquidate or reliquidate all entries. CBP asserted that the "volume of entries" made each year prevent it from being able to "affirmatively review and liquidate each entry." CBP is still responsible for collecting and liquidating all non-IEEPA tariffs, which seems to have initially caused CBP to doubt its ability to comply with the CIT's order. However, CBP then filed a subsequent declaration which outlined its plans to implement a new online system to process IEEPA refunds.

CBP plans to implement the Consolidated Administration and Processing of Entries (CAPE) claims portal. According to CBP, CAPE will be a web-based resource allowing importers and brokers to submit IEEPA refund requests. CAPE will use information submitted by importers to determine refund eligibility. If eligible, tariff rates will be liquidated or reliquidated "as if the IEEPA duties had never been declared." After liquidation or reliquidation, CAPE will automatically issue refunds to eligible importers. It is important to note that CAPE is not yet finalized. Accordingly, CBP will be implementing a phased development of CAPE, with basic system functionality being activated first. To ensure eligibility for refunds, importers must first enroll in the Automated Clearing House (ACH) program. ACH is a system used by CBP to process and transmit electronic credit and debit transfers and will be used to distribute IEEPA refunds. For more information on the CAPE system, click here.

Refunds have been a looming issue since the Court's decision in *Learning Resources*. Given the amount collected under the IEEPA tariffs, many U.S. importers are likely seeking to recover refunds. When the Court did not address refunds in its opinion, those importers were left with uncertainty. However, with its introduction of the CAPE system, CBP has provided at least one potential avenue for producer refunds under IEEPA.

Section 122 Tariffs

On February 20, 2026, President Trump announced a new 10% global tariff rate under Section 122 of the Trade Act of 1974 (Section 122). The initial announcement came the same day the Supreme Court invalidated the IEEPA tariffs. Since its enactment, no tariffs had previously been implemented under Section 122. Because no tariffs have been imposed under Section 122 before, many importers may be unclear about Section 122's purpose and how it relates to the newly announced tariffs.

Section 122 was implemented to address "fundamental international payments problems." More specifically, Section 122 allows the president to impose tariffs to: 1) deal with large and serious United States balance-of-payments deficits; 2) prevent an imminent and significant depreciation of the dollar in foreign exchange markets; or 3) cooperate with other countries in correcting an international balance-of-payments disequilibrium.

A balance-of-payments refers to a record detailing all transactions made between a country's entities and international trading partners. It includes a current account, a capital account, and a financial account. The current account tracks a nation's trade of goods and services, its earnings on foreign investments, and its foreign money transfers. The capital account covers transactions in foreign financial institutions and central bank reserves. The financial account records deposits, ownership of investment securities, and direct investment between U.S. residents and foreign entities. A balance-of-payments deficit means that the United States is sending more money out than it is taking in.

Unlike IEEPA, Section 122 explicitly grants the President authority to impose tariffs. However, Section 122 also places limitations on any tariffs enacted under its authority. To address one of the above-mentioned payments problems, the President may enact a temporary tariff. The tariff cannot exceed 150 days, unless approved by Congress. 19 U.S.C. § 2132(a)(3). The tariff rate may not exceed 15% *ad valorem*. An *ad valorem* tariff is calculated based on the total value of the goods, rather than their quantity or weight. In other words, the tariff may not exceed 15% of the total value of the imported goods. Section 122 requires that the tariff rate be applied "consistently with the principle of nondiscriminatory treatment." 19 U.S.C. § 2132(d)(1). This means that the rate must generally apply equally to all countries. However, when a country has "large or persistent balance-of-payments surpluses," the President may target them specifically.

Using the authority granted by Section 122, the Trump Administration announced a 10% *ad valorem* import duty on articles being imported into the United States. The administration asserts that the Section 122 tariffs are necessary to correct "a large and serious balance-of-payments deficit." The announcement explains that the United States is currently in an overall account deficit and running a deficit in each component of the current account. To support this claim, the Trump Administration asserts that: 1) the annual U.S. goods trade deficit reached 40% during 2024; 2) the U.S. made less on exported capital and labor than other countries made by exporting capital

and labor to the U.S. and; 3) more money is currently being transferred out of the United States than is being transferred in. According to the announcement, these issues "endanger U.S. economic and national security."

The announcement additionally lists certain exemptions from the Section 122 tariff rate. The exemptions include but are not limited to: certain critical minerals; natural resources unavailable in the United States; beef, tomatoes, and oranges; pharmaceuticals; certain electronics; certain aerospace products; and informational materials. Additionally, goods traded according to the agreement between the United States, Mexico, and Canada will be exempted. As discussed above, the Section 122 tariffs face a 150-day statutory-limit, which could potentially be extended by Congress. This means that the tariffs could at least be active until July 20, 2026.

The Section 122 tariffs have already faced legal challenges. A coalition of twenty-four states filed a lawsuit challenging the Section 122 tariffs on March 5, 2026. The suit, filed in the CIT, argues that Section 122 does not authorize the Trump Administration's tariffs. The complaint argues that a trade deficit is not a balance-of-payments deficit, and therefore Section 122 does not apply. According to the states, the administration is "contorting" the term balance-of-payments and "cherry-picking only the negative components." They argue that when foreign capital and financial investments into the United States are included, the actual balance-of-payments is only 0.2% of the United States' gross domestic product, which the states characterize as "essentially a rounding error." The states claim that Section 122 does not authorize tariffs based on a trade deficit and that the administration cannot "redefine" the term balance-of-payments to justify the Section 122 tariffs. The plaintiffs conclude by requesting the CIT to declare the Section 122 tariffs unlawful, vacate them, and order refunds of tariffs already collected.

Whether the Section 122 tariffs will survive this challenge remains to be seen. As of the time of writing, the tariffs have been in effect for just over a month, and many questions remain unanswered. Section 122 imposes a 150-day limit, but Congress could extend that period. Even if Congress were to extend the deadline, the tariffs could be overturned by the courts. Further, President Trump has indicated that the rate will be increased to 15%. Whether Section 122 authorized the recent tariffs is an issue for the federal courts to decide, which could take some time.

Potential Section 301 Tariffs

On March 17, 2026, the Office of the United States Trade Representative (USTR) initiated an investigation of foreign countries under Section 301 of the Trade Act of 1974 (Section 301). According to a USTR press release, the investigation focuses on "acts, policies, and practices of various economies" related to structural excess capacity in manufacturing sectors. Structural excess capacity occurs when production capacity exceeds domestic and global demand. The USTR

claims that this excess capacity will lead to "overproduction and large or persistent trade surpluses, as well as underutilized and unused capacity, in manufacturing sectors." According to the USTR, this poses "a serious challenge to U.S. efforts to re-shore supply chains and provide good-paying jobs for American workers." While the USTR has explained why it launched the investigation, many may still be unclear about how Section 301 works and what could come next.

Section 301, at its core, is designed to address "unfair" foreign trade policies and enforce international trade agreements. Section 301 applies when the USTR determines that "the rights of the United States under any trade agreement are being denied." Section 301 also applies when "an act, policy, or practice of a foreign country violates, or is inconsistent with, the provisions of, or otherwise denies benefits to the United States under, any trade agreement, or is unjustifiable and burdens or restricts United States commerce."

A Section 301 investigation can be initiated by the USTR itself or by a private party. Private parties must file a petition describing the unfair trade practice and how it is harming the U.S. economy. Once filed, the USTR has 45 days to decide whether to begin a formal investigation. The USTR must publish a notice in the Federal Register when self-initiating an investigation. The USTR is also required to seek public comment on proposed actions. For non-trade agreement investigations, a final determination will generally be issued 12 months after an investigation begins.

If the USTR finds through investigation that a country has violated a trade agreement or implemented an act, policy, or practice that is unjustifiable, Section 301 authorizes certain actions. Most notably, the USTR may impose tariffs. Under Section 301 the USTR is authorized to impose duties or "other import restrictions" on the goods of a foreign country for "such time as the Trade Representative determines appropriate."

The USTR announced that it has self-initiated a Section 301 investigation. The USTR will investigate China, the European Union, Singapore, Switzerland, Norway, Indonesia, Malaysia, Cambodia, Thailand, Korea, Vietnam, Taiwan, Bangladesh, Mexico, Japan, and India for the above-mentioned structural excess capacity concerns. If the USTR determines that the policies or practices of the countries under investigation are actionable under Section 301, it may act under the statute, including imposing tariffs.

This is a broad investigation, and it will likely be some time before any official action is announced. However, any actions taken could have significant economic consequences. Individuals interested in submitting a public comment on the investigation may do so here. The deadline to submit written comments is April 15, 2026.

Conclusion

In the aftermath of the *Learning Resources* decision, many questions remained unanswered. However, some answers have emerged in the weeks since. While not finalized, the CAPE system may provide an avenue for importers seeking IEEPA refunds. Despite ongoing legal challenges, President Trump's Section 122 tariffs suggest that tariffs remain a central part of the administration's trade strategy. This is further reinforced by the USTR's decision to initiate a broad Section 301 investigation against U.S. trading partners. It remains to be seen what the investigation will ultimately find and what actions may follow. Regardless, importers and consumers should stay informed about these developments and monitor further changes in U.S. trade policy.

To learn more about the IEEPA tariffs, click here.

To read the full text of the Trade Act of 1974, click here.

To learn more about enrolling in the ACH program, click here.

Federal Court Strikes Down 2019 & 2024 ESA Regulations (published 4.16.26)

On March 30, 2026, a federal court in California issued a ruling to overturn several Endangered Species Act ("ESA") regulations adopted by the Trump administration in 2019 and the Biden administration in 2024. The plaintiffs in ***Ctr. for Biological Diversity v. U.S. Dep't of Interior*, No. 24-cv-04651 (N.D. Cal. Mar. 30, 2026)** challenged six rules in total with the court ultimately concluding that four violated the statutory text of the ESA. Earlier this year, the United States Fish and Wildlife Service ("FWS") together with the National Marine Fisheries Service ("NMFS") proposed a slate of new ESA regulations intended to restore the rules established under the first Trump administration. While those rules have yet to be finalized, it is possible that the recent court ruling may offer some insight into how courts may ultimately treat those regulations.

ESA Overview

The ESA was enacted in 1973 for the purpose of conserving species at risk of extinction and the habitats upon which those species depend. 16 U.S.C. § 1531(b). The statute is jointly administered by FWS and NMFS (collectively, "the Services") which are responsible for creating and maintaining a list of species that are classified as either "threatened" or "endangered" depending on the level of risk those species face. 16 U.S.C. § 1533. Once a species is added to that list, it becomes protected under the ESA.

When the Services list a species for protection under the ESA, they must also designate critical habitat for the species. 16 U.S.C. § 1533(a)(3)(A)(i). The ESA defines critical habitat as specific geographical areas which are "occupied by the species, at the time it is listed […] on which are found those physical or biological features essential to the conservation of the species" or areas which are not occupied by the species at the time of listing but the Services have determined are "essential for the conservation of the species." 16 U.S.C. § 1532 (5)(A).

Along with requiring the Services to list species under the ESA and designate critical habitat for those species, the ESA also requires all other federal agencies to consult with the Services to avoid harming listed species or designated critical habitat. Specifically, the ESA requires each federal agency to ensure that any action it "authorize[s], fund[s], or carrie[s] out" is "not likely to jeopardize the continued existence of any [listed] species or result in the destruction or adverse modification of" critical habitat. 16 U.S.C. § 1536(a)(2). To initiate this process, the agency taking action will determine whether its action "may affect" listed species. 50 C.F.R. § 402.13. If the agency concludes that its action "may affect" a listed species, it must reach out to the Services to determine whether the action is

"likely to adversely affect" the species. 50 C.F.R. § 402.13 If so, then the Services must engage in formal consultation, a process which requires the consulting Service to prepare a document known as a Biological Opinion ("BiOp"). 50 C.F.R. § 402.13 The BiOp will evaluate more thoroughly the expected impacts of the agency's action and if it concludes that the action is likely to jeopardize the continued existence of a protected species or result in the destruction or adverse modification of critical habitat, it must also include mitigation measures the agency can take to avoid causing such negative impacts. 50 C.F.R. § 402.13. When making a determination about the impacts an agency action may have on listed species, the Services must base their conclusions on "the best scientific and commercial data available." 16 U.S.C. § 1536(a)(2).

Background to the Case

Since 2019, the ESA has experienced several rounds of regulatory changes. In August 2019, the Services issued final rules to change the procedures related to the listing of species under the ESA and the consultation process between the Services and other federal agencies. A closer look at those changes is available here. The plaintiffs in *Ctr. for Biological Diversity v. U.S. Dep't of Interior* filed a lawsuit to challenge those 2019 regulations. However, following a change in Presidential administration, the court sent the matter back to the Services for review, bringing that lawsuit to an end. In 2024, the Services adopted new regulations which, according to the plaintiffs, resolved some of their concerns with the 2019 regulations but ultimately retained certain issues while introducing others. More information on the 2024 regulatory changes can be found here.

After the new regulations were finalized in 2024, the plaintiffs filed the current lawsuit to challenge six specific provisions that had been either introduced in 2019 and retained in 2024 or introduced for the first time in 2024. Following another change in Presidential administration in 2025, the Services sought to have the case either paused or dismissed, citing another round of updated ESA regulations that had been proposed in 2025 which the Services expect to finalize before the end of 2026. However, the court concluded that neither pausing or dismissing the case would be appropriate, noting that it would be better for the court to "provide the [Services] with its reading" before the new regulations are final so that the Services can take into account any "problems" the court might find.

Many of the regulatory changes proposed in 2025 were identical to those that had been made in 2019 before being modified in 2024. Although various lawsuits were filed to challenge the 2019 rules, they were largely paused or dismissed after the Services announced that they would revisit those regulations following the transition from the Trump administration to the Biden administration. For that reason, no court ever fully considered whether the 2019 rules complied with the ESA. The recent decision in *Ctr. for Biological*

Diversity v. U.S. Dep't of Interior represents the first time a court has considered the legality of those regulations and may provide some insight into how the rules proposed in 2025 may be viewed by courts after they are finalized.

Recent Court Decision

The plaintiffs in *Ctr. for Biological Diversity v. U.S. Dep't of Interior* asked the court to review six ESA regulations and consider whether they violated the statutory requirements of the ESA. Four of those regulations are related to the consultation process while the other two are concerned with the designation of critical habitat. Of those six, the court found that four violated the ESA and should be overturned. The other two were upheld.

"Effects of the Action"

During agency consultation with the Services, the ESA requires the Services to evaluate the effects of the agency action on listed species and critical habitat to determine whether jeopardy of a species or the destruction or adverse modification of critical habitat is likely to occur. 16 U.S.C. § 1536. Before 2019, the ESA regulations defined "effects of the action" as "the direct and indirect effects of an action on the species or critical habitat." 50 C.F.R. § 402.02 (2018). The 2019 rules changed the definition of "effects of the action" to "all consequences to listed species or critical habitat that are caused by the proposed action" and clarified that a "consequence is caused by the proposed action if it would not occur but for the proposed action and it is reasonably certain to occur." 50 C.F.R. § 402.02 (2019). The Services left this definition in place when it amended the regulations in 2024.

The plaintiffs argue that this violates the ESA's requirement that the Services rely on the best scientific data available when considering the impacts an agency's action may have on listed species and that it the phrase "reasonably certain to occur" conflicts with the ESA requirement that the Services consider whether jeopardy of a species is "likely" to occur. The court agreed with the plaintiffs on both arguments. First, the court concluded that the 2019 rule violates the ESA's "best available data" requirement because the ESA "imposes a mandatory duty on the Services to analyze the likelihood of jeopardy or harm to habitat using the best available data." According to the court, the best scientific data available may not be the same as impacts that are "reasonably certain to occur." Next, the court concluded that the provision of the 2019 regulation that requires the Services to only consider those impacts to species and habitat which are "reasonably certain to occur" is contrary to the ESA requirement that Services consider whether jeopardy of a species or harm to habitat is "likely." Because what is "likely" may not necessarily include what is "reasonably certain to occur," the court held that this regulation violated the ESA and should be overturned.

Consideration of Mitigation Measures

When drafting a BiOp, the ESA regulations require the Services to take into account "any beneficial actions" taken or proposed to be taken by the action agency. 50 C.F.R. § 402.14(g)(8). The purpose of this rule is to ensure that the Services consider any activities that are beneficial to listed species that the consulting agency plans to include as part of its proposed action when determining what the impacts of that action could be to protected wildlife. In 2019, the Services amended the ESA rules to clarify that the Services should take such beneficial activities into consideration without "any additional demonstration of binding plans." 50 C.F.R. § 402.14(g)(8). In other words, the 2019 rules require the Services to give proposed beneficial activities the same consideration as any other portion of the agency action even if the agency has not committed to carrying out those activities.

The plaintiffs argued that this violates the ESA's requirement that the Services "insure" against jeopardy of listed species by "forcing them to consider amorphous, non-binding mitigation plans in making no-jeopardy findings." In it's opinion, the court agreed with the plaintiffs, concluding that the 2019 rule violated the ESA because it does not satisfy the statutory requirement that the Services "insure" against harm to species or habitat. According to the court, the ESA requires beneficial activities to be excluded from consideration unless they are binding.

Definition of "Destruction or Adverse Modification"

Under the ESA, the Services must "insure" that federal agency actions will not cause jeopardy to listed species or "destruction or adverse modification" to designated critical habitat. 16 U.S.C. § 1536(a)(2). Prior to 2019, the ESA regulations defined "destruction or adverse modification" as "a direct or indirect alteration that appreciably diminishes the value of critical habitat for the conservation of a listed species." 50 C.F.R. § 402.02 (2018). In 2019, that definition was amended to "a direct or indirect alteration that appreciably diminishes the value of critical habitat *as a whole* for the conservation of a listed species." 50 C.F.R. § 402.02 (2019). That definition was retained in the 2024 regulations.

The plaintiffs argue that introducing the language "as a whole" violates the ESA by replacing the statutory requirement to avoid all destruction or adverse modification of critical habitat with a regulatory provision that allows at least some destruction or adverse modification of critical habitat. The court agreed, concluding that the text of the ESA "prohibits adverse modification entirely" and that the 2019 rule violated that requirement by permitting at least some adverse modification to critical habitat.

Duty to Request Reinitiation of Consultation

Before 2024, the ESA regulations concerning agency consultation required both the agency taking action or the consulting Service to request reinitiation of consultation under certain circumstances. 50 C.F.R. § 402.16(a) (2023). In 2024, the Services amended their regulations so that only the agency taking action is required to request reinitiation of consultation. The plaintiffs claim that the Services unlawfully rescinded their duty to request reinitiation of consultation, arguing that the Services failed to provide adequate reasons to support amending the regulations. In 2024, the Services stated that they were amending the regulation to clarify that only the action agency has the authority and responsibility to initiate or reinitiation consultation. The court was not persuaded by that reasoning. According to the court, while the text of the ESA does not allow the Services to compel any federal agency to engage in consultation, nothing in the pre-2024 rule gave the Services that authority. The rule required the Services to request reinitiation in certain circumstances but did not grant the Services the authority to require the federal agency to reinitiate consultation. Because the Services failed to provide a persuasive reason for changing a rule that had been in place for 25 years, the court found the change to be unlawfully arbitrary and concluded that it should be overturned.

Rules Upheld

Finally, the court considered the last two regulations challenged by the plaintiffs. While the court overturned the first four regulations it considered, it upheld the last two after concluding that they did not violate the ESA.

The ESA defines "threated species" as "any species which is likely to become an endangered species within the foreseeable future[.]" 16 U.S.C. § 1532(20). Before 2024, the ESA regulations required the Services to defined "foreseeable future" as extending "only so far into the future as the Services can reasonably determine that both the future threats and the species' responses to those threats are likely." 50 C.F.R. § 424.11(d) (2023). In 2024, the Services amended that definition to "as far into the future as the Services can make reasonably reliable predictions about the threats to the species and the species' responses to those threats." 50 C.F.R. § 424.11(d) (2025). In making this change, the Services replaced language requiring that they "reasonably determine" that threats to a species are "likely" with language that the Services make "reasonably reliable predictions" about those same threats. The plaintiffs argued that the new language contradicts the ESA requirement that the Services base their conclusions on the "best available data," but the court disagreed. In its ruling, the court concluded that the two phrases "appear synonymous" and that to determine whether an effect is "likely" requires making a "reliable prediction" about that effect. Because the court determined that the pre-2024 rule and the amended rule are functionally equivalent, it concluded that the rule should be upheld.

Finally, the court considered the plaintiffs' challenge to an ESA regulation concerning the designation of critical habitat. The text of the ESA requires the Services to designate critical habitat at the same time it lists a species "to the maximum extent prudent and determinable." 16 U.S.C. § 1533(a)(3). Before 2024, the ESA regulations identified two limited circumstances where designating critical habitat at the same time a species is listed would not be prudent and determinable. In 2024, the Services modified the regulation to include two other circumstances where designating critical habitat would not be necessary. The plaintiffs argue that the new rule violates the ESA by unlawfully expanding the conditions under which the Services may find that designating critical habitat is not prudent and determinable. However, the court disagreed, citing previous court decisions which held that the Services could only make a not-prudent finding with respect to critical habitat would be beneficial to the species. Because the two additional circumstances outlined in the 2024 ruling described situations where reaching a not-prudent finding would be beneficial to the species, the court found that the regulation complied with the ESA and should be upheld.

Going Forward

Since 2019, the ESA has seen several rounds of regulatory updates. So far, this is the first time a court has reviewed any of the updated rules on the merits to consider whether they comply with the statutory requirements of the ESA. In 2025, the Services launched a new round of regulatory changes, many of which mirror the changes made in 2019. While those rules have yet to be finalized, the ruling in *Ctr. for Biological Diversity v. U.S. Dep't of Interior* may offer some insight into how courts will treat those regulations once they are final. For those who are regulated under the ESA, remaining informed on regulatory changes is helpful to understand how the law will be implemented going forward.

To view the court's decision in *Ctr. for Biological Diversity v. U.S. Dep't of Interior*, click here.

To view the text of the ESA, click here.

For more NALC resources on the ESA, click here.

Supreme Court Agrees to Hear Pesticide Preemption Lawsuit (published 1.27.26)

The United States Supreme Court has announced that it will hear oral arguments in *Durnell v. Monsanto*, a case filed by a Missouri plaintiff who claims that exposure to the herbicide Roundup and its active ingredient glyphosate caused him to develop non-Hodgkin's lymphoma. The case is one of thousands that have been filed over the last decade against Monsanto Company (now owned by Bayer) by plaintiffs who claim that using Roundup caused them to develop cancer and that Monsanto failed to warn consumers about the alleged health risk. For its part, Bayer has argued that the state law claims raised by plaintiffs in these cases are preempted by federal pesticide law and should be dismissed. After years of litigation, that question will now be presented to the Supreme Court. However, the Court rules in this case will have an impact not only on ongoing litigation involving Roundup and glyphosate but may set a precedent for lawsuits involving other pesticide products.

Background: Roundup Lawsuits and *Durnell*

Roundup is one of the most widely used herbicides in the United States. It was developed in the 1970s and has been available in the United States for decades. Glyphosate, the active ingredient in Roundup, was first approved by the Environmental Protection Agency ("EPA") since 1974. Roundup is used both in agricultural and non-agricultural settings. Since the 1990s, Roundup has been an essential part of Monsanto's Roundup Ready system which paired use of the herbicide with glyphosate-resistant crop seeds to allow direct applications during the growing seasons. Commercial formulations of Roundup have been used in home and municipal landscaping for years.

Since 2015, tens of thousands of lawsuits have been filed against Bayer by plaintiffs claiming that the use of Roundup caused them to develop cancer. These cases have been filed in state courts and raise what products liability claims that arise out of state law, specifically the civil tort of failure to warn. In response, Bayer has argued that federal pesticide law preempts state law products liability claims and that such claims should be dismissed. While only a handful of the cases filed against Bayer have gone to trial, juries and judges alike have been split on the issue. While some juries have issued verdicts in favor of Bayer, finding that the pesticide manufacturer complied with the law and is not liable for a plaintiff's injuries, others have returned verdicts in favor of the plaintiffs and awarded damages in amounts exceeding $2 billion. Similarly, of the three circuit courts that have been asked to determine whether federal pesticide law preempts the plaintiffs' state law claims, the Third Circuit has held that the claims are preempted while the Ninth and Eleventh Circuits have held that they are not.

The plaintiff in *Durnell* originally filed his lawsuit against Bayer in 2019. He filed his case in state court in Missouri where he lives and where Monsanto is headquartered. Like other plaintiffs in pesticide liability cases, the plaintiff in *Durnell* raised several state law products liability claims including failure to warn. At trial, the jury concluded that Monsanto had failed to warn the plaintiff of possible health risks of using Roundup and awarded him $1.25 million. Bayer appealed that verdict to the Missouri Court of Appeals which affirmed the jury order and held that the plaintiff's failure to warn claim was not preempted by federal law. Bayer then attempted to appeal that ruling to the Missouri Supreme Court which declined to hear the case. Now, the matter comes before the United States Supreme Court.

Arguments Before the Supreme Court

Both the plaintiff and Bayer have made arguments to the Supreme Court that have become familiar to those keeping up with how pesticide liability cases have evolved in recent years. Each argument focuses on the text of the Federal Insecticide, Rodenticide, and Fungicide Act ("FIFRA") and a previous Supreme Court case to either support or refute the argument that federal pesticide law preempts state law claims of failure to warn.

FIFRA is the primary federal law regulating pesticide use in the United States. Under FIFRA, a pesticide cannot be sold or distributed in the United States until it has been approved for use by the Environmental Protection Agency ("EPA"). To approve a pesticide, EPA must determine that the product will not cause "unreasonable adverse effects" on the environment when used as intended. 7 U.S.C. § 136a(c)(5)(C). FIFRA defines "unreasonable adverse effects" as "any unreasonable risk to man or the environment, taking into account the economic, social, and environmental costs and benefits of the use of any pesticide[.]" 7 U.S.C. § 136(bb). To meet this standard, EPA will assess the human health impacts of pesticides it is seeking to register, including assessing the carcinogenicity of the product and its active ingredients.

Along with providing for the registration of pesticide products, FIFRA also describes the authority that states have to regulate approved pesticides. Under FIFRA, a state may "regulate the sale or use of any federally registered pesticide[.]" 7 U.S.C. § 136v(a). However, FIFRA also provides that states "shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from" those required by federal law. 7 U.S.C. § 136v(b). In other words, while FIFRA allows states to regulate the sale and use of federally registered pesticides, it does not allow states to set requirements for the labeling or packaging of a registered pesticide that differs from the labeling and packaging approved by EPA. Additionally, FIFRA prohibits the sale and distribution of any pesticide which is "misbranded." 7 U.S.C. § 136j(a)(1)(E). Under FIFRA, a pesticide is

considered misbranded if its label does not include a warning statement which may be necessary to protect health and the environment. 7 U.S.C. § 136(q)(1)(G).

Failure to warn is a type of civil tort that is typically raised in products liability cases. As with most civil torts, failure to warn arises out of state law and is enforced at the state level. When a plaintiff raises a claim of failure to warn, they are not arguing that a product they used was defective, but rather that the product manufacturer failed to provide adequate warnings or instructions about the safe use of the product. To succeed on failure to warn, a plaintiff will generally need to demonstrate two things. First, that the manufacturer did not adequately warn consumers about a particular risk, and second that the risk was either known or knowable in light of the best available knowledge at the time the product was manufactured and distributed.

In the past, the Supreme Court has only once addressed FIFRA's prohibition on states to impose labeling requirements that differ from those approved by EPA and how it interacts with products liability claims that arise under state law. In ***Bates v. Dow Agrosciences LLC*, 544 U.S. 431**, the Supreme Court held that a pesticide labeling requirement imposed by state law would be preempted by FIFRA if the requirement is "in addition to or different from" the labeling and packaging requirements imposed under FIFRA. The Court noted that a state law requiring a pesticide label to include the word "DANGER" when its federally registered label is required to include the word "CAUTION" would be preempted by FIFRA. However, the Court also noted that a state requirement for pesticide labeling would not be preempted if it was "equivalent to, and fully consistent with, FIFRA's misbranding provisions."

In appealing *Durnell* to the Supreme Court, Bayer asked the Court to consider whether FIFRA preempts the plaintiff's state law failure to warn claim. Bayer argues that the claim is preempted. It first cites FIFRA's requirement that states may not require a pesticide's label to bear language that is "in addition to or different from" federal labeling requirements. According to Bayer, the only way it could fully resolve the plaintiff's claims would be to amend the label for Roundup products sold in Missouri to include a cancer warning which is not required by the federal label. Not only does the federal label for Roundup not include a cancer warning, but Bayer also notes that EPA has never made a finding that either Roundup or glyphosate are carcinogenic to humans. Relying on the ruling in *Bates*, Bayer argues that the plaintiff's failure to warn claims should be preempted because to resolve them, Bayer would be required to put a cancer warning on its Roundup labels which would differ from the labeling language required under federal law.

The plaintiff argues exactly the opposite. According to the plaintiff, his failure to warn claims are not preempted by FIFRA because they run parallel to FIFRA's misbranding

provisions. Also relying on *Bates*, the plaintiff in *Durnell* argues that Supreme Court precedent has already established that a state law products liability claim will not be preempted by FIFRA if it is equivalent to and consistent with FIFRA's prohibition on the sale of misbranded pesticides. According to the plaintiff, his failure to warn claim is consistent with FIFRA's misbranding prohibitions because FIFRA considers a pesticide to be misbranded if it does not include a warning necessary to protect health and the claim of failure to warn was raised to argue that Bayer failed to provide a necessary health warning to users of Roundup. Because failure to warn raises a claim that is consistent with FIFRA's misbranding provisions, the plaintiff asks the Supreme Court to rule that the claim is not preempted.

While these arguments directly mirror claims raised by Bayer and other plaintiffs in other cases involving federal preemption of failure to warn claims in pesticide liability cases, *Durnell* adds a twist that slightly differentiates it from those cases. Unlike other plaintiffs, the plaintiff in *Durnell* asserts that his failure to warn claims were not brought over the labels affixed to each individual unit of Roundup, but rather to the marketing materials that Monsanto used to advertise Roundup in the 1990s and 2000s. The plaintiff claims that he bought and used Roundup based on commercials and print advertising that stated using Roundup was completely safe and featured people applying Roundup while wearing only tee shirts and shorts. Because FIFRA applies only to pesticide labeling, not marketing materials, the plaintiff argues that his lawsuit differs from previous litigation where the question of whether FIFRA preempts failure to warn has been raised. Bayer maintains that there is no difference between *Durnell* and prior preemption cases because it would still need to update labels for units of Roundup sold in the state of Missouri to include a cancer warning to fully redress the plaintiff's claim.

Going Forward

As of the publication of this article, the Supreme Court has not scheduled a date to hear oral arguments in *Durnell*. It is not yet clear when a final ruling in the case can be expected. Whatever the outcome, whether the Court agrees with the plaintiff and finds that FIFRA does not preempt the state law claim of failure to warn or sides with Bayer and finds that FIFRA does preempt such claims, the final decision in this lawsuit will affect not only the thousands of currently pending pesticide liability cases but is also likely to affect any such lawsuits filed in the future. While the bulk of pesticide liability cases filed over the last decade have involved Roundup and glyphosate, other pesticides such as paraquat and chlorpyrifos have also been the focus of such lawsuits. Despite settling thousands of pesticide liability lawsuits, Bayer still has thousands more actively pending against it. The

company has indicated that if the matter is not resolved, it could threaten the future availability of Roundup for agricultural uses.

Although it is too early to predict how the Supreme Court will rule, prior to agreeing to hear *Durnell*, the Court asked the federal government to weigh in. In December, the Solicitor General filed an amicus brief both urging the Supreme Court to take up the case and clarifying that the federal government believes that FIFRA preempts the plaintiff's failure to warn case.

The National Agricultural Law Center will provide in-depth updates as this case proceeds.

To view Bayer's petition to the Supreme Court, click here.

To view the plaintiff's response, click here.

To view the Solicitor General's amicus brief, click here.

For more information on pesticide liability lawsuits from the National Agricultural Law Center, click here.

WOTUS Update: EPA & Corps Propose New Definition (published 12.02.25)

On November 17, 2025, the Environmental Protection Agency ("EPA") together with the United States Army Corps of Engineers ("the Corps") announced a proposed rule to redefine the term "waters of the United States" under the Clean Water Act ("CWA"). The intent of the proposal is to bring the definition of waters of the United States, commonly referred to as WOTUS, in line with the United States Supreme Court 2023 decision ***Sackett v. EPA*, 566 US 120 (2023)**. This proposal marks the sixth time since 2015 that the regulatory definition of WOTUS has changed and is likely to prompt litigation after it is formally finalized. The proposal has been published the Federal Register and is currently open for public comment through January 5, 2026.

Background CWA, Current WOTUS Rule, and *Sackett*

The CWA of 1972 is the leading federal water pollution statute in the United States. The purpose of the Act is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). To achieve this goal, the CWA has established permitting programs to limit the amount of pollution discharged into waters and wetlands. Under the National Pollution Elimination System ("NPDES") program, it is illegal for anyone to discharge a pollutant from a discernable, concrete source into "navigable waters" without first receiving a permit from EPA. 33 U.S.C. § 1342. Similarly, the 404 permitting program prohibits the discharge of "dredged or fill material" into "navigable waters" without a permit from the Corps. 33 U.S.C. § 1344. Crucially, both the NPDES and 404 permitting programs cover activities that occur within "navigable waters." Although the term "navigable waters" is a legal term of art which is generally understood to refer to waters which can be used to facilitate interstate or foreign commerce, the CWA defines the term as "waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7). However, the CWA does not define the term "waters of the United States." Instead, it has been left up to EPA and the Corps to define the term.

In the decades since the CWA was passed, crafting a lasting definition of WOTUS has been a struggle for the agencies and courts, and the formal regulatory definition has changed several times. A full timeline of the different definitions of WOTUS is available here. Most recently, the definition of WOTUS was revised in 2023, first through a finalized rulemaking conducted by EPA during the Biden administration, and then again following the Supreme Court's ruling in *Sackett v. EPA*. Under the initial 2023 final rule, the definition of WOTUS included five categories of waters: (1) traditional navigable waters that could be used in interstate for foreign commerce, the territorial seas, and interstate waters including interstate wetlands; (2) impoundments of waters otherwise identified as WOTUS; (3) tributaries of traditionally navigable waters or impoundments that met either the relatively

permanent standard or significant nexus test articulated by the Supreme Court in ***Rapanos v. US*, 547 US 715 (2006)**; (4) wetlands adjacent to any WOTUS with "adjacent" understood to mean neighboring, bordering, or contiguous; and (5) all other lakes, ponds, streams, and wetlands that satisfied either the relatively permanent standard or significant nexus test. Further information on the initial 2023 WOTUS definition can be found here.

The initial 2023 WOTUS rule fully incorporated both the relatively permanent standard and the significant nexus test which stem from the Supreme Court's decision in *Rapanos v. US*. In that case, the Supreme Court was asked to consider the degree to which wetlands could be included in the definition of WOTUS. The Court was unable to reach a majority opinion, instead issuing a plurality opinion and a concurring opinion. The plurality opinion articulated the relatively permanent standard which would extend the definition of WOTUS to those waters which are "relatively permanent, standing or continuously flowing" and then to those wetlands which share a "continuous surface connection" with such waters. The concurring opinion, on the other hand, crafted the significant nexus test which extended the WOTUS jurisdiction to those wetlands that share a "significant nexus," with a water that is already recognized as a WOTUS. A significant nexus would exist if a wetland "significantly affect[s] the chemical, physical, and biological integrity" with a recognized WOTUS.

Weeks after the first 2023 definition of WOTUS was finalized, the Supreme Court released its decision in *Sackett v. EPA*. Like in *Rapanos v. US*, the Court in *Sackett v. EPA* was asked to consider to what extent wetlands should be included in the WOTUS definition. Specifically, the plaintiffs specifically asked the Supreme Court to formally overturn the significant nexus test and adopt the relatively permanent standard. Ultimately, the Court did just that, concluding that the term "waters" in "waters of the United States" refers to "only those relatively permanent, standing or continuously flowing bodies of water […] described in ordinary parlance as streams, oceans, river, and lakes" and to wetlands that are "indistinguishable" from such waters due to a continuous surface connection.

Following the Supreme Court's decision in *Sackett v. EPA*, EPA issued what is known as the Conforming Rule to revise the WOTUS definition in light of the Court's ruling. Issued in August 2025, the Conforming Rule cut references to the significant nexus test from the WOTUS definition and clarified that the word "adjacent" with respect to adjacent wetlands meant "having a continuous surface connection." The rule also noted that only those tributaries of navigable waters which satisfy the relatively permanent standard would be considered WOTUS. To learn more about the Conforming Rule, click here.

When the Trump administration took office in 2025, it announced an intention to revisit numerous environmental regulations, including the definition of WOTUS. After holding a

series of listening sessions with stakeholders across the county, EPA and the Corps have released their latest proposal to redefine the term.

Proposed WOTUS Definition

According to EPA, its latest WOTUS proposal has two primary goals: to bring the definition in line with *Sackett v. EPA* and to provide more clarity to landowners and the public as to which waters fall under the CWA's permitting jurisdiction. To that end, it is proposing to include five categories of waters in the definition of WOTUS and is introducing new definitions intended to clarify when a water is relatively permanent and what constitutes a continuous surface connection.

Under the proposal, the following categories of waters would be considered WOTUS:

(1) Traditionally navigable waters which may be used to facilitate interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide and the territorial seas.
(2) Impoundments of waters otherwise identified as WOTUS.
(3) Tributaries of traditionally navigable waters which are relatively permanent, standing or continuously flowing.
(4) Wetlands adjacent to a traditionally navigable water or tributary.
(5) Lakes and ponds that do not fall into the above categories but which are relatively permanent, standing or continuously flowing and share a continuous surface connection with a traditionally navigable water or tributary.

Importantly, the proposal would not include interstate waters as a category of WOTUS. This is a departure from previous WOTUS definitions, almost all of which have included interstate waters as WOTUS. These categories also differ from previous WOTUS definitions by specifying that waters which fall under category five must not only be relatively permanent but must also share a continuous surface connection with a traditionally navigable water or tributary to be considered WOTUS. Under past definitions, the continuous surface connection standard was applied only to wetlands.

Along with making changes to the categories of waters considered WOTUS, the proposed rule also includes new definitions for the terms "relatively permanent," "continuous surface connection," and "tributary." Under the proposed rule, "relatively permanent" would be defined as "standing or continuously flowing bodies of surface water that are standing or continuously flowing year-round or at least during the wet season." EPA notes that "the wet season" would refer to a predictable and extended period of time when surface water is present in a geographical feature in response to an annual wet season when precipitation is greater than average. However, that would not include what are

known as “ephemeral waters” which are geographic features that contain surface water only in direct response to precipitation. Under this definition of relatively permanent, a river which periodically dries out in the late summer months, but which flows during the winter and spring after increased rain and snowmelt could be considered a WOTUS, while a creek that is dry most of the time and flows only after a heavy rain would likely not be considered a WOTUS.

The proposed rule would define “continuous surface connection” as “having surface water at least during the wet season and abutting (*i.e.*, touching) a jurisdictional water.” EPA clarifies that this definition presents a two-pronged test which requires a wetland or waterbody to both: (1) abut, as in directly touch, a traditionally navigable water or tributary; and (2) have surface water at least during the wet season. Wetlands or waters with a sub-surface connection to a recognized WOTUS – meaning connected to a WOTUS by water that is not on the surface but is not deep enough underground to be considered groundwater – would not be considered a WOTUS under this definition. Additionally, EPA notes that CWA permitting jurisdiction would only be extended to the portion of a wetland which retains surface water at least during the wet season.

Finally, the proposal would define “tributary” as “a body of water with relatively permanent flow, a bed and bank, that connects to a downstream traditional navigable water or the territorial seas, either directly or through one or more waters or features that convey relatively permanent flow.” Under this definition, a tributary to a traditionally navigable water that has a discernable bank and bed, and which has surface water at least during the wet season could be considered a WOTUS. However, a water without a bank and bed, such as a grassed waterway, would likely not be considered a WOTUS even if it held surface water year-round.

Besides defining what a WOTUS is, the proposal also strengthens language describing what a WOTUS is not. Particularly relevant to agriculture, the proposal would strengthen existing exclusions for prior converted cropland. The term “prior converted cropland” comes from the Wetland Conservation provisions of the 1985 Farm Bill, better known as Swampbuster. Prior converted cropland refers to wetland areas which were converted to agricultural land capable of producing a crop prior to December 23, 1985. Although prior converted cropland is currently excluded from the definition of WOTUS, the proposed rule would clarify that such land would only lose that exclusion and become subject to CWA jurisdiction if it were abandoned and reverted to a wetland that met the definition of “adjacent wetland” under WOTUS.

Next Steps

The proposed rule was published in the Federal Register on November 20, 2025, formally initiating a period of public comment that is currently set to end on January 5, 2026. While public comments may address any part of the proposal, EPA is specifically requesting comment on the following: whether WOTUS should be limited to only traditionally navigable waters and those wetlands that share a continuous surface connection with such waters; whether "relatively permanent" should include only those waters that contain surface water year-round instead of waters that contain surface water at least during an annual wet season; and whether a wetland must have a continuous surface connection with a navigable water or tributary year-round to be considered a WOTUS.

After the period of public comment concludes, EPA and the Corps will review the comments it receives before drafting and issuing a final rule. Once the rule becomes finalized, it is very likely that it will be challenged in court. Since 2015, all final regulations defining WOTUS have led to lengthy legal battles that often result in separate WOTUS definitions being applied across the country as the court cases proceed. Importantly, the last time a court was asked to consider whether the regulatory definition of WOTUS complied with the text of the CWA, the doctrine of *Chevron* deference was still the law of the land. Under *Chevron* deference, courts were instructed to defer to agency interpretations of ambiguous statutory language so long as the interpretation was reasonable. However, in 2024, the Supreme Court overturned *Chevron* deference in its landmark decision ***Loper Bright Enters. v. Raimondo*, 603 US 369 (2024)**. According to the Supreme Court, judges should not defer to agency statutory interpretations but should themselves state what the law is. This means that judges asked to consider whether a future WOTUS definition complies with the CWA may rely on judicial interpretations of the statute rather than agency interpretations.

The new proposed WOTUS definition has kicked off another cycle of attempting to define a crucial, but ambiguous term that determines when someone needs a CWA permit and when they do not. Whether the final definition will satisfy EPA's goals of crafting a durable definition remains to be seen.

To view the proposed WOTUS rule and learn how to submit a comment, click here.

To view the current definition of WOTUS, click here.

To view the text of *Sackett v. EPA*, click here.

To view the text of the CWA, click here.

For more CWA resources from the National Agricultural Law Center, click here.

Preliminary Injunction Halts Enforcement of West Virginia's Food Dye Ban (published 2.3.26)

On December 23, 2025, a District Judge in the Southern District of West Virginia ruled that the state is temporarily prohibited from enforcing its synthetic food dye ban while the law is being challenged in court. This law, enacted as HB 2354 and codified at W. Va. Code § 16-7-2, 4; 18-5D-3A, is being challenged by the International Association of Color Manufacturers (IACM). While the litigation remains ongoing, this article will discuss the court's most recent ruling.

Background on HB 2354

In 2025, West Virginia enacted HB 2354, a bill that addressed synthetic color dyes. Specifically, this bill was two-fold and included both a provision banning the use of certain synthetic color dyes statewide and prohibiting foods with these ingredients from being included in a "meal served in a school nutrition program." The bill had a two-step implementation scheme with the school portion going into effect last year, and the statewide ban going into effect in 2028.

The statewide ban portion included language that declared foods with ingredients that are "poisonous or injurious" to health to be adulterated. W. Va. Code § 16-7-2(b)(7). This language is followed by an enumerated list of "poisonous or injurious" ingredients that includes, "butylated hydroxyanisole, propylparaben, FD&C Blue No.1, FD&C Blue No.2, FD&C Green No.3, FD&C Red No. 3, FD&C Red No. 40, FD&C Yellow No. 5, and FD&C Yellow No. 6." In West Virginia, adulterated foods are prohibited from being sold and violators are guilty of a misdemeanor and will be fined upon conviction. W. Va. Code § 16-7-4. However, this law includes an exception for sellers of foods with the enumerated ingredients if the seller makes less than $5,000 in aggregate of food per month. This portion of the law is set to go into effect on January 1, 2028.

The second part of the law, codified at W. Va. Code § 18-5D-3A, bans the following color dyes from being served in school nutrition program meals – Red Dye No. 3, Red Dye No. 40, Yellow Dye No. 5, Yellow Dye No. 6, Blue Dye No. 1, Blue Dye No. 2, and Green Dye No. 3. This provision did not prohibit the sale of food items with these ingredients as part of a school fundraiser off school premises or on school premises at least one-half hour after the end of the school day. The school meal portion of the law went into effect on August 1, 2025.

Background of color additives

The Food and Drug Administration (FDA) defines color additives as "a dye, pigment or other substance, which is capable of imparting color when added or applied to a food, drug, or cosmetic to the human body." They are distinguished from food additives by the Federal Food, Drug and Cosmetic Act (FDCA), and must be approved by FDA before they can be used in food. Color additives are classified into two categories – naturally occurring and synthetic. A synthetic color dye is manmade and is required by the FDA to be certified as safe before it is included in food. While a naturally occurring color additive must also be approved by the FDA before it is used, it is exempted from the safety certification process that synthetic dyes must undergo.

There are nine synthetic color dyes approved for use in foods by the FDA – three of which the agency is in the process of revoking. The approval for the nine can be found at 21 CFR § 74.101-706. Seven of the nine approved synthetic dyes are included in the enumerated list of prohibited ingredients in West Virginia's law. The other two enumerated ingredients are not classified as color additives by the FDA. Butylated hydroxyanisole is classified as a food additive, and propylparaben is an ingredient classified under the "Generally Recognized As Safe" pathway. To learn more about the federal government's current color dye scheme, click here to read NALC article "FDA Announces Plan to 'Phase Out' Synthetic Dyes."

The Case

Two months after the school meal provision of HB 2354 went into effect, the trade association, International Association of Color Manufacturers (IACM), challenged its constitutionality. IACM has been the singular association "representing the interests of the color additives industry, both natural and synthetics," since 1972. Its members include manufacturers, producers, and users in the color industry. The case is *International Association of Color Manufacturers v. Singh.*

In its complaint, IACM is claiming HB 2354's unconstitutionality in three ways. First, IACM claims the law is a violation of the Equal Protection Clause because it "targeted color additives without any rational basis for finding that they are . . . unsafe in any way." Second, they claim the law is a prohibited bill of attainder that "singl[es] out for prohibition and criminal sanction the named color additives" without a proper judicial proceeding. Last, the complaint claims that the law is unconstitutionally vague in violation of the Due Process Clause.

This litigation is ongoing, and the merits of IACM's challenge remain undecided. However, this article will further discuss a recent decision in the case – the Judge's ruling on IACM's request for a preliminary injunction.

A preliminary injunction is a motion that may be granted before or during a trial with the goal of preserving the status quo before a final judgement. For a preliminary injunction to be issued, a plaintiff must satisfy four factors: 1) that the plaintiff is likely to succeed on the merits, 2) that he is likely to suffer irreparable harm unless the injunction is issued, 3) that the balance of equities tips in his favor, and 4) that an injunction is in the public interest. However, when the defendant is the government, the last two factors are combined.

Success on the Merits

The Court first looked at IACM's three claims to see if they would be likely to succeed on the merits. For the equal protection claim, the Court determined that IACM was not likely to succeed because "there was at least a debatable question regarding the safety of the named color additives" brought before the West Virginia legislature. An equal protection claim arises from the Fourteenth Amendment to the U.S. Constitution and provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of law." Specifically, this clause requires equal treatment for individuals in similar situations. However, unless a law burdens a fundamental right or a suspect class, it will be upheld if "it bears a rational relation to some legitimate end." Through looking at the legislative history, the Court determined that enough discussion about the potential safety risks of color additives occurred to create a rational basis for HB 2354's enactment.

Next, the Court determined that IACM was also unlikely to succeed on their bill of attainder claim. An unconstitutional bill of attainder occurs when a legislative act singles out an individual or narrow group of people for punishment without a judicial proceeding. There are three elements that must be met for a legislative act to be considered a bill of attainder: 1) the law must impose punishment, 2) it must target specific individuals or identifiable groups, and 3) it must do so in a manner that bypasses judicial protections. Here, the Court found that HB 2354 is not an unconstitutional bill of attainder. The Court determined that the law applies to anyone who adulterates food, and not just the specific manufacturers or users of the enumerated color additives. Further, the Court found the bill does not impose punishment without judicial protection because it includes language that clarifies a punishment will not be levied until after conviction.

Last, the Court looks to IACM's claim of unconstitutional vagueness and determines that IACM would be successful. Specifically, the Court finds that HB 2354 is unconstitutionally vague because it fails to define "poisonous and injurious" and does not prohibit other color additives not included in the enumerated list from being classified as such. The doctrine of void for vagueness applies when a statute fails to "give a person of ordinary intelligence adequate notice of what conduct is prohibited" or does not "include sufficient standards to prevent arbitrary and discriminatory enforcement." Manning v. Caldwell for City of

Roanoke, 930 F.3d 264, 272 (4th Cir. 2019). Thus, a statute that does not clearly state what actions it is prohibiting would be considered vague because it does not give adequate notice to the public and might lead to unfair enforcement.

Here, along with its lack of definition for poisonous or injurious, the Court took issue with the following language in HB 2354, "poisonous or injurious to the health, *including* butylated hydroxyanisole, propylparaben, FD&C Blue No. 1 . . ." (emphasis added). In particular, the Court found that a failure to define "poisonous or injurious" paired with the insertion of a "nonexclusive" enumerated list of FDA-approved color additives would "leave the door open for arbitrary enforcement." In other words, the Court believes HB 2354 is vague because it does not make clear what color additives would be classified as "poisonous and injurious." Further, since there is no standard that clarifies which color additives are prohibited, additional color additives could be considered "poisonous and injurious" without the public having adequate notice.

Though this ruling analyzed the claims of IACM and made assertions of their likely outcomes, it is not a ruling on the merits. However, a ruling like this is often an indicator of the direction a judge might go later when the merits are actually being decided.

Irreparable Harm

Next, the Court looked at a preliminary injunction's second factor, irreparable harm. For an injunction to succeed, the person seeking it must prove that it is likely to suffer irreparable harm in its absence. Harm that cannot be fully rectified by the trial's final judgement is considered irreparable, and economic harms will only be deemed irreparable if they are unrecoverable. Here, the Court finds that IACM has made sufficient showing that its members will suffer irreparable economic harm if this injunction fails. The Court specifies that the uncertainty surrounding HB 2354, because of its likely unconstitutional vagueness, is sufficient to establish irreparable harm. The Court explains that IACM's members would suffer harm if they spent significant resources changing their processes, updating equipment, or developing new products for a law that is likely unconstitutional.

Balance of Equities and Public Interest

Last, the court considers the third and fourth factors of a preliminary injunction – the balance of equities and public interest. In a case where the defendant is the government, these two factors are merged, thus the Court analyzes them together. The goal of a preliminary injunction is to "keep the status quo," and this factor will consider if the hardships imposed on the plaintiff outweighs the public's interest in having the law enforced. Here, the Court determines that it would be unfair to require IACM's members to comply with HB 2354 given that it is likely unconstitutional. Further, because the statewide

ban portion of HB 2354 is not yet being enforced by West Virginia's Department of Health, the Court believes that granting this injunction will not harm the public and will not disturb the status quo.

Impacts of the injunction

Because of the factors discussed, the Court grants IACM the preliminary injunction. This means that while the litigation remains ongoing, West Virginia's Department of Health will not be able to enforce the statewide ban portion of HB 2354. However, the Court notes in a footnote of its decision that the injunction will not apply to the school meal portion of the law. They make clear that this distinction is because IACM only "demonstrated that Section 16-7-2(b)(7)," the statewide ban portion, "is likely unconstitutionally vague." Thus, the West Virginia Board of Education will be permitted to continue enforcing the school meal portion of the law.

Conclusion

This case remains ongoing, and at this time, no trial date has been set. As more state legislatures consider passing similar legislation to West Virginia's, it is likely that this will not be the only litigation pertaining to the matter. To stay up to date on this case and the actions of state legislatures nationwide, click here to subscribe to NALC's biweekly newsletter, "The Feed."

Texas Food Law Litigation Updates: Part 2 (published 3.3.26)

Though 2026 is young, the year has already seen a few interesting judicial rulings related to food law coming out of the state of Texas. Specifically, courts in the Western District of Texas have issued two decisions on preliminary injunctions – granting one and denying the other. This article is the second in a two-part series covering recent litigation updates in Texas. The first article can be read here.

Cell-cultured Protein Ban

The first case involves a challenge to a Texas law that sought to temporarily ban the sale of "cell-cultured proteins" in Texas. SB 261, passed in the 2025 Texas legislative session, defined cell-cultured protein as "a food product derived from harvesting animal cells and artificially replicating those cells in a growth medium to produce tissue." Per the law, the prohibition on selling cell-cultured meat went into effect on September 1, 2025, and will last until September 1, 2027. The law is codified into the Texas code at Tex. Health & Safety Code §§ 431.002(5-a), 431.02105(a). Texas is one of seven states to have passed a ban on the sale of cell-cultured meat. To learn more about other state alternative protein laws, click here to view NALC's Alternative Protein Laws State Compilation.

The day after SB 261 went into effect, it was challenged in court. The plaintiffs are Wild Type, Inc. d/b/a Wildtype (Wildtype) and UPSIDE Foods, Inc. (Upside) – two companies based out of California who produce and sell cultivated meat. Wildtype produces cultivated salmon, and Upside produces cultivated chicken. The plaintiffs claim that SB 261 violates the Dormant Commerce Clause and the Supremacy Clause of the US Constitution.

January 2026 Ruling

On January 16, 2026, the court heard oral arguments on a number of motions in this case. Following the arguments, the court orally ruled on all motions; however, it also released an order explaining the decisions. The motions that were heard included Defendant Garza's Motion to Dismiss for Lack of Jurisdiction; Defendants Paxton, Young, and Shuford's Motion to Dismiss for Lack of Jurisdiction and for Failure to State a Claim; and Plaintiffs' Motion for Preliminary Injunction. Specifically, the judge granted Defendant Garza's Motion to Dismiss and Granted in-part the Motion to Dismiss from Defendants Paxton, Young, and Shuford. This means that Defendant Garza, the County Attorney for Travis County, will no longer be a party in this case. As for the other defendants, the court granted in-part their motion to dismiss. This means that while it dismissed part of the claims against them, the case will still be allowed to continue on some of the Plaintiff's claims. Specifically, the court dismissed Upside's claims that SB 261 is preempted by the federal poultry laws, but found

that both plaintiffs may still bring their claim that SB 261 violated the Dormant Commerce Clause.

In determining these rulings, the court specifically looked to Upside's claim that the Poultry Product Inspection Act (PPIA) preempted SB 261. The PPIA is the federal law that "regulates the processing, inspection, distribution, labeling, and sale of poultry products sold in interstate commerce," and it is administered by the US Department of Agriculture's (USDA) Food Safety and Inspection Service (FSIS). Specifically, the PPIA includes an express preemption clause that states "requirements within the scope of this chapter with respect to premises, facilities and operations of any official establishment which are in addition to, or different than those made under this chapter may not be imposed by any State."

Express preemption claims will be evaluated by looking to the scope of the express preemption clause and determining if the challenged state law falls within the scope. Here, the court determined that the scope of the PPIA's express preemption claim extended to food safety activities and any behaviors that would cause the adulteration of a product. Under that standard, the court finds that SB 261 does not fall within the scope of the PPIA's clause because SB 261 is a "complete sales ban" that has no impact on food safety nor behaviors that might adulterate a chicken product. Thus, the court found that the PPIA would not preempt SB 261 and that claim should be dismissed.

Last, the court turned to the Plaintiff's motion for a preliminary injunction. In making this motion, Upside and Wildtype were asking the court to prohibit Texas from enforcing this law while the litigation is ongoing. A preliminary injunction will have four elements: 1) moving party must show they are likely to succeed on the merits, 2) that they will suffer irreparable harm unless the injunction is issued, 3) that the balance of equities tips in their favor, and 4) that an injunction is in the public interest. Here, the court determined that the Plaintiffs do not meet the irreparable harm element because Plaintiff's do not have significant "contractual business already in place in Texas." Additionally, the court finds that it would not be in the balance of equities to grant this preliminary injunction for two companies with very little business in Texas. Further, since two of the four elements are not met, the court declines the opportunity to analyze all four and denies the preliminary injunction.

Effect of the ruling

The court's decision to deny plaintiff's motion for preliminary injunction does not mean the case is resolved, nor is it a determination on the case's merits. This decision's effect is that the state of Texas will have the ability to enforce the ban on cell-cultured proteins while the litigation remains ongoing. Further, because of the court's decision to deny Defendants

Paxton, Young, and Shuford's motion to dismiss against the Dormant Commerce Clause claim, the case will continue on that claim. However, Upside and Wildtype have appealed the denial of a preliminary injunction to the 5th Circuit. While it remains unclear at this time how the 5th Circuit will rule, it is likely that no judgement on the merits will occur until the preliminary injunction issue is first settled.

MAHA Law

Also, in its 2025 legislative session, Texas passed SB 25, which has been referred to as Texas' "MAHA bill." This name is referencing the fact that many of the policy changes included in this legislation are aligned with priorities of the "Make America Healthy Again" movement. This law includes a section that requires food manufacturers to bear a particular disclosure statement if their food product contains any of 44 listed ingredients. Tex. Health & Safety Code § 431.0815. Specifically, the disclosure must say, "WARNING: This product contains an ingredient that is not recommended for human consumption by the appropriate authority in Australia, Canada, the European Union, or the United Kingdom." This portion of SB 25 will not go into effect until January 1, 2027, and its scope is limited to food product labels developed or copyrighted after the effective date. To learn more about the legislation itself, click here to read NALC article "'MAHA' Movement: New Texas and Louisiana Laws."

On December 5, 2025, a group of nonprofit associations that represent food and beverage manufacturers brought a lawsuit challenging the constitutionality of SB 25's labeling provision. Specifically, the plaintiffs make four claims 1) that SB 25's labeling requirement is a violation of the First Amendment, 2) that it is preempted by federal law, 3) that it is unconstitutionally vague, and 4) that it violates the Dorman Commerce Clause.

Like the litigation on Texas' cell-cultured meat ban, this case remains ongoing. However, the court recently published an order that ruled on the plaintiff's request for a preliminary injunction. As previously mentioned, a preliminary injunction is a pretrial motion that can order a party to cease or begin doing a specific action. For a preliminary injunction to be successful, the moving party must satisfy four elements: 1) that they are likely to succeed on the merits, 2) that they will suffer irreparable harm unless the injunction is issued, 3) that the balance of equities tips in their favor, and 4) that an injunction is in the public interest.

Likelihood of Success on the Merits

To determine if the first element of a preliminary injunction is met, the court first looked to see if plaintiffs would be likely to succeed on their claim that SB 25's labeling requirement violates the First Amendment. The First Amendment of the US Constitution prohibits laws

that abridge the freedom of speech and includes protections against content-based regulations. A content-based regulation is one that will compel a particular message and require an individual or entity to alter the content of their speech. These laws are presumed to be unconstitutional unless the government can prove "they are narrowly tailored to serve compelling state interests" under the standard of strict scrutiny.

Here, the court notes that SB 25 compels the manufacturers of foods and beverages to convey a word-for-word, government-scripted message on their food labels. As a result, the court finds that strict scrutiny is likely to be the standard applied. When strict scrutiny is applied, the burden shifts, and now the government must prove that its actions were constitutional (as opposed to the plaintiffs having to show that the actions were unconstitutional). The court noted that the government failed to meet its burden, instead focusing almost entirely on a different argument. Because the government did not meet its burden under that analysis, if the strict scrutiny standard is applied, the statute would be unconstitutional on First Amendment grounds.

Instead, the government primarily focused its argument on a claim that the court should consider the case under the intermediate scrutiny argument. Intermediate scrutiny would be applied here if a court classified SB 25's labeling provision as commercial speech rather than content-based regulation. While the court does not assess whether it is commercial speech or content-based here, it walks SB 25 through an intermediate scrutiny analysis by applying the four-part test established in *Central Hudson Gas & Electric Corporation v. Public Service Commission of New York*, 447 U.S. 557 (1980). It's four elements include 1) is the speech misleading or does it concern unlawful activity, 2) is there a substantial government interest, 3) does the regulation advance the government interest asserted, and 4) is it narrowly tailored to achieve the interest.

Here, the court determines that there is a substantial government interest in promoting the consumption of better food ingredients by citizens of Texas. However, the court does not believe that SB 25's labeling provision asserts this interest in a "narrowly tailored" way. It finds there are less restrictive ways Texas could accomplish this goal. As an example, the court states that Texas could have conducted a public advertising campaign warning of these dangers. Thus, the four elements of *Central Hudson* are not met, and the court determines SB 25's labeling provision would likely not pass intermediate scrutiny. Since the court found that the provision would likely not pass either a strict scrutiny or intermediate scrutiny evaluation, it concludes that the plaintiffs have shown a substantial likelihood of success on their First Amendment claim.

Before moving on to the other elements though, the court also evaluates the likelihood of success on plaintiff's vagueness and preemption claims. Both of these claims are related

to a portion of SB 25's labeling provision that would make the provision ineffective if the US Food and Drug Administration or the USDA issued a law or regulation that prohibited the use, imposed conditions of use, or determined the safety of one of the 44 listed ingredients. Tex. Health & Safety Code § 431.0817. The court determines that plaintiffs have not shown they are likely to succeed on their vagueness challenge because they have not produced enough evidence to show that food or beverage manufacturers would be unclear on what triggers the preemption clause. Further, the court finds that the plaintiffs would likely not succeed on their claim that SB 25's labeling provision is preempted by *current* federal laws because neither the Food, Drug, and Cosmetics Act nor the Nutrition Labeling and Education Act "directly conflict" with the Texas law. Though the court finds that success on the merits is not likely with the claims of vagueness and preemption, the first element of a preliminary injunction is met through the likelihood of success on the First Amendment claim.

Irreparable Harm

Next, the court looked to the second factor of a preliminary injunction, irreparable harm. To meet this element, the person seeking a preliminary injunction must prove they are likely to suffer irreparable harm if the law is enforced. In cases involving the First Amendment, courts recognize that the loss of free speech constitutes an irreparable injury, even if the injury only occurs for a short period of time. Here, since the court found it was likely that plaintiffs would succeed on their First Amendment claim, the court determines that irreparable harm is satisfied. Thus, the second element of a preliminary injunction is met.

Balance of Equities and Public Interest

Last, the court looked to the third and fourth elements of a preliminary injunction. In cases where the government is the defendant, these two factors merge. This element will consider whether the hardships imposed on the moving party outweigh the public's interest the law's enforcement. Here, since the hardship suffered is a likely infringement upon First Amendment freedoms, the court determines that this outweighs any public interest in SB 25's enforcement. Accordingly, the court finds that the third and fourth factors of a preliminary injunction are met.

Effects of the ruling

Since the four factors were satisfied, the court grants the plaintiffs a preliminary injunction and the state of Texas will be prohibited from enforcing the labeling provisions of SB 25 while the litigation is ongoing. A decision on a preliminary injunction is not a ruling on the merits, but might be an indicator of the direction a court might go in the future. A trial date has not yet been set for this case, and it currently sits in the discovery phase of the lawsuit.

Conclusion

Since neither of the court's most recent rulings on SB 261 or SB 25 were final judgements, there will likely continue to be noteworthy updates in both cases. To stay up-to-date on these lawsuits and other issues related to food law, click here to subscribe to NALC's biweekly newsletter, "The Feed."

'MAHA' Movement: Defining Ultra-processed Foods (published 10.21.25)

This month California Governor Gavin Newsom signed AB 1264 into law. This landmark legislation creates a statutory definition of ultra-processed foods (UPF) and makes California the first state in the nation to ban certain UPFs from being served in schools. AB 1264's enactment follows recent announcements from the US Department of Agriculture (USDA) and the Food and Drug Administration (FDA) that the federal agencies are collaborating to create a definition for UPFs. This article will discuss both the California law and compare it with another popular food classification system.

Background of UPFs and NOVA

The new California enactment is the first time UPFs have been officially defined by law. This is noteworthy because there is no otherwise universally accepted definition of UPF, whether in law or in science. However, there are several food classification systems that attempt to define it. The system most applied in scientific literature is called Nova, the Portuguese translation for the word "new." Nova was created by researchers at the University of Sao Paulo, Brazil in the format of a 2010 publication titled, "A new classification of foods based on the extent and purpose of their processing." It expanded on work published the year before by Brazilian epidemiologist Carlos Monteiro, a collaborator on the Nova publication, in which Monteiro first termed the phrase UPF. The 2010 publication extended the concept of UPFs into the Nova system and further classified foods into three categories based on "the extent and purpose of the industrial processing applied to them."

In 2019, Monteiro further expanded Nova in a publication for the UN Decade of Nutrition. Now, Nova recognizes four categories of food. The categories include unprocessed or minimally processed; processed culinary ingredients; processed foods; and UPFs. Unprocessed or minimally processed includes edible parts of plants or animals, fungi, algae and water. Food can be still be classified in this category if it underwent minimal processing such as roasting, boiling, non-alcoholic fermentation, or pasteurization. Processed culinary ingredients include oils, butter, lard, sugar, and salt. These are substances that are derived from group 1 foods or else from nature by processes like pressing, refining, grinding, milling, and drying. Processed foods are foods that are made by adding a group 2 substance to a group 1 food and are generally recognized as modified versions of the group 1 food. This could include canned vegetables, tinned fish preserved in oil, whole fruit preserved in syrup, and most freshly baked breads. Under the Nova system, UPFs are defined as "formulations made mostly or entirely from substances derived from foods and additives, with little if any intact group 1 food." Examples of UPF food under the

Nova system include soft drinks, sweet or savory packaged snacks, and pre-prepared frozen dishes.

As mentioned before, Nova is not the only food classification system that defines UPFs, but it was the first and is the most applied in scientific literature. Food and Agriculture Organization of the United Nations' publication titled "Ultra-processed foods, diet quality, and health using the NOVA classification system" contains a helpful chart in Annex 1 that outlines some of the different systems.

California's AB 1264

With a goal of making school meals healthier, California enacted AB 1264. This law, along with creating a legal definition for UPFs, prohibits certain foods meeting the definition from being served in California's public schools. This is the first time a state has both sought to statutorily define UPFs and ban their use in schools. However, this is not the first time California has passed landmark legislation related to the ingredients of food served in schools. In 2024, California was the first state to prohibit the sale of food and beverages containing synthetic color additives in schools. In 2025, several states passed similar legislation, many of whom did so under the mantle of "Make America Healthy Again" (MAHA). Though the California initiatives were not enacted under the "MAHA" mantle, AB 1264, in a way similar to the synthetic dye ban, might serve as a model for how other states attempt to define UPFs. To learn more about California's school synthetic dye prohibition, click here to read NALC article "State Food Laws Enacted in 2024." To lean more about other state "MAHA" actions, click here to read NALC article, "'MAHA' Movement: New Texas and Louisiana Laws."

Definition of UPFs

Along with defining UPFs, AB 1264 bans certain foods that meet that definition from being served in school meals. Specifically, the law bans "restricted school foods" and "UPFs of concern" from being served in elementary, middle, or high schools after July 1, 2035. The classification of foods as being "restricted school foods" or "UPFs of concern" depends on whether the foods meet the definition of UPFs laid out in the California law. Thus, to understand which foods are prohibited, this article will first discuss California's definition of UPFs.

AB 1264 will codify the following definition of UPFs at Cal. Health & Safety Code § 104661. UPFs are food or beverages that contain:

- A substance available in FDA's Substances Added to Food database that has a FDA-defined technical effect, and

- *Either* 1) high amounts of saturated fat, sodium, or added sugar, *or* 2) a non-nutritive sweetener

FDA's Substances Added to Food is a searchable database that includes many of the types of ingredients regulated by the FDA. For example, the database includes food additives, color additives, and Generally Recognized as Safe substances that are listed in FDA regulations. California's new UPF definition applies to a substance found in the database that is designed to have any of the following technical effects, surface-active agents; stabilizers and thickeners; propellants, aerating agents, and gases; colors and coloring adjuncts; emulsifiers and emulsifier salts; flavoring agents and adjuvants (excluding spices and other natural seasonings and flavorings); flavor enhancers (excluding spices and other natural seasonings and flavorings); and nonnutritive sweeteners. The definitions of these technical effects can be found in 21 CFR § 170.3(o).

To meet the UPF definition, a food or beverage must contain one of the substances with a defined technical effect and contain *either* 1) high amounts of saturated fats, sodium, or added sugar *or* 2) a nonnutritive sweeter. Specifically, the law defines a product with a high amount of saturated fat as a food or beverage deriving 10 percent or greater of its total energy from saturated fat. Similarly, high sodium food or beverages contain a ratio equal to or greater than 1:1 milligrams of sodium to calories. Finally, added sugar products meeting the definition include food or beverages with at least 10 percent of total energy derived from added sugars. Thus, under California's UPF definition, a food containing a substance with a defined technical effect that derives 12 percent of its total energy from added sugars would be a UPF.

Further, California's definition would also include a food that contains 1) a substance with a defined technical effect and 2) a non-nutritive sweetener. A non-nutritive sweetener is defined as a substance with less than 2 percent of the caloric value of sucrose per equivalent unit of sweetening capacity. 21 CFR § 170.3(o)(19). California lists several examples of a non-nutritive sweetener including sucralose, steviol glycosides, and lactitol.

The law clarifies that raw agricultural commodities, unprocessed locally grown or raised agricultural products, minimally processed prepared foods, class 1 milk, alcoholic beverages, medical foods, infant formula, and commodity foods specifically made available by the USDA do not qualify as UPFs. Additionally, the law explains that salt, sodium chloride, spices or other natural seasonings or flavorings, nor natural color additives "shall not by themselves cause a food or beverage to be categorized as a UPF."

"Minimally processed prepared foods" is defined in Cal. Food & Agri. Code § 49015(a)(4) as food that prepared using 1) traditional processes to make food edible, to preserve it, or to

make it safe for human consumption, or 2) physical processes that do not fundamentally alter the raw product or that only separate a whole, intact food into component parts. Traditional processes could include smoking, roasting, freezing, drying, and fermenting. Physical processes could include grinding meat, separating eggs, and pressing fruits to produce juice. Thus, under California law, foods that undergo these processes do not meet the standard of "ultra-processed."

Examples of UPFs

Using California's definition, this article will evaluate the following foods and beverages to determine if they would classify as UPFs.

- Goldfish – Pepperidge Farm's Goldfish backed snack crackers would be considered a UPF because the product contains 1) Riboflavin, a database substance that functions as a color or coloring adjunct and flavor enhancer, and 2) has a 250mg of sodium and 140 calories – a ration greater than 1:1.
- Dino Nuggets – Tyson Foods' Frozen (chicken) Dino Nuggets would be considered a UPF under the California standard because the product contains food starch, a stabilizer or thickener, a high amount of sodium with 430mg of sodium and 210 calories.
- Mac & Cheese – Based on the nutrition facts of Kraft's Original Mac & Cheese Macaroni and Cheese Dinner, it would qualify as an UPF. The ingredient list contains Sodium Triphosphate, a substance designed as an emulsifier or emulsifier salt, and contains greater than a 1:1 sodium to calorie ratio with 530mg of sodium and 220 calories in a serving.
- Corn Dogs – Based on the nutrition facts of State Fair's Classic Corn Dogs, this food would qualify as an UPF. The product contains Sodium Diacetate which is a substance designed as a flavoring agent and adjuvant, and the product contains more than 10% of total energy from saturated fat.
- Gatorade – The lemon-lime flavor of Gatorade would qualify as a UPF because it contains 1) FD&C Yellow 5, a substance designed to function as a color or coloring adjunct, and 2) more than 10% of its total energy from added sugars.
- Apple Juice – Mott's 100% Original Apple Juice would not meet the California definition of a UPF because as juice produced from the pressing of a fruit, it falls under the "minimally processed prepared food" exception. However, regardless of the exception, it would still not be a UPF because it does not meet the definition's two-part test. While the apple juice contains ascorbic acid, a substance designed to function as a stabilizer or thickener, it has 0 percent added sugars and saturated

fats, has a sodium to calorie ratio under 1:1, and does not contain a non-nutritive sweetener.

Prohibiting specific UPFs from schools

Along with creating a definition for UPFs, the California law also prohibits "restricted school foods" and "UPFs of concern" from being served in schools. UPFs of concern include food that 1) meets the law's outlined UPF definition and 2) is classified as "of concern" through regulations adopted by the California Department of Public Health (CDPH). Restricted school foods are defined very broadly by the law as a food or beverage that contains one or more of the listed substances with a defined technical effect and is also restricted from service or sale in schools via CDPH regulations.

The law directs the CDPH to define both UPFs of concern and restricted school foods after considering several factors. Seven factors are listed in the law and include questions like, "whether the substance or group of substances are banned or restricted in other state, federal, or international jurisdictions due to concerns about adverse health consequences," "whether the food has been modified to be high in saturated fat, added sugar, or salt," and "whether the food meets the requirements of [FDA's] final rule . . . titled 'Food Labeling: Nutrient Content Claims; Definition of Healthy.'" CDPH's consideration of the listed factors must be "guided by a rigorous examination of available reputable peer-reviewed scientific evidence" and must be completed by June 1, 2028. By July 1, 2029 schools must begin to phase out both restricted school foods and UPFs of concern, and by July 1, 2032 a vendor shall not offer restricted school foods or UPFs of concern to a school.

CDPH is required to review the regulations and update definitions every five years. Additionally, the law creates reporting requirements for vendors of food products sold to a school. The vendor reporting requirements will go into place on February 1, 2028 and must be submitted yearly until February 1, 2032.

CA vs Nova

California's definition of UPFs is different from the standard created in Nova because it outlines tangible characteristics that a food must possess to be classified as a UPF. For instance, California's definition classifies food as an UPF is it contains a specific substance with a defined technical effect or if it contains a certain amount of added sugars. Conversely, Nova categorizes food based on a broad spectrum of the type and extent of processing it underwent. However, Nova is vague about what level of processing crosses into the UPF threshold. For example, in the UN Decade of Nutrition article UPFs are classified as those with "additives that imitate or enhance the sensory qualities of foods." However, the article also blurs the line between UPFs and processed foods by stating that

"additives in UPFs include some also used in processed foods, such as preservatives, antioxidants and stabilizers." While Nova is a helpful tool in categorizing foods into four groups, it is not a nuanced definition like the California law.

Federal Agencies Seek to Define UPFs

The timing of the enactment of AB 1264 is significant because the USDA and FDA are currently collaborating to establish a definition of UPFs. On July 23, 2025, the agencies published a press release announcing a joint Request for Information to "gather information and data to help establish a federally recognized uniform definition for UPFs." This initiative follows statements in the Make Our Children Healthy Again Assessment, published by the Make America Healthy Again Commission, that UPF overconsumption is one of the driving factors of what the assessment calls the "childhood chronic disease crisis." The agencies have not indicated that they plan to prohibit UPFs in school meals, as California has done, but they have stated a uniform definition will "allow for consistency in research and policy." The RFI is publicly available for comments until Oct. 23, 2025.

Though California's law and the state's initiative is not categorized under the mantle of "MAHA," its enactment might have an effect on the definition USDA and FDA create. Further, as other state legislatures begin their 2026 sessions in the upcoming months, they might model California's law in their own UPF definitional attempts.

To learn more about the FDA's Final "Healthy" Rule, click here to read NALC article "FDA Releases Final 'Healthy' Rule."

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IN FOCUS

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Committee on Foreign Investment in the United States (CFIUS)

The Committee on Foreign Investment in the United States (CFIUS) is an interagency body chaired by the Secretary of the Treasury. It serves the President in overseeing the potential national security risks of certain foreign direct investment (FDI) in the U.S. economy. CFIUS jurisdiction includes the review of mergers, acquisitions, and takeovers that could result in foreign control of a U.S. business; certain noncontrolling investments in businesses involved in critical technologies, critical infrastructure, or sensitive personal data (so-called "TID U.S. businesses"); and certain real estate transactions. At the recommendation of CFIUS, the President may suspend or prohibit transactions that threaten to impair U.S. national security.

The United States is the world's largest foreign investor and recipient of FDI. U.S. policy has supported a rules-based and open investment environment domestically and globally to promote U.S. economic growth and ensure the U.S. position as a premier FDI destination. Amid this backdrop, CFIUS has reviewed a small subset of foreign investment with an exclusive focus on national security. The focus of CFIUS's national security actions has evolved over time in response to emerging issues and concerns. Congressional focus on CFIUS has intensified since 2016 amid growing attention to the potential national security ramifications of investments by firms directed, controlled, or funded by a foreign government, notably the People's Republic of China (PRC), and in strategic sectors. Members are engaged in oversight of CFIUS reforms that Congress mandated in 2018 and some have introduced legislation to address perceived gaps in CFIUS's jurisdiction and actions.

CFIUS Authorities and Composition

CFIUS derives its authorities from Section 721 of the Defense Production Act (DPA), as amended (50 U.S.C. §4565), and implementing regulations (31 C.F.R. Chapter VIII). CFIUS initially was created and operated through a series of executive orders. In 1988, Congress passed the "Exon-Florio" amendment to the DPA (50 U.S.C. App. §2170), which codified the review process, at the time largely driven by concerns over Japanese firms' acquisitions of U.S. defense-related firms. In 2007, amid concerns over the proposed purchase of commercial operations of six U.S. ports by a firm based in the United Arab Emirates, Congress passed the Foreign Investment and National Security Act of 2007 (P.L. 110-49), which formally gave CFIUS statutory authority.

In 2018, Congress passed the Foreign Investment Risk Review Modernization Act (FIRRMA, Title XVII, P.L. 115-232), which expanded CFIUS's jurisdiction and review process in key ways. FIRRMA was intended to "strengthen and modernize" CFIUS and enhance its ability to address concerns involving nonpassive, noncontrolling investments (e.g., minority stake) in TID business and real estate transactions (e.g., land purchases) in proximity to military installations, or part of maritime ports or airports. Foreign investors with ties to countries that are part of the "five eyes" alliance—Australia, Canada, New Zealand, and the United Kingdom—may be exempt from some of the rules.

CFIUS consists of nine members: Secretary of the Treasury (chair); Secretaries of State, Defense, Homeland Security, Commerce, and Energy; Attorney General; U.S. Trade Representative; and Director of the Office of Science and Technology Policy. The Secretary of Labor and Director of National Intelligence (DNI) are nonvoting, ex officio members. Five White House offices observe or participate in CFIUS, as appropriate (e.g., the Council of Economic Advisers and National Security Council). The President can appoint other officials to serve on a case-by-case basis.

CFIUS Review Process

The review process begins with notification to CFIUS by the parties to the transaction, which is a voluntary step except in certain cases. Even when notification is not mandatory, firms have an incentive to do so to receive potential "safe harbor" from CFIUS, which limits future CFIUS action on a transaction after it is cleared. Non-notified transactions remain subject indefinitely to future CFIUS review and possible divestment or other actions mandated by the President. As directed by FIRRMA, CFIUS has increased attention and resources to monitoring non-notified transactions of concern. CFIUS may also unilaterally initiate a review.

> The President can exercise authority to suspend or prohibit a foreign investment, subject to a CFIUS review, if he/she finds that (1) credible evidence exists that the foreign person might take action that threatens to impair national security, and (2) no other laws provide "adequate and appropriate authority" to protect the national security risks.

Notification. A party's filing of a transaction can be submitted as (1) a declaration (an abbreviated, short-form filing (30-day CFIUS assessment) or (2) a traditional written notice (45-day CFIUS review). Declarations and notices are distinguished by submission length, timeline for CFIUS' consideration, and CFIUS's options for disposition of the submission. Filing is mandatory in select cases where a transaction involves (1) a foreign government acquiring a "substantial interest" in a TID U.S. business, and (2) a TID U.S. business that produces, designs, manufactures, etc. a critical technology subject to export licensing/controls. In 2026, Treasury proposed a Known Investor Program (KIP) that may streamline filing processes and offer benefits for certain foreign investors that frequently file with CFIUS.

National Security Review. Treasury and a co-lead agency conduct a 45-day review (30-day review for declarations) to determine the effects of the transaction on U.S. national security, informed by a DNI threat analysis. CFIUS's "risk-based assessment" considers the threat, vulnerabilities, and

consequences to national security related to the transaction. In its assessment, CFIUS is to consider an illustrative list of national security factors. Factors for consideration in statute include the domestic production needed for national defense; control of domestic industries and commercial activity by foreign citizens; effects on sales of military goods or technology to a country that supports terrorism or proliferates missile technology or chemical and biological weapons; U.S. technological leadership in areas affecting national security; and effects on U.S. critical infrastructure and critical technologies. In 2022, President Biden issued E.O. 14083 to elaborate and expand on such factors. These include effects on the resilience of critical supply chains and technological leadership; aggregate industry investment trends; cybersecurity risks; and risks to U.S. sensitive data.

National Security Investigation. The initial review proceeds to a 45-day investigation if CFIUS finds that a transaction threatens U.S. national security and the risk has not been mitigated; is foreign-government controlled; or would result in foreign control of any U.S. critical infrastructure. A 15-day extension is allowed in "extraordinary circumstances." CFIUS can negotiate and impose mitigation conditions on the parties to address its concerns; a lead agency is tasked with monitoring compliance with such agreements. CFIUS Enforcement and Penalty Guidelines, issued in 2022, and regulatory updates in 2024, emphasize monitoring and compliance with mitigation measures as priorities.

Presidential Decision. If CFIUS determines a transaction poses unresolved concerns, it may recommend to the President that the deal be prohibited, unless the parties abandon the transaction. The President has 15 days to act. Presidents have prohibited 11 transactions to date, most in the past decade (**Table 1**). President Trump issued orders in 2025 and 2026 to block two PRC acquisitions of U.S. firms. Trump also reopened a CFIUS review and reversed a Biden order that prohibited Japan's Nippon Steel from acquiring U.S. Steel Corp. A national security agreement gives the U.S. government some rights in U.S. Steel.

Table 1. Presidential Blocks of Foreign Transactions

Year	U.S. Business	Acquirer	Sector
1990	MAMCO	CATIC	Aerospace
2012	4 wind farms	Ralls Corp. (Sany Group)	Renewables
2016	Aixtron SE	Grand Chip (China IC Fund)	Semiconductor
2017	Lattice	Canyon Bridge Capital Partners	Semiconductor
2018	Qualcomm	Broadcom	Semiconductor
2020	StayNTouch, Inc.	Shiji Information Technology Co.	Software
2020*	Musical.ly	ByteDance	Digital platform
2024	Real estate	MineOne	Crypto mining
2025*	U.S. Steel	Nippon Steel	Steel
2025	Jupiter Systems	Suirui Int'l	AV equipment
2026	EMCORE	HieFo Corp.	Semiconductor

Source: Presidential orders and *Federal Register*.
Note: * Orders ultimately were not enforced.

Recent Activity

CFIUS must report annually to Congress on its activities (**Table 2**). In most years since FIRRMA was enacted, there has been an increase in transactions reviewed. In 2024, CFIUS reviewed 325 filings (116 declarations, and 209 notices). CFIUS cleared 91 declarations and requested parties submit a subsequent notice in 15% of cases. Six declarations involved real estate. Over half of total notices proceeded to an investigation. In 49 cases, parties withdrew the notice during the investigation to address issues, and the majority refiled. CFIUS adopted mitigation measures for 25 notices (12% of total). In 7 cases, parties abandoned the deal after CFIUS was unable to resolve its concerns, or after the parties refused proposed measures. In 2024 CFIUS assessed four penalties for breaches of mitigation terms.

Table 2. Transactions Reviewed by CFIUS, 2019-2024

	2019	2020	2021	2022	2023	2024
Declarations	94	126	164	154	109	116
Notices	231	187	272	286	233	209
Investigations	113	88	130	163	128	116
Withdrawals	30	28	72	87	57	49
Presidential Decision*	1	1	0	0	0	2

Source: CFIUS Annual Report to Congress for CY2024, Aug. 2025.
Note: * Reported based on the year review was initiated. Filing numbers are greater than the number of distinct transactions, for example, due to the withdrawal and refile process.

Issues for Congress

Congress remains engaged in oversight of implementation of FIRRMA and CFIUS activities. Some Members say that PRC state-directed investments require a proactive and strategic approach. Some say that PRC investments in new operations and emerging technologies may evade or fall outside current authorities. Some Members have introduced bills to expand CFIUS jurisdiction over agricultural land; ban some investments by the PRC and foreign adversaries; and add the Secretary of Agriculture as a CFIUS member. These efforts stem in part from reports of PRC land buying and Treasury's 2022 decision that CFIUS did not have jurisdiction to review a PRC firm's land purchase in North Dakota near a U.S. Air Force base. (Treasury since has added some military bases subject to CFIUS' real estate jurisdiction.) Congress also enacted legislation on outbound investment to China (P.L. 119-60). Other issues include

- How well is CFIUS balancing an open U.S. investment posture with the aim to protect national security? How should CFIUS protect critical technologies in ways that promote competitiveness and a market-driven economy?
- Post FIRRMA, how sufficient are CFIUS's authorities to achieve current and emerging policy objectives? How has E.O. 14083 affected CFIUS reviews in practice?
- There may be incentives to file declarations instead of notices due to their fast turnarounds. What types of transactions is CFIUS clearing through declarations?
- How is the Commerce Department's role in identifying emerging technologies for export controls affecting CFIUS reviews?
- In what ways has CFIUS improved coordination with U.S. allies and partners in information sharing and in investment screening efforts as mandated by FIRRMA?
- How will KIP reforms affect CFIUS decisionmaking and review outcomes?

Cathleen D. Cimino-Isaacs, Specialist in International Trade and Finance
Karen M. Sutter, Specialist in Asian Trade and Finance

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Solar Smarts for Landowners: An Overview

By Rusty Rumley

While not a new subject, solar leasing is a topic that will garner increased attention because of the additional funds from the Inflation Reduction Act (IRA) becoming available at the beginning of 2023. The IRA incentivizes the adoption of solar through several mechanisms such as the 30% solar tax credit for installing solar on a residence, but the primary one affecting solar leasing on a commercial scale is the 30% business investment tax credit. This credit is expected to spur demand for more commercial solar projects over the next decade and landowners can expect to be approached by representatives of these future projects for leasing opportunities.

What is a solar lease?

The typical commercial solar lease is where an outside party approaches a landowner to negotiate placing solar panels, substations, power lines, roads and other necessary infrastructure on their property for a significant period of time (twenty-five to thirty-five years with optional extensions are common) for a specified rental rate per acre per year or with some form of revenue sharing much like a royalty payment for an oil or gas lease.

These leases tend to be complicated and due to the length of the lease it is important to have an experienced attorney look over any potential contract before signing. While the leases tend to be long, twenty to forty pages is not uncommon, there are some clauses that need to be reviewed carefully.

Typical Clauses and Things to be Aware of in Solar Leases

Different companies use different lease agreements; however, there are similarities between the various contracts. Understanding these clauses can help when consulting with an experienced attorney about potential lease options.

Signing a lease agreement does not guarantee a solar lease.

Signing a solar lease guarantees that the solar developer has the option to go forward with the construction of a solar project, but it does not guarantee that they will build it. Solar companies may approach many landowners and sign lease agreements that lock the landowner into an initial agreement where the solar company can gather data and decide which site will best fit their needs. During the initial period the landowner typically has to grant them access to the property and refrain from signing any other agreements that might interfere with the solar lease. If by the end of the initial period the company has not started construction then the agreement typically expires, the landowner is able to keep any payments that have already been made, and the landowner can sign new lease agreements with other solar companies.

Income from the Solar Lease

What have your neighbors been offered? Many leases have a confidentiality clause, but those are typically only binding after the contract has been signed. Rental rates can vary dramatically so researching current rates is critical before signing a solar lease. Another issue this often not thought of is how will your rental rate increase over time? Remember that these agreements can last for

more than three decades. The revenue you receive might be adequate in 2023, but will that same sum be a fair rental rate in 2037? Escalation clauses address this issue by building into the agreement an orderly increase in the rental rate over the life of the lease agreement.

Property taxes

Property that is assessed and tax as agricultural property generally has a lower property tax rate than residential or commercial property. If a solar project is developed on your property then a county assessor may determine that the property is in commercial energy production rather than agricultural production which could significantly increase your annual property tax. This should be an area that is addressed in a lease agreement. Does the solar company pay the increase in taxes due to the solar development or will the landowner bear this cost?

Liability for Damage to the Solar Equipment

What about protecting the solar panels and other equipment on the leased property? Some leases make the landowner liable for any damages to equipment on the leased property. Can you guarantee that nobody will damage the equipment? Many solar projects construct fencing around the perimeter and it may be prudent to make the company responsible for any damage that occurs on their leased property.

Decommissioning the Project

Solar projects can easily last twenty-five to thirty-five years; however, at some point the project will no longer be economically viable. Who will pay for cleanup at the end of the lease period? Many contracts are silent as to which party bears the cost of removing the solar equipment and restoring the land to its prior condition. A good lease agreement should specify which party will be responsible for decommissioning the project and some ever require the solar company to establish a bond to pay for cleanup at termination. A lawyer can be extremely helpful in negotiating these types of arrangements.

Conclusion

There are numerous things that a landowner should think about before signing a solar lease and this article covers some of the important things to consider. Having an experienced attorney go through the lease is crucial because the time to negotiate is before signing the contract. For more information on the subject of solar leases click **here**.

To read the Inflation Reduction Act of 2022, click **here**.

To read Understanding Solar Energy Agreements by Shannon Ferrell, click **here**.

To read about Land Use Conflicts between Wind and Solar Renewable Energy and Agricultural Uses, click **here**.

Solar Leasing for Landowners: Payment Structures

Rusty Rumley

Senior Staff Attorney

&

Grace Henson

Research Fellow

Solar leasing is the practice of renting tracts of land to install solar panels and infrastructure to generate electricity from sunlight. The typical commercial solar lease is where an outside party approaches a landowner to negotiate placing solar panels, substations, power lines, roads and other necessary infrastructure on their property for a significant period of time (twenty-five to thirty-five years with optional extensions are common) for a specified rental rate per acre per year or with some form of revenue sharing much like a royalty payment for an oil or gas lease.

Because landowners and solar companies are free to negotiate terms, the clauses and terms vary greatly from lease to lease. However, there are several common clauses that all leases contain. Available commercial solar leases were gathered and analyzed to create this blog series about common clauses and to layout the variety of terms within those common clauses. The following post details common components of the payment structure of solar leases.

Common Payment Structures

Solar companies establish payment structures in their proposed lease agreements, and this is typically one of the first sections that a landowner will review. Many solar companies exist across the country resulting in diverse payment structures. While most lease agreements will vary, there are some common approaches that most companies follow. A very common approach to solar leases is to divide the lease into separate phases and pay different rates or through different calculations according to the phase of the solar lease. Some leases may pay a fixed rate based on the potential megawatts of power that the project could generate or even pay a royalty payment of some percentage of the power actually produced while many leases pay a fixed amount per acre per year. Other factors, such as state laws can also impact lease agreements. For example, both Tennessee and Florida statutorily require solar

lease agreements to include statements of the lease's compensation structure.[1] It is critical to carefully examine the lease and understand what compensation you are entitled to either during the life of the lease or if payment depends on the current phase of the lease agreement.

Simple Payment Structure

Simple payment structures may focus on one phase, such as the production phase, to compensate the property owner. For example, one lease agreement we reviewed requires payment based on the potential amount of energy produced:

> "… the annual rent of Seventy-five hundred dollars ($7,500) per megawatt (AC) of Installed Power (as defined herein) payable to Landlord, in advance, in annual installments."

This type of payment structure exposes the landowner to a major potential risk. Not all lease agreements turn into a completed solar project. There may be years after signing the initial agreement before a final decision on a project is made. Will the landowner be compensated for this time period? Simple payment structures may not take into account the time and complexity of building a solar project, so landowners need to ensure that they are adequately compensated for what they provide even if the project is never completed.

Payments Based on Lease Phases

Solar leases, and the developments themselves, are complicated projects that will take years to start producing power. It is common to break up lease agreements into different phases and the compensation methods and amount for the phases may differ dramatically. Common phases are the option phase, the construction phase, the operations phase and the decommissioning phase. Lease agreements may use some, or all, of the phases above. Exact names may differ from lease to lease, but the practical effects are similar.

The Option Phase

An option phase is the time period between the signing of the agreement and the beginning of the construction phase. Some of these phases can be as short as six months, while others may last for years. During the option phase, most leases contain no guarantee that the leased land will actually be used for a solar project.

[1] *See* Tenn. Code Ann. § 66-9-204; *see also* Fla. Stat. § 520.23 (2023).

The company may enter into contracts with several landowners while they decide which land to initiate their project on. The company will also need to sort out many practical issues such as permits, loans, power purchase agreements and a myriad of other things necessary for a successful solar project. Because rental payments in the future are unknown, it is beneficial to require rent payments during the option period. Example:

> "As consideration for the Option, during the Option Period, Grantee shall pay to Landowner option payments (collectively, the "Option Payments" and each an "Option Payment") in the amount of (i) US $2,500 (the "Initial Option Payment"), due and payable on the date that is forty-five (45) days after the Effective Date and (ii) thereafter, US $625 per calendar quarter, due and payable on the first day of the applicable calendar quarter."

Construction Phase

This phase of construction typically begins when they start bringing in construction equipment and materials and will last until solar project is actively producing power. During the option phase there may be minimal disruption to the landowner's use of their property, but during the construction phase the landowner may have very limited access to a significant portion of their property. Payments for this phase tend to be more substantial than the payments from the option phase because of the loss of access to the property. Examples:

- Payment is to begin when construction begins, and payment is to be made per acre.
- Landowner shall be paid $20,000 annually during Construction period.

Operations Phase

This phase begins when the construction is complete and the project begins producing power commercially. This phase can last for decades and ends when the project goes into the decommissioning phase. It is important to carefully review the contract to see how long it can last. Many contracts also include language where a specified period of time is guaranteed (20 years) and the company is entitled to extend this phase at their own discretion (company has an option to extend the agreement by five or ten years at their sole discretion). Payment calculations during the operations phase can also vary substantially. Many contracts pay on a per acre per year basis, but other contracts are paid on installed megawatts or a royalty payment based on the actual amount of power generated. Because of the length of this phase in the lease it is a common practice build in an escalation clause to keep up with inflation. Examples:

- $2,200 per acre of Easement Area per year during the Operations Period, escalating at a rate of 2% per annum.
- …$1,000 per acre per year for the Rent Payment of the leased property. Starting on the third (3rd) anniversary of the first Rent Payment Date, and for each annual anniversary thereafter, the annual Rent shall be increased by three percent (3%) over the Rent otherwise then in effect.

Decommissioning Phase

This phase begins at the end of the operations phase and, hopefully, concludes when all of the solar project infrastructure has been removed from the property and the premises has been returned to the state that it was in before the construction phase began. Many older agreements do not address the decommissioning phase and landowners may need to negotiate for payment and additional security to ensure proper decommissioning. Because of the length of these leases the original parties that signed the agreement may no longer be available (or the project could be sold to another company) so it is critical to document each party's responsibilities in the contract. One common approach to ensure that funds are available to pay for decommissioning is to require a bond from the solar company that can cover cleanup at the end of the lease. It also may be a wise idea to have payments for the property to continue through the decommissioning phase to incentivize the company to move forward. Example:

- Rental Payment of $1,500 per acre per year shall continue until all solar infrastructure has been removed from the premises at the conclusion of the agreement.

Conclusion

Overall, it is important that the solar lease agreement accurately encapsulates the terms agreed on by the parties. It is important to have an attorney that is knowledgeable about solar leases to thoroughly review the agreement for the landowner because once the contract is signed it is very difficult to make any changes. The long lease period means that anything left out of the agreement is something that the landowner, and potentially their heirs, will have to deal with for years to come.

To see more articles in this series click here.

To read the Inflation Reduction Act of 2022, click **here**.

To read the Farmland Owner's Guide to Solar Leasing, click here.
To read Understanding Solar Energy Agreements, click here.

Solar Smarts for Landowners: Property Owner Rights/Use

Rusty Rumley, Senior Staff Attorney

Grace Henson, Research Fellow

Solar leasing is the practice installing solar panels on large areas of land leased from a third party to generate electricity from sunlight. Commercial solar leasing is a topic that has garnered increasing attention because of the high rental rates in many areas of the country. Large-scale commercial solar leases include several unique aspects that make them differ from the typical residential solar contract. Because landowners and solar companies are free to enter a contract containing whatever terms the parties agree on, the clauses and terms vary greatly from lease to lease. However, there are several common clauses that many leases contain. We gathered and analyzed many available commercial solar leases to create this blog series about the most common clauses and layout the variety of terms found within those common clauses. The following post details common clauses involving the landowner's rights and use of the land during the lease; however, it is important to have an attorney thoroughly review any contract before it is signed. To read the overview post on Solar Smarts for Landowners click here.

Access and Use of the Property Clauses

Land carries an intrinsic value for farmers that is often difficult to put into words. Protecting the land and farming land that is not being used under a solar lease is often a priority when negotiating any lease. This makes it important to consider whether the lease agreement significantly limits the landowner's access to, or use of, their property. Many leases contain an "owner access" or property use restriction clause that specifies what actions can be taken by both the solar developer and the landowner. Having clear expectations from both sides of the agreement can limit potential conflicts in the future. In our research, some solar leases may adequately address many of these issues while others are lacking in detail. If there are specific uses and activities that the landowner wishes to continue, the lease agreement should expressly include those rights before anything is signed. Below are sample clauses from various solar leases that we have selected to use as examples as well as commentary about the clauses:

- Landlord shall not make any material changes to the property that would impact the soil quality of the Easement area or block the sunlight.

This clause provides very little guidance to the lease parties and is written entirely in favor of the solar developer. What impacts soil quality and what should be avoided to not block sunlight? Adding clear expectations with specific descriptions of prohibited activities would help to clarify this clause. The landowner will also want assurances on how they can continue to use their property in a way that does not violate the lease agreement. These issues will be addressed as we look at different clauses. Example two:

- "During the Development Term, owner shall have the right to continue to use the Property for agricultural, ranching, timber harvesting, and/or other reasonable purposes so long as the Property is maintained substantially in accordance with its current condition and in compliance with all applicable laws."

This clause allows the property owner to continue using the property for normal farming activities during the development term of the lease. It is important to note that this clause only applies to the development term, not the entire lease. Once construction begins the landowner will lose access to some property but notice that the exact property at issue is not described in this clause. To learn more about the different phases of a solar lease read our guide to Understanding Solar Energy Agreements here.

If a landowner wishes to retain rights to use the land in these ways throughout the entirety of the lease term, the lease agreement should reflect that and include a similar clause applicable to the construction and operation terms. One issue that frequently arises is that due to the nature of the construction phase, the project may need more of the land than when the project moves into the operation phase. The solar developer will need extra space to store equipment and supplies during the construction phase, and the landowner should make sure that they will be compensated for this additional temporary usage. During this phase the landowner is unlikely to be able to continue farming this property. Because the development phase can take years to complete the landowner would like to be able to farm their property in the meantime and receive sufficient notice before the solar lease moves into the construction phase. For pasture this notice may be short, but for row crops the landowner should negotiate for a longer notice period so that they do not lose

a growing crop. Regardless of the notice period, it is important to include language specifying damages when a solar lease moves into the construction phase.

A lease may also include an owner access clause that specifies the process to be followed for the landowner to access the leased premises.

For example:

- "During the Construction and Operation Term and any Extended Term with respect to any Property, Owner shall have the right to reasonably access such Property at reasonable intervals and at reasonable times and upon at least forty-eight hours' prior advance written notice to Lessee to inspect such Property. Any such access shall not materially interfere with Lessee's use of such Property for Solar Energy Purposes and occupancy of such Property in any manner."

This clause clarifies the steps to be taken for the landowner to access the property and also places a restriction on the actions taken by the landowner while on the property. The property owner may want to inspect their property to make sure that the property is being taken care of, but this is also a potentially dangerous place to be with either construction equipment during the construction phase or dangerous amounts of electricity during the operation term so the solar developer will want to protect themselves as well.

Ultimately, a solar lease also grants access to the land to many individuals who are likely strangers to the landowner. Employees from the solar company, maintenance workers, and others will be accessing the land over the course of several decades. This is likely unfamiliar to rural landowners and can cause additional stress and impose increased liability. A lease may specifically limit what can be grown on the land (timber is typically prohibited since it may create shade), what can be built on the land (barns, houses or other structures that could create shade) and other uses, such as hunting rights, may be restricted or significantly limited.

It is important to negotiate the access and usage of the property that the landowner will feel comfortable with before signing any agreement. Once the agreement is signed then it is very difficult to change the agreement in the future.

Maintenance of the Property

Most leases establish which party is responsible for maintenance of the property. Some leases require the tenant to maintain the property, while others hold the landowner responsible for keeping the land in proper order.

For example:

- "Landlord shall maintain its property adjacent to the Leased Premises in good condition and state of repair to avoid interference with Tenant's use of the Leased Premises and the Easement. Landlord shall not construct or permit to be constructed structures or plant or permit to be planted trees adjacent to the Leased Premises that will impede solar access to Solar Farm."
- Landlord shall maintain the property in a good condition, including the property in the immediate vicinity of the System.
- Operator (tenant) shall maintain the property in a neat and clean condition. Operator shall repair any cattle guards, fences, or gates damaged in connection to the Operator's activities on the property.

Many solar agreements split the duty for maintenance of the property. The solar developer is often responsible for the property that is being actively used by the project (this land is almost aways fenced in to limit access) and the property owner is responsible for maintaining the property outside the fence. Many solar developers will also reserve the right to maintain land immediately outside of the project so that they can cut down vegetation that could create shade or a fire hazard. Specifying responsibilities between the parties can make relations better over the life of the lease agreement.

Conclusion

A property owner should consider how the lease terms impact their ability to use their land. Issues such as use of the surrounding land and maintenance of the property may seem like far away concepts during the lease negotiation, but the terms created during these negotiations will dictate how the land will be used and maintained for decades to come.

To read other articles in the Solar Smarts for Landowners series click **here**.

To read Understanding Solar Energy Agreements by Shannon Ferrell, click **here**.

To read about Land Use Conflicts between Wind and Solar Renewable Energy and Agricultural Uses, click **here**.

Solar Smarts for Landowners: Miscellaneous Clauses

Solar leasing is the practice of installing solar panels on large areas of land leased from a third party to generate electricity from sunlight. Commercial solar leasing is a topic that has garnered increasing attention because of the high rental rates in many areas of the country. Large-scale commercial solar leases include several unique aspects that make them differ from the typical residential solar contract. Because landowners and solar companies are free to enter a contract containing whatever terms the parties agree on, the clauses and terms vary greatly from lease to lease. However, there are several common clauses that many leases contain. We gathered and analyzed many available commercial solar leases to create this blog series about the most common clauses and layout the variety of terms found within those common clauses. The following post details common clauses regarding miscellaneous topics such as assignment/subleasing provisions, confidentiality clauses, binding arbitration clauses, insurance requirements, and oil, gas, and mineral rights.

Assignment/Subleasing

Most, if not all, of these leases include a clause that allows the developer to assign, transfer, or sublease their interest in the property without the consent of the landowner. Some leases require limited or no notice to sublease or assign the developer's interest to another party. Landowners may be able to negotiate for more notice on an assignment or sublease, but it is doubtful that the developer will forego this ability. Solar leases are long-term contracts that can last for decades and developers will want, or need, the flexibility to transfer the project to another party. What does this practically mean for the landowner? Other than negotiating for more notice potentially, this type of clause illustrates the importance of capturing the full agreement in writing. A landowner may have a wonderful relationship with the initial developer, but subsequent operators may not be so accommodating. The landowner's success in navigating future challenges with the solar company depends on the language that is negotiated before the lease is executed.

Confidentiality Clauses

Solar companies often ask that landowners not discuss the details of their agreements with their neighbors or nearby landowners. Some leases specifically include confidentiality clauses that prohibit either party from disclosing to a third party the financial details of the agreement, especially during the option period. Landowners are also often prohibited from revealing the lessee's product design,

methods of operation and construction to any third party. These clauses are included to protect the unique features of a solar company's business model from competing companies and potentially in negotiating different pay rates with different neighbors. There are several different issues that landowners and their attorneys should be aware of with confidentiality clauses.

First, this does not stop the landowner from seeking legal advice on the lease. In fact, a landowner may be able to use this clause to negotiate with the developer on paying some, or all, of the landowner's attorney fees for reviewing the lease because they are creating legal liability for the landowner. In some parts of the country developers may be willing to reimburse attorney fees for the landowners and not in other parts, but it is an issue that your attorney should explore.

Second, the landowner should be able to consult with other people such as family members, accountants, tenants and lenders before signing the agreement as the contract needs to be executed for the confidentiality clause in the lease to come into force. Some developers may have other types of documents, such as Non-Disclosure Agreements (NDAs), that are introduced earlier in the negotiations and those agreements should be carefully reviewed by the landowner's attorney before they are signed.

It is important to be aware of any confidentiality requirements in your agreement to avoid liability for breach of contract.

Arbitration and Venue

Ideally, lease agreements would sufficiently encapsulate the agreement of the parties, and the parties would not have any issues that lead to disputes. However, no contract can address all potential problems that may arise during a lease that is likely to last more than a quarter of a century. Leases often include arbitration clauses that require parties to resolve any disputes through binding arbitration rather than in court. Before entering a lease agreement that requires arbitration, a landowner should consider whether they are willing to surrender their right to have the case heard in court. These binding arbitration clauses are often more favorable to the solar companies because a landowner is much more likely to win a jury trial in his or her hometown against a large solar corporation.

Here is an example of a binding arbitration clause:

> "Any Dispute that is not settled to their mutual satisfaction within the applicable notice or cure periods provided in this Agreement shall be settled by arbitration between the Parties."

Venue, or forum selection, is another clause that your attorney should carefully review. Venue clauses decide the location where a contract dispute will be litigated. If the solar lease does not specify where venue should occur, then the default answer is where the breach of contract happened. This is usually going to be the county or parish where the solar lease is located which typically favors the landowner. Developers that do not have an arbitration clause will usually want to have any court actions held in a location that is more favorable to them. The landowner's attorney should carefully review these sections of the agreement to fully protect the landowner's interests as much as practicable in case of a later dispute.

Insurance/Indemnification

It is important to ensure that, in the case of an accident that causes loss, both parties are protected. The most common lease requires the developer to maintain an insurance policy that covers injury to person and property. These clauses typically include a minimum policy amount. For example, a $2 million minimum for each individual occurrence and $5 million in umbrella liability insurance. This requirement ensures that the solar developer will be able to pay for any damages that arise from its actions or injuries on the property.

Additionally, landowners are subject to premises liability and owe a certain duty of care to those who enter their land. This duty of care would extend to employees of the solar company, maintenance workers, and any other individual who enters the land in relation to the solar project. Solar leases should include indemnity clauses in which the developer agrees to indemnify and hold harmless the landowner for any losses caused by injury to another person or piece of property. This is important because it is possible that an accident may occur in the 30+ year span these agreements typically last, and the landowner does not want to be held liable for personal injury in relation to the project. Some early solar leases have indemnity clauses that protect the developer at the landowner's expense and those should be avoided whenever possible. The landowner should not be held responsible if, for example, teenagers shoot at solar panels from the road and cause damage. A well drafted lease will put the risk of liability on the developer since they are the ones with control over that property during the life of the solar lease.

Mineral Rights and Solar Leases

It is very common in some states that both mineral developments (usually oil and gas exploration) and solar development are happening in the same area at the

same time. Solar developers will want the exclusive right to use the property for their solar project and may ask landowners for some form of assurance in the lease that they will have sole rights to the property. This may not be something that the landowner can guarantee. People that own the surface estate (the landowners) may not own the mineral estate (the valuable minerals underneath the surface) if those rights have been severed. In many states the mineral estate is the dominant estate over the surface estate, and they may use a "reasonable amount" of the surface as necessary to extract their minerals. This means that if the landowner has only the surface rights to their property, then they cannot, and should not, guarantee that the solar developer will have exclusive rights to the surface because they cannot exclude a mineral owner from extracting those minerals. With modern drilling techniques there is more flexibility on where the wellhead can be located, but the landowner should not agree to clauses that they may not be able to honor. Developers in states with active mineral exploration should be aware of this issue; however, the landowner's attorney should also seek to minimize the risk by recognizing this risk in the lease agreement.

Conclusion

Ultimately, landowners and solar companies may include any clauses they wish in a lease agreement. It is best to enter into a comprehensive agreement that addresses all material issues and topics in order to protect both the landowner and the developer. Any term that is written in the lease is enforceable against both parties, and it will be more difficult, if not impossible to enforce terms that are not included in the written agreement. Landowners spend much of their time looking at the payment clause of a solar lease, but the other miscellaneous clauses can impact the overall success of the lease agreement.

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IN FOCUS

Updated November 25, 2025

New Adverse Effect Wage Rate (AEWR) Methodology for Temporary Employment of H-2A Nonimmigrants in the United States

Introduction

The H-2A visa program allows for the temporary admission of foreign workers to the United States to perform agricultural labor or services of a seasonal or temporary nature. (See CRS Report R44849, *H-2A and H-2B Temporary Worker Visas: Policy and Related Issues* for a discussion of the H-2A visa program.)

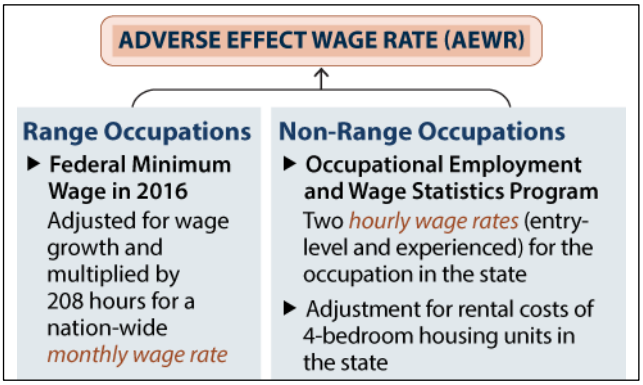
The Immigration and Nationality Act (INA) authorizes the H-2A program and requires that prospective H-2A employers apply to the Department of Labor (DOL) for labor certification. Per 8 U.S.C. §1188(a)(1), before approving a labor certification application, DOL must determine that

- there are not sufficient U.S. workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the agricultural labor or services for which an employer desires to hire temporary foreign workers (H-2A workers); and
- the employment of the H-2A workers will not *adversely affect* the wages and working conditions of workers similarly employed in the United States.

The INA does not specify a method for the Secretary of Labor to make these two determinations. To ensure there are not sufficient U.S. workers who are qualified and available to perform the work, DOL requires employers to advertise and engage in positive recruitment of U.S. workers for the H-2A job opportunity, and to offer U.S. workers terms and working conditions that are not less favorable than those offered to H-2A workers. To guard against adverse effects on similarly employed U.S. workers, DOL also requires employers to offer wages at or above the highest of five wages levels: (1) the adverse effect wage rate (AEWR), (2) the applicable prevailing wage rate, (3) an agreed-upon collective bargaining wage rate, (4) the federal minimum wage rate, or (5) the applicable state minimum wage rate. DOL regulations govern the offered wage rate and provide the methodologies for determining AEWRs and prevailing wage rates.

For most H-2A workers, the applicable AEWR is a state-level, *hourly rate* based on average wage estimates. However, a *monthly* AEWR is used for certain positions—referred to as *range occupations*—that involve the herding or production of livestock on the range, under certain working conditions. For the purpose of H-2A labor certification, agricultural positions that do not meet these requirements are referred to as *non-range occupations*.

Figure 1. Sources of Wages for the H-2A Adverse Effect Wage Rate



Source: CRS presentation of information from 20 C.F.R. §§655.120 and 655.211 and 90 *Federal Register* 47914.

DOL AEWR Methodology: Range Occupations

DOL calculates a *monthly* AEWR for *range occupations*. For H-2A program purposes, range occupations involve the herding or production of livestock, performed on the range for more than 50% of the workdays in the work contract period, and generally require workers to be on-call 24 hours per day, 7 days per week. DOL provides a monthly AEWR for such positions given their unique nature, which makes recording work hours difficult.

The monthly rate for these positions was initially calculated in 2016 as $7.25 per hour (i.e., the federal minimum wage) multiplied by 48 hours per week and 4.333 weeks per month. Since 2017, the monthly AEWR for range occupations has been adjusted annually based on growth in the Bureau of Labor Statistics (BLS) Employment Cost Index (ECI) for private sector wages and salaries over the preceding September-to-September (12-month) period. Effective January 1, 2025, it is $2,058.31 per month.

DOL AEWR Methodology: Non-Range Occupations

On October 2, 2025, DOL released an interim final rule (IFR) with a new methodology for calculating *hourly* AEWRs for *non-range occupations*. The new AEWR methodology in the IFR provides AEWRs at two experience/skill levels within each non-range occupation in each state or territory. These AEWRs are based on estimates of hourly wages from the BLS Occupational Employment and Wage Statistics (OEWS) program for each state or territory, with a deduction for the estimated value of employer-provided housing.

"Entry-level" (Skill Level I) wage rates are determined as the average hourly wage paid to the lowest-paid third of workers in the occupation in the state or territory (roughly the 17th percentile of the wage distribution). "Experienced" (Skill Level II) wage rates are determined as the average hourly wage rate paid to all workers in the occupation in the state or territory.

DOL groups five agricultural occupations together as "Field and Livestock Workers (Combined)," with AEWRs specified for these occupations as a group. All other non-range occupations have occupation-specific AEWRs.

Housing Cost Adjustments

Per 8 U.S.C. §1188(c)(4), employers must provide H-2A workers with housing. The 2025 IFR includes a new housing cost adjustment in the AEWR. This adjustment is based on the weighted average of Fair Market Rents for four-bedroom housing units in the state or territory, as published by the Department of Housing and Urban Development. This monthly rent is then divided by eight (assuming eight workers per housing unit) and spread over an assumed 173.9 hours worked per month. The housing adjustment may not exceed 30% of the hourly AEWR. These adjustments in 2025 range from -$.71 (Puerto Rico) to -$3.18 (Hawaii).

Field and Livestock Workers (Combined)

DOL states "the vast majority of certified H-2A job opportunities are concentrated in the five field and livestock worker (combined) occupation[s]." These five occupations have the following Standard Occupational Classification (SOC) codes and titles:

- 45-2041 Graders and Sorters, Agricultural Products;
- 45-2091 Agricultural Equipment Operators;
- 45-2092 Farmworkers and Laborers, Crop, Nursery, and Greenhouse;
- 45-2093 Farmworkers, Farm, Ranch, and Aquacultural Animals; and
- 53-7064 Packers and Packagers, Hand.

Per the IFR methodology effective October 2, 2025, AEWRs for non-range occupations in the Field and Livestock Workers (Combined) group ranged from $7.35 per hour (Guam) to $14.83 (DC) in entry-level positions and from $8.54 per hour (Guam) to $21.16 (DC) in experienced positions. Among states, entry-level AEWRs for these occupations ranged from $8.24 (Louisiana) to $14.35 (Vermont) and experienced AEWRs ranged from $12.77 (Florida) to $18.11 (Alaska).

Other Non-Range Occupations

Farm supervisors or managers, heavy truck drivers, and logging workers are examples of agricultural occupations not included in the Field and Livestock Workers (Combined) category. For these occupations, the AEWR is based on the state- or territory-wide OEWS wage estimate for the individual occupation at the appropriate experience/skill level. If the OEWS program does not publish state or territory-wide wage estimates for the occupation, the AEWR is based on the national OEWS wage for the occupation at the appropriate experience/skill level.

Classification of H-2A Job Opportunities

As part of labor certification, employers identify the tasks, duties, and requirements associated with work to be performed by H-2A workers. DOL uses this information to determine the occupation or occupations and the experience/skill level for the H-2A job. Descriptions of the definitions, skill requirements, and tasks typically performed by workers in each occupation are available from the Occupational Information Network (O*NET) website at https://www.onetonline.org/.

Some H-2A jobs cannot be classified within a single occupation. If the DOL-assigned occupations have *different* AEWRs, then the wage rate applies for the occupation in which the worker spends the majority of workdays.

Coverage and Publication Schedule

The OEWS program collects wage data from all states, the District of Columbia, Guam, Puerto Rico, and the U.S. Virgin Islands. OEWS does not collect data from—and consequently AEWRs are not available for—American Samoa or the Commonwealth of the Northern Mariana Islands. DOL publishes notices of AEWR adjustments in the *Federal Register* on or about July 1 each year.

Recent Regulatory History

DOL's previous final rule on the methodology for determining hourly AEWRs for non-range agricultural occupations took effect March 30, 2023. It used the Farm Labor Survey (FLS) of the National Agricultural Statistics Service (NASS) to determine the AEWR for field and livestock occupations and the OEWS to determine the AEWR for other occupations and for geographic areas without FLS data. It set the AEWR for positions spanning multiple occupations using the highest applicable AEWR. Multiple groups of agricultural employers sued to block the 2023 AEWR final rule, arguing aspects of it were arbitrary and capricious. On August 25, 2025, the U.S. District Court for the Western District of Louisiana vacated the rule. This meant AEWRs were set according to a 2010 rule that relied only on the FLS. On August 28, 2025, NASS announced the cancelation of the FLS, leaving a regulatory gap.

In recent years, both the number of H-2A workers and the AEWR have increased. DOL says in the new IFR that

> the high costs to participate in the H-2A program—including the mandatory AEWRs on top of other non-wage costs such as housing, transportation, and fees—have become increasingly burdensome ... immediate reform to the H-2A program's minimum wage policy, or the AEWRs, is necessary to avoid imminent widespread disruption across the U.S. agricultural sector.

The new IFR adds a lower, "entry-level" skill AEWR and subtracts a housing cost adjustment from all AEWRs. Both changes are expected to result in lower employer costs.

Elizabeth Weber Handwerker, Analyst in Labor Policy

IF12408

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Concise History of Wage Regulations for the H-2A Agricultural Worker Visa

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Prepared for Members and
Committees of Congress

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Concise History of Wage Regulations for the H-2A Agricultural Worker Visa

SUMMARY

R48833

January 28, 2026

Elizabeth Weber Handwerker
Analyst in Labor Policy

The H-2A visa program is unique among temporary work visa programs in that it allows U.S. employers to bring in an unlimited number of foreign workers, but specifies the terms and conditions of their employment. Among these terms and conditions are that workers on H-2A visas may only perform agricultural work, and their employers must provide them with housing, transportation, and pay them wage rates at or above those specified in U.S. Department of Labor (DOL) regulations.

This report summarizes all the changes in these wage regulations since the H-2A program began in 1987. Since June 1, 1987, these DOL regulations have required that H-2A workers be paid the highest of four wage rates: the Adverse Effect Wage Rate (AEWR), the prevailing wage in a local agricultural labor market, the federal minimum wage, or the state statutory minimum wage. In 2010, a fifth wage rate, the agreed upon collectively bargained wage, was added to these four wage rates. For most H-2A workers, the AEWR has historically been the highest applicable wage rate.

There are separate AEWRs for range and non-range H-2A positions. Range positions involve work without a regular workday or workweek, such as the production of sheep or other livestock on the range. The AEWR for range positions is determined based on a 2015 rule.

For most non-range H-2A positions, AEWRs were based from 1987 to 2025 (except during part of 2009) on agricultural wage surveys from the U.S. Department of Agriculture (USDA) known as the *Farm Labor Survey* (FLS). USDA attempted to cancel this survey in 2011, 2020, and 2025. The 2011 FLS cancelation was reversed via funding from DOL, leaving the AEWR calculation methodology for non-range H-2A positions unchanged. The 2020 FLS cancelation was reversed by a court order, after DOL issued a new non-range AEWR methodology that did not rely on the FLS (this methodology was also reversed by a court order). The 2025 FLS cancelation has not been reversed.

An interim final rule (IFR) for the non-range AEWR methodology was published in October 2025. This rule filled the regulatory vacuum created by (1) a judicial ruling in August 2025, vacating the 2023 non-range AEWR methodology; and (2) the USDA cancellation of the FLS, which the previous non-range AEWR methodology relied upon.

The 2025 IFR changes the non-range AEWR methodology in four ways. First, it relies on wage statistics from the Bureau of Labor Statistics' (BLS') Occupational Employment and Wage Statistics (OEWS) program, rather than the FLS. Second, it sets non-range AEWRs separately by occupation and skill level. Third, it downwardly adjusts the non-range AEWR by an "Adverse Compensation Adjustment" for the cost of employer-provided housing. Fourth, it sets the non-range AEWR for positions that span multiple occupations using the AEWR for the occupation at which workers are expected to spend the majority of their workdays. The first two of these changes have some precedent in H-2A wage regulations issued in 2009 and 2023. The third change does not have any precedent in H-2A wage regulations. Litigation over this IFR began shortly after it was released.

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Introduction

The H-2A visa program allows for the temporary admission of foreign workers to the United States to perform agricultural labor or services of a seasonal or temporary nature. This program is uncapped, meaning it permits temporary entry of an unlimited number of foreign workers into the United States, provided that all program requirements are met. More information about H-2A visas and their non-wage requirements can be found in CRS Report R44849, *H-2A and H-2B Temporary Worker Visas: Policy and Related Issues*.

The Immigration and Nationality Act (INA; P.L. 82-414), as originally enacted in 1952, authorized an H-2 nonimmigrant visa category for foreign agricultural and nonagricultural workers coming temporarily to the United States to perform temporary services (other than those of an exceptional nature requiring distinguished merit and ability) or labor. The 1986 Immigration Reform and Control Act (IRCA; P.L. 99-603), in Section 301,[1] amended the INA to subdivide the H-2 program into the current H-2A agricultural worker and H-2B nonagricultural worker programs. The INA also details the admissions process for H-2A workers. The H-2A program is administered by the U.S. Department of Homeland Security's (DHS's) U.S. Citizenship and Immigration Services (USCIS) and the U.S. Department of Labor's (DOL's) Employment and Training Administration (ETA).

Employers interested in hiring H-2A workers must first apply to DOL for labor certification. Before approving a labor certification application, the Secretary of Labor must determine that

- there are not a sufficient number of U.S. workers who are able, willing, and qualified and will be available at the time and place needed to perform the agricultural labor or services for which an employer desires to hire temporary foreign workers; and
- the employment of the H-2A workers will not adversely affect the wages and working conditions of workers similarly employed in the United States.

Statute does not specify a method for the Secretary of Labor to make these two determinations. To ensure there are not a sufficient number of U.S. workers who are qualified and available to perform the work, DOL requires employers to engage in recruitment of U.S. workers for the H-2A job opportunity. To guard against adverse effects on similarly employed U.S. workers, DOL requires employers to offer wages at or above certain levels, and to offer U.S. workers terms and working conditions that are not less favorable than those offered to H-2A workers. After receiving labor certification, a prospective H-2A employer may submit an application, known as a petition, to DHS to bring in foreign workers.

This report details the DOL regulations regarding wage requirements for labor certification and how these regulations have changed since the IRCA became law on November 6, 1986.

The Adverse Effect Wage Rate (AEWR)

As DOL noted in the first proposed regulations for the H-2A program in 1987:

> DOL, through its own knowledge, informed experience, and judgment, has found for many years that the presence of alien workers in agriculture depresses the wages of similarly employed U.S. workers. In order to ensure that the wages of similarly employed U.S. workers are not adversely affected, DOL is continuing in these H-2A regulations its past

[1] This is now codified at 8 U.S.C. §1188(a)(1).

> policy and practice of requiring covered agricultural employers to offer and pay their U.S. and H-2A workers no less than the applicable hourly adverse effect wage rate (AEWR).... [A] worker in employment under the H-2A program must be paid at the highest of the applicable wage rates, whether that highest rate is the AEWR, the prevailing wage, or the Federal or State statutory minimum wage.[2]

AEWRs previously existed under the H-2 program, although their geographic specificity and the method of determining them changed over time.[3] In 1968, DOL began determining AEWRs for the H-2 program in each state using hourly farm wage rates reported in the 1959 Census of Agriculture[4] and "adjusting the previous year's Statewide AEWR by the same percentage as the percentage change in the Statewide annual average wage rates for field and livestock workers, as surveyed by the United States Department of Agriculture (USDA)."[5]

Available Wage Estimates for Setting the AEWR

Agricultural wage surveys from the U.S. Department of Agriculture (USDA) (sometimes known as the *Farm Labor Survey* [FLS]) have existed since the 1930s, and provided quarterly or annual average agricultural worker wage estimates at the state or multi-state region level of geography.

In the 1990s, a second source of agricultural wage data became available from the Bureau of Labor Statistics (BLS): the Occupational Employment and Wage Statistics (OEWS) program.[6] Except for a brief period in 2011,[7] the OEWS has surveyed only non-farm employers,[8] but an October 2025 interim final rule (IFR) indicates that starting in FY2026, the OEWS will be expanded to collect data from farms as well as non-farm business establishments.[9]

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[2] U.S. Department of Labor (DOL), Employment and Training Administration (ETA), "Labor Certification Process for the Temporary Employment of Aliens in Agriculture and Logging in the United States," 52 *Federal Register* 16774, May 5, 1987, https://archives.federalregister.gov/issue_slice/1987/5/5/16766-16795.pdf#page=9.

[3] A description of the AEWR from 1952 through 1964 is provided in Howard N. Dellon, "Foreign Agricultural Workers and the Prevention of Adverse Effect", 17 *Labor Law Journal* 739 (1966). State-level AEWRs were first effective in 1963. The H-2 program included both agricultural and non-agricultural jobs, but AEWRs applied only to agricultural jobs. H-2 labor certification for non-agricultural jobs involved different procedures, as described, for example, in DOL, ETA, "Procedures for Processing Applications for Certification of Temporary Employment in Nonagricultural Occupations in the United States," 49 *Federal Register* 25837-25845, June 25, 1984, https://archives.federalregister.gov/issue_slice/1984/6/25/25836-25845.pdf#page=2.

[4] DOL, ETA, "Labor Certification Process for the Temporary Employment of Aliens in Agriculture in the United States; Adverse Effect Wage Rate Methodology," 54 *Federal Register* 28040, July 5, 1989, https://archives.federalregister.gov/issue_slice/1989/7/5/28031-28051.pdf#page=10.

[5] DOL, ETA, "Labor Certification Process for the Temporary Employment of Aliens in Agriculture and Logging in the United States," 52 *Federal Register* 16775, May 5, 1987, https://archives.federalregister.gov/issue_slice/1987/5/5/16766-16795.pdf#page=10.

[6] Until 2021, this program was called the Occupational Employment Statistics (OES) program. DOL, Bureau of Labor Statistics (BLS), *Occupational Employment and Wage Statistics (OEWS)*, https://www.bls.gov/oes/notices/2023/occupational-employment-and-wage-statistics-oews.htm.

[7] Stella D. Fayer, "Agriculture: Occupational Employment and Wages," *Monthly Labor Review*, DOL, BLS, July 2014, https://doi.org/10.21916/mlr.2014.25

[8] DOL, BLS, *Occupational Employment and Wage Statistics: Overview*, April 2, 2025, https://www.bls.gov/oes/oes_emp.htm. While the FLS estimates are derived from surveys of farm establishments, the OEWS includes wage estimates for occupations such as Agricultural Equipment Operators; Farmworkers and Laborers, Crop, Nursery, and Greenhouse; and Farmworkers, Farm, Ranch, and Aquacultural Animals, based on surveys of non-farm employers in industries such as Support Activities for Agriculture (which includes farm labor contractors).

[9] DOL, ETA, "Adverse Effect Wage Rate Methodology for the Temporary Employment of H-2A Nonimmigrants in Non-Range Occupations in the United States," 90 *Federal Register* 47932, October 2, 2025, https://www.federalregister.gov/d/2025-19365/p-268.

The OEWS program publishes estimates of mean wages for each occupation in each state, Puerto Rico, and Guam. This program also provides the DOL Office of Foreign Labor Certification (OFLC) with special estimates (not otherwise published) of mean wages for the lower third and the upper two-thirds of the wage distribution by occupations and geographic areas. Since the late 1990s, OFLC has used these special estimates to establish prevailing wages for the H-1B visa program,[10] and for a few months during 2009 they were also used in setting the AEWR.

In August 2025, USDA discontinued the FLS.[11] In a *Federal Register* notice, USDA noted that "recent improvements to the Department of Labor (DOL) Bureau of Labor Statistics Occupational Employment and Wage Statistics (OEWS) program make the OEWS the superior barometer for measuring farm wages."[12] BLS continues collecting data for the OEWS.[13]

More information about agricultural wage measurement in the FLS and OEWS is available in CRS Report R47944, *Measuring Wages in the Agricultural Sector for the H-2A Visa Program*.

Initial Establishment of the AEWR for the H-2A Program

An interim final rule published on June 1, 1987 (using the AEWR methodology from a proposed rule published on May 5, 1987), established procedures for calculating and announcing AEWRs for H-2A work. DOL "set the AEWRs in each year for the H-2A program at a level equal to the previous year's annual regional average hourly wage rates for field and livestock workers (combined), as computed by USDA quarterly wage surveys ... USDA publishes the data for the 48 contiguous States and Hawaii by nineteen agricultural regions, which consist of one or more States." These AEWRs were based on the FLS and were the same for all occupations within a geographic area.[14]

The AEWRs established for the H-2A program in 1987 were lower in every state except Florida and Oregon than the AEWRs in effect for that year under the earlier H-2 program.[15] This decrease in the AEWRs was smallest in California, where it fell from $5.43/hour to $5.17/hour under the new methodology, and largest in Alabama, where it fell from $7.11/hour to $3.73/hour. The new methodology established an AEWR in Hawaii ($6.43/hour), where no AEWR had existed before, but it did not provide an AEWR in Alaska or any U.S. territories.[16]

[10] For more information about the prevailing wages used in the H-1B visa program, see CRS In Focus IF12892, *Prevailing Wage Requirements for H-1B, H-1B1, and E-3 Workers in Specialty Occupations*

[11] U.S. Department of Agriculture (USDA), National Agricultural Statistics Service (NASS), *NASS discontinues select data collection programs and reports*, August 28, 2025, https://www.nass.usda.gov/Newsroom/Notices/2025/08-28-2025.php.

[12] USDA, NASS, "Discontinuance of Information Collections," 90 *Federal Register* 42560, September 3, 2025.

[13] DOL, BLS, *OEWS Survey Respondents: Instructions*, November 17, 2025, https://www.bls.gov/respondents/oes/instructions.htm.

[14] DOL, ETA, "Labor Certification Process for the Temporary Employment of Aliens in Agriculture and Logging in the United States," 52 *Federal Register* 16775, May 5, 1987, https://archives.federalregister.gov/issue_slice/1987/5/5/16766-16795.pdf#page=10; and DOL, ETA, "Labor Certification Process for the Temporary Employment of Aliens in Agriculture and Logging in the United States," 52 *Federal Register* 20496, June 1, 1987, https://archives.federalregister.gov/issue_slice/1987/6/1/20492-20524.pdf#page=5.

[15] The H-2 program included both agricultural and non-agricultural jobs, but AEWRs applied only to agricultural jobs.

[16] CRS calculations based on DOL, ETA, "Labor Certification Process for the Temporary Employment of Aliens in Agriculture and Logging in the United States," 52 *Federal Register* 16777, May 5, 1987, https://archives.federalregister.gov/issue_slice/1987/5/5/16766-16795.pdf#page=12.

The 1987 regulations also allowed for "special procedures ... for work in occupations characterized by other than a reasonably regular workday or workweek, such as the range production of sheep or other livestock," without specifying a specific AEWR in these situations.[17]

Overview of Wage Regulations Since 1987

An overview of changes in H-2A wage regulations since 1987 is provided in **Table 1**. Administrations have changed these regulations over time to encourage greater use of the H-2A program, respond to implementation issues and litigation, and respond to changes in data availability.

[17] DOL, ETA, "Labor Certification Process for the Temporary Employment of Aliens in Agriculture and Logging in the United States," 52 *Federal Register* 16772, May 5, 1987, https://archives.federalregister.gov/issue_slice/1987/5/5/16766-16795.pdf#page=7.

Table 1. Overview of Changes in H-2A Wage Regulations

Federal Register Notices and Dates	Wage Regulation or Change(s) Made to Previous Regulation	Rationale for Change(s)
Effective Date: June 1, 1987 Notice of Proposed Rulemaking (NPRM) published in 52 *Federal Register* 16770, May 5, 1987.[a] Interim final rule published in 52 *Federal Register* 20496, Jun 1, 1987.[b] Final rule published in 54 *Federal Register* 28037, July 5, 1989.[c]	"Employers applying for temporary alien agricultural labor certifications must agree to comply with all employment-related laws Thus, a worker in employment under the H-2A program must be paid at the highest of the applicable wage rates, whether that highest rate is the AEWR, the prevailing wage, or the Federal or State statutory minimum wage." (Prevailing wages for specific areas and agricultural activities were determined by state workforce agency [SWA] surveys) AEWRs were set each year at levels equal to the previous year's annual regional average hourly wage rates for field and livestock workers (combined), as reported in the USDA FLS. Special procedures were established "for work in occupations characterized by other than a reasonably regular workday or workweek, such as the range production of sheep or other livestock."	Establishing labor certification regulations for the new H-2A visa program.
Effective Date: January 17, 2009 NPRM published in 73 *Federal Register* 8538, February 13, 2008.[d] Final rule published 73 *Federal Register* 77110, December 18, 2008.[e]	The source of the AEWR switched from the USDA FLS to the BLS OEWS (then called the OES). Under this rule, the AEWR was set separately by experience or skill level (four possible levels) for each occupation in each geographic area. The applicable AEWR was determined by the experience or skill involved in the position, as follows (mirroring the four skill levels for each occupation in each geographic area used in setting prevailing wages for H-1B positions): • Level I wage rates for beginning level employees. This wage rate was calculated as the average wage for the bottom third of the wage distribution (roughly the 17th percentile). • Level II wage rates for employees with education or experience providing them with a "good understanding of the occupation" (as shown in job requests with requirements for years of education and/or experience). This wage rate was calculated as one-third of the way between Level I and Level IV, and was roughly the 33th percentile of the wage distribution. • Level III wage rates for employees with education or experience providing them with a "sound understanding of the occupation" and special skills or knowledge (as shown in job requests with requirement for years of higher levels of experience or educational degrees and with terms such as "lead," "senior," "crew chief," or "journeyman"). This wage rate was calculated as two-thirds of the way between Level I and Level IV, and was roughly the 50th percentile of the wage distribution. • Level IV wage rates for employees with sufficient experience in the occupation to plan and conduct work requiring judgment (as shown in job requests involving management and/or supervisory responsibilities). This wage rate was calculated as the average wage for the uppermost two-thirds of the wage distribution (roughly the 67th percentile)	Concern over "the increasing presence of undocumented workers in agricultural occupations and because of growing concern about the stability of the agricultural industry given its difficulty in gaining access to a legal workforce .... The H-2A program is woefully underutilized by agricultural employers." Changes in the AEWR were part of a larger effort to make the H-2A program easier for agricultural employers to use.

Federal Register Notices and Dates	Wage Regulation or Change(s) Made to Previous Regulation	Rationale for Change(s)
Effective Date: June 29, 2009 A notice of proposed suspension of the new rule was published in 74 *Federal Register* 11408 on March 17, 2009,[f] and made effective by 74 *Federal Register* 25972 on May 29, 2009.[g]	Reverting to previous regulation for nine months.	The notice of proposed suspension said, "it is rapidly becoming evident that the Department and the SWAs may lack sufficient resources to effectively and efficiently implement the H-2A Final Rule.....Furthermore, development of the H-2A Final Rule was based in part on policy positions of the prior Administration with which the current Administration may differ."
Effective Date: March 15, 2010 NPRM published in 74 *Federal Register* 45906, September 9, 2009.[h] Final rule published in 75 *Federal Register* 6884, February 12, 2010.[i]	The AEWR returned to its 1987 definition, based on the USDA FLS, with only one AEWR for all occupations and skill levels within each state or multi-state region. Wage requirements for the H-2A program were modified to add a fifth wage rate, the agreed upon collective bargaining wage: "an employer must offer, advertise in its recruitment, and pay a wage that is the highest of the AEWR, the prevailing hourly wage or piece rate, the agreed-upon collective bargaining wage, or the Federal or State minimum wage."	"The wages of agricultural workers have been adversely impacted to a far greater extent than anticipated by the 2008 Final Rule.....It was never the Department's intention to produce a substantial and across-the-board reduction in the level of wage protection provided by the AEWR."
Notice of suspension of data collection published in 76 *Federal Register* 28730 on May 18, 2011;[j] notice of resumption published in 76 *Federal Register* 38110 on June 29, 2011.[k]	No change in regulation; USDA discontinued the FLS and then resumed it with DOL funding.	USDA cancelled the FLS due to budget constraints; DOL provided funding for its resumption.

Federal Register Notices and Dates	Wage Regulation or Change(s) Made to Previous Regulation	Rationale for Change(s)
Effective Date: November 16, 2015 NPRM published in 80 *Federal Register* 20300, April 15, 2015.[l] Final rule published in 80 *Federal Register* 62958, October 16, 2015.[m]	Monthly AEWR methodology was established *for range positions only* (in which workers are on call up to 24 hours per day, 7 days per week): • The monthly AEWR was initially $7.25 (the federal minimum wage) multiplied by 48 hours, and then multiplied by 4.333 weeks per month ($1,507.88 per month). • Beginning with calendar year 2017, the monthly AEWR is adjusted annually based on the Employment Cost Index (ECI) for wages and salaries published by BLS for the preceding October-October period. Transition Rates were provided from the effective date of the rule until 2018.	In *Mendoza, et al. v. Perez*, the D.C. Circuit court ruled DOL needed a rule to establish standards for H-2A herder positions, rather than field memoranda or guidance letters. DOL said there were not sufficient prevailing wage surveys from State Workforce Agencies to use such surveys in setting wages for H-2A workers in range positions.
Effective Date: December 21, 2020 NPRM affecting many aspects of the H-2A program published at 84 *Federal Register* 36168 on July 26, 2019.[n] Notice of suspension of FLS data collection published in 85 *Federal Register* 61719 on September 30, 2020.[o] Final rule focused on the AEWR published at 85 *Federal Register* 70445 on November 5, 2020.[p]	For non-range occupations: (1) If the occupation and geographic area were included in the USDA FLS in November 2019 (field and livestock workers in all U.S. states other than Alaska), • for the period from December 21, 2020, through calendar year 2022, the AEWR would be the AEWR in effect on January 2, 2020; • beginning in calendar year 2023, and annually thereafter, the AEWR would be adjusted based on the ECI for wages and salaries published by BLS for the most recent preceding 12 months. (2) If the occupation or geographic area was not included in the USDA FLS in November 2019 (occupations other than field and livestock occupations, and all occupations in Alaska or U.S. territories), • the AEWR would be the statewide annual average hourly gross wage for the occupation if it is reported by the OES; or • if no statewide wage for the occupation and geographic area is reported by the OES, the AEWR would be the national average hourly gross wage for the occupation reported by the OES.	Initial changes were proposed to "modernize the H-2A" program in several ways. In September 2020, USDA announced the cancelation of the FLS. DOL published a final rule focused on the AEWR, promulgating an AEWR methodology that did not rely on the FLS.

Federal Register Notices and Dates	Wage Regulation or Change(s) Made to Previous Regulation	Rationale for Change(s)
Effective date: February 23, 2021 Notice of FLS resumption published in 85 *Federal Register* 79463 on December 10, 2020.[q] AEWRs published at 86 *Federal Register* 10996 on February 23, 2021.[r]	Return to the 2010 methodology for non-range occupations.	In *United Farm Workers, et al. v. Sonny Perdue, et al.*, the U.S. District Court for the Eastern District of California ordered USDA to reinstate data collection for the FLS on October 28, 2020. In *United Farm Workers, et al. v. DOL, et al.,* this court ordered DOL to return to the previous AEWR methodology on December 23, 2020.
Effective Date: November 14, 2022 Final rule regarding aspects of the H-2A program other than the AEWR published at 87 *Federal Register* 61660 on October 12, 2022.[s]	Specifies requirements for wage surveys such that the OFLC administrator will issue a prevailing wage for a specific crop activity or agricultural activity (or a distinct work task preformed in that activity) in an individual state.	This was a continuation of the 2019 rulemaking.

Federal Register Notices and Dates	Wage Regulation or Change(s) Made to Previous Regulation	Rationale for Change(s)
Effective Date: March 30, 2023 NPRM published at 86 *Federal Register* 68174 on December 1, 2021,[t] continuing the rulemaking process begun in 2019. Final rule published at 88 *Federal Register* 12760 on February 28, 2023.[u]	For non-range occupations: (1) For occupations included in the USDA FLS Field and Livestock Workers (combined) category: • If an annual average hourly gross wage in the state or region is reported by the FLS, that wage is the AEWR for the state. • If an annual average hourly gross wage in the state or region is not reported by the FLS (e.g., Alaska), the AEWR for the occupations is the statewide annual average hourly gross wage in the state as reported by the OEWS. • If a statewide annual average hourly gross wage in the state is not reported by the OEWS, the AEWR for the occupations is the national annual average hourly gross wage as reported by the OEWS. (2) For all other occupations: • The AEWR for each occupation is the statewide annual average hourly gross wage for that occupation in the state as reported by the OEWS. • If a statewide annual average hourly gross wage in the state is not reported by the OEWS, the AEWR for each occupation is the national annual average hourly gross wage for that occupation as reported by the OEWS. If the job duties on the job order cannot be encompassed within a single occupational classification, the applicable AEWR is the highest AEWR for all applicable occupations.	This was a continuation of the 2019 rulemaking. It addressed concerns that FLS-based AEWRs were not appropriate for the small set of H-2A jobs in typically higher paid occupations with wages unmeasured by the FLS and in places without FLS coverage (such as Alaska and Puerto Rico). DOL also wanted a regulation that would provide for the use of OEWS data to set the AEWR when FLS was not available, in case USDA canceled the FLS again.

Federal Register Notices and Dates	Wage Regulation or Change(s) Made to Previous Regulation	Rationale for Change(s)
Effective Date: October 2, 2025 Notice of discontinuance of FLS data collection published in 90 *Federal Register* 42560 on September 3, 2025.[v] Interim final rule published at 90 *Federal Register* 47914 on October 2, 2025.[w]	For all non-range occupations, the AEWR is based on OEWS data: (1) For occupations included in the Field and Livestock Workers (combined) category: • If a state- or territory-wide annual average hourly wage for this group of occupations in each skill level (as described below) is reported by the OEWS, the AEWR in the state or territory is the state- or territory-wide OEWS average hourly wage for these occupations at that skill level. • If a state- or territory-wide annual average hourly wage for this group of occupations at either skill level is not reported by the OEWS, the AEWR in the state or territory is the national annual OEWS average hourly gross wage for these occupations at that skill level. (2) For all other occupations: • The AEWR for each occupation is the state- or territory-wide annual average hourly OEWS wage for the specific occupation in the state or territory at each skill level. • If a state- or territory-wide annual average hourly gross wage in the state or territory at either skill level is not reported by the OEWS, the AEWR for each occupation is the national annual OEWS average hourly wage for that specific occupation at that skill level. For all non-range occupations, AEWRs are determined at two skill levels: • Skill Level I ("entry-level") wage rates are computed as the mean wage of the first third of the wage distribution for the occupation(s) and area. This skill level is associated with job offers where workers need no formal education or specialized training credentials and/or very little work-related experience (*e.g.,* up to 2 months of related work experience cultivating diversified vegetable crops). • Skill Level II ("experienced") wage rates are computed as the mean wage of the entire wage distribution for the occupation(s) and area. This skill level is associated with job offers that may require some formal education or training credentials or certificates and/or work-related experience at a level normal for the occupation (*e.g.,* 3 months of related work experience harvesting apples). There is a downward AEWR compensation adjustment for each state or territory computed as an equivalent hourly rate based on one-eighth of the weighted statewide average of fair market rents for a four-bedroom housing unit available from the U.S. Department of Housing and Urban Development, provided that such adjustment shall not exceed 30% of the AEWRs determined above. The occupational classification and applicable AEWR is determined based on the majority of workdays during the contract period the worker will spend performing the agricultural labor or services, including duties that are closely and directly related, and the qualifications on the job order.	In *Teche Vermilion Sugar Cane Growers Association Inc., et al. v. Chavez-DeRemer, et al.*, the U.S. District Court for the Western District of Louisiana ruled that the 2023 AEWR rule was "arbitrary and capricious" and vacated the rule on August 21, 2025. This reverted the AEWR methodology to the 2010 rule (relying on FLS data). The same week, USDA announced the cancelation of the FLS. This left a regulatory vacuum. The court case focused on the comparability of wages between non-agricultural heavy truck drivers and agricultural sugar cane haulers. DOL said this was why it was now setting two skill-based AEWRs within each occupation and geographic area. DOL also wrote, "With illegal border crossings at record lows—agricultural employers, who have historically been incentivized to rely on such workers because of high AEWRs mandated to use the H-2A program, will experience economic harm caused by mounting labor shortages."

Source: CRS presentation and analysis of the *Federal Register* notices listed.

Notes: Information in the "Rationale for Change(s)" column is taken directly from the relevant *Federal Register* notices. These rationales reflect agency justifications for changes.

a. DOL, ETA, "Labor Certification Process for the Temporary Employment of Aliens in Agriculture and Logging in the United States," 52 *Federal Register* 16770, May 5, 1987, https://archives.federalregister.gov/issue_slice/1987/5/5/16766-16795.pdf#page=5.

b. DOL, ETA, "Labor Certification Process for the Temporary Employment of Aliens in Agriculture and Logging in the United States," 52 *Federal Register* 20496, June 1, 1987, https://archives.federalregister.gov/issue_slice/1987/6/1/20492-20524.pdf#page=5.

c. DOL, ETA, "Labor Certification Process for the Temporary Employment of Aliens in Agriculture in the United States; Adverse Effect Wage Rate Methodology," 54 *Federal Register* 28037, July 5, 1989, https://archives.federalregister.gov/issue_slice/1989/7/5/28036-28053.pdf#page=2.

d. DOL, ETA, "Temporary Agricultural Employment of H-2A Aliens in the United States; Modernizing the Labor Certification Process and Enforcement," 73 *Federal Register* 8538, February 13, 2008, https://www.federalregister.gov/documents/2008/02/13/E8-2525/temporary-agricultural-employment-of-h-2a-aliens-in-the-united-states-modernizing-the-labor.

e. DOL, ETA, "Temporary Agricultural Employment of H-2A Aliens in the United States; Modernizing the Labor Certification Process and Enforcement," 73 *Federal Register* 77110, December 18, 2008, https://www.federalregister.gov/documents/2008/12/18/E8-29309/temporary-agricultural-employment-of-h-2a-aliens-in-the-united-states-modernizing-the-labor.

f. DOL, ETA, "Temporary Employment of H-2A Aliens in the United States," 74 *Federal Register* 11408, March 17, 2009, https://www.federalregister.gov/documents/2009/03/17/E9-5562/temporary-employment-of-h-2a-aliens-in-the-united-states.

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Current Status of the AEWR

On August 25, 2025, the U.S. District Court for the Western District of Louisiana issued an order in *Teche Vermilion Sugar Cane Growers Association, Inc., et al. v. Lori Chavez-DeRemer,* vacating the 2023 H-2A AEWR final rule. This vacatur said only that the 2023 final rule was "arbitrary and capricious in violation of the Administrative Procedure Act."[18] In a preliminary injunction the previous year, the court ruled H-2A sugarcane truck drivers and non-farm heavy and tractor-trailer truck drivers do sufficiently different jobs that DOL should not use the average wage for all non-farm heavy and tractor-trailer truck drivers to set the AEWR for H-2A sugarcane truck drivers, and DOL had not shown any evidence that the wages and working conditions of any H-2A workers affected non-farm heavy and tractor-trailer truck drivers.[19]

As a result of this vacatur, AEWR rates would have been set according to the methodology of the 2010 rule.[20] However, the 2010 rule used data from the FLS to set AEWR rates, and USDA discontinued the FLS on August 28, 2025.[21] This left a regulatory vacuum. DOL released a new interim final rule (IFR) on September 30, 2025, which became effective on publication in the *Federal Register* on October 2, 2025.[22] The AEWR is now determined by this IFR (see the last row of **Table 1**).

In the "Justification" section of the 2025 IFR, DOL noted that the changes are intended to address:

> immediate dangers to the American food supply. The methodology for calculating AEWRs in the vacated 2023 AEWR Final Rule and even under current 2010 final rule, both of which used a single average gross hourly wage for the vast majority of H-2A jobs without regard to the qualifications of the employer's job offer or how much time a worker spends performing specific duties during a work contract period poses an imminent risk to the supply of agricultural labor by setting unreasonably high price floors on labor. This IFR addresses and solves this imminent threat by implementing an AEWR methodology that results in more precise market-based price floors that still serves its statutory function of protecting American workers, but also, ensures that American supermarkets and U.S. consumers will have access to safe, affordable and American-grown produce....
>
> Employers in the U.S. agricultural sector are facing a structural, not cyclical, workforce crisis driven by both the lack of an available legal workforce that is relatively mobile and able to adjust to changes in labor demands as well as an ever hastening loss of the mobile

[18] Teche Vermilion Sugar Cane Growers Association Inc., et al. v. Lori Chavez-DeRemer, et al. (United States District Court, Western District of Louisiana, Lafayette Division, 2025), https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/Teche-Vermillion-Judgment.pdf.

[19] Teche Vermilion Sugar Cane Growers Association Inc., et al. v. Julie Su, et al. (United States District Court, Western District of Louisiana, Lafayette Division, 2024), https://scholar.google.com/scholar_case?case=11085968560824963067&q=749+F.Supp.3d+697&hl=en&as_sdt=1006.

[20] DOL, ETA, OFLC, *OFLC Announces Update to Implementation of the 2023 H-2A AEWR Final Rule; District Court's Order Vacating the Final Rule*, August 28, 2025, https://www.dol.gov/agencies/eta/foreign-labor.

[21] USDA, NASS, *NASS discontinues select data collection programs and reports*, August 28, 2025, https://www.nass.usda.gov/Newsroom/Notices/2025/08-28-2025.php.

[22] DOL, ETA, "Adverse Effect Wage Rate Methodology for the Temporary Employment of H-2A Nonimmigrants in Non-Range Occupations in the United States," 90 *Federal Register* 47914, October 2, 2025, https://www.federalregister.gov/d/2025-19365/p-4.

> illegal alien workforce that had flowed in and out of the United States through a previously porous border.[23]

The 2025 IFR made four main changes to AEWR methodology that affect AEWR levels, as discussed below.

Wage Data

The first change the 2025 IFR makes to the AEWR methodology is the source of wage data for Field and Livestock Workers (combined). This occupational group contains more than 95% of H-2A job opportunities.[24] Previously, the AEWR for these workers was determined (in all states except Alaska) by average state or regional wages in the FLS. Under the 2025 IFR, the AEWR for these workers is determined by state- or territory-level wage measurements from the OEWS. Except for a brief period in 2011,[25] the OEWS has surveyed only non-farm employers,[26] but the 2025 IFR indicates that starting in FY2026, the OEWS will be expanded to collect data from farms as well as non-farm business establishments.[27] The OEWS program uses three years of data to produce estimates.[28] If the OEWS program began collecting data from farms in November 2025, these data will be fully incorporated into OEWS estimates for May 2028, published in early 2029.

The change of wage data source from the FLS to the OEWS for Field and Livestock Workers (combined) classified in Skill Level II (see below) will mean a change as of fall 2025 of only a few cents per hour in many states, though there are larger increases (e.g., $1.45/hour in New Jersey) and decreases (e.g., $1.26/hour in California) in others.[29]

Two Levels of AEWRs: Skill Level I and Skill Level II

A second change to AEWR methodology in the 2025 IFR is the establishment of two AEWRs for each occupation in each state or territory. Skill Level I ("entry-level") is associated with job offers where workers need no formal education or specialized training credentials and employers typically require no or very little work-related experience (e.g., up to two months of related work

[23] DOL, ETA, "Adverse Effect Wage Rate Methodology for the Temporary Employment of H-2A Nonimmigrants in Non-Range Occupations in the United States," 90 *Federal Register* 47920, October 2, 2025, https://www.federalregister.gov/d/2025-19365/p-188. A summary of structural workforce issues in the agricultural sector is available in CRS Report R48614, *Rising Agricultural Wages: Context for Congressional Interest in the H-2A Visa Program*

[24] DOL, ETA, "Adverse Effect Wage Rate Methodology for the Temporary Employment of H-2A Nonimmigrants in Non-Range Occupations in the United States," 90 *Federal Register* 47914, October 2, 2025, https://www.federalregister.gov/d/2025-19365/p-162.

[25] Stella D. Fayer, "Agriculture: Occupational Employment and Wages," *Monthly Labor Review*, DOL, BLS, July 2014, https://doi.org/10.21916/mlr.2014.25.

[26] DOL, BLS, *Occupational Employment and Wage Statistics: Overview*, April 2, 2025, https://www.bls.gov/oes/oes_emp.htm. The OEWS does include wage estimates for occupations such as Agricultural Equipment Operators; Farmworkers and Laborers, Crop, Nursery, and Greenhouse; and Farmworkers, Farm, Ranch, and Aquacultural Animals. These estimates are based on surveys of non-farm employers in industries such as Support Activities for Agriculture (which includes farm labor contractors).

[27] DOL, ETA, "Adverse Effect Wage Rate Methodology for the Temporary Employment of H-2A Nonimmigrants in Non-Range Occupations in the United States," 90 *Federal Register* 47932, October 2, 2025, https://www.federalregister.gov/d/2025-19365/p-268.

[28] *Technical Notes for May 2024 OEWS Estimates*, April 2, 2025, https://www.bls.gov/oes/2024/may/oes_tec.htm.

[29] Lucas Smith and Richard Stup, *Major H-2A Wage Changes: Overview of New AEWR Methodology*, Cornell Agricultural Workforce Development, The Ag Workforce Journal, October 10, 2025, https://agworkforce.cals.cornell.edu/2025/10/10/major-h-2a-wage-changes-overview-of-new-aewr-methodology/.

experience cultivating diversified vegetable crops). Skill Level II ("experienced") is associated with job offers that may require some formal education or training credentials or certificates and employers typically require work-related experience at a level that is normal for the occupation (e.g., three months of related work experience harvesting apples). AEWRs for Skill Level I positions are computed as the mean wage of the lowest third of the wage distribution for the occupation(s) in the state or territory; AEWRs for Skill Level II positions are computed as the mean wage of the entire wage distribution for the occupation(s). In the "Justification" section of the IFR, DOL indicated that having separate skill level-based AEWRs within each occupation within each state was necessary because *Teche Vermilion Sugar Cane Growers Association, Inc., et al. v. Lori Chavez-DeRemer* focused on the comparability of wages for non-farm heavy and tractor-trailer truck drivers with wages for workers engaged in driving sugarcane trucks.

This change in AEWR methodology has precedent: the 2008 final rule (in effect during early 2009) also had multiple skill levels for each occupation in each geographic area. In the 2010 final rule (reverting to the AEWR methodology of the 1987 final rule), DOL said:

> The Department assumed [in the 2008 final rule] that employers would seek a variety of skill levels in occupations for which workers were sought—some higher and some lower than the occupational median, but that the overall result would likely be balanced and average to the median. The FY 2009 implementation experience revealed a significantly different outcome: 73 percent of applicants for H-2A workers specified the lowest available skill level—corresponding to the wage earned by the lowest paid 16 percent of observations in the OES data.[30]

The difference between Skill Level I AEWRs and Skill Level II AEWRs in the 2025 IFR can be substantial. For workers in the Field and Livestock Workers (combined) category, in fall 2025 Skill Level I AEWRs were lower than Skill Level II AEWRs by amounts ranging from 87 cents per hour (Puerto Rico) to $6.67 per hour (North Dakota).[31]

Adverse Compensation Adjustment

A third change to AEWR methodology in the 2025 IFR is a new Adverse Compensation Adjustment to the AEWR for the cost of employer-provided housing.[32] DOL's rationale for this change is to equalize compensation between domestic workers (who pay for their own housing) and workers in H-2A positions (who have housing provided by their employers).[33] Housing costs are the second largest cost (after wages) to employers in the H-2A program.[34] The magnitude of this adjustment in reducing the effective AEWR in fall 2025 ranged from 71 cents per hour

[30] DOL, ETA, "Temporary Agricultural Employment of H-2A Aliens in the United States," 75 *Federal Register* 6898, February 12, 2010, https://www.federalregister.gov/d/2010-2731/p-146.

[31] CRS calculations based on DOL, ETA, "Adverse Effect Wage Rate Methodology for the Temporary Employment of H-2A Nonimmigrants in Non-Range Occupations in the United States," 90 *Federal Register* 47914, October 2, 2025, https://www.federalregister.gov/d/2025-19365/p-259.

[32] Regulations regarding employer provided housing for the H-2A program built on or after April 3, 1980, are at 29 C.F.R. §§1910.142 et seq., https://www.ecfr.gov/current/title-29/subtitle-B/chapter-XVII/part-1910/subpart-J/section-1910.142. For older employer-provided housing, regulations are at 20 C.F.R. §§654.404 et seq., https://www.ecfr.gov/current/title-20/chapter-V/part-654/subpart-E/. Regulations for employer provided housing for H-2A range positions are at 20 C.F.R. §655.235, https://www.ecfr.gov/current/title-20/chapter-V/part-655/subpart-B/section-655.235.

[33] DOL, ETA, "Adverse Effect Wage Rate Methodology for the Temporary Employment of H-2A Nonimmigrants in Non-Range Occupations in the United States," 90 *Federal Register* 47914, October 2, 2025, https://www.federalregister.gov/d/2025-19365/p-425.

[34] USDA, *H-2A Visa Program: Costs of the H-2A Visa Program*, https://www.farmers.gov/working-with-us/h2a-visa-program#costs.

(Puerto Rico) to $3.18 per hour (Hawaii).[35] In several states—including the major agricultural states of California, Florida, and Washington—after making this adjustment, the AEWR is now lower than state-level minimum wages, and so the wage employers must pay H-2A workers in these states is the state-level minimum wage rather than the AEWR.[36] There is no precedent for this adjustment in the previous history of the AEWR.

AEWR for Positions Spanning Multiple Occupations

A fourth change to AEWR methodology in the 2025 IFR is the AEWR for positions that span occupations with different AEWRs. This was one of the concerns raised in litigation over the 2023 final rule. That rule determined the AEWR for these positions as the highest applicable AEWR. The 2025 IFR determines the AEWR for these positions based on the work done during the majority of workdays.[37]

Ongoing Litigation

A group of 18 individual farm workers, the United Farm Workers (UFW), and the UFW Foundation has filed suit to block the 2025 IFR.[38] Their suit argues that

> First, the IFR contravenes DOL's statutory mandate to ensure that the employment of H-2A workers will not adversely affect the wages of similarly employed U.S. workers....
>
> Second, the IFR is arbitrary and capricious.... Most H-2A positions are likely to be classified as Skill Level I, and the AEWRs for Skill Level I positions will be equal to only the *17th wage percentile* for the relevant farming sectors. Stated differently, whereas many AEWRs were previously equal to the average wage in a given sector, they will now be less than the amount that *83%* of farmworkers receive in that sector....
>
> By statute and regulation, U.S. employers must provide H-2A employees with free housing. Critically, until now, that housing never impacted the applicable AEWRs....
>
> the OEWS data is based on a three-year reporting cycle, meaning it is unclear how it can produce accurate farm wages before 2029.[39]

[35] ETA, DOL OFLC, *Statewide 2025-2026 IFR AEWRs*, October 2025, https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/DOL-OFLC_2025-2026_AEWRs_FINAL.xlsx.

[36] Lucas Smith and Richard Stup, *Major H-2A Wage Changes: Overview of New AEWR Methodology*, Cornell Agricultural Workforce Development, *The Ag Workforce Journal*, October 10, 2025, https://agworkforce.cals.cornell.edu/2025/10/10/major-h-2a-wage-changes-overview-of-new-aewr-methodology/.

[37] DOL, ETA, "Adverse Effect Wage Rate Methodology for the Temporary Employment of H-2A Nonimmigrants in Non-Range Occupations in the United States," 90 *Federal Register* 47914, October 2, 2025, https://www.federalregister.gov/d/2025-19365/p-362.

[38] UFW Foundation, *U.S. Farm Workers Sue Trump Administration to Save American Farm Jobs and Wages*, Washington, DC, November 21, 2025, https://ufwfoundation.org/u-s-farm-workers-sue-trump-administration-to-save-american-farm-jobs-and-wages/.

[39] United Farm Workers, et al., v. United States Department of Labor (United States District Court, Eastern District of California, 2025).

Commentary

Academic observers say that the 2025 IFR makes major changes to wage requirements, and these requirements may change further based on public comments and the outcome of ongoing litigation.[40] They also note that the 2025 IFR establishes AEWRs lower than minimum wages in many states, including states that are heavy users of the H-2A program, such as California, Florida, and Washington. This may shift agricultural labor cost regulation discussions from the federal to the state level.[41]

Author Information

Elizabeth Weber Handwerker
Analyst in Labor Policy

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[40] Lucas Smith and Richard Stup, *Major H-2A Wage Changes: Overview of New AEWR Methodology*, Cornell Agricultural Workforce Development, *The Ag Workforce Journal*, October 10, 2025, https://agworkforce.cals.cornell.edu/2025/10/10/major-h-2a-wage-changes-overview-of-new-aewr-methodology/; and Myat Thida Win and Zachariah Rutledge, *Explaining the new H-2A Wage Rule for Michigan growers*, Michigan State University Extension, December 12, 2025, https://www.canr.msu.edu/news/explaining-the-new-h-2a-wage-rule-for-michigan-growers.

[41] Philip Martin, *DOL: H-2A Changes*, *Rural Migration News*, October 24, 2025, https://migration.ucdavis.edu/rmn/blog/post/?id=3086. Note that some states exempt agricultural workers from minimum wage laws. An overview of minimum wage provisions for agricultural workers by state is available in The National Agricultural Law Center, *Minimum Wage for Agricultural Workers*, https://nationalaglawcenter.org/state-compilations/agpay/minimumwage/.

Identity Theft: Trends and Issues

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CRS REPORT
Prepared for Members and
Committees of Congress

Summary

In the current fiscal environment, policymakers are increasingly concerned with securing the economic health of the United States—including combating those crimes that threaten to undermine the nation's financial stability. Identity theft is one such crime. In 2012, about 12.6 million Americans were reportedly victims of identity fraud, and the average identity fraud victim incurred a mean of $365 in costs as a result of the fraud. Identity theft is often committed to facilitate other crimes such as credit card fraud, document fraud, or employment fraud, which in turn can affect not only the nation's economy but its security. Consequently, in securing the nation and its economic health, policymakers are also tasked with reducing identity theft and its impact.

Identity theft has remained the dominant consumer fraud complaint to the Federal Trade Commission (FTC). Nevertheless, while the number of overall identity theft complaints generally increased between when the FTC began recording identity theft complaints in 2000 and 2008, the number of complaints decreased in both 2009 and 2010 before rising in 2011 and 2012. Identity theft case filings and convictions peaked in 2007 and 2008, and have generally declined since. *Aggravated identity theft* case filings and convictions, on the other hand, have largely continued to increase since aggravated identity theft was added as a federal offense in 2004.

Congress continues to debate the federal government's role in (1) preventing identity theft and its related crimes, (2) mitigating the potential effects of identity theft after it occurs, and (3) providing the most effective tools to investigate and prosecute identity thieves. With respect to preventing identity theft, one issue concerning policymakers is the prevalence of personally identifiable information—and in particular, the prevalence of Social Security numbers (SSNs)—in both the private and public sectors. One policy option to reduce their prevalence may involve restricting the use of SSNs on government-issued documents such as Medicare identification cards. Another option could entail providing federal agencies with increased regulatory authority to curb the prevalence of SSN use in the private sector. In debating policies to mitigate the effects of identity theft, one option Congress may consider is whether to strengthen data breach notification requirements. Such requirements could affect the notification of relevant law enforcement authorities as well as any individuals whose personally identifiable information may be at risk from the breach. Congress may also be interested in assessing the true scope of data breaches, particularly involving government networks.

There have already been several legislative and administrative actions aimed at curtailing identity theft. Congress enacted legislation naming identity theft as a federal crime in 1998 (P.L. 105-318) and later provided for enhanced penalties for aggravated identity theft (P.L. 108-275). In April 2007, the President's Identity Theft Task Force issued recommendations to combat identity theft, including specific legislative recommendations to close identity theft-related gaps in the federal criminal statutes. In a further attempt to curb identity theft, Congress directed the FTC to issue an Identity Theft Red Flags Rule, requiring that creditors and financial institutions with specified account types develop and institute written identity theft prevention programs.

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Introduction

Policymakers continue to be concerned with securing the economic health of the United States—including combating those crimes that threaten to undermine the nation's financial stability.[1] Identity theft, for one, poses both security and economic risks. By some estimates, identity fraud cost Americans nearly $21 billion in 2012.[2] Federal Trade Commission (FTC) complaint data indicate that the most common fraud complaint received (18% of all consumer fraud complaints) is that of identity theft.[3] In 2012, for instance, about 12.6 million Americans were reportedly victims of identity fraud. This is an increase from the approximately 11.6 million who were victimized in 2011 and 10.2 million who were victimized in 2010.[4] Mirroring this increase in the overall number of reported identity fraud incidents, consumer costs relating to these incidents increased in 2012; the average identity fraud victim incurred a mean of $365.[5] Nonetheless, this cost is about 42% less than the average expense roughly a decade ago.[6]

An increase in globalization and a lack of cyber borders provide an environment ripe for identity thieves to operate from within the nation's borders—as well as from beyond. Federal law enforcement is thus challenged with investigating criminals who may or may not be operating within U.S. borders; may have numerous identities—actual, stolen, or cyber; and may be acting alone or as part of a sophisticated criminal enterprise.[7] In addition, identity theft is often interconnected with various other criminal activities. These activities range from credit card and bank fraud to immigration and employment fraud. In turn, the effects felt by individuals and businesses who have fallen prey to identity thieves extend outside of pure financial burdens; identity thieves affect not only the nation's economic health, but its national security as well. Consequently, policymakers may debate the federal government's role in preventing identity theft and its related crimes, mitigating the potential effects of identity theft after it occurs, and providing the most effective tools to investigate and prosecute identity thieves.

This report first provides a brief federal legislative history of identity theft laws. It analyzes selected trends in identity theft, including prevalent identity theft-related crimes, the federal agencies involved in combating identity theft, and the trends in identity theft complaints and prosecutions. The report also discusses the relationship between data breaches and identity theft as well as possible effects of the FTC's Identity Theft Red Flags Rule. It also examines possible issues for Congress to consider.

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[1] See, for example, U.S. Congress, House Committee on Financial Services, *Cyber Threats to Capital Markets and Corporate Accounts*, 112th Cong., 2st sess., June 1, 2012.

[2] Javelin Strategy & Research, *2013 Identity Fraud Report: Data Breaches Becoming a Treasure Trove for Fraudsters*, February 2013.

[3] Federal Trade Commission, *Consumer Sentinel Network Data Book for January–December 2012*, February 2013, http://www.ftc.gov/sentinel/reports/sentinel-annual-reports/sentinel-cy2012.pdf.

[4] Javelin Strategy & Research, *2013 Identity Fraud Report: Data Breaches Becoming a Treasure Trove for Fraudsters*, February 2013.

[5] Ibid.

[6] CRS calculation based on data from Javelin Strategy & Research, *2013 Identity Fraud Report: Data Breaches Becoming a Treasure Trove for Fraudsters*, February 2013; and Javelin Strategy & Research, *2012 Identity Fraud Report: Consumers Taking Control to Reduce Their Risk of Fraud*, February 2012.

[7] For more information on these challenges, see CRS Report R41927, *The Interplay of Borders, Turf, Cyberspace, and Jurisdiction: Issues Confronting U.S. Law Enforcement*, by Kristin Finklea.

Definitions of Identity Theft

When does taking and using someone else's identity become a crime? Current federal law defines identity theft as a federal crime when someone

> knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person with the intent to commit, or to aid or abet, or in connection with, any unlawful activity that constitutes a violation of Federal law, or that constitutes a felony under any applicable State or local law.[8]

The current federal law also provides enhanced penalties for *aggravated identity theft* when someone "knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person" in the commission of particular felony violations.[9] Aggravated identity theft carries an enhanced two-year prison sentence for most specified crimes and an enhanced five-year sentence for specified terrorism violations.

Identity theft is also defined in the Code of Federal Regulations (CFR) as "fraud committed or attempted using the identifying information of another person without permission."[10] Identity theft can both facilitate and be facilitated by other crimes. For example, identity theft may make possible crimes such as bank fraud, document fraud, or immigration fraud, and it may be aided by crimes such as theft in the form of robbery or burglary.[11] Therefore, one of the primary challenges in analyzing the trends in identity theft (e.g., offending, victimization, or prosecution rates)—as well as the policy issues that Congress may wish to consider—arises from this interconnectivity between identity theft and other crimes.

Theft vs. Fraud

Identity theft and identity fraud are terms that are often used interchangeably. Identity fraud[12] is the umbrella term that refers to a number of crimes involving the use of false identification—

[8] 18 U.S.C. §1028(a)(7).

[9] These felony violations as outlined in 18 U.S.C. §1028A include theft of public money, property, or records; theft, embezzlement, or misapplication by bank officer or employee theft from employee benefit plans; false personation of citizenship; false statements in connection with the acquisition of a firearm; fraud and false statements; mail, bank, and wire fraud; specified nationality and citizenship violations; specified passport and visa violations; obtaining customer information by false pretenses; specified violations the Immigration and Nationality Act relating to willfully failing to leave the United States after deportation and creating a counterfeit alien registration card and various other immigration offenses; specified violations of the Social Security Act relating to false statements relating to programs under the act; and specified terrorism violations. The basic penalty for identity theft under 18 U.S.C. §1028 ranges from not more than five years imprisonment to not more than 30 years, depending on the circumstances.

[10] According to the CFR definitional section for the Fair Credit Reporting Act (16 C.F.R. §603.2), "[t]he term ''identifying information'' means any name or number that may be used, alone or in conjunction with any other information, to identify a specific person, including any—(1) Name, Social Security number, date of birth, official State or government issued driver's license or identification number, alien registration number, government passport number, employer or taxpayer identification number; (2) Unique biometric data, such as fingerprint, voice print, retina or iris image, or other unique physical representation; (3) Unique electronic identification number, address, or routing code; or (4) Telecommunication identifying information or access device (as defined in 18 U.S.C. 1029(e))."

[11] Graeme R. Newman and Megan M. McNally, "Identity Theft Literature Review," Prepared for presentation and discussion at the National Institute of Justice Focus Group Meeting to develop a research agenda to identify the most effective avenues of research that will impact on prevention, harm reduction and enforcement, Contract #2005-TO-008, January 2005.

[12] Identity fraud became a federal crime through the False Identification Crime Control Act of 1982 (P.L. 97-398), and it is codified at 18 U.S.C. §1028.

though not *necessarily* a means of identification belonging to another person. Identity theft is the specific form of identity fraud that involves using the personally identifiable information of someone else. Both identity fraud and identity theft are crimes often committed in connection with other violations, as mentioned above. Identity theft, however, may involve an added element of victimization, as this form of fraud may directly affect the life of the victim whose identity was stolen in addition to defrauding third parties (such as the government, employers, consumers, financial institutions, and health care and insurance providers, just to name a few). This report, however, maintains a focus on identity theft rather than the broader term of identity fraud.

Knowledge Element

Another definitional issue is one that went before the U.S. Supreme Court. The statutory definitions of identity theft and aggravated identity theft indicate that they are crimes when someone "*knowingly* [emphasis added] transfers, possesses, or uses, without lawful authority, a means of identification of another person" in conjunction with specified felony violations outlined in the U.S. Code. The definitional element under question was the word "knowingly." In *Flores-Figueroa v. United States*, the Court decided that in order to be found guilty of aggravated identity theft, a defendant must have knowledge that the means of identification he used belonged to another individual.[13] It is not sufficient to only have knowledge that the means of identification used was not his own. Although the case before the Court specifically involved aggravated identity theft, the issue may apply to the identity theft statute as well, due to its overlap in wording about the element of knowledge.

Since the Court has issued its final decision in *Flores-Figueroa v. United States*, Congress may wish to consider whether there is a need to clarify the difference between these two types of knowledge in the U.S. Code. If a clarification is warranted, Congress may wish to consider whether the identity theft and aggravated identity theft statutes should be amended to reflect the definitions of both types of knowledge.[14]

Legislative History[15]

Until 1998, identity theft was not a federal crime.[16] Leading up to Congress designating identity theft as a federal crime, identity fraud was on the rise, and the Internet was increasingly being used as a method of defrauding innocent victims. Law enforcement and policymakers suggested that the current laws at the time were ineffective at combating the growing prevalence of identity theft;[17] the laws were not keeping up with technology, and stronger laws were needed to

[13] *Flores-Figueroa v. United States*, 129 S. Ct. 1186 (2009).

[14] Legislation was introduced in the 112th Congress (H.R. 2552, Identity Theft Improvement Act of 2011) that would have amended the identity theft and aggravated identity theft statutes such that in criminal cases, the government would not need to prove that the defendant knew the stolen means of identification belonged to another person.

[15] The legislation described in this section covers those Acts directly related to the identity theft statutes. Other statutes, such as the credit reporting statutes, indirectly address identity theft by possibly assisting victims, however, they are not discussed here. For more information on the scope of federal laws relating to identity theft, see archived CRS Report RL31919, *Federal Laws Related to Identity Theft*, by Gina Stevens. See also CRS Report RL31666, *Fair Credit Reporting Act: Rights and Responsibilities*, by Margaret Mikyung Lee.

[16] The first state to enact an identity theft law was Arizona in 1996.

[17] Before identity theft became a federal crime, identity fraud had been established as a crime in the False Identification Crime Control Act of 1982 (P.L. 97-398). However, the identity fraud statute did not contain a specific theft provision.

investigate and punish identity thieves.[18] In addition, policymakers also suggested that industries that handled records containing individuals' personally identifiable information—such as credit, medical, and criminal records—needed superior methods to ensure the validity of the information they collected and utilized.

Identity Theft Assumption Deterrence Act

In 1998, Congress passed the Identity Theft Assumption Deterrence Act (P.L. 105-318), which criminalized identity theft at the federal level. In addition to making identity theft a crime, this act provided penalties for individuals who either committed or attempted to commit identity theft and provided for forfeiture of property used or intended to be used in the fraud. It also directed the FTC to record complaints of identity theft, provide victims with informational materials, and refer complaints to the appropriate consumer reporting and law enforcement agencies. The FTC now records consumer complaint data and reports it in the Identity Theft Data Clearinghouse; identity theft complaint data are available for 2000 and forward.[19]

Identity Theft Penalty Enhancement Act

Congress further strengthened the federal government's ability to prosecute identity theft with the passage of the Identity Theft Penalty Enhancement Act (P.L. 108-275).[20] This act established penalties for *aggravated identity theft*, in which a convicted perpetrator could receive additional penalties (two to five years' imprisonment) for identity theft committed in relation to other federal crimes. Examples of such federal crimes include theft of public property, theft by a bank officer or employee, theft from employee benefit plans, false statements regarding Social Security and Medicare benefits, several fraud and immigration offenses, and specified felony violations pertaining to terrorist acts.

Identity Theft Enforcement and Restitution Act of 2008

Most recently, Congress enhanced the identity theft laws by passing the Identity Theft Enforcement and Restitution Act of 2008 (Title II of P.L. 110-326). Among other elements, the act authorized restitution to identity theft victims for their time spent recovering from the harm caused by the actual or intended identity theft.

Identity Theft Task Force

In addition to congressional efforts to combat identity theft, there have been administrative efforts as well. The President's Identity Theft Task Force (Task Force) was established in May 2006 by Executive Order 13402.[21] The task force was created to coordinate federal agencies in their efforts against identity theft, and it was charged with creating a strategic plan to combat (increase

[18] From remarks James Bauer, Deputy Assistant Director, Office of Investigations, U.S. Secret Service, before the U.S. Congress, Senate Committee on the Judiciary, Subcommittee on Technology, Terrorism, and Government Information, *The Identity Theft and Assumption Deterrence Act*, 105th Cong., 2nd sess., May 20, 1998.

[19] Unless otherwise noted in this report, all dates refer to calendar years rather than fiscal years.

[20] Aggravated Identity Theft is codified at 18 U.S.C. §1028A.

[21] Executive Order 13402, "Strengthening Federal Efforts To Protect Against Identity Theft," 71 *Federal Register* 93, May 15, 2006.

awareness of, prevent, detect, and prosecute) identity theft. It was composed of representatives from 17 federal agencies.[22]

Recommendations

In April 2007, the task force authored a strategic plan for combating identity theft in which it made recommendations in four primary areas:

- preventing identity theft by keeping consumer data out of criminals' hands,
- preventing identity theft by making it more difficult for criminals to misuse consumer data,
- assisting victims in detecting and recovering from identity theft, and
- deterring identity theft by increasing the prosecution and punishment of identity thieves.[23]

With respect to identity theft prevention, the task force suggested that decreasing the use of Social Security numbers (SSNs) in the public sector and reviewing the use of SSNs in the private sector could help prevent identity theft. Also, the task force suggested that educating employers and individuals on how to safeguard data, as well as establishing national data protection and breach notification standards, could further aid in preventing identity theft.

Relating to victim assistance, the task force suggested that identity theft victims may be better served if first responders were specially trained to assist this particular class of victim. It also addressed victim redress by recommending that identity theft victims be able to obtain an alternative identification document after the theft of their identities. Through the Identity Theft Enforcement and Restitution Act of 2008 (Title II of P.L. 110-326), Congress responded to the task force's recommendation that criminal restitution statutes allow victims to be compensated for their time in recovering from the actual or attempted identity theft.

Regarding identity theft deterrence, the task force recommended enhancing information gathering and sharing between domestic law enforcement agencies and the private sector, ramping up identity theft training for law enforcement and prosecutors, and increasing enforcement and prosecution of identity theft. The task force also promoted international cooperation to decrease identity theft through identifying countries that may be safe havens for identity thieves, encouraging anti-identity theft legislation in other countries, and increasing international cooperation in the investigation and prosecution of identity theft.

Legislative Recommendations

More specifically, the task force recommended that Congress close gaps in the federal criminal statues to more effectively prosecute and punish identity theft-related offenses by

[22] Members of the task force included the Attorney General (chair), the Chairman of the Federal Trade Commission (co-chair), the Secretary of the Treasury, the Secretary of Commerce, the Secretary of Health and Human Services, the Secretary of Veterans Affairs, the Secretary of Homeland Security, the Director of the Office of Management and Budget, the Commissioner of Social Security, the Chairman of the Board of Governors of the Federal Reserve System, the Chairperson of the Board of Directors of the Federal Deposit Insurance Corporation, the Comptroller of the Currency, the Director of the Office of Thrift Supervision, the Chairman of the National Credit Union Administration Board, the Postmaster General, the Director of the Office of Personnel Management, and the Chairman of the Securities and Exchange Commission.

[23] The President's Identity Theft Task Force, *Combating Identity Theft: A Strategic Plan*, April 23, 2007.

- amending the identity theft and aggravated identity theft statutes so that thieves who misappropriate the identities of corporations and organizations—and not just the identities of individuals—can be prosecuted,
- amending the aggravated identity theft statute by adding new crimes as predicate offenses for aggravated identity theft violations,
- amending the statute criminalizing the theft of electronic data by eliminating provisions requiring that the information be stolen through interstate communications,
- amending the computer fraud statute by eliminating the requirement that damage to a victim's computer exceed $5,000,
- amending the cyber-extortion statute by expanding the definition of cyber-extortion, and
- ensuring that the Sentencing Commission allows for enhanced sentences imposed on identity thieves whose actions affect multiple victims.[24]

Congress has already taken steps to address some of these task force recommendations. Through the Identity Theft Enforcement and Restitution Act of 2008 (Title II of P.L. 110-326), Congress, among other things, eliminated provisions in the U.S. Code requiring the illegal conduct to involve interstate or foreign communication, eliminated provisions requiring that damage to a victim's computer amass to $5,000, and expanded the definition of cyber-extortion.

However, Congress has not yet addressed the task force recommendation to expand the identity theft and aggravated identity theft statutes to apply to corporations and organizations as well as to individuals, nor has it addressed the recommendation to expand the list of predicate offenses for aggravated identity theft. Issues surrounding these recommendations are analyzed in the section "Potential Issues for Congress."

Red Flags Rule[25]

The Identity Theft Red Flags Rule, issued in 2007, requires creditors and financial institutions to implement identity theft prevention programs. It is implemented pursuant to the Fair and Accurate Credit Transactions (FACT) Act of 2003 (P.L. 108-159). The FACT Act amended the Fair Credit Reporting Act (FCRA)[26] by directing the FTC, along with the federal banking agencies and the National Credit Union Administration, to develop Red Flags guidelines. These guidelines require

[24] Ibid.

[25] The Red Flags Rule is listed in the Code of Federal Regulations at 16 C.F.R. §681.2. The Red Flags Rule was issued jointly by the FTC; the Office of the Comptroller of the Currency, Treasury; the Board of Governors of the Federal Reserve System; the Federal Deposit Insurance Corporation; the Office of Thrift Supervision, Treasury; and the National Credit Union Administration. The final rules are available in the Federal Register. See Department of the Treasury, Office of the Comptroller of the Currency; Federal Reserve System; Federal Deposit Insurance Corporation; Department of the Treasury, Office of Thrift Supervision; National Credit Union Administration; Federal Trade Commission, "Identity Theft Red Flags and Address Discrepancies Under the Fair and Accurate Credit Transactions Act of 2003; Final Rule," 72 *Federal Register* 63718 - 63775, November 9, 2007.

[26] The FCRA is codified at 15 U.S.C. §1681.

creditors[27] and financial institutions[28] with "covered accounts"[29] to develop and institute written identity theft prevention programs. According to the FTC, the identity theft prevention programs required by the rule must provide for

- identifying patterns, practices, or specific activities—known as "red flags"—that could indicate identity theft and then incorporating those red flags into the identity theft prevention program;
- detecting those red flags that have been incorporated into the identity theft prevention program;
- responding to the detection of red flags; and
- updating the identity theft prevention program periodically to reflect any changes in identity theft risks.[30]

Possible "red flags" could include

- alerts, notifications, or warnings from a consumer reporting agency;
- suspicious documents;
- suspicious personally identifiable information, such as a suspicious address;
- unusual use of—or suspicious activity relating to—a covered account; and
- notices from customers, victims of identity theft, law enforcement authorities, or other businesses about possible identity theft in connection with covered accounts.[31]

The deadline for creditors and financial institutions to comply with the Red Flags Rule was originally set at November 1, 2008. However, many of the organizations affected by the Red Flags Rule were not prepared to institute their identity theft prevention programs by this date. Therefore, the FTC moved the deadline to May 1, 2009,[32] further extended the compliance date to

[27] Under the Red Flags Rule, a creditor was originally defined as "any person who regularly extends, renews, or continues credit; any person who regularly arranges for the extension, renewal, or continuation of credit; or any assignee of an original creditor who participates in the decision to extend, renew, or continue credit," 15 U.S.C. §1691a. The Red Flag Program Clarification Act of 2010 (P.L. 111-319) limited this definition of a creditor, excluding any creditor "that advances funds on behalf of a person for expenses incidental to a service provided by the creditor to that person." In November 2012, the FTC issued an Interim Final Rule amending the Red Flags Rule definition of a creditor to be in line with the definition outlined in P.L. 111-319.

[28] Under the Red Flags Rule, a financial institution is defined as "a State or National bank, a State or Federal savings and loan association, a mutual savings bank, a State or Federal credit union, or any other person that, directly or indirectly, holds a transaction account (as defined in §461(b) of title 12) belonging to a consumer," 15 U.S.C. §1681a(t).

[29] A covered account is one that is used primarily for personal, family, or household purposes, and that involves multiple payments or transactions. These include credit card accounts, mortgage loans, automobile loans, margin accounts, cell phone accounts, utility accounts, checking accounts, savings accounts, and other accounts for which there is a foreseeable risk of identity theft. The Rule also requires creditors and financial institutions to periodically determine whether they maintain any covered accounts, 72 *Federal Register* 63719.

[30] Federal Trade Commission, "Agencies Issue Final Rules on Identity Theft Red Flags and Notices of Address Discrepancy," press release, October 31, 2007, http://ftc.gov/opa/2007/10/redflag.shtm.

[31] http://www.ftc.gov/bcp/edu/pubs/business/alerts/alt050.shtm.

[32] Federal Trade Commission, "FTC Will Grant Six-Month Delay of Enforcement of 'Red Flags' Rule Requiring Creditors and Financial Institutions to Have Identity Theft Prevention Programs," press release, October 22, 2008, http://www.ftc.gov/opa/2008/10/redflags.shtm.

November 1, 2009,[33] and later to June 1, 2010.[34] The final enforcement date was set at December 31, 2010,[35] and this last extension was, in part, a result of the debate over whether Congress wrote the FACT Act Red Flags provision too broadly by including all entities qualifying as creditors and financial institutions (discussed further below).

The effect that the Red Flags Rule will have on the prevalence of identity theft remains uncertain. One potential effect is that the Red Flags Rule may help creditors and financial institutions prevent identity theft by identifying potential lapses in security or suspicious activities that could lead to identity theft. This could possibly lead to an overall decrease in the number of identity theft incidents reported to the FTC, as well as the number of identity theft cases investigated and prosecuted. Once detected, the Red Flags Rule requires that the creditor or financial institution respond to the identified red flag. One response option that creditors and financial institutions might include in their prevention programs is to notify consumers or law enforcement of data breaches that could potentially lead to the theft of consumers' personally identifiable information. While notification is not a required element in the identity theft prevention programs,[36] early notification could lead to consumers taking swift action to prevent identity theft or mitigate the severity of the damage that could result if they had not been notified as quickly.

When the Red Flags Rule was created, the FTC originally estimated that it would impact approximately 11.1 million creditors and financial institutions required to implement the identity theft prevention programs.[37] The FTC estimated the total annual labor costs (for each of the first three years the rule is in effect) for all creditors and financial institutions covered by the rule to be about $143 million.[38] Some entities considered creditors or financial institutions under the rule expressed concern that the burden of the rule overlaps with burdens already incurred under other regulations. For example, the American Bar Association (ABA) questioned whether lawyers are considered "creditors" under the Red Flags Rule because they generally do not require payment until after services are rendered. Further, the American Medical Association indicated that physicians should be exempt from the Red Flags Rule because of patient privacy and security protections required by the Health Insurance Portability and Accountability Act (HIPAA).[39] In addition, there may have been concern that to avoid being considered creditors, some physicians could possibly require full payment at the time of service (rather than allowing deferred payments). This could in turn lead to some patients avoiding potentially necessary treatment if they are unable to pay in full at the time of service; on the other hand, the rule may have no effect

[33] Federal Trade Commission, "FTC Will Grant Three-Month Delay of Enforcement of 'Red Flags' Rule Requiring Creditors and Financial Institutions to Adopt Identity Theft Prevention Programs," press release, April 30, 2009, http://www.ftc.gov/opa/2009/04/redflagsrule.shtm.

[34] Federal Trade Commission, "FTC Extends Enforcement Deadline for Identity Theft Red Flags Rule," press release, October 30, 2009, http://www.ftc.gov/opa/2009/10/redflags.shtm.

[35] Federal Trade Commission, "FTC Extends Enforcement Deadline for Identity Theft Red Flags Rule," press release, May 28, 2010, http://www.ftc.gov/opa/2010/05/redflags.shtm.

[36] The FTC has published a guide to assist businesses in creating the identity theft prevention programs, available at Federal Trade Commission, *Fighting Fraud With the Red Flags Rule: A How-To Guide for Business*, March 2009, http://www.ftc.gov/bcp/edu/pubs/business/idtheft/bus23.pdf.

[37] Identity Theft Red Flags Final Rule, p. 63741.

[38] Ibid. Cost estimates are provided by OMB in three-year increments. Therefore, cost estimates for subsequent years are unavailable and could change from the estimates provided for the first three years.

[39] Letter from American Medical Association et al. to William E. Kovacic, Chairman, U.S. Federal Trade Commission, September 30, 2008, http://www.ama-assn.org/ama1/pub/upload/mm/31/ftc_letter20080930.pdf. HIPAA was enacted by P.L. 104-191. For more information on HIPAA or health information privacy, see CRS Report R40546, *The Privacy and Security Provisions for Health Information in the American Recovery and Reinvestment Act of 2009*, by Gina Stevens and Edward C. Liu.

on patients' willingness to seek medical treatment. The Red Flag Program Clarification Act of 2010 (P.L. 111-319) limited the Red Flags Rule's definition of a creditor, excluding any creditor "that advances funds on behalf of a person for expenses incidental to a service provided by the creditor to that person." This legislation did not exempt any broad categories of businesses or entities, but the majority of businesses in certain categories—such as physicians—would be exempt from Red Flags Rule compliance. Any actual effects of the Red Flags Rule—including effects on identity theft rates as well as any indirect consequences—have not yet been evident.[40] Congress may consider monitoring the effects of the impending Red Flags Rule on subsequent identity theft rates.

Trends in Identity Theft

A number of studies have aimed to measure the prevalence of identity theft. Due to a number of factors, including a lack of a consistent definition of identity theft victimization across studies and differing survey populations, there is not a clear understanding of the true scope of identity theft in the United States. For instance, a Bureau of Justice Statistics (BJS) study estimates that 16.6 million U.S. residents were victims of at least one identity theft incident.[41] Another study by Javelin Strategy & Research estimates that in 2012, about 12.6 million Americans were victims of identity theft; this is an increase from the approximately 11.6 million estimated to have been victimized in 2011.[42]

In addition to survey research on identity theft victimization, trends in consumer complaints of victimization provide additional insight into the issue. Similar to the increase in estimated victimization exhibited in surveys, consumer complaints of identity theft to the FTC exhibited a corresponding increase. The FTC received 369,132 consumer complaints of identity theft in 2012, up from 279,156 complaints in 2011.[43] Nonetheless, identity theft incidents reported to the FTC remain a fraction of the estimated victim population. There is a noted difference between the 369,132 complaints received by the FTC in 2012 and survey data indicating that between 12.6 million and 16.6 million people may have actually been victimized. This disparity between research on identity theft victimization and consumer reports could be a result of several factors. For one, while some identity theft victims may file a report with the FTC, others may file complaints with credit bureaus, while still others may file complaints with law enforcement. Not all victims, however, may file complaints with consumer protection entities, credit reporting agencies, and law enforcement. Another possible factor contributing to the disparity is that victims may not—for any number of reasons—report an identity theft incident. These individuals, however, may be more likely to indicate the incident on a survey prompting them about their experiences with identity theft or fraud.

Since the FTC began recording consumer complaint data in 2000, identity theft has remained the most common consumer fraud complaint. **Figure 1** illustrates the number of identity theft

[40] CRS has not identified any academic research analyzing the effects of the Red Flags Rule.

[41] Erica Karrell and Lynn Langton, *Victims of Identity Theft, 2012*, U.S. Department of Justice, Bureau of Justice Statistics, NCJ 243779, December 2013. The BJS researchers relied upon data from the 2012 Identity Theft Supplement (ITS) to the National Crime Victimization Survey (NCVS). Over 69,800 individuals ages 16 and over responded to the ITS questionnaire.

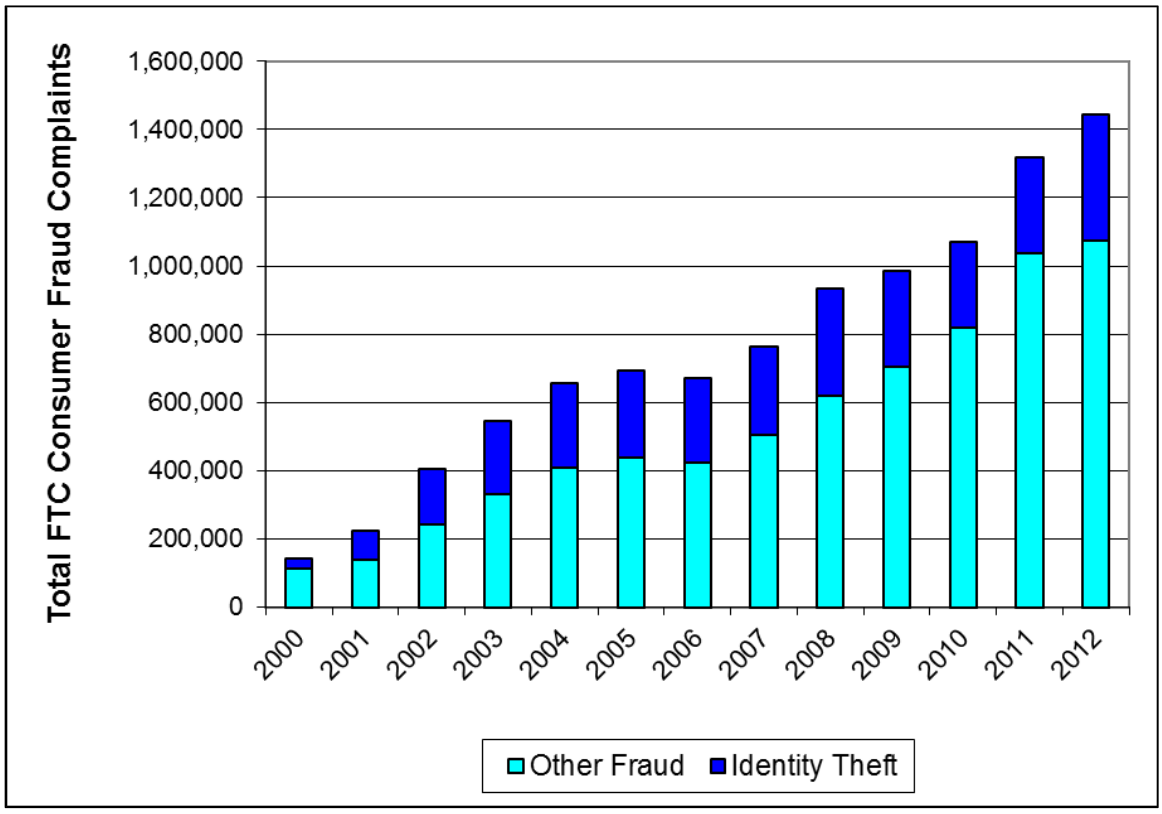
[42] Javelin Strategy & Research, *2013 Identity Fraud Report: Data Breaches Becoming a Treasure Trove for Fraudsters*, February 2013.

[43] Federal Trade Commission, *Consumer Sentinel Network Data Book for January–December 2012*, February 2013, http://www.ftc.gov/sentinel/reports/sentinel-annual-reports/sentinel-cy2012.pdf.

complaints received by the FTC between 2000 and 2012 in relation to the number of all other fraud complaints received. According to CRS analysis, since 2000, the number of identity theft complaints has averaged about 32% of the total number of consumer complaints received by the FTC.[44]

Figure 1. FTC Consumer Complaint Data

Identity Theft and Other Fraud for 2000-2012



Source: CRS presentation of FTC Identity Theft Clearinghouse data. Annual reports for each calendar year are available at http://www.ftc.gov/enforcement/consumer-sentinel-network/reports.

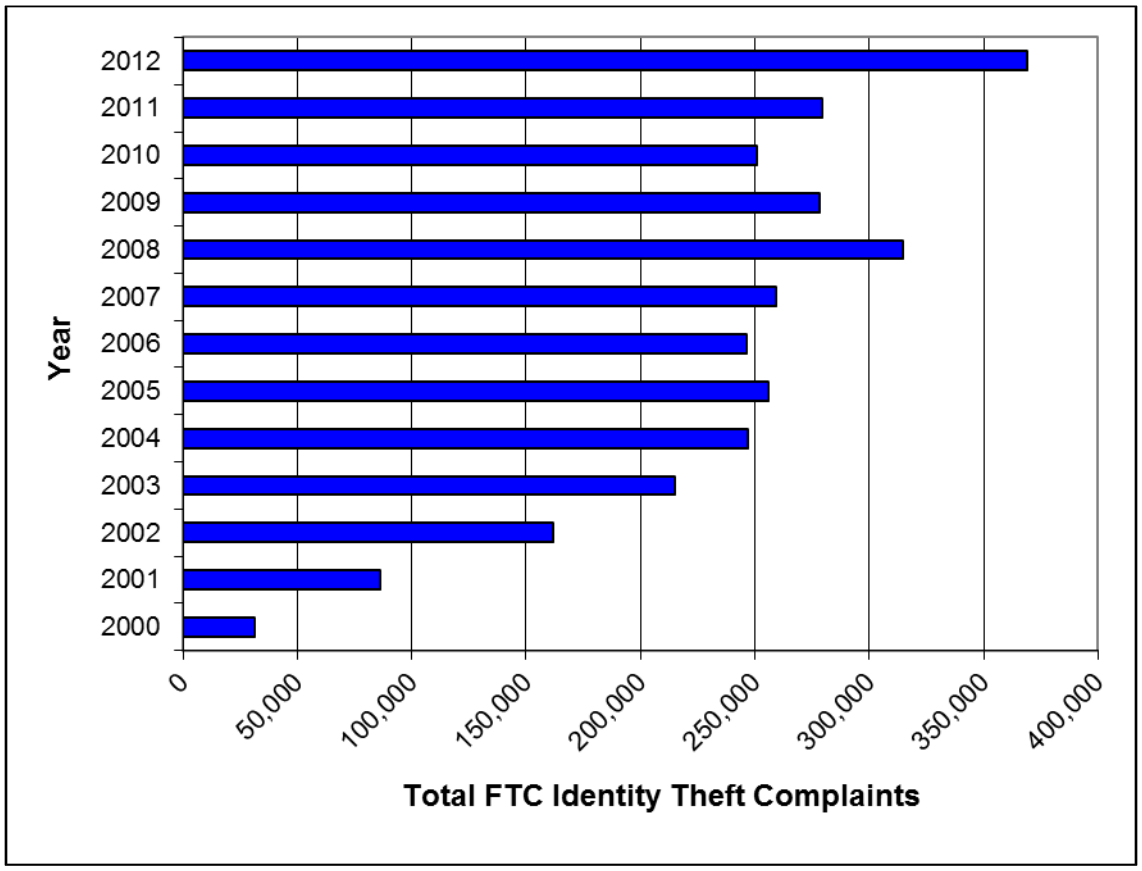
Notes: Data indicate the number of identity theft and other fraud complaints received by the FTC each calendar year. According to CRS analysis, between 2000 and 2012, the number of identity theft complaints has averaged about 32% of the total number of consumer complaints received by the FTC. The percentage has ranged between about 22% and about 40%.

Identity theft has remained the dominant consumer fraud complaint to the FTC. However, while the number of overall identity theft complaints generally increased between 2000 (when the commission began recording identity theft complaints) and 2008, the number of complaints decreased in both 2009 and 2010 before rising again in 2011 and 2012. **Figure 2** illustrates these trends in identity theft complaints reported to the FTC.

[44] Between 2000 and 2012, the proportion of consumer fraud complaints that are classified as identity theft complaints has ranged from about 22% to about 40%. The total number of identity theft and other fraud complaints reported to the FTC are available from the annual Identity Theft Clearinghouse Data reports, available at http://www.ftc.gov/enforcement/consumer-sentinel-network/reports.

Figure 2. FTC Identity Theft Complaint Data

2000-2012



Source: CRS presentation of FTC Identity Theft Clearinghouse data. Annual reports for each calendar year are available at http://www.ftc.gov/enforcement/consumer-sentinel-network/reports.

Notes: Data indicate the number of identity theft complaints received by the FTC each calendar year.

Perpetrators

Increasing globalization and the expansion of advanced technology have provided a challenging environment for law enforcement to both identify and apprehend identity thieves targeting persons residing in the United States. For one, these criminals may be operating from within U.S. borders as well as from beyond. There is no publically available information, however, delineating the proportion of identity theft (or other crimes known to be identity theft-related) committed by domestic and international criminals.[45] Secondly, while some identity thieves operate alone, others operate as part of larger criminal networks or organized crime syndicates. The FBI has indicated that it, for one, targets identity theft investigations on larger criminal networks.[46] These criminal networks may involve identity thieves located in various cities across

[45] Statistics are available on the proportion of cyber-related crimes committed by perpetrators from various countries. However, only a proportion of those crimes are identity theft crimes, and analysts therefore cannot reliably extrapolate the proportion of identity theft crimes committed by domestic and international criminals.

[46] Federal Bureau of Investigation, *Financial Crimes Report to the Public*, Fiscal Year 2006, http://www.fbi.gov/stats-services/publications/fcs_report2006.

the United States or in multiple cities around the world, and these criminals may be victimizing not only Americans, but persons living in countries across the globe. In a joint study by Verizon and international law enforcement partners, including the U.S. Secret Service, of selected data breaches of businesses around the globe during 2012, 55% of data breaches by external actors—sources outside the compromised organization—were attributed to organized crime.[47] It is unknown, however, how many of these records compromised by organized crime were used in identity theft and related crimes. A third challenge in identifying identity thieves is that perpetrators may operate under multiple identities including actual identities, various stolen identities, and cyber identities and nicknames.[48]

Investigations and Prosecutions

As mentioned earlier, identity theft is defined broadly, and it is directly involved in a number of other crimes and frauds. As a result, there are practical investigative implications that influence analysts' abilities to understand the true extent of identity theft in the United States. For instance, only a proportion (the exact number of which is unknown) of identity theft incidents are reported to law enforcement. While some instances may be reported to consumer protection agencies (e.g., the FTC), credit reporting agencies (e.g., Equifax, Experian, and Trans Union), and law enforcement agencies, some instances may be reported to only one. For example, the FTC indicates that of the 42% of identity theft complaints that included information on whether the theft was reported to law enforcement, 68% were reported to law enforcement.[49]

Another issue that may affect analysts' abilities to evaluate the true extent of identity theft is that law enforcement agencies may not uniformly report identity theft because crime incident reporting forms may not necessarily contain specific categories for identity theft. In addition, there may not be standard procedures for recording the identity theft component of the criminal violations of primary concern.[50] Issues such as these may lead to discrepancies between data available on identity theft reported by consumers, identity theft reported by state and local law enforcement, and identity theft investigated and prosecuted by federal law enforcement.

Various federal agencies are involved in investigating identity theft, including the Federal Bureau of Investigation (FBI), the U.S. Secret Service, the U.S. Postal Inspection Service, the Social Security Administration Office of the Inspector General (SSA OIG), and the U.S. Immigration and Customs Enforcement (ICE). In addition, federal law enforcement agencies may work on task forces with state and local law enforcement as well as with international authorities to bring identity thieves to justice. The Department of Justice (DOJ) is responsible for prosecuting federal identity theft cases.

[47] *2013 Data Breach Investigations Report*, Verizon, http://www.verizonenterprise.com/DBIR/2013/. Of note, external actors were involved in 98% of all data breaches.

[48] For a discussion of actor attribution issues related to cybercrime, see CRS Report R42547, *Cybercrime: Conceptual Issues for Congress and U.S. Law Enforcement*, by Kristin Finklea and Catherine A. Theohary.

[49] Federal Trade Commission, *Consumer Sentinel Network Data Book for January–December 2012*, February 2013, http://www.ftc.gov/sentinel/reports/sentinel-annual-reports/sentinel-cy2012.pdf.

[50] Graeme R. Newman and Megan M. McNally, "Identity Theft Literature Review," Prepared for presentation and discussion at the National Institute of Justice Focus Group Meeting to develop a research agenda to identify the most effective avenues of research that will impact on prevention, harm reduction and enforcement, Contract #2005-TO-008, January 2005, http://www.ncjrs.gov/pdffiles1/nij/grants/210459.pdf.

Federal Bureau of Investigation (FBI)

The FBI investigates identity theft primarily through its Financial Crimes Section. However, because the nature of identity theft is cross-cutting and may facilitate many other crimes, identity theft is investigated in other sections of the FBI as well. The FBI is involved in over 20 identity theft task forces and working groups around the country. It is also involved in over 80 other financial crimes task forces, which may also investigate cases with identity theft elements.[51] The FBI focuses its identity theft crime fighting resources on those cases involving organized groups of identity thieves and criminal enterprises that affect a large number of victims. The FBI partners with the National White Collar Crime Center (NW3C) to form the Internet Crime Complaint Center (IC3). The IC3 serves the broad law enforcement community to receive, develop, and refer Internet crime complaints—including those of identity theft.[52]

United States Secret Service

The Secret Service serves a dual mission of (1) protecting the nation's financial infrastructure and payment systems to safeguard the economy and (2) protecting national leaders.[53] In carrying out the former part of this mission, the Secret Service conducts criminal investigations into counterfeiting, financial crimes, computer fraud, and computer-based attacks on the nation's financial and critical infrastructures. The Secret Service has 43 Financial Crimes Task Forces and 33 Electronic Crimes Task Forces that investigate identity theft, as well as a number of other crimes.[54] In FY2012, the Secret Service arrested 4,277 suspects for crimes related to identity theft, and in FY2013, they arrested 3,868 such suspects.[55]

United States Postal Inspection Service

The U.S. Postal Inspection Service is the federal law enforcement arm of the Postal Service and is the lead federal investigative agency when identity thieves have used the postal system in conducting their fraudulent activities. The most recent Postal Inspection Service data indicate that in FY2012, the Postal Inspection Service sponsored 15 multi-agency task forces across the country that specialized in financial crimes, including identity theft. Further, postal inspectors arrested 627 identity theft suspects—from both Postal Inspection Service investigations and task force investigations in which the Postal Inspection Service was involved.[56] In addition to investigating identity theft, the Postal Inspection Service has been involved in delivering educational presentations to consumer groups to assist in preventing identity theft, and inspectors are involved in sponsoring outreach programs for victims of identity theft.[57] Examples of victim services include notifying victims of potential identity theft if the Postal Inspection Service discovers compromised identities as well as assisting in victim restitution by providing victims

[51] Federal Bureau of Investigation, *Financial Crimes Report to the Public*, Fiscal Year 2006, http://www.fbi.gov/publications/financial/fcs_report2006/publicrpt06.pdf.

[52] See the IC3 website at http://www.ic3.gov/default.aspx. Among the many Internet crimes reported to the IC3 are identity theft and phishing. Phishing refers to gathering identity information from victims under false pretenses, such as pretending to be a representative of a financial institution collecting personal information to update financial records.

[53] 18 U.S.C. §3056.

[54] Information provided to CRS by the Secret Service Office of Congressional Affairs, January 10, 2014.

[55] Ibid.

[56] Data provided to CRS by the USPIS Office of Congressional Affairs.

[57] U.S. Postal Inspection Service, *U.S. Postal Inspection Service Annual Report FY2010*, http://www.postalinspectorsvideo.com/uspis/AnnualReport2010.pdf.

money from the funds forfeited as a result of Postal Inspection Service identity theft investigations.[58]

Social Security Administration Office of the Inspector General (SSA OIG)

Because the theft and misuse of Social Security numbers (SSNs) is one of the primary modes of identity theft, the SSA OIG is involved in investigating identity theft. The SSA has programs to assist victims of identity theft who have had their SSNs stolen or misused by placing fraud alerts on their credit files, replacing Social Security cards, issuing new Social Security numbers in specific instances, and helping to correct victims' earnings records.[59] The SSA OIG protects the integrity of the SSN by investigating and detecting fraud, waste, and abuse. It also determines how the use or misuse of SSNs influences programs administered by the SSA. The SSA OIG is involved in providing a limited range of SSN verification for law enforcement agencies. Further, the SSA OIG maintains a hotline for consumers to report identity theft, and then these data are transferred to the FTC to be included in their consumer complaint database.[60]

Immigration and Customs Enforcement

The U.S. Immigration and Customs Enforcement (ICE) investigates cases involving identity theft, particularly immigration cases that involve document and benefit fraud. In 2006, ICE created Document and Benefit Fraud Task Forces (DBFTFs). These DBFTFs, located in 19 cities throughout the United States, are aimed at dismantling and seizing the financial assets of criminal organizations that threaten the nation's security by engaging in document and benefits fraud.[61]

Department of Justice

The U.S. Attorneys Offices (USAOs) prosecute federal identity theft cases referred by the various investigative agencies. CRS was unable to determine the proportion of identity theft cases referred to the USAOs by each investigative agency for several reasons. For one, some of the investigations reported by each agency are investigations conducted by a task force, to which several agencies may have contributed. Consequently, these investigations may be reported by each participating agency. If the total number of reported investigations from each agency were combined, it is likely that the overall number of identity theft investigations would be inflated because of double (or more) reporting of an investigation from multiple agencies. A second factor is that the USAOs do not track the proportion of case referrals by statute; rather, they track case referrals by program area. For instance, the proportion of identity theft (18 U.S.C. §1028) and aggravated identity theft (18 U.S.C. §1028A) case referrals from each agency are not tracked according to the charging statutes. Identity theft cases fall under several programmatic categories—including white collar crime and immigration—which also contain several other crimes. Thus, trends in federal identity theft and aggravated identity theft cases may be better

[58] U.S. Postal Inspection Service, *FY2007 Annual Report of Investigations of the United States Postal Inspection Service*, January 2008, pp. 16-17, https://postalinspectors.uspis.gov/radDocs/pubs/AR2007.pdf.

[59] Social Security Administration, *Identity Theft Fact Sheet*, October 2006, http://www.socialsecurity.gov/pubs/idtheft.htm.

[60] Information provided to CRS by the Social Security Administration, Office of the Inspector General, Office of Congressional Affairs.

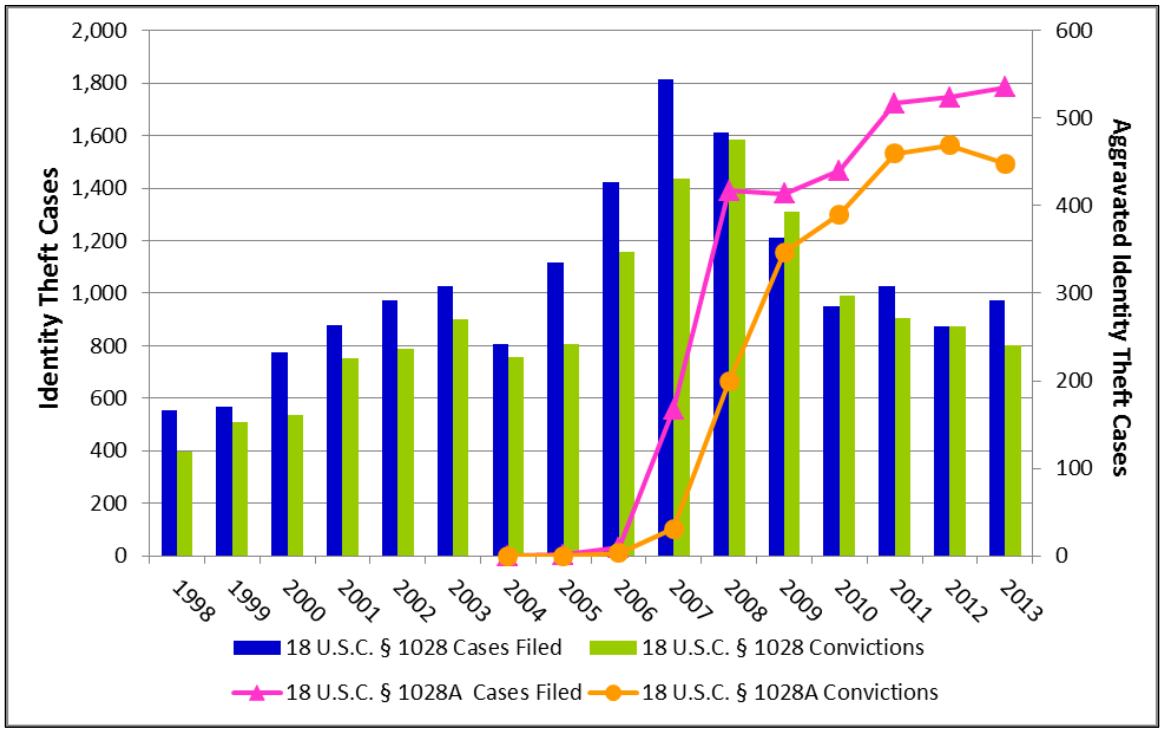
[61] U.S. Immigration and Customs Enforcement, *Document and Benefit Fraud Task Force (DBFTF)*, http://www.ice.gov/document-benefit-fraud/.

tracked by the number of total cases referred to and prosecuted by the USAOs, irrespective of the referring agency.

While the number of identity theft complaints to the FTC has fluctuated over the past several years, so too has the number of identity theft cases prosecuted by DOJ. **Figure 3** illustrates the number of identity theft (18 U.S.C. §1028) and aggravated identity theft (18 U.S.C. §1028A) cases filed[62] with the USAOs as well as convictions between FY1998 and FY2013.

Figure 3. Federal Identity Theft and Aggravated Identity Theft Cases

Cases Filed and Case Convictions FY1998-FY2013



Source: CRS analysis of data provided by the USAO, Congressional Affairs.

Notes: Identity theft cases filed and convictions are plotted on the left Y-axis while the aggravated identity theft cases filed and convictions are plotted on the right Y-axis. Identity theft is prosecuted under 18 U.S.C. §1028 and aggravated identity theft is prosecuted under 18 U.S.C. §1028A. Identity theft became a federal crime in 1998, and aggravated identity theft became a federal crime in 2004. Data include all cases filed with the USAOs containing an identity theft or aggravated identity theft violation, and are not limited to those cases where identity theft or aggravated identity theft is the lead charge. This includes data filed with the USAOs from all federal agencies.

The number of identity theft and aggravated identity theft cases *filed* both increased in FY2013 relative to FY2012; conversely, the number of identity theft and aggravated identity theft case *convictions* decreased in FY2013 relative to FY2012 levels. Identity theft case filings and convictions peaked in 2007 and 2008, and have generally declined since. Aggravated identity theft case filings and convictions, on the other hand, have largely continued to increase since aggravated identity theft was added as a federal offense in 2004. Still, if the identity theft and

[62] There may be multiple defendants in a case. Of note, **Figure 3** depicts the number of cases (rather than the number of *defendant* cases) prosecuted and the number of convictions for charges of identity theft and aggravated identity theft for FY1998 through FY2013.

aggravated identity theft data are combined, total case filings and convictions have mostly declined since 2008.

There are several possible explanations for these trends. One possibility is that there has been a decrease in the overall number of actual identity theft incidents, and law enforcement has been responding proportionally by arresting fewer identity thieves and filing fewer cases with the U.S. Attorneys' Offices. However, research indicating that the number of individuals victimized by identity thieves is actually continuing to increase, which would suggest this is not a viable explanation.[63] A second possibility is that there has actually been an increase in the number of identity theft incidents, but that either these criminals are evading federal law enforcement or law enforcement has dedicated fewer resources toward combating identity theft, which has resulted in decreased investigations and prosecutions. Yet another explanation may be that fewer perpetrators are actually impacting a greater number of victims. As criminals become more technologically savvy, they may be able to expand their reach to a greater number of victims.

As illustrated in **Figure 3**, the number of identity theft cases filed in FY2013, while larger than the number filed in FY2012, maintained the largely downward trend beginning in FY2008. This was accompanied by a sustained increase in aggravated identity theft case filings. Several factors could possibly contribute to these divergent trends. One explanation is that some cases in which defendants would have been charged with identity theft in earlier years may more recently have resulted in defendants being charged with aggravated identity theft. Therefore, a decrease in identity theft case filings may be complemented with an increase in aggravated identity theft case filings. As mentioned before, aggravated identity theft became a federal crime in 2004, and is reflected in **Figure 3** by the increase in aggravated identity theft case filings and convictions in later years.

Domestic Impact

As noted, survey data suggest that between 12.6 million and 16.6 million people may have been victimized by identity thieves and fraudsters in 2012.[64] And these are the known cases. The FTC recognizes two primary forms of identity theft: existing account fraud and new account fraud. Existing account fraud refers to the misuse of a consumer's existing credit card, debit card, or other account, while new account fraud refers to the use of stolen consumer identifying information to open new accounts in the consumer's name.[65] **Figure 4** illustrates the most common misuses of victims' identities.

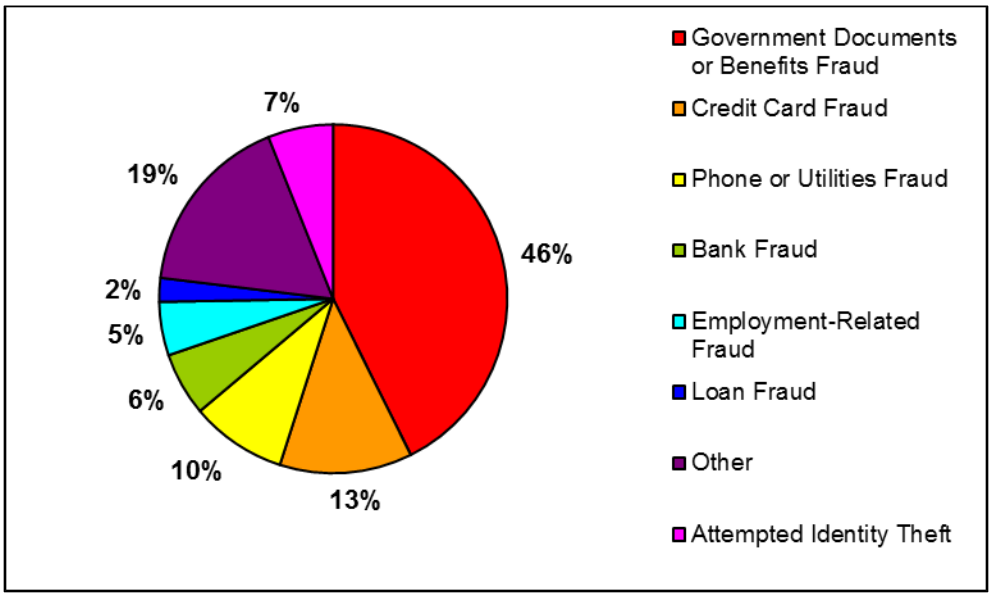
[63] Javelin Strategy & Research, *2013 Identity Fraud Report: Data Breaches Becoming a Treasure Trove for Fraudsters*, February 2013; Erica Karrell and Lynn Langton, *Victims of Identity Theft, 2012*, U.S. Department of Justice, Bureau of Justice Statistics, NCJ 243779, December 2013.

[64] Ibid.

[65] Federal Trade Commission, *Prepared Statement of the Federal Trade Commission Before the Subcommittee on Crime, Terrorism, and Homeland Security, House Committee on the Judiciary, on Protecting Consumer Privacy and Combating Identity Theft*, Washington, DC, December 18, 2007, p. 2, http://www.ftc.gov/os/testimony/P065404idtheft.pdf.

Figure 4. FTC Identity Theft Complaints, 2012

How Victims' Information is Misused



Source: Federal Trade Commission, *Consumer Sentinel Network Data Book for January–December 2012*, February 2013, http://www.ftc.gov/sentinel/reports/sentinel-annual-reports/sentinel-cy2012.pdf.

Notes: Of the 369,132 identity theft complaints received by the FTC in 2012, the most prevalent form of identity theft was government documents or benefits fraud. About 11% of the identity theft complaints received by the FTC involved more than one form of identity theft. For this reason, the sum of the various types of identity theft included in the figure amounts to greater than 100%. Also, within in the category "other," are complaints of victims' identities being misused across subcategories including Internet/email, data breach, evading the law, medical, apartment/house rented, insurance, securities/other investments, property rental fraud, child support, magazines, bankruptcy, miscellaneous, and uncertain. The uncertain subcategory alone accounts for about 8% of all identity theft complaints.

Between 2000—when the FTC began tracking identity theft complaints—and 2008, the FTC consistently reported that the most common misuse of a victim's identity was credit card fraud.[66] In 2008, government documents and benefits fraud became the second most prevalent misuse of a victim's identity, and in 2010, it became the most prevalent—remaining the leading category in 2012.[67] Within the documents/benefits fraud category, the FTC has reported a particularly large increase in identity theft related to tax return fraud. And, tax return-related fraud was involved in about 43% of the identity theft complaints received by the FTC in 2012 and about 24% of these complaints in 2011.[68]

Identity theft and the various crimes it facilitates affect the economy and national security of the United States. Selected crimes facilitated by identity theft are outlined in the section below.

[66] Although there are estimates regarding the cost of identity theft to consumers, CRS was unable to locate any comprehensive, reliable data on the costs of identity theft (separate from the total cost of financial fraud) to the credit card industry.

[67] Federal Trade Commission, *Consumer Sentinel Network Data Book for January–December 2012*, February 2013, http://www.ftc.gov/sentinel/reports/sentinel-annual-reports/sentinel-cy2012.pdf.

[68] Ibid.

Credit Card Fraud[69]

After a victim's identity is stolen, the primary criminal use of this information is credit card fraud. Beyond amassing charges on a victim's credit card, identity thieves may sometimes change the billing address so that the victim will not receive the bills and see the fraudulent charges, allowing the thief more time to abuse the victim's identity and credit. If a victim does not receive the bill, and therefore does not pay it, this could adversely affect the victim's credit. In addition to abusing existing credit card accounts, a thief could also open new accounts in the victim's name, incurring more charges on the victim's line of credit. These actions could in turn affect not only the victim's immediate pocketbook, but future credit as well. The Identity Theft Resource Center (ITRC) has predicted that organized crime groups will become more involved in identity theft-related crime such as credit card fraud and that these crimes will become increasingly transnational.[70] As mentioned, criminals are no longer constrained by physical borders, and they can victimize U.S. persons and businesses both from within the United States and from beyond.

- In February 2011, Operation Power Outage led to the arrest of 83 individuals associated with Armenian Power, an Armenian and Eastern European transnational criminal organization. These individuals were allegedly involved in a range of criminal activities including credit card fraud. One scheme is reported to have used skimming devices, secretly installed on cash register machines, to steal customer account information. This information was subsequently used to create counterfeit credit and debit cards.[71] In September 2013, eight individuals pleaded guilty to charges "relating to the activities of the Armenian Power criminal enterprise," and 51 persons "previously pleaded guilty for their roles."[72]

Document Fraud[73]

Identity thieves can use personally identifiable information to create fake or counterfeit documents such as birth certificates, licenses, and Social Security cards. One way that thieves can use the stolen information is to obtain government benefits in a victim's name. This directly affects the victim if the victim attempts to legitimately apply for benefits and then is denied because someone else may already be (fraudulently) receiving those benefits under the victim's name. The creation of fraudulent documents may, among other things, provide fake identities for unauthorized immigrants[74] living in the United States or fake passports for people trying to

[69] Credit card fraud is codified at 18 U.S.C. §1029.

[70] Identity Theft Resource Center, *ITRC Forecasts Black Ice Ahead in 2011*, December 15, 2010, http://www.idtheftcenter.org/artman2/publish/m_press/ITRC_Forecasts_for_2011.shtml.

[71] Federal Bureau of Investigation, *Operation Power Outage: Armenian Organized Crime Group Targeted*, April 3, 2011, http://www.fbi.gov/news/stories/2011/march/armenian_030311/armenian_030311.

[72] Federal Bureau of Investigation, *Eight Defendants Plead Guilty in Los Angeles in Armenian Power Gang Case*, September 11, 2013, http://www.fbi.gov/losangeles/press-releases/2013/eight-defendants-plead-guilty-in-los-angeles-in-armenian-power-gang-case.

[73] Document fraud is codified at 18 U.S.C. §1028. The statutory definition of identity theft is found within this section of the Code at 18 U.S.C. §1028(a)(7).

[74] A complete discussion of immigration-related document fraud is outside the scope of this report, but more information can be found in CRS Report RL32657, *Immigration-Related Document Fraud: Overview of Civil, Criminal, and Immigration Consequences*, by Michael John Garcia; and archived CRS Report RL34007, *Immigration Fraud: Policies, Investigations, and Issues*, by Ruth Ellen Wasem.

illegally enter the United States. In addition, DOJ has indicated that identity theft is implicated in international terrorism. In May 2002, former Attorney General John Ashcroft stated that

> [I]dentity theft is a major facilitator of international terrorism. Terrorists have used stolen identities in connection with planned terrorist attacks. An Algerian national facing U.S. charges of identity theft, for example, allegedly stole the identities of 21 members of a health club in Cambridge, Massachusetts, and transferred the identities to one of the individuals convicted in the failed 1999 plot to bomb the Los Angeles International Airport.[75]

Identity theft and resulting document fraud can thus have not only an economic impact on the United States, but a national security impact as well.

- In September 2013, three defendants pleaded guilty for their roles in "a sophisticated scheme to produce and sell high-quality false identification documents throughout the nation ... generating profits of more than $3 million over several years."[76] The fraudsters, through their illegitimate business, "Novel Design," sold over 25,000 fraudulent driver's licenses throughout the nation. They even outsourced some of the manufacturing of these fake documents to entities in Bangladesh and China.

Employment Fraud

Identity theft can facilitate employment fraud if the thief uses the victim's personally identifiable information to obtain a job. With the recent elevated levels of unemployment,[77] policymakers may wish to monitor trends in employment fraud. This form of fraud could adversely affect a victim's credit, ability to file his or her taxes, and ability to obtain future employment, among other things. Not only can identity theft lead to employment fraud, but employment fraud may be a means to steal someone's identity. Identity thieves may use scams that falsely advertise employment as a means to phish for personally identifiable information. The thief can then use this information to commit other crimes while the job-seeking individual remains unemployed and victimized.

Data Breaches and Identity Theft

The Identity Theft Resource Center (ITRC) is one organization that tracks data breaches across the nation, and the resulting statistics indicate that the total number of reported data breaches generally increased between 2005 and 2008 and then fluctuated through 2013 (during which year, there were 619 reported breaches).[78] **Figure 5** illustrates this trend. Breaches are recorded across

[75] Department of Justice, *Transcript of Attorney General Remarks at Identity Theft Press Conference Held With FTC Trade Commission Chairman Timothy J. Muris and Senator Diane Feinstein*, DOJ Conference Center, May 2, 2002, http://www.usdoj.gov/archive/ag/speeches/2002/050202agidtheftranscript.htm. Also cited in U.S. General Accounting Office, *Identity Fraud: Prevalence and Links to Alien Illegal Activities*, GAO-02-830T, June 25, 2002, p. 9, http://www.gao.gov/new.items/d02830t.pdf.

[76] Federal Bureau of Investigation, *Three Accused of Operating Fake ID Ring Plead Guilty*, September 4, 2013, http://www.fbi.gov/richmond/press-releases/2013/three-accused-of-operating-fake-id-ring-plead-guilty.

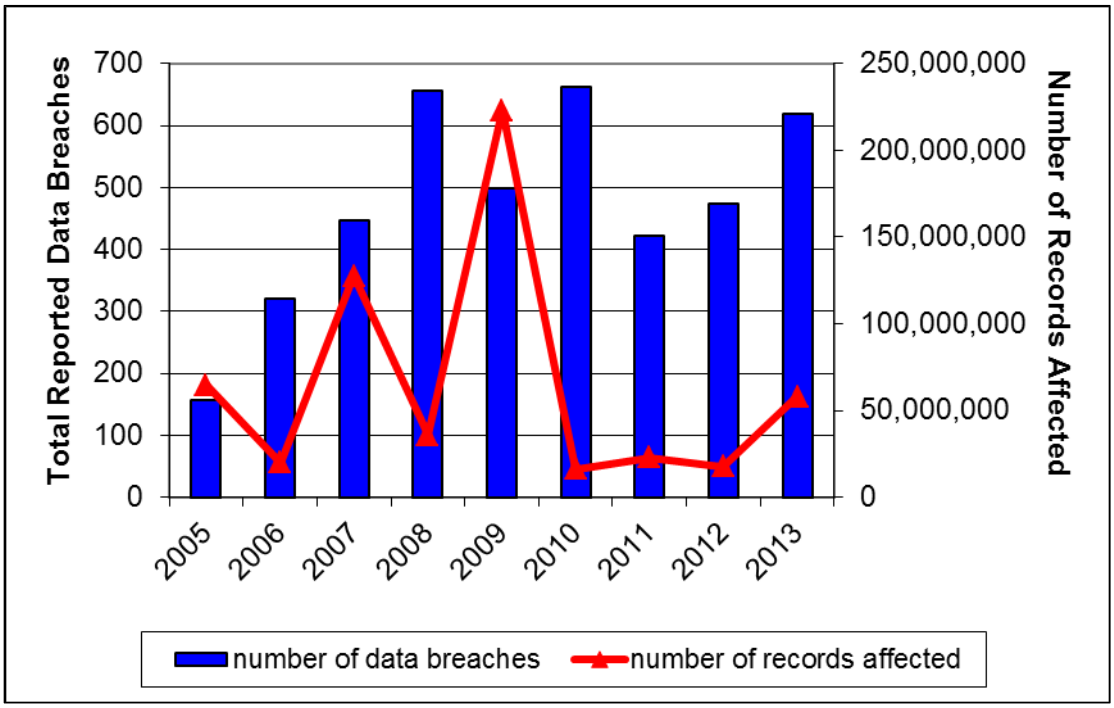
[77] According to the Bureau of Labor Statistics (BLS), the unemployment rate remained at or above 7.0% between December 2008 and November 2013 (peaking at 10.0% in October 2009). In December 2013, the unemployment rate dropped to 6.7%. See http://data.bls.gov/timeseries/LNS14000000.

[78] Identity Theft Resource Center, *2013 Breach Stats*, January 1, 2014, http://www.idtheftcenter.org/images/breach/2013/ITRC_Breach_Stats_Report_2013.pdf. The IRTC indicates that the criteria for qualifying as a data breach is "[a]ny name or number that may be used, alone or in conjunction with other information, to identify a specific

five industries: banking/credit/financial, business, educational, government/military, and medical/healthcare. In 2013, the medical/healthcare industry experienced the greatest number of data breaches (43.1%) for the first time since the ITRC began tracking this information in 2005 (from 2007-2012, the business sector had filled this top spot). The medical sector was followed in number of breaches by the business (33.9%), government (10.2%), educational (9.0%), and banking (3.7%) sectors.

Figure 5. Total Number of Reported Data Breaches and Records Affected

2005-2013



Source: CRS analysis of data provided by the Identity Theft Resource Center, available at http://www.idtheftcenter.org/id-theft/data-breaches.html.

Notes: Breaches are recorded across five primary industries: banking/credit/financial, business, educational, government/military, and medical/healthcare.

Several factors may influence the number of reported breaches. One such factor may be the increasing number of states that have enacted laws requiring data breach notification.[79] California was the first state to enact such legislation in 2002. As of December 2013, 46 states, the District of Columbia, Guam, Puerto Rico, and the U.S. Virgin Islands have enacted data breach notification laws.[80] The increasing prevalence of state laws requiring breach notification could

individual, including: name, Social Security number, date of birth. Banking or financial account number, credit card or debit card number with or without a PIN, official state or government issued driver's license or identification number, passport identification number, alien registration number, employer or taxpayer identification number, or insurance policy or subscriber numbers; unique biometric data; [or] electronic identification number, address or routing code or telecommunication identifying information or device."

[79] For more information on data breach notification laws affecting the private and public sectors, see CRS Report RL34120, *Federal Information Security and Data Breach Notification Laws*, by Gina Stevens.

[80] National Conference of State Legislatures, *State Security Breach Notification Laws*, http://www.ncsl.org/research/telecommunications-and-information-technology/security-breach-notification-laws.aspx.

lead to an increase in reported breaches to law enforcement, media, or the individuals affected. Nonetheless, the actual number of data breaches remains underreported, and the number of reported breaches does not reflect the magnitude of data breaches. Because of these factors, analysts are unable to say with certainty whether the increase in the number of reported data breaches in 2013 is an accurate reflection of the trend in data breaches.

Furthermore, the number of records affected by each data breach is variable, and in many cases unknown. In 2013, for example, at least 57,868,922 records were put at risk, but information on the exact number of records exposed was only available for 366 (about 59%) of the 619 reported data breaches.[81] Of note, however, "due to the mandatory reporting requirement for healthcare industry breaches affecting 500 or more individuals, 84% of [the] healthcare breaches publicly stated the number of records exposed."[82]

Because available data on known data breaches and reported identity theft incidents are not comprehensive, and because year-to-year changes in one measure may not trend with changes in the other, it can be difficult to determine whether there is a relationship between the two. Intuitively, the data breaches and identity theft may seem to correlate, but some analysts have found that the link may not be very strong. There are several ways to analyze the relationship between data breaches and identity theft. One is to examine the set of data breach victims and determine the proportion of those victims that are also victims of identity theft. Some claim that data breaches are a direct cause of identity theft and may rely on this position to advocate the need for increased data security and data breach notification laws to protect consumers and help with quickly mitigating any potential damage from such data breaches. Meanwhile, other experts claim that less than 1% of data breach victims are also victims of identity theft.[83] Some may use this data to argue against the need for increased data security and breach notification laws, suggesting that such laws could produce a larger cost for businesses than prevention for consumers. Results from one study note that 25% of surveyed individuals had, at some point, received a "notification about a data breach that involved the loss or theft of their personal information" (and 51% of respondents couldn't recall whether they had received such a notification.[84] And, Javelin Strategy & Research data suggest that nearly one in four (22.5%) individuals receiving breach notifications became victims of fraud.[85]

Another means to evaluate the relationship between data breaches and identity theft is to examine identity theft victims and analyze the proportion of those victims whose identity was stolen as a result of a data breach. Javelin Strategy and Research found that about 11% of victims' identities that were stolen had been under the control of a company and were stolen from the company through methods such as data breaches. Most victims (65%) did not know how their identities had been stolen, and some proportion of these could have occurred as a result of a data breach.[86]

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[81] Identity Theft Resource Center, *2013 Breach Stats—Known vs. Unknown Totals*, January 1, 2014, http://www.idtheftcenter.org/images/breach/2013/KnownvsUnknownSummary2013.pdf.

[82] Identity Theft Resource Center, *2013 Data Breaches*, http://www.idtheftcenter.org/ITRC-Surveys-Studies/2013-data-breaches.html.

[83] Findings from Javelin Strategy & Research cited in Ben Worthen, "Cardholders Buy Peace of Mind, If Not Security," *The Wall Street Journal*, March 10, 2009, p. D1.

[84] Ponemon Institute LLC, *2012 Consumer Study on Data Breach Notification*, Sponsored by Experian Data Breach Resolution, June 2012, p. 3.

[85] Javelin Strategy & Research, *2013 Identity Fraud Report: Data Breaches Becoming a Treasure Trove for Fraudsters*, February 2013.

[86] Rachel Kim, *2009 Identity Fraud Survey Report: Consumer Version*, Javelin Strategy & Research, February 2009, http://www.javelinstrategy.com.

Synovate conducted a similar study on behalf of the FTC and found that about 12% of victims' stolen identities had been under the control of a company and were thus accessed via a data breach.[87] The Center for Identity Management and Information Protection at Utica College evaluated identity theft cases handled by the U.S. Secret Service between 2002 and 2006 and found that in nearly 27% of the cases, a breach of company-controlled data was the source of the identity theft.[88]

It appears that the stronger relationship between identity theft and data breaches is found when analyzing identity theft victims whose data were obtained through a data breach rather than in analyzing data breaches that result in identity theft. In efforts to curb identity theft, policymakers are left with the issue of how to target data breaches. The question is whether the federal government's role in curbing identity theft should be more preventative, more responsive, or both. One policy option may be for Congress to increase data security for the purpose of preventing those data breaches that could potentially result in identity theft. Congress has already enacted data breach laws targeting certain components of the public and private sectors, such as the Veterans Administration and healthcare providers.[89] Another option could be for Congress to dedicate resources to assisting victims of identity theft and providing sufficient deterrence and punishment measures (in the form of penalties or sanctions). These options are analyzed further below.

Potential Issues for Congress

As Congress debates means to prevent identity theft, mitigate the potential effects of identity theft, and investigate and prosecute identity thieves, there are several issues policymakers may wish to consider. One issue surrounds the extent to which reducing the availability of SSNs may reduce the prevalence of identity theft. A second issue involves the degree to which increasing breach notification requirements may reduce both identity theft and the monetary burden incurred by victims. Yet another issue concerns the adequacy of (1) the current legal definitions of identity theft and aggravated identity theft and (2) the list of predicate offenses for aggravated identity theft.

Identity Theft Prevention

Policymakers may question what the extent of the federal government's role should be in preventing identity theft. One element of this discussion centers around the fact that identity theft is often committed to facilitate other crimes and frauds (e.g., credit card fraud, document fraud, and employment fraud). Consequently, preventing identity theft could proactively prevent other

[87] Synovate, *Federal Trade Commission: 2006 Identity Theft Survey Report*, November 2007, http://www.ftc.gov/os/2007/11/SynovateFinalReportIDTheft2006.pdf.

[88] Gary R. Gordon, Donald J. Rebovich, and Kyung-Seok Choo, et al., *Identity Fraud Trends and Patterns: Building a Data-Based Foundation for Proactive Enforcement*, Center for Identity Management and Information Protection, Utica College, OJP, BJA Grant No. 2006-DD-BX-K086, October 2007, http://www.utica.edu/academic/institutes/ecii/publications/media/cimip_id_theft_study_oct_22_noon.pdf.

[89] For example, the Veterans Affairs Information Security Act, Title IX of P.L. 109-461 requires the Veterans Administration (VA) to implement an information security program to protect its sensitive personal information. For more information, see CRS Report RL34120, *Federal Information Security and Data Breach Notification Laws*, by Gina Stevens. Also, the Health Information Technology for Economic and Clinical Health (HITECH) Act, in P.L. 111-5, established—among other things—a notification requirement for a breach of non-encrypted health information. For further information on the HITECH Act, see CRS Report R40161, *The Health Information Technology for Economic and Clinical Health (HITECH) Act*, by C. Stephen Redhead.

crimes. When policymakers consider the federal government's role in preventing identity theft, they necessarily consider the government's role in preventing interrelated crimes.

Congress may also consider the various means available to prevent identity theft and evaluate the federal government's role—if any—in implementing them. Possible ways to prevent identity theft include securing data in the private sector, securing data in the public sector, and improving consumer authentication processes.[90]

Securing Social Security Numbers

The prevalence of personally identifiable information—and in particular, of Social Security numbers (SSN)—has been an issue concerning policymakers, analysts, and data security experts.[91] There are few restrictions on the use of SSNs in the private sector, and therefore the use of SSNs is widespread.[92] Some industries, such as the financial services industry, have stricter requirements for safeguarding personally identifying information. There are greater restrictions on the use of SSNs in the public sector, as Congress has already taken direct steps in reducing the prevalence of SSNs in this arena. For example, in the Intelligence Reform and Terrorism Prevention Act of 2004 (P.L. 108-458), Congress prohibited states from displaying or electronically including SSNs on driver's licenses, motor vehicle registrations, or personal identification cards. One document that continues to display SSNs, however, is the Medicare identification card. Congress may consider whether the continued display of SSNs on Medicare cards places individuals at undue risk for identity theft as well as for becoming a victim of other crimes facilitated by identity theft and whether it should enact legislation to prohibit the display of SSNs on Medicare cards. Proponents of legislation to remove SSNs from Medicare cards cite reports that as of 2013, approximately 50 million Medicare cards displayed Social Security numbers, potentially placing these individuals at risk for identity theft.[93] Opponents of such legislation may cite that transitioning to a different Medicare identifier has most recently been estimated to cost between $255 million and $317 million.[94]

Another policy option to safeguard personally identifiable information that Congress may consider is increasing restrictions on the disclosure of certain forms of personally identifiable information, such as SSNs, in connection with federally funded grant programs. One example of Congress taking such action is in the Violence Against Women and Department of Justice Reauthorization Act of 2005 (P.L. 109-162). Provisions in this act prohibit grantees that receive funds under the Violence Against Women Act of 1994 from disclosing certain personally identifiable information—including SSNs—collected in connection with services through the grant program.[95] Congress may consider whether existing SSN restrictions for federal grant recipients are sufficient or whether the federal government should play a larger role in limiting

[90] The President's Identity Theft Task Force, *Combating Identity Theft: A Strategic Plan*, April 23, 2007, http://www.identitytheft.gov/reports/StrategicPlan.pdf.

[91] For a complete discussion of the collection, disclosure, and confidentiality of Social Security numbers, see CRS Report RL30318, *The Social Security Number: Legal Developments Affecting Its Collection, Disclosure, and Confidentiality*, by Kathleen S. Swendiman.

[92] U.S. Government Accountability Office, *Social Security Numbers: Use is Widespread and Protection Could be Improved*, GAO-07-1023T, June 21, 2007, http://www.gao.gov/new.items/d071023t.pdf.

[93] U.S. Government Accountability Office, *Medicare Information Technology: Centers for Medicare and Medicaid Services Needs to Pursue a Solution for Removing Social Security Numbers from Cards*, GAO-13-761, September 2013, p. 2.

[94] Ibid., p. 14.

[95] 42 U.S.C. §13925.

the use of SSNs—and more specifically, whether it should set limitations as part of eligibility requirements for federal assistance.

The Government Accountability Office (GAO) has identified vulnerabilities in federal laws protecting personally identifiable information—and specifically, SSNs—across industries. For one, some industries, such as the financial services industry, have more restrictions on safeguarding this information, while information resellers are not covered by the same restrictions.[96] In order to reduce discrepancies across industries, one policy option may be to provide certain federal agencies with authority to curb the prevalence of SSN use in the private sector; for example, GAO has recommended that Congress provide SSA with the authority to enact standards for uniformly truncating SSNs so that the entire nine-digit numbers are not as readily available.[97] A similar option may be to provide the Attorney General, the FTC, or the SSA with the authority to set rules and standards for the sale and purchase of SSNs.

Others have suggested that policies should be focused on *eliminating* the use of SSNs as authenticators rather than on *securing* their use. The premise is that SSNs are often public information and, if not already available, they can be predicted with relative ease.[98] For instance, researchers have demonstrated how the public availability of names and birth data allow for SSN predictability and subsequent vulnerability. As such, some have recommended that efforts not be focused on securing SSNs that are often already public and predictable. Rather, they have suggested that private sector entities abandon the SSN in favor of an alternative identity authenticator.[99]

Effects of Data Breaches

One issue that Congress may consider involves the relationship between data breaches and identity theft. Although there is not a large body of research examining this relationship, existing data suggest that between 12%[100] and 27%[101] of identity theft incidents may result from data breaches. However, this proportion is truly unknown because most victims of identity theft do not know precisely how their personally identifiable information was acquired. In order to prevent any proportion of identity theft that may result from data breaches, or to mitigate the extent of the damage resulting from breach-related identity theft, Congress may wish to consider whether to strengthen data breach notification requirements. Such requirements could affect both the notification of the relevant law enforcement authorities as well as the notification of the individual whose personally identifiable information may be at risk from the breach.

Proponents of increasing breach notification requirements point to research on recent trends in identity theft and the resulting monetary loss. As mentioned, the sooner people become aware that

[96] U.S. Government Accountability Office, *Social Security Numbers: Use is Widespread and Protection Could be Improved*, GAO-07-1023T, June 21, 2007, pp. 12-13, http://www.gao.gov/new.items/d071023t.pdf.

[97] Ibid.

[98] See, for example, Alessandro Acquisti and Ralph Gross, "Social Insecurity: The Unintended Consequences of Identity Fraud Prevention Policies," http://www.heinz.cmu.edu/~acquisti/papers/acquisti-MISQ.pdf.

[99] Ibid.

[100] Synovate, *Federal Trade Commission: 2006 Identity Theft Survey Report*, November 2007, http://www.ftc.gov/os/2007/11/SynovateFinalReportIDTheft2006.pdf.

[101] Gary R. Gordon, Donald J. Rebovich, and Kyung-Seok Choo, et al., *Identity Fraud Trends and Patterns: Building a Data-Based Foundation for Proactive Enforcement*, Center for Identity Management and Information Protection, Utica College, OJP, BJA Grant No. 2006-DD-BX-K086, October 2007, http://www.utica.edu/academic/institutes/ecii/publications/media/cimip_id_theft_study_oct_22_noon.pdf.

they are victims of identity theft, the faster they take compensatory steps to mitigate the damage.[102] Proponents also argue that placing enhanced reporting requirements on industries may influence businesses to increase their data security standards, which could, in effect, decrease data breaches and any possibly resulting identity theft. Results from one study suggest that the adoption of state-level data breach disclosure laws could reduce the identity theft from these breaches by, on average, 6.1%.[103] On the other hand, opponents of increasing notification requirements point to research suggesting that the percentage of data breaches that result in identity theft could be less than 1%, as previously discussed.[104] Opponents may then argue that the costs that businesses could incur from increased notification (in terms of dollars and personnel time) could thus exceed the costs incurred by potential identity theft victims from the small proportion of data breaches that may actually result in identity theft.

In addition to strengthening post-breach notification requirements, another policy option aimed at decreasing data breach-related identity theft involves strengthening data security. Several options to reduce the availability of personally identifiable information were discussed in the preceding section. However, a broader data security issue concerns overall information security. Because many incidents of identity theft may occur over the Internet, enhancing cyber security measures could reduce the incidents of identity theft.[105]

Deterrence and Punishment

As mentioned, identity theft is broadly defined in current law. This is in part because it is a facilitating crime, and the criminal act of stealing someone's identity often does not end there. Consequently, investigating and prosecuting identity theft often involves investigating and prosecuting a number of related crimes. In light of this interconnectivity, the President's Identity Theft Task Force recommended expanding the list of predicate offenses for aggravated identity theft, as discussed earlier.[106] The task force specifically suggested adding identity theft-related crimes such as mail theft,[107] counterfeit securities,[108] and tax fraud.[109] However, the task force did not cite specific data to support the claim that these specifically mentioned crimes are in fact those most often related to (either facilitating or facilitated by) identity theft. If Congress considers expanding the list of predicate offenses for aggravated identity theft, it may request that the U.S. Attorneys as well as the appropriate investigative agencies (e.g., FBI, USSS, ICE, and USPIS) provide a report detailing the relationship between identity theft and other federal crimes

[102] Javelin Strategy & Research, "Latest Javelin Research Shows Identity Fraud Increased 22 Percent, Affecting Nearly Ten Million Americans: But Consumer Costs Fell Sharply by 31 Percent," press release, February 9, 2009, http://www.javelinstrategy.com/2009/02/09/latest-javelin-research-shows-identity-fraud-increased-22-percent-affecting-nearly-ten-million-americans-but-consumer-costs-fell-sharply-by-31-percent/.

[103] Sasha Romanosky, Rahul Telang, and Alessandro Acquisti, "Do Data Breach Disclosure Laws Reduce Identity Theft?," *Journal of Policy Analysis & Management*, vol. 30, no. 2 (April 1, 2011), pp. 256-286.

[104] Findings from Javelin Strategy & Research cited in Ben Worthen, "Cardholders Buy Peace of Mind, If Not Security," *The Wall Street Journal*, March 10, 2009, p. D1.

[105] A complete discussion of relevant cyber security issues is outside the scope of this report. However, see CRS Report R42507, *Cybersecurity: Authoritative Reports and Resources, by Topic*, by Rita Tehan as a resource for relevant CRS products.

[106] The President's Identity Theft Task Force, *Combating Identity Theft: A Strategic Plan*, April 23, 2007, at http://www.identitytheft.gov/reports/StrategicPlan.pdf.

[107] 18 U.S.C. §1708.

[108] 18 U.S.C. §513.

[109] 26 U.S.C. §7201, 7206-7207.

not yet codified as predicate offenses. A second question that Congress may raise if it considers expanding the list of predicate offenses regards which identity theft-related crimes may most affect national priorities such as economic health and national security.

As more information is stored online by individuals and organizations, there is a risk that online identity thieves may take advantage of this large body of data. And there need not be an increasing number of data breaches in order for criminals to reach a large pool of information. As illustrated in **Figure 5**, the number of reported data breaches does not necessarily trend with the number of potentially exposed records. As mentioned, the range of potential victims includes not only individuals but organizations as well. The task force cites "phishing" as a means by which identity thieves assume the identity of a corporation or organization in order to solicit personally identifiable information from individuals.[110] For reasons such as this, the task force recommended that Congress clarify the identity theft and aggravated identity theft statutes to cover both individuals and organizations targeted by identity thieves.

Author Information

Kristin Finklea
Specialist in Domestic Security

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[110] The President's Identity Theft Task Force, *Combating Identity Theft: A Strategic Plan*, April 23, 2007, pp. 91-92.

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SBA Disaster Loan Credit Standards, Collateral Requirements, and Debt Collection

May 27, 2026

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Committees of Congress

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SBA Disaster Loan Credit Standards, Collateral Requirements, and Debt Collection

SUMMARY

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May 27, 2026

Anthony A. Cilluffo
Analyst in Public Finance

Bruce R. Lindsay
Specialist in American National Government

Maria Kreiser
Senior Research Librarian

The U.S. Small Business Administration (SBA) provides low-interest, long-term loans to disaster survivors to allow them to repair or replace uninsured or underinsured property. About 80% of SBA disaster loans are made to individuals, either for real property damage (such as that to a house) or for personal property damage (such as that to a vehicle or other personal belongings). The other 20% of disaster loans are made to businesses and private nonprofit organizations, either to cover physical damage to business property or to cover financial obligations that could have been met had the disaster not occurred.

In designing the disaster loan program, Congress and the SBA have sought to balance "sympathetic consideration" of the needs and circumstances of disaster survivors with the need to maintain program integrity and protect the federal government's financial interests. Three key factors in this balance are (1) the credit standards required to obtain a disaster loan; (2) the amount and quality of collateral required to be pledged to secure a disaster loan; and (3) debt collection processes followed after default. Together, credit, collateral, and collection policies are designed to keep loan performance and program losses at levels that are deemed acceptable by Congress and the SBA.

To secure an SBA disaster loan, an applicant must demonstrate that they are reasonably likely to repay the loan. The SBA relies on an applicant's credit score to determine whether the applicant has an acceptable credit history; the applicant's credit score further determines whether the applicant is eligible for a loan, what level of processing is required, and whether the applicant likely has access to credit elsewhere (which determines the loan's interest rate). The applicant's repayment ability is gauged on the applicant's income and existing debt. Besides determining loan eligibility, the applicant's estimated repayment ability contributes to decisions regarding monthly payment amount and loan maturity date. The SBA uses a multistep process for loan applications that is designed to quickly decline applications with clearly unacceptable credit histories or little repayment ability; faster rejections allow the SBA to more quickly refer applicants to the Federal Emergency Management Agency (FEMA) for possible grant assistance.

Disaster loan applicants may be required to pledge specific assets as collateral for their loan. In the event of default, the SBA can seize and liquidate this collateral to repay the loan. Requiring more collateral for a loan may increase the likelihood that the SBA will be repaid or, after default, increase the amount the SBA is able to recover. However, higher collateral requirements may reduce access to the program by preventing applicants with insufficient collateral from accessing SBA disaster loans. Currently, disaster loans of $50,000 or less made for a *presidentially* declared major disaster do not require collateral. For disasters receiving declaration by the *SBA Administrator*, loans of $14,000 or less do not require collateral. For SBA home disaster loans that require collateral, the SBA's collateral requirements are more lenient than those of most private lenders. For these loans, the SBA typically takes the borrower's house as the only collateral, regardless of the house's available equity.

SBA business disaster loans have higher collateral requirements compared with SBA disaster loans for individuals or households. Businesses generally must have collateral with available equity at least equal to the value of the disaster loan. Business disaster loans also often require personal guarantees from business principals. Congress and the SBA have, at times, changed the dollar-value threshold above which borrowers are required to pledge collateral; usually, they have increased the threshold. Stated justifications for the changes—when provided—often mention the need to account for inflation occurring since the last change, or a desire to simplify the program.

In the case of loan default and liquidation of collateral, debt collection represents the last opportunity for the federal government to recover its capital. Before a loan defaults, the SBA uses a variety of tools, including financial hardship relief and loan modifications, to help borrowers return to making regular monthly payments. If those options fail, the SBA can refer the loan to the Department of the Treasury for enhanced debt collection efforts, including offsetting (holding back) the borrower's wages or federal payments to the borrower (such as federal tax refunds, contractor payments, or Social Security benefits). A borrower who defaults on an SBA disaster loan also becomes ineligible for most federal loans in the future.

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Introduction

The U.S Small Business Administration (SBA) has been a major source of disaster assistance since the agency was established in 1953. The SBA disaster loan program offers direct, low-interest, long-term loans for physical and economic damages to businesses, nonprofit organizations, and small agricultural cooperatives. The SBA also provides disaster loans to individuals and households.[1]

The SBA disaster loan program provides two types of disaster loans to small businesses and nonprofit organizations:

1. **Business physical disaster loans** provide businesses located in a declared disaster area with up to $2 million[2] to repair or replace damaged physical property, including machinery, equipment, fixtures, inventory, and leasehold improvements[3] that are not covered by insurance.
2. **Economic injury disaster loans (EIDLs)** provide businesses located in a declared disaster area with up to $2 million[4] to help meet financial obligations and operating expenses that could have been met had the disaster not occurred. EIDL proceeds can be used only for the working capital necessary to enable the business or organization to alleviate the specific economic injury and to resume normal operations. EIDL amounts are based on actual economic injury and financial needs, regardless of whether the business suffered any property damage.

Business physical disaster loans and EIDLs are collectively referred to as "SBA business disaster loans."

The SBA disaster loan program also provides two types of disaster loans to individuals and households:[5]

1. **Personal property disaster loans** provide creditworthy homeowners or renters located in a declared disaster area with up to $100,000 to repair or replace their damaged personal property.
2. **Real property disaster loans** provide creditworthy homeowners located in a declared disaster area with up to $500,000 to repair or restore their primary residence to its pre-disaster condition.

Personal property disaster loans and real property disaster loans are collectively referred to as "SBA home disaster loans."

[1] For more information about the Small Business Administration (SBA) disaster loan program, see CRS Report R44412, *SBA Disaster Loan Program: Frequently Asked Questions*, by Bruce R. Lindsay.

[2] The SBA can waive the $2 million maximum amount and provide a larger business physical disaster loan if the business is a major source of employment in the area and meets other requirements. See 15 U.S.C. §636d.

[3] Leasehold improvements are changes that a tenant makes to a commercial rental property to customize the property to the tenant's needs.

[4] The SBA can waive the $2 million maximum amount and provide a larger economic injury disaster loan (EIDL) if the business is a major source of employment in the area and meets other requirements. See 15 U.S.C. §636d.

[5] See the SBA's regulations for Home Disaster Loans (13 C.F.R. §§123.100-123.108); Physical Disaster Business Loans (13 C.F.R. §§123.200-204); and Economic Injury Disaster Loans (13 C.F.R. §123.300-123.303).

Historically, the majority of disaster loans provided by the SBA (roughly 80%) are for individuals and households.[6]

If the amount of an SBA disaster loan is above a certain threshold, an applicant must pledge collateral such as real estate, personal property, or other items of ascertainable value to secure the loan. The SBA uses collateral to minimize its risk by ensuring borrowers stay current on their financial commitment. Collateral also helps offset loan default losses. The SBA obtains rights to a borrower's collateral with a security agreement that outlines the steps the SBA may take if the borrower fails to repay the disaster loan. While the SBA will seek to secure any available collateral, it will not reject an applicant solely because the applicant cannot provide collateral to secure their loan.

The SBA typically secures its collateral interest by taking a lien against the applicant's property. The lien is recorded within the county or state in which the property is located.[7] The SBA does not require an applicant to pledge collateral if the loan amount (or aggregate loan amount) does not exceed the unsecured thresholds (also known as unsecured loan limits). The SBA does not require collateral for personal property disaster loans if the applicant does not own real estate (this usually occurs when the applicant is a renter).[8]

Following a disaster loan default, the SBA is required under the Debt Collection Improvement Act of 1996 (P.L. 104-134, as amended) to "maximize collections of delinquent debts owed to the Government by ensuring quick action ... and the use of all appropriate collection tools."[9] For the first several months following a missed payment, the SBA tries to get the borrower back to making regular monthly payments. Beyond the first few months after a missed payment, the SBA may begin debt collection efforts, including by liquidating collateral and referring the borrower to the Department of the Treasury.[10]

This report first provides an overview of SBA disaster loan budgeting, credit standards, and loan collateral requirements. As discussed later in this report, the amount of collateral required for a disaster loan depends on (1) what type of declaration is issued for the incident, and (2) the total amount of the disaster loan. This report then transitions to discussion of the SBA's policy for debt collection. For the purposes of this report, debt collection occurs when the borrower has become delinquent in making payments on their SBA disaster loan.

Overview of SBA Disaster Loan Budgeting[11]

Budgeting for the SBA disaster loan program is governed by the Federal Credit Reform Act of 1990 (FCRA; Subtitle B of Title XIII of P.L. 101-508). Under FCRA, the SBA records the expected lifetime cost of a disaster loan in the fiscal year that the loan is obligated. This amount,

[6] U.S. Congress, House Committee on Small Business, *Small Business Administration Disaster Assistance Program*, 2017, p. 1. More SBA disaster assistance was provided to small businesses than individuals and households in response to the economic impact of the Coronavirus disease 2019 (COVID-19). For more information about SBA disaster assistance for COVID-19, see CRS Report R46284, *COVID-19 Relief Assistance to Small Businesses: Issues and Policy Options*, by Bruce R. Lindsay, Adam G. Levin, and R. Corinne Blackford.

[7] The SBA sends a letter to the senior lien holder requesting advance notice of any foreclosure actions against the borrower if the lien is located in a "non-notice" state.

[8] Renters who own real estate are required to pledge the real estate as collateral for the loan.

[9] 31 U.S.C. §3701 note.

[10] SBA, *Disaster Loan Servicing and Liquidation*, SOP 50 52 2, September 1, 2015, https://www.sba.gov/sites/default/files/files/SOP_50_52_2_1.pdf (hereinafter SBA SOP 50 52 2).

[11] This section is largely drawn from CRS Report R48558, *SBA Disaster Loans Program Account: Overview and Policy Options*, by Bruce R. Lindsay and Anthony A. Cilluffo.

also known as a *credit subsidy*, is the amount by which the federal government's disbursements exceed amounts received over the loan's lifetime (on a net present value basis).[12] This calculation is largely based on assumptions about the difference between the federal government's cost of borrowing funds and the interest rate charged to disaster loan borrowers; the expected disaster loan default rate; and how much of the defaulted balance the government will eventually recover.[13] At the estimated FY2026 subsidy rate of 18.75%, $1 of credit subsidy appropriations can support $5.33 (or $1 divided by 0.1875) of disaster loan lending.

At times, Congress and the SBA have expressed interest in reducing the cost of a given amount of lending in the disaster loan program. There are two broad options for doing so: (1) reducing the interest rate subsidy, or (2) reducing the cost of defaults, net of recoveries.[14] As shown in **Table 1**, the component of the subsidy rate related to the interest rate has varied from FY2016 to FY2026, from -3.88% to 15.67%, largely based on the external interest rate environment. For more about interest rates in the disaster loan program, see CRS Report R46963, *SBA Disaster Loan Interest Rates: Overview and Policy Options*, by Bruce R. Lindsay, Darryl E. Getter, and Anthony A. Cilluffo.

Compared with the interest rate component, the cost of the defaults component of the subsidy rate (net of recoveries) has varied less over the FY2016 to FY2026 period, ranging from 9.70% to 13.64%, as shown in **Table 1**. Assumptions about the lifetime default rate for the cohort (the group of loans made during a fiscal year) and the post-default recovery rate determine this portion of the subsidy rate. The program's credit policy is the largest contributor to the default rate, while collateral requirements and debt collection policies contribute to the post-default recovery rate. The remainder of this report examines each of these three policy areas in detail.

Table 1. SBA Disaster Loan Credit Subsidy Rates and Loan Assumptions, FY2016-FY2026

Numbers Are Percentages

Fiscal Year	Initial Subsidy Rate Estimate	Components of Subsidy Rate			Loan Assumptions		
		Defaults, Net of Recoveries	Interest Subsidy	All Other	Borrower Interest Rate	Default Rate	Post-Default Recovery Rate
2026	18.75	10.57	10.16	-1.98	2.90	29.01	30.53
2025	22.22	9.70	15.67	-3.15	3.16	29.57	28.57
2024	20.55	10.34	12.67	-2.46	2.93	28.22	27.76
2023	12.91	11.57	1.66	-0.32	2.23	25.38	28.69
2022	8.96	12.61	-3.88	0.23	1.82	25.68	32.01
2021	8.92	11.22	0.72	-3.02	2.23	24.82	29.89
2020	13.62	10.35	7.58	-4.31	2.91	26.11	24.57

[12] A net present value basis calculation adjusts for time differences in the value of money. Generally, due to factors such as inflation and the possibility of earning interest on savings, a dollar is worth more today than it will be far into the future.

[13] A hypothetical loan with no default risk that charges an interest rate similar to the Treasury's cost of borrowing would have no subsidy cost. Disaster loans differ from this hypothetical by both (1) having an interest rate below the Treasury's cost of borrowing and (2) having a default rate above zero.

[14] Alternatively, if Congress or the SBA wanted to expand access to the disaster loan program by making programmatic changes, then this budgetary analysis could help guide an analysis of the potential budgetary costs of those changes.

Fiscal Year	Initial Subsidy Rate Estimate	Components of Subsidy Rate			Loan Assumptions		
		Defaults, Net of Recoveries	Interest Subsidy	All Other	Borrower Interest Rate	Default Rate	Post-Default Recovery Rate
2019	12.29	12.74	2.56	-3.02	2.67	27.85	23.22
2018	12.54	13.01	3.45	-3.91	2.73	28.51	21.59
2017	14.42	13.30	5.62	-4.49	2.81	29.65	19.81
2016	12.10	13.64	2.56	-4.11	2.90	27.88	18.13

Source: Table created by CRS using data from President's Budget, Federal Credit Supplements, FY2017-FY2026, available at https://www.govinfo.gov/app/collection/budget/. Each fiscal year is from the following fiscal year's budget document (for example, FY2016 data are from the FY2017 President's Budget), except FY2026, which is from the FY2026 President's Budget.

Notes: SBA = Small Business Administration. The initial subsidy rate estimate is the sum of the three components of subsidy rate. (Any differences are due to rounding.) The initial subsidy rate estimate is estimated before the beginning of the fiscal year and does not incorporate any annual reestimates of the subsidy rate. The initial subsidy rate is the rate used for determining the cost of loans made during the fiscal year, as well as reinstatements of loans for each respective fiscal year after the end of the year. A reinstatement is a loan or part of a loan initially approved in a prior fiscal year that was canceled but subsequently reapproved by the SBA.

SBA Disaster Loan Credit Policy

As a creditor, the SBA takes steps to be reasonably sure a loan will be repaid in full. To that end, the SBA requires that the applicant have a "satisfactory credit history," meaning that the applicant's credit history "generally shows payments to creditors as agreed unless otherwise justified."[15] The SBA requires that its loan officers "consider the totality of circumstances affecting the overall credit of the applicant when evaluating credit."[16] Applicants must also be able to afford the additional debt burden of the potential loan to be approved.

Acceptable Credit History

For both individual and business applicants, the credit verification process for a disaster loan generally starts when an SBA loan officer pulls a credit bureau report (such as a report from Equifax, Experian, or TransUnion) for the applicant. An individual loan application will generally use only the credit report of the individual applicant. A disaster loan of $200,000 or more to a business also requires a commercial credit report (such as that from Dun & Bradstreet) prior to a credit worthiness decision.[17]

For individual disaster loan applicants, there are three important credit score thresholds:

1. An applicant with a credit score below the SBA's minimum acceptable score is automatically declined. As of November 2023, the SBA uses a minimum acceptable credit score of 570.[18] According to the U.S. Government

[15] SBA, *Disaster Assistance Program*, SOP 50 30 9, May 31, 2018, p. 87, https://www.sba.gov/sites/default/files/2018-06/SOP%2050%2030%209-FINAL.PDF (hereinafter SBA SOP 50 30 9).

[16] SBA SOP 50 30 9, p. 87.

[17] SBA SOP 50 30 9, p. 87.

[18] U.S. Government Accountability Office (GAO), *Disaster Loan Program: SBA Should Include Key Issues in Its Review of How the Program Affects Underserved Communities*, GAO-24-106682, November 30, 2023, p. 11, https://www.gao.gov/products/gao-24-106682.

Accountability Office (GAO), the SBA has reported that it "automatically declines applicants so they can seek assistance from [the Federal Emergency Management Agency (FEMA)] faster."[19] An applicant whose application is automatically rejected due to a low credit score may request that the SBA reconsider their application through a manual review of the applicant's credit report.

2. An applicant with a credit score of 625 or greater with an income of $50,000 per year or greater is eligible for expedited processing.[20] Applicants meeting both requirements are presumed to have repayment ability, allowing them to bypass the fixed debt method for repayment analysis (explained further below).[21]
3. An applicant with a credit score of 700 or greater might be determined to have credit available elsewhere and therefore may have to pay a higher interest rate on their SBA disaster loan.[22]

The SBA is generally willing to consider the totality of circumstances behind adverse credit events, particularly if the events were due to a disaster. Applicants can overcome a poor credit history with reasonable explanations for why the events happened, such as if the events were due to factors outside the applicant's control or if the events were due to temporary factors.[23] Applicants are less likely to be successful in doing so, however, if their credit history includes delinquent federal obligations, such as federal student loans, SBA business loans, previous disaster loans, federal contracts or grants, or other debts owed to the government. Applicants with delinquent federal obligations who do not have a judgment lien against their property may be eligible for a disaster loan, but the loan would require special processing. Applicants with delinquent federal obligations who do have a judgment lien against their property are generally ineligible, but an applicant might be eligible if the delinquency is due to the disaster itself or if the applicant was current on a repayment plan before the disaster.[24]

Repayment Ability

Disaster loan applicants must also demonstrate an acceptable repayment ability to be approved for a disaster loan. For the repayment ability analysis for SBA home disaster loans, there are three key thresholds:

[19] GAO, *Disaster Loan Program*. For more about FEMA assistance for individuals, see CRS In Focus IF11298, *A Brief Overview of FEMA's Individual Assistance Program*, by Elizabeth M. Webster.

[20] GAO, *Disaster Loan Program*, p. 8.

[21] SBA SOP 50 30 9, pp. 92-93.

[22] Historically, the SBA's determination of "credit elsewhere" had three parts; applicants were determined to have reasonable credit available elsewhere if they passed at least two of the three tests. One of those tests is having a credit score of 700 or greater. Another test is related to whether the applicant's available cash flow is significantly greater than the expected loan payment. The third test is whether the applicant's pre-disaster adjusted net worth (assets minus liabilities, with a $100,000 deduction) is more than four times greater than the uncompensated loss. The SBA amended its regulations in July 2024 to remove the cash flow and net worth tests, allowing the agency to base the credit elsewhere test entirely on the applicant's credit score. The SBA has not updated the program SOPs for that change, so it is not clear how the SBA implemented the change or if it is still using the 700 credit score threshold. See SBA, "Disaster Assistance Loan Program Changes to Unsecured Loan Amounts and Credit Elsewhere Criteria," 89 *Federal Register* 59826, July 24, 2024, https://www.federalregister.gov/d/2024-16207.

[23] SBA SOP 50 30 9, pp. 87-88.

[24] SBA SOP 50 30 9, pp. 90-91.

1. At the initial interview stage, the SBA *summarily declines*[25] applications from applicants with low income, as they are unlikely to have available cash flow to repay a disaster loan.[26] The SBA also summarily declines applicants with high existing debt relative to their income.[27] In both cases, a shorter time frame for rejection decisions may allow the SBA to refer disaster survivors more quickly to FEMA for potential grant assistance.[28]
2. For applicants who are not summarily declined for low income or high existing debt, the SBA makes an initial estimate of repayment ability based on income as reported on the loan application and total debts from the credit bureau report. If this initial estimate of monthly income available for repayment is less than $50, then the SBA *automatically declines*[29] the application.[30]
3. If the applicant passes the previous two tests and is not eligible for expedited processing (which requires a credit score of at least 625 and an income of at least $50,000 per year), then the SBA assesses repayment ability using the SBA's "fixed debt method" (FDM).[31] The FDM is based on the principle that there is a maximum amount of debt that a person can reasonably afford and that providing debt above that level entails unacceptable risk of default.[32] The test compares monthly gross income to existing debt and an estimate of basic living expenses to determine whether the applicant has enough available cash flow to be able to repay the disaster loan. For individual applicants, the income available for additional debt payments (which helps determine the maximum loan amount and the loan term) is generally monthly gross income (from all recurring sources), less a 25% disregard[33] for living expenses and less monthly payments for housing (rent or mortgage and related expenses), auto loans, credit cards, and other obligations.[34]

The process to determine repayment ability for business disaster loans is different. Business disaster loans are not subject to the summary declination and automatic declination processes. Instead, business applicants are more likely than individual applicants to undergo the full FDM

[25] In the SBA disaster loan program, a *summary decline* is when an application is declined at the intake stage, before it has been accepted for processing.

[26] The low-income threshold is updated by the SBA annually. However, these announcements are not publicly available. For 2017 income levels, see SBA SOP 50 30 9, Appendix 4, p. 165.

[27] SBA SOP 50 30 9, p. 10.

[28] For more about FEMA assistance for individuals, see CRS In Focus IF11298, *A Brief Overview of FEMA's Individual Assistance Program*, by Elizabeth M. Webster.

[29] In the SBA disaster loan program, an *automatic decline* is when an application is declined by the automated checks based on the credit bureau report. These tests occur after an application has been accepted for processing.

[30] SBA SOP 50 30 9, p. 92. Individuals and households with low income may be eligible for FEMA grant assistance. For more information about the application process for FEMA and SBA disaster assistance, see CRS Report R45238, *FEMA and SBA Disaster Assistance for Individuals and Households: Application Processes, Determinations, and Appeals*, by Bruce R. Lindsay and Elizabeth M. Webster.

[31] As mentioned above, an applicant with a credit score of 625 or greater and income of $50,000 or greater is presumed to have repayment ability and is eligible for expedited processing. Applicants who are eligible for expedited processing do not undergo the fixed debt method (FDM) examination.

[32] SBA SOP 50 30 9, p. 96.

[33] In the SBA disaster loan program, the *disregard* is the portion of income that is considered to be unavailable to service a disaster loan. For example, an applicant with $3,000 in monthly income would have $750 (25% of $3,000) disregarded. The test would assume that the applicant has a total of $2,250 ($3,000 minus $750) available each month for housing costs, existing debts, and the SBA disaster loan.

[34] SBA SOP 50 30 9, pp. 96-100.

analysis. For the FDM analysis, business applicants have a 40% disregard rate for their monthly gross income (versus the 25% disregard rate for individual applicants).[35]

Loan Acceptance and Approval Data

A November 2023 GAO analysis examined the outcomes of SBA disaster loan applications submitted by survivors of one of 13 hurricanes that occurred from FY2018 to FY2022.[36] **Table 2** summarizes the outcomes, which are also described below.

Of the 430,158 disaster loan applications submitted, over half (54%) were either summarily declined or were declined after further processing. Around a quarter (about 111,380) of total applicants were summarily declined for having low income, high existing debt, or both. Among the applications that were accepted for processing but later declined, 63,399 applications (15% of all received applications) were declined due to unsatisfactory credit history, and 39,287 (9% of all received applications) were declined due to a lack of repayment ability. These two groups include some overlap, since the SBA can identify multiple reasons for declining an application. The SBA and GAO sources are not clear about how much the groups overlap. Depending on how much overlap there was between these two groups, somewhere between 41% and 50% of total disaster loan applications received following the 13 hurricanes were declined due to an unacceptable credit history, a lack of repayment ability, or both.[37]

Table 2. Outcomes of SBA Disaster Loan Applications

Based on Applications from Survivors of 13 Hurricanes from FY2018 to FY2022

Outcome	Number of Applications	Percent of Applications Received
Applications received	**430,158**	**100%**
Summarily declined for low income, high existing debt, or both	~111,380[a]	26%
Other applications not accepted for processing	~5,862[a]	1%
Applications accepted for processing	312,916	73%
... Total declined (automatic decline or after further review)	120,924	28%
... Unsatisfactory credit history[b]	63,399[c]	15%
... Lack of repayment ability[b]	39,287[c]	9%
... Ineligible business or property[b]	13,176[c]	3%
... Applications withdrawn	59,703	14%
... Applications in progress at the time of GAO's study	911	<1%
... Applications approved	131,378	31%

[35] SBA SOP 50 30 9, p. 96. This higher disregard rate means that a business will qualify for a smaller disaster loan, or would require a longer loan term, than an individual with similar income and existing debts.

[36] GAO, *Disaster Loan Program*.

[37] These shares include applications summarily declined for low income, high existing debt, or both, as well as loans declined during processing for unsatisfactory credit history or lack of repayment ability. Therefore, the number of loans declined for these reasons can range from 174,779 (111,380 plus 63,399, which assumes *all* loans that were declined during processing for lack of repayment ability were also declined for unsatisfactory credit history) to 214,066 (111,380 plus 63,399 plus 39,287, which assumes that *none* of the loans that were declined during processing for unsatisfactory credit history were also declined for lack of repayment ability). The share of total applications thus declined can range from 41% (174,779 divided by 430,158) to 50% (214,066 divided by 430,158).

Source: Table created by CRS based on data in U.S. Government Accountability Office (GAO), *Disaster Loan Program: SBA Should Include Key Issues in Its Review of How the Program Affects Underserved Communities*, GAO-24-106682, November 30, 2023, pp. 21-24, https://www.gao.gov/products/gao-24-106682.

Notes: SBA = Small Business Administration. See the GAO report for additional details on the analysis.

a. These numbers are estimates. GAO states that "most applications (95 percent) that were not accepted [for processing] were summarily declined" (see p. 22 of the GAO report).

b. These are only the top three reasons for an application's decline; other reasons are not listed.

c. The numbers and percentages do not sum to the total and share of loans declined because the SBA can list multiple reasons for declining an application; an application may therefore be counted under multiple categories.

According to GAO's analysis, the average credit score of applicants whose applications were automatically declined for poor credit was 533, while the average credit score of applicants whose applications were approved was 697.[38]

SBA Disaster Loan Collateral Policy

As a provider of disaster assistance, the SBA has decided that it should seek to "sympathetically consider" the needs of the applicant.[39] To that end, the SBA often requires less collateral for a disaster loan than would be required for a similar loan in the private sector. Disaster loans (real property and business physical) that fall below a certain threshold do not require any collateral. For real property disaster loans (typically for homes) above the collateral threshold, the SBA typically takes a lien on the applicant's disaster-damaged house and considers the collateral requirement to be met, regardless of the value of the collateral. Business applicants have stricter collateral requirements. Businesses must pledge collateral with sufficient value to cover the full amount of the loan. Additionally, the business's principals must provide personal guarantees, which may be secured by the principals' personal assets. Congress and the SBA have regularly made changes to these collateral policies over the history of the program, as described below in "Collateral Policy History."

The unsecured loan threshold has a role in determining the loan proceeds that the SBA can provide to borrowers relatively quickly. Loan processing takes longer for borrowers who provide collateral because the SBA must document the collateral and make required legal filings to protect the SBA's interest in the collateral. However, the SBA can advance amounts up to the unsecured threshold to borrowers relatively quickly, after the loan has been approved and accepted but before collateral filings are complete.[40] Therefore, the unsecured loan threshold is often included in policy discussions about the speed of the SBA's response to disasters.

Secured and Unsecured Loans

Whether a loan is secured or unsecured depends upon whether the borrower pledged collateral and, if so, on the value of the collateral in relation to the loan amount. An *unsecured loan* does not have collateral. A *secured loan* has specific pledged collateral (such as a lien on the borrower's house). A *fully secured loan*, such as what the SBA requires for larger business disaster loans, has specific pledged collateral with a value at least equal to the value of the loan. The *unsecured loan threshold* is used interchangeably with *collateral threshold*, and is the highest dollar value disaster loan (based on loan and declaration type) that the SBA will make without requiring the borrower to pledge collateral.

[38] Due to data limitations, these credit score averages are based on disaster loan applications for 11 of the 13 hurricanes considered. GAO, *Disaster Loan Program*, p. 23.

[39] In program guidance, the SBA encourages disaster assistance employees to "balance between protection of the Agency's [financial] interest and sympathetic consideration of the applicant's needs." See SBA SOP 50 30 9, p. 96.

[40] See SBA SOP 50 30 9, pp. 143-144.

Collateral by Loan Type and Declaration Type

Collateral requirements for SBA disaster loans vary by the type of disaster declaration, disaster loan type, and loan amount (see **Table 3**). There are two types of declarations relevant to the SBA disaster loan program—presidential declarations and SBA Administrator declarations.[41] While the SBA does not require collateral for loans below the threshold amounts listed in **Table 3**, it will accept collateral for smaller loans if the applicant voluntarily offers it (which the applicant may choose to do for tax purposes).[42]

Table 3. SBA Disaster Loan Collateral Requirements

Loan Threshold Amounts for Collateral, by SBA Disaster Loan Type and Declaration

Physical Disaster Home and Business Loan		Economic Injury Disaster Loan (EIDL)
Presidential Declaration	SBA Administrator Declaration	Any Declaration
$50,000	$14,000	$50,000

Source: Table created by CRS based on analysis of 13 C.F.R. §123.11.

Note: SBA = Small Business Administration.

Collateral for SBA Home Disaster Loans

The SBA does not require collateral for a home disaster loan

- of $50,000 or less, if the incident is declared a major disaster pursuant to the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act; P.L. 93-288, as amended; 42 U.S.C. §§5121 et seq.);[43] or
- of $14,000 or less, if the incident is declared a disaster pursuant to the Small Business Act (P.L. 83-163, as amended; 15 U.S.C. §§631 et seq.).[44]

As noted above, for most home disaster loans above the collateral threshold, the SBA will take the disaster-damaged property as collateral for the loan. In these cases, the SBA will consider the collateral requirement to be met, regardless of the owner's available equity in the property.[45] Additional collateral requirements may apply in other, limited cases, such as if the borrower uses the loan proceeds to relocate or if the borrower offers other collateral in lieu of the primary

[41] For information about the types of disaster declarations, see CRS Report R44412, *SBA Disaster Loan Program: Frequently Asked Questions*, by Bruce R. Lindsay.

[42] An SBA home disaster loan primarily secured by a lien on the applicant's private residence may qualify for the mortgage interest deduction. For more information, see Internal Revenue Service, *Home Mortgage Interest Deduction*, Pub. 936, October 28, 2025, p. 6, https://www.irs.gov/forms-pubs/about-publication-936.

[43] The Stafford Act authorizes the federal government's primary sources of financial assistance to help state and local governments, and individuals and households, recover and rebuild following an incident. For an overview of various federal disaster assistance programs, see CRS Report R48712, *Federal Disaster Assistance: An Overview of Programs*, coordinated by Maura Mullins.

[44] The Small Business Act authorizes the SBA Disaster Loan Program. The SBA operates the Disaster Loan Program to provide low-interest loans to homeowners, renters, businesses of all sizes, and nonprofit organizations to assist them with recovering from declared disasters.

[45] Available equity is the value of an asset minus any other claims against it. For example, if the owner of a house worth $400,000 has a mortgage with a senior lien on the house with a balance of $250,000, and a home equity line of credit with a junior lien of $50,000, then the available equity in the house is $100,000 ($400,000 minus $250,000 minus $50,000).

residence.[46] The SBA does not require collateral for personal property loans, even above $50,000, if the applicant does not own any real estate.[47]

Because of these standards, most SBA home disaster loans are provided on terms that are less secured when compared with most private lenders' terms. Private lenders require collateral for many types of private loans without government guarantees. For example, a mortgage is secured by the house and an auto loan by the vehicle. Private lenders might require higher standards for collateral than the SBA, such as requiring that the loan be fully secured by collateral (meaning the value of the collateral meets or exceeds the value of the loan). Taking collateral provides the lender with some security in case of loan default, which reduces the net cost of default for the lender. Private lenders sometimes offer some unsecured credit products—such as credit cards and personal loans—that do not require collateral, but those often have significantly higher interest rates than loans with collateral.

The SBA reported that, for the full portfolio of SBA disaster loans (both home disaster loans and business disaster loans) from 2018 to 2023,[48] 41% of approved borrowers did not provide collateral to fully secure the disaster loan; 13% did not have available equity to secure 20% of the loan; and 7% did not have any available equity to secure any portion of the loan.[49] Security rates are likely lower for home disaster loans, since collateral requirements are higher for business loans (as described below); therefore, these figures would likely be higher for home disaster loans if analyzed separately.

Collateral for SBA Business Disaster Loans

The SBA requires more collateral for business disaster loans than for home disaster loans. However, the SBA does not require collateral for a business disaster loan

- of $50,000 or less, if the loan is an EIDL (regardless of declaration type);
- of $50,000 or less, if the loan is for physical damage and the incident is declared a major disaster pursuant to the Stafford Act; or
- of $14,000 or less, if the loan is for physical damage and the incident is declared a disaster pursuant to the Small Business Act.

Generally, in cases where collateral is required, SBA loan officers are required to "determine what collateral is available, and take that collateral which will best secure each loan."[50] Generally, the SBA requires that business borrowers pledge collateral with available equity worth at least 100% of the loan amount. The SBA prefers real estate (especially non-damaged real estate) and fixed assets, such as machinery and equipment, as collateral. Additionally, the SBA requires all principals in the business (such as partners in a partnership or all owners with at least a 20% share in a corporation) to provide personal guarantees of loan repayment. If the business can pledge sufficient business assets to fully secure the loan, then the required personal guarantees can be unsecured. If not, then the guarantors must make secured guarantees, in which they pledge specific personal assets (such as their personal residence) as collateral for the business loan.[51]

[46] SBA SOP 50 30 9, pp. 113-114.

[47] SBA SOP 50 30 9, p. 113.

[48] The SBA source for these data does not clarify whether these are fiscal years or calendar years.

[49] SBA, "Disaster Assistance Loan Program Changes to Unsecured Loan Amounts and Credit Elsewhere Criteria," 89 *Federal Register* 59826, July 24, 2024, https://www.federalregister.gov/d/2024-16207.

[50] SBA SOP 50 30 9, p. 114.

[51] SBA SOP 50 30 9, pp. 114-117.

Collateral for Multiple Disaster Loans

In some instances, a borrower may have more than one SBA disaster loan (e.g., an individual real property loan and an EIDL).[52] The SBA aggregates loan amounts for the same type of loan (treating home and business physical disaster loans as the same type) provided for the same disaster when determining if the loans require collateral. If the total of all physical disaster loans (home and business) is more than $50,000, then collateral is required for all loans, even if the amount of each loan is less than $50,000. The SBA aggregates physical disaster loans separately from EIDLs. For businesses, the SBA treats affiliated businesses as one borrower for this aggregation. The SBA does not aggregate disaster loans with outstanding balances owed by the same borrower from different disasters.[53]

For example, a borrower with a home disaster loan of $30,000 and a business physical disaster loan of $30,000 would require collateral on both loans. A borrower with a business physical disaster loan of $30,000 and an EIDL of $30,000 would not require collateral on either loan. A borrower with a business physical disaster loan of $25,000 from a disaster several years ago and a new home disaster loan of $30,000 from a disaster this year would not require collateral for either loan. All of these examples assume the loans are pursuant to a presidentially declared disaster; the examples would be different for SBA Administrator-declared disasters.

Collateral Policy History

Collateral requirements for the disaster loan program have changed over time as Congress and the SBA have struck different balances between the need to protect the SBA's interest in the loan and "sympathetic consideration" of the disaster survivor's situation. The stated justifications for changes in collateral thresholds—when provided—have often mentioned adjusting the levels for inflation. **Table 4** lists some of the thresholds (explained further below) in effect at different times in the program's history; threshold amounts are listed in nominal dollars, with comparable values in 2025 dollars using three methods of adjusting for price changes.[54]

Table 4. SBA Disaster Loan Collateral Thresholds

Year and Loan Type	Nominal Dollars	2025 Dollars		
		Median Home Sales Price[a]	GDP Deflator	PPI for Construction Materials
1978, all loans[b]	$5,000	$37,032	$19,349	$21,319
1988, physical disaster loans	$10,000	$36,859	$23,449	$29,216
2008, MREIDL	$50,000	$90,100	$73,265	$86,008

[52] Examples include a borrower who needs a physical disaster loan to repair their business and an EIDL for working capital for the same disaster; a borrower who has two or more affiliate businesses that were damaged by the same disaster; and a borrower who has a home and a business damaged by the same disaster.

[53] SBA SOP 50 30 9, pp. 112-113, with updates by CRS for increased unsecured loan threshold amounts.

[54] Several methods of inflation adjustment are economically reasonable in this context. The median home sales price measures changes in the market value of the primary assets (primary residences) used as collateral for disaster loans to individuals. Additionally, most of these loans to individuals are made to repair disaster damage to a primary residence. The gross domestic product (GDP) deflator measures broad price changes in the economy, using prices paid for goods and services by consumers, businesses, and the government. The Producer Price Index (PPI) for construction materials measures changes in the cost of construction materials. Since most disaster loans (both individual and business) are to repair physical damage, the cost of construction materials is one measure of how those costs have changed over time. Other price adjustment measures beyond these three are also possible; these three were chosen for illustration.

Year and Loan Type	Nominal Dollars	2025 Dollars		
		Median Home Sales Price[a]	GDP Deflator	PPI for Construction Materials
2008, physical disaster loans	$14,000	$25,228	$20,514	$24,082
2014, all except MREIDL	$25,000	$36,187	$33,441	$39,393
2024, loans for presidentially declared disasters	$50,000	$49,365	$51,414	$51,429

Source: Table created by CRS based on data from the Federal Reserve Bank of St. Louis, Federal Reserve Economic Data, accessed April 29, 2026: "Median Sales Price of Houses Sold for the United States," https://fred.stlouisfed.org/series/MSPUS; "Gross Domestic Product: Implicit Price Deflator," https://fred.stlouisfed.org/series/GDPDEF; and "Producer Price Index by Commodity: Special Indexes: Construction Materials," https://fred.stlouisfed.org/series/WPUSI012011.

Notes: SBA = Small Business Administration; GDP = Gross Domestic Product; PPI = Producer Price Index; MREIDL=Military Reservist Economic Injury Disaster Loan. All index data are based on annual averages. The changes in the table are illustrative of long-term trends in the program and are not comprehensive of all changes. See accompanying text for explanations of each change and the types of disaster loans to which they apply.

a. This value adjustment is calculated based on the ratio of the collateral threshold and the median sales price for homes. According to the U.S. Census Bureau and U.S. Department of Housing and Urban Development data cited by the Federal Reserve Bank of St. Louis, the median sales price of homes sold was $55,850 in 1978; $112,225 in 1988; $229,550 in 2008; $285,775 in 2014; $418,975 in 2024; and $413,650 in 2025. For example, in 1978, the $5,000 collateral threshold was about 9% of the median home sale price of $55,850. The equivalent amount in 2025 based on this ratio is $413,650 * 9% = $37,032 (calculated before rounding).

b. Senate Report 100-416 does not include a specific year, instead stating "late 1970s." This table uses 1978 for illustration.

As enacted in the 1950s, the Small Business Act did not provide statutory references to a specific dollar value threshold for requiring collateral,[55] and the SBA administratively allowed smaller loans to go unsecured. By the late 1970s, the administrative unsecured loan limit was $5,000.[56]

The Small Business Administration Reauthorization and Amendment Act of 1988 (P.L. 100-590) provided the first statutory threshold for requiring collateral, with physical disaster loans (home and business) of more than $10,000 requiring collateral.[57] The conference report for that act explained that "this increase simply recognizes inflation and will partially compensate for it and also should streamline loan processing and reduce red tape."[58] The SBA kept the collateral threshold for EIDLs at $5,000.

Several changes to disaster loan collateral policy were made in 2008. The Military Reservist and Veteran Small Business Reauthorization and Opportunity Act of 2008 (P.L. 110-186) added a new provision that required collateral for Military Reservist EIDLs of more than $50,000.[59] Later that same year, the Food, Conservation, and Energy Act of 2008 (P.L. 110-246; 2008 farm bill) was enacted, which made two changes to collateral policies.[60] First, it increased the statutory threshold to require collateral for physical disaster loans of more than $14,000 (from $10,000). Second, it

[55] The Small Business Act, P.L. 83-163 and P.L. 85-536.

[56] U.S. Congress, Senate Committee on Small Business, *Small Business Administration Reauthorization and Amendment Act of 1988*, report to accompany H.R. 4174, 100th Cong., 2nd sess., S.Rept. 100-416, July 7, 1988, p. 23.

[57] P.L. 100-590, §122.

[58] U.S. Congress, House of Representatives, *SBA Reauthorization and Amendment Act of 1988: Conference Report*, report to accompany H.R. 4174, 100th Cong., 2nd sess., H.Rept. 100-1029, October 3, 1988, p. 38.

[59] P.L. 110-186, §203.

[60] P.L. 110-246, §12065.

allowed the SBA to increase that threshold "as the Administrator determines appropriate in the event of a major disaster." The committee report for a related earlier bill[61] again framed the increase in terms of inflation: "[The unsecured loan] threshold is not indexed to inflation ..... This bill would raise the level to $14,000 to allow for homeowners and businesses to access additional capital without the need for collateral."[62] The committee report did not include an explanation for granting discretion to the SBA Administrator to increase the threshold for loans made pursuant to a major disaster.[63]

Following Hurricane Sandy in late 2012, President Obama established the Hurricane Sandy Rebuilding Task Force, comprised of the heads of 23 executive branch departments and agencies.[64] As part of the Task Force's charge, it developed a "Rebuilding Strategy" that included a recommendation to "increase SBA's unsecured disaster loan limits and expedite the disbursement of small dollar loans."[65] Pursuant to that recommendation, in April 2014, the SBA increased the collateral threshold for physical disaster loans (home and business) made pursuant to a major disaster to $25,000 (from $14,000) and increased the collateral threshold for EIDLs for all disaster types (except Military Reservist EIDLs) to $25,000 (from $5,000). The collateral threshold for SBA Administrator-declared disasters was still $14,000. In making the change, the SBA pointed to the Task Force's recommendation and noted that "with these increased limits, more businesses, homeowners, and other potential victims that may be impacted by future disasters will receive much-needed small dollar loans more quickly following a disaster";[66] these unsecured loans can follow expedited processing and disbursement procedures since the SBA does not need to process additional documentation for pledged collateral.[67]

In 2015, the Recovery Improvements for Small Entities (RISE) After Disaster Act of 2015 (P.L. 114-88) made two changes to SBA disaster loan collateral policies. First, the act included a provision that clarified that the SBA shall not require a business owner to pledge their personal residence as collateral for a physical business disaster loan or EIDL of $200,000 or less, provided that the owner could substitute other personal assets of equal quality for the full amount of the loan.

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[61] S. 163 (110th Congress), the Small Business Disaster Response and Loan Improvements Act of 2007.

[62] U.S. Congress, Senate Committee on Small Business and Entrepreneurship, *Small Business Disaster Response and Loan Improvements Act of 2007*, report to accompany S. 163, 110th Cong., 1st sess., S.Rept. 110-64, May 7, 2007, p. 4.

[63] Although the committee report did not mention a rationale for the change, the context of the bill suggests a few possibilities. First, the report mentions that the unsecured loan threshold is not indexed for inflation. Granting discretion to the SBA Administrator to increase the threshold, at least for major disasters, could allow the SBA to administratively address the effects of inflation. Second, the original legislation (S. 163) was part of a succession of efforts (detailed in the introduction of S.Rept. 110-64) by the Senate Committee on Small Business and Entrepreneurship to reform the SBA disaster loan program following the historically destructive hurricanes Katrina and Rita in 2005. Specifically, the bill's report states that "the SBA failed in its mission to respond quickly and effectively to victims' needs in the weeks and months following the hurricanes." Granting authority to the SBA Administrator to increase the collateral threshold could give the SBA increased flexibility to respond to disasters when there is a heightened need to respond quickly, or in cases of exceptionally destructive disasters that leave even once-prosperous survivors without any valuable assets for collateral. Finally, granting the authority only for major disasters may recognize that the SBA responds to a variety of disasters and that disasters of differing severity may warrant different credit policies.

[64] Executive Order 13632 of December 7, 2012, "Establishing the Hurricane Sandy Rebuilding Task Force," 77 *Federal Register* 74341, December 14, 2012, https://www.federalregister.gov/d/2012-30310.

[65] See recommendation 42 on p. 25 of Hurricane Sandy Task Force, *Hurricane Sandy Rebuilding Strategy: Progress Update – Spring 2014*, https://archives.hud.gov/news/2014/pr14-076-sandy-rebuilding-0614.pdf.

[66] SBA, "Disaster Assistance Loan Program; Disaster Loan Credit and Collateral Requirements," 79 *Federal Register* 22859, April 25, 2014, https://www.federalregister.gov/d/2014-09183.

[67] SBA, "Disaster Assistance Loan Program."

Second, the act increased the statutory collateral threshold for physical disaster loans (home and business) to $25,000 (from $14,000) for all disaster types, and the act allowed the SBA Administrator discretion to administratively increase the threshold for all disaster types (not just major disasters). The increased threshold and the SBA Administrator's expanded discretion were set to expire after three years, in 2018. However, they were both temporarily extended twice: through 2019 (by P.L. 115-280) and through 2022 (by the Rebuilding Small Businesses After Disasters Act, P.L. 116-70). Both temporary provisions expired on November 25, 2022.

The SBA made two administrative changes to collateral thresholds since the expiration of the temporary changes provided by the RISE After Disaster Act of 2015. First, in June 2023, the SBA amended its regulations to grant itself greater discretion regarding when to take collateral for loans above the collateral threshold. Before the change, borrowers were required to provide available collateral. After the change, borrowers are required to provide available collateral *as determined by the SBA*. The rulemaking stated that "this increased flexibility will allow SBA to tailor this collateral requirement to the disaster survivor's circumstances. For example, requiring liens on property with no liquidation value may increase the cost burden to the borrower without providing meaningful liquidated recovery for SBA in the event of a default."[68]

Second, in July 2024, the SBA exercised its statutory discretion to increase certain collateral thresholds. At that time, the SBA set the collateral thresholds for physical disaster loans (home and business) made pursuant to a major disaster and all EIDLs at $50,000 (for most loan types, up from $25,000), while the threshold for physical disaster loans made pursuant to an SBA-declared disaster is the statutory value of $14,000 (down from $25,000). The SBA stated that it expected that the change would reduce the share of disaster loans that require collateral from 46% under the previous thresholds to 31% under the new thresholds.[69]

SBA Disaster Loan Debt Collection Policy

Following a default, the SBA is required under the Debt Collection Improvement Act of 1996 (P.L. 104-134, as amended) to "maximize collections of delinquent debts owed to the Government by ensuring quick action ... and the use of all appropriate collection tools."[70] The SBA uses an escalating collection process that depends upon the length of time a disaster loan has been in default. The collection process starts with a past due notice and payment reminder calls after around one month of payment delinquency. Collection efforts then escalate over time to include due process notices, acceleration of the total amount due,[71] seizure and liquidation of collateral, reporting to credit bureaus, and referrals to the Treasury for enhanced collection efforts.[72]

Delinquency and Default

During the first 60 days following a missed payment, the SBA begins the debt collection process by sending the borrower past due notices in the mail and making automated payment reminder

[68] SBA, "Disaster Assistance Loan Program Changes to Maximum Loan Amounts and Miscellaneous Updates," 88 *Federal Register* 39335, June 16, 2023, https://www.federalregister.gov/d/2023-12779.

[69] SBA, "Disaster Assistance Loan Program Changes to Unsecured Loan Amounts and Credit Elsewhere Criteria," 89 *Federal Register* 59826, July 24, 2024, https://www.federalregister.gov/d/2024-16207.

[70] 31 U.S.C. §3701 note.

[71] Acceleration of the loan means that the full amount remaining on the loan is due immediately, regardless of the previous repayment schedule.

[72] SBA SOP 50 52 2.

phone calls. The SBA's initial goal following a missed loan payment is to return the loan to regular servicing status (that is, to get the borrower back to making regular payments as agreed upon). The SBA uses a variety of tools to do this, depending upon the borrower's situation. These include the following:

- A **deferment**, which can suspend monthly payments for a period of time in response to a temporary challenge.[73] For example, a borrower's income might be low for several months because a temporary injury prevents the borrower from working. Loan payments can resume after the borrower recovers and returns to work.
- **Severe financial hardship relief**, which can modify loan terms to assist borrowers who have experienced significant adverse events since receiving the SBA disaster loan.[74] For instance, the SBA may grant permanent or temporary changes to the loan terms, such as lower monthly payments or a lower interest rate. In addition, this relief delays the SBA's decision to move the loan into liquidation and collection.
- A **workout**, which is an agreement between the SBA and the borrower to make substantive changes to the loan that enable the borrower to repay as much of the original loan as possible while avoiding the need for actions such as foreclosure, liquidation of collateral, bankruptcy, and enhanced debt collection. Some of the possible loan changes include forbearance, changing the monthly payment amount, lowering the interest rate, or allowing the borrower to sell collateral to pay down the loan.[75] The workout process can start as late as the beginning of the collateral liquidation process. A workout is often the last chance for the SBA and the borrower to resolve the debt before debt collection and/or litigation.

Debt Collection and Charge-Off

Debt collection activity increases significantly when a loan is over 60 days past due, as shown in **Table 5**. At that time, the SBA sends the borrower and loan guarantors a "60 day" due process letter to inform them that the SBA intends, in an additional 60 days (that is, at 120 days delinquent), to send the loan to the Treasury for enhanced debt collection. The borrower has until the end of that 60-day period to pay the full amount of the loan, enter into a satisfactory installment agreement to repay the loan, or prove that the borrower is not legally liable for the debt (such as due to bankruptcy or fraud).[76] At 75 days past due, the SBA sends a demand notice, which formally accelerates the entire amount due on the loan and demands payment for the full amount. Automated payment reminder phone calls also continue through this period. The borrower has "reasonable time" following the 60-day due process notice to enter into an acceptable workout plan for the loan.[77] If the borrower and the SBA fail to reach an agreement, then the SBA will begin to liquidate collateral.

[73] SBA SOP 50 52 2, pp. 70-72.

[74] SBA SOP 50 52 2, pp. 40-44.

[75] SBA SOP 50 52 2, pp. 84-86.

[76] For due process requirements, see 13 C.F.R. §140.3.

[77] SBA SOP 50 52 2, p. 84.

Table 5. Timeline of SBA Actions Following Disaster Loan Delinquency

Days After Delinquency	SBA Actions	
1-59	The SBA seeks to get the loan back to regular repayment status through tools such as deferment, severe financial hardship relief, and workout plans.	Throughout the delinquency period before charge-off and referral to Treasury, the SBA makes automated payment reminder phone calls and mails past due notices.
60	The SBA sends the "60 day" due process letter informing the borrower that the SBA intends to refer the debt to Treasury for collection in an additional 60 days.	
75	The SBA sends a demand notice, formally accelerating (demanding full payment of) the delinquent debt.	
120+	Once the SBA has completed collateral liquidation, the loan is eligible to be charged off (removed from the SBA's books), transferred to Treasury's Cross-Servicing program and the Treasury Offset Program, and reported to credit bureaus and the federal database of defaulted borrowers; for cancelled or uncollectible debt, the SBA issues an IRS Form 1099-C (which may have tax consequences for the borrower).	

Source: Table created by CRS based on Small Business Administration (SBA), *Disaster Loan Servicing and Liquidation*, SOP 50 52 2, September 1, 2015, https://www.sba.gov/sites/default/files/files/SOP_50_52_2_1.pdf, and other SBA policies.

Notes: Dates following delinquency are approximate; specific actions may occur at different times depending upon the facts and circumstances. See the accompanying text for additional information about each action.

The SBA takes a number of additional actions once loans are 120 days past due. After this time, if the SBA has completed all debt collection actions for which expected recoveries exceed expected costs and does not anticipate additional payments, debt collection, or recoveries on the loan, it will *charge off* the remaining balance. Charge-off is an administrative accounting action by which the SBA recognizes the loss of the unpaid loan amount, for purposes of its own financial reporting. Charge-off is not loan forgiveness and it does not release the borrower or guarantors from needing to repay the loan. Instead, charge-off formally moves the loan from liquidation to a post-liquidation status that makes it eligible for additional collection tools.[78]

Following charge-off, the SBA may take several actions. For debts that have been canceled for being uncollectible (such as due to an accepted offer in compromise[79]), the SBA issues an Internal Revenue Service (IRS) Form 1099-C reporting the cancellation of debt; the canceled debt amount may be taxable income to the borrower. The SBA reports the debt to private credit reporting bureaus; having the debt on their credit record may make it harder for the borrower to obtain credit (private or government) in the future. The SBA also reports the debt to the federal Credit Alert Verification Reporting System (CAIVRS); having debt recorded in the CAIVRS generally makes a borrower ineligible for future federal loans.[80]

[78] SBA SOP 50 52 2, pp. 120-121.

[79] An *offer in compromise* is an agreement between the SBA and the borrower to settle the debt for less than the full amount owed. The SBA states that, "generally, an offer in compromise will be accepted if it reflects the [borrower's] true ability to pay, and will be rejected if the [borrower] can pay the loan in full via a lump sum payment or an installment agreement, or if acceptance of the offer would harm the integrity of the SBA disaster loan program." See SBA SOP 50 52 2, p. 106.

[80] For more about CAIVRS, see U.S. Department of Housing and Urban Development, "Credit Alert Verification Reporting System (CAIVRS)," accessed March 25, 2026, https://www.hud.gov/stat/sfh/caivrs-system.

If the remaining debt is still collectible, the SBA sends it to the Treasury's Cross-Servicing program and the Treasury Offset Program.[81] The Treasury conducts enhanced debt collection activities such as (as applicable) garnishing wages or offsetting federal payments to the borrower, including federal contractor payments, Social Security benefits, federal income tax refunds, and other payments. Borrowers remain subject to federal payment offset until the debt is repaid, the debt becomes unenforceable (such as through bankruptcy, death, or a statute of limitations), or the Treasury accepts an offer in compromise. In FY2024 (the most recent full fiscal year data available), the SBA reported recovering $126.5 million on charged-off disaster loans, mostly through Treasury efforts.[82]

Concluding Observations

The SBA disaster loan program expanded during the COVID-19 pandemic, largely due to the issuance of nearly 4 million COVID EIDLs for a total of nearly $387 billion.[83] Given this portfolio growth and the SBA's ongoing responsibilities in servicing these loans, the core underwriting and debt collection policies in the program may be of increased interest.[84] In the disaster loan program, Congress and the SBA seek to balance a "sympathetic consideration" of the needs of disaster survivors with the need to financially safeguard the program (and taxpayers) from losses.[85] Disaster loan program policies regarding credit standards, required collateral, and debt collection all contribute to this balance at different points in the loan lifecycle. Credit standards determine which borrowers can get a disaster loan and prevent lending to applicants who do not have a realistic chance of repaying the loan. Collateral policy determines the level of security of the loan if the borrower were to default on payments. Collection policy comes into play after default and liquidation of collateral; collection policy represents the federal government's last chance to be repaid, by enforcing debt collection from other sources, including wages, tax refunds, and Social Security benefits.

[81] For more about the Treasury's debt collection programs, see CRS Report RL34660, *Federal Government Debt Collection: An Overview of the Treasury Offset and Federal Payment Levy Programs*, by Gary Guenther.

[82] SBA, "Small Business Administration Loan Program Performance," data as of June 30, 2025, https://www.sba.gov/document/report-small-business-administration-loan-program-performance.

[83] The unpaid principal balance (the outstanding loan amount without interest) for the SBA disaster loan program increased from $9.6 billion at the end of FY2019 to $367.0 billion at the end of FY2022. SBA, "Small Business Administration Loan Program Performance."

[84] For example, the SBA Office of Inspector General issued an audit report on the SBA's collection efforts on delinquent COVID EIDLs in August 2025. SBA Office of Inspector General, "SBA's Collection Efforts on Delinquent COVID-19 EIDLs," Report 25-23, August 12, 2025, https://www.sba.gov/document/report-25-23-sbas-collection-efforts-delinquent-covid-19-eidls.

[85] The SBA SOPs for the disaster loan program remind employees of this need for balance several times. For example, see SOP 50 30 9, p. 96, and SOP 50 52 2, pp. 6, 7, 43, 46, and 49.

Author Information

Anthony A. Cilluffo
Analyst in Public Finance

Maria Kreiser
Senior Research Librarian

Bruce R. Lindsay
Specialist in American National Government

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Farm Credit System

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CRS REPORT
Prepared for Members and
Committees of Congress

Summary

The Farm Credit System (FCS) is a nationwide financial cooperative lending to agricultural and aquatic producers, rural homeowners, and certain agriculture-related businesses and cooperatives. Established in 1916, this government-sponsored enterprise (GSE) has a statutory mandate to serve agriculture. It receives tax benefits but no federal appropriations or guarantees. FCS is the only direct lender among the GSEs. Farmer Mac, a separate GSE but regulated under the umbrella of FCS, is a secondary market for farm loans. Federal oversight by the Farm Credit Administration (FCA) provides for the safety and soundness of FCS institutions.

Current issues and legislation affecting the FCS are discussed in CRS Report RS21977, *Agricultural Credit: Institutions and Issues*.

The Farm Credit System

The Farm Credit System (FCS) was created to provide a permanent, reliable source of credit to U.S. agriculture. Before the Federal Farm Loan Act was enacted in 1916, credit was often unavailable or unaffordable in rural areas. Many lenders avoided farm loans due to the inherent risks of agriculture. Statutory authority is in the Farm Credit Act of 1971, as amended (12 U.S.C. 2001 *et seq.*). Comprehensive changes were enacted in the Agricultural Credit Act of 1987.

The FCS is authorized by statute to lend to farmers, ranchers, and harvesters of aquatic products. Loans may also be made to finance the processing and marketing activities of these borrowers; for home ownership in rural areas; certain farm- or ranch-related businesses; and agricultural, aquatic, and public utility cooperatives.

FCS is a commercial for-profit lender and is *not* a lender of last resort.[1] Borrowers must meet creditworthiness requirements similar to those of a commercial lender. FCS has "young, beginning, and small" (YBS) farmer lending programs, but they do not have statutory targets or mandates.

The FCS holds nearly 41% of the farm sector's total debt (about the same as the 42% share by commercial banks) and has the largest share of farm real estate loans (46%).[2] As of March 31, 2016, FCS had $238 billion in loans outstanding, of which about 46% was in long-term agricultural real estate loans, 19% in short- and intermediate-term agricultural loans, 15% in loans to agribusinesses, 8% in energy and water/waste water loans, 2% in export financing loans and leases, 3% in rural home loans, and 3% in communications loans (**Figure 4**).[3]

Government-Sponsored Enterprise (GSE)

As a GSE, FCS is a privately owned, federally chartered cooperative designed to provide credit nationwide. It is limited to serving agriculture and related businesses and homeowners in rural areas. Each GSE is given certain benefits, such as implicit federal guarantees or tax exemptions, presumably to overcome barriers faced by purely private markets.[4] FCS is the only direct lender among the GSEs. Other GSEs, such as Fannie Mae, are secondary markets. FCS is not a government agency, and it is not explicitly guaranteed by the U.S. government.[5]

The tax benefits for FCS include an exemption from federal, state, municipal, and local taxation on the profits earned by the real estate side of FCS (12 U.S.C. 2098). Income earned by the non-real-estate side of FCS is subject to taxation. The exemption originated in the 1916 act. Commercial bankers estimate that the annual value of these tax benefits amounted to over $1 billion in 2011.[6] For investors who buy FCS bonds on Wall Street, the interest earned is exempt

[1] The Farm Service Agency (FSA) is a lender of last resort for borrowers who are unable to get a loan from another lender. For more general background, see CRS Report RS21977, *Agricultural Credit: Institutions and Issues*.

[2] See CRS Report RS21977, *Agricultural Credit: Institutions and Issues*.

[3] Federal Farm Credit Banks Funding Corporation, Quarterly Information Statement, March 31, 2016, http://www.farmcreditfunding.com/ffcb_live/financialInformation.html?tab=statements.

[4] There are five GSEs: Federal National Mortgage Association (Fannie Mae), Federal Home Loan Mortgage Corporation (Freddie Mac), Federal Home Loan Bank System, Federal Agricultural Mortgage Corporation (Farmer Mac), and FCS. For more on GSEs, see CRS Report RL30533, *The Quasi Government: Hybrid Organizations with Both Government and Private Sector Legal Characteristics*.

[5] Because of the significant role of GSEs in the U.S. economy, many investors believe that the federal government will not allow a GSE to fail. Thus, an implicit, albeit not statutory, guarantee exists.

[6] *Farm Credit Watch*, February 2012.

from state, municipal, and local taxes. This makes FCS bonds more attractive to the investing public and helps assure a plentiful supply of funds for loans. Commercial bankers say that the tax benefits let FCS offer lower interest rates to borrowers and thus give FCS an operating advantage, since they compete in the same retail lending market.

Cooperative Business Organization

FCS associations are owned by the borrowers who purchase stock, which is required as part of their loans (the smaller of $1,000 or 2% of the loan amount). FCS stockholders elect the boards of directors for banks and associations. Each has one vote, regardless of the loan size. Most directors are members, but federal law requires at least one from outside.

If an association is profitable, the directors may choose to retain the profits or distribute some of it through dividends or *patronage refunds* that are proportional to the size of the loan. Patronage refunds can effectively reduce the cost of borrowing.

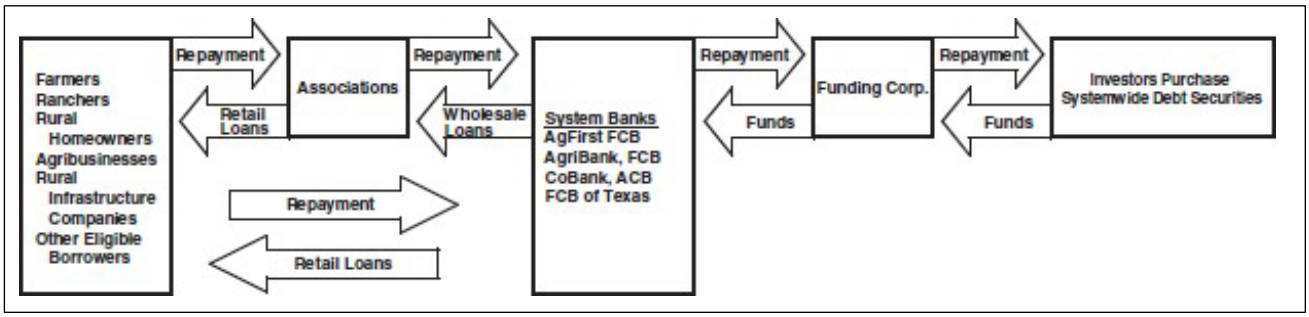
Funded with Bonds and Stock and Insured

With the exception of seed money that was repaid by the 1950s and a temporary U.S. Treasury line of credit in the 1980s,[7] FCS operates without any direct federal appropriations. FCS banks and associations do not take deposits like commercial banks.

Instead, the **Federal Farm Credit Banks Funding Corporation** uses capital markets to sell FCS bonds and notes.[8] These debts become the joint and several liabilities of all FCS banks. The funding corporation allocates funding to the banks, which provide funds to associations, which lend to borrowers. Profits from loans repay bondholders (**Figure 1**).

FCS also raises capital through two other methods. Borrowers are required to buy stock (the lesser of $1,000 or 2% of the loan amount) and become cooperative members. FCS also retains profits that are not returned as patronage to borrowers.

Figure 1. Flow of Funds Through the FCS Between Bondholders and Borrowers



Source: Farm Credit System, 2015 Annual Information Statement.

Besides relying on the capital that the FCS has built, obligations of the FCS are further insured by the **Farm Credit System Insurance Corporation**, which was established by statute in 1988 to ensure timely payment of principal and interest on FCS debt securities. Annual premiums are paid

[7] The Financial Assistance Corporation (FAC) borrowed $1.26 billion from Treasury during the farm financial crisis of the 1980s. In 2005, these bonds were repaid with interest. The FAC was dissolved in December 2006.

[8] The Funding Corporation is a central source for FCS financial statements at http://www.farmcredit-ffcb.com.

by each bank through an assessment based on loan volume until the secure base amount of 2% of total outstanding loans is reached.

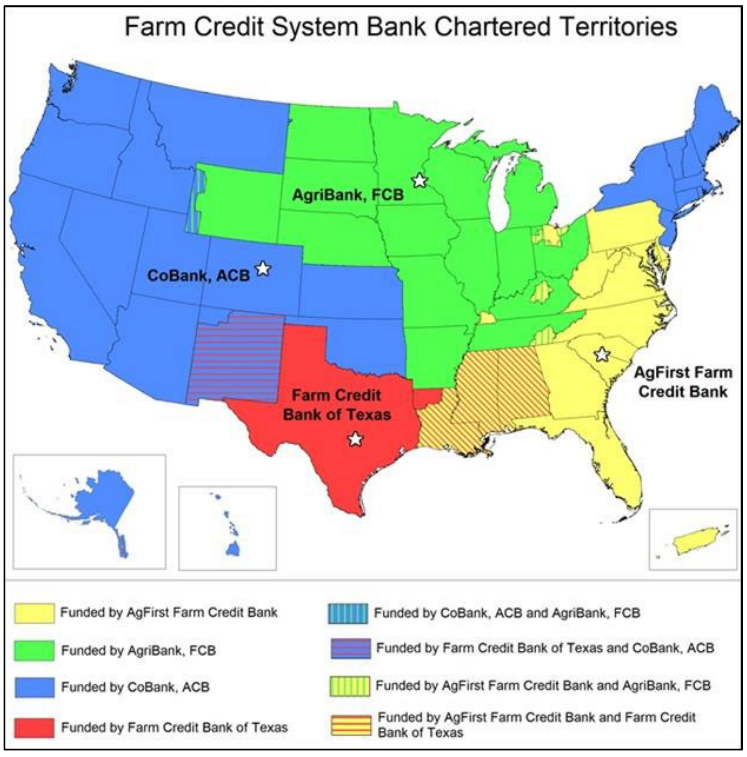
National System of Banks and Associations

FCS is composed of four regional banks (**Figure 2**) that provide funds and support services to 74 smaller Agricultural Credit Associations (ACAs), Federal Land Credit Associations (FLCAs), and Production Credit Associations (PCAs). These associations (**Figure 3**), in turn, provide loans to eligible borrowers. The most common operating structure (due to favorable tax and regulatory rules) is a "parent ACA" with FLCA and PCA subsidiaries. There are 72 ACAs and two FLCAs.[9]

In addition to its charter as one of the regional banks, CoBank has a nationwide charter to finance farmer-owned cooperatives and rural utilities. It finances agricultural exports and provides international services for farmer-owned cooperatives through three international offices.

The number of banks and associations has been declining for decades through mergers and reorganizations. This consolidation has continued in recent decades through the "parent ACA" structure. In the mid-1940s, there were over 2,000 lending associations. There were nearly 900 in 1983, fewer than 400 by 1987, 200 in 1998, 95 in 2006, and 80 in 2015. The system operated with 12 districts into the 1980s, 8 districts in 1998, 5 districts in 2004, and 4 regional banks since 2012.

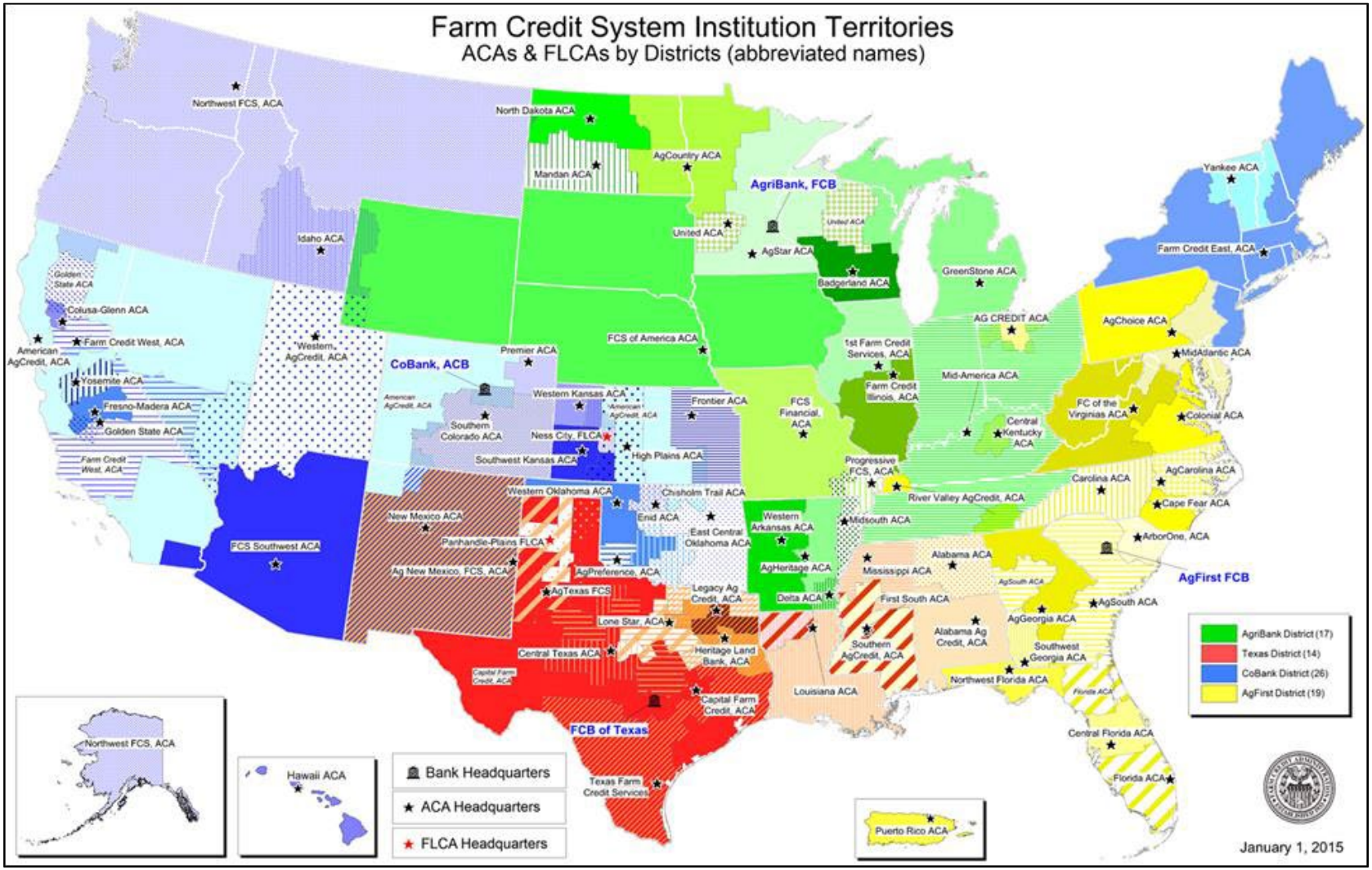
Figure 2. Farm Credit System as of January 1, 2016



Source: Farm Credit Administration, at http://www.fca.gov/info/directory.html.

[9] The Farm Credit Administration maintains a directory of FCS institutions at http://www.fca.gov/info/directory.html.

Figure 3. Farm Credit System Associations That Deliver Loans to Borrowers



Source: Farm Credit Administration, http://www.fca.gov/info/directory.html.

Twenty years ago, the typical FCS association covered several counties and specialized in either land or farm production loans. Today, the typical FCS association covers a much larger region, delivers a wide range of farm and rural credit programs and services, and has an extensive loan portfolio. FCS may benefit when consolidation creates more diversified portfolios. Customers may benefit if greater institutional efficiency is passed along through lower interest rates. However, consolidation may weaken the original cooperative concept of local borrower control.

Each association within FCS has a specific "charter territory." If an association wants to lend outside its charter territory, it must first obtain approval from the other territory's association. Charter territories help ensure that borrowers are served locally and maintain local control of the association. Charter territories and any changes must be approved by FCA.

Types of Loans and Borrowers

The FCS provides three types of loans to farm producers: (1) operating loans for the short-term financing of consumables such as feed, seed, fertilizer, or fuel; (2) installment loans for intermediate-term financing of durables such as equipment or breeding livestock; and (3) real estate loans for long-term financing (up to 40 years) of land, buildings, and homes.

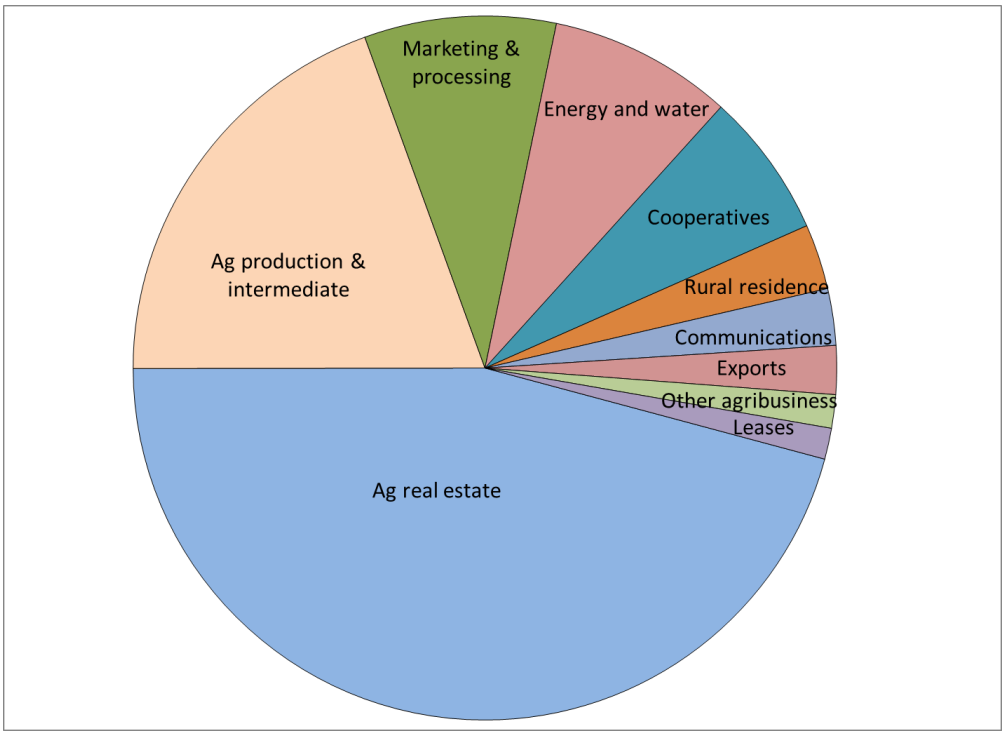
The FCS has a statutory mandate to serve agriculture, certain agribusinesses, and rural homeowners (e.g., 12 U.S.C. 2019 and 2075). Borrowers must meet eligibility and creditworthiness requirements. Types of eligible borrowers and the scope of their financing can be grouped into the following categories (e.g., 12 U.S.C. 2017, 2075, and 2129):

- **Full-time farmers.** For individuals with over 50% of their assets and income from agriculture, FCS can lend for all agricultural, family, and non-agricultural needs (including vehicles, education, home improvements, and living expenses).
- **Part-time farmers.** For individuals who own farmland or produce agricultural products but earn less than 50% of their income from agriculture, FCS can lend for all agricultural and family needs. Non-agricultural lending is limited.
- **Farming-related businesses.** FCS can lend to businesses that *process* or *market* farm, ranch, or aquatic products if more than 50% of the business is owned by farmers who provide at least some of the "throughput." FCS can also lend to businesses that *provide services* to farmers and ranchers, such as crop spraying and cotton ginning. The extent of financing is based on the amount of the business's farm-related income.
- **Rural homeowners.** FCS can lend for the purchase, construction, improvement, or refinancing of single-family dwellings in rural areas (2,500 population limit).
- **Farmer-owned cooperatives and certain rural utilities** (electric and telecom).

Figure 4 illustrates FCS's portfolio of loans outstanding ($238 billion as of March 31, 2016). About 65% of the loan portfolio is in the primary categories of farm real estate and operating loans.

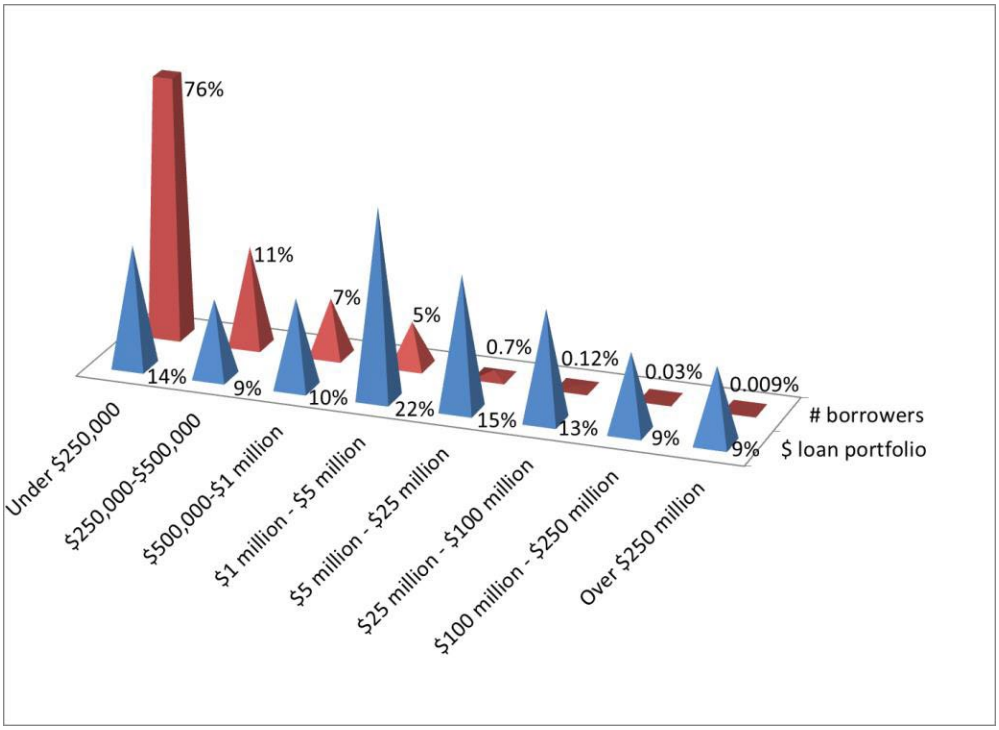
Figure 5 presents the loan portfolio by size of loan and the number of borrowers in each size category. About 74% of borrowers (402,000 out of 527,000) have loans under $250,000 in size and account for 14% of the loan portfolio. At the other extreme, 49 borrowers (0.009% of 527,000) have loans over $250 million and account for 9% of the loan portfolio.

Figure 4. Farm Credit System Loan Portfolio by Type of Loan, 2016



Source: CRS, based on Farm Credit System, Quarterly Information Statement, March 31, 2016.

Figure 5. Farm Credit System Loan Portfolio by Size of Loan, 2015



Source: CRS, based on Farm Credit System, 2015 Annual Information Statement, Dec. 31, 2015.

Federal Regulation

Congressional Oversight

Congressional oversight of FCS is provided by the House and Senate Agriculture Committees, which have primary jurisdiction for the FCS statutes.

The most recent congressional hearings on agricultural credit were in the House on December 2, 2015 (with witnesses from the FCA),[10] and in the Senate on June 13, 2006 (on agricultural credit but not specifically the FCS).[11] The Senate Agriculture Committee also holds hearings on nominees for the Farm Credit Administration board of directors, most recently in March 2015.[12]

Farm Credit Administration (FCA)

FCA is an independent agency and the federal regulator responsible for examining and ensuring the safety and soundness of all FCS institutions (12 U.S.C. 2241 *et seq*.; 12 C.F.R. 600 *et seq*.).

FCA is directed by a three-member board nominated by the President and confirmed by the Senate (**Table 1**). Board members serve six-year terms and may not be reappointed after serving a full term or more than three years of a previous member's term. The President designates one member as chairman, who serves until the end of that member's term. Members may continue to serve on the board until their replacements are confirmed.

FCA's operating expenses are paid through assessments on FCS banks and associations. Even though FCA does not receive an appropriation from Congress, the annual agriculture appropriations act places a limit on FCA's administrative expenses ($65.6 million in FY2016).

Table 1. Farm Credit Administration Board of Directors

Name	Senate Confirmation and Comments	Term Expires
Kenneth A. Spearman, Chairman	Confirmed on 10/8/2009 to complete the term of Dallas P. Tonsager that was to expire 5/21/2010. Reappointed to full term. Appointed chairman of the board and CEO on March 13, 2015.	5/21/2016
Jeffrey S. Hall	Confirmed on March 9, 2015.	10/13/2018
Dallas P. Tonsager	Confirmed on March 9, 2015. Previously an FCA board member for a partial term from 2004 to 2009.	5/21/2020

Source: CRS.

[10] House Committee on Agriculture, "To Review the Farm Credit System," public hearing on December 2, 2015, http://agriculture.house.gov/calendar/eventsingle.aspx?EventID=3032.

[11] Senate Committee on Agriculture, Nutrition and Forestry, "Review of USDA Farm Loan Programs," hearing on June 13, 2006, http://www.ag.senate.gov/hearings/review-usda-farm-loan-programs.

[12] Senate Committee on Agriculture, Nutrition and Forestry, "Nominations," http://www.ag.senate.gov/nominations.

Issues for Congress

Competition and "Similar Entity Lending"

Competition between the FCS and commercial banks is an ongoing source of contention related to congressional oversight and statutory jurisdiction. The FCS is unique among the GSEs because it is a retail lender making loans directly to farmers and thus is in direct competition with commercial banks. Because of this direct competition for creditworthy borrowers, the FCS and commercial banks often have an adversarial relationship over policy.

Commercial banks assert unfair competition from the FCS for borrowers because of tax advantages that can lower the relative cost of funds for the FCS.[13] They often call for increased congressional oversight. The FCS counters by citing its statutory mandate (and limitations) to serve agricultural borrowers in good times and bad times.[14]

Recently, the assertion of unfair competition and inappropriate lending has been leveled over the characteristics of some borrowers that have obtained FCS loans and/or the purposes of those loans.[15] The policy-related issue is the purpose and extent of the statutory authority for "similar entity lending" that certain FCS banks have used to participate (i.e., have a partial interest, or to buy part of a loan from another bank) in loans to borrowers that would otherwise be ineligible for direct FCS loans.

The authority to make "similar entity loans" was added to the Farm Credit Act in 1994 (P.L. 103-376, Section 5). It allows the FCS to participate in loans that are originated by a commercial bank to borrowers that are expressly *not* eligible for FCS loans but for purposes that are "functionally similar" to activities that are conducted by FCS-eligible borrowers (12 U.S.C. 2206a; 12 C.F.R. 613.3300, 62 *Federal Register* 4444, January 30, 1997). The provision is meant to allow greater diversification in the FCS loan portfolio for risk management along with traditional means of diversification (such as geographic breadth) and lending to a range of commodity sectors. "Similar entity loans" cannot exceed 15% of the FCS entity's total loan volume and must be less than 50% of the individual loan.

Commercial banking advocates charge that many of the similar entity loans fail a perception test of meeting the original statutory intent that FCS makes credit available to farmers and rural communities and are often inappropriately large or risky. FCS advocates counter that the loans are legal under the statute, follow the intent of achieving diversification, and help commercial banks by jointly cooperating through loan participations.

Several Members at a House Agriculture Committee hearing in December 2015 raised questions about the appropriateness and perception of some similar entity loans, despite statements about

[13] See, for example, American Bankers Association, letter to House and Senate Agriculture Committees, February 2, 2015, http://www.aba.com/Advocacy/LetterstoCongress/Documents/LetterSenateAgCommreFCS-Oversight020215.pdf.

[14] See, for example, Farm Credit Council, letter to House and Senate Agriculture Committees, February 5, 2015, http://www.fccouncil.com/files/FCC_Letters_in_Response_to_ABA_5Feb2015.pdf.

[15] For example, the FCS participation in a loan to Verizon is highlighted in the *Denver Post*, "Group Challenges CoBank's Financing of Verizon-Vodafone Deal," October 23, 2013, at http://www.denverpost.com/breakingnews/ci_24365106/group-challenges-cobanks-financing-verizon-vodafone-deal.

the legality of such loans.[16] In response to the hearing,[17] FCA issued a "bookletter"[18] in March 2016 that provided further guidance and reporting requirements for FCS associations to guard against reputation risk from similar entity lending.[19]

Recent Farm Bills

The most recent statutory changes to the Farm Credit Act have been in omnibus farm bills, and those changes have been relatively minor in terms of the scope of FCS lending or the structure of the institution. For example, the 2014 farm bill (P.L. 113-79) established the intent that compensation disclosure of FCS executives rests with FCS boards of directors rather than elsewhere, such as with shareholders.[20] The previous farm bill in 2008 (P.L. 110-246) allowed the Federal Agricultural Mortgage Company (Farmer Mac, see below) to participate in rural utility loans and made technical changes to the premiums paid by FCS banks to the FCS Insurance Corporation, but it did not expand the scope of FCS authority as some advocates had hoped.[21]

Farmer Mac—Another Farm Credit Act Institution

The Federal Agricultural Mortgage Company (Farmer Mac) was established in the Agricultural Credit Act of 1987 as a secondary market for agricultural loans. It purchases and pools qualified loans and may sell them to investors as securities or hold them in its own portfolio.

Although Farmer Mac is statutorily part of the Farm Credit Act and is regulated by FCA, it has no liability for the debt of any other FCS institution, and the other FCS institutions have no liability for Farmer Mac debt. It is considered a separate GSE.

Farmer Mac is an investor-owned corporation, not a member-owned cooperative. Voting stock may be owned by banks, insurance companies, and FCS institutions. Nonvoting stock may be owned by any investor. Its board of directors has members from the FCS, commercial banks, and the public at large.

Farmer Mac operates two programs: Farmer Mac I (loans not guaranteed by the U.S. Department of Agriculture [USDA]) and Farmer Mac II (USDA-guaranteed loans).

- A majority of **Farmer Mac I** volume comes from the sale of "long-term standby purchase agreements." Farmer Mac promises to purchase specific agricultural mortgages, thus guaranteeing the loans against default risk while the participating lender retains interest rate risk.

[16] House Committee on Agriculture, "Transcript of Hearing to Review the Farm Credit System," December 2, 2015, http://agriculture.house.gov/uploadedfiles/12.2.15_hearing_transcript.pdf.

[17] Jeffrey S. Hall, FCA board member, "Statement in Support of Bookletter 67," March 10, 2016, http://www.fca.gov/Download/Statements/hall10march2016_2.pdf.

[18] Bookletters are documents issued by an official that communicate FCA's legal interpretations and its position on specific issues.

[19] FCA, Bookletter BL-67, "Lending to Similar Entities," March 10, 2016, http://ww3.fca.gov/readingrm/Handbook/FCA%20Bookletters/BL-067.docx?Web=1.

[20] In 2012, FCA had published a rule that provided for advisory votes by shareholders on senior officer compensation (12 C.F.R. 611.360; 77 *Federal Register* 60596, October 3, 2012). That rule was withdrawn following the provision in the 2014 farm bill (Section 5404 of P.L. 113-79; 79 *Federal Register* 17856, March 31, 2014).

[21] Although the House Agriculture Committee-reported version of the farm bill in 2007 contained provisions to expand the scope of the FCS loans, those provisions were removed by a floor amendment from leaders of the House Financial Services Committee (H.Amdt. 702 to H.R. 2419).

- Under **Farmer Mac II**, the company purchases the portion of individual loans that are guaranteed by USDA. On these purchases, Farmer Mac accepts the interest rate risk but carries no default risk.

Author Information

Jim Monke
Specialist in Agricultural Policy

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INSIGHT

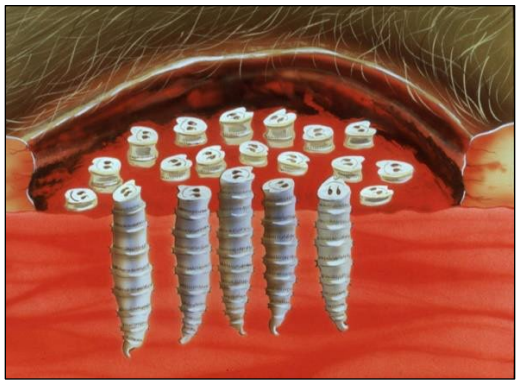
New World Screwworm: Current Issues

June 2, 2025

The New World screwworm (*Cochliomyia hominivorax*) is a housefly-sized parasite that lays eggs in the wounds or mucous membranes of warm-blooded vertebrates (e.g., mammals, birds). The U.S. Department of Agriculture (USDA) eradicated screwworm from the United States in 1966, but recent cases in Mexico have raised concerns about possible new domestic cases. USDA considers screwworm a serious threat to livestock, estimating losses from a 1976 outbreak in Texas at $732 million and $1.8 billion to the state's livestock producers and economy, respectively, in 2024 dollars.

Screwworm larvae feed on healthy, living tissue (see **Figure 1**), causing a painful condition known as "myiasis." Treatment may include wound care, surgical removal, and topical pesticide application. Left untreated, the affected host may die within 1-2 weeks.

Figure 1. Larvae Infestation in Wound



Source: U.S. Department of Agriculture (USDA), National Agricultural Library, "Slide of Larvae Living in Wound."

Note: "Screwworm" describes the larvae's appearance as it burrows into the host.

Eradication

Previously limited to the U.S. Southwest, screwworm migrated to the Southeast via a shipment of infested animals in 1933. Entomologists at USDA's Agricultural Research Service spent decades developing and deploying the Sterile Insect Technique, which consists of releasing sterile male flies into affected areas to reduce screwworm reproductive success until the population dies out. The United States declared itself free of indigenous screwworm by 1966.

International Cooperation

In 1972, the United States experienced a widespread screwworm outbreak, spurring the establishment of a joint Mexico-United States Screwworm Eradication Commission. Both countries agreed to move the screwworm barrier zone from the southern U.S. border to the narrowest point in Mexico, the Isthmus of Tehuantepec.

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The Mexico-U.S. commission continued its eradication efforts south of Mexico, ultimately setting a barrier zone between Central and South America at Panama's Darién Gap. In 1994, the Panama-United States Commission for the Eradication and Prevention of Screwworm (COPEG) initiated plans for a facility capable of producing up to 100 million sterile flies weekly to maintain the barrier zone. Completed in 2006, the facility is managed jointly by Panama's Agriculture Ministry and USDA's Animal and Plant Health Inspection Service (APHIS). APHIS has funded 90% of COPEG's activities and estimated in 2025 that its investment has saved the U.S. cattle industry $2.3 billion annually.

Current Issues

In 2023, screwworm annual detections increased in Panama—from around 25 cases to more than 6,500 cases. Screwworm spread northward from Panama through Costa Rica, Nicaragua, Honduras, Guatemala, Belize, and El Salvador.

In November 2024, a screwworm case was reported in southern Mexico. In response, the United States suspended live animal imports from Mexico. After both countries agreed to enhanced preclearance inspection and treatment protocols, the southern border reopened to Mexico-origin cattle and bison in February 2025.

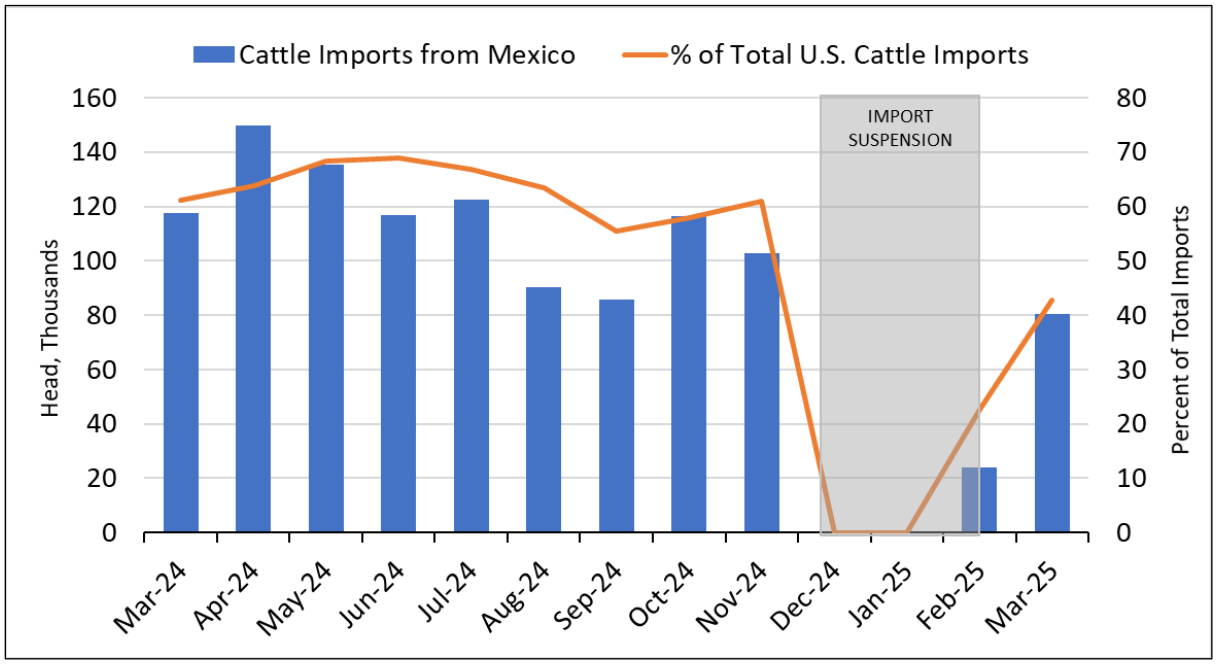
In April 2025, Secretary of Agriculture Brooke Rollins wrote to her counterpart in Mexico with concerns that Mexico was impeding eradication efforts. "Despite the fact that all materials and operations are being funded entirely by the [United States]," Secretary Rollins stated, Mexico's aviation authorities were imposing restrictions on "USDA APHIS-contracted" aircraft fleets, and its customs authorities were imposing import duties on aviation equipment and "sterile fly shipments."

USDA announced on May 11, 2025, that it would again suspend imports of live animals on a "month-by-month basis, until a significant window of containment is achieved." Mexico's President Claudia Sheinbaum reportedly called the action "unfair."

Mexico typically accounts for more than 60% of imported cattle, approximately 1.25 million head annually in 2023 and 2024 (**Figure 2**). The U.S. cattle herd, at 87 million head, is at its lowest level since 1951. Fewer cattle imports may further constrain supply, which could increase beef prices for U.S. consumers.

U.S. livestock stakeholder groups generally supported USDA's import suspension. One group acknowledged that although the border closure may "cause economic harm for U.S. farmers and ranchers" and "create supply chain disruptions," the costs would be less than responding to a U.S. screwworm outbreak.

Figure 2. Cattle Imports from Mexico and Mexico's Share of Total Cattle Imports, March 2024-March 2025



Source: USDA, Economic Research Service, "Livestock and Meat International Trade Data," updated May 7, 2025.

Note: Shading represents U.S. suspension of live animal imports from Mexico from November 2024 to February 2025.

Congressional Considerations

The Animal Health Protection Act (7 U.S.C. §§8301 et seq.) authorizes the Secretary of Agriculture to act to eradicate diseases or pests that threaten animal and public health, which includes restricting animal movement, destroying animals, and implementing preventive disease controls. As Congress monitors the northward spread of screwworm, it may consider various options, including maintaining the current approach, evaluating existing eradication efforts, determining program funding levels and staffing, and considering proposals for a domestic sterile fly-rearing facility.

APHIS received emergency funding of $109.8 million in 2023 and $165 million in 2024 from the Commodity Credit Corporation (CCC) for screwworm response activities. In May 2025, USDA announced an additional $21 million transfer of CCC funds to convert an existing fruit-fly-rearing facility in Metapa, Mexico, into a sterile fly-rearing facility. For FY2025, APHIS requested an increase of $3.6 million to address aging infrastructure and higher operational costs at its Panama fly-rearing facility. A 2023 APHIS improvement plan included the Panama facility on a list of its three "highest priority facilities in need of repair."

Congress may assess domestic or international capacity needs for sterile fly production and dispersal. Some Members of Congress wrote to Secretary Rollins in March 2025 requesting that USDA consider the feasibility of building a domestic sterile fly production facility. The United States operated a sterile fly-rearing facility in Texas from 1962 to 1982. Similar facilities exist today for research purposes, though none are configured for the current requested scale of production. Bills introduced in the 119th Congress (H.R. 3392, S. 1751) would provide a $300 million appropriations authorization for the construction of a screwworm-fly-rearing facility in an at-risk state.

Author Information

Christine Whitt
Analyst Agricultural Policy

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Avian Influenza (Bird Flu) in the United States

June 23, 2025

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Avian Influenza (Bird Flu) in the United States

SUMMARY

R48580

June 23, 2025

Todd Kuiken
Analyst in Science and Technology Policy

Pervaze A. Sheikh
Specialist in Natural Resources Policy

Avian influenza, sometimes referred to as "bird flu," is a disease caused by influenza A viruses. It can be highly contagious and has a history of infecting birds, wildlife, and humans. A subtype of avian influenza, H5N1, was first detected in 1996 in Guangdong Province in China and has been spread globally by migratory birds. A 2021 outbreak of H5N1 that originated in Europe has caused a panzootic in birds that spread to the United States in early 2022. H5N1 is widespread in wild birds and is responsible for outbreaks in poultry and dairy cattle in the United States. There have been reported cases of humans infected with H5N1 in the United States since 2024, mostly among dairy and poultry workers who contracted the disease from infected animals.

H5N1 is not known to spread easily from human to human, but its ability to adapt, mutate, reassort with other viruses, and infect different mammal species means that the potential for human-to-human transmission exists. Some Members of Congress have expressed concerns about the spread of H5N1 and its potential health effects on humans, as well as its possible negative economic impact on agriculture, especially in the poultry and livestock industries. Some Members also expressed concern about avian influenza when previous pandemics occurred.

Avian influenza is part of the *Orthomyxoviridae* family and is grouped into four main categories: A, B, C, and D. Type A viruses are known to infect birds and mammals (including humans), while Types B, C, and D are restricted to certain host ranges. Type A viruses include avian influenza, swine influenza, and canine influenza. Type A viruses have caused more documented global pandemics in human history than any other type of pathogen, including four pandemics since the beginning of the 20th century. Highly pathogenic avian influenza (HPAI) can cause high mortality rates in wild birds and poultry, while low pathogenic avian influenza (LPAI) typically causes few or no clinical signs. Avian influenza is globally spread by birds that fly long distances via migratory pathways. These pathways can also be conduits for the spread of avian influenza to mammals (including humans) from wild birds. H5N1 is responsible for a recent outbreak circling the globe. The virus has infected wild birds, some species of mammals (e.g., domestic cats, harbor seals, mountain lions), poultry, and livestock in the United States. Federal, state, and local agencies are responding to H5N1 in various ways, including monitoring the spread of H5N1; creating policies to address potential impacts in industries such as poultry; and contemplating countermeasures for addressing the disease in animals and potentially humans.

There are several issues that Congress might consider when addressing avian influenza in the United States: the effectiveness and coverage of existing biosurveillance practices and policies; the effectiveness of coordination among federal agencies; the status of international collaboration; research and data required to fill existing knowledge gaps; activities related to monitoring and planning for potential spillover of avian influenza to humans; and policies that lead to suppressing or eliminating avian influenza in the United States. Some of these policies include

- heightening surveillance and detection of infected organisms;
- increasing biosecurity measures to protect livestock and poultry from infected wild birds and mammals;
- limiting exposure of wildlife associated with humans (e.g., livestock, poultry, and pets) to H5N1;
- instituting rapid response and containment protocols of infected animals, including efforts to cull infected animals;
- creating and testing mitigation and treatment methods, such as vaccines and therapeutic remedies; and
- conducting research on mutations and genetic reassortment to provide insight into whether human-to-human transmission of the virus is imminent.

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Appendix A. Chronology of Significant Global Events Related to Avian Influenza and Influenza A 32
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Introduction

Avian influenza, sometimes referred to as "bird flu," is a disease caused by influenza A viruses. It can be highly contagious and has a history of infecting birds, wildlife, and humans (**Table 1**). Wild birds, mainly waterfowl, naturally carry this virus and have introduced it to regions around the world, including the United States.[1] Avian influenza is not a novel virus; it was first identified in the 1800s and has mutated into various subtypes since that time (**Appendix A**). A subtype of avian influenza, H5N1, was first detected in 1996 in Guangdong Province in China and has been spread globally by migratory birds. Influenza A viruses have been responsible for multiple outbreaks among animals and humans, including those in the United States.[2]

Table 1. Selected Pandemics Attributed to Influenza A

Date	Name	Description
1918-1919	Spanish flu	This pandemic, caused by the H1N1 influenza virus is estimated to have killed approximately 50-100 million people.
1957	Asian flu	This was an H2N2 virus that originated from an avian influenza A virus. The virus emerged in East Asia and spread around the world, causing an estimated 1.1 million deaths worldwide and 116,000 deaths in the United States.
1968	Hong Kong flu	The 1968 pandemic was caused by an influenza A (H3N2) virus. It was first detected in Hong Kong and later spread to other countries and the United States. The estimated number of deaths was 1 million worldwide and about 100,000 in the United States.
1977	Russian influenza pandemic	This virus is believed to be similar to those circulating in the 1950s. It is hypothesized that the virus had been kept frozen in a laboratory and accidently released.
1997		In May 1997, H5N1 was isolated from a 3-year-old boy in Hong Kong. Eighteen Hong Kong residents were infected with H5N1 influenza viruses, six of whom died.
2009	Swine flu	The 2009 H1N1 swine flu pandemic was caused by a reassortment of avian influenza that had been circulating in swine for at least 10 years. The precursor swine strains had segments of avian influenza tracing back 30 years. The Centers for Disease Control and Prevention (CDC) estimated that the United States had 60.8 million cases, of which 12,469 people died. The CDC estimated that between 151,700 and 575,400 people died worldwide from the pandemic.

Source: Taisuke Horimoto and Yoshihiro Kawaoka, "Pandemic Threat Posed by Avian Influenza A Viruses," *Clinical Microbiology Reviews*, vol. 14, no. 1 (2001); Samantha J. Lycett et al., "A Brief History of Bird Flu," *Philosophical Transactions of the Royal Society B*, vol. 374, no. 1775 (2019), https://doi.org/10.1098/rstb.2018.0257;

[1] Ruopeng Xie et al., "The Episodic Resurgence of Highly Pathogenic Avian Influenza H5 Virus," *Nature*, vol. 622, no. 7984 (October 18, 2023), pp. 810-817 (hereinafter Xie et al., "The Episodic Resurgence of Highly Pathogenic Avian Influenza H5 Virus").

[2] Thao-Quyen Nguyen et al., "Emergence and Interstate Spread of Highly Pathogenic Avian Influenza A(H5N1) in Dairy Cattle in the United States," *Science*, vol. 388, no. 6745 (April 2025) (hereinafter Nguyen et al., "Emergence and Interstate Spread of Highly Pathogenic Avian Influenza A(H5N1)").

and CDC, "2009 H1N1 Pandemic (H1N1pdm09 Virus)," 2019, https://archive.cdc.gov/www_cdc_gov/flu/pandemic-resources/2009-h1n1-pandemic.html.

One outbreak of H5N1 has caused a panzootic[3] in birds since 2021, which spread to the United States in early 2022. H5N1 is widespread in wild birds and is responsible for outbreaks in poultry and dairy cattle in the United States. Since the outbreak, the U.S. Department of Agriculture (USDA) reported H5N1 infections in over 1,074 herds of dairy cattle in 17 states across the United States as of May 21, 2025.[4] Further, there have been reported cases of humans infected with H5N1 in the United States since 2024, mostly among dairy and poultry workers who contracted the disease from infected animals, although some human cases have no known connections with the dairy and poultry industry (**Table 2**).[5]

Table 2. Confirmed U.S. Human Cases of H5N1 and Exposure Route

Confirmed Cases from 2024 Through January 5, 2025

State	Dairy Herds[a]	Poultry Farms and Culling Operations[a]	Other Animal Exposure[b]	Exposure Source Unknown	Total Cases
California	36	0	0	2	38
Colorado	1	9	0	0	10
Iowa	0	1	0	0	1
Louisiana	0	0	1	0	1
Michigan	2	0	0	0	2
Missouri	0	0	0	1	1
Nevada	1	0	0	0	1
Ohio	0	1	0	0	1
Oregon	0	1	0	0	1
Texas	1	0	0	0	1
Washington	0	11	0	0	11
Wisconsin	0	0	1	0	1
Wyoming	0	0	1	0	1
Total U.S.	**41**	**24**	**2**	**3**	**70**

Source: Centers for Disease Control and Prevention, "H5 Bird Flu: Current Situation," February 27, 2025, https://www.cdc.gov/bird-flu/situation-summary/index.html.

Notes: Data used in the table were downloaded on February 27, 2025.

a. Exposure is associated with commercial agriculture and related operations.

b. Exposure was related to other animals, such as backyard flocks, wild birds, or other mammals.

Although the current public health risk is low for humans, according to the Centers for Disease Control and Prevention (CDC), many scientists have expressed concern about the possibility of

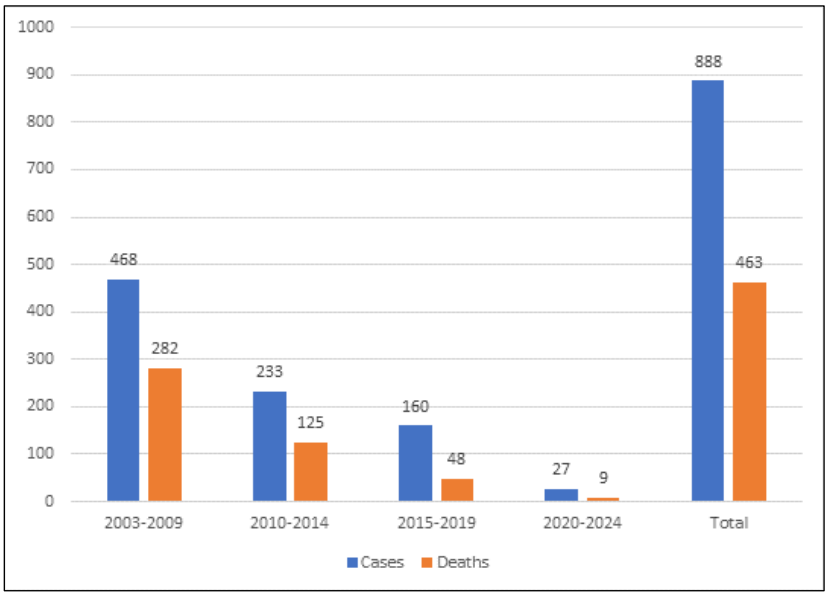
[3] *Panzootic* refers to an outbreak of a disease within nonhuman animals that spreads across a large region or worldwide. The equivalent term for a human disease outbreak is a *pandemic*.

[4] U.S. Department of Agriculture (USDA), "HPAI Confirmed Cases in Livestock Herds," January 16, 2025, https://www.aphis.usda.gov/livestock-poultry-disease/avian/avian-influenza/hpai-detections/hpai-confirmed-cases-livestock.

[5] Centers for Disease Control and Prevention (CDC), "H5 Bird Flu: Current Situation," May 30, 2025, https://www.cdc.gov/bird-flu/situation-summary/index.html.

H5N1 evolving and spreading among humans through airborne transmission.[6] Historically, H5N1 is associated with a high human mortality rate: more than 50% of reported cases before 2019 resulted in fatalities (**Figure 1**). Most of these previous human fatalities and cases were due to transmission of the virus from animals to humans, with some limited human-to-human transmission.

Figure 1. Number of Confirmed Human Cases and Deaths for Avian Influenza A (H5N1) Reported to World Health Organization, 2003-2024



Source: World Health Organization (WHO), *Cumulative Number of Confirmed Human Cases for Avian Influenza A(H5N1) Reported to WHO, 2003-2024*, March 28, 2024, https://cdn.who.int/media/docs/default-source/influenza/h5n1-human-case-cumulative-table/cumulative-number-of-confirmed-human-cases-for-avian-influenza-a(h5n1)-reported-to-who--2003-2024.pdf.

Notes: Most cases were reported in Egypt, Indonesia, and Vietnam (approximately 77% of the total).

Recent cases of human H5N1 infections appear to be the result of animal-to-human transmission but are usually not as severe as older H5N1 cases.[7] Some scientists note that the reasons for this difference are uncertain, but they do not know whether the low fatality rate in humans is due to host immunity, route of exposure, or mutations in the virus.[8] Of 70 people in the United States diagnosed since 2022 with H5N1, one died, according to the CDC.[9] Current strains of H5N1 are not found to spread easily from human to human; however, stakeholders are monitoring the situation for changes.[10] The potential for human-to-human transmission exists, according to

[6] Ranu S. Dhillon et al., "Steps to Prevent and Respond to an H5N1 Epidemic in the USA," *Nature Medicine*, vol. 31, no. 4 (April 2025), pp. 1063-1065 (hereinafter Dhillon et al., "Steps to Prevent and Respond to an H5N1 Epidemic in the USA"); and Yuying Liang, "Pathogenicity and Virulence of Influenza," *Virulence*, vol. 14, no. 1 (2023).

[7] Florian Krammer et al., "Highly Pathogenic Avian Influenza H5N1: History, Current Situation, and Outlook," *Journal of Virology*, vol. 99, no. 4 (March 27, 2005) (hereinafter Krammer et al., "Highly Pathogenic Avian Influenza H5N1: History").

[8] Michael G. Ison and Jeanne Marrazzo, "The Emerging Threat of H5N1 to Human Health," *The New England Journal of Medicine*, vol. 392, no. 9 (2025), pp. 916-918 (hereinafter Ison and Marrazzo, "The Emerging Threat of H5N1 to Human Health").

[9] CDC, "H5 Bird Flu: Current Situation," May 30, 2025, https://www.cdc.gov/bird-flu/situation-summary/index.html.

[10] As of May 23, 2025, there were no known cases of human-to-human transmission of H5N1, according to the CDC. (continued...)

scientists, because of the ability of the virus to adapt and infect several mammals and its ability to mutate and reassort with other viruses.[11]

The spread and evolution of H5N1 is a concern for many people because influenza A viruses have caused more documented global pandemics in human history than any other type of pathogen, including four pandemics (**Table 1**) since the beginning of the 20th century.[12] After causing a pandemic, these types of viruses usually establish themselves in human populations as seasonal flu viruses, causing millions of infections and thousands of deaths per year.[13] Scientists attribute influenza pandemics in 1957, 1968, and 2009 to reassortant viruses[14] that contained genetic segments from human seasonal flu viruses and animal influenza viruses.[15]

Although comparatively little is known about some other zoonotic diseases, such as severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2; the virus that caused COVID-19), there is a large body of knowledge about avian influenza viruses, including methods to dampen virus spread and vaccines to treat infections.[16]

Some Members of Congress have expressed concerns in hearings and letters to federal agencies about the spread of H5N1 and its potential health effects on humans, as well as its economic effects on agriculture, especially in the poultry and livestock industries.[17] For example, several Members asked about the impact of avian influenza on poultry flocks and the availability and price of eggs,[18] the potential for avian influenza to circulate among humans,[19] and communication between the federal government and stakeholders, among other issues.[20] Concern over avian influenza is not new to Congress. Congress has expressed interest in the origins and effects of diseases as pandemics have emerged. For example, the House Committee on International

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See CDC, "H5 Bird Flu: Current Situation," May 30, 2025, https://www.cdc.gov/bird-flu/situation-summary/index.html.

[11] Krammer et al., "Highly Pathogenic Avian Influenza H5N1: History." See Appendix B for definitions of selected terms, including *reassortment*.

[12] Thomas P. Peacock et al., "The Global H5N1 Influenza Panzootic in Mammals," *Nature*, vol. 637, no. 8045 (January 2025), pp. 304-313 (hereinafter Peacock et al., "The Global H5N1 Influenza Panzootic in Mammals"); and Walter N. Harrington et al., "The Evolution and Future of Influenza Pandemic Preparedness," *Experimental and Molecular Medicine*, vol. 53 (2021), pp. 737-749 (hereinafter Harrington et al., "The Evolution and Future of Influenza Pandemic Preparedness").

[13] Krammer et al., "Highly Pathogenic Avian Influenza H5N1: History."

[14] A reassortant virus is created through reassortment, a process in which viruses with segmented genomes exchange genetic material during coinfection.

[15] Eefje J. A. Schrauwen and Ron A. M. Fouchier, "Host Adaptation and Transmission of Influenza A Viruses in Mammals," *Emerging Microbes and Infections*, vol. 3, no. 2 (2014).

[16] Krammer et al., "Highly Pathogenic Avian Influenza H5N1: History."

[17] For more information on the effects of H5N1 on the poultry industry, see CRS Report R48518, *The Highly Pathogenic Avian Influenza (HPAI) Outbreak in Poultry, 2022-Present*, by Lia Biondo.

[18] For example, see Sen. Charles Schumer, "Bird Flu," remarks in the Senate, *Congressional Record*, daily edition, vol. 171, no. 17 (January 27, 2025), p. S386.

[19] For example, see letter from Rep. Jamie Raskin and Rep. Robert Garcia to Hon. Xavier Becerra, Secretary, U.S. Department of Health and Human Services (HHS), December 13, 2024, https://oversightdemocrats.house.gov/sites/evo-subsites/democrats-oversight.house.gov/files/evo-media-document/2024-12-13.JBR%20Garcia%20to%20Becerra-HHS%20re%20HPAI%20-%20Public%20Health.pdf.

[20] For example, see letter from Rep. Donald S. Beyer Jr. et al. to Gary Washington, Acting Secretary, USDA, and Susan C. Monarez, Acting Director, CDC, February 4, 2025, https://beyer.house.gov/uploadedfiles/congressional_letter_-_help_virginia_bird_flu_response_-_02-04-2025.pdf.

Relations held a hearing in 2005 entitled "Avian Flu: Addressing the Global Threat," to gauge the potential for avian influenza to spread to the United States.[21]

This report provides an overview of avian influenza viruses, how they are named and classified (including H5N1), how they spread and evolve, and efforts by federal agencies to manage viruses. The report also discusses the current outbreak of H5N1 in the United States and some issues that Congress may wish to consider. There is a glossary of select terms in **Appendix B**.

Background on Influenza A and Avian Influenza

Influenza viruses are part of the *Orthomyxoviridae* family and are grouped into four main types: A, B, C, and D.[22] Type A viruses are known to infect a large variety of birds and mammals (including humans), whereas the other types (B, C, and D) are restricted to certain host ranges.[23] Influenza A viruses, which include all avian influenza viruses, have eight distinct genomic segments. Influenza A viruses are classified into subtypes based on the combinations of proteins on the virus surface.[24] Influenza A animal viruses infect various species and are named after their host animal, for example, avian influenza, swine influenza, or canine influenza.[25] Despite these categories, cross-species transmission of these viruses are common. Influenza A, for example, was responsible for the Spanish flu pandemic (1918-1919), which originated in the United States and killed an estimated 50-100 million people worldwide, as well as other outbreaks described in **Table 1**.

Avian influenza was originally referred to as a "fowl plague" and was first identified in Italy in 1878.[26] In the 20th century, the fowl plague was classified as a type A influenza virus.[27] In 1924, avian influenza infected poultry in the United States, causing severe losses in live bird markets in New York City. In the 1950s, phylogenetic studies showed that avian and human influenza viruses were related.[28] By this time, avian influenza had been reported in poultry in most of Europe, Russia, North America, South America, the Middle East, Africa, and Asia. Subsequently, there have been several outbreaks of avian influenza throughout the world. Scientists have also attributed an avian origin to subsequent human influenza viruses that caused outbreaks in 1957 and 1968.[29]

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[21] U.S. Congress, House Committee on International Relations, *Avian Flu: Addressing the Global Threat*, 109th Cong., 1st sess., December 7, 2005, S.Hrg. 109-137.

[22] Andrew M. Q. King et al., ed. "Family – Orthomyxoviridae," in *Virus Taxonomy: Ninth Report of the International Committee on Taxonomy of Viruses*, pp. 749-761 (Elsevier, 2012), https://doi.org/10.1016/B978-0-12-384684-6.00061-6.

[23] Samantha J. Lycett et al., "A Brief History of Bird Flu," *Philosophical Transactions of the Royal Society B*, vol. 374, no. 1775 (2019), https://doi.org/10.1098/rstb.2018.0257 (hereinafter Lycett et al., "A Brief History of Bird Flu").

[24] World Health Organization (WHO), "Influenza (Avian and Other Zoonotic)," October 3, 2023, https://www.who.int/news-room/fact-sheets/detail/influenza-(avian-and-other-zoonotic).

[25] WHO, "Influenza (Avian and Other Zoonotic)," October 3, 2023, https://www.who.int/news-room/fact-sheets/detail/influenza-(avian-and-other-zoonotic).

[26] B. Lee Ligon, "Avian Influenza Virus H5N1: A Review of Its History and Information Regarding Its Potential to Cause the Next Pandemic," *Seminars in Pediatric Infectious Diseases*, vol. 16, no. 4 (2005), pp. 326-335 (hereinafter Ligon, "Avian Influenza Virus H5N1: A Review of Its History"); and CDC, "Highlights in the History of Avian Influenza (Bird Flu)," June 1, 2024, https://www.cdc.gov/bird-flu/avian-timeline/index.html.

[27] Ligon, "Avian Influenza Virus H5N1: A Review of Its History."

[28] Lycett et al., "A Brief History of Bird Flu."

[29] R. Fang et al., "Complete Structure of A/duck/Ukraine/63 Influenza Hemagglutinin Gene: Animal Virus as Progenitor of Human H3 Hong Kong 1968 Influenza Hemagglutinin," *Cell*, vol. 25, no. 2 (1981), pp. 315-323, (continued...)

Classification of Avian Influenza

Avian influenza A viruses are classified into two categories: highly pathogenic avian influenza (HPAI), which can cause severe clinical signs and possible high mortality rates in wild birds and poultry, and low pathogenic avian influenza (LPAI), which typically causes few or no clinical signs.[30] LPAI viruses have the ability to mutate into HPAI viruses. For example, an LPAI H5N2 that was circulating in chickens in the United States in 1983 became an HPAI within six months.[31]

Avian influenza is further classified into subtypes based on two surface proteins, hemagglutinin (H) and neuraminidase (N). Each of the subtypes are numerical combinations of H and N, such as H5N1, H7N2, and H7N8. The numbers represent a different subtype of each surface protein. (See the text box on nomenclature for more information.) Each distinct subtype evolves into clades and subclades (i.e., genetic groups separated according to DNA sequences).[32] For example, since the emergency of H5N1 lineage in China in 1996, the virus has evolved and been grouped into 10 clades and multiple subclades.[33] The recent outbreaks of H5N1 around the world are attributed to the 2.3.4.4b clade of H5N1.[34]

https://doi.org/10.1016/0092-8674(81)90049-0; and Judith R. Schäffr et al., "Origin of the Pandemic 1957 H2 Influenza A Virus and the Persistence of Its Possible Progenitors in the Avian Reservoir," *Virology*, vol. 194, no. 2 (1993), 781-788, https://doi.org/10.1006/viro.1993.1319. The subsequent two human pandemics (1957 and 1968) were not caused by completely avian-origin viruses but rather by reassortant viruses with avian origin (Lycett et al., "A Brief History of Bird Flu").

[30] World Organisation for Animal Health (WOAH), "What Is Avian Influenza?," 2025, https://www.woah.org/en/disease/avian-influenza/.

[31] Ligon, "Avian Influenza Virus H5N1: A Review of Its History"; and CDC, "1960-1999 Highlights in the History of Avian Influenza (Bird Flu) Timeline," April 30, 2024, https://www.cdc.gov/bird-flu/avian-timeline/1960-1999.html.

[32] A *clade* is a group of organisms (e.g., viruses) that evolved from a common ancestor. For avian influenza, it is the organization of the hemagglutinin gene highly pathogenic avian influenza, based on molecular analysis. "The mutation of the [hemagglutinin gene] has resulted in genetically divergent groups of virus strains termed clades such as 2.3.4.4b." Food and Agriculture Organization of the United Nations and WOAH, *Global Strategy for the Prevention and Control of High Pathogenicity Avian Influenza (2024–2033)*, 2025, p. 23, https://www.woah.org/app/uploads/2025/02/web-gf-tads-hpai-strategy-woah.pdf.

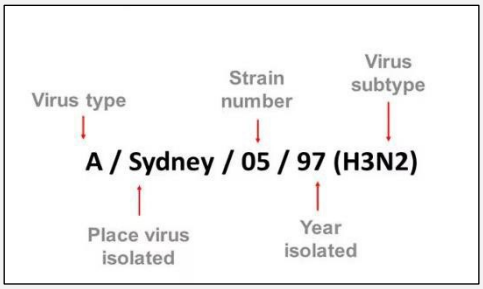
[33] Dong-Hun Lee et al., "Evolution, Global Spread, and Pathogenicity of Highly Pathogenic Avian Influenza H5Nx Clade 2.3.4.4," *Journal of Veterinary Science*, vol. 18, no. S1 (2017), pp. 269-280.

[34] Gina R. Castro-Sanguinetti et al., "Highly Pathogenic Avian Influenza Virus H5N1 Clade 2.3.4.4b from Peru Forms a Monophyletic Group with Chilean Isolates in South America," *Scientific Reports*, vol. 14 (February 13, 2024).

Nomenclature of Avian Influenza Virus

Influenza viruses have a standard nomenclature that includes the virus type; location at which it was isolated; isolate number; isolate year; and, for influenza A viruses, subtype (see **Figure 2**). Influenza A viruses are divided into subtypes based on two proteins on the surface of the virus: hemagglutinin (H) and neuraminidase (N). There are 18 different hemagglutinin subtypes and 11 different neuraminidase subtypes represented by H1 through H18 and N1 through N11; these impact the spread and severity of the virus. Many different combinations of H and N proteins are possible. Each combination is considered a different subtype and can be further broken down into different strains, for example, H5N1 and H7N9. Over time, a classification system was developed to distinguish between subtypes of influenza on the basis of the antigenic properties (characteristics of a molecule's ability to trigger an immune response) of their structural and surface proteins—specifically, the nucleoprotein (NP) (type) and hemagglutinin (HA) (subtype) and neuraminidase (NA) (subtype) proteins. HA provides a virus with the ability to attach to a host cell and is also the target for a host cell's immune response.

Figure 2. Nomenclature of Influenza Viruses



Source: CRS, adapted from U.S. Centers for Disease Control and Prevention, "Highlights in the History of Avian Influenza (Bird Flu)," June 1, 2024, https://www.cdc.gov/bird-flu/avian-timeline/index.html.

Transmission and Spillover of Avian Influenza Among Wildlife

Avian influenza is spread by wild birds that naturally carry different forms of the avian influenza virus. Wild birds, specifically waterfowl, from two orders, *Anseriformes* (i.e., ducks, geese, and swans) and *Charadriiformes* (i.e., gulls, terns, and sandpipers), are natural reservoirs of influenza A virus.[35] The avian influenza virus is thought to have low pathogenicity in these species. One study suggests that these types of birds have carried the virus without developing symptoms for thousands of years.[36] However, other species of birds that get infected by this virus can demonstrate a wide spectrum of reactions, ranging from mild illness to a highly contagious and rapidly fatal sickness that can result in severe epidemics among bird species. Avian influenza viruses can become highly pathogenic and cause high mortality in birds, nearing 100% mortality within 48 hours in some species, according to scientists.[37]

Avian influenza is globally spread by birds that fly long distances via migratory pathways. For example, one study that examined data between 2003 and 2012 found that the timing of H5N1 outbreaks in Eastern Asia followed wild bird migratory flyways.[38] Avian influenza can also be

[35] The order *Anseriformes* comprises about 180 species of birds, and the order *Charadriiformes* comprises about 390 species of birds. Reservoirs of an infectious agent are the habitats in which a virus can live, grow, and multiply. See CDC, "Lesson 1: Introduction to Epidemiology," May 18, 2012, https://archive.cdc.gov/www_cdc_gov/csels/dsepd/ss1978/lesson1/section10.html.

[36] Ligon, "Avian Influenza Virus H5N1: A Review of Its History."

[37] Ligon, "Avian Influenza Virus H5N1: A Review of Its History."

[38] Huaiyu Tian et al., "Avian Influenza H5N1 Viral and Bird Migration Networks in Asia," *Proceedings of the National Academy of Sciences, USA*, vol. 112, no. 1 (2014), pp. 172-177.

spread globally and regionally through the trade in infected poultry.[39] This can include trading between backyard chicken flocks.

Migratory pathways can be conduits for the spread of avian influenza to mammals from wild birds. Some scientists assert that infections of avian influenza in certain mammal species were found along flyways (**Figure 3**) used by migratory birds.[40] Several mammal species, including cattle and humans, were infected by avian influenza from birds and poultry in the current U.S. outbreak, which was first reported in 2022.[41] Avian influenza has spread from birds to mammals, sometimes through direct contact or in some cases through contact with contaminated fecal matter.[42] Scientists report that several terrestrial carnivores such as foxes, raccoons, and bobcats have been infected after scavenging dead, infected birds.[43] Marine mammal species such as sea lions, elephant seals, dolphins, porpoises, and sea otters have been infected with avian influenza, presumably from interactions with infected sea birds.[44] Overall, the mechanisms of viral spillover from birds to other organisms is not fully understood.[45] Some studies indicate that a viral adaptation to mammals might lead to an increased risk of transmission and disease.[46]

[39] M. Gauthier-Clerc et al., "Recent Expansion of Highly Pathogenic Avian Influenza H5N1: A Critical Review," *IBIS: International Journal of Avian Science*, vol. 149, no. 2 (2007), pp. 202-214.

[40] Stephanie Sonnberg et al., "Natural History of Highly Pathogenic Avian Influenza H5N1," *Virus Research*, vol. 178, no. 1 (2013) (hereinafter Sonnberg et al., "Natural History of Highly Pathogenic Avian Influenza H5N1").

[41] CDC, "H5 Bird Flu: Current Situation," May 30, 2025, https://www.cdc.gov/bird-flu/situation-summary/index.html.

[42] Sonnberg et al., "Natural History of Highly Pathogenic Avian Influenza H5N1."

[43] Peacock et al., "The Global H5N1 Influenza Panzootic in Mammals."

[44] Peacock et al., "The Global H5N1 Influenza Panzootic in Mammals."

[45] Timothy M. Uyeki, "Highly Pathogenic Avian Influenza A(H5N1) Virus Infection in a Dairy Farm Worker," *New England Journal of Medicine*, vol. 390, no. 21 (May 3, 2024), pp. 2028-2029.

[46] Catalina Pardo-Roa, "Cross-Species and Mammal-to-Mammal Transmission of Clade 2.3.4.4b Highly Pathogenic Avian Influenza A/H5N1 with PB2 Adaptations," *Nature Communications*, vol. 16 (March 6, 2025) (hereinafter Pardo-Roa, "Cross-Species and Mammal-to-Mammal Transmission of Clade 2.3.4.4b").

Figure 3. North American Bird Migration Flyways

Source: Audubon, "Birds on the Move," in *Audubon Adventures*, https://www.audubonadventures.org/migration_kids.htm (illustration by Thinkstock/Bluebird Design).

Note: Hawaii is part of the broader Pacific Flyway and is not shown on this map. The central portion of the Pacific Flyway extends across the ocean from New Zealand to islands like Hawaii and up through the Alaskan Arctic.

Some scientists contend that extensive mammal-to-mammal transmission of H5N1 could be an indicator of or precursor to human-to-human transmission and could justify heightened biosurveillance efforts.[47] Most mammalian cases of avian influenza result in *dead-end* infections, meaning there is no transmission among species or to other hosts, according to some scientists.[48] However, in some instances, scientists have reported mammal-to-mammal transmission within and between mammal species. For example, H5N1 virus was suspected to be transmitted among animals in fur farms (mink, arctic foxes, and raccoon dogs) in Europe within the last five years.[49] Mammal-to-mammal transmission was suggested in this case, as well as transmission through contamination from equipment, clothing, and carcasses. Mammal-to-mammal transmission was also suspected among sea lions in Peru and Chile, although uncertainty exists as to whether the infections were due to interactions with birds or mammals.[50] In other cases, however, transmission among mammals might happen through animal products such as raw milk or

[47] Marcela M. Uhart, "Massive Outbreak of Influenza A H5N1 in Elephant Seals at Península Valdés, Argentina: Increased Evidence for Mammal-to-Mammal Transmission," *Nature Communications*, vol. 15 (2024).

[48] Peacock et al., "The Global H5N1 Influenza Panzootic in Mammals."

[49] Lauri Kareinen et al., "Highly Pathogenic Avian Influenza A(H5N1) Virus Infections on Fur Farms Connected to Mass Mortalities of Black-Headed Gulls, Finland, July to October 2023," *Eurosurveillance*, vol. 29, no. 25 (June 20, 2024).

[50] Pardo-Roa, "Cross-Species and Mammal-to-Mammal Transmission of Clade 2.3.4.4b."

through consumption of carcasses of infected animals.[51] Lastly, in the United States, scientists attribute H5N1 infections in humans and cats to interactions with infected cattle and contaminated raw milk. According to scientists, infections could be spread from cattle to cattle through contaminated milking equipment.[52]

Avian Influenza Mutation and Reassortment

Influenza viruses are highly variable in terms of their interactions with one another, their hosts, and the environment.[53] When two or more viruses infect a single host at the same time, they can "swap" segments of their genome (i.e., genetic reassortment), resulting in a new hybrid virus.[54] These hybrid viruses can have new traits that lead to properties that affect transmissibility, virulence, and host variability.[55] H5N1 can also undergo mutations that may lead to new traits or characteristics that influence its transmission. According to scientists, monitoring and measuring changes in H5N1 are paramount for trying to understand whether H5N1 could gain or has gained the ability to transmit from human to human.[56] (The section "Spillover to Humans and Transmission Among Humans" provides additional information on human infections and possible routes of transmission.)

Scientists are concerned about the ability of H5N1 and H5Nx Clade 2.3.4.4b viruses to expand globally, spill over into mammals, and evolve through genomic reassortment and mutations.[57] The concern is centered on the potential of the virus to "evolve towards more efficient mammalian transmission and increase the risk of a global pandemic."[58] To determine the extent of the outbreak and how the virus is evolving, scientists are collecting samples from infected seabirds, birds of prey, backyard poultry, commercial poultry, marine and terrestrial mammals, and humans.[59] They extract and sequence viral ribonucleic acid (RNA) from these samples and compare strands for similarities and differences to hypothesize about the evolution and transmission of H5N1. Most of this work is being done with birds and mammals to determine how the virus has been, or is being, transmitted over time and space among species. This information is also being used to test the hypothesis that H5N1 has evolved into viral strains that allow for mammal-to-mammal transmission. Sustained mammal-to-mammal spread of H5N1 does not appear to be definitively verified; however, several studies provide evidence that it has

[51] Massimo Galli et al., "H5N1 Influenza A Virus: Lessons from Past Outbreaks and Emerging Threats," *Le Infezioni in Medicini*, vol. 1 (2025), pp. 76-89 (hereinafter Galli et al., "H5N1 Influenza A Virus: Lessons from Past Outbreaks").

[52] For example, see Peacock et al., "The Global H5N1 Influenza Panzootic in Mammals."

[53] Sonnberg et al., "Natural History of Highly Pathogenic Avian Influenza H5N1."

[54] Y. Kawaoka et al., "Avian-to-Human Transmission of the PB1 Gene of Influenza A Viruses in the 1957 and 1968 Pandemics," *Journal of Virology*, vol. 63, no. 11 (1989).

[55] Peacock et al., "The Global H5N1 Influenza Panzootic in Mammals."

[56] Dhillon et al., "Steps to Prevent and Respond to an H5N1 Epidemic in the USA." Some scientists express concern when an avian flu virus coinfects a species that may be harboring another virus that can infect humans. They suggest that the resulting hybrid avian flu virus could evolve to enable human-to-human transmission.

[57] Mohammad Jawad Jahid and Jacqueline M. Nolting, "Dynamics of a Panzootic: Genomic Insights, Host Range, and Epidemiology of the Highly Pathogenic Avian Influenza A(H5N1) Clade 2.3.4.4b in the United States," *Viruses*, vol. 17, no. 3 (2025) (hereinafter Jahid and Nolting, "Dynamics of a Panzootic").

[58] Pardo-Roa, "Cross-Species and Mammal-to-Mammal Transmission of Clade 2.3.4.4b."

[59] For example, see Pardo-Roa, "Cross-Species and Mammal-to-Mammal Transmission of Clade 2.3.4.4b."

occurred among some species in certain cases, such as marine mammals in South America,[60] fur-producing species in European fur farms, and cattle.[61]

On the basis of these types of studies, scientists have identified two main variants of H5N1, which are being monitored in species in the United States: (1) B3.13, spreading mainly in cows in the United States, and (2) D1.1, found mostly in wild and domesticated birds, including poultry.[62] Scientists hypothesize that mutations in B3.13 could lead to H5N1 viruses that could more readily bind to human cells, potentially leading to human-to-human transmission.[63] For example, in one study of H5N1, scientists introduced several mutations into a viral HA protein and found that one mutation improved the ability of the virus to attach to receptors found on human cells.[64] In another study, some scientists reportedly identified mutations in B3.13 that appear in genes that encode certain viral proteins that make it easier to replicate in airway linings in cows and humans.[65] These mutations, according to the study, may make the virus better adapted to reside in human cells.[66]

The Rise of H5N1 Avian Influenza

H5N1 avian influenza is spreading throughout the world in wild birds, wildlife, marine mammals, and commercial poultry, dairy, and fur farms. H5N1 from Clade 2.3.4.4b is the dominant form of the currently spreading avian influenza virus.

H5N1 avian influenza virus was identified in chickens in Scotland in 1959 and then in turkeys in England in 1991.[67] In 1996, commercially farmed geese in the Guangdong Province of China contracted H5N1, presumably from wild birds. Infected geese led to outbreaks of H5N1 in chicken farms in Hong Kong in 1997, which also led to human infections and fatalities. All poultry in Hong Kong were killed in 1997 and 1998; however, several strains of H5N1 were later detected in wild and domesticated birds outside of these farms. Poultry outbreaks and human cases followed in 2003 in mainland China and countries in southeast Asia such as Vietnam and Thailand. Avian influenza viruses later were grouped into clades, including Clade 2.3.4.4b, which can be traced back to 2016, when it was found in domesticated poultry flocks in East and Southeast Asia.[68] The initial outbreaks of this clade were limited to avian species and caused losses in the poultry industry in the areas where infections were detected. Clade 2.3.4.4b was disseminated throughout the world in birds flying on migratory bird flyways and through global

[60] Pardo-Roa, "Cross-Species and Mammal-to-Mammal Transmission of Clade 2.3.4.4b."

[61] Leonardo C. Caserta et al., "Spillover of Highly Pathogenic Avian Influenza H5N1 Virus to Dairy Cattle," *Nature*, vol. 634 (July 25, 2024), pp. 669-676.

[62] Max Koslov, "Will Bird Flu Spark a Human Pandemic? Scientists Say the Risk Is Rising," *Nature*, vol. 638 (January 27, 2025), pp. 16-17.

[63] Nguyen et al., "Emergence and Interstate Spread of Highly Pathogenic Avian Influenza A(H5N1)."

[64] Several other changes in the virus would be needed for human-to-human transmission; the mutation studied would be a *stepping stone* mutation to transmission. See Ting Hui-Lin et al., "A Single Mutation in Bovine Influenza H5N1 Hemagglutinin Switches Specificity to Human Receptors," *Science*, vol. 386, no. 6726 (December 5, 2024), pp. 1128-1134.

[65] Vidhi Dholakia et al., "Polymerase Mutations Underlie Early Adaptation of H5N1 Influenza Virus to Dairy Cattle and Other Mammals," *BioRxiv* (preprint), January 6, 2025 (hereinafter Dholakia et al., "Polymerase Mutations Underlie Early Adaptation of H5N1").

[66] Dholakia et al., "Polymerase Mutations Underlie Early Adaptation of H5N1."

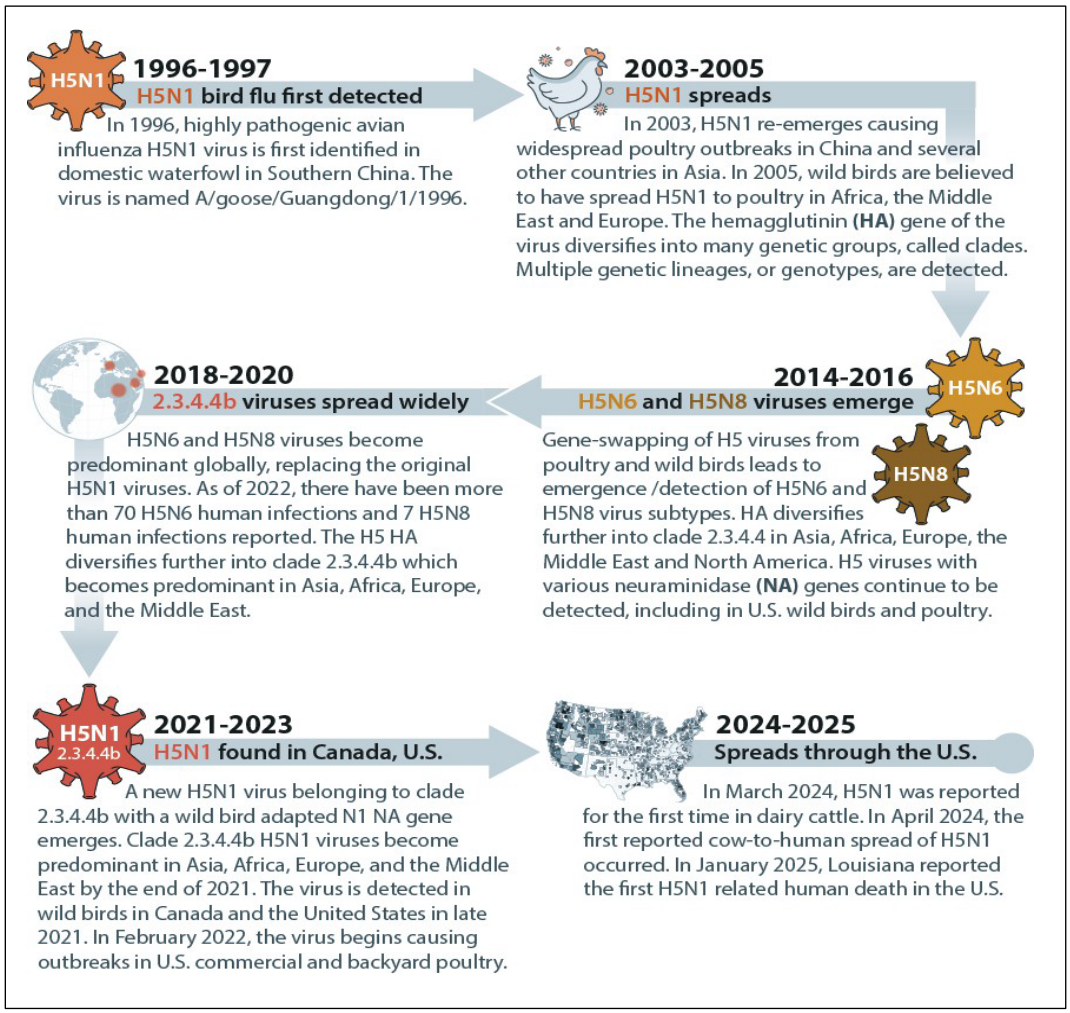
[67] Alejandro Mena et al., "The Impact of Highly Pathogenic Avian Influenza H5N1 in the United States: A Scoping Review of Past Detections and Present Outbreaks," *Viruses*, vol. 17, no. 307 (February 24, 2025) (hereinafter Mena et al., "The Impact of Highly Pathogenic Avian Influenza H5N1 in the United States").

[68] Xie et al., "The Episodic Resurgence of Highly Pathogenic Avian Influenza H5 Virus."

trade networks.[69] In late 2021, H5N1 Clade 2.3.4.4b was introduced to North America from Eurasia by birds flying within the East Atlantic Flyway, according to some scientists,[70] and spread to several wildlife species, including foxes, skunks, bears, bobcats, and raccoons, as well as cattle and humans.[71] **Figure 4** depicts the spread of avian influenza viruses since 1996.

Figure 4. Identification, Evolution, and Spread of Avian Influenzas

(1996-2025)



Source: CRS, adapted from Centers for Disease Control and Prevention, "Emergence and Evolution of H5N1 Bird Flu," June 6, 2023, https://archive.cdc.gov/www_cdc_gov/flu/avianflu/communication-resources/bird-flu-origin-infographic.html.

H5N1 Avian Influenza in the United States

Avian influenza has been active on and off in the United States for at least the last century. Scientists reported that the first outbreak of an HPAI in the United States occurred in 1924,

[69] Xie et al., "The Episodic Resurgence of Highly Pathogenic Avian Influenza H5 Virus."

[70] Xie et al., "The Episodic Resurgence of Highly Pathogenic Avian Influenza H5 Virus."

[71] Eric R. Burrough et al., "Highly Pathogenic Avian Influenza A(H5N1) Clade 2.3.4.4b Virus Infection in Domestic Dairy Cattle and Cats, United States, 2024," *Emerging Infectious Diseases*, vol. 30, no. 7 (July 2024).

causing severe losses of birds in markets in New York City.[72] By the 1950s, avian influenza was reported in poultry in most of Europe, Russia, North America, South America, the Middle East, Africa, and Asia.[73] (**Appendix A** provides a history of avian influenza events from 1878 through the current outbreak of H5N1.)

H5N1 Clade 2.3.4.4b began spreading throughout the United States in 2022. Evidence of H5N1 infections was found in wild birds, poultry, and scavenging birds such as vultures, among others.[74] From 2022 through May 2025, over 13,000 wild birds were found to be infected with H5N1 (**Figure 5**).[75] Wild bird samples are collected by the Animal and Plant Health Inspection Service (APHIS) Wildlife Disease Program and screened for avian influenza viruses. The data are analyzed and reported by the wild bird surveillance program. This program aims to be an early warning system for the introduction and distribution of avian influenza viruses in the United States.[76]

[72] CDC, "1880-1959 Highlights in the History of Avian Influenza (Bird Flu) Timeline," April 30, 2024, https://www.cdc.gov/bird-flu/avian-timeline/1880-1959.html.

[73] CDC, "1880-1959 Highlights in the History of Avian Influenza (Bird Flu) Timeline," April 30, 2024, https://www.cdc.gov/bird-flu/avian-timeline/1880-1959.html.

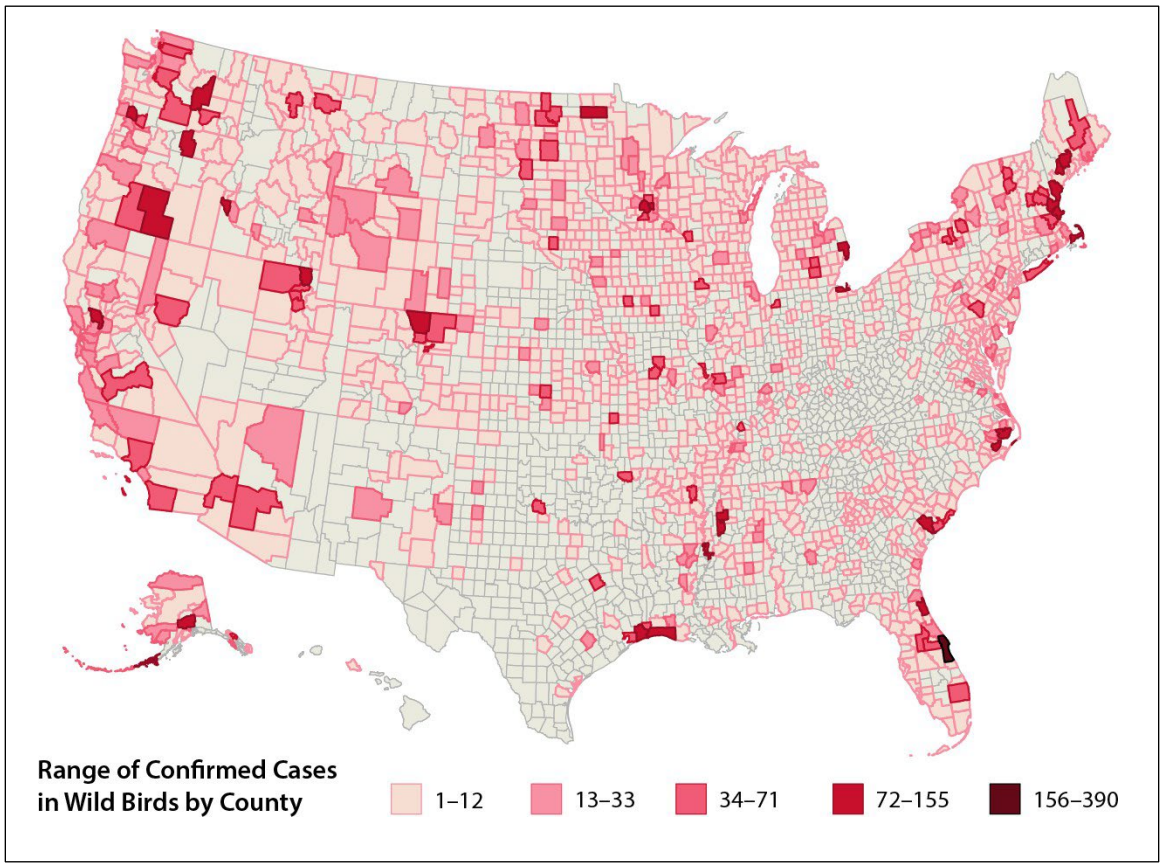
[74] Mena et al., "The Impact of Highly Pathogenic Avian Influenza H5N1 in the United States."

[75] U.S. Animal and Plant Health Inspection Service (APHIS), "Detections of Highly Pathogenic Avian Influenza in Wild Birds," May 13, 2025, https://www.aphis.usda.gov/livestock-poultry-disease/avian/avian-influenza/hpai-detections/wild-birds (hereinafter APHIS, "Detections of Highly Pathogenic Avian Influenza in Wild Birds").

[76] APHIS, "Detections of Highly Pathogenic Avian Influenza in Wild Birds."

Figure 5. Number of Confirmed Cases of Avian Influenza in U.S. Wild Birds

January 12, 2022-May 16, 2025



Source: CRS, using data taken from Animal and Plant Health Inspection Service, "Detections of Highly Pathogenic Avian Influenza in Wild Birds," May 16, 2025, https://www.aphis.usda.gov/livestock-poultry-disease/avian/avian-influenza/hpai-detections/wild-birds.

H5N1 has also spread among commercial and backyard poultry flocks in the United States. During this recent outbreak, APHIS first confirmed H5N1 in a commercial poultry flock in February 2022.[77] Since this detection until May 2025, APHIS has reported avian influenza in 1,705 commercial and backyard flocks in all states in the United States (**Figure 6**).[78] Over 170 million birds were reported to be infected by the virus during this time. The majority of infected birds, over 80 million in total, were in Iowa, California, and Ohio.[79] For additional information about H5N1 in poultry, see CRS Report R48518, *The Highly Pathogenic Avian Influenza (HPAI) Outbreak in Poultry, 2022-Present*, by Lia Biondo.

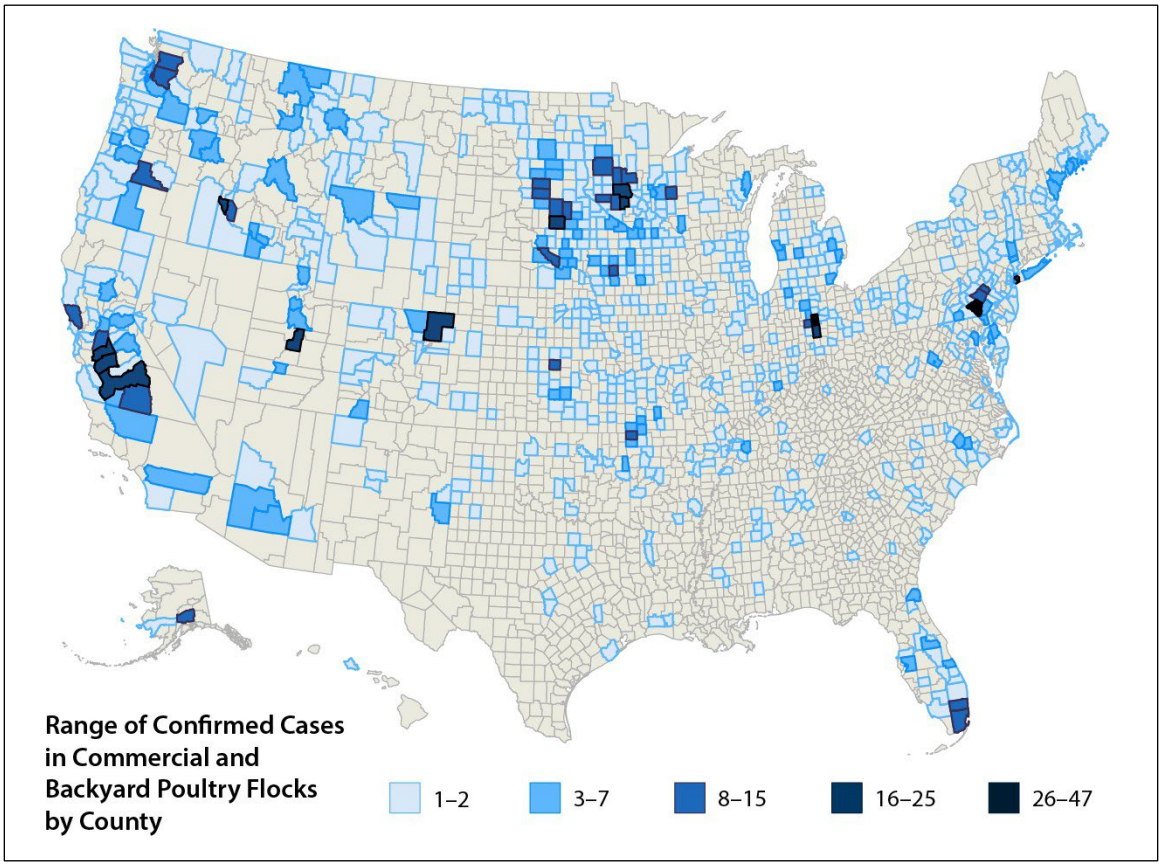
[77] APHIS, "Confirmations of Highly Pathogenic Avian Influenza in Commercial and Backyard Flocks," March 17, 2025, https://www.aphis.usda.gov/livestock-poultry-disease/avian/avian-influenza/hpai-detections/commercial-backyard-flocks (hereinafter APHIS, "Confirmations of Highly Pathogenic Avian Influenza in Commercial and Backyard Flocks").

[78] APHIS, "Confirmations of Highly Pathogenic Avian Influenza in Commercial and Backyard Flocks."

[79] APHIS, "Confirmations of Highly Pathogenic Avian Influenza in Commercial and Backyard Flocks."

Figure 6. Number of Confirmed Cases of Avian Influenza in U.S. Commercial and Backyard Poultry Flocks

February 8, 2022-May 30, 2025



Source: CRS, using data taken from Animal and Plant Health Inspection Service, "Confirmations of Highly Pathogenic Avian Influenza in Commercial and Backyard Flocks," May 30, 2025, https://www.aphis.usda.gov/livestock-poultry-disease/avian/avian-influenza/hpai-detections/commercial-backyard-flocks.

Notes: Poultry consists of egg layers, broilers, and turkeys. Testing did not delineate virus strains.

From 2022 to May 2025, there were 617 reported avian influenza infections in mammals in the United States (**Figure 7**).[80] Infections in mammals generally cause illness and, in some cases, death.[81] Reported infections in the United States were found in domestic cats, harbor seals, mountain lions, house and deer mice, skunks, racoons, and foxes.[82]

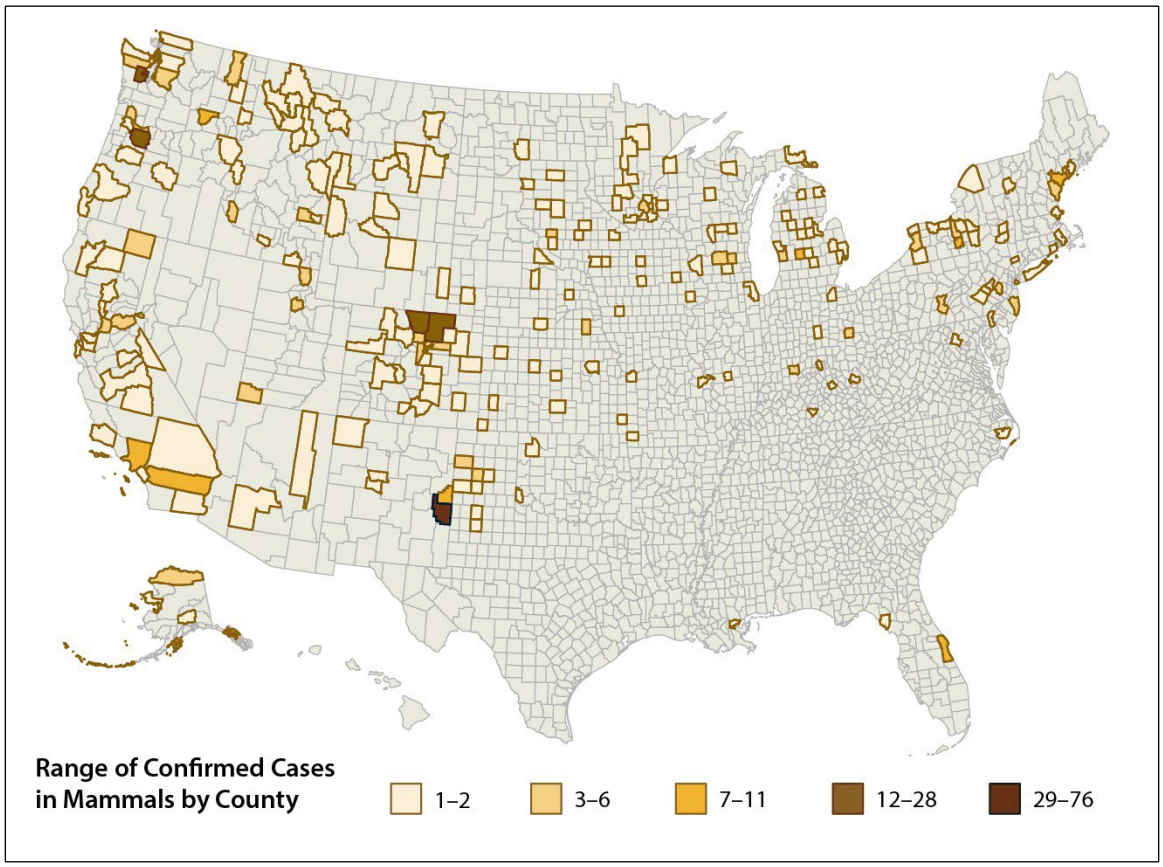
[80] APHIS, "Detections of Highly Pathogenic Avian Influenza in Mammals," May 15, 2025, https://www.aphis.usda.gov/livestock-poultry-disease/avian/avian-influenza/hpai-detections/mammals (hereinafter APHIS, "Detections of Highly Pathogenic Avian Influenza in Mammals").

[81] APHIS, "Detections of Highly Pathogenic Avian Influenza in Mammals."

[82] APHIS, "Detections of Highly Pathogenic Avian Influenza in Mammals."

Figure 7. Number of Confirmed Cases of Avian Influenza in U.S. Mammals

May 5, 2022-May 15, 2025



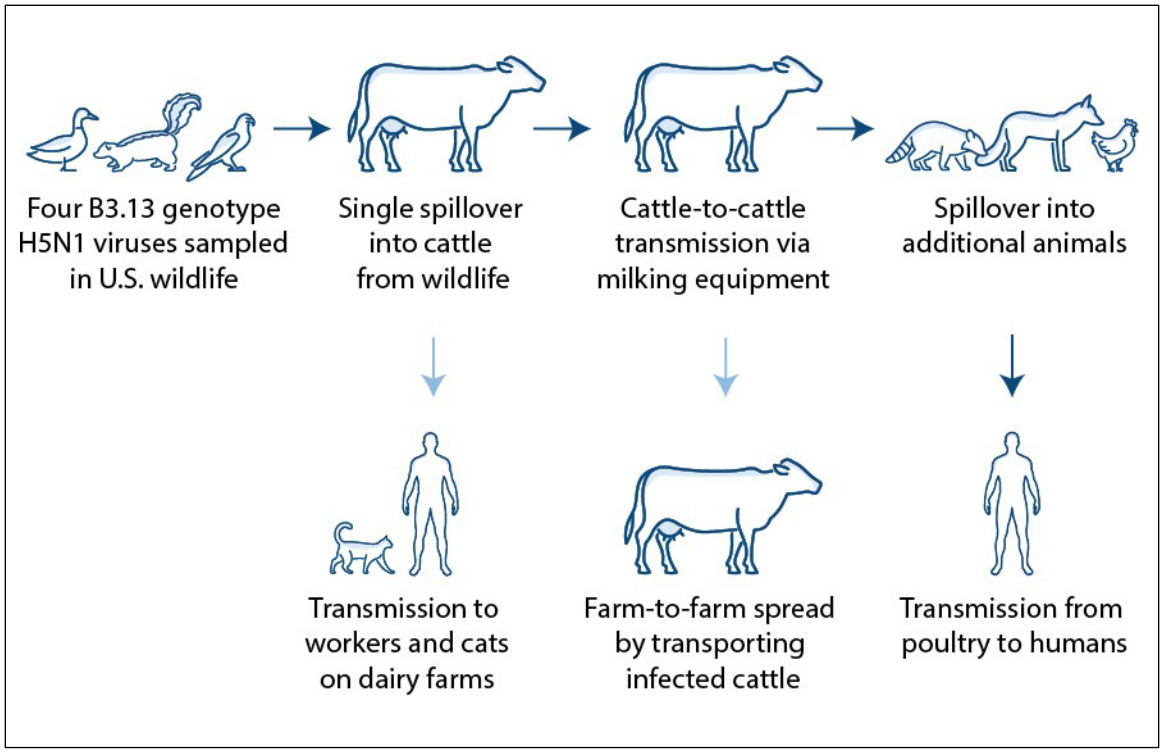
Source: CRS, using data taken from Animal and Plant Health Inspection Service, "Detections of Highly Pathogenic Avian Influenza in Mammals," May 15, 2025, https://www.aphis.usda.gov/livestock-poultry-disease/avian/avian-influenza/hpai-detections/mammals.

H5N1 was first reported in cattle in the United States in Texas in March 2024. The genotype that infected U.S. cattle was from B3.13 and is thought to have originated with a bird-to-cow transmission event earlier than the reported infection.[83] The virus continues to spread among dairy herds likely through interstate transport of infected animals, use of contaminated equipment, and other bird-to-cow transmission events (**Figure 8**).[84]

[83] Krammer et al., "Highly Pathogenic Avian Influenza H5N1: History."

[84] Peacock et al., "The Global H5N1 Influenza Panzootic in Mammals."

Figure 8. Potential Pathways of Current Spread of H5N1 in the United States



Source: CRS, adapted from Thomas P. Peacock et al., "The Global H5N1 Influenza Panzootic in Mammals," *Nature*, vol. 637, no. 8045 (January 2025), pp. 304-313 (figure on p. 308).

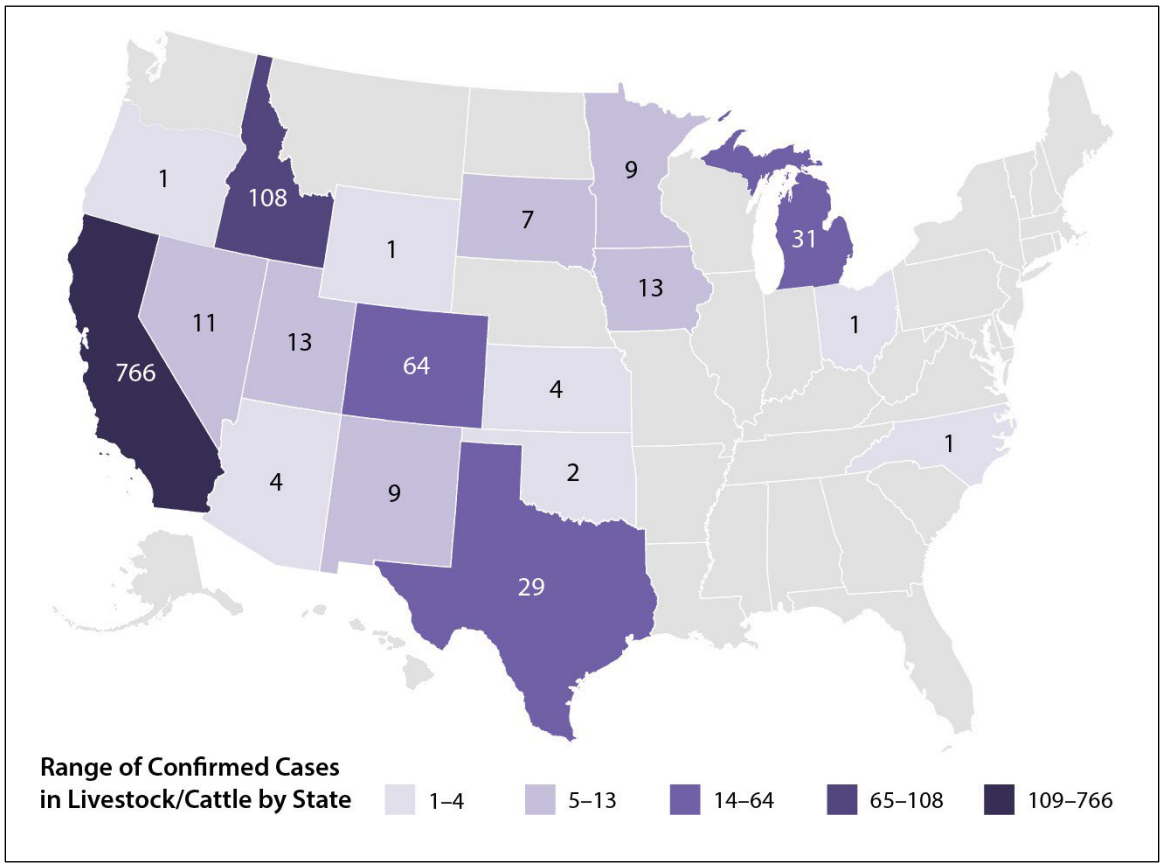
According to APHIS, there were 1,074 confirmed cases of HPAI in cattle in 17 states from March 2024 to May 2025.[85] Of this total, there were 766 reported cases in California (**Figure 9**).[86] For more information on cattle and avian influenza, see CRS In Focus IF12837, *H5N1 HPAI Continues to Spread in Dairy Herds*, by Joel L. Greene and Lia Biondo.

[85] APHIS, "Detections of Highly Pathogenic Avian Influenza in Livestock," April 8, 2025, https://www.aphis.usda.gov/livestock-poultry-disease/avian/avian-influenza/hpai-detections/hpai-confirmed-cases-livestock (hereinafter APHIS, "Detections of Highly Pathogenic Avian Influenza in Livestock").

[86] APHIS, "Detections of Highly Pathogenic Avian Influenza in Livestock."

Figure 9. Number of U.S. Confirmed Cases of Avian Influenza in Livestock

March 25, 2024-May 21, 2025



Source: CRS, using data taken from Animal and Plant Health Inspection Service, "HPAI Confirmed Cases in Livestock," May 21, 2025, https://www.aphis.usda.gov/livestock-poultry-disease/avian/avian-influenza/hpai-detections/hpai-confirmed-cases-livestock.

Notes: See also CRS In Focus IF12837, *H5N1 HPAI Continues to Spread in Dairy Herds*, by Joel L. Greene and Lia Biondo.

H5N1 has infected humans in the United States, primarily from dairy herds and poultry farms. Scientists contend that H5N1 is infecting humans through their handling of dairy cows and poultry, as well as through milking equipment and potentially via consuming raw milk. Human infections in the United States have come from both the B3.13 and D1.1 genotypes of H5N1. There are 70 reported cases of H5N1, including one death in humans in the United States as of March 2025, according to the CDC (**Table 2**).[87]

Recent Selected Federal Actions to Address H5N1

In the United States, several federal agencies, as well as state and local agencies, are responding to H5N1. Federal departments involved include the USDA, Department of the Interior (DOI), and Department of Health and Human Services (HHS), among others. Federal agencies are conducting activities that range from monitoring the spread of H5N1 in wild birds, poultry flocks,

[87] CDC, "CDC A(H5N1) Bird Flu Response Update March 19, 2025," March 19, 2025, https://www.cdc.gov/bird-flu/spotlights/h5n1-response-03192025.html.

dairy herds, and humans to creating policies for addressing H5N1 in the United States. **Table 3** provides a summary of selected federal agency activities.

Table 3. Selected Federal Agencies and Their Activities to Address H5N1

Department and Agency	Description of Activities
U.S. Department of Agriculture (USDA)	On February 26, 2025, the USDA announced a "Five-Pronged Approach to Address Avian Flu." This strategy addresses the impact of avian influenza on the poultry industry in the United States (see the text box "USDA Five-Pronged Approach to Address Avian Flu" below).
Animal and Plant Health Inspection Service (APHIS)	APHIS is addressing H5N1 by monitoring and preventing the spread of H5N1 in poultry and other animals, including dairy cows. It is conducting research on the virus and developing vaccines for commercial poultry and livestock.[a]
U.S. Department of Health and Human Services (HHS)	HHS agencies have multiple initiatives and funding programs related to H5N1.[b]
Centers for Disease Control and Prevention (CDC)	The CDC conducts surveillance of public health, monitors human cases of H5N1, and provides guidance to state health departments on how to investigate suspected cases.[c] The CDC aims to understand the transmission pathways of the virus and develop strategies for prevention and treatment. The CDC reports monitoring data through its flu monitoring system. The CDC also receives reports from public health laboratories and performs tests in wastewater for the prevalence of H5N1. The CDC has a public health strategy for addressing H5N1 in humans. The strategy has several objectives, including • preventing infection and illness in people exposed to H5N1; • understanding human infection and illness with H5N1, including clinical, virologic, and epidemiologic characteristics; and • preparing for and mitigating the possibility of an H5N1 pandemic in humans.
National Institutes of Health (NIH)	NIH conducts and funds research on several aspects of H5N1, including • increasing the understanding of the biology of H5N1 viruses and factors that affect their transmission and efficacy, • developing and evaluating prevention strategies (e.g., vaccine development), • advancing treatments, and • creating and supporting strategies to detect H5N1. Through the National Institute of Allergy and Infectious Diseases, a research agenda was created in December 2024 to address H5N1 with these four objectives. The agenda contains specific sub-objectives, such as evaluating the science behind the outbreak of H5N1 in dairy cows and the possibility for human-to-human transmission of H5N1.[d]
Food and Drug Administration (FDA)	With respect to avian influenza, FDA is responsible for the safety of milk, dairy products, and animal feed supply. FDA tests these products for contamination from H5N1 and their safety for human and animal consumption. FDA also provides guidance to industry on measures to prevent the spread of H5N1 through their products.
U.S. Department of the Interior (DOI)	DOI has several initiatives that aim to monitor and study wildlife that might have contracted H5N1 on its trust lands.

Department and Agency	Description of Activities
U.S. Fish and Wildlife Service (FWS)	FWS is aiding in the surveillance of migratory birds that might have contracted H5N1 through efforts organized by the Interagency Steering Committee for Avian Influenza Surveillance in Wild Migratory Birds. FWS also monitors wild birds and aims to ensure biosecurity and safety on its trust lands, and assists in the collection of wild bird samples for testing.[e]
U.S. Geological Survey (USGS)	USGS conducts research into the ecology of avian influenza virus and surveillance for avian influenza viruses in wildlife. Specifically, the National Wildlife Health Center conducts research on the processes and environmental factors that affect the spread, distribution, and transmission of avian influenza in wild birds and poultry.[f]

Source: Compiled by CRS from sources cited below.

Notes: The information in this table summarizes selected efforts by federal agencies and should not be considered comprehensive.

a. For more information on the USDA response to H5N1, see CRS Report R48518, *The Highly Pathogenic Avian Influenza (HPAI) Outbreak in Poultry, 2022-Present*, by Lia Biondo.

b. CRS In Focus IF12895, *H5N1 Avian Influenza: The Human Health Response*, by Kavya Sekar, Amanda K. Sarata, and Hassan Z. Sheikh.

c. For more information on the CDC, see CRS In Focus IF12241, *The Centers for Disease Control and Prevention (CDC)*, by Kavya Sekar, and CRS In Focus IF12895, *H5N1 Avian Influenza: The Human Health Response*, by Kavya Sekar, Amanda K. Sarata, and Hassan Z. Sheikh.

d. National Institute of Allergy and Infectious Diseases (NIAID), *NIAID Research Agenda for 2024 H5N1 Influenza*, May 23, 2024, https://www.niaid.nih.gov/sites/default/files/niaid-h5n1-research-agenda.pdf.

e. U.S. Fish & Wildlife Service, "Avian Influenza," https://www.fws.gov/avian-influenza.

f. National Wildlife Health Center, "Avian Influenza Surveillance," U.S. Geological Survey, February 10, 2025, https://www.usgs.gov/centers/nwhc/science/avian-influenza-surveillance.

USDA Five-Pronged Approach to Address Avian Flu

On February 26, 2025, the USDA announced a "Five-Pronged Approach to Address Avian Flu." This strategy addresses the impact of avian influenza on the poultry industry in the United States. The approach includes

- investing up to $500 million in biosecurity measures for U.S. poultry producers, including expanding Wildlife Biosecurity Assessments to producers to reduce transmission of H5N1 from birds to poultry;
- increasing financial aid up to $400 million for farmers to repopulate poultry flocks;
- reducing regulatory burdens on the chicken and egg industry to stimulate innovation and reduce prices, including expanding the commercial supply for eggs, limiting culling during avian influenza outbreaks, and educating stakeholders on geographical price differences among eggs;
- exploring pathways toward vaccines, therapeutics, and other strategies for protecting egg-laying poultry; and
- considering import and export options for eggs to reduce costs for consumers and evaluating international best practices for safe egg production.

In an update to this strategy, the USDA noted that it has expanded biosecurity assessments, increased the indemnity rate for layer hens, evaluated solutions for disease management, invested $100 million in avian flu research and vaccine development, and explored import/export adjustments to stabilize supply.

Sources: U.S. Department of Agriculture, "USDA Invests Up to $1 Billion to Combat Avian Flu and Reduce Egg Prices," press release, February 26, 2025, https://www.usda.gov/about-usda/news/press-releases/2025/02/26/usda-invests-1-billion-combat-avian-flu-and-reduce-egg-prices; and U.S. Department of Agriculture, "USDA Update on Progress of Five-Pronged Strategy to Combat Avian Flu and Lower Egg Prices," press release, March 20, 2025, https://www.usda.gov/about-usda/news/press-releases/2025/03/20/usda-update-progress-five-pronged-strategy-combat-avian-flu-and-lower-egg-prices. For more information on the USDA response to H5N1, see CRS Report R48518, *The Highly Pathogenic Avian Influenza (HPAI) Outbreak in Poultry, 2022-Present*, by Lia Biondo.

There are also some interagency efforts that address specific aspects of avian influenza. For example, the Interagency Steering Committee for Surveillance for Highly Pathogenic Avian Influenza coordinates federal efforts for the surveillance of wild birds to detect avian influenza viruses in the United States. The committee consists of representatives from the USDA, U.S. Fish and Wildlife Service (FWS), U.S. Geological Survey (USGS), National Flyway Council, and Association of Fish and Wildlife Agencies.[88] In addition, the CDC, the USDA, and DOI released a framework called "One Health" in January 2025 to help individuals navigate health threats shared between people and animals. The approach acknowledges the interdependence of humans, domestic and wild animals, plants, and the wider environment (including ecosystems) for addressing disease and aims to coordinate multiple sectors, disciplines, and communities to address health and ecosystem threats.[89] This effort also resulted in the creation of the United States One Health Coordination Unit. This federal entity is a platform for the CDC to work with the USDA, DOI, and other departments to exchange information and coordinate all One Health activities, including enhancing health-sustaining resources, emergency preparedness, and the prevention, detection, and response to zoonotic diseases.[90]

In the context of H5N1, a One Health approach could include surveillance and testing programs of wild birds and mammals that involve wildlife biologists, veterinarians, and public health officials or joint investigations into human cases of avian influenza that include tracing the source of the infection back to wildlife.

Considerations for Congress

Issues that Congress might consider when addressing avian influenza in the United States include the effectiveness and coverage of existing biosurveillance practices and policies; the effectiveness of coordination among federal agencies and nonfederal entities; the status of international collaboration; research and data required to fill existing knowledge gaps; activities related to monitoring and planning for potential spillover of avian influenza to humans; and policies that lead to suppressing or eliminating avian influenza in the United States.

Biosurveillance for H5N1

Conducting biosurveillance to monitor and record wildlife, poultry, and livestock infections of avian influenza is a priority for stakeholders.[91] Scientists assert that effective responses to avian influenza outbreaks rely on the rapid detection and identification of emerging strains of H5N1.[92] This requires extensive sampling of animal species that might be carrying H5N1 strains and could be considered intermediates host for human infections. Further, scientists note that sampling

[88] U.S. Geological Survey, "What Is Avian Influenza?" https://geonarrative.usgs.gov/avianinfluenza/.

[89] CDC et al., *National One Health Framework to Address Zoonotic Diseases and Advance Public Health Preparedness in the United States*, 2025, https://www.cdc.gov/one-health/media/pdfs/2025/01/354391-A-NOHF-ZOONOSES-508_FINAL.pdf.

[90] CDC, "Federal One Health Coordination," February 14, 2025, https://www.cdc.gov/one-health/php/about/federal-one-health-coordination-1.html.

[91] Sergio A. Lambertucci et al., "The Threat of Avian Influenza H5N1 Looms over Global Biodiversity," *Nature Reviews Biodiversity*, vol. 1 (2025), pp. 7-9 (hereinafter Lambertucci et al., "The Threat of Avian Influenza H5N1 Looms over Global Biodiversity").

[92] For example, see European Food Safety Authority (EFSA) Panel on Animal Health and Animal Welfare (AHAW) et al., "Preparedness, Prevention and Control Related to Zoonotic Avian Influenza," *European Food Safety Authority Journal*, vol. 23, no. 1 (2025), Article e9191 (hereinafter EFSA AHAW et al., "Preparedness, Prevention and Control Related to Zoonotic Avian Influenza").

strains from human infections may also identify compatible H5N1 viruses and help contain their spread.[93] Some scientists assert that monitoring should be increased for marine birds and mammals, as well as terrestrial scavengers.[94] These are species most susceptible to infection and potential indicators of where the virus might be spreading. Further, they contend that monitoring should be increased along migratory flyways, especially in regions that are unaffected by the virus.[95] This could allow scientists to map the risk of H5N1 infection, prioritize surveillance efforts, and minimize the effects of the virus if it spreads to new regions.[96]

Other stakeholders might argue that existing surveillance actions by the federal government are sufficient to track the spread of avian influenza, citing APHIS, which stated that "the United States has the strongest avian influenza surveillance program in the world."[97] Most cases of H5N1 are found in domesticated birds and livestock as opposed to wild birds, leading some stakeholders to argue that increased monitoring of wildlife may not be as effective as biosurveillance on livestock. In response, some scientists note that certain studies found that preventive and control measures for infected wild birds (e.g., vaccines) could lower the incidence of disease outbreaks in poultry.[98]

Congress might consider whether current biosurveillance programs, particularly of wild birds, are sufficient to identify potential exposure pathways early enough to prevent transmission and continued spread to other animals, such as mammals, commercial poultry, and livestock. A related congressional oversight topic could be the effects of staff reductions at the USDA and other federal agencies on biosurveillance of H5N1 in livestock, wildlife, and humans. Options to increase biosurveillance, if desired, could include providing more resources for surveillance efforts through APHIS and FWS, and establishing early warning or identification networks across the country to provide real-time data to help identify infected animals and prevent future infections. Data collected during surveillance programs could also be used for broader research efforts. Legislative options could include expanding surveillance systems to monitor the prevalence of zoonotic diseases in humans. For example, H.R. 766 in the 119th Congress would authorize the National Wastewater Surveillance System to monitor a broad variety of pathogens, including avian influenza, to detect the prevalence of zoonotic diseases.[99] Section 6003(a)(3) of P.L. 117-2, the American Rescue Plan Act of 2021, authorized the Zoonotic Disease Initiative, a grant program focused on wildlife disease prevention and preparedness.[100]

The following are other potential topics for congressional oversight:

- The role of state and local governments in surveillance and response to H5N1, how this role does or does not support the federal response to H5N1, and what level of federal support these entities need to implement and report biosurveillance.

[93] Harrington et al., "The Evolution and Future of Influenza Pandemic Preparedness."

[94] Lambertucci et al., "The Threat of Avian Influenza H5N1 Looms over Global Biodiversity."

[95] Lambertucci et al., "The Threat of Avian Influenza H5N1 Looms over Global Biodiversity."

[96] Lambertucci et al., "The Threat of Avian Influenza H5N1 Looms over Global Biodiversity."

[97] APHIS, "H5N1 Influenza," March 20, 2025, https://www.aphis.usda.gov/h5n1-hpai#detections-hpai.

[98] Masato Hatta et al., "An Influenza mRNA Vaccine Protects Ferrets from Lethal Infection with Highly Pathogenic Avian Influenza A(H5N1) Virus," *Science Translational Medicine*, vol. 16, no. 778 (2024).

[99] The National Wastewater Surveillance System was implemented by the CDC in September 2020. The system aimed to coordinate and increase capacity to track the presence of SARS-CoV-2, the virus that causes COVID-19, in wastewater samples collected across the country.

[100] U.S. Fish & Wildlife Service, "American Rescue Plan Act Zoonotic Disease Grant Program," 2023, https://www.fws.gov/project/american-rescue-plan-act-zoonotic-disease-grant-program.

- How individuals with backyard flocks could use information networks to protect and monitor their flocks for avian influenza. This topic could include federal outreach programs such as those administered by the USDA Cooperative Extension System to identify other animal populations raised by smallholders not currently seen as potential vectors for disease.[101] Congress might also consider whether state and local programs should be federally supported to conduct such work.

Federal Agency Coordination

In the United States, several federal agencies are addressing various aspects of avian influenza. Coordination among these agencies should be a priority, according to several scientists who support the One Health approach to addressing zoonotic viruses such as avian influenza.[102] Some Members of Congress contend that coordination among federal agencies to address avian influenza is critical to control its spread and that apparent contradictions in strategies to lower avian influenza among federal agencies might indicate a lack of coordination.[103] In May 2024, 16 U.S. Senators wrote to the Secretary of Agriculture and expressed support for a collaborative federal response to increase pathogen surveillance and inform farmers, ranchers, and veterinarians of the latest developments and mitigation efforts.[104]

Other stakeholders might contend that current coordination among federal agencies to address avian influenza is sufficient. For example, the "Five-Pronged Approach" to control avian influenza recently promulgated by the USDA commits $1 billion to implementing this approach.[105] This initiative is focused on the poultry industry, however. The One Health approach, in contrast, might include other species and additional federal agencies such as FWS and the CDC.

Current policies and coordination among federal agencies to address H5N1 and other forms of avian influenza could be a subject for congressional oversight. If Congress determined that more or better coordination were required, legislative options could include providing new authorities and/or funding for federal agencies to facilitate and direct coordination, establishing an executive office to address avian influenza, and authorizing a federal task force with decisionmaking authority to lead efforts to combat the current outbreak and any future outbreaks when needed.

[101] National Institute of Food and Agriculture, "Cooperative Extension System," 2025, https://www.nifa.usda.gov/about-nifa/how-we-work/extension/cooperative-extension-system.

[102] Jahid and Nolting, "Dynamics of a Panzootic."

[103] Letter from Raja Krishnamoorthi, Ranking Member of the Subcommittee on Health Care and Financial Services, et al., to Hon. Robert F. Kennedy Jr., HHS Secretary, April 1, 2025, https://oversightdemocrats.house.gov/sites/evo-subsites/democrats-oversight.house.gov/files/evo-media-document/2025-04-01-gec-krishnamoorthi-et-al-to-jfkjr-re-bird-flu.pdf.

[104] For example, see letter from Sen. Amy Klobuchar et al. to Hon. Tom Vilsack, Secretary of Agriculture, May 1, 2024, https://www.klobuchar.senate.gov/public/_cache/files/6/7/676a55eb-4f22-4de6-9f7e-ca4314cce98d/A60BA7F007F2918BB694829DCABF8D5F.24.5.1-letter-to-secretary-vilsack-regarding-avian-flu.pdf.

[105] USDA, "USDA Invests Up to $1 Billion to Combat Avian Flu and Reduce Egg Prices," press release, February 26, 2025, https://www.usda.gov/about-usda/news/press-releases/2025/02/26/usda-invests-1-billion-combat-avian-flu-and-reduce-egg-prices; and USDA, "USDA Update on Progress of Five-Pronged Strategy to Combat Avian Flu and Lower Egg Prices," press release, March 20, 2025, https://www.usda.gov/about-usda/news/press-releases/2025/03/20/usda-update-progress-five-pronged-strategy-combat-avian-flu-and-lower-egg-prices.

New Authorities for Federal Agencies

If Congress determined that current levels of federal and nonfederal coordination to address H5N1 were insufficient, a range of options could be considered, including the following:

- Directing agencies to enter into cooperative agreements with other federal or nonfederal agencies to address avian influenza.
- Requiring submission of a crosscut budget that would show funding for activities addressing H5N1.[106] A crosscut budget is often used to present budget information from two or more agencies whose activities are targeted at a common policy goal and may allow Congress to examine whether these activities are complementary or duplicative, for example.
- Establishing a program related to H5N1 similar to the Networking and Information Technology Research and Development (NITRD) Program, which coordinates the activities of multiple agencies to tackle multidisciplinary, multi-technology, and multisector research and development needs.[107]

Executive Office for Avian Influenza

Another legislative option could be to establish a White House office to coordinate activities to inform future policies and actions to fight avian influenza or assign this function to an existing office. An example could be to utilize the Office of Pandemic Preparedness and Response (OPPR) for such activities.[108] The primary function of the office is to

> [p]rovide advice, within the Executive Office of the President, on policy related to preparedness for, and response to, pandemic and other biological threats that may impact national security, and support strategic coordination and communication with respect to relevant activities across the Federal Government.[109]

By law, OPPR is tasked with coordinating federal activities in order to "prepare for, and respond to, pandemic and other biological threats" as well as other responsibilities prescribed in P.L. 117-328. OPPR is required to submit a report every two years, in part, on current and emerging pandemic and other biological threats that pose a significant level of risk to national security as well as the roles and responsibilities of the federal government in preparing for, and responding to, such threats to the President; the Senate Committee on Health, Education, Labor and Pensions; and the House Committee on Energy and Commerce. On January 20, 2025, President Trump issued National Security Presidential Memorandum/NSPM-1, "Organization of the National Security Council and Subcommittees," which named the director of the OPPR Policy as a member on the National Security Council.[110]

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[106] Crosscut budgets can assist in making data from multiple agencies more understandable and could be used to inform congressional oversight committees, participating agencies, and stakeholders. A crosscut budget may be used to track funding for a theme (e.g., addressing avian influenza), list program accomplishments, measure progress toward achieving program goals, or compare similar activities conducted by various agencies. For more information, see CRS Report RL34329, *Crosscut Budgets in Ecosystem Restoration Initiatives: Examples and Issues for Congress*, by Pervaze A. Sheikh and Clinton T. Brass.

[107] Networking and Information Technology Research and Development (NITRD) Program, "About the NITRD Program," 2025, https://www.nitrd.gov/about-nitrd/.

[108] Established under the Consolidated Appropriations Act, 2023 (P.L. 117-328), Title II, Subtitle A, §2104.

[109] Consolidated Appropriations Act, 2023 (P.L. 117-328, §2104(b)).

[110] National Security Presidential Memorandum-1, "Organization of the National Security Council and
(continued...)

Congress may consider a similar office focused on addressing avian influenza or an office that has a broader mandate that would identify, coordinate, prepare for, and respond to novel, adapted, or currently circulating zoonotic viruses. Some stakeholders might oppose this approach if they view the office as creating an additional layer of bureaucracy that might delay actions needed to address H5N1 by agencies with specialized expertise and "on-the-ground" presence, such as surveillance and response activities. This concern likely would depend on the structure and authority given to the office.

Federal Task Force

Congress might also consider creating a federal task force to address H5N1. A federal task force could have several duties that support a One Health approach to zoonotic diseases:

- identify opportunities to leverage federal resources with state or local resources and increase coordination among federal and nonfederal stakeholders;
- create a federal plan to contain H5N1 that could include strategies for research, biosurveillance, and containment and prevention protocols;[111]
- provide technical assistance and scientific resources to nonfederal stakeholders to address H5N1;
- organize federal agency activities to reduce overlap and be the point of contact for international collaborative efforts to eliminate H5N1;
- create a crosscut budget to show how federal funding is being spent on H5N1 and the authorities used for implementing activities; and
- solicit and address recommendations from stakeholders on how to improve the federal response to H5N1.

A task force also could provide Congress with a single entity over which it could exercise oversight for H5N1, rather than having to oversee the individual agencies.

Multiagency efforts that focus on coordination, such as a federal task force, may pose some challenges. For example, if consensus from all task force members were to be needed for activities to progress, one task force member could slow or stop efforts. Further, a task force would not have the authority to allocate funding to rapidly support response efforts. Congress could address this potential issue by providing funding for broad objectives, thereby giving the entity more discretion to direct funding to certain projects or activities deemed a high priority. Another option could be to appropriate funding to a single agency and grant that agency transfer authority to send funds to other agencies where activities need to be implemented.[112]

International Collaboration to Address Avian Influenza

Congress might consider the role of the United States in international organizations and programs associated with emerging disease identification and monitoring. H5N1 is spreading throughout the world, primarily through migratory birds and transport of infected animals. There are several

Subcommittees," January 20, 2025, https://www.whitehouse.gov/presidential-actions/2025/01/organization-of-the-national-security-council-and-subcommittees/.

[111] For example, under the Great Lakes Restoration Initiative, there is a federal task force that creates an action plan every four years to guide restoration and coordinates work among federal agencies to implement the plan. See 33 U.S.C. §1268(c)(7).

[112] For an example related to restoration in the Great Lakes, see 33 U.S.C. §1268(c)(7)(D)(ii).

international efforts to address avian influenza, focusing on monitoring, gathering, and reporting data on infections, research, and strategies for addressing the disease (**Table 4**).

Table 4. Selected International Organizations and Their Efforts to Address H5N1

Organization	Description
World Health Organization (WHO)	The WHO coordinates efforts to respond to H5N1 with other countries and international organizations. WHO efforts include surveillance and reporting of human cases of H5N1, providing technical assistance to countries, and preparing guidelines for prevention and control. It also advises on research to address the virus. In January 2025, President Trump issued Executive Order 14155, which stated that the United States intends to withdraw from the WHO.[a]
World Organisation for Animal Health (WOAH)	The WOAH focuses on animal health and provides guidance to member countries on the diagnosis, control, and prevention of H5N1 in animals. It also provides technical assistance and training and coordinates scientific studies. The United States is a member country.
Food and Agriculture Organization (FAO)	FAO addresses the impact of H5N1 on animal health and food security. FAO assists member countries to strengthen biosecurity measures against H5N1 and develop and implement national preparedness plans for H5N1. FAO also studies and reports the potential economic and food security impacts of H5N1 outbreaks. The United States is a member country.
Pan American Health Organization (PAHO)	The PAHO collaborates with countries in the Americas to increase and improve surveillance of H5N1; provide technical support to detect, treat, and investigate human infections of H5N1; and improve the capacity of labs to diagnose and monitor genetic changes of H5N1. The United States is a member country.

Sources: WHO, "What Research Is Important to Prepare and Respond to H5N1Influenza Outbreaks," press release, March 19, 2025; WOAH, "Avian Influenza," press release, 2025; FAO, "The Spread of H5N1 Highly Pathogenic Avian Influenza Calls for Stepped Up Action, FAO Says," press release, March 17, 2025; PAHO, *Avian Influenza*, 2025.

a. Executive Order 14155 of January 20, 2025, "Withdrawing the United States from the World Health Organization," 90 *Federal Register* 8361, January 29, 2025.

Some scientists contend that international collaboration is needed to improve biosurveillance and sharing of information on the extent and spread of avian influenza.[113] Further, they assert that international collaboration is needed to share data and insights on the spread of H5N1, given the global nature of migratory bird patterns, an indicator of viral spread.[114] They note that some organizations are working to improve information sharing and surveillance, but they lack financial resources, infrastructure, and ability to test and monitor organisms in developing areas. One scientist emphasizes that the possibility of unseen H5N1 transmission spreading among farmworkers or mammal populations in developing countries is higher than for developed countries. This may occur because of fear of a government presence, which could be detrimental to understanding the transmission of the disease, and lack of sufficient resources for testing.[115]

Other stakeholders argue that participation in certain international organizations may not be advantageous because of the ineffectiveness of the organization and potential politicization of the

[113] Food and Agriculture Organization of the United Nations, "The Spread of H5N1 Highly Pathogenic Avian Influenza Calls for Stepped Up Action, FAO Says," press release, March 17, 2025; and Lambertucci et al., "The Threat of Avian Influenza H5N1 Looms over Global Biodiversity."

[114] Mena et al., "The Impact of Highly Pathogenic Avian Influenza H5N1 in the United States."

[115] Peacock et al., "The Global H5N1 Influenza Panzootic in Mammals."

organization's actions. For example, the United States has stated that it intends to withdraw from the World Health Organization (WHO) because of its handling of the COVID-19 pandemic and the alleged politicization of its actions.[116]

Congress might consider whether federal participation in international efforts to address and monitor H5N1 is necessary to positively impact detection and tracking. Some potential advantages of participating in international efforts related to H5N1 might include receiving monitoring data of migratory birds carrying the virus from other countries into the United States, being aware of new strains of H5N1 in real time from around the globe, and participating in efforts to lower and control the spread of the disease at a global level. Some disadvantages might include the cost of paying dues for participation and the potential failure to control the virus because of ineffectual leadership and inadequate efforts. Congress might also consider the implications of the Administration's intent to withdraw from the WHO, pursuant to Executive Order 14155, "Withdrawing the United States from the World Health Organization," and its potential impacts on U.S. pandemic preparedness for zoonotic diseases such as avian influenza.[117]

Research and Data Collection

Several scientists contend that conducting research and collecting data on avian influenza viruses is a key step toward controlling them in wildlife, commercially raised animals, and humans.[118] Some scientists assert that research into how H5N1 evolves, spreads, and can be controlled is essential to address the effects of the virus. Selected research tasks recommended by scientists include the following:

- Studying the biology and evolution of H5N1 and factors that influence their ability to transmit and cause disease (e.g., how the H5N1 adapts and evolves), including studying mutations that might make it easier for the virus to infect humans or be spread through human-to-human transmission.[119]
- Gaining a better understanding of infections and pathogenesis in cattle, small ruminants, swine, and poultry.[120]
- Developing a better understanding of transmission among wildlife species that live around humans.[121]
- Developing prevention and mitigation strategies (e.g., vaccines) to counter H5N1 and advancing treatments to address H5N1 (e.g., vaccines, antivirals, diagnostic

[116] Executive Order 14155 of January 20, 2025, "Withdrawing the United States from the World Health Organization," 90 *Federal Register* 8361, January 29, 2025.

[117] Executive Order 14155 of January 20, 2025, "Withdrawing the United States from the World Health Organization," 90 *Federal Register* 8361, January 29, 2025.

[118] For example, see Galli et al., "H5N1 Influenza A Virus: Lessons from Past Outbreaks."

[119] National Institute of Allergy and Infectious Diseases (NIAID), *NIAID Research Agenda for 2024 H5N1 Influenza*, May 23, 2024, https://www.niaid.nih.gov/sites/default/files/niaid-h5n1-research-agenda.pdf.

[120] HHS, "U.S. Highly Pathogenic Avian Influenza A(H5N1) Research Priorities: October 2024," October 2024, https://www.hhs.gov/programs/public-health-safety/us-highly-pathogenic-avian-influenza-a-h5n1-research-priorities-october-2024/index.html (hereinafter HHS, "U.S. Highly Pathogenic Avian Influenza A(H5N1) Research Priorities").

[121] National Academies of Sciences, Engineering, and Medicine, *Potential Research Priorities to Inform U.S. Readiness and Response to Avian Influenza A (H5N1), Proceedings of a Workshop—in Brief*, 2024, https://nap.nationalacademies.org/read/28581/chapter/1#14 (hereinafter National Academies of Sciences, Engineering, and Medicine, *Potential Research Priorities for Avian Influenza A*).

tests).[122] Developing strategies to detect H5N1and prevent transmission, especially in developing countries where resources for this work are minimal.

- Estimating the potential for H5N1 to create a human pandemic.[123]

Certain research that investigates how viruses evolve to become more transmissible or virulent has raised biosafety and biosecurity concerns.[124] These discussions began, in part, in 2011-2012 around a set of studies funded by the National Institutes of Health (NIH) on respiratory transmission of H5N1.[125] These particular types of studies became known as "gain-of-function" (GOF) research and led to various federal oversight policies to address biosafety and biosecurity of such research, including a temporary moratorium on certain GOF research in 2014.[126] Since then, policymakers, scientists, and the public have debated the magnitude of potential risks and benefits of GOF and other life sciences research involving pathogens, how to weigh those risks and benefits appropriately, and to what extent community engagement and transparent decisionmaking should have a role in determining those risk and benefits. These discussions have led to various federal policies being developed and updated over the years.[127] These include, most recently, the Trump Administration's Executive Order 14292, "Improving the Safety and Security of Biological Research," released on May 5, 2025, which includes the Administration's intention to revise or replace the *United States Government Policy for Oversight of Dual Use Research of Concern and Pathogens with Enhanced Pandemic Potential*, which was scheduled to take effect on May 6, 2025.[128]

In addition to funding research, some stakeholders also suggest funding the creation of a system to characterize and catalog emerging viruses and their evolution.[129] Such a system would compile genetic sequences of viruses collected from all over the world and use bioinformatics[130] tools to evaluate the zoonotic potential of new mutations or combinations of new mutations of avian influenza viruses. A system of this type could address scientists' concerns about the limitations on assessing emerging mutations in H5N1.[131] Further, some scientists and policy analysts note that

[122] HHS, *U.S. Highly Pathogenic Avian Influenza A(H5N1) Research Priorities*.

[123] National Academies of Sciences, Engineering, and Medicine, *Potential Research Priorities for Avian Influenza A*.

[124] CRS Report R47114, *Oversight of Gain-of-Function Research with Pathogens: Issues for Congress*, by Todd Kuiken.

[125] Kelsey Lane Warmbrod et al., "COVID-19 and the Gain of Function Debates: Improving Biosafety Measures Requires a More Precise Definition of Which Experiments Would Raise Safety Concerns," *EMBO Reports*, vol. 22, no. 10 (2021).

[126] Office of Science and Technology Policy, *U.S. Government Gain-of-Function Deliberative Process and Research Funding Pause on Selected Gain-of-Function Research Involving Influenza, MERS, and SARS Viruses*, October 17, 2014.

[127] CRS Report R48155, *Oversight of Laboratory Biosafety and Biosecurity: Current Policies and Options for Congress*, by Todd Kuiken.

[128] Office of Science and Technology Policy, *United States Government Policy for Oversight of Dual Use Research of Concern and Pathogens with Enhanced Pandemic Potential*, May 2024; and Executive Order 14292 of May 5, 2025, "Improving the Safety and Security of Biological Research," 90 *Federal Register* 19611, May 8, 2025, https://www.federalregister.gov/documents/2025/05/08/2025-08266/improving-the-safety-and-security-of-biological-research.

[129] EFSA AHAW et al., "Preparedness, Prevention and Control Related to Zoonotic Avian Influenza."

[130] Bioinformatics "is a scientific subdiscipline that involves using computer technology to collect, store, analyze and disseminate biological data and information, such as DNA and amino acid sequences or annotations about those sequences." See National Institutes of Health, "Bioinformatics," June 2, 2025, https://www.genome.gov/genetics-glossary/Bioinformatics.

[131] Ison and Marrazzo, "The Emerging Threat of H5N1 to Human Health."

supporting the collection of data in developing countries is needed to understand the evolution of viruses and fill in gaps in our knowledge of how they change.[132]

Congress might consider whether funding is needed for domestic and international efforts to collect, study, and report viral data. Such funds could support existing research programs and strategies but focus them on H5N1 through agencies such as NIH, APHIS, and USGS or support the creation of new research initiatives focused on H5N1. Another option would be to elevate the importance of studying H5N1 by directing agencies to give research proposals for its study a higher priority than they currently receive. For example, H.R. 2868 in the 119th Congress would include the study of HPAI as a high-priority research and extension area under Title 7, Section 5925(d), of the *U.S. Code* for the Secretary of Agriculture.

While some Members of Congress may support this approach domestically and internationally, others might assert that international efforts to collect data and report findings should be the responsibility of the individual countries where an outbreak is occurring or that current research efforts into zoonotic viruses such as avian influenza are sufficient to control and eliminate the virus.

Spillover to Humans and Transmission Among Humans[133]

Currently, the number of human cases of H5N1 in the United States is low (70), and it has primarily been spread by contact with infected animals (see **Table 2**). As discussed previously (see the text box "Nomenclature of Avian Influenza Virus"), hemagglutinin provides a virus with the ability to attach to a specific receptor in a host's cell. The hemagglutinin of avian influenza recognizes avian-type receptors. While humans can become infected with an avian influenza, typically via contact with an infected animal, without changes in the hemagglutinin of that particular virus, human-to-human transmission does not currently occur. Reassortment can occur when a host is coinfected with multiple influenza viruses, which may accelerate viral evolution, resulting in a virus that is more infectious to humans. Reassortment is believed to have occurred in the influenza pandemics in 1918, 1957, 1968, and 2009.[134]

In a recent human case of H5N1 in Louisiana, where it is believed that the patient contracted H5N1 from contact with poultry on the patient's property, the CDC analyzed samples from the patient's lungs for evidence of changes in the hemagglutinin compared with samples collected in wild birds and poultry in Louisiana. While changes were identified that suggest that the virus may have enhanced ability to infect humans, it is believed that these changes occurred within the patient after infection rather than being transmitted at the time of infection.[135] According to the CDC,

> Of note, virus sequences from poultry sampled on the patient's property were nearly identical to the virus sequences from the patient but did not have the mixed nucleotides identified in the patient's clinical sample, strongly suggesting that the changes emerged during infection as virus replicated in the patient. Although concerning, and a reminder that A(H5N1) viruses can develop changes during the clinical course of a human infection,

[132] For example, see CRS Report RL33219, *U.S. and International Responses to the Global Spread of Avian Flu: Issues for Congress*, by Tiaji Salaam-Blyther.

[133] For additional information on the human health response to H5N1, see CRS In Focus IF12895, *H5N1 Avian Influenza: The Human Health Response*, by Kavya Sekar, Amanda K. Sarata, and Hassan Z. Sheikh.

[134] Ting-Hui Lin et al., "A Single Mutation in Bovine Influenza H5N1 Hemagglutinin Switches Specificity to Human Receptors," *Science*, vol. 386, no. 6726 (December 2024), pp. 1128-1134.

[135] Johns Hopkins Bloomberg School of Public Health, "Bird Flu Is Raising Red Flags Among Health Officials," January 14, 2025, https://publichealth.jhu.edu/2025/bird-flu-is-raising-red-flags-among-health-officials.

> these changes would be more concerning if found in animal hosts or in early stages of infection (e.g., within a few days of symptom onset) when these changes might be more likely to facilitate spread to close contacts. Notably, in this case, no transmission from the patient in Louisiana to other persons has been identified.[136]

Understanding how and when this adaptation, or reassortment, occurs can aid in prevention and preparedness efforts. Scientists have conducted experiments with viruses to better understand how they evolve. Certain types of these experiments have raised biosafety and biosecurity concerns. How to evaluate the risks and benefits of such experiments, whether to ban such research, or whether alternative methods could be investigated has been debated.[137]

Congress may consider the implications if H5N1, or another avian influenza virus, evolves and becomes transmissible between humans. What federal investments or policies may be needed to identify, abate, and address such a change in the virus's ability to infect humans? Further, Congress might debate whether the United States has in place sufficient programs, policies, and resources to address an outbreak of H5N1 in humans in places where human-to-human transmission is prevalent.

Eliminating or Suppressing Avian Influenza

Sustained H5N1 wild-bird epizootics repeatedly spill over to and back from domestic bird populations, increasing zoonotic and pandemic risks for wildlife and humans. Vaccinations and culling of infected birds and wildlife are the two main approaches for controlling influenza viruses.[138] Culling is commonly used to curb avian influenza in poultry, and millions of poultry have been culled to stamp out avian influenza outbreaks in the past. For example, in the 2014-2015 outbreak in the United States, over 50 million birds were depopulated (this figure includes birds that were culled and those that succumbed to the disease) on 232 infected premises.[139] However, in the current outbreak, continuous culling might be unsustainable because H5N1 is persistent in wild birds throughout the country.[140] Scientists propose several strategies that the United States and other countries could implement to limit the spread and impact of H5N1. Some of these strategies include the following:

- heightening surveillance and detection of infected organisms, especially wild birds along migratory flyways and infected mammals;
- improving biosecurity measures to protect livestock and poultry from infected wild birds and mammals, such as restricting farm access, lowering exposure of livestock and poultry to wild birds, ensuring that no milk enters the market from sick cows, and requiring that handlers use personal protective equipment (PPE);[141]

[136] CDC, "Genetic Sequences of Highly Pathogenic Avian Influenza A(H5N1) Viruses Identified in a Person in Louisiana," December 26, 2024, https://www.cdc.gov/bird-flu/spotlights/h5n1-response-12232024.html.

[137] CRS Report R47114, *Oversight of Gain-of-Function Research with Pathogens: Issues for Congress*, by Todd Kuiken.

[138] Jahid and Nolting, "Dynamics of a Panzootic."

[139] USDA, *Final Report for the 2014–2015 Outbreak of Highly Pathogenic Avian Influenza (HPAI) in the United States*, August 11, 2016, https://www.aphis.usda.gov/media/document/2086/file.

[140] Xie et al., "The Episodic Resurgence of Highly Pathogenic Avian Influenza H5 Virus."

[141] Tomas Perez-Acle et al., "Are We Cultivating the Perfect Storm for a Human Avian Influenza Pandemic?," *Biological Research*, vol. 57 (2024), Article 96 (hereinafter Perez-Acle et al., "Are We Cultivating the Perfect Storm for a Human Avian Influenza Pandemic").

- limiting exposure of wildlife associated with humans (e.g., livestock, poultry, and pets) to H5N1;
- conducting rapid response and containment of infected animals, including efforts to cull infected poultry and possibly other species;
- creating and testing mitigation and treatment methods, such as vaccines and therapeutic remedies; and
- researching mutations and genetic reassortment that might give scientists insight into the possibilities of mammal-to-mammal transmission and mammal-to-human transmission.

Congress might consider how the United States will control and eliminate avian influenza and whether current efforts to achieve this objective are sufficient. As the number of wildlife species and domesticated pets that test positive for H5N1 increases, so too does the potential for spread into humans and further potential for the virus to mutate into a more transmissible or virulent form. Congress might consider how federal programs or other policies might reduce these contact points between humans and infected species (beyond poultry and livestock) to help reduce the potential for spread and mutation between humans.

Stakeholders have offered options for Congress to consider to fortify the U.S. response toward eliminating H5N1 and other strains of avian influenza before it becomes a pandemic for humans. These include the following, in addition to options described above:

- rapid monitoring, testing, and research to get real-time data analysis on the spread and evolution of the virus[142] and efficient transmission of data to domestic and international databases;[143]
- funding to support research, implementation of biosecurity measures,[144] and on-farm and field testing,[145] such as protecting farm workers through PPE and isolating livestock and poultry from wild birds that might be carrying H5N1;[146] and
- conducting outreach to the public on the risks of handling wild birds, consuming raw milk, and raising backyard chicken flocks.

[142] Dhillon et al., "Steps to Prevent and Respond to an H5N1 Epidemic in the USA."

[143] Perez-Acle et al., "Are We Cultivating the Perfect Storm for a Human Avian Influenza Pandemic?"

[144] Dhillon et al., "Steps to Prevent and Respond to an H5N1 Epidemic in the USA."

[145] Perez-Acle et al., "Are We Cultivating the Perfect Storm for a Human Avian Influenza Pandemic?"

[146] Noah Kojima et al., "Building Global Preparedness for Avian Influenza," *The Lancet*, vol. 403, no. 10443 (June 8, 2024), pp. 2461-2465.

Appendix A. Chronology of Significant Global Events Related to Avian Influenza and Influenza A

Table A-1. Chronology of Significant Global Events Related to Avian Influenza and Influenza A

Information Compiled from Centers for Disease Control and Prevention (CDC) Websites Unless Otherwise Noted

Date	Event
1878	In 1878, the term "fowl plague" was used to describe the poultry disease observed in Italy and other European countries. "Fowl plague" was then differentiated from fowl cholera in 1880. Though these are the oldest bird flu references date, it is believed that prior to these references the disease had already been in existence for a long time, perhaps for hundreds of years.
1894	There are reports of subsequent outbreaks in poultry of HPAI in 1894 and 1901 in Italy, which spread with the poultry stock of an itinerary poultry merchant to eastern Austria and Germany and later to Belgium and France.
1901	The cause (etiology) of HPAI in domestic poultry was identified as a virus, though influenza viruses were not isolated until the 1930s.
1918	[The Spanish flu was caused by H1N1 influenza virus and is estimated to have killed approximately 50 million people.]
1924	The first outbreak of HPAI in poultry in the United States occurred during the fall and winter of 1924–1925. The disease first appeared to have caused severe losses in live bird markets in New York City.
1950s	By the mid-1900s, HPAI had been [documented] in poultry in most of Europe, Russia, North America, South America, Middle East, Africa and Asia.
1957	[A pandemic commonly referred to as the "Asian flu" emerged. This was a H2N2 virus that was a combination of reassortant viruses with avian origin. The virus emerged in East Asia and spread around the world, causing an estimated 1.1 million deaths worldwide and 116,000 deaths in the United States.]
1959	The first HPAI A(H5N1) virus was isolated following an outbreak in chickens in Scotland.
1961	An outbreak in wild birds (common tern) in South Africa suggests wild birds as a possible reservoir for avian influenza A viruses.
1967	Researchers proposed a relationship between human and avian influenza A viruses after a study showed a relationship between the 1957 human pandemic influenza virus and an influenza A virus isolated from a turkey.
1968	The 1968 pandemic was caused by an influenza A (H3N2) virus [composed] of two genes from an avian influenza A virus, including a new H3 hemagglutinin, but also contained the N2 neuraminidase from the 1957 H2N2 virus. In addition, the 1968 H3N2 pandemic [resulted from a reassortment] between the seasonal human influenza A(H2N2) virus and a low pathogenic avian influenza A virus. It was first detected in Hong Kong in July, and noted in the United States by September 1968. The estimated number of deaths was 1 million worldwide and about 100,000 in the United States. Though indications on the potential role of bird flu on the origin of human pandemics had been present for nearly a decade, it wasn't until 1968 that avian influenza A virus infections in wild birds in the United States, Australia, and Russia were confirmed using blood tests.

1983	In April 1983, an LPAI H5N2 virus circulated in chickens in the United States. Later that year, this virus had evolved into a highly pathogenic strain causing high mortality in affected flocks.
1996	HPAI H5N1 virus first identified in farmed waterfowl (geese) in Southern China in 1996.
1997	HPAI H5N1 virus outbreaks were detected in poultry in Hong Kong, and zoonotic (animal to human) transmission led to 18 human infections with six deaths. These were the recognized first H5N1 human infections with fatal outcomes.
2002	[HPAI was first detected in South America, in commercial poultry in Chile.]
2004	An outbreak of bird flu due to an H7N3 virus occurred among poultry in Canada. Within days, the virus causing this outbreak had changed from low to high pathogenicity. [During the same year], the United States experienced a poultry outbreak of a North American lineage HPAI H5N2 virus that was restricted to one farm.
2003-2005	Wild birds spread HPAI H5N1 virus to poultry in Africa, the Middle East[,] and Europe, and the HPAI H5N1 virus's HA surface protein diversified into numerous clades (related groups), and viruses reassorted into multiple genetic lineages (genotypes) that were detected around the world.
2009	A novel influenza A H1N1 virus emerged in humans. It was detected first in the United States and spread quickly across the United States and the world. This new H1N1 virus contained a unique combination of swine, avian[,] and human influenza genes not previously identified in animals or people. This virus was designated as influenza A (H1N1)pdm09 virus.
2010s	Multiple HPAI H5 viruses were identified with new NA subtypes (e.g., H5N2, H5N3, H5N6, H5N8 and H5N9) following reassortment (gene swapping) with wild bird lineages among wild birds and/or domestic poultry.
2014	HPAI H5N6 and H5N8 viruses emerged. Reassortment (gene-swapping) of H5 viruses with wild bird lineages led to the emergence and detection of H5N6 and H5N8 virus subtypes ... in Asia, Europe, and North America. In January 2014, the first human infection [of] HPAI H5N1 ... was reported in Canada in a traveler returning from China. In December [of] 2014, [USDA] reported HPAI H5N2 and H5N8 viruses in [U.S.] wild birds in several states.
2015	[In January, HPAI H5N1 was identified in a wild bird sample taken in 2014. It is believed that the virus was a reassortment of the Asian lineage H5 combined with an N1 NA from a North American wild bird. Between January and June HPAI H5 outbreaks were reported across 21 states and Canada in commercial poultry flocks.]
2016	Avian influenza HPAI H5N8 virus was detected in two seals stranded on the Baltic coast of Poland in 2016 and 2017.
2017	Outbreaks of HPAI H5N8 ... in domestic poultry and wild birds [were reported] in Europe, Asia, and parts of Africa.
2018	HPAI H5N6 and H5N8 ... become the predominant type of bird flu circulating among birds in Asia, Africa, the Middle East, and Europe.
2019	861 human cases of H5N1 virus infection and 455 deaths had been reported from 17 countries since November 2003.

2020	Reassortment ... between poultry and wild bird viruses led to the emergence of HPAI H5N1 with the NA viruses with an N1 NA from wild birds. [It was] first identified in Europe [and then] spread across Europe and into Africa, the Middle East and Asia. Five human cases of HPAI H5N6 virus infection were reported in China. [In the fall,] HPAI H5N8 virus was detected in several swans, seals, and a fox in the United Kingdom. In December, HPAI H5N8 was isolated from an asymptomatic poultry worker in Russia.
2021	[Additional] reports of HPAI H5N8 ... in seals [from] the United Kingdom, Germany, and Denmark. In March ... Laos reported its first human infection with HPAI H5N6 in a child who first became mildly ill in February following contact with infected poultry. In May ... HPAI H5N1 virus was detected in wild fox kits [juvenile foxes] at a rehabilitation center in the Netherlands, during an outbreak of HPAI in wild birds. [This was followed in December by reported infections] in wild foxes in Estonia. China reported 36 [human cases of] HPAI H5N6 virus with 18 deaths [in 2021].
2022 (January)	HPAI H5N1 clade 2.3.4.4b virus infection was reported in an asymptomatic 80-year-old man who raised ducks that became sick in England in late December 2021. First HPAI H5N1 virus (clade 2.3.4.4b) infection in wild birds in the United States since 2016 was reported by USDA/APHIS.
2022 (February)	Peru reported HPAI H5N1 virus infections in sea lions following deaths of hundreds of sea lions that began in January. USDA/APHIS announced an HPAI H5N1 outbreak in turkeys in a commercial poultry facility, marking the first HPAI detection in commercial poultry in the United States since 2020.
2022 (March)	Cambodia reported a case of LPAI H9N2 virus infection in a young child who was hospitalized for one day.
2022 (April)	The first human case of HPAI H5N1 virus was reported in the United States. The first human infection with low pathogenic avian influenza A H3N8 virus was reported in China. [Between January and April], China reported seven cases of HPAI H5N6 virus infection following poultry exposures, with severe or critical illness, including one death. [In this same time period,] China reported four cases of LPAI H9N2 virus infection, three in children and one in an adult, all with mild illness.
2022 (May)	Sporadic HPAI H5 virus infections in mammals were ... reported in several U.S. states and Canadian provinces[,] as well as in other countries.
2022 (May)	China reported a case of LPAI H10N3 virus infection in a man without known poultry exposure who became critically ill but recovered.
2022 (June-July)	HPAI H5N1 virus was ... detected in ten seals in Maine.
2022 (May-September)	At least eight U.S. states ... detected HPAI H5 virus in fox kits. [Other mammals also began to test positive for H5, including] two bobcats in Wisconsin, a coyote pup in Michigan, raccoons in Washington and Michigan, skunks in Idaho and Canada, and Mink in Canada.
2022 (May-September)	China reported four human cases of HPAI H5N6 virus infection after poultry exposures, with severe or critical illness, including one death.
2022 (May-September)	China reported four cases of LPAI H9N2 virus infection in children, including one who was hospitalized.
2022 (September)	Spain reported a human case of HPAI H5N1 in an asymptomatic poultry worker who was working at a poultry farm with a confirmed outbreak of H5N1.
2022 (October)	Vietnam reported a case of human infection with HPAI A(H5) virus in a child who became critically ill following exposure to infected backyard poultry. HPAI H5N1 viruses of clade 2.3.4.4b caused infections and some deaths among mink on a farm in northwest Spain.

2022 (November)	Spain reported a second human case of HPAI H5N1 in an asymptomatic poultry worker at the same poultry farm. China reported a human case of HPAI H5N1 virus infection following poultry exposure in an adult who developed critical illness and died.
2022 (October-November)	H5N1 virus infections [were] reported in [additional] mammals, including sea lions in New England and Peru, and bears, wild foxes, and skunks in Canada, the United States, and other countries.
2022 (October-November)	China reported four cases of LPAI H9N2 virus infection ... three mild cases in children, and one case of severe illness in an adult.
2022 (November-December)	H5N1 virus infections were reported in bears in Alaska, Nebraska, and Montana.
2023 (January)	Ecuador reported its first human infection with HPAI A(H5) in a child who became critically ill following exposure to infected backyard poultry.
2023 (February)	Cambodia Ministry of Health reported two human infections with HPAI H5N1 virus, including one fatal case.
2023 (December)	HPAI A(H5N1) virus was found to have infected a polar bear for the first time. This also was the first time an Arctic animal died from HPAI A(H5N1) virus. HPAI A(H5N1) virus infections were reported in elephant and fur seals in the Antarctic.
2024 (March)	[In Minnesota,] HPAI A(H5N1) virus ... infections were reported for the first time in goat kids (juvenile goats) on a farm, where a poultry flock had tested positive for the same virus. H5N1 bird were reported for the first time in dairy cows on farms in Kansas and Texas.
2024 (April)	A person in the United States tested positive for highly pathogenic avian influenza H5N1 bird flu. This would be the first reported cow-to-human spread of H5N1 bird flu.
2024 (May)	CDC reports the second (May 22) and third (May 30) cases of H5N1 bird flu virus infection in people who had exposure to infected dairy cows in Michigan. [On May 28,] USDA confirmed the first H5N1 bird flu virus infections in alpacas on the same premises where a poultry flock had tested positive for the same virus earlier that month.
2024 (July)	CDC confirms the fourth case of H5N1 bird flu virus infection in a person who had exposure to infected cows in Colorado.
2024 (September-October)	[First human H5N1 case in the United States (Missouri) reported with no known exposure to animals.[a] First confirmed H5N1infecction reported in a pig in Oregon on a farm co-located with poultry that had also tested positive for H5N1.[b]]
2025 (January)	[H5N9 reported in a California duck farm.[c] Louisiana reports the first H5N1-related human death in the United States.[d]]
2025 (May)	[Since 2022, 13,025 wild birds have tested positive for avian influenza, and 169,296,749 poultry have been affected by avian influenza.[e] Since March 2024, 1,063 dairy herds have been affected by avian influenza.[f]]

Source: Primary sources are Centers for Disease Control and Prevention (CDC), "1880-1959 Highlights in the History of Avian Influenza (Bird Flu) Timeline," April 30, 2024, https://www.cdc.gov/bird-flu/avian-timeline/1880-1959.html; CDC, "1960-1999 Highlights in the History of Avian Influenza (Bird Flu) Timeline," April 30, 2024, https://www.cdc.gov/bird-flu/avian-timeline/1960-1999.html; CDC, "2000-2009 Highlights in the History of Avian Influenza (Bird Flu) Timeline," April 30, 2024, https://www.cdc.gov/bird-flu/avian-timeline/2000-2009.html; CDC, "2010-2019 Highlights in the History of Avian Influenza (Bird Flu) Timeline," April 30, 2024, https://www.cdc.gov/bird-flu/avian-timeline/2010-2019.html; CDC, "2020-2024 Highlights in the History of Avian Influenza (Bird Flu) Timeline," April 30, 2024, https://www.cdc.gov/bird-flu/avian-timeline/2020s.html. Additional sources are listed below.

Notes: HPAI = highly pathogenic avian influenza; LPAI = low pathogenic avian influenza; HA = hemagglutinin; NA = neuraminidase; APHIS = Animal and Plant Health Inspection Service.

a. Michaela Simoneau et al., "The United States Needs to Step Up Its Response to Bird Flu," Center for Strategic and International Studies, December 19, 2024, https://features.csis.org/US-bird-flu-response/.
b. U.S. Department of Agriculture (USDA), "Federal and State Veterinary Agencies Share Update on HPAI Detections in Oregon Backyard Farm, Including First H5N1 Detections in Swine," press release, October 30, 2024, https://www.aphis.usda.gov/news/agency-announcements/federal-state-veterinary-agencies-share-update-hpai-detections-oregon.
c. Reuters, "US Reports First Outbreak of H5N9 Bird Flu in Poultry," January 27, 2025, https://www.reuters.com/business/healthcare-pharmaceuticals/us-reported-first-outbreak-h5n9-bird-flu-poultry-woah-says-2025-01-27/.
d. Louisiana Department of Health (LDH), "LDH Reports First U.S. H5N1-Related Human Death," press release, January 6, 2025, https://ldh.la.gov/news/H5N1-death.
e. CDC, "H5 Bird Flu: Current Situation," May 30, 2025, https://www.cdc.gov/bird-flu/situation-summary/index.html.
f. CDC, "H5 Bird Flu: Current Situation," May 30, 2025, https://www.cdc.gov/bird-flu/situation-summary/index.html.

Appendix B. Glossary of Selected Terms

Table B-1. Glossary of Selected Terms

Term	Definition
Avian influenza	A highly contagious viral disease affecting both domestic and wild birds "caused by viruses divided into multiple subtypes (i.e. H5N1, H5N3, H5N8 etc.) whose genetic characteristics rapidly evolve."[a]
Biosurveillance	A process that detects and characterizes outbreaks of disease in people, plants, and animals. It monitors the environment for bacteria, viruses, and other biological agents that cause disease.[b]
Clade	A group of organisms that evolved from a common ancestor. For avian influenza, it is the organization of the hemagglutinin gene highly pathogenic avian influenza based on molecular analysis. "The mutation of the [hemagglutinin gene] has resulted in genetically divergent groups of virus strains termed clades such as 2.3.4.4b."[c]
Endemic	A disease outbreak consistently present but limited to a particular region or country.[d]
Epidemic	"An unexpected increase in the number of disease cases in a specific geographical area."[e]
Epizootic	Outbreak of a disease in an animal population.
H5N1	"One of several influenza viruses that causes a highly infectious respiratory disease in birds called avian influenza, or bird flu. Can also cause a range of diseases in human, from mild to severe, and in some cases [death]."[f]
Highly pathogenic avian influenza (HPAI)	Avian influenza "that can cause severe clinical signs and possible high mortality rates."[g]
Influenza A virus	*Alphainfluenzavirus influenzae* is a pathogen that infects birds and some mammals. Influenza "A viruses are divided into subtypes based on two proteins on the surface of the virus: hemagglutinin (H) and neuraminidase (N). There are 18 different hemagglutinin subtypes and 11 different neuraminidase subtypes (H1 through H18 and N1 through N11, respectively)." [It is the only influenza virus] known to cause flu pandemics.[h]
Low pathogenic avian influenza (LPAI)	Avian influenza "that typically causes little or no clinical signs."[i]
Mutation	A mutation occurs when there is a change to the genetic material of a virus (e.g.; DNA or RNA) as it replicates inside a host cell. Viruses mutate to adapt to their surroundings, enabling them to move more efficiently from host to host (transmissibility).[j] A mutation can result in a new variant of the virus.
Mutation rate	"The number of new mutations in the genome of a virus over a unit of time, usually one generation."[k]
Pandemic	"An epidemic occurring worldwide or over a very wide area, crossing international boundaries, and usually affecting a large number of people."[l] "The WHO declares a pandemic when a disease's growth is exponential."[m]
Panzootic	"A widespread outbreak of a disease affecting several kinds of animals."[n]
Pathogen	An agent that causes disease, especially a living organism such as a virus, bacterium, or fungus.
Reassortment	A process where viruses co-infecting a cell exchange segments of their genomes, which results in a novel virus.[o]
Spillover	Transmission of a pathogen from an animal to a human.

Transmission	The process by which a pathogen passes from a source of infection to a new host.
Variant	Any change to the genetic sequence of a virus that occurs when a virus replicates. These changes can affect transmission, severity, treatment and immunity. Also referred to as a *viral mutant*, *variant*, or *strain*.[p]
Zoonosis or zoonotic disease	Any disease or infection that is naturally transmissible vertebrate animals to humans.

Source: CRS, using material from sources listed below.

Notes:

a. World Organisation for Animal Health (WOAH), "What Is Avian Influenza?" 2025, https://www.woah.org/en/disease/avian-influenza/.

b. Michael M. Wagner, "Introduction," in *Handbook of Biosurveillance*, ed. Michael M Wagner et al. (Elsevier, 2006).

c. Food and Agriculture Organization of the United Nations and WOAH, *Global Strategy for the Prevention and Control of High Pathogenicity Avian Influenza (2024–2033)*, 2025, p. 23, https://www.woah.org/app/uploads/2025/02/web-gf-tads-hpai-strategy-woah.pdf.

d. Columbia University Irving Medical Center, "Epidemic, Endemic, Pandemic: What Are the Differences?," February 19, 2021, https://www.publichealth.columbia.edu/news/epidemic-endemic-pandemic-what-are-differences.

e. Columbia University Irving Medical Center, "Epidemic, Endemic, Pandemic: What Are the Differences?," February 19, 2021, https://www.publichealth.columbia.edu/news/epidemic-endemic-pandemic-what-are-differences.

f. World Health Organization (WHO), "Influenza: A(H5N1)," May 16, 2024, https://www.who.int/news-room/questions-and-answers/item/influenza-h5n1.

g. WOAH, "What Is Avian Influenza?," 2025, https://www.woah.org/en/disease/avian-influenza/.

h. Centers for Disease Control and Prevention, "Types of Influenza Viruses," September 18, 2024, https://www.cdc.gov/flu/about/viruses-types.html.

i. WOAH, "What Is Avian Influenza?," 2025, https://www.woah.org/en/disease/avian-influenza/.

j. Mahdee Sobhanie, "How Do Virus Mutations Happen, and What Do They Mean?," Ohio State University Wexner Medical Center, December 14, 2021, https://wexnermedical.osu.edu/our-stories/virus-mutations-what-do-they-mean.

k. Itamar Caspi et al., "Mutation Rate, Selection, and Epistasis Inferred From RNA Virus Haplotypes Via Neural Posterior Estimation," *Virus Evolution*, vol. 9, no. 1 (2023).

l. Sara Agnelli and Ilaria Capua, "Pandemic or Panzootic—A Reflection on Terminology for SARS-CoV-2 Infection," *Emerging Infectious Diseases*, vol. 28, no. 12 (2022).

m. Columbia University Irving Medical Center, "Epidemic, Endemic, Pandemic: What Are the Differences?," February 19, 2021, https://www.publichealth.columbia.edu/news/epidemic-endemic-pandemic-what-are-differences.

n. Sara Agnelli and Ilaria Capua, "Pandemic or Panzootic—A Reflection on Terminology for SARS-CoV-2 Infection," *Emerging Infectious Diseases*, vol. 28, no. 12 (2022).

o. John Steel and Anice C. Lowen, "Influenza A Virus Reassortment," in *Influenza Pathogenesis and Control - Volume I. Current Topics in Microbiology and Immunology*, ed. Richard W. Compans and Michael B. A. Oldstone (Springer, 2014), pp. 377-401.

p. Titus Divala, "What Is a Variant? An Expert Explains," Wellcome, October 18, 2023, https://wellcome.org/news/what-variant-expert-explains.

Author Information

Todd Kuiken
Analyst in Science and Technology Policy

Pervaze A. Sheikh
Specialist in Natural Resources Policy

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Committees of Congress

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Retailer Inventory and Pricing Behavior During Supply Chain Disruptions

SUMMARY

R48916

May 11, 2026

Michael Alan Havlin
Analyst in Industrial Organization and Business

Clare Y. Cho
Specialist in Industrial Organization and Business Policy

Recent supply chain disruptions have contributed to price increases for certain consumer goods, such as vehicles, groceries, apparel, and consumer electronics. Congress has expressed interest in various types of retailers that sell these consumer goods, particularly after their profits and prices have increased following supply chain disruptions.

Retailers provide services to producers and consumers and charge a price for their services. One of their main services is *inventory management*. That is, retailers acquire, hold, and maintain goods that are for sale to consumers. A retailer's inventory management can affect its pricing behavior, particularly during supply chain disruptions. For example, if supply chain disruptions prevent a retailer from acquiring new inventory, the retailer might choose to increase prices to potentially increase its profits, avoid selling out of a product, or both. The price of a retail service is typically the *markup* charged on the product—the difference between the amount a retailer pays the supplier and the amount the retailer charges the consumer. The size of a markup may vary with time, retailer type, and a variety of competitive and contextual factors.

Retailer behavior can affect how supply chain disruptions transmit down to the consumer. Retailers' responses to such events may vary by the type of retailer, type of disruption, and a variety of contextual factors, such as inventory levels, competition, retail pricing strategies, and information access. Because of these factors, changes in markups and consumer prices are not uniformly driven by supplier price changes. Retailers might increase, decrease, or maintain their markups following changes in supplier pricing. During the Great Recession, vehicle dealerships paid higher prices to manufacturers that faced tightening financial constraints but did not pass those higher costs on to consumers. In contrast, during the COVID-19 pandemic, vehicle dealerships increased markups while experiencing record low vehicle inventories. As another example, grocery stores increased markups for meats during certain agricultural supply chain disruptions. Changes in tariffs in 2025 contributed to changes in import volumes and prices paid by retailers, both of which might affect retailer behavior. How a retailer responds to a supply chain disruption can affect both its profitability and consumer prices.

A retailer typically makes pricing and inventory decisions in response to market forces, such as consumer demand for its products, competitive pressure from other retailers, and the diversity of its upstream supplier network. Statute can affect retailers' pricing behaviors within certain contexts. For example, Section 102 of the Defense Production Act of 1950 (50 U.S.C. §4512) prohibits hoarding of materials that the President has designated as scarce for the purpose of selling those goods at an elevated price.

No federal laws or regulations explicitly prohibit *price gouging*, a term often used to describe price increases perceived to be excessive, typically in response to sudden changes in supply or demand (e.g., caused by a supply chain disruption). Price gouging bills introduced by Members of the 119th Congress and state price gouging laws often have focused on supply chain disruptions or other market shocks. Congress might consider using its oversight authority to ask federal agencies to take actions to enforce existing laws that can affect pricing during supply chain disruptions. Congress might consider addressing price gouging through legislation. If Members of Congress choose to introduce additional legislation related to price gouging, considerations may include the circumstances in which a price increase might be considered excessive, whether to prohibit a specific price increase in statute or direct a federal agency to promulgate regulations to define the terms excessive or price gouging, and whether to prohibit price gouging in specific contexts or for certain goods.

Congress also might consider legislation addressing supply chain resiliency. One option that Congress might consider is to direct research to identify industries to build supply chain resiliency and support domestic production of certain goods. The House and Senate passed their respective versions of a Promoting Resilient Supply Chains Act of 2025 (H.R. 2444; S. 257), which would direct the Assistant Secretary of Commerce for Industry and Analysis to lead and establish an intergovernmental working group to develop plans and analyses to increase U.S. supply chain resiliency for industries and goods critical to U.S. economic or national security.

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Introduction

A range of recent supply chain disruptions have contributed to price increases for certain consumer goods,[1] such as vehicles, groceries, apparel, and consumer electronics. In some cases, price increases for these goods have coincided with higher retail profits. Congress has expressed interest in various types of retailers that sell these consumer goods, particularly after their profits and prices increased following supply chain disruptions.[2] For example, the pricing behavior, inventory levels, and profits of grocery stores and vehicle dealerships received attention from some Members of Congress following recent supply chain disruptions. Additionally, some Members have also commented on the potential effects of certain tariff increases on the availability and price of retail goods such as apparel and consumer electronics.[3]

This report discusses how retailer behavior and inventory levels can affect consumer prices for certain goods during supply chain disruptions. The specific types of retail goods that receive congressional attention generally reflect the concerns of consumers. The behaviors and disruptions of a selection of consumer goods analyzed in this report illustrate the range of possible retailer pricing and inventory behaviors during supply chain disruptions.

During the 119th Congress, some Members have introduced legislation that could affect the availability and pricing of retail goods during supply chain disruptions. This report (1) provides background on the retail industry, (2) analyzes the pricing behavior of certain retailers during selected supply chain disruptions, and (3) discusses selected policy options for Congress. Selected options discussed in this report include continued oversight, legislation to prohibit certain price increases in some contexts, and legislation to affect supply chain resiliency.

Retailing Background

Retailers provide services to producers and consumers.[4] Generally, these services can help consumers acquire goods and provide producers a place to store and market their goods. Retailers charge a price for these services and typically charge consumers a higher price for goods than the

[1] A supply chain disruption is an event that affects supplier networks and that typically contributes to supplier prices increasing at accelerated rates or the availability of goods decreasing or both.

[2] For example, see U.S. Congress, House Committee on Energy and Commerce, Subcommittee on Consumer Protection and Commerce, *Pandemic Profiteers: Legislation to Stop Corporate Price Gouging*, hearing, 117th Cong., 2nd sess., February 2, 2022, https://docs.house.gov/Committee/Calendar/ByEvent.aspx?EventID=114360; U.S. Congress, Senate Committee on Banking, Housing, and Urban Affairs, *The Semiannual Monetary Policy Report to the Congress*, hearing on the Oversight on the Monetary Policy Report to Congress Pursuant to the Full Employment and Balanced Growth Act of 1978, 118th Cong., 1st sess., March 7, 2023, S.Hrg. 118-205; and U.S. Congress, Senate Special Committee on Aging, *Making Washington Work for Seniors: Fighting to End Inflation and Achieve Fiscal Sanity*, hearing, 119th Cong., 1st sess., January 29, 2025, https://www.congress.gov/event/119th-congress/senate-event/LC74258/text.

[3] U.S. Joint Economic Committee, Representative Don Beyer, "Trump's Tariff Plans Will Drive up Costs for the Average American Family between $1,600 and $2,000 per year," March 3, 2025, https://beyer.house.gov/uploadedfiles/jec_house_dems_trump_tariffs_report_3.3.25.pdf; and "Short Term Pain, Long Term Gain: Rep. Burchett on Tariffs," *Bloomberg*, April 3, 2025, https://www.bloomberg.com/news/videos/2025-04-03/short-term-pain-long-term-gain-rep-burchett-on-tariffs-video.

[4] In the context of this report, a retailer is a business with a physical store that purchases goods for purposes of resale to final consumers. A producer is a business that creates a physical good through an assembly, manufacturing, agricultural, mining, packaging, or other physical activity. Producers might sell their physical goods directly to a retailer or to an intermediary (commonly referred to as a wholesaler).

retailers pay the suppliers of these goods.[5] Retailers also seek other profit opportunities tied to their services and goods (e.g., financial products, insurance products, warranties).[6] This section describes and analyzes (1) retail inventory management and (2) the prices retailers charge for providing their services.

Retail Inventory Management

Retailers aim to maximize their revenue by matching consumers and products across a range of preferences, characteristics, prices, and time horizons. They facilitate that matching process by managing inventory and evaluating consumer behavior, among other activities. Inventory management is one of the main services of a retailer that can affect its pricing behavior, particularly during supply chain disruptions.

Retailers acquire, hold, and maintain *inventories* available for sale to consumers. Inventories are the unfinished or finished goods that a business possesses at its facilities that it has not yet sold; for retailers, these are generally finished goods. Retailers typically acquire these inventories from multiple suppliers, although some retailers might acquire them from one supplier. Retailer inventory management can help producers reduce manufacturing costs by, for example, enabling manufacturers to produce larger batches of goods, thereby reducing the average per-unit cost of production. Retail inventory management services also can allow producers to shift the cost of overproduction to retailers if consumer demand is lower than expected because the retailer would hold the excess inventory. If demand is higher than expected, the retailer might be able to increase prices and obtain a greater profit. Retailers also help suppliers reach consumers in different geographic areas. These services also can help consumers find a variety of goods and brands to choose from in one location.

Holding and maintaining inventories is costly for retailers.[7] Thus, retailers tend to hold an inventory level that they believe balances the conflicting risks of losing potential revenue by selling out of inventory and of incurring additional costs from potentially holding inventory levels that exceed consumer demand.[8] The amount of inventory a retailer holds depends on factors such as the characteristics of their consumer base and the costs of holding inventory. The costs to retailers to hold inventory may include financing and insurance, maintenance, depreciation, spoilage, obsolescence, and theft. Different products or industries may have different cost profiles. For example, a vehicle may have higher inventory financing and insurance costs than a food item at a grocery store.[9] These factors, among others, result in different types of retailers holding different levels of inventories relative to their sales.

Supply chain disruptions can limit a retailer's ability to acquire inventories. Congress has held hearings on the effect of some recent supply chain disruptions on retail inventory levels and

[5] A supplier is a business that sells a physical good to a retailer. Suppliers can be producers or wholesalers. Wholesalers acquire their goods from producers or other wholesalers.

[6] Kevin Camp et al., "Automotive Dealerships 2007-19: Profit-Margin Compression and Product Innovation," *Monthly Labor Review*, BLS (October 2022), https://doi.org/10.21916/mlr.2022.26.

[7] Amulya Gurtu, "Optimization of Inventory Holding Cost Due to Price, Weight, and Volume of Items," *Journal of Risk and Financial Management*, vol. 14, no. 2 (February 2021), p. 65, https://doi.org/10.3390/jrfm14020065.

[8] Eric T. Anderson et al., "Measuring and Mitigating the Costs of Stockouts," *Management Science*, vol. 52, no. 11 (November 2006), p. 1751, http://dx.doi.org/10.1287/mnsc.1060.0577; and Terry Damron and William T. Rupp, "Inventory Control in the Retail Sector: Case Studies of Best Business Practices," *International Journal of Procurement Management*, vol. 9, no. 3 (2016), p. 354, http://dx.doi.org/10.1504/IJPM.2016.076309.

[9] Unless noted otherwise, throughout this report, *grocery store* refers to a store that primarily sells food intended for consumption at home (e.g., Kroger, Albertsons); it does not include a supercenter (e.g., Walmart Supercenter, Target) or warehouse club (e.g., Costco, Sam's Club).

prices.[10] Because retailers tend to hold the amount of inventory that they believe balances the risks of selling out or holding too much, unexpected changes in supply or demand can contribute to shortages or excess inventory. If supply chain disruptions become more frequent, some retailers may choose to hold more inventory to be more resilient to these disruptions. For retailers and consumers, this increased retail inventory might reduce the likelihood of shortages and related short-term, scarcity-driven price increases. Holding more inventory might also increase costs for retailers, who might pass on these costs to consumers through higher prices.

Retail Prices: Markups

Retailers charge a price for the services they provide. The price of a retail service is typically the *markup* charged on the product—that is, the difference between what a retailer pays the supplier and what the retailer charges the consumer.[11] For example, if a retailer pays its supplier $20 for a shirt and sells it to a consumer for $30, the price of the retail service and markup would be $10. Markups can be expressed in dollars or as a percent. In the example above, the dollar markup would be $10 and the markup percent would be 50% ($10 ÷ $20). For retailers that sell many types of products, the markup on each product may differ. The markup charged by a retailer can vary across retailer types. For example, in 2024, publicly traded vehicle dealerships typically had a markup percent between 6% and 9%,[12] while publicly traded grocery stores typically had a markup percent between 30% and 40%.[13]

A retailer with a higher markup is not necessarily more profitable than a retailer with a lower markup. Retailers use the *gross profits*[14] generated from selling products to pay their other costs (e.g., operating costs such as wages, utilities, and rents). If the gross profits exceed those other costs, then the retailer will have generated a *net profit.*[15] A retailer's total profitability also depends on the total value of its sales, its other costs, and other ancillary services from which it might profit.[16] For example, a retailer with $1 million in sales at an 8% markup would earn a gross profit of $74,074, whereas a retailer with $300,000 in sales at a 30% markup would earn a lesser gross profit of $69,231. Cash generated from gross profits can be used to pay a retailer's operating costs, which can vary across retailers. For example, in 2024, operating costs for publicly traded grocery stores were typically between 17% and 26% of total sales, whereas

[10] For example, see U.S. Congress, House Committee on Energy and Commerce, Subcommittee on Consumer Protection and Commerce, *Pandemic Profiteers: Legislation to Stop Corporate Price Gouging*, hearing, 117th Cong., 2nd sess., February 2, 2022, https://docs.house.gov/Committee/Calendar/ByEvent.aspx?EventID=114360.

[11] Producer Price Index Program Staff, "Wholesale and Retail Producer Price Indexes: Margin Prices," *Beyond the Numbers*, U.S. Bureau of Labor Statistics (BLS), vol. 1, no. 8 (August 2012), https://www.bls.gov/opub/btn/volume-1/wholesale-and-retail-producer-price-indexes-margin-prices.htm; and BLS, *Handbook of Methods: Producer Price Indexes*, July 31, 2025, https://www.bls.gov/opub/hom/ppi/concepts.htm.

[12] Typical range identified by CRS analysis of vehicle dealership 10-Ks. For example, see AutoNation, Inc., *Form 10-K for the Fiscal Year Ended December 31, 2024*, filed with the U.S. Securities and Exchange Commission (SEC), February 14, 2025, https://www.sec.gov/ix?doc=/Archives/edgar/data/0000350698/000035069825000029/an-20241231.htm.

[13] Typical range identified by CRS analysis of grocery store 10-Ks. For example, see Albertsons Companies, Inc., *Form 10-K for the Fiscal Year Ended February 22, 2025*, filed with the SEC, April 21, 2025, https://www.sec.gov/ix?doc=/Archives/edgar/data/0001646972/000164697225000052/aci-20250222.htm. This markup percent does not apply to supercenters (e.g., Walmart, Target) and warehouse clubs (e.g., Costco, Sam's Club).

[14] *Gross profits* are revenues minus inventory acquisition costs (i.e., net profits before subtracting operating, administrative, and other costs).

[15] *Net profits* are revenues minus total costs.

[16] For example, vehicle dealerships generally earn more profits from financial and insurance sales than they do from vehicle sales; Camp et al., "Automotive Dealerships 2007-19."

operating costs for publicly traded vehicle dealerships were typically between 10% and 12% of total sales.[17]

The markup a retailer charges is influenced by consumer behavior, the prices it pays suppliers, and a range of competitive and contextual factors. These factors include the availability of substitutes for a retailer's product, competition among retailers to sell the same product in the same market, cost structure of products and markets, inventory levels for products for sale, and a retailer's range of products. Retailers sometimes implement a pricing strategy tailored to one or more of those factors.

To maximize revenues, retailers may change prices and markups in response to changes in market conditions. For example, if a retailer thinks demand is increasing faster than it can acquire additional inventory, the retailer might increase prices so that it can get the most revenue out of its available inventory. Conversely, if demand is falling and the retailer is concerned it might have excess inventory, the retailer might decrease prices to attract consumers and stimulate sales. Producers may change their production levels in response to retailer price changes, which might result in additional changes in price. For example, when retailers increase their markups and prices, doing so can incentivize producers to increase production. If supply chains are functioning smoothly and producers are able to increase production, retailers may have more inventory to sell, which can result in decreases in prices if inventory levels increase relative to sales.

In some cases, ethical considerations could arise when retailers increase prices during supply chain disruptions. Some consumers and policymakers might assert that the fairest way to allocate scarce goods is to adjust the price. This allows the consumers who are willing to pay more for these goods to obtain them and retailers to generate a higher profit. Alternatively, some consumers and policymakers might assert it is unethical or unfair for a retailer to raise prices during a disruption when supply is constrained and inventories are low. When supply is constrained, higher markups and retail prices might not result in increased supply of a good. This can contribute to perceptions of *profiteering*, which is a word commonly used to describe someone gaining a profit without providing a commensurate value in return. Price increases that occur during rapid supply or demand changes, such as in response to a natural disaster or other supply chain disruption, are sometimes considered to be *price gouging*, which is a term often used to describe price increases perceived to be excessive, typically in response to sudden changes in supply or demand (e.g., caused by a supply chain disruption). For example, during the COVID-19 pandemic, the Attorney General for the District of Columbia suggested that a convenience store was "price gouging" for selling scarce cleaning supplies at a reported 200% markup.[18] Some retailers might use extra revenue earned during supply chain disruptions to make improvements, such as investing in commercial infrastructure that might help them manage inventory effectively.

If supply chain disruptions were to become more frequent, retailers might respond by holding more inventory or diversifying their supplier network by identifying additional sources of goods. This might result in fewer price fluctuations if retailers are less susceptible to supply chain disruptions. It might also incentivize more producers to enter supplier markets, resulting in supply

[17] In this report, *operating costs* refer to selling, general, and administrative costs. Typical range identified by CRS analysis of vehicle dealership and grocery store 10-Ks. For example, in 2024, Albertsons Companies' "selling & administrative expenses" were 26% of its total revenue, whereas AutoNation's "selling, general, and administrative expenses" were 12% of its total revenue (see Albertsons Companies, Inc., *Form 10-K*; and AutoNation, Inc., *Form 10-K*, respectively).

[18] Sydney Coplin, "DC Convenience Store Accused of Price Gouging During State of Emergency," *NBCWashington*, May 4, 2020, https://www.nbcwashington.com/news/coronavirus/dc-convenience-store-accused-of-price-gouging-during-state-of-emergency/2292842/.

chain resiliency without intervention from policymakers. Retailers may be unable to diversify their supplier network if it is too costly or if additional sources of the goods do not exist. For example, scarcity-driven price increases may be too small or too brief to incentivize domestic producers to enter a market. As another example, tariffs or other trade restrictions could prevent retailers from using suppliers in other countries.

Retailers and Supply Chain Disruptions

Retailers' pricing behaviors during supply chain disruptions highlight their role as the final node in supply chains for new consumer goods. Retailer behavior can affect how supply chain disruptions transmit down to the consumer. Retailers might respond differently depending on whether the disruption directly affects prices, inventories, or both. Changes to inventory levels are some of the main contributors to changes in retail prices during supply chain disruptions,[19] but other factors can affect retail prices (e.g., competition, consumer demand, retail pricing strategies, and information access). Because of these factors, changes in retailer markups and consumer prices are not uniformly driven by changes in supplier prices or inventory levels.

During a supply chain disruption, retailers might increase, decrease, or maintain their markups in response to changes in supplier pricing or inventory levels. For example, multiple studies found that retail markups accounted for some of the increased inflation during the COVID-19 pandemic;[20] during the Great Recession of 2007-2009 (GR), some retailers absorbed price increases from manufacturers by decreasing their markups.[21] When retailers anticipate disruptions, they might adjust their inventories before and during the disruption.

This section analyzes retailer pricing and inventory behavior during a selection of disruptions to illustrate the different ways a retailer and its inventories can affect prices or product availability for consumers. Each of the disruptions and associated retailer responses may be relevant to potential policy options that Congress might consider. This section uses three examples that illustrate retailers increasing or decreasing their markups or adjusting their inventories during supply chain disruptions: (1) vehicle dealerships' responses to the GR and the COVID-19 pandemic, (2) grocery stores' responses to agricultural supply chain disruptions, and (3) import supply disruptions following changes in tariff conditions in 2025. The characteristics that distinguish each disruption include consumer demand, inventories, and the degree to which the disruption was anticipated.

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[19] Neil Mehrotra et al., *Retail Inventories and Inflation Dynamics: The Price Margin Channel*, International Finance Discussion Papers no. 1424, October 2025, https://doi.org/10.17016/IFDP.2025.1424; Florian Zettelmeyer et al., *Scarcity Rents in Car Retailing: Evidence from Inventory Fluctuations at Dealerships*, NBER, May 2006, http://www.nber.org/papers/w12177; Ayelet Israeli et al., "How Market Power Affects Dynamic Pricing: Evidence from Inventory Fluctuations at Car Dealerships," *Journal of Management Science*, vol. 68, no. 4 (October 2021), http://dx.doi.org/10.1287/mnsc.2021.3967; and Salomé Baslandze and Simon Fuchs, "The Price of Delay: Supply Chain Disruptions and Pricing Dynamics," Federal Reserve Bank of Atlanta, Working Paper 2025-8a, revised March 2026, https://www.atlantafed.org/-/media/Project/Atlanta/FRBA/Documents/research/publication/working-paper/2025/09/24/08-the-price-of-delay-supply-chain-disruptions-and-pricing-dynamics.pdf.

[20] Andrew Glover et al., "How Much Have Record Corporate Profits Contributed to Recent Inflation," *Economic Review*, Federal Reserve Bank of Kansas City, vol. 108, no. 1 (January 2023), https://www.kansascityfed.org/documents/9329/EconomicReviewV108N1GloverMustredelRiovonEndeBecker.pdf; Michael Havlin, "Automotive Dealerships 2019-22: Dealer Markup Increases Drive New-Vehicle Consumer Inflation," *Monthly Labor Review*, BLS (April 2023), https://www.bls.gov/opub/mlr/2023/article/automotive-dealerships-markups.htm; and Leila Davis, "Profits and Markups During the Post-COVID-19 Inflation Shock in the U.S. Economy: A Firm-Level Lens," *European Journal of Economics and Economic Policies*, vol. 21, no. 1 (September 2024), p. 309, https://doi.org/10.4337/ejeep.2024.0137.

[21] Camp et al., "Automotive Dealerships 2007-19."

Vehicle Dealership Markups: Great Recession and Pandemic

The changes in consumer prices and markups at vehicle dealerships during the GR and the COVID-19 pandemic demonstrate how inventory levels, consumer demand, and supplier prices may affect retailer behavior and prices during disruptions. The supply chain disruptions in each case had different characteristics, which contributed to contrasting responses from dealerships.

Great Recession

The GR precipitated some unique supply and demand conditions that affected vehicle dealership (retailer) behavior. The GR was a broad decrease in economic activity that lasted from December 2007 to June 2009. A contributing factor to the GR was a financial crisis that reduced the supply of cash and other liquid financial assets available to banks, households, and manufacturers.[22] Although the GR was primarily a demand disruption in that consumer demand decreased as the financial crisis deepened, the underlying financial crisis contributed to some supply chain disruptions—especially for automotive manufacturers and vehicle dealerships. The GR example discussed in this subsection illustrates the role of retail inventory management services during disruptions and how prices charged by retailers can decrease despite price increases from their suppliers.

During the GR, vehicle dealerships paid higher prices to manufacturers and absorbed excess inventories while reducing prices for consumers. Because of tightening financial conditions and the potential of bankruptcy caused by the financial crisis,[23] manufacturers of new vehicles increased prices to remain solvent during the GR despite a decrease in consumer demand.[24] From December 2007 to January 2009,[25] prices paid by dealerships to acquire new vehicles increased on average by 2.5% for domestically produced vehicles and by 1.9% for imported vehicles.[26] Because of decreased consumer demand, dealerships could not pass these price increases onto consumers while maintaining vehicle sales. Inventory levels at dealerships increased, and the excess inventory contributed to lower markups (see **Figure 1**) and consumer prices at dealerships.[27] From December 2007 to January 2009, dealership markups decreased by 18.9%,[28] and prices that dealerships charged consumers for vehicles decreased by 2.7%.

[22] For more information on the Great Recession (GR) and financial crises, see CRS Report R47479, *Common Causes of Economic Recession*, by Lida R. Weinstock.

[23] Simon Gilchrist et al., *Inflation Dynamics During the Financial Crisis*, National Bureau of Economic Research (NBER), November 2016, http://www.nber.org/papers/w22827.

[24] Camp et al., "Automotive Dealerships 2007-19."

[25] December is baseline peak month immediately preceding the GR, and January 2009 is when dealership markups reached a GR minimum.

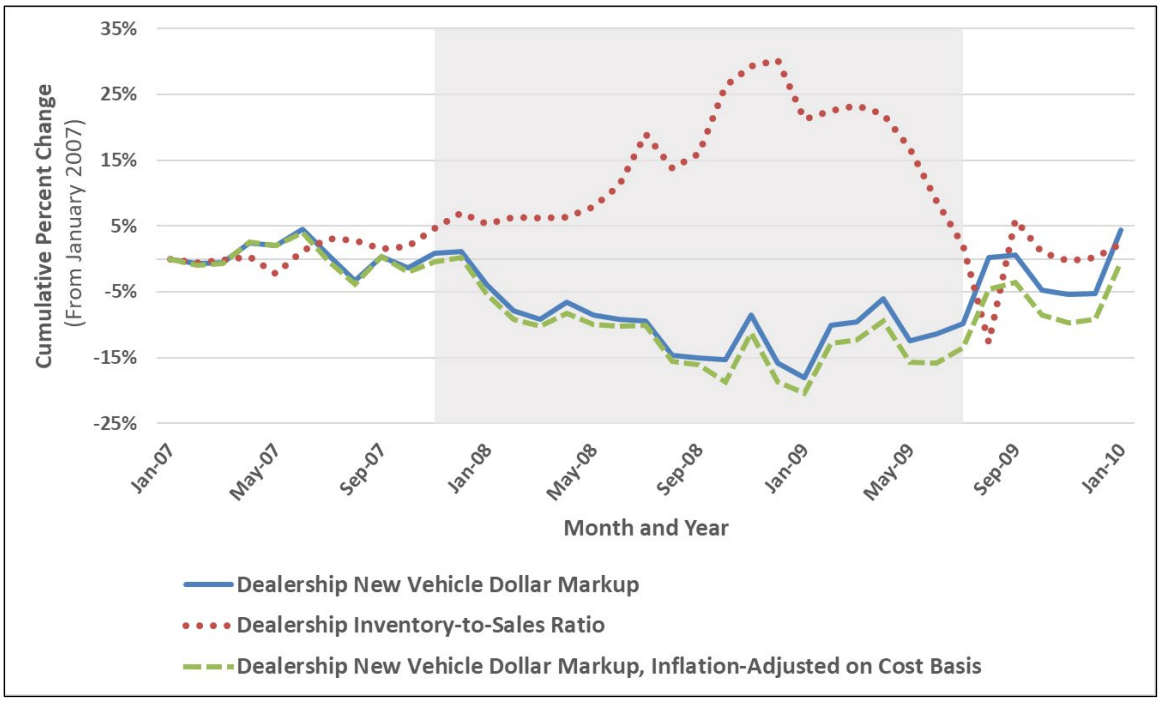
[26] CRS calculations based on Producer Price Index (PPI) and Import Price Index (IPP) data from BLS, accessed via the BLS one-screen data tool; BLS, *PPI for Commodity Data*, accessed September 16, 2025, https://www.bls.gov/data/home.htm; and BLS, "Data Tools," accessed September 16, 2025, https://www.bls.gov/data/home.htm.

[27] Inventory levels affect vehicle dealerships' pricing power; see Florian Zettelmeyer et al., *Scarcity Rents in Car Retailing: Evidence from Inventory Fluctuations at Dealerships*; and Ayelet Israeli et al., "How Market Power Affects Dynamic Pricing: Evidence from Inventory Fluctuations at Car Dealerships.

[28] According to the BLS PPIs that track dollar markups. Unless otherwise specified, references to percent changes in dollar markups in this report are based on the BLS PPIs that directly measure changes to dollar markups.

Figure 1.Vehicle Markups and Inventories During the Great Recession

January 2007 to January 2010



Source: CRS with data from U.S. Bureau of Labor Statistics (BLS) and U.S. Bureau of Economic Analysis.

Notes: Dealership New Vehicle Dollar Markup is a BLS price index that measures the change to the dollar markup (price – cost of goods sold). Dealership New Vehicle Dollar Markup, Inflation-Adjusted on Cost Basis is the Dealership New Vehicle Dollar Markup adjusted for inflation by the Producer Price Index and U.S. Import Price Indexes for vehicles. The inflation-adjusted measure indicates whether dollar markups grew at a faster or slower rate than supplier price changes. The Vehicle Dealership Inventory-to-Sales Ratio is a measure of inventory levels, where inventories are expressed as a ratio to sales. In the vehicle dealership industry, inventory levels sometimes have a relationship with dealership pricing behavior. The Great Recession (GR) began in December 2007 and lasted until June 2009 (illustrated by the gray box). The Global Financial Crisis began in summer 2007. January 2007 was chosen as the base year to provide pre-GR and pre-GFC context. January 2010 was chosen as the ending month because dealership markups had generally reached pre-GR levels by this time.

COVID-19 Pandemic

The COVID-19 pandemic was the worldwide spread of a new strain of coronavirus that affected numerous supply chains and consumer behaviors.[29] The pandemic example discussed in this subsection demonstrates how retailers may allocate scarce resources during a supply chain disruption by increasing prices, how decreases in inventories across retailers can enable them to increase prices without losing customers,[30] and how retailer price increases can materialize as a result of supply constraints originating further back in the supply chain.

During the COVID-19 pandemic, imbalances between demand and supply contributed to vehicle shortages at vehicle dealerships. When the COVID-19 pandemic began, many automotive manufacturers expected a prolonged economic recession and cancelled orders for new goods

[29] For more information on the effect of the COVID-19 pandemic on the U.S. economy, see CRS Report R46606, *COVID-19 and the U.S. Economy*, by Lida R. Weinstock.

[30] Zettelmeyer et al., *Scarcity Rents in Car Retailing*; and Israeli et al., "How Market Power Affects Dynamic Pricing."

across their supply chains.[31] The cancelled orders made it challenging to restart production in the automotive sector. For example, when automotive manufacturers cancelled orders for semiconductors, the cancellations contributed to semiconductor manufacturers pivoting their capacity and production toward technology companies.[32] Automotive manufacturers then faced difficulties obtaining semiconductors, which delayed new vehicle production and contributed to limited inventories at dealerships. Meanwhile, consumer demand increased as a result of economic stimuli and pandemic-related behavior changes.[33]

Because of the changes in production and consumer demand, the automotive industry experienced record-low vehicle inventories at dealerships and an increase in vehicle consumer prices that outpaced the increase in supplier prices. From January 2020 through June 2022,[34] the prices dealerships paid to manufacturers for new vehicles increased on average by 7.3% for domestically produced vehicles and 3.9% for imported vehicles.[35] Meanwhile, the prices dealerships charged consumers for vehicles increased on average by 16.2%.[36] This differential was reflected in higher markups at dealerships (see **Figure 2**).[37]

[31] David Coffin et al., *The Roadblocks of the COVID-19 Pandemic in the U.S. Automotive Industry*, International Trade Commission, Working Paper ID-091, June 2022, https://www.usitc.gov/publications/332/working_papers/final_the_roadblocks_of_the_covid-19_pandemic_in_the_automotive_industry.pdf.

[32] Coffin et al., *The Roadblocks of the COVID-19 Pandemic in the U.S. Automotive Industry*; and Havlin, "Automotive Dealerships 2019-22."

[33] Havlin, "Automotive Dealerships 2019-22."

[34] January 2020 is used as the pre-Covid-19 baseline because some portions of the economy were being affected as early as February 2020, and June of 2022 is the referenced time period because it is when vehicle dealership markups reached the maximum level between January 2020 and January 2025.

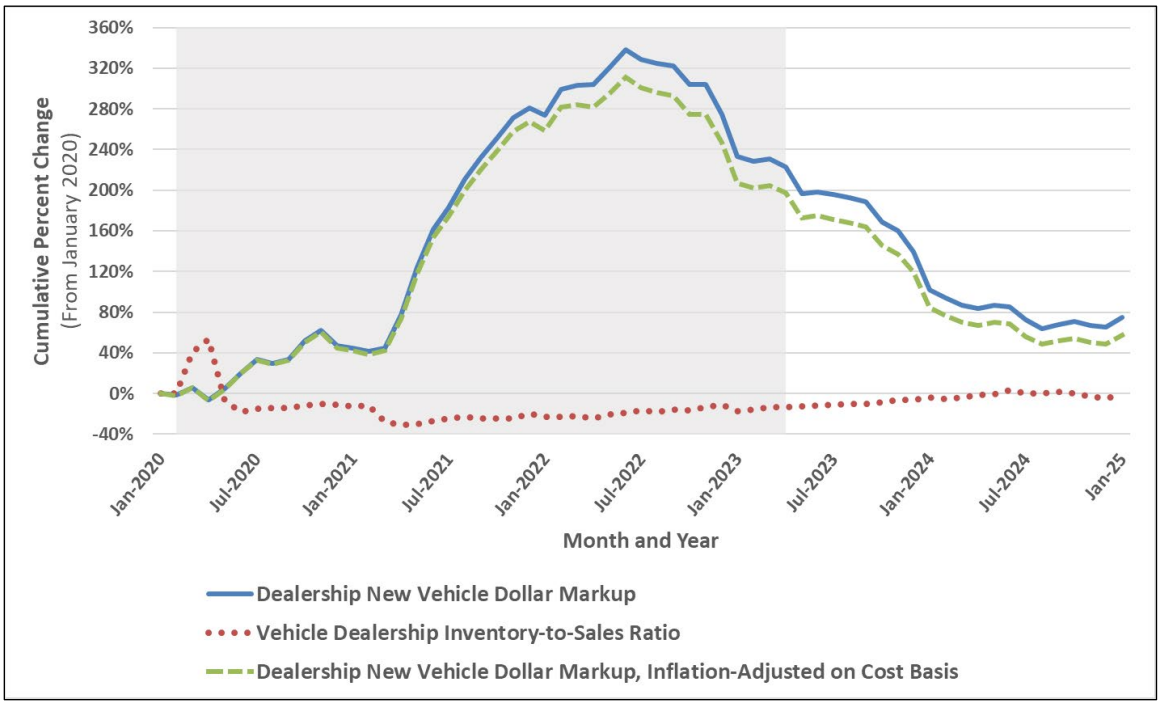
[35] CRS calculations based on PPI and IPP data, accessed via the BLS one-screen data tool; BLS, "Data Tool," accessed September 16, 2025, https://www.bls.gov/data/home.htm.

[36] CRS calculations based on Consumer Price Index (CPI) data from BLS, accessed via the BLS one-screen data tool; BLS, "Data Tool," accessed September 16, 2025, https://www.bls.gov/data/home.htm.

[37] For demonstration of how these measures relate, see Havlin, "Automotive Dealerships 2019-22."

Figure 2.Vehicle Markups and Inventories During the COVID-19 Pandemic

January 2020 to January 2025



Source: CRS with data from U.S. Bureau of Labor Statistics (BLS) and U.S. Bureau of Economic Analysis.

Notes: Dealership New Vehicle Dollar Markup is a BLS price index that measures the change to the dollar markup (price – cost of goods sold). Dealership New Vehicle Dollar Markup, Inflation-Adjusted on Cost Basis is the Dealership New Vehicle Dollar Markup adjusted for inflation by the Producer Price Index and U.S. Import and Export Price Indexes for vehicles. The inflation-adjusted measure indicates whether dollar markups grew at a faster or slower rate than supplier price changes. The Vehicle Dealership Inventory-to-Sales Ratio is a measure of inventory levels, where inventories are expressed as a ratio to sales. In the vehicle dealership industry, inventory levels sometimes have a relationship with dealership pricing behavior. A national emergency for the COVID-19 pandemic was declared in March 2020 and was terminated in April 2023 (illustrated by the gray box). This chart begins in January 2020 to provide pre-pandemic context. January 2025 is the ending date because it generally excludes certain tariff changes that occurred in 2025.

Grocery Store Markups During Selected Agricultural Shortages

Certain agricultural supply chain disruptions[38] have contributed to lower retail inventories and higher retail prices for meats.[39] The markup behavior of grocery stores during these agricultural supply chain disruptions highlight how dollar markups and retail prices can increase when retail markup percentages do not increase.[40] Additionally, this example discusses how an increasing

[38] The proportion of food manufacturers identifying "insufficient supply of materials" as the reason for underutilized plant capacity increased from the first quarter (Q1) of 2021 to Q4 of 2025, with accelerated increases occurring in 2021 and 2022, which is an indicator of a supply chain disruption. U.S. Census Bureau, Quarterly Survey of Plant Capacity Utilization, accessed April 7, 2026, https://www.census.gov/programs-surveys/qpc/data/tables.html; and Neil Mehrotra et al., *Retail Inventories and Inflation Dynamics: The Price Margin Channel*.

[39] Thomas Bittmann et al., "Short- and Long-Term Drought Impacts on the U.S. Beef Value Chain," *Environmental Research Letters*, vol. 20 (2025), https://doi.org/10.1088/1748-9326/ade45d; and Omid Zamani et al., "The Effect of Avian Influenza Outbreaks on Retail Price Premiums in the United States Poultry Market," *Poultry Science*, vol. 103, no. 10 (October 2024), https://doi.org/10.1016/j.psj.2024.104102.

[40] For discussion of the difference between a dollar markup and markup percent, see "Retail Prices: Markups."

dollar markup can contribute to higher retail profits regardless of whether markup percentages increase.

Several agricultural supply chain disruptions started in 2021 and 2022. In part due to droughts,[41] beef cow herd sizes decreased at successively accelerating annual rates from 2021 through 2023, and decreases continued into 2026.[42] In 2025, live beef cow inventories reached the lowest level since 1961.[43] Around the same time as the beef supply chain disruptions, starting in early-2022, culling of poultry began increasing at accelerating rates in response to an avian flu,[44] which reduced the supply of poultry. These disruptions contributed to grocery stores facing higher supplier prices and less inventory available for meats.[45]

In response to these supply chain disruptions,[46] as **Figure 3** illustrates, grocery stores generally increased their average retail meat prices by a larger dollar amount than their average supplier price increases but not by a larger percent change. Generally, dollar markups increasing at a slower percent rate than supplier prices means that the markup percent decreased.[47] Similarly, when supplier prices increase at a higher percent rate than consumer prices, it means the markup percent decreased but not necessarily the dollar markup.

As a discrete, hypothetical example of how a dollar markup can increase while the percent markup does not, consider a supermarket that buys one pound of ground beef for $3 and sells it to a consumer for $4 in January 2021; the dollar markup would be $1, and the markup percent would be 33.3% ($1 ÷ $3). Then, in January 2023, if the supermarket buys one pound of ground beef for $4.25 and sells it to a consumer for $5.50, the dollar markup would be $1.25, and the markup percent would be 29.4% ($1.25 ÷ $4.25). Although the dollar markup increased by 25% in this example, the markup percent decreased by 11.7%. Additionally, in this example, the dollar markup increased although the consumer price percent increase of 37.5% was smaller than the supplier percent increase of 41.7%.

This example underscores the distinction between dollar markups and percent markups and how dollar markups can increase when percent markups remain constant or decrease, which might inform certain policy considerations. The effects of higher meat dollar markups during these

[41] R. Aaron Hrozencik, "The Stocking Impact and Financial-Climate Risk of the Livestock Forage Disaster Program," Economic Research Service, Report no. 329 (January 2024), https://ers.usda.gov/sites/default/files/_laserfiche/publications/108372/ERR-329.pdf?v=57904.

[42] Bernt Nelson, "Smaller Cattle Herd Creates Market Volatility," American Farm Bureau Federation, February 10, 2026, https://www.fb.org/market-intel/smaller-cattle-herd-creates-market-volatility; U.S. Department of Agriculture (USDA) National Agricultural Statistics Service (NASS), "United States Cattle Inventory Report," news release, July 25, 2025, https://web.archive.org/web/20250725203702/https://www.nass.usda.gov/Newsroom/2025/07-25-2025.php; and USDA NASS, *Quick Stats*, accessed April 7, 2026, https://quickstats.nass.usda.gov/results/81B2426E-08E0-3871-B132-06D93D6C72A2.

[43] USDA NASS, *Quick Stats.*

[44] USDA Economic Research Service (ERS), *Livestock, Dairy, and Poultry Outlook: May 2022*, Mary 18, 2022, https://ers.usda.gov/sites/default/files/_laserfiche/outlooks/103952/LDP-M-335.pdf?v=80650; USDA, "Confirmations of Highly Pathogenic Avian Influenza in Commercial and Backyard Flocks," Animal and Plant Health Inspection Service, https://www.aphis.usda.gov/livestock-poultry-disease/avian/avian-influenza/hpai-detections/commercial-backyard-flocks; and CRS Report R48518, *The Highly Pathogenic Avian Influenza (HPAI) Outbreak in Poultry, 2022-Present*, by Christine Whitt.

[45] Bittmann et al., "Short-and Long-Term Drought Impacts on the U.S. Beef Value Chain"; and USDA ERS, Livestock, Dairy, and Poultry Outlook: May 2022. For more discussion of beef cow inventories and prices, see CRS Insight IN12687, *Argentine Beef Import Quota Expansion*, by Benjamin Tsui and Christine Whitt.

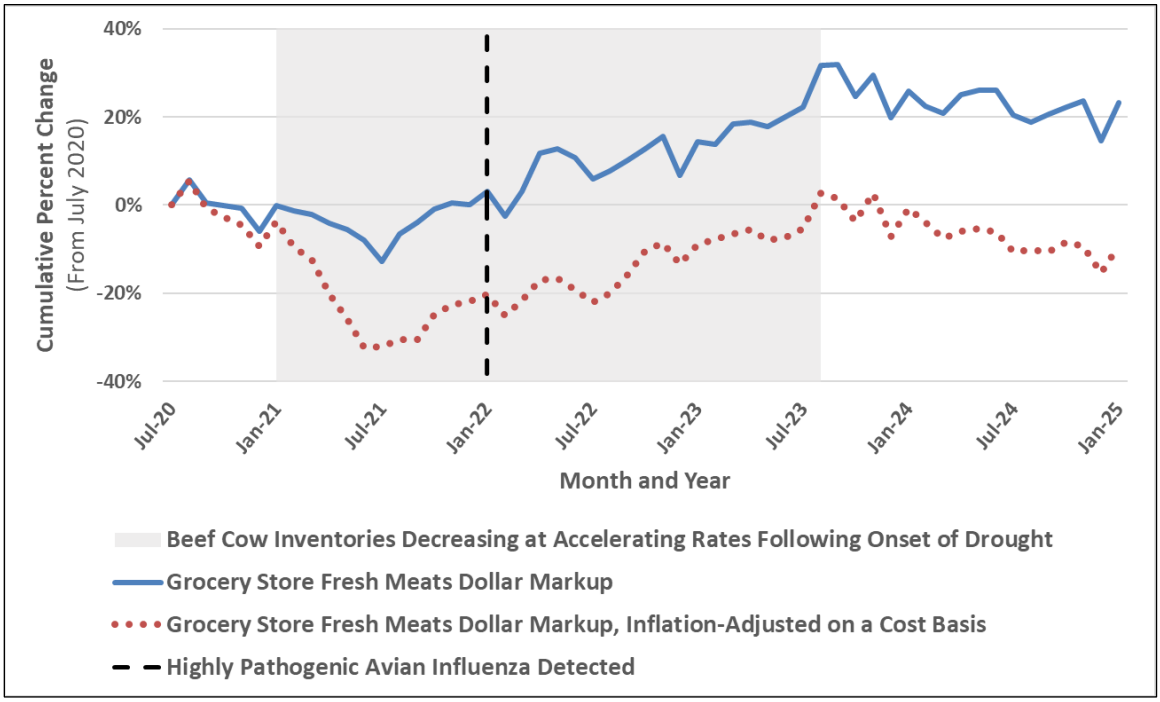
[46] Bittmann et al., "Short-and Long-Term Drought Impacts on the U.S. Beef Value Chain"; and Zamani et al., "The Effect of Avian Influenza Outbreaks on Retail Price Premiums in the United States Poultry Market."

[47] An exception would be when dollar markups are negative in the initial period.

supply chain disruptions on net profits for a grocery retailer depend on the retailer's other costs (e.g., rent, utilities, wages) and its total sales volume.

Figure 3. Supermarket and Grocery Store Fresh Meats During Selected Agricultural Shortages

July 2020 to January 2025



Source: CRS with data from U.S. Bureau of Labor Statistics (BLS) and U.S. Department of Agriculture.

Notes: Grocery Store Fresh Meats Dollar Markup is a BLS price index that measures the change to the dollar markup (price – cost of goods sold). Grocery Store Fresh Meats Dollar Markup, Inflation-Adjusted on Cost Basis is the Grocery Store Fresh Meats Dollar Markup adjusted for inflation by the Producer Price Index (PPI) for Meats, Poultry, and Fish. The inflation-adjusted measure indicates whether dollar markups grew at a faster or slower rate than supplier price changes. This chart begins in July 2020 to exclude certain COVID-19-related volatility that occurred in the first half of 2020 that was unrelated to the drought that began in 2020 and to include the effects of the drought and the Highly Pathogenic Avian Influenza. January 2025 is the ending date because it generally excludes certain tariff changes that occurred in 2025.

Import Volumes and Tariffs in 2025

Tariff increases in 2025 disrupted retail supply chains.[48] This disruption was widely anticipated by businesses,[49] including some retailers,[50] and generally contributed to higher costs and lower

[48] For example, see Marina Azzimonti et al., "Tariffs: Estimating the Economic Impact of the 2025 Measures and Proposals," Economic Brief, Federal Reserve Bank of Richmond, April 2025, https://www.richmondfed.org/publications/research/economic_brief/2025/eb_25-12. For discussion of tariff increases during 2025 and the products that were affected, see CRS Report R48549, *Presidential 2025 Tariff Actions: Timeline and Status*, by Keigh E. Hammond and William F. Burkhart.

[49] Philippe Andrade et al., "Who Will Pay for Tariffs? Businesses' Expectations about Costs and Prices," Federal Reserve Bank of Boston, *Current Policy Perspectives*, vol. 25, no. 13 (September 2025), https://www.bostonfed.org/publications/current-policy-perspectives/2025/who-pays-for-tariffs.aspx.

[50] Russell Mills et al., "SOURCE Insights: An Initial Look at the Anticipated Impact of Tariffs on Fourth District

(continued...)

inventories for retailers of the goods affected by the tariff increases. Retailer behavior during this supply chain disruption highlights the role of inventories in retail markups for a range of retailer types and highlights how retailers might respond when they anticipate a disruption.

Changes in import data reported by the Bureau of Economic Analysis (BEA) suggest that retailers adjusted their inventories before and after tariff increases in 2025.[51] According to BEA, quarterly real imports of consumer goods (excluding automotive and food)[52] increased by 25% from the fourth quarter (Q4) of 2024 to Q1 of 2025.[53] This increase in imports was likely due to retailers acquiring inventories before tariff increases took effect.[54] Subsequently, as some tariff increases took effect in Q2 of 2025,[55] BEA's estimate of quarterly inflation-adjusted consumer goods imports decreased by 26% from Q1 to Q2 of 2025,[56] then decreased by 8% from Q2 to Q3 of 2025, and then by 6% from Q3 to Q4 of 2025.[57] In Q4 of 2025, BEA's quarterly estimate of these imports was the lowest since Q3 of 2020,[58] which was a quarter coinciding with the COVID-19 pandemic supply chain disruptions. According to BEA, the categories listed under consumer goods with import volumes that decreased on an annual basis from 2024 to 2025 were (1) furniture and household items; (2) apparel, footwear, and household goods; (3) household and kitchen appliances; (4) home entertainment and recreational equipment and materials; (5) other durable consumer goods; and (6) other nondurable consumer goods.

These import decreases were not accompanied by a decrease in retail sales,[59] suggesting retailers drew down inventories to maintain sales. Seasonally adjusted inventories relative to sales decreased for retailers across a range of product types from Q4 of 2024 to Q4 of 2025.[60] Some businesses and business associations have reported that sudden decreases in imports can generally contribute to potential inventory shortages.[61] In November 2025, the founder of a consumer

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Businesses," Federal Reserve Bank of Cleveland, February 2025, https://www.clevelandfed.org/publications/cleveland-fed-district-data-brief/2025/cfddb-20250422-sorce-insights-anticipated-impact-of-tariffs; and T. Woods, "3 Major Retailers that Will Raise Prices Immediately Under Trump—Tariffs Play Key Role," *Yahoo!Finance,* January 3, 2025, https://finance.yahoo.com/news/3-major-retailers-raise-prices-150119217.html.

[51] The Bureau of Economic Analysis (BEA) provides a measure of real imports, which is adjusted for both inflation and seasonal trends.

[52] The category of data published by the BEA is "consumer goods, except food and automotive"; this is a category of data that is inflation-adjusted and seasonally adjusted by BEA.

[53] Largest percent increase on record going back to Q1 2007, which is when this data series became available; see BEA, "Table 4.2.6B Real Exports and Imports of Goods and Services by Type of Product, Chained Dollars: Quarterly," accessed on February 26, 2025.

[54] Retail Dive Staff, "3 Ways Tariffs are Impacting Retailers," *RetailDive*, August 28, 2025, https://www.retaildive.com/news/3-ways-tariffs-are-impacting-retailers/758864/.

[55] For discussion of tariff increases during 2025, see CRS Report R48549, *Presidential 2025 Tariff Actions: Timeline and Status*, by Keigh E. Hammond and William F. Burkhart.

[56] Largest percent decrease on record going back to Q1 of 2007, which is when this data series became available; see BEA, "Table 4.2.6B Real Exports and Imports of Goods and Services by Type of Product, Chained Dollars: Quarterly."

[57] BEA, "Table 4.2.6B Real Exports and Imports of Goods and Services by Type of Product, Chained Dollars: Quarterly."

[58] BEA, "Table 4.2.6B Real Exports and Imports of Goods and Services by Type of Product, Chained Dollars: Quarterly."

[59] CRS analysis of retail sales data from Census Bureau, *Time Series / Trend Charts*, accessed April 1, 2026, https://www.census.gov/econ/currentdata/.

[60] CRS analysis of data in BEA, "Table 3BU. Real Inventory-Sales Ratios for Manufacturing and Trade, Seasonally Adjusted," accessed March 13, 2026.

[61] Fin Daniel Gómez and Richard Escobedo, "Walmart, Target CEOs Privately Warned Trump Tariffs Could Lead to Empty Shelves Soon," *CBSNews*, April 23, 2025, https://www.cbsnews.com/news/walmart-target-trump-tariff-supply-(continued...)

electronics retailer reportedly stated, "we have sold down to extremely low stock levels—we probably have about 10% of the inventory we need."[62]

Some retailers, knowing that their competitors would also likely import fewer goods and thus have fewer inventories, may have increased their markups.[63] Some research suggests that when supply shocks are widely anticipated and known by all market participants—as is the case with the 2025 tariff increases—retailers might increase prices to a greater degree and at a faster rate compared with an unexpected shock.[64] According to Bureau of Labor Statistics (BLS) data, dollar markups at retailers of certain types of consumer goods (e.g., electronics, apparel, and furniture) increased at accelerated rates in 2025 compared with 2024 and prior years.[65] In some cases, the types of consumer goods with markups that increased at accelerated rates in 2025 also experienced import volume decreases in 2025. For example, from December 2024 to December 2025, in-store dollar markups of "furniture retailers" increased by 8% after decreasing the prior year.[66] As another example, in 2025, in-store dollar markups of "hobby, toy, and game retailers" increased by 13% after averaging an annualized change of 0% in the prior four years. Not all retailer types had increases in markups in 2025.

Selected Policy Options for Congress

Some Members of Congress have expressed concern about retailers' price increases and perceptions of price gouging, particularly during supply chain disruptions. These concerns tend to be focused on retailers of certain goods that are experiencing increases in price or decreases in availability. Should Congress consider policy options to affect such behavior, Congress might evaluate how certain retailers and other market participants might respond to these policies. Retailers tend to respond to policy changes in manners that allow them to maximize their profits, which might include responses that are contrary to the goal of the policy.

This section provides some considerations were Congress to (1) continue oversight of retailers through existing laws, (2) consider legislation to affect price gouging, and/or (3) consider legislation to strengthen supply chain resiliency.

Continued Oversight

Congress might choose not to take legislative action and continue monitoring how retailers respond to public perceptions of their behavior and other market conditions, such as consumer demand for their products, competitive pressure from other retailers, and changes in their supplier network during supply chain disruptions. For example, a retailer might choose not to increase

chains/; and Lori Ann LaRocoo, "The Trade War's Wave of Retail Shortages Will Hit U.S. Consumers in Stages. Here's When," *CNBC*, April 24, 2025, https://www.cnbc.com/2025/04/24/unsustainable-china-trade-war-retail-shortage-warnings.html.

[62] Deborah Mary Sophia and Savyata Mishra, "Small US Retailers Face Holiday Supply Chaos Due to Trump Tariffs," Reuters, November 26, 2025, https://www.reuters.com/business/retail-consumer/small-us-retailers-face-holiday-supply-chaos-due-trump-tariffs-2025-11-26/.

[63] For more information on the retail inventory-markup relationship, see Neil Mehrotra et al., *Retail Inventories and Inflation Dynamics: The Price Margin Channel*, International Finance Discussion Papers no. 1424, October 2025, https://doi.org/10.17016/IFDP.2025.1424.

[64] Alverez-Blaser et al., *Markups and Cost Pass-through Along the Supply Chain*; Isabella M. Weber and Evan Wasner, "Sellers' Inflation, Profits and Conflict: Why Can Large Firms Hike Prices in an Emergency?," *Review of Keynesian Economics*, vol. 2, no. 2 (April 14, 2023), p. 183, https://doi.org/10.4337/roke.2023.02.05.

[65] CRS analysis of BLS retail trade price indexes.

[66] CRS calculations based on BLS retail trade price indexes.

prices when demand is high because of concerns that its customers would choose to patronize a competing retailer. Alternatively, a retailer might choose to vary its prices with demand, which could contribute to higher prices in some cases and lower prices in others. Congress has exercised oversight of such behavior by, for example, evaluating it in hearings or sending letters to retailers, some of which might be publicly available.[67]

Congress might consider using its oversight authority of federal agencies to review their enforcement of existing federal statutes that may affect retailer pricing behavior during supply chain disruptions. For example, the Federal Trade Commission (FTC), Department of Justice (DOJ), and Consumer Financial Protection Bureau published a joint press release warning consumers about potential scams and price gouging in the wake of hurricanes and other natural disasters.[68] The FTC also released a report on grocery store supply chain disruptions during the COVID-19 pandemic, which provided insights on how market structure and business conduct differed across grocery retailers, wholesalers, and producers.[69] DOJ has taken action against individuals for violating the Defense Production Act of 1950 (DPA, 50 U.S.C. §§4501 et seq.), as discussed below.

Defense Production Act of 1950

The DPA was enacted during the Korean War to provide the President with greater executive powers to control defense production and aspects of industrial and economic policy; it has been used primarily in the context of national defense.[70] Section 102 of the DPA prohibits the accumulation of materials that the President has designated as scarce "in excess of the reasonable demands of business, personal, or home consumption" or for the purpose of resale of products "at prices in excess of prevailing market prices."[71]

The first Trump Administration and the Biden Administration used the authority provided by Section 102 of the DPA during the COVID-19 pandemic. President Trump used this authority to instruct the Secretary of Health and Human Services, in consultation with the Administrator of the Federal Emergency Management Agency, to prevent hoarding of certain health and medical products, including personal protective equipment.[72] Subsequently, DOJ created a COVID-19

[67] For example, see U.S. Congress, House Committee on Energy and Commerce, Subcommittee on Consumer Protection and Commerce, *Pandemic Profiteers: Legislation to Stop Corporate Price Gouging*, hearing, 117th Cong., 2nd sess., February 2, 2022, https://docs.house.gov/Committee/Calendar/ByEvent.aspx?EventID=114360; U.S. Congress, Senate Committee on Banking, Housing, and Urban Affairs, *The Semiannual Monetary Policy Report to the Congress*, hearing on the Oversight on the Monetary Policy Report to Congress Pursuant to the Full Employment and Balanced Growth Act of 1978, 118th Cong., 1st sess., March 7, 2023, S.Hrg. 118-205; and U.S. Congress, Senate Special Committee on Aging, *Making Washington Work for Seniors: Fighting to End Inflation and Achieve Fiscal Sanity*, hearing, 119th Cong., 1st sess., January 29, 2025, https://www.congress.gov/event/119th-congress/senate-event/LC74258/text.

[68] FTC, "FTC, DOJ and CFPB Warn Consumers About Potential Scams and Price Gouging in the Wake of Hurricanes and other Natural Disasters," press release, October 9, 2024, https://www.ftc.gov/news-events/news/press-releases/2024/10/ftc-doj-cfpb-warn-consumers-about-potential-scams-price-gouging-wake-hurricanes-other-natural.

[69] FTC, *Feeding America in a Time of Crisis: The United States Grocery Supply Chain and the COVID-19 Pandemic*, March 21, 2024, https://www.ftc.gov/reports/feeding-america-time-crisis-ftc-staff-report-united-states-grocery-supply-chain-covid-19-pandemic.

[70] For more information on the Defense Production Act of 1950, see CRS Report R43767, *The Defense Production Act of 1950: History, Authorities, and Considerations for Congress*, by Alexandra G. Neenan.

[71] 50 U.S.C. §4512; and see CRS Report R43767, *The Defense Production Act of 1950: History, Authorities, and Considerations for Congress*, by Alexandra G. Neenan.

[72] Executive Order 13910 of March 23, 2020, "Preventing Hoarding of Health and Medical Resources to Respond to the Spread of COVID-19," 85 *Federal Register* 17001, March 26, 2020, https://www.federalregister.gov/documents/2020/03/26/2020-06478/preventing-hoarding-of-health-and-medical-resources-to-respond-to-the-spread-of-covid-19.

Hoarding and Price Gouging Task Force to "pursue bad actors who amass critical supplies either far beyond what they could use or for the purpose of profiteering."[73] The Biden Administration extended this scarcity designation,[74] and DOJ indicted several individuals in multiple cases for violating Section 102 of the DPA. Section 102 does not explicitly prohibit price gouging, but DOJ used the term to describe its indictments in press releases.[75] To the extent that Section 102 affects price gouging, it would be limited to the context of prohibiting hoarding of materials designated as scarce by the President for the purpose of price gouging.

As part of its oversight activities, Congress could ask the President to designate certain products as scarce and use the President's authority under Section 102 of the DPA to prevent retailers from hoarding and reselling these products at an elevated price. Congress also could amend the DPA to explicitly address price gouging as proposed in some bills discussed in the following section.

Retailer Price Gouging

Some Members of the 119th Congress have introduced bills that would prohibit price gouging; the majority of these bills include provisions on supply chain disruptions.[76] For example, the Cracking Down on Price Gouging Act (H.R. 4720) would amend Section 102 of the DPA to include "price gouging" and presume that a violation has occurred if prices increase by a certain percent after a shortage caused by a supply chain disruption. Similarly, the Price Gouging Prevention Acts of 2025 (H.R. 4528 and S. 2321) would presume that a violation has occurred if sales at a "grossly excessive price" occur during a "market shock"[77] and other conditions are met. As another example, the Stop Disaster Price Gouging Act (H.R. 2427) would prohibit price gouging for certain goods after the date on which the President declares a major disaster or emergency, which are events that typically include or cause supply chain disruptions.

No federal laws or regulations explicitly prohibit price gouging. According to the National Conference of State Legislatures, as of January 2025, 39 states, the District of Columbia, and some U.S. territories have statutes or regulations that prohibit price gouging.[78] Most of these state laws and regulations prohibit price gouging in response to a disaster or state of emergency,[79] in

[73] Department of Justice, "Combating Price Gouging & Hoarding," March 23, 2022, https://www.justice.gov/coronavirus/combatingpricegouginghoarding.

[74] Executive Order 14001 of January 21, 2021, "A Sustainable Public Health Supply Chain," 86 *Federal Register* 7219, January 26, 2021; and Department of Health and Human Services, "Extension of Designation of Scarce Materials or Threatened Materials Subject to COVID-19 Hoarding Prevention Measures; Extension of Effective Date with Modifications," 86 *Federal Register* 35810, July 7, 2021.

[75] For example, see U.S. Attorney's Office, District of Puerto Rico, "Individual Indicted for Price Gouging," press release, April 29, 2021, https://www.justice.gov/usao-pr/pr/individual-indicted-price-gouging.

[76] The price gouging bills that do not include supply chain disruption provisions tend to focus on specific products, such as medications or groceries.

[77] *Market shock* is a term that commonly includes supply chain disruptions.

[78] National Conference of State Legislatures, "Price Gouging State Statutes," updated January 21, 2025, https://www.ncsl.org/financial-services/price-gouging-state-statutes. For more information on selected examples of state laws on price gouging, see CRS Report R47072, *Gasoline Price Increases: Federal and State Authority to Limit "Price Gouging"*, by Adam Vann.

[79] For example, see Conn. Gen. Stat. §29-319, https://www.cga.ct.gov/2025/pub/chap_541.htm#sec_29-319; and Ind. Code §§4-6-9.1-1 et seq., https://iga.in.gov/laws/2025/ic/titles/4#4-6-9.1-1.

response to market disruptions,[80] or at all times;[81] some are applicable for specific consumer products, such as fuel or milk.[82]

A fundamental question for legislation on price gouging is the circumstances or situations in which a price increase is considered excessive. In the 119th Congress, some bills would prohibit a certain percentage increase in price over a specified time period in certain cases.[83] Other bills would prohibit an excessive increase in prices, direct the FTC to promulgate regulations to define excessive, and provide a percentage increase for the FTC to consider in its definition.[84] Both sets of bills include an exception or affirmative defense if the seller increases prices in response to an increase in costs. Congress could consider specifying a maximum dollar or percent markup in legislation[85] because the markup explains the relationship between the price at which the retailer sells a good and its acquisition cost.[86] Specifying a maximum in terms of a markup percent might result in a more flexible policy that would allow retailers to adjust their markup based on the magnitude of their costs but might not address price increases where a retailer is maintaining a constant markup percent. Specifying the maximum markup in terms of dollars might account for price increases where the markup percent is constant, but the inflation-adjusted size of the markup would decrease over time unless Congress were to adjust the maximum dollar markup for inflation. Congress might also consider using different markups for different types of retailers,[87] which might accommodate the fact that retailers of different types of goods tend to have different markups.

How Congress chooses to address the definition of excessive or price gouging in legislation, if Congress chooses to address it, might have different tradeoffs. Legislation that would direct a federal agency to define the term might provide agency flexibility to adapt to changing market conditions, such as how suppliers are responding to a supply chain disruption. Alternatively, legislation that would explicitly define excessive or price gouging in statute could provide retailers more clarity on how to comply with the law but might not allow regulating agencies to adapt to changing market conditions or the economy over time.

Congress might consider the scope of a price gouging prohibition; legislation could apply in certain contexts, such as supply chain disruptions, or at all times. Legislation in which a proposed prohibition focuses on supply disruptions might target instances where retail markup increases do not generally result in suppliers increasing production because supply is constrained. Such a scope might also require regulators and retailers to identify when a supply chain disruption is occurring and when the law would apply.

[80] For example, see Me. Rev. Stat. Ann. tit. 10 §1105, https://www.mainelegislature.org/legis/statutes/10/title10sec1105.html; and N.Y. General Business Law §396-r, https://www.nysenate.gov/legislation/laws/GBS/396-R.

[81] For example, see Mich. Comp. laws 445.903, https://www.legislature.mi.gov/Laws/MCL?objectName=MCL-445-903.

[82] For example, see Conn. Gen. Stat. §29-319, https://www.cga.ct.gov/2025/pub/chap_541.htm#sec_29-319; Ind. Code §4-6-9.1-1 et seq., https://iga.in.gov/laws/2025/ic/titles/4#4-6-9.1-1; and N.Y. General Business Law §396-rr, https://www.nysenate.gov/legislation/laws/GBS/396-RR.

[83] See Cracking Down on Price Gouging Act (H.R. 4720) and Stop Disaster Price Gouging Act (H.R. 2427).

[84] See Price Gouging Prevention Acts of 2025 (H.R. 4528 and S. 2321) and Stop Price Gouging in Grocery Stores Act of 2025 (H.R. 4966).

[85] For example, similar to the language in §2(a)(1)(B) of the Stop Disaster Price Gouging Act (H.R. 2427).

[86] See "Retailers and Supply Chain Disruptions."

[87] For example, similar to what is accounted for by the language contained in §2(a)(2)(A(i)(II) of H.R. 2427.

Congress also could limit the scope of a prohibition to, for example, certain goods that tend to be in demand during supply chain disruptions,[88] such as groceries or fuel, or apply it to all goods. Limiting a prohibition to certain goods might focus policymaking on areas where consumer concerns around fairness and access are more acute than others. A potential bill could define or list certain "essential goods," but the types of goods that consumers perceive to be essential might vary, change, and include goods that are not covered by the law. Similarly, when a supply chain disruption begins, its duration is typically unknown; the length of a supply chain disruption can affect which goods are perceived to be essential by consumers.[89] Congress, regulators, or the courts would need to determine which goods are considered essential and thus covered by the law.

Congress also might consider how retailers operating in the United States may respond if they were to face explicit restrictions on the prices they charge, particularly during a supply chain disruption. The immediate effect might be lower consumer prices and retail profits for a period, but there might be other longer-term effects. For example, lower retailer profits might result in store closures or lower retailer investments in assets such as financial stocks, logistical infrastructure, excess inventory buffers, or upstream supply chain infrastructure.

A restriction on prices that retailers charge might also incentivize the development of less-regulated underground resale markets, particularly if supply of the product is constrained by a disruption. For example, if consumers are willing to pay more than the capped price, someone might acquire and hoard the good and then resell it to other consumers in an undocumented market. Generally, less-regulated markets might be less likely to comply with a price-gouging law and might be more susceptible to other illegal or unethical commercial behavior.

It is unclear how retailers would choose to allocate scarce goods if they were unable to adjust prices above a threshold. Although consumers might pay lower prices than they would without a price gouging prohibition in place, consumers might encounter other allocation systems that could raise other potential congressional concerns. With reduced pricing flexibility, retailers might sell the goods to consumers who arrive first, which could contribute to longer lines.[90] Retailers also might prioritize certain consumers, such as repeat customers, customers with social or political capital, or customers who buy memberships with the retailer. The relative value of prioritizing certain consumers might be higher if retailers were unable to sell their goods at prices that maximize revenues. Congress also may choose not to pursue legislation and to defer to market forces and consumer responses to address price gouging.

Supply Chain Resiliency

Congress might consider addressing underlying supply chain conditions to reduce uncertainty and minimize disruptions, which may reduce incidences of short-term scarcity-driven retail price increases. The supplier network available to retailers can affect their ability to acquire inventories, which can affect their pricing behavior, particularly during disruptions.[91] In some cases,

[88] Consumers may find it difficult to abstain from certain goods for any amount of time, even when prices increase.

[89] For example, consumers might be able to abstain from purchasing a new vehicle for a shorter time period but find it more difficult to abstain from purchasing a new vehicle for a longer period of time.

[90] Yoram Barzel, "A Theory of Rationing by Waiting," *The Journal of Law & Economics*, vol. 17, no. 1 (April 1974), p. 73, https://doi.org/10.1086/466785; and H. E. Frech III and William C. Lee, "The Welfare Cost of Rationing-By-Queuing Across Markets: Theory and Estimates from the U.S. Gasoline Crises," *The Quarterly Journal of Economics*, vol. 102, no. 1 (February 1987), p. 97, https://doi.org/10.2307/1884682.

[91] See "Retailers and Supply Chain Disruptions."

increasing supply chain resiliency to address short-term disruption-driven price increases may contribute to longer-term structural cost increases, which may be passed on to consumers.

Congress might consider incentivizing diversified supplier networks for certain goods to affect supply chain resiliency. Some consumer goods are mostly manufactured, or depend on components that are mostly manufactured, outside of the United States. Globalized supply chains generally have provided U.S. consumers with a more diverse selection of goods, typically resulting in lower prices during stable economic periods, but also may contribute to import reliance and exposure to global supply chain disruptions.[92] Domestic production also can be vulnerable to supply chain disruptions under certain market conditions, such as when most of the production is conducted by a few firms and when it is difficult for new firms to enter the market.[93] One way Congress might help diversify supplier networks and build supply chain resiliency is with policies that support domestic production capacity. These policies could result in decreased incidences of short-term scarcity driven price increases but may also contribute to longer-term structural cost increases for the private sector because producers in the United States sometimes have higher costs than those located in other countries.

Congress has sometimes sought to ease the tension between supply chain resiliency and private sector costs by subsidizing certain industries (e.g., by providing production or investment tax credits while allowing competition from imports).[94] These types of policies may reduce the likelihood of shortages and help diversify supply chains. They could also contribute to countries retaliating against each other with increases in their respective subsidies.[95] Additionally, production or investment tax credits could decrease federal government revenues.[96] Depending on how the subsidies are specified, they also may raise potential concerns regarding U.S. commitments to certain trade agreements.[97]

Congress might consider identifying industries and consumer goods for which it determines supply chain resiliency potentially is needed to help prevent shortages and price fluctuations for these items during supply chain disruptions. A Promoting Resilient Supply Chains Act of 2025 (PRSCA; H.R. 2444 as passed by the House; S. 257 as passed by the Senate) would direct the Assistant Secretary of Commerce for Industry and Analysis to lead and establish an intergovernmental working group to develop plans and analyses to increase U.S. supply chain resiliency for industries and goods critical to the economic or national security of the United States. The bills would direct the Assistant Secretary to identify which industries, supply chains, and goods are critical to the economic security of the United States. The bills would consider both domestic and international components of the supply chain. The Senate and the House passed their respective versions of PRSCA, which differ regarding the role of the Department of Homeland Security (DHS). Each chamber of Congress might consider the role of the DHS in

[92] For analysis of a selection of these disruptions, see "Retailers and Supply Chain Disruptions."

[93] For example, the supply chain disruptions in the domestic production of infant formula (see FTC, *Market Factors Relevant to Infant Formula Supply Disruptions 2022*, March 13, 2024, https://www.ftc.gov/system/files/ftc_gov/pdf/infant_formula_report_final.pdf).

[94] For example, see the Infrastructure Investment and Jobs Act (P.L. 117-58), the CHIPS Act of 2022 (Division A of P.L. 117-167), P.L. 117-169 (the FY2022 budget reconciliation law, commonly referred to as the Inflation Reduction Act), and P.L. 119-21 (the FY2025 budget reconciliation law, commonly referred to as the One Big Beautiful Bill Act).

[95] Elizabeth Van Heuvelen, "Subsidy Wars," *Finance & Development Magazine*, IMF, June 2023, https://www.imf.org/en/Publications/fandd/issues/2023/06/B2B-subsidy-wars-elizabeth-van-heuvelen.

[96] Subsidies that are government expenditures would increase government expenditures, and subsidies that reduce tax obligations would reduce government revenues.

[97] For list of trade agreements, see CRS Report R45846, *Congressional Votes on Free Trade Agreements and Trade Promotion Authority*, by Keigh E. Hammond.

supply chain resiliency and whether its potential role is appropriate. The Congressional Budget Office estimates it would cost less than $500,000 to execute the activities proposed in the PRSCA bills.[98]

Author Information

Michael Alan Havlin
Analyst in Industrial Organization and Business

Clare Y. Cho
Specialist in Industrial Organization and Business Policy

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[98] Congressional Budget Office, *Cost Estimate*, February 19, 2025, https://www.cbo.gov/system/files/2025-02/s0257.pdf.

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SUMMARY

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Zachary T. Neuhofer
Analyst in Agricultural Policy

U.S. Department of Agriculture (USDA) Horticulture Programs: Action in the 119th Congress

The farm bill generally contains reauthorizations, amendments, and new programs that impact specialty crops, organic agriculture, local and regional food programs, hemp, and pest and disease management. Many of these programs are contained in the horticulture title, which was first added to a farm bill in the Food, Conservation, and Energy Act of 2008 (2008 farm bill; P.L. 110-234). The 2008 farm bill amended programs that were introduced in the Specialty Crop Competitiveness Act of 2004 (P.L. 108-465) (such as the Specialty Crop Block Grant Program), created new programs that primarily benefitted horticulture (such as the Plant Pest and Disease Management and Disaster Prevention Program), and contained support for the National Organic Program (NOP). In subsequent farm bills, the Agricultural Act of 2014 (2014 farm bill; P.L. 113-79) and the Agriculture Improvement Act of 2018 (2018 farm bill; P.L. 115-334), the horticulture title expanded to include support for local and urban agriculture and hemp production. Farm bill support for horticultural crops is not limited to the horticulture title; programs in other titles, such as the research and trade titles, also provide support for these crops.

The most recent farm bill, the 2018 farm bill, expired in 2023. It has been extended three times for a year at a time: in November 2023 to cover FY2024 and crop year 2024 (P.L. 118-22, Division B, §102); in December 2024 to cover FY2025 and crop year 2025 (P.L. 118-158, Division D, §4101); and in November 2025 to cover FY2026 and crop year 2026 (P.L. 119-37, Division E, §5002).

The 119th Congress passed two laws that impact horticulture programs and provisions from the 2018 farm bill. These two laws are the FY2025 budget reconciliation law (P.L. 119-21), which amended certain existing horticulture programs, and the Continuing Appropriations, Agriculture, Legislative Branch, Military Construction and Veterans Affairs, and Extensions Act, 2026 (P.L. 119-37, Division B, §781), which amended the federal definition of *hemp* and extended the 2018 farm bill through FY2026.

P.L. 119-21 provided additional funding for certain mandatory spending programs in the horticulture title. The law did not reauthorize all expired or expiring programs from the 2018 farm bill. The law impacted horticulture programs with and without budget baseline. Programs with baseline that received increased funding in P.L. 119-21 include the Specialty Crop Research Initiative, the Plant Pest and Disease Management and Disaster Prevention Program, and the Specialty Crop Block Grant Program. Horticulture programs without baseline that received funding from P.L. 119-21 include support programs for NOP; the Emergency Citrus Disease Research and Development Trust Fund; the Multiple Crop and Pesticide Use Survey; and the Urban, Indoor, and Other Emerging Agricultural Production, Research, Education, and Extension Initiative.

P.L. 119-37 amended the federal definition of hemp that was established in the 2018 farm bill. That prior definition allowed agricultural production and processing of hemp and hemp-derived products to fall outside of restrictions in the Controlled Substances Act (21 U.S.C. §§801-904) that otherwise affect cannabis. The new definition defines hemp on the basis of a total tetrahydrocannabinol (THC) concentration of 0.3% on a dry weight basis rather than only delta-9 THC, while making explicit inclusions and exclusions.

On February 13, 2026, Representative Glenn "GT" Thompson, chairman of the House Committee on Agriculture, introduced a farm bill, the Farm, Food, and National Security Act of 2026 (H.R. 7567), which contains reauthorizations and amendments to horticulture programs. The bill was voted out of committee and ordered to be reported on March 4, 2026. On April 30, 2026, the bill was passed by the House. Some other Members of Congress also have introduced legislation that would impact horticulture programs.

In addition to the amendments to horticulture programs in P.L. 119-21 and P.L. 119-37, Congress may consider reauthorizing the program authority for existing horticulture programs that receive mandatory spending or reauthorizing programs that receive discretionary appropriations. Congress also could consider amending, expanding, or terminating existing horticulture programs and provisions related to hemp, specialty crops, local and regional food systems, and organic agriculture. Additionally, Congress could create new programs impacting these areas or take no action on horticulture programs.

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Introduction

For nearly a century, Congress has passed farm bills, which are omnibus, multiyear laws that govern an array of agricultural and food programs.[1] Since 2008, farm bills have contained a horticulture title that reauthorizes, amends, and authorizes new programs that impact specialty crops, organic agriculture, local and regional food systems, hemp, and pest and disease management.[2] Areas covered under the horticulture title also may receive support from programs and authorizations in other titles, such as the research, trade, commodities, and crop insurance titles.

The Food, Conservation, and Energy Act of 2008 (2008 farm bill; P.L. 110-234) was the first farm bill to contain a horticulture title.[3] Its horticulture title consisted of specialty crop programs, such as the Specialty Crop Block Grant Program (SCBGP); new programs that primarily benefitted horticulture, such as the Plant Pest and Disease Management and Disaster Prevention Program; and financial support for the National Organic Program (NOP).[4] Congress expanded the horticulture title in the next two farm bills, the Agricultural Act of 2014 (2014 farm bill; P.L. 113-79) and the Agriculture Improvement Act of 2018 (2018 farm bill; P.L. 115-334), by including financial support for local and urban agriculture and addressing hemp production.[5]

Congress extended the 2018 farm bill, which expired in 2023, three times for a year at a time.[6] As of March 2026, the 119th Congress has passed two laws that impact programs and provisions from the horticulture title of the 2018 farm bill. The FY2025 budget reconciliation law (P.L. 119-21) amended a number of existing horticulture programs.[7] The Continuing Appropriations, Agriculture, Legislative Branch, Military Construction and Veterans Affairs, and Extensions Act, 2026 (P.L. 119-37), provided an extension of the 2018 farm bill through FY2026, provided annual appropriations for agricultural programs through FY2026, and amended the statutory definition of *hemp*.

This report provides an overview of provisions in P.L. 119-21 and P.L. 119-37 that have affected farm bill horticulture title programs and related policies. This report does not discuss all farm bill

[1] For background on farm bills, see CRS Report RS22131, *What Is the Farm Bill?*

[2] Discussion of the horticultural title generally centers around specialty crops, although not all horticultural crops are considered specialty crops (e.g., hemp). The statutory definition of *specialty crop* is "fruits and vegetables, tree nuts, dried fruits, and horticulture and nursery crops (including floriculture)" (7 U.S.C. §1621 note). For information on the U.S. Department of Agriculture's (USDA's) interpretation of the definition, see USDA, Agricultural Marketing Service (AMS), "What is a Specialty Crop," https://www.ams.usda.gov/services/grants/scbgp/specialty-crop.

[3] For information on past farm bills, see CRS Report R45210, *Farm Bills: Major Legislative Actions, 1965-2024*.

[4] Many of these programs had been enacted in the Specialty Crop Competitiveness Act of 2004 (P.L. 108-465). For information on specialty crop programs in the farm bill, see CRS Report R48625, *Specialty Crops: Selected Farm Bill Programs*. The National Organic Program (NOP) was created in 1990 through the Organic Foods Production Act in the Food, Agriculture, Conservation, and Trade Act of 1990 (P.L. 101-624). NOP was fully implemented by USDA in 2002. For discussion of USDA support for organic agriculture, see CRS In Focus IF10278, *U.S. Farm Policy: USDA-Certified Organic Production*.

[5] For information on local food programs in the farm bill, see CRS Report R46538, *Local and Urban Food Systems: Selected Farm Bill and Other Federal Programs*. For more on hemp, see CRS Report R44742, *Defining Hemp: A Fact Sheet*; and CRS In Focus IF13136, *Changes to the Statutory Definition of Hemp and Issues for Congress*.

[6] Programs may operate on a calendar year, fiscal year, or crop year. A *crop year* is the calendar year in which a commodity is harvested. The 2018 farm bill was extended in November 2023 to cover FY2024 and crop year 2024 (P.L. 118-22, Division B, §102); in December 2024 to cover FY2025 and crop year 2025 (P.L. 118-158, Division D, §4101); and in November 2025 to cover FY2026 and crop year 2026 (P.L. 119-37, Division E, §5002).

[7] For more on the general impact of P.L. 119-21 on the farm bill, see CRS Report R48775, *The Farm Bill After FY2025 Budget Reconciliation: Frequently Asked Questions*.

provisions that may affect the horticultural sector, and it does not discuss discretionary appropriations in P.L. 119-37.[8] The report summarizes selected proposed legislation in the 119th Congress relating to areas of the horticulture title, including the Farm, Food, and National Security Act of 2026 (H.R. 7567). Potential issues for Congress relating to horticulture programs and policies are discussed, including potential topics of debate and possible enactment of a future farm bill.

Legislation Enacted in the 119th Congress

This section provides an overview of the provisions enacted in P.L. 119-21 and P.L. 119-37 that impact farm bill horticulture programs and provisions.

FY2025 Budget Reconciliation Law (P.L. 119-21)

The FY2025 budget reconciliation law (P.L. 119-21), enacted in July 2025, made changes to selected mandatory spending for farm bill programs relating to areas in the horticulture title. The law reauthorized some expired or expiring horticulture program provisions from the 2018 farm bill.[9]

Mandatory spending programs may have permanently authorized funding or may receive temporarily authorized funding that expires after a specific fiscal year.[10] Both types of programs may face disruptions to operations as a result of an expired program authority. Some farm bill horticulture programs are considered to have permanently authorized funding (baseline); that is, these programs are assumed to continue, from a Congressional Budget Office (CBO) budgetary perspective, beyond the end of their authorization period. These programs are included in the future government spending projections by CBO, regardless of whether their program authorization expires.[11] Some horticulture programs with permanently authorized funding have a separate program authorization (i.e., SCBGP grants to states, the Local Agriculture Marketing Program [LAMP], and the Organic Agriculture Research and Extension Initiative [OREI]).[12] Other programs may not continue in the CBO spending projections because the authorizing and

[8] The horticulture titles of some farm bills have been used to amend the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA, 7 U.S.C. §§136 et seq), a law that governs pesticide use in agricultural production. This report does not discuss potential amendments to FIFRA or all farm bill provisions that may affect the horticultural sector. For example, exporters of U.S. horticultural crops may benefit from USDA trade-related programs; see CRS In Focus IF12155, *Farm Bill Primer: Trade and Export Promotion Programs*. Additionally, horticultural crop producers may be impacted by changes to the federal crop insurance and disaster assistance programs, as these changes may increase the financial support offered to farmers; see CRS Report R48574, *One Big Beautiful Bill Act (H.R. 1): Title I, Farm Safety Net and Miscellaneous Provisions*.

[9] For more on the impacts of budget reconciliation on farm bill programs, see CRS Report R48775, *The Farm Bill After FY2025 Budget Reconciliation: Frequently Asked Questions*. For more on budget reconciliation, see CRS Report R48444, *The Reconciliation Process: Frequently Asked Questions*.

[10] Programs with *mandatory spending authority* are authorized for a period of years and have multiyear estimates of projected spending under current law (i.e., *baseline* projections). If legislation proposes policy changes for programs, the proposed changes' effects are evaluated as the additional costs or savings from the proposed provisions (i.e., budgetary *scores* of a bill) relative to the baseline projections.

[11] For an overview of budget baseline, see CRS In Focus IF12115, *Farm Bill Primer: Programs Without a Budget Baseline*.

[12] For example, annual mandatory funding for the Local Agriculture Marketing Program (LAMP) is permanently authorized as per 7 U.S.C. §1627c(i)(1), but the authorization to provide grants in the program expires at the end of FY2026, per 7 U.S.C. §1627c(d)(1) and the 2018 farm bill extension in P.L. 119-37.

budget committees did not provide funding past a particular fiscal year, which may lead CBO to assume that they will not continue.[13]

CBO estimated that the horticulture section of P.L. 119-21 (§10606) would increase spending by $334 million from FY2025 to FY2034 compared with the (January 2025) baseline projections for the same budget window.[14] This scoring estimate reflects the changes in Section 10106; it does not include all spending on horticultural programs. In total, including other titles of the farm bill discussed in this report and itemized in the bullet lists in the next two headings, the budget projections from P.L. 119-21 increase spending by approximately $1.3 billion from FY2025 to FY2034.[15] This implies that over the course of FY2025-FY2034, mandatory spending on the horticulture programs discussed in this report would be approximately $1.3 billion more than if P.L. 119-21 had not been enacted. This estimate accounts for programs with permanent funding and those that received funding through FY2031 in P.L. 119-21.

Funding Increases for Programs with Permanently Authorized Funding

The following programs with permanently authorized funding received an increase in annual mandatory funding from the Commodity Credit Corporation (CCC) under P.L. 119-21:[16]

- **Specialty Crop Research Initiative (**SCRI; 7 U.S.C. §7632).[17] Annual CCC funding increased from $80 million in FY2025 to $175 million for FY2026 and each year thereafter to remain available until expended.
- **Plant Pest and Disease Management and Disaster Prevention** (7 U.S.C. §7721).[18] Annual CCC funding increased from $75 million in FY2025 to $90 million for FY2026 and each year thereafter.
- **SCBGP** (7 U.S.C. §1621 note).[19] Annual CCC funding increased from $85 million in FY2025 to $100 million for FY2026 and each year thereafter.

[13] For more on the budget dynamics of the farm bill, see CRS In Focus IF12233, *Farm Bill Primer: Budget Dynamics*. For discussion of the broader impact of P.L. 119-21 on selected farm bill programs beyond horticulture, see CRS Insight IN12573, *Budget Reconciliation: Farm Bill Programs Without a Budget Baseline and Trade Promotion, Research, Horticulture, and Animal Health Programs with a Budget Baseline*.

[14] Report available at Congressional Budget Office (CBO), "Estimated Budgetary Effects of P.L. 119-21, to Provide for Reconciliation Pursuant to Title II of H. Con. Res. 14, Relative to CBO's January 2025 Baseline," July 21, 2025, https://www.cbo.gov/publication/61570.

[15] This estimate was calculated by CRS from CBO baseline estimates.

[16] The Commodity Credit Corporation (CCC) is the government-owned financial institution that finances authorized federal farm commodity price support and production programs. For more on the CCC, see CRS Report R44606, *The Commodity Credit Corporation (CCC)*. For an overview of horticulture programs with baseline, see CRS Report R48625, *Specialty Crops: Selected Farm Bill Programs*. The rules of budget reconciliation do not allow for all of the policy changes that may be proposed for some mandatory spending programs, particularly for discretionary spending programs that are usually in a farm bill.

[17] P.L. 119-21, §10604(e). An overview of the program and funding opportunities can be found at USDA, National Institute of Food and Agriculture (NIFA), "Specialty Crop Research Initiative," https://www.nifa.usda.gov/grants/funding-opportunities/specialty-crop-research-initiative.

[18] P.L. 119-21, §10606(a). For an overview of the Plant Pest and Disease Management and Disaster Prevention Program under the Animal Health and Plant Inspection Service (APHIS), see USDA, APHIS, "PPA 771: Plant Pest and Disease Management and Disaster Prevention Program," https://www.aphis.usda.gov/funding/ppdmdpp.

[19] P.L. 119-21, §10606(b). An overview and program information for the Specialty Crop Block Grant Program can be found at USDA, AMS, "Specialty Crop Block Grant Program," https://www.ams.usda.gov/services/grants/scbgp.

Funding for Programs Extended in P.L. 119-21

P.L. 119-21 also provided funding for certain horticulture programs that were not funded after FY2024. These programs received mandatory budget authority in the 2018 farm bill, but the funding expired along with the 2018 farm bill's expiration in 2023.[20] Some of these programs received one year of funding for FY2024 in the Further Continuing Appropriations and Other Extensions Act, 2024 (FY2024 farm bill extension; P.L. 118-22, Division B). P.L. 119-21 provided funding for these programs consistent with or higher than 2018 farm bill levels:

- **Urban, Indoor, and Other Emerging Agricultural Production Research, Education, and Extension Initiative** (7 U.S.C. §5925g).[21] P.L. 119-21 provides $2 million annually for FY2025-FY2031. The 2018 farm bill funded the program with $10 million in FY2019 to remain available until expended, and the FY2024 farm bill extension provided $2 million in funding for FY2024.
- **Organic Production and Market Data Initiative** (7 U.S.C. §5925c).[22] P.L. 119-21 provides $10 million in total for FY2026-FY2031 to remain available until expended. The 2018 farm bill provided $5 million in total for FY2019-FY2023 to remain available until expended. The FY2024 farm bill extension provided $1 million for FY2024.
- **Modernization and Improvement of International Trade Technology Systems and Data Collection** (7 U.S.C. §6522).[23] P.L. 119-21 provides $1 million in funds for FY2025 and $5 million in FY2026. The 2018 farm bill provided $5 million for FY2019, and an additional $1 million was provided for FY2024 in the FY2024 farm bill extension. Each allocation is to remain available until expended.
- **National Organic Certification Cost Share Program** (7 U.S.C. §6523).[24] P.L. 119-21 provides $8 million annually for FY2025-FY2031. This is the same annual spending level as in the 2018 farm bill for FY2022 and FY2023 and in the FY2024 farm bill extension for FY2024. Each allocation is to remain available until expended.
- **Multiple Crop and Pesticide Use Survey** (not codified; see §10109(c) of P.L. 115-334).[25] P.L. 119-21 provided $5 million of CCC funding for FY2026 to remain available until expended. This is an increase from the 2018 farm bill, which provided $500,000 for FY2019 to remain available until expended.

[20] For background on these programs, including discussion of one-year mandatory funding provided for some of these programs in a farm bill extension for FY2024, see CRS In Focus IF12115, *Farm Bill Primer: Programs Without a Budget Baseline*.

[21] P.L. 119-21, §10604(a). For more on the program and funding opportunities, see USDA, NIFA, "Urban, Indoor, and Emerging Agriculture," https://www.nifa.usda.gov/grants/funding-opportunities/urban-indoor-emerging-agriculture.

[22] P.L. 119-21, §10606(c). The data outputs from the initiative can be found at USDA, AMS, "Organic Reports," https://www.ams.usda.gov/market-news/organic.

[23] P.L. 119-21, §10606(d). This funding contributes to the USDA Organic Integrity Database, which contains information on USDA certified organic operations globally. For a link to the database, see USDA, AMS, "Organic Integrity Database," https://organic.ams.usda.gov/integrity/Default. For more on USDA organic enforcement, see CRS Report R48379, *Organic Agriculture Standards: Oversight and Enforcement*.

[24] P.L. 119-21, §10606(e). For more on the Organic Certification Cost-Share program and funding opportunities, see USDA, Farm Service Agency, "Organic Certification Cost Share Program," https://www.fsa.usda.gov/resources/programs/organic-certification-cost-share-program-occsp.

[25] P.L. 119-21, §10606(f). For more on the survey, see USDA, "Notice of Request for Approval for Generic Clearance to Conduct Multiple Crop and Pesticide Use Surveys," 85 *Federal Register* 17304-17306, March 27, 2020.

- **Emergency Citrus Disease Research and Development Trust Fund** (7 U.S.C. §7632 note).[26] P.L. 119-21 provides for a transfer of $25 million annually from the CCC for FY2025-FY2031 to remain available until expended. This funding level is the same as in the 2018 farm bill and as the level provided for in the FY2024 farm bill extension for FY2024.

Continuing Appropriations, Agriculture, Legislative Branch, Military Construction and Veterans Affairs, and Extensions Act, 2026 (P.L. 119-37)

P.L. 119-37 provides an extension of the 2018 farm bill through FY2026 and annual appropriations for agricultural programs through FY2026. The law also amends the statutory definition of hemp in 7 U.S.C. §1639o. P.L. 119-37 extends through FY2026 the 2018 farm bill authorization to provide grants through some programs, such as SCBGP.[27] The law also extends through FY2026 authorizations of appropriations for some farm bill programs, such as the allocation to Specialty Crop Market News.[28]

Statutory Definition of Hemp

The 2018 farm bill excluded hemp from the definition of marijuana in the Controlled Substances Act (CSA) and defined hemp.[29] Hemp and marijuana are varieties of the same plant, *cannabis sativa*.[30] In the 2018 farm bill, Congress amended the CSA definition of marijuana to reflect the differences in the chemical and psychoactive properties between hemp and marijuana. The 2018 farm bill referred only to the level of delta-9 tetrahydrocannabinol (THC) to distinguish hemp from marijuana and did not include in the definition the other cannabinoids found within the cannabis plant.[31]

P.L. 119-37 amended the statutory definition of hemp in 7 U.S.C. §1639o. P.L. 119-37 changed the limit in the hemp definition to a *total THC concentration* of less than 0.3% on a dry weight basis, rather than 0.3% of delta-9 THC only.[32] The new definition of hemp also explicitly includes

[26] P.L. 119-21, §10607(f). An overview of the trust fund and its projects and funding opportunities can be found at USDA, NIFA, "Emergency Citrus Disease Research and Extension Program," https://www.nifa.usda.gov/grants/programs/emergency-citrus-disease-research-extension-program.

[27] For more on the implications of the 2018 farm bill extension, see this report's "Potential Issues for Congress " section.

[28] 7 U.S.C. §1622b.

[29] *Marijuana* is defined in 21 U.S.C. §802. *Hemp* is defined in 7 U.S.C §1639o; the amended definition is denoted under the "Amendment of Section" in 7 U.S.C. §1639o.

[30] For more on hemp as an agricultural commodity, see CRS Report R44742, *Defining Hemp: A Fact Sheet*.

[31] *Cannabinoids* refer to the unique chemical compounds produced in cannabis. Delta-9 tetrahydrocannabinol (THC) is the primary intoxicant cannabinoid in cannabis but is not the only naturally occurring THC compound in the plant. For more on the chemical composition of cannabis, see CRS Report R44742, *Defining Hemp: A Fact Sheet*. Congress considered similar amendments to the statutory definition and hemp production programs in the 118th Congress. For more on the prior legislative actions and issues that led to the change in the definition of hemp, see CRS In Focus IF13136, *Changes to the Statutory Definition of Hemp and Issues for Congress*.

[32] For a more detailed description of these changes and potential implications, see CRS In Focus IF13136, *Changes to the Statutory Definition of Hemp and Issues for Congress*; CRS Legal Sidebar LSB11381, *Changes to the Federal Definition of Hemp: Legal Considerations Under the Controlled Substances Act*; and CRS Insight IN12620, *Change to Federal Definition of Hemp and Implications for Federal Enforcement*.

industrial hemp—which generally is hemp grown for non-cannabinoid purposes—and establishes exclusions from the new hemp definition, such as

- seeds from a cannabis plant exceeding a 0.3% total THC concentration,
- intermediate hemp-derived products exceeding a 0.3% total THC concentration, and
- final hemp-derived cannabinoid products containing more than 0.4 milligrams of THC per "container."

Congress directed that the change to the definition of hemp is to go into effect 365 days after enactment of P.L. 119-37.

By being excluded from the new hemp definition, these seeds and products, listed above, remain subject to the CSA definition of marijuana; this seemingly alters the legal status of many hemp products currently available on the market, though it remains unclear if and how federal law enforcement will enforce the new prohibitions when the new definition goes into effect. The new hemp definition also excludes hemp-derived cannabinoid products that contain cannabinoids that are not naturally produced by the cannabis plant or are capable of being naturally produced but were synthesized or manufactured outside the plant.[33] P.L. 119-37 also requires the U.S. Food and Drug Administration (FDA) within 90 days of enactment to publish lists of naturally occurring cannabinoids, THC-class cannabinoids, and all known cannabinoids that have similar effects as THC-class cannabinoids. FDA also is to further define the term *container*.

Legislation Introduced in the 119th Congress

Since enactment of P.L. 119-21 and P.L. 119-37, Congress has been working on a new farm bill.[34] On February 13, 2026, House Committee on Agriculture Chairman Glenn "GT" Thompson introduced the Farm, Food, and National Security Act of 2026 (H.R. 7567), which was ordered to be reported on March 4, 2026, and reported in the House on April 21, 2026. On April 30, 2026, H.R. 7567 was passed by the House. Some other Members of Congress also have introduced legislation related to federal horticulture programs. This section describes selected legislation introduced in the 119th Congress that would impact horticulture programs and provisions.[35]

The Farm, Food, and National Security Act of 2026 (H.R. 7567)

H.R. 7567 would reauthorize and amend selected horticulture programs and their appropriations and create new programs.

H.R. 7567 would reauthorize the program authority through FY2031 for horticulture programs in the farm bill that receive mandatory spending, such as the SCBGP, LAMP (7 U.S.C. §1627c), and OREI (7 U.S.C. §5925b).[36] In addition to reauthorization, the bill would prevent USDA from requiring a cost share for states and sub-awardees in the SCBGP.

[33] National Institute on Drug Abuse, "Synthetic Cannabinoids," https://nida.nih.gov/research-topics/synthetic-cannabinoids.

[34] For more on the potential farm bill, see CRS Report R48775, *The Farm Bill After FY2025 Budget Reconciliation: Frequently Asked Questions*.

[35] The section discusses legislation introduced as of May 22, 2026.

[36] For more on the Organic Agriculture Research and Extension Initiative, funding opportunities, and eligibility, see USDA, NIFA, "Organic Agriculture Research and Extension Initiative," https://www.nifa.usda.gov/grants/funding-

(continued...)

H.R. 7567 would reauthorize appropriations for selected horticulture programs through FY2031. These programs include OREI; SCRI; Specialty Crop Market News (7 U.S.C. §1622b); the Office of Urban Agriculture and Innovative Production (OUAIP) (7 U.S.C. §6923); the National Plant Diagnostic Network (7 U.S.C. §8914); the Acer Access and Development Program (7 U.S.C. §1632c); the organic production and market data initiative; and NOP (7 U.S.C. §6522).[37]

Section 10005 of H.R. 7567 would amend the state and tribal hemp production plans and USDA hemp production plans in statute.[38] The bill would amend the testing standard for hemp to total THC rather than delta-9 THC only. Additionally, the bill would require states, Tribes, and USDA to provide procedures in their hemp production plans for producers to designate if they are producing solely industrial hemp or hemp for other purposes (i.e., for cannabinoid uses). The bill also allows states, Tribes, and USDA to relax testing requirements for industrial hemp producers by eliminating the requirements for total THC testing and instead developing inspection procedures. The bill would amend enforcement procedures in the hemp production plans and require USDA to collaborate with the Drug Enforcement Administration (DEA) to accredit laboratories for testing hemp.

H.R. 7567 would amend SCRI and other horticulture programs, including NOP and LAMP. The bill includes an allocation of $30 million in its mandatory funding to go toward a newly created Specialty Crop Mechanization and Automation Research and Extension Program as part of SCRI.[39] Additionally, the bill would allow the Secretary of Agriculture to waive the matching funds requirement for SCRI.[40] Section 10003 would amend OUAIP by expanding its responsibilities and focus. For example, it would expand the ability of the office to enter into cooperative agreements with eligible entities to support the development of urban and innovative production. Section 10105 would amend organic certification and include the option for USDA to offer technical assistance, outreach, and education to support organic production through existing programs at USDA agencies.[41] Section 10102 would amend LAMP by expanding the types of businesses that can participate in LAMP programs, expand the eligible activities for grants to include the purchase of equipment for certain purposes, and simplify the application process for specified eligible entities. Section 10107 would provide amendments to NOP, including definitions for *oversight protocols* and *risk to organic integrity*. Section 10108 of the bill would maintain requirements for compliance inspections but allow virtual inspections for domestic operations that are less likely to be found in violation of the organic standards. Section 10109 would require USDA to conduct a study on whether NOP should restructure its oversight protocols. Section 12414 would require USDA to submit a report to the agriculture committees in

opportunities/organic-agriculture-research-extension-initiative. For more on the programs in LAMP, see USDA, AMS, "Local Agriculture Market Program," https://www.ams.usda.gov/services/grants/lamp. The relevant sections of H.R. 7567 for these reauthorizations are §§7205, 10001, and 10102.

[37] For more on data collection from Specialty Crop Market News, see USDA, AMS, "Specialty Crops," https://www.ams.usda.gov/market-news/fruits-vegetables. For an overview, eligibility, and funding opportunities within the National Plant Diagnostic Network, see USDA, NIFA, "Food and Agriculture Defense Initiative National Plant Diagnostic Network," https://www.nifa.usda.gov/grants/programs/fadi/fadi-npdn. For more on the Acer Access and Development Program and funding opportunities, see USDA, AMS, "Acer Access and Development Program," https://www.ams.usda.gov/services/grants/acer. The relevant sections for these reauthorizations in H.R. 7567 are §§7205, 7305, 10002, 10003, 10004, 10103, 10104, and 10105.

[38] State and tribal hemp production plan requirements are found at 7 U.S.C. §1639p. USDA's hemp production plan requirements are found at 7 U.S.C. §1639q.

[39] Currently, the Specialty Crop Research Initiative (SCRI) can fund projects dedicated to specialty crop mechanization but does not have any set funds for these projects, which generally are awarded through competitive grants.

[40] H.R. 3656 also would waive the matching funds requirement for SCRI.

[41] H.R. 7567 includes price reporting and requirements for data for organic milk.

both chambers that discusses the barriers for organic farms to participate in federal programs. The report also would contain steps that USDA can take to remove barriers for organic farmers and any actions needed from Congress for this purpose.

Section 4306 would create the Local Farmers Feeding Our Communities Program, a new program that would support local food and require USDA to enter into cooperative purchasing agreements with state, tribal, and territorial governments to purchase food from local and regional producers and distribute it to organizations with experience in food distribution, such as certain nonprofits. The bill would authorize $200 million in appropriations through FY2031 for the program.

Some other provisions would impact individual crops. Section 7613 would require the National Agricultural Statistics Service (NASS) to conduct a survey on grape production in each state. Additionally, Section 12421 would require that any honey packed, repacked, labeled, marketed, or sold in interstate commerce in the United States (including imports) is honey, pure honey, or meets acceptable standards determined by USDA. The bill requires the honey to be tested in a qualified laboratory in the United States. A foreign certificate alone would not be sufficient. Section 12416 would require federal agencies (including USDA) to collaborate with domestic honey producers and land-grant universities to establish a harmonized federal definition and standards for honey.

Other Selected Legislation

Some Members of Congress have introduced other legislation in the 119th Congress that would impact horticulture programs and farm bill provisions.

Since enactment of P.L. 119-37, which amended the definition of hemp, some Members have introduced legislation to extend the effective date for the new definition to three years (H.R. 7024, H.R. 7010, S. 3686), and one bill would repeal the new hemp definition (H.R. 6209). Additionally, some Members have introduced legislation that would provide regulatory frameworks for hemp cannabinoid products (H.R. 7212, S. 3474).

Other bills in the 119th Congress would amend or create new horticulture programs. For example, some Members have introduced legislation that would create grants to support mechanization for specialty crop producers (H.R. 5097) or to promote specialty crops broadly (H.R. 5059). Some legislation would require that a certain fraction of SCRI funding is spent on research relating to projects focused on climate (H.R. 3077, S. 1507). Additional proposals would amend organic agriculture programs, such as proposals to expand organic research (H.R. 5703, S. 1385), modify organic import testing requirements (S. 1398), or create organic market development grants (H.R. 6593, S. 3427). Some bills would create a program, similar to Section 4306 of H.R. 7567, to procure and distribute local foods (H.R. 4782, H.R. 6697, H.R. 6706, S. 2338).[42] Other proposals would amend LAMP to increase CCC funding transferred to the program (H.R. 6775), distribute the funding allocations differently across priorities (H.R. 3077, S. 1507, H.R. 6775), or both.

Potential Issues for Congress

Following enactment of P.L. 119-21 and P.L. 119-37, with respect to horticulture programs and policies, Congress may consider whether or not to undertake any additional farm bill reauthorizations, create new agricultural programs, amend existing programs and provisions, or

[42] H.R. 4782 was cited as legislation included in H.R. 7567 as per House Committee on Agriculture, *Standalone Legislation Included in* H.R. 7567*, the Farm, Food, and National Security Act of 2026*, https://agriculture.house.gov/uploadedfiles/ffns26_markerbill_tracker.pdf.

eliminate programs. This section provides discussion of potential issues for Congress on various horticulture policy topics, including specialty crops, organic agriculture, hemp, and local and regional food systems.

Reauthorization of Expiring Programs

Congress may consider whether to reauthorize horticulture programs that receive mandatory spending and whether to adjust those spending levels. These programs are SCBGP, LAMP, and OREI. Although these programs have permanently authorized spending, their authorization to operate expires at the end of FY2026 when the farm bill extension in P.L. 119-37 expires.[43] H.R. 7567 includes reauthorizations of these programs through FY2031 and would not alter the mandatory funding allocations.

Additionally, Congress may consider whether to reauthorize and whether to change the authorized levels of appropriations for horticulture programs that receive discretionary spending, such as OREI; the Urban, Indoor, and Other Emerging Agricultural Production, Research, Education, and Extension Initiative; and Specialty Crop Market News.[44] The authorizations for appropriations for these programs and initiatives are set to expire at the end of FY2026 when the farm bill extension in P.L. 119-37 expires. H.R. 7567 includes reauthorizations of appropriations for these programs at current levels through FY2031.

Congress may consider another short-term extension (e.g., one year) of the 2018 farm bill if new farm bill legislation is not passed in the 119th Congress. Another extension of the farm bill would continue the authorization to provide grants through programs such as SCBGP, LAMP, and OREI for the length of the extension. If an extension were not enacted in this circumstance, the authorization to provide grants in these programs would expire. An extension would extend the authorization of appropriations for discretionary programs. Additionally, an extension generally would not include amendments to the programs, such as those offered in H.R. 7567. Programs that received funding through P.L. 119-21 would continue to operate and would not be impacted by a farm bill extension unless their authorization is separate from their funding, such as with SCBGP. Additionally, Congress could consider allowing these programs to expire and cease operations.

Specialty Crop Programs

Congress may consider whether or not to amend or expand horticulture programs or decrease funding or eliminate such programs. For example, Congress could change the allocation of funds for specialty crop research in the SCRI program to support mechanization and automation research. Current law highlights mechanization research as a priority of the program—such projects are eligible to receive funding, but these activities are not given a formal allocation in the mandatory funding. H.R. 7567 would allocate $30 million of SCRI's annual funding of $175 million to mechanization and automation projects. Other legislation would prioritize SCRI research projects focused on climate (H.R. 3077, S. 1507). Some legislation introduced in the 119th Congress would promote mechanization and specialty crops broadly (H.R. 5059; H.R. 5097). Industry groups have expressed support for specialty crop mechanization programs

[43] For more on expiring authorizations, see CRS Report R48775, *The Farm Bill After FY2025 Budget Reconciliation: Frequently Asked Questions*.

[44] For more on the work of the Office of Urban Agriculture and Innovative Production, see USDA, "Urban Agriculture and Innovative Production," https://www.usda.gov/farming-and-ranching/agricultural-education-and-outreach/urban-agriculture-and-innovative-production. For more programs for which Congress may consider reauthorizing appropriations, see this report's "H.R. 7567) " section.

through research or market promotion for specialty crops broadly.[45] Others may be of the opinion that farmers have sufficient funding opportunities for these efforts or that they are commercial or nongovernmental activities. Additionally, Congress may consider evaluating cost-sharing requirements for horticulture programs (e.g., H.R. 7567 would prohibit USDA from imposing cost-share requirements).

Congress may consider expanding or reducing the responsibilities and projects of OUAIP. Currently, the office promotes urban, indoor, and emerging agricultural practices that include operations such as community gardens and farms in urban areas, rooftop farms, greenhouses, hydroponic farms, and others. The office manages programs that support the above operations, coordinates within USDA to update programs, engages in stakeholder relations, and has other responsibilities.[46] H.R. 7567 proposes to expand the office's mission to include controlled environment agriculture. The bill also proposes to add technical assistance to operations and promotion of conservation techniques to the office's responsibilities. Additionally, the bill would authorize the office to enter into cooperative agreements to support urban and innovative agricultural production. Some in the industry have supported expansion of OUAIP's activities and an increase of funding for the office.[47] Others may question the federal role in assisting urban agriculture and argue that the resources supporting urban agriculture should be spent elsewhere.

Congress may also consider specific provisions and amendments to statutes for individual crops. For example, H.R. 7567 would require NASS to collect additional survey data on grape production.[48] Congress may consider whether this activity might be needed for additional crops. Congress also may choose to amend the inspection and certification standards for various crops in interstate commerce. For example, H.R. 7567 would amend the identification requirements for honey in 7 U.S.C. §1622(h)(6).[49] The bill would introduce requirements that honey in the domestic U.S. market, including imports, is to be inspected in certified laboratories to ensure that the product meets standards of identification set by USDA. Currently, honey imports may be marketed as honey when certified by a foreign entity. Additionally, the bill would require USDA and other agencies to establish a national definition for honey. These legislative actions follow concerns from the FDA and the honey industry surrounding the prevalence of fraudulent honey on the market.[50] Others may question the role of the federal government in food standards and identity.

Organic Agriculture

Congress may consider whether or not to change policies within NOP or programs that support agricultural production certified under NOP. Possible changes could include directing USDA to offer technical assistance, outreach, and education to support organic production through existing programs at USDA agencies or reauthorizing or changing appropriations levels for NOP, as proposed in H.R. 7567. Congress also could consider requiring USDA to report on potential

[45] Specialty Crop Farm Bill Alliance (SCFBA), *Farm Bill Policy Recommendations*, https://farmbillalliance.com/wp-content/uploads/2025/08/SCFBA-Recommendations-119th-Congress-FINAL.pdf.

[46] 7 U.S.C. §6923.

[47] National Sustainable Agriculture Coalition (NSAC), *2023 Farm Bill Platform*, August 5, 2025, https://sustainableagriculture.net/wp-content/uploads/2022/11/2023-Farm-Bill-Platform.pdf.

[48] Similar provisions are proposed in H.R. 4205 in the 119th Congress.

[49] Similar provisions are proposed in H.R. 2162 in the 119th Congress.

[50] See Food and Drug Administration (FDA), "FDA Releases FY25 Sampling Results on Economically Motivated Adulteration in Honey," https://www.fda.gov/food/hfp-constituent-updates/fda-releases-fy25-sampling-results-economically-motivated-adulteration-honey; and CRS In Focus IF12185, *Ongoing Efforts to Address Fraud and Adulteration of Honey*.

barriers to access for organic farmers to receive federal assistance, which is also proposed in H.R. 7567. Congress may consider amending NOP's inspection and oversight requirements similarly to H.R. 7567, which bases the requirements on the potential for an operation to violate the NOP standards or whether the operation is domestic or international. These standards would require additional inspection and oversight of international operations and operations that are deemed "higher risk" for violating organic standards while reducing the oversight protocols of on-site inspections to once every three years among operations deemed "lower risk." Additionally, Congress could consider allowing for virtual inspections for operations that are deemed lower risk for violations of organic standards. Congress also may consider making no further amendments to organic standards and enforcement and continuing to conduct oversight of the current standards.[51] Congress might consider other options, such as expanding organic research (H.R. 5703, S. 1385), modifying regulations for organic imports (S. 1398), or creating marketing and promotion grants (H.R. 6593, S. 3427). Some stakeholders have expressed support for efforts to improve organic regulations, market access, and research.[52] Others may question the federal role in assisting and promoting organic agriculture or express that there is no need to amend or update the current NOP standards.[53]

Local and Regional Food Systems

Congress may consider creating new local food programs, expanding existing ones, or decreasing funding or eliminating such programs. For example, H.R. 7567 would codify a program similar to the Local Food Purchase Assistance Cooperative Agreement Program (LFPA). USDA created and implemented LFPA using funds from the American Rescue Plan Act (P.L. 117-2) and from the CCC to enter into cooperative purchasing agreements with qualifying local and regional producers, who then distributed the commodities.[54] Data from USAspending.gov reflect a recission of funds for LFPA in 2025.[55] H.R. 7567 would authorize appropriations for its version of the program without using CCC funding. Prior to the introduction of H.R. 7567, some Members of Congress introduced bills that would codify the program in various forms (H.R. 4782, H.R. 6697, H.R. 6706, S. 2338).[56]

Congress also may consider amending other programs, such as LAMP. Such program amendments could resemble those in H.R. 7567, which proposes to expand the types of eligible businesses that may participate in LAMP or the activities eligible to receive grant support, such as the purchase of equipment. Congress also could choose to amend the mandatory CCC funding to LAMP (H.R. 6775) or reorganize the mandatory funding allocations differently across LAMP programs (H.R. 3077, S. 1507, H.R. 6775).

[51] For more on the current oversight and reporting following the 2018 farm bill, see CRS Report R48379, *Organic Agriculture Standards: Oversight and Enforcement*.

[52] Organic Trade Association, "Farm Bill," https://ota.com/advocacy/policy-positions/organic-trade-association-farm-bill-priorities; and NSAC, *2023 Farm Bill Platform*.

[53] For example, see Peter Van Doren, "Should Taxpayers Back the 'Organic' Label?," *Cato at Liberty* (blog), Cato Institute, May 5, 2017, https://www.cato.org/blog/should-taxpayers-back-organic-label.

[54] For more on the Local Food Purchase Assistance Cooperative Agreement Program, see USDA, AMS, "Local Food Purchase Assistance Cooperative Agreement Program," https://www.ams.usda.gov/selling-food-to-usda/lfpacap. For more on the CCC funding, see CRS Report R44606, *The Commodity Credit Corporation (CCC)*.

[55] See USAspending.gov, "Advanced Search," https://www.usaspending.gov/search?hash=628f314b21490d2b9da9ca26c2b80bf1.

[56] H.R. 4782 was cited as legislation included in H.R. 7567, in House Committee on Agriculture, *Standalone Legislation Included in* H.R. 7567*, The Farm, Food, and National Security Act of 2026*, https://agriculture.house.gov/uploadedfiles/ffns26_markerbill_tally-by-title_final.pdf.

Some industry groups have supported such proposed changes and funding expansion for commodity procurement and local food grant programs.[57] Others have supported reducing funding and emphasis for local food programs.[58]

Hemp

A variety of stakeholders have advocated for various federal definitions of hemp. Prior to enactment of P.L. 119-37, some regulatory groups and attorneys general in several states expressed a desire for Congress to amend the statutory definition of hemp along the lines of the current law.[59] The concerns of these groups include interpretations of the 2018 farm bill definition that led to the production of hemp products that contained less than 0.3% delta-9 THC but had a total THC concentration that exceeded 0.3% total THC, with potential to be intoxicating (known to some as the "farm bill loophole").[60] Other groups have expressed opposition to the definitional changes in P.L. 119-37 and support a delay in the effective date of the new definition or a repeal of the language. These groups also have supported regulation of the market of hemp-derived consumer products through agencies such as the FDA.[61]

Since the passage of the new hemp definition in P.L. 119-37, some in Congress have desired a three-year extension of the effective date for the new definition or a repeal of the new hemp definition. In conjunction with these proposals, some Members have introduced legislation that would create regulatory frameworks for hemp cannabinoid production and products. During the House Committee on Agriculture markup of H.R. 7567, an amendment was offered and subsequently withdrawn to delay the implementation of the new hemp definition.[62] Prior to the markup, it was reported that House Agriculture Committee Chairman Thompson expressed concern that a delay of the implementation of the definition of hemp was not germane and falls "under the jurisdiction of the House Energy and Commerce Committee," implying that the farm bill is not the proper vehicle for consideration of any delays to the implementation of the definition.[63]

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[57] SCFBA, *Farm Bill Policy Recommendations*; NSAC, "Senate Bill Offers a Pathway to Sustain Local Food Purchasing Program," *NSAC's Blog*, April 12, 2024, https://sustainableagriculture.net/blog/senate-bill-offers-a-pathway-to-sustain-local-food-purchasing-program/.

[58] Aimee Picchi, "USDA cancels $1 billion in funding for schools and food banks to buy food from local suppliers," *CBS News*, updated March 13, 2025, https://www.cbsnews.com/news/usda-cancels-local-food-purchasing-food-banks-school-meals/.

[59] For example, see Letter from Gillian Schauer, PhD, et al., executive director, Cannabis Regulators Association, to Rep. Glenn "GT" Thompson et al., chairman, House Committee on Agriculture, September 15, 2023, https://static1.squarespace.com/static/5f7e577e23ad7c718c269776/t/65046e14c614b50e07d952c8/1694789140786/CANNRA+Letter_Farm+Bill_Sept2023_FINAL.pdf; and National Association of Attorneys General, "39 State and Territory Attorneys General Call for Clarification of Federal 'Hemp' Definition," press release, October 24, 2025, https://www.naag.org/press-releases/bipartisan-coalition-of-39-state-and-territory-attorneys-general-urges-clarify-federal-definition-of-hemp/.

[60] For more on legal interpretations of the 2018 farm bill's definition of hemp, see CRS Report R48637, *The 2018 Farm Bill's Hemp Definition and Legal Challenges to State Laws Restricting Certain THC Products*.

[61] U.S. Hemp Roundtable, "This is an inflection point for hemp," November 24, 2025, https://hempsupporter.com/news/this-is-an-inflection-point-for-hemp/.

[62] See "Amendment offered by Mr. Baird of Indiana," in U.S. House of Representatives Committee Repository, "Markup of "To Consider H.R. 7567, the Farm, Food, and National Security Act of 2026," https://docs.house.gov/meetings/AG/AG00/20260303/118990/BILLS-119-15-B001307-Amdt-15.pdf.

[63] Olivia M. Bridges, "Thompson finds Baird's hemp amendment to farm bill isn't germane," *CQ News*, February 25, 2026.

The 2018 farm bill established hemp production plan requirements for states, territories, and Tribes that desire to have primary regulatory authority of hemp production in their locales.[64] The 2018 farm bill also directed USDA to establish regulations that would monitor and regulate hemp production for states, territories, and Tribes that do not have a USDA-approved hemp production plan.[65] Congress may consider adopting the amendments to hemp production plans in H.R. 7567, which would provide amendments to the state and tribal hemp production plans and USDA hemp production plans in statute. The amendments in the bill would mirror the definitional change in P.L. 119-37 by updating the testing standard for hemp to total THC rather than delta-9 THC only. The bill also would allow states, territories, and Tribes to reduce or relax testing requirements for industrial hemp. In addition, Congress may consider conducting oversight of the implementation of the new hemp definition across federal departments and agencies, including USDA, the FDA, and the DEA.

Author Information

Zachary T. Neuhofer
Analyst in Agricultural Policy

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[64] 7 U.S.C. §1639p.

[65] 7 U.S.C. §1639q.

Recent events have brought renewed attention to a long-running legal battle between the state of Oklahoma and major poultry companies in Arkansas over environmental concerns and water pollution. The case centers on allegations that poultry waste generated in northwest Arkansas was contributing to water pollution in eastern Oklahoma, particularly in the Illinois River Watershed (IRW).

The lawsuit began in 2005 when Oklahoma officials filed claims in federal court against several poultry companies, including Tyson Foods, Cargill, and Cobb-Vantress. Poultry production generates large quantities of chicken litter- a mixture of manure, bedding, feathers, and feed residue. Growers commonly apply chicken litter to fields as fertilizer because it contains valuable nutrients such as nitrogen and phosphorus. However, excessive phosphorus application can create runoff problems that impair nearby streams and rivers. In this case, Oklahoma officials argued that phosphorus from chicken litter spread on farmland in Arkansas was washing into the IRW, contributing to algae growth and declining water quality.

After years of discovery, pretrial motions and a fifty-two day trial, closing arguments were heard in February 2010. The trial involved numerous legal claims, including public nuisance, trespass, negligence, and violations of environmental laws. Oklahoma sought injunctive relief that would require changes to litter management practices and requested damages for environmental remediation. The poultry companies denied liability and argued that growers, as independent contractors, controlled litter application decisions and should be held directly responsible for any damages. The companies also argued that the growers complied with existing state regulations and nutrient management requirements.

In January 2023, the court issued its 219 page ruling. In short, however, the court held that poultry litter was a key non-point source of pollution in the watershed. Additionally, it found that the poultry companies were responsible for the damages caused by the litter. The court did not, however, specifically forbid the future use of litter. Further, the court did not identify specific consequences for the ruling. Instead, the parties were directed to "meet and attempt to reach an agreement with regard to remedies to be imposed".

The parties were unable to reach an agreement. Further, the poultry companies filed a motion to dismiss, arguing that in the 13 years between the trial and the ruling, conditions in IRW "materially changed" enough that it was unfair to hold the poultry companies responsible for litter application. The court held a hearing on the motion in December 2024, where experts from both sides presented evidence about the effects of the litter. Six months after the hearing, the court issued a ruling finding that conditions in the watershed were not "materially changed," and continuing phosphorus run-off from litter application continued to be a significant source of injury to the IRW.

Soon after that, the court issued its ruling on damages. In addition to civil penalties of $10,000 per violation, the court held the companies jointly and severally responsible for environmental cleanup efforts of the watershed. Remediation would be paid for through a dedicated account, initially funded by the companies at $10 million. A court-appointed special master would oversee remediation activities- predicted by the court to last 30 years- and provide ongoing progress reports. The remedies also included restrictions on poultry litter application rates, generally limiting application to two tons per acre, while also holding the companies responsible for removal, storage, transport and disposal of future litter from barns in the watershed.

In the next few months, however, the Oklahoma Attorney General's office announced settlements with several of the companies that would 1) provide a sum of money to facilitate cleanup and 2) progressively reduce the amount of litter applied in the IRW. No civil penalties would be imposed. The settling companies include Cargill, George's, Peterson Farms and Tyson, who cumulatively agreed to pay $31 million.

However, in April 2026, the judge rejected the settlement proposals. In his ruling, he held that the proposed sum and scope of the settlements, which was substantially less than his ruling on damages, was insufficient to cover the costs of the cleanup.

Currently, there are pending appeals for both the substantive rulings and the rejection of the settlement. The Oklahoma Attorney General and Oklahoma Secretary of Energy have joined the settlement appeal.

While the results of this case are yet to be finalized, the Oklahoma legislature has passed legislation ensuring that similar cases in the future will be limited. In 2024, Senate Bill 1424 was passed. It prevents lawsuits against poultry companies over chicken waste pollution as long as the poultry farm has an approved waste disposal plan with the state.

This case underscores the difficulty of regulating "nonpoint source pollution," a category that includes runoff from farms and agricultural land. Nonpoint source pollution is not directly regulated in the Clean Water Act, which leaves much of the responsibility for addressing agricultural runoff to the states and creates significant challenges for enforcing water quality protections when pollution comes from widespread, diffuse sources rather than a single discharge point.

The consequences of this ruling will have significant implications not only for poultry companies, but also for growers and others involved in the poultry industry, as well as residents of the area and those who enjoy the recreational opportunities available within the watershed.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA *ex rel.* GENTNER DRUMMOND, in his capacity as Attorney General of the State of Oklahoma and OKLAHOMA SECRETARY OF ENERGY AND ENVIRONMENT JEFF STARLING in his capacity as the TRUSTEE FOR NATURAL RESOURCES FOR THE STATE OF OKLAHOMA, Plaintiffs, v. TYSON FOODS, INC., TYSON POULTRY, INC., TYSON CHICKEN, INC., COBB-VANTRESS, INC., CAL-MAINE FOODS, INC., CARGILL, INC., CARGILL TURKEY PRODUCTION, LLC, GEORGE'S, INC., GEORGE'S FARMS, INC., PETERSON FARMS, INC., and SIMMONS FOODS, INC., Defendants.	)	Case No. 05-CV-00329-GKF-SH

ORDER

This matter comes before the court on the Joint Motion for Entry of Consent Judgment [Doc. 3229] of plaintiff State of Oklahoma and defendants George's, Inc. and George's Farms, Inc. (collectively, "George's"); the Joint Motion for Entry of Consent Judgment and Request for Indicative Ruling [Doc. 3268] of the State and defendants Tyson Foods, Inc.; Tyson Poultry, Inc.; Tyson Chicken, Inc.; and Cobb-Vantress, Inc. (collectively, "Tyson"); the Joint Motion for Entry of Consent Judgment and Request for Indicative Ruling [Doc. 3269] of the State and defendants Cargill Incorporated and Cargill Turkey Production, LLC (collectively, "Cargill"); and the Joint

Motion for Entry of Consent Judgment and Request for Indicative Ruling [Doc. 3279] of the State and defendant Peterson Farms, Inc. ("Peterson"). For the reasons set forth herein, the motions are denied.

Background/Procedural History

On January 18, 2023, the court entered Findings of Fact and Conclusions of Law [Doc. 2979], finding in favor of the State and against defendants on the State's claims of statutory public nuisance, federal common law nuisance, trespass, and violations of Okla. Stat. tit. 27A, § 2-6-105 and Okla. Stat. tit. 2, § 2-18.1. The court directed the parties "to meet and attempt to reach an agreement with regard to remedies to be imposed in this action." The court advised that "[t]he agreed remedies, if any, must be approved by the court," and "[i]n the event the parties [we]re unable to reach an accord, the court shall enter judgment." [*Id.* at p. 218].

On September 13 and 14, 2023, the parties engaged in mediation sessions with retired Tenth Circuit Judge Deanell Reece Tacha. The parties subsequently engaged in an all-day, in-person mediation session with Judge Tacha on October 12, 2023, but were unable to reach an agreed-upon resolution. [Doc. 3008; Doc. 3009].

On October 26, 2023, defendants filed a motion seeking dismissal of this case based on defendants' contentions that plaintiffs' claims for injunctive relief were moot and that proceeding on the record, at that time, would violate their due-process rights. The court denied the motion and set this matter for evidentiary hearing. [Doc. 3023; Doc. 3038].

The court held an evidentiary hearing on December 3, 2024 to December 6, 2024 and December 16 and December 17, 2024, to address "the contention made by the defendants, upon which the plaintiff has the burden of proof, that the conditions in the [Illinois River Watershed] materially changed following the end of trial." [Doc. 3137; Doc. 3098, p. 4].

In an Opinion and Order of June 17, 2025, the concluded that the State had satisfied its burden to show that conditions had not materially changed in the IRW following trial. [Doc. 3161]. The court therefore directed briefing as to a proposed final judgment.

On December 19, 2025, the court entered the Judgment, which includes a thirty-year term and three primary forms of relief: (1) remediation, (2) restriction on land application of poultry waste, and (3) civil penalties. [Doc. 3192].

With respect to remediation, the Judgment contemplates a phased approach that includes remedial investigation, planning, implementation, and monitoring, overseen by a court-appointed special master. [*Id*. at pp. 9-20]. Costs and expenses of the special master shall be paid by defendants through monies deposited into an Evergreen Fund, beginning with an initial deposit of $10,000,000. [*Id*. at p. 19]. If at, any time, the balance of the Evergreen Fund falls below $5,000,000, defendants shall replenish the account with an additional payment of $5,000,000. [*Id.*].

As to the restriction on land application of poultry waste in the IRW, the Judgment limits the land application of poultry waste to a level that provides the true agronomic need for plants in order to reduce the phosphorus run-off that pollutes the waters of the IRW. Based upon Specifically, the Judgment provides that the poultry waste generated by the defendants' birds shall not be applied on land having a Soil Test Phosphorus (STP) measure of 120 lbs./acre or greater. [*Id.* at p. 20]. Nor shall land application of poultry waste be permitted at any rate that would cause the land to exceed 120 lbs./acre STP. [*Id.* at p. 21]. To that end, the Judgment requires that defendants' contract growers have access to sufficient poultry waste removal equipment, storage facilities, transportation methods, and disposal methods for poultry waste generated by defendants' birds, and the defendants shall hold their Contract Growers harmless for the costs of removal,

storage, transportation, and disposal of poultry waste generated by defendants' birds. [*Id.* at p. 22]. Pursuant to Judgment, the court shall appoint a special master who shall be charged with overseeing remediation of the IRW and the restrictions on land application of poultry waste. [*Id.* at p. 11].

Finally, pursuant to Okla. Stat. tit. 27A, § 2-3-504, the Judgment imposes civil penalties against defendants Tyson Foods, Inc., Cobb-Vantress, Cargill, Inc., George's, Inc., Simmons, and Cal-Maine. [*Id.* at pp. 31-32].

Defendants appealed. Thereafter, defendants filed a motion to stay the Judgment during the pendency of the appeal.

In an Opinion and Order of January 16, 2026, the court stayed the monetary portions of the Judgment, but declined to stay the injunctive portions.

On January 14, 2026, the State and George's filed the Joint Motion for Entry of Consent Judgment. [Doc. 3229]. The court set the motion for hearing on February 2, 2026, but, at the request of the parties, continued the hearing to February 27, 2026. [Doc. 3263].

On February 5, 2026, the court directed that, on or before February 19, 2026, the State and George's submit supplemental briefing directed to Federal Rule of Civil Procedure 60(b), as well as *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18 (1994). [Doc. 3265].

On February 12, 2026, the State and Tyson filed their Joint Motion for Entry of Consent Judgment and Request for Indicative Ruling. [Doc. 3268]. That same day, the State and Cargill filed their Joint Motion for Entry of Consent Judgment and Request for Indicative Ruling. [Doc. 3269]. The court set the motions for hearing on March 6, 2026. [Doc. 3278].

On February 19, 2026, the State and George's submitted the supplemental brief directed to Rule 60(b) and *Bancorp*. [Doc. 3273].

On February 24, 2026, the State and Peterson's filed the Joint Motion for Entry of Consent Judgment and Request for Indicative Ruling. [Doc. 3279]. The court set the motion for hearing with Cargill's and Tyson's respective motions. [Doc. 3281].

On February 27, 2026, the court held a hearing on the State's and George's joint motion. [Doc. 3286; Doc. 3287].

On March 4, 2026, with leave of court, the State, Tyson, Cargill, and Peterson filed a Joint Supplemental Brief Supporting Entry of the Consent Judgment. [Doc. 3292].

On March 6, 2026, the court held a hearing on the State's joint motions with Tyson, Cargill, and Peterson. [Doc. 3293; Doc. 3296].

Proposed Consent Judgments

Prior to considering the motions, it is first necessary to discuss the proposed consent judgments. Although they include some substantively different terms, the four proposed consent judgments adopt the same basic framework.

First, the settling defendants would make a one-time payment, in varying amounts, to a Monetary Relief Fund.[1] The monies shall be used "for purposes including, but not limited to, remediation or conservation projects in the IRW and for payment of attorney's fees and litigation costs in an amount to be determined either by order of the Court or by agreement between the State and its outside private lawyers." [Doc. 3229-1, p. 5; Doc. 3268-1, p. 5; Doc. 3269-1, p. 5; Doc. 3279-1, p. 5]. The parties state that the Attorney General will oversee the remediation or conservation projections. [Doc. 3296, p. 8].

[1] George's shall make a one-time payment in the amount of $5,000,000 [Doc 3229-1, p. 5]; Tyson shall make a one-time payment in the amount of $18,050,000 [Doc. 3268-1, p. 5]; Cargill shall make a one-time payment in the amount of $6,175,000 [Doc. 3269-1, p. 5]; and Peterson shall make a one-time payment in the amount of $950,000 [Doc. 3279-1, p. 5].

Second, the settling defendants would land-apply decreasing percentages of the total amount of poultry waste removed each year from poultry houses they or their contract growers own or operate. The land application restrictions are based on the weight of the litter removed from the poultry house, rather than soil test phosphorous (STP) levels. [Doc. 3229-1, pp. 6-8; Doc. 3268-1, pp. 6-8; Doc. 3269-1, pp. 6-8; Doc. 3279-1, pp. 6-8]; *see also* [Doc. 3287, pp. 10-11]. For example, with respect to the proposed consent judgments with George's and Tyson, the percentage of poultry waste to be land applied in the IRW from poultry houses they control would decrease from 40% in years 1 and 2 to 20% in years 5, 6 and 7. [Doc. 3229-1, p. 6; Doc. 3268-1, pp. 6-7; Doc. 3269-1, p. 6; Doc. 3279-1, pp. 6-7]. A special master would monitor the settling defendants' compliance with the land application restrictions. [Doc. 3229-1, pp. 9-12; Doc. 3268-1, pp. 9-13; Doc. 3269-1, pp. 9-14; Doc. 3279-1, pp. 9-14].

Third, with respect to the special master, each settling defendant would make a payment for deposit into an escrow account to be used to pay for the services and/or expenses of the special master in monitoring compliance with the litter application restrictions.[2] [Doc. 3229-1, p. 10; Doc. 3268-1, p. 11; Doc. 3269-1, p. 11; Doc. 3279-1, p. 11]. The account would be controlled by the Attorney General. [Doc. 3287, pp. 14-15].

Fourth, upon approval of the proposed consent judgments, the State shall "fully, finally, and forever release, relinquish and discharge" the settling defendants from

> any and all manner of claims, demands, actions, suits or causes of action . . . arising out of or relating in any way to the conduct alleged or that could have been alleged in the case as it concerns poultry litter in the Illinois River Watershed, any waterways, groundwater or waters of the State in the Illinois River Watershed and/or Lake Tenkiller (the "Released Claims").

[2] George's would deposit $250,000 [Doc. 3229-1, p 10]; Tyson would deposit $950,000 [Doc. 3268-1, p. 11]; Cargill would deposit $325,000 [Doc. 3269-1, p. 11]; and Peterson would deposit $50,000 [Doc. 3279-1, p. 11]. The payments to the Monetary Relief Fund would total $30,175,000.

[Doc. 3229-1, p. 13; Doc. 3268-1 pp. 14-15; Doc. 3269-1, pp. 14-15; Doc. 3279-1, p. 15]. Additionally, the parties "agree the IRW Growers were never sued by the State in this lawsuit," but, "for the avoidance of doubt," the State would release "any person that is or was previously under contract with any Released Party for the production or care of poultry or eggs in the Illinois River Watershed" from any Released Claim. [Doc. 3229-1, p. 14; Doc. 3268-1, p. 15; Doc. 3269-1, p. 15; Doc. 3279-1, p. 16].

The proposed consent judgments as to George's and Tyson would be for seven-year terms. [Doc. 3229-1, p. 16; Doc. 3268-1, p. 17]. The proposed consent judgments as to Cargill and Peterson would be for ten-year terms. [Doc. 3269-1, p. 18; Doc. 3279-1, p. 18]. None of the proposed consent judgments include the imposition of civil penalties pursuant to Okla. Stat. tit. 27A, § 2-3-504. [Doc. 3296, p. 14], unlike the penalties imposed in this court's Judgment.

Given the structural similarities between the four proposed consent judgments, the court analyzes the four motions together.

Analysis

The movants agree that the proposed consent judgments would "supersede[] and replace[] the Judgment . . . entered by the Court on December 19, 2025" as to each settling defendant. [Doc. 3229-1, p. 3; Doc. 3268-1, p. 3; Doc. 3269-1, p. 3; Doc. 3279-1, p. 3]. Accordingly, the movants seek to set aside the Judgment and the court must examine Federal Rule of Civil Procedure 60(b).

Pursuant to Federal Rule of Civil Procedure 60(b),

> [o]n motion and just terms, the court may relieve a party . . . from a final judgment, order, or proceeding for the following reasons:
>
> ***

> (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
>
> (6) any other reason that justifies relief.

Fed. R. Civ. P. 60(b)(5), (6). "A Rule 60(b) motion for relief from judgment is an extraordinary remedy and may be granted only in exceptional circumstances." *Jackson v. Los Lunas Cmty. Program,* 880 F.3d 1176, 1191-92 (10th Cir. 2018). "The determination on vacatur is an equitable one, but the presumption is in favor of retaining the judgment, which 'should stand unless a court concludes that the public interest would be served by a vacatur.'" *19 Solid Waste Dep't Mechs. v. City of Albuquerque*, 76 F.3d 1142, 1144 (10th Cir. 1996) (quoting *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 26 (1994)). The movants seek vacatur pursuant to Rule 60(b)(5) and 60(b)(6).[3] The court separately considers each subsection.

A. Federal Rule of Civil Procedure 60(b)(5)

Looking first to Rule 60(b)(5), the Rule "permits relief from a judgment or order if '[1] the judgment has been satisfied, released, or discharged; [2] it is based on an earlier judgment that has been reversed or vacated; *or* [3] applying it prospectively is no longer equitable.'" *Jackson,* 880 F.3d at 1192 (quoting Fed. R. Civ. P. 60(b)(5)). As recognized by the Tenth Circuit, "[u]se of the disjunctive 'or' demonstrates 'that each of the provision's three grounds for relief is independently sufficient.'" *Jackson,* 880 F.3d at 1192 (quoting *Horne v. Flores,* 557 U.S. 433, 454 (2009)).

[3] In the supplemental briefs, the parties contend that "changed circumstances warrant ***modification*** of the December 19 Judgment." [Doc. 3273, p. 7]; *see also* [Doc. 3292, p. 6 ("The court should modify the judgment under Rule 60(b)(5).")]. However, the parties' requests cannot be fairly characterized as "modifications." BLACK'S LAW DICTIONARY defines "modify" as "[t]o make somewhat different; to make small changes to (something) by way of improvement, suitability, or effectiveness." *Modify,* BLACK'S LAW DICTIONARY (12th ed. 2024). The settling parties do not seek to make "small changes" to the Judgment. Rather, the settling parties seek to "supersede[] and replace[] the Judgment." [Doc. 3229-1, p. 3; Doc. 3268-1, p. 3; Doc. 3269-1, p. 3; Doc. 3279-1, p. 3].

The movants first assert that, by virtue of the settlement agreements as set forth in the proposed consent judgments, the Judgment has been released or discharged.[4] However, the proposed Consent Judgments are each "conditioned upon the approval of the Consent Judgment by the Court." [Doc. 3229-1, p. 13; Doc. 3268-1, p. 14; Doc. 3269-1, p. 14; Doc. 3279-1, p. 15]. Thus, the State has only contingently released the Judgment and *has not* released or discharged defendants from their obligations under the Judgment as required by the Rule. *See* [Doc. 3296, p. 5]. For these reasons, Rule 60(b)(5)'s provision for satisfaction, release, or discharge of the judgment is inapplicable.

The movants next argue that applying the Judgment prospectively is no longer equitable.[5] *See* Fed. R. Civ. P. 60(b)(5) ("[T]he court may relieve a party . . . from a final judgment [where] . . . applying it prospectively is no longer equitable.").

As an initial matter, the Rule provides relief only from "judgments that have prospective application or effect." *United States v. Melot,* 712 F. App'x 719, 720-21 (10th Cir. 2017) (unpublished).[6] The court's Judgment includes the imposition of civil penalties, which are not prospective. *Melot,* 712 F. App'x at 721 ("A money judgment, on the other hand, simply remedies a past wrong; it isn't executory and doesn't require the court to supervise any future changing

[4] Movants do not assert that the Judgment has been satisfied nor could they do so as the provision of the Rule requires the court "to focus on whether the movant has satisfied each obligation set forth in the [judgment]." *Jackson,* 880 F.3d at 1201. Defendants have not.

[5] The parties do not contend that Rule 60(b)(5)'s provision for vacatur where the judgment "is based on an earlier judgment that has been reversed or vacated" applies. *See* Fed. R. Civ. P. 60(b)(5).

[6] "Unpublished decisions are not precedential but may be cited for their persuasive value." 10th Cir. R. 32.1(A).

conditions."). Accordingly, vacatur of the civil penalties portion of the Judgment pursuant to this provision of Rule 60(b)(5) is impermissible.

However, the primary focus of the Judgment is prospective relief and therefore the court considers whether it is no longer equitable to apply the Judgment. Pursuant to this subprovision of Rule 60(b)(5), "a party can ask a court to modify or vacate a judgment or order if 'a significant change either in factual conditions or in law' renders continued enforcement 'detrimental to the public interest.'" *Horne v. Flores*, 557 U.S. 433, 447 (2009) (quoting *Rufo v. Inmates of Suffolk Cnty. Jail*, 502 U.S. 367, 384 (1992)). "The party seeking relief bears the burden of establishing that changed circumstances warrant relief, but once a party carries this burden, a court abuses its discretion 'when it refuses to modify an injunction . . . in light of such changes.'" *Horne,* 557 U.S. at 447 (quoting *Agostini v. Felton*, 521 U.S. 203, 215 (1997)).

The movants contend that the proposed consent judgments and the asserted "expanded substantive provisions" included therein constitute a significant change in factual conditions that warrant relief. *See* [Doc. 3292, pp. 6-7; Doc. 3273, pp. 10-11]. However, the parties cite no binding precedent for the proposition that a post-judgment settlement agreement constitutes a "significant change . . . in factual conditions" for purposes of Rule 60(b)(5). Rather, although not considering Rule 60(b)(5) specifically, the U.S. Supreme Court has concluded that "exceptional circumstances" to warrant vacatur "do not include the mere fact that the settlement agreement provides for vacatur." *U.S. Bancorp Mortg. Co.,* 513 U.S. at 29.[7] Under the circumstances, the court cannot conclude that defendants have shown a "significant change . . . in factual conditions" based upon the proposed settlements as reflected in the consent judgments.

[7] For the reasons discussed herein, the parties have not shown "exceptional" or "extraordinary" circumstances.

Nor have the movants demonstrated that continued enforcement of the Judgment would be "detrimental to the public interest." *Horne,* 557 U.S. at 447; *see also Jackson*, 880 F.3d at 1194. Although the court must adopt a "flexible approach to evaluating the equities," *Jackson*, 880 F.3d at 1201, "a critical question in th[e] Rule 60(b)(5) inquiry is whether the objective of the District Court's [judgment] . . . has been achieved." *Horne*, 557 U.S. at 450. That is

> where the basis of the Rule 60(b)(5) motion is that continued enforcement of the decree is no longer equitable, instead of inquiring narrowly whether the specific obligations of a [judgment] have been attained, the court must broadly inquire whether the party obligated by the [judgment] is at that time in compliance with federal law.

Jackson, 880 F.3d at 1202.

The court previously concluded that "defendants, by their conduct, have unreasonably interfered with the public's right to the use and enjoyment of the waters of the IRW in Oklahoma. The State's injuries from phosphorous concentrations in the rivers and streams of the IRW and Lake Tenkiller are significant." [Doc. 2979, p. 201]. As a result, the court held that "[d]efendants are liable to the State for statutory public nuisance and for federal common law nuisance with respect to their conduct in the Oklahoma portion of the IRW and their conduct in the Arkansas portion of the IRW." [*Id.*]. Further, less than a year ago, this court found that phosphorous run-off from land-applied poultry waste continues to be a significant source of phosphorous, causing actual and ongoing injury to the waters of the IRW, and that conditions have not materially changed in the IRW. [Doc. 3161, pp. 20-22]. Settling defendants have presented no evidence that run-off from land-applied poultry waste has ceased to be a source of phosphorous, causing injury to the IRW waters such that the objectives of the Judgment—abatement of the nuisance and compliance with federal law—have been achieved. In light of the ongoing nuisance, settling

defendants are not "in compliance with federal law" and vacatur pursuant to Rule 60(b)(5) must be denied for this additional reason. *See Jackson,* 880 F.3d at 1202.

A comparison of the proposed consent judgments with the Judgment reveals the following:

- The proposed consent judgments do not limit the application of poultry waste to reduce phosphorus runoff into the waters of the IRW. The record makes clear that land application of poultry manure at rates in excess of agronomic need elevates the level of phosphorus in the soil and increases the concentration of phosphorus in the runoff. In order to limit the application of poultry waste to reduce phosphorus runoff, the current Judgment prohibits the application of poultry waste at any rate that would cause STP to exceed 120 lbs./acre. The proposed consent judgments simply do not prevent the application of poultry manure at rates exceeding agronomic need and would result in continuing phosphorus pollution.

- The proposed consent judgments are insufficient in duration. Based on testimony by Soil Scientist and Geomorphologist Gregory Scott that "following cessation of land application, it would take up to thirty years of hay production and removal to remove legacy phosphorous placed in the soil up to a STP of 300," this court concluded that a thirty-year period of oversight by a special master is warranted. Yet, the proposed consent judgments would expire in only ten years with respect to Cargill and Peterson and would expire in only seven years with respect to George's and Tyson. The parties cite no evidence suggesting that a seven (or ten) year term is sufficient to remediate phosphorus pollution in the waters of the IRW or ensure that no additional pollution occurs. Rather, during the February 27 hearing, the State conceded it did not believe that remediation could be achieved in the short term. [Doc. 3287, pp. 9-10].

- The proposed "Monetary Relief Fund" contained in the proposed consent judgments would fail to provide sufficient monies to remediate the phosphorus pollution caused by the settling defendants. Under the terms of the proposed consent judgments, the Monetary Relief Fund is "for purposes including, but not limited to, remediation or conservation projects in the IRW and for payment of attorney's fees and litigation costs in an amount to be determined either by order of the Court or by agreement between the State and its outside private lawyers." See, e.g., [Doc. 3229-1, p. 5]. The State advised the court at the February 27 hearing that, pursuant to the terms of the contract between the State and outside counsel, "no more than 50 percent" of the Monetary Relief Fund would be expended on attorney fees and costs. If half of the Monetary Relief Fund of $30,175,000 is paid to outside counsel, only $15,087,500 would remain "for purposes including, but not limited to, remediation" of the phosphorus pollution caused by the defendants' overapplication of poultry manure. In contrast, the court's Judgment contemplates a remedial investigation by a special master, followed by a remediation plan funded by defendants' payments into an evergreen fund and implemented by the special master over the next thirty years. The proposed Monetary Relief Fund simply does

not constitute an adequate remedy to warrant vacatur of the Judgment. .

- Under the proposed consent judgments, the defendants would pay no penalties to the Oklahoma Department of Environmental Quality Revolving Fund for their violations of Oklahoma's Environmental Quality Code, in contrast to the penalties imposed by the court on pp. 23-33 of the Judgment.

- The proposed consent judgments do not assure that the amount of poultry waste applied to the lands of the IRW will decrease. At the hearing held March 6, the State conceded that, under the terms of the proposed consent judgments, if the amount of poultry waste produced by a settling defendant was to increase significantly, the amount of poultry waste applied to the land could actually increase despite the percentage restrictions contained in the proposed consent judgments. [Doc. 3296, pp. 9-10].

For all these reasons, the movants have not shown that applying the Judgment prospectively is no longer equitable. Accordingly, Federal Rule of Civil Procedure 60(b)(5) is inapplicable, and the parties' motions are denied insofar as vacatur is sought under subpart (b)(5).

B. Federal Rule of Civil Procedure 60(b)(6)

Movants also rely on Federal Rule of Civil Procedure 60(b)(6) pursuant to which a court may grant relief from a final judgment for "any other reason that justifies relief." Fed. R. Civ. P. 60(b)(6). The Tenth Circuit has described the provision "as a 'grand reservoir of equitable power to do justice in a particular case,'" but has cautioned that "a district court may grant a Rule 60(b)(6) motion, 'only in extraordinary circumstances and only when necessary to accomplish justice.'" *Kile v. United States*, 915 F.3d 682, 687 (10th Cir. 2019) (quoting *Cashner v. Freedom Stores, Inc.*, 98 F.3d 572, 579 (10th Cir. 1996)); *see also Johnson v. Spencer*, 950 F.3d 680, 700-01 (10th Cir. 2020) (internal citation omitted) (quoting *McGraw v. Barnhart*, 450 F.3d 493, 505 (10th Cir. 2006)) ("Although 'the rule should be liberally construed when substantial justice will thus be served,' 'relief under Rule 60(b)(6) is extraordinary and reserved for exceptional circumstances.'"). The court begins its analysis with *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18 (1994). *See In re Renfrow*, No. 22-CV-00381-SH, 2022 WL 17668704,

at *4 (N.D. Okla. Dec. 14, 2022) ("With any request for vacatur after settlement, consideration must start with [*Bancorp*].").

In *Bancorp*, the Court held that "mootness by reason of settlement" generally "does not justify vacatur of a judgment under review." *U.S. Bancorp Mortg. Co.*, 513 U.S. at 29. Recognizing that "the determination is an equitable one," however, the Court acknowledged that "exceptional circumstances may conceivably counsel in favor of" vacatur. *Id*. But "the mere fact that the settlement agreement provides for vacatur" is insufficient. *Id.* The Court reasoned as follows:

> As always when federal courts contemplate equitable relief, our holding must also take account of the public interest. Judicial precedents are presumptively correct and valuable to the legal community as a whole. They are not merely the property of private litigants and should stand unless a court concludes that the public interest would be served by a vacatur. Congress has prescribed a primary route, by appeal as of right and certiorari, through which parties may seek relief from the legal consequences of judicial judgments. To allow a party who steps off the statutory path to employ the secondary remedy of vacatur as a refined form of collateral attack on the judgment would—quite apart from any considerations of fairness to the parties—disturb the orderly operation of the federal judicial system.

Id. at 26-27 (internal quotations and citations omitted). The Court further noted that permitting vacatur of judgments under appellate review as a matter of course "may *deter* settlement at an earlier stage," because "[*s*]*ome* litigants, at least, may think it worthwhile to roll the dice rather than settle in the district court . . . if, but only if, an unfavorable outcome can be washed away by a settlement-related vacatur." *Id.* at 27-28.

Bancorp considered vacatur of binding appellate decisions, not district court judgments, and does not preclude the requested relief. However, as recognized by another court in this district, "numerous courts have applied *Bancorp* outside its original context." *In re Renfrow,* 2022 WL 17668704, at *6; *see also Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096, 1129 n.20 (10th Cir. 2010) ("[*Bancorp's*] rationale also governs the district court's decision

whether to vacate its own judgment pursuant to Fed. R. Civ. P. 60(b).”). In fact, “[i]n the decades since *Bancorp*, its equitable considerations have been consistently applied by courts in the Tenth Circuit and beyond to conclude that, absent ‘exceptional circumstances,’ mootness of an appeal by reason of settlement generally does not justify vacatur of an underlying judgment.” *In re Renfrow*, 2022 WL 17668704, at *5. Further, the movants agree that *Bancorp* provides a general framework for the court’s analysis of the motions. [Doc. 3287, p. 26; Doc. 3296, pp. 19, 30]. Thus, the court turns to the considerations articulated in *Bancorp*.

The court acknowledges differences in this case and *Bancorp*. Significantly, unlike in *Bancorp*, both prevailing and losing parties request vacatur. *See Major League Baseball Props*., *Inc. v. Pac. Trading Cards, Inc*., 150 F.3d 149, 152 (2d Cir. 1998) (“Unlike *Bancorp*, therefore, the victor in the district court wanted a settlement as much as, or more than, the loser did.”).

Further, the parties in *Bancorp* had been granted certiorari with respect to a precedential appellate decision, whereas, in this matter, defendants’ appeals are in their early stages. Accordingly, vacatur at this juncture would avoid further litigation through appeal, at least with respect to the settling defendants.[8]

And yet, in other, more significant ways, this case implicates the concerns expressed by the U.S. Supreme Court in *Bancorp*.

In *Bancorp*, the Supreme Court acknowledged that, because vacatur is an equitable determination, a court must consider “the nature and character of the conditions which have caused the case to become moot.” *Rio Grande Silvery Minnow*, 601 F.3d at 1129 (quoting *U.S. Bancorp*

[8] Simmons and Cal-Maine have not reached settlement agreements with the State and, presumably, their appeals would continue. Accordingly, regardless of whether the court vacates its Judgment in favor of the proposed consent judgments, the State will incur costs and expenses associated with those appeals. Moreover, that Simmons and Cal-Maine have not settled creates significant administration and management issues, discussed herein.

Mortg. Co., 513 U.S. at 24). The Court observed "[t]he principal condition to which we have looked is whether the party seeking relief from the judgment below caused the mootness by voluntary action." *U.S. Bancorp Mortg. Co*., 513 U.S. at 24.

As recognized by the Supreme Court in *Bancorp*, "exceptional circumstances" to justify vacatur "do not include the mere fact that the settlement agreement provides for vacatur." *U.S. Bancorp Mortg. Co*., 513 U.S. at 29. Further, although the parties cite the public's interest in settlement, generally, the Court recognized that "while the availability of vacatur may facilitate settlement after the judgment under review has been rendered and certiorari granted (or appeal filed), it may *deter* settlement at an earlier stage." *U.S. Bancorp Mortg. Co*., 513 U.S. at 27-28. "*Some* litigants, at least, may think it worthwhile to roll the dice rather than settle in the district court . . . if, but only if, an unfavorable outcome can be washed away by a settlement-related vacatur." *U.S. Bancorp Mortg. Co*., 513 U.S. at 28; *see also Okla. Radio Assocs. v. Fed. Dep. Ins. Corp*., 3 F.3d 1436, 1444 (10th Cir. 1993) ("The furthering of settlement of controversies is important and desirable, but there are significant countervailing considerations which we must also weigh. A policy permitting litigants to use the settlement process as a means of obtaining the withdrawal of unfavorable precedents is fraught with the potential for abuse.").

The need for vacatur rests entirely upon the parties and therefore weighs against the requested relief. The court entered the Findings of Fact and Conclusions of Law over three years ago. At that time, the court directed the parties "to meet and attempt to reach an agreement with regard to remedies to be imposed in this action." [Doc. 2979, p. 218]. The parties conferred for months but were unable to independently reach a resolution. The parties next requested mediation before Judge Tacha, which the court so directed. Again, the parties were unable to reach a resolution. As late as November 5, 2025, the State indicated that the parties were engaged in "on-

going settlement negotiations." [Doc. 3184, p. 2]. Yet, no resolution was reached as to any party until after entry of the Judgment. Had the parties truly wished to reach a negotiated resolution of this matter *without regard to outcom*e, such agreement could have been reached at any time in the nearly three years between the court's Findings of Fact and Conclusions of Law and the Judgment. The parties' failure to do so suggests they "roll[ed] the dice" and now seek to erase the result of that gamble through vacatur. *See U.S. Bancorp Mortg. Co*., 513 U.S. at 27-28. Providing relief from the court's Judgment, under the circumstances, may suggest to other litigants in this district that they need not engage in good-faith settlement negotiations in the earlier stages of litigation because any disagreeable consequences can be eradicated through a post-judgment settlement.

Further, the court must take into account the public's interest. *See U.S. Bancorp Mortg. Co*., 513 U.S. at 26. As recognized by the Supreme Court in *Bancorp*, "Congress has prescribed a primary route, by appeal as of right and certiorari, through which parties may seek relief from the legal consequences of judicial judgments," *Id.* The parties began traveling that route, *see* [Doc. 3198 to 3200; Doc. 3202], but now seek to reverse course and "step[] off the statutory path."[9] *U.S. Bancorp Mortg. Co*., 513 U.S. at 26. However, the interest of the public is often best served through "orderly operation of the federal judicial system." *Id*. Defendants having filed Notices of Appeal, this court lacks jurisdiction over this matter. It is for the Tenth Circuit, not this court, to

[9] It is of no consequence that the parties have made the settlements contingent upon vacatur and have not yet dismissed the respective appeals. As explained by the U.S. Court of Appeals for the Second Circuit: "The parties cannot change that result by sleight of the draftsman's hand—making the settlement contingent upon, rather than in contemplation of, vacatur. Unlike a motion made after settlement is complete, the appeal in this case is not yet moot. But it would become moot were we to grant the vacatur, once the remaining terms of the settlement agreement were complied with. The contingent nature of the settlement does not alter the equitable calculus. '[T]he losing part[ies are still] voluntarily forfeit[ing their] legal remedy by the ordinary processes of appeal or certiorari, thereby surrendering [their] claim to the equitable remedy of vacatur.'" *ATSI Commc'ns, Inc. v. Shaar Fund, Ltd*., 547 F.3d 109, 113 (2d Cir. 2008) (quoting *U.S. Bancorp*, 513 U.S. at 25).

determine the Judgment's future and the parties "are not free to contract about [its] existence." *Okla. Radio Assocs.,* 3 F.3d at 1444 (quoting *In re Mem'l Hosp. of Iowa Cnty., Inc*., 862 F.2d 1299, 1303 (7th Cir. 1998)).

Rather than focusing on the public's interest in the "orderly operation of the federal judicial system," the parties urge the court to consider the public's interest in the proposed consent judgments themselves. However, the proposed consent judgments "do[] not present . . . the kind of action that would furnish compelling reasons for vacatur." *Schell v. Oxy USA Inc*., 814 F.3d 1107, 1123 (10th Cir. 2016). In addition to the reasons listed on pages 12 and 13 above, the following factors weigh against vacatur:

- The proposed structure is unworkable. Defendants Cal-Maine and Simmons have not reached settlement agreements with the State in this matter. Thus, the court's December 19 Judgment stands as to those defendants, regardless of the action taken by the court as the proposed consent judgments. As a result, Cal-Maine and Simmons are required to contribute to the Evergreen Fund established by the December 19 Judgment to finance remediation projects, overseen by the Special Master. In contrast, the settling defendants would contribute to the Special Monetary Fund, an account distinct from the Evergreen Fund, in order to finance attorney's fees and costs, as well as "remediation and conservation projects" chosen by the Attorney General, rather than the Special Master. The Special Master would have no authority with respect to remediation under the terms of the proposed consent judgments. The dueling judgments create a situation where insufficient funds are provided for the Special Master's enumerated duty to remediate, and insufficient details are provided as to any remediation or conservation projects to be overseen by the Attorney General. Further, Cal-Maine and Simmons must comply with this court's restriction of 120 lbs./acre STP for land application of poultry waste. However, the proposed consent judgments relieve the settling defendants of their obligations to comply with the STP restrictions in favor of Litter Removal Limitations. Accordingly, the Special Master would be tasked with monitoring Litter Removal Limitations as to some defendants, but Soil Test Phosphorous limits as to the nonsettling defendants.

- The proposed consent judgments would fail to adequately fund the duties of the special master contemplated by those agreements. Nor would the special master be adequately equipped to ensure the settling defendants' compliance with the Litter Removal Commitments, as the proposed consent judgments include no staffing or administrative provisions. The settling defendants would pay a total of only $1,325,000 to fund seven to ten years of the special master's responsibilities to monitor compliance with litter removal requirements over the million-acre watershed. Once those monies are depleted, it appears likely that Oklahoma taxpayers would be paying the special master's fees and expenses.

- During the hearings on the motions, the State conceded that up to fifty percent (50%) of the settling defendants' one-time payments into the Monetary Relief Fund could be expended on attorney's fees and costs, rather than remediation. [Doc. 3287, p. 7; Doc. 3296, pp. 5-6]. However, the fifty-percent limitation is not included in any of the proposed consent judgments and, as a result, the State could devote more of the funds to attorney's fees, rather than remediation or conservation. Further, payment of attorney's fees and costs to outside counsel would be controlled by agreements between the State and its outside private lawyers and not subject to judicial review. [Doc. 3287, pp. 6-7].

- The proposed consent judgments contain releases of nonparty contract growers that are or were previously under contract with the settling defendants. The proposed releases exceed the scope of this litigation and this court lacks the jurisdiction to include such releases in this case. If the State and the defendants wish to release any potential claims against the contract growers, they may do so in a separate agreement. Furthermore, the proposed release is unnecessary to protect current contract growers in light of paragraph 4(h) of the court's Judgment requiring the defendants to hold their contract growers harmless for the costs of removal, storage, transportation and disposal of poultry waste generated by the defendants' birds.

- Finally, although the court does not wish to discount the concerns of contract growers in the Illinois River Watershed, the asserted economic harm to the poultry industry and Oklahoma poultry farmers is too speculative to justify a finding of exceptional circumstances. *19 Solid Waste Dep't Mechs. v. City of Albuquerque*, 76 F.3d 1142, 1145 (10th Cir. 1996); *Amoco Oil Co. v. U.S. Env'tl Prot. Agency*, 231 F.3d 694, 700 (10th Cir. 2000).

For all these reasons, the movants have not demonstrated "extraordinary circumstances" that justify relief from the Judgment under Rule 60(b)(6). Thus, the motions must be denied.[10]

[10] Although this court lacks jurisdiction to grant the parties' requested relief, the court may properly consider and deny the motions. *West v. Ortiz*, No. 06-1192, 2007 WL 706924, at *5 n.5 (10th Cir. 2007) (unpublished); *Blinder, Robinson & Co. v. U.S. Secs. & Exch. Comm'n,* 748 F.2d 1415, 1420 (10th Cir. 1984) ("In ordinary civil cases the rule is that after an appeal has been taken the district court retains jurisdiction to consider and deny a Rule 60(b) motion."); *see also* Fed. R. Civ. P. 62.1(a)(2) ("If a timely motion is made for relief that the court lacks authority to grant because of an appeal that has been docketed and is pending, the court may . . . deny the motion."); Fed. R. Civ. P. 62.1 advisory committee's note to 2009 adoption ("After an appeal has been docketed and while it remains pending, the district court cannot grant a Rule 60(b) motion without a remand. But it can entertain the motion and deny it, defer consideration, or state that it would grant the motion if the court of appeals remands for that purpose or state that the motion raises a substantial issue.").

Conclusion

WHEREFORE, the Joint Motion for Entry of Consent Judgment [Doc. 3229] of plaintiff State of Oklahoma and defendants George's, Inc. and George's Farms, Inc.; the Joint Motion for Entry of Consent Judgment and Request for Indicative Ruling [Doc. 3268] of the State and defendants Tyson Foods, Inc.; Tyson Poultry, Inc.; Tyson Chicken, Inc.; and Cobb-Vantress, Inc.; the Joint Motion for Entry of Consent Judgment and Request for Indicative Ruling [Doc. 3269] of the State and defendants Cargill Incorporated and Cargill Turkey Production, LLC; and the Joint Motion for Entry of Consent Judgment and Request for Indicative Ruling [Doc. 3279] of the State and defendant Peterson Farms, Inc. are denied.

IT IS SO ORDERED this 8th day of April, 2026.

GREGORY K. FRIZZELL
UNITED STATES DISTRICT JUDGE

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Introduction

This report constitutes a guide to a series of two-page "primers" examining the various programs and policies that comprise periodic omnibus legislation on farm and food policy, commonly known as "the farm bill." The President signed the 2018 farm bill, the Agriculture Improvement Act of 2018 (P.L. 115-334), into law on December 20, 2018. The 2018 farm bill generally authorizes programs for five years. Congress enacted a one-year extension in November 2023 for 2024 (P.L. 118-22, Division B, §102) and a second one-year extension in December 2024 to cover FY2025 and the 2025 crop year (P.L. 118-158, Division D). Many farm bill programs will expire in 2025 unless Congress extends their authorization through a new farm bill or other legislation.

The 2018 farm bill authorized a broad array of programs and policies across 12 titles that define much of the federal government's role in the agricultural sector. It also established the parameters for key domestic and foreign nutrition assistance programs. The 2018 farm bill authorizes a wide range of agriculture and food programs and policies that address commodity support; conservation; trade; foreign and domestic nutrition assistance; farm credit and rural development; research, extension, and education; forestry; energy; horticulture; crop insurance; and livestock-related matters, among others

There are 23 primers summarized in this report and organized under descriptive headings rather than by farm bill titles to facilitate accessibility for those who are not familiar with the 2018 farm bill. The concept behind these primers is to provide relevant information on key programs and policy initiatives authorized by the 2018 farm bill in a concise format that serves as a quick reference resource for Members of Congress and congressional staff. To this end, the primers describe many of the leading programs and policies within the 2018 farm bill. They also identify some of the higher-profile policy issues that may arise as Congress engages in the process of writing a new farm bill and highlight some policy options that Congress could consider as it undertakes this task. The titles of the primers are hyperlinked for easy access.

The primers listed herein also identify CRS subject matter analysts and provide references to related CRS reports for those who want to explore a specific topic area within the 2018 farm bill in greater depth or who seek additional analysis on an individual program or policy. For an overview of the entire 2018 farm bill, see CRS Report R45525, *The 2018 Farm Bill (P.L. 115-334): Summary and Side-by-Side Comparison*. For a history of farm bill legislation, see CRS Report R45210, *Farm Bills: Major Legislative Actions, 1965-2024*. For a discussion of the consequences of farm bill expiration, see CRS Report R47659, *Expiration of the 2018 Farm Bill and Extension for 2025*. For analysis of the farm bill markup in 2024, see CRS Report R48167, *The 2024 Farm Bill: H.R. 8467 Compared with Current Law*.

This report summarizes the farm bill primers listed below. The headings of the summaries contain hyperlinks to the full CRS In Focus products.

- *Farm Bill Primer: What Is the Farm Bill?*
- *Farm Bill Primer: Budget Dynamics*
- *Farm Bill Primer: Programs Without Baseline Beyond FY2024*
- *Farm Bill Primer: Animal Disease Management and Prevention*
- *Farm Bill Primer: Farm Safety Net Programs*
- *Farm Bill Primer: PLC and ARC Farm Support Programs*
- *Farm Bill Primer: MAL and LDP Farm Support Programs*
- *Farm Bill Primer: Support for Cotton*
- *Farm Bill Primer: Support for the Dairy Industry*

- *Farm Bill Primer: Federal Crop Insurance Program*
- *Farm Bill Primer: Disaster Assistance*
- *Farm Bill Primer: Conservation Title*
- *Farm Bill Primer: Energy Title*
- *Farm Bill Primer: Forestry Title*
- *Farm Bill Primer: Horticulture Title and Related Provisions*
- *Farm Bill Primer: Selected Hemp Industry Issues*
- *Farm Bill Primer: Beginning and Underserved Producers*
- *Farm Bill Primer: Support for Native Agricultural Producers*
- *Farm Bill Primer: SNAP and Nutrition Title Programs*
- *Farm Bill Primer: Agricultural Research and Extension*
- *Farm Bill Primer: USDA Support for Aquaculture Operations*
- *Farm Bill Primer: Rural Development Title*
- *Farm Bill Primer: Rural Broadband Provisions*
- *Farm Bill Primer: Trade and Export Promotion Programs*

Overview and Budget

CRS In Focus IF12047, *Farm Bill Primer: Background and Status*, by Jim Monke and Megan Stubbs

This CRS In Focus provides an overview of the multiyear, omnibus legislation known as the farm bill. In particular, it describes the breadth of agriculture and nutrition policy that the farm bill authorizes while providing a brief history of the evolution of the farm bill to the present day. It further reviews estimated costs of the 2018 farm bill by title at the time of enactment and an updated estimate of the budget baseline for mandatory programs for a next farm bill. The House markup of a farm bill in 2024 is discussed in the context of current issues.

CRS In Focus IF12233, *Farm Bill Primer: Budget Dynamics*, by Jim Monke

Congress may consider a new farm bill in 2025 because provisions authorized in the 2018 farm bill (P.L. 115-334) begin expiring at the end of FY2025. From a budgetary perspective, many farm bill programs are assumed to continue. This report discusses the two types of funding—mandatory spending and discretionary authorizations—and the implications of each for farm bill budgeting and program continuity. Farm bill programs have nearly $1.4 trillion of mandatory funding available for the next 10 years. The In Focus also addresses supplemental funding in recent years, which may influence policy expectations for a new farm bill.

CRS In Focus IF12115, *Farm Bill Primer: Programs Without a Budget Baseline*, by Jim Monke

In preparation for a next farm bill, Congress may consider a subset of 21 programs in the 2018 farm bill that do not have a budget baseline for funding beyond FY2024. This In Focus identifies these 21 programs, which received a total of $906 million of mandatory funding during the five years (FY2019-FY2023) of the 2018 farm bill and $177 million in FY2024 for the first one-year extension. The second one-year extension for FY2025 did not provide additional funding for these programs. Programs that receive mandatory funding do not require annual discretionary appropriations. Reauthorizing farm bill programs without baseline would have a positive score (cost) and therefore would likely need to be offset by reductions elsewhere.

Animal Health

CRS In Focus IF12934, *Farm Bill Primer: Animal Disease Management and Prevention*, by Lia Biondo

Animal agriculture accounts for about half of the total value of U.S. agricultural products. The current highly pathogenic avian influenza outbreak illustrates how animal diseases can be costly to control, disrupt domestic supply and international trade of animal products, and affect human health. USDA's Animal and Plant Health Inspection Service (APHIS) is responsible for protecting and improving animal health in the United States. Congress provides APHIS approximately $400 million annually to administer several programs to prevent and respond to animal disease. This CRS In Focus describes those APHIS programs and identifies selected issues of potential interest to Congress.

Commodity Programs and Farm Support

CRS In Focus IF12218, *Farm Bill Primer: Farm Safety Net Programs*, by Stephanie Rosch

The so-called federal "farm safety net" is a collection of programs administered by the U.S. Department of Agriculture (USDA) that provide risk protection and income support to farmers in the United States who experience natural disasters, adverse growing conditions, and/or low market prices. Farm safety net programs fall into three categories: the federal crop insurance program (FCIP), standing agricultural disaster programs, and agricultural commodity support programs. The FCIP and standing agricultural disaster programs are permanently authorized under various laws. The commodity support programs are authorized through the 2025 crop year.

CRS In Focus IF12114, *Farm Bill Primer: PLC and ARC Farm Support Programs*, by Stephanie Rosch

The Price Loss Coverage (PLC) and the Agriculture Risk Coverage (ARC) programs provide income support to producers of certain eligible commodities. The amount of support varies by commodity and from year-to-year based on program enrollments and market conditions. These programs are authorized through the 2025 crop year. The 2018 farm bill reauthorized these programs with relatively minor changes that expanded support available to producers. This CRS In Focus addresses significant features of these programs and identifies selected issues that Congress could consider as it debates a next farm bill.

CRS In Focus IF12140, *Farm Bill Primer: MAL and LDP Farm Support Programs*, by Stephanie Rosch

The Marketing Assistance Loan (MAL) program has been a significant feature of U.S. farm policy since the 1930s. The MAL program provides loans to farmers that are collateralized by eligible stored commodities and provides price support to borrowers when market prices drop below levels specified in statute. Congress has authorized the Loan Deficiency Payment (LDP) program since the 1980s. The LDP program provides payments to farmers eligible to receive price support under the MAL program. Farmers must meet eligibility requirements for these programs and cannot receive both MAL and LDP benefits for the same commodity. These programs are authorized through the 2025 crop year.

CRS In Focus IF12195, *Farm Bill Primer: Support for Cotton*, by Stephanie Rosch

The United States is the world's third-largest cotton producer and the leading cotton exporter, accounting for nearly one-third of global trade in raw cotton. Between 2000 and 2020, U.S. cotton production decreased by more than 15%, and U.S. textile mill usage decreased by more than 80%. Title I of the 2018 farm bill reauthorized commodity support for domestic producers of cotton, including support that had been previously eliminated in the Agricultural Act of 2014 (2014 farm bill; P.L. 113-79). Titles I and XII of the 2018 farm bill reauthorized support for domestic users of cotton for various periods. Certain programs are authorized through the 2025 crop year. In addition, the Secretary of Agriculture has taken measures, outside of the farm bill programs, to support cotton producers.

CRS In Focus IF12202, *Farm Bill Primer: Support for the Dairy Industry*, by Christine Whitt

The 2018 farm bill provides support to the dairy industry through a variety of programs. The Dairy Margin Coverage (DMC), enacted in the 2018 farm bill, is the primary program that provides income support to milk producers. The DMC allows milk producers to buy a guaranteed margin—calculated as the all milk price minus feed costs—for their milk production. Each year, participating dairy producers choose a margin coverage level and the share of their milk production history to cover. They receive DMC payments for months in which the margin is triggered based on USDA's calculation of the milk-feed margin. This program is authorized through December 31, 2025.

CRS In Focus IF12201, *Farm Bill Primer: Federal Crop Insurance Program*, by Stephanie Rosch

The federal crop insurance program (FCIP) helps make insurance coverage available to farmers from private sector insurers to help mitigate potential financial consequences of adverse growing and market conditions. USDA regulates the policies offered and subsidizes the premiums that farmers pay in order to encourage farmer participation in the program. Premium subsidies covered about 60% of the total premium on average for all policies sold in 2024. Since its inception in 1938, the FCIP has grown from an ancillary program with low participation to a central pillar of federal farm support, with more than 543 million acres and $192 billion in crop and livestock value insured in 2024. The FCIP is permanently authorized, but Congress has modified it in various ways in periodic farm bills.

CRS In Focus IF12101, *Farm Bill Primer: Disaster Assistance*, by Christine Whitt

A number of federal programs help agricultural producers recover from the effects of natural disasters, including federal crop insurance, the Noninsured Crop Disaster Assistance Program, livestock and fruit tree disaster programs, and emergency disaster loans. All programs are permanently authorized, and most receive "such sums as necessary" through mandatory spending authority. As such, these programs did not require reauthorization in the 2018 farm bill.

Conservation

CRS In Focus IF12024, *Farm Bill Primer: Conservation Title*, by Megan Stubbs

The conservation title of a farm bill generally contains a number of reauthorizations, amendments, and new programs that encourage farmers and ranchers to implement resource-conserving practices on private land. Starting in 1985, farm bills have addressed a broader range of topics as "conservation." Conservation programs administered by USDA can be grouped into the following categories based on similarities: working land programs, land retirement programs, easement programs, partnership programs, conservation compliance, and other overarching provisions.

Energy

CRS In Focus IF10639, *Farm Bill Primer: Energy Title*, by Kelsi Bracmort

The 2018 farm bill contains 12 titles that address agricultural and food programs and Title IX, the energy title. The 2018 farm bill was the fourth farm bill to contain an energy title. The energy title is primarily focused on support for renewable energy—particularly agriculture-related energy, energy efficiency, and bioproducts (e.g., cleaning supplies). This In Focus summarizes the 2018 farm bill energy title, including mandatory versus discretionary funding amounts, as a basis for informing discussions on a next farm bill while identifying issues that Congress could consider as part of that process.

Forestry

CRS In Focus IF12054, *Farm Bill Primer: Forestry Title*, by Anne A. Riddle

Forest management generally, as well as forest research and forestry assistance, is often considered by the agriculture committees in Congress. Although most forestry programs are permanently authorized, forestry is often addressed in the periodic farm bills to reauthorize many agriculture programs. The 2018 farm bill included a separate forestry title, and this In Focus summarizes some of the forestry provisions addressed in the 2018 farm bill and related issues that Congress may debate as it considers a next farm bill.

Horticulture, Specialty Crops, and Organic Farming

CRS In Focus IF12017, *Farm Bill Primer: Horticulture Title and Related Provisions*, by Renée Johnson

The 2018 farm bill reauthorized and expanded funding for many of the existing USDA programs supporting fruits, vegetables, and other specialty crops while providing support for many locally sourced products (not limited to crops) and hemp cultivation. Support for these sectors is not limited to the horticulture title; it is also contained within other farm bill titles, covering a range of programs administered by USDA. This In Focus provides an overview of selected 2018 farm bill provisions and issues for a next farm bill related to specialty crops, organically produced and locally sourced products, and hemp.

CRS In Focus IF12278, *Farm Bill Primer: Hemp Industry Support and Regulation*, by Renée Johnson

The 2018 farm bill legalized hemp by removing *hemp* from the definition of marijuana in the Controlled Substances Act. It also directed USDA to create a framework to regulate hemp cultivation under federal law and facilitate commercial cultivation, processing, marketing, and sale of hemp and hemp-derived products. Other 2018 farm bill provisions made hemp producers eligible for federal crop insurance and agricultural research programs. A number of hemp stakeholders are advocating for additional changes via a next farm bill, such as relaxing some USDA regulatory requirements and reducing the Drug Enforcement Administration's role in regulating hemp.

New, Beginning, Underserved, and Veteran Farmers and Ranchers

CRS In Focus IF12096, *Farm Bill Primer: Beginning and Underserved Producers*, by Jim Monke

Beginning farmers and ranchers—generally defined as having operated a farm or ranch for no more than 10 years—comprise a significant part of the U.S. agricultural sector. They contribute to rural and non-rural economies and are considered to be critical given ongoing concerns about the aging U.S. farm population, the "disappearing middle" (i.e., mid-sized farms both in terms of farm numbers and value of sales), and general trends toward increasing consolidation and fewer, larger farms. The 2018 farm bill reauthorized and expanded programs administered by USDA that support new farmers and ranchers. These programs targeted new farmers within specific farm demographic groups based on age, race, and gender, as well as socially disadvantaged (underserved) farmers and farmers who are military veterans.

CRS In Focus IF12160, *Farm Bill Primer: Support for Tribal Food and Agriculture*, by Jim Monke

In 2017, Native agricultural producers accounted for 2% of all U.S. producers. The 2018 farm bill (P.L. 115-334) expanded federal farm program support for Native agricultural producers and tribal communities. Congress further enhanced community and economic development for tribes in the Indian Community Economic Enhancement Act of 2020 (P.L. 116-261) and provided additional support for historically underserved agricultural producers, including Native producers, in the American Rescue Plan Act of 2021 (P.L. 117-2).

Nutrition Assistance

CRS In Focus IF12255, *Farm Bill Primer: SNAP and Nutrition Title Programs*, by Randy Alison Aussenberg and Kara Clifford Billings

The nutrition title of a farm bill typically reauthorizes a number of nutrition or domestic food assistance programs, including the Supplemental Nutrition Assistance Program (SNAP, formerly the Food Stamp Program). These programs were reauthorized by the 2018 farm bill and extended by P.L. 118-22. They are authorized through September 30, 2025. In a subsequent farm bill's nutrition title, policymakers might revisit 2018 debates and decisions and consider new challenges and questions, including temporary changes made during the COVID-19 pandemic.

Research, Extension, and Related Matters

CRS In Focus IF12023, *Farm Bill Primer: Agricultural Research and Extension*, by Eleni G. Bickell

The research title addresses research, extension, and education at land-grant universities and other nonfederal institutions, as well as departmental policies, programs, and research within USDA. Most of the research title programs require annual discretionary appropriations; a few programs receive mandatory spending. This In Focus provides background information and discusses selected 2018 farm bill provisions and issues for a next farm bill related to agricultural research, extension, and education, including funding.

CRS In Focus IF12275, *Farm Bill Primer: USDA Support for Aquaculture Operations*, by Eleni G. Bickell

Aquaculture facilities that grow aquatic animal and plant species in controlled or selected environments are generally eligible for the same support from USDA that is available to all U.S. farmers, ranchers, and producers. The 2018 farm bill reauthorized and expanded provisions specifically related to USDA's aquaculture research and assistance programs. Aquaculture producers are also eligible for other USDA competitive grants available to all U.S. agricultural producers. Aquaculture stakeholders have identified a number of policy recommendations in support of the industry, some of which Congress could address in a next farm bill.

Rural Development

CRS In Focus IF12038, *Farm Bill Primer: Rural Development Title*, by Lisa S. Benson

Omnibus farm bills are the major modern legislative vehicle for addressing many rural development issues. Since 1973, omnibus farm bills have included a rural development title, which has included USDA Rural Development programs focused on rural utility systems (i.e., water, waste disposal, electricity, and broadband), rural business, and rural housing. The USDA Rural Business-Cooperative Service, USDA Rural Utilities Service, and USDA Rural Housing Service administer these programs. Most USDA Rural Development programs rely on discretionary funding, which Congress authorizes in farm bills and funds through the annual appropriations process.

CRS In Focus IF12041, *Farm Bill Primer: Rural Broadband Provisions*, by Lisa S. Benson

Congress has included provisions addressing rural broadband (i.e., high-speed internet access) in the rural development title of omnibus farm bills since 2002. The 2018 farm bill amended and reauthorized many of the rural broadband programs administered by USDA. This In Focus provides background information on USDA rural broadband programs and an overview of selected rural broadband provisions in the 2018 farm bill and identifies some issues that Congress could consider as it debates a next farm bill.

Trade and Export Promotion

CRS In Focus IF12155, *Farm Bill Primer: Trade and Export Promotion Programs*, by Benjamin Tsui

Agricultural exports are significant to farmers and the U.S. economy. With the productivity of U.S. agriculture growing faster than domestic demand, farmers and agriculturally oriented firms rely on export markets to sustain prices and revenue. The trade title of the 2018 farm bill (P.L. 115-334) authorizes programs to expand foreign markets for U.S. farmers and food manufacturers through export market development programs and export credit guarantee programs. These programs are authorized through FY2025.

Author Information

Jim Monke, Coordinator
Specialist in Agricultural Policy

Megan Stubbs, Coordinator
Specialist in Agricultural Conservation and Natural Resources Policy

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Retaliatory Tariffs on U.S. Agriculture and USDA's Responses: Frequently Asked Questions

May 27, 2025

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R48548

May 27, 2025

Benjamin Tsui
Analyst in Agricultural Policy

Stephanie Rosch
Analyst in Agricultural Policy

SUMMARY

In 2025, the Trump Administration imposed several rounds of tariffs against trading partners under the under the International Emergency Economic Powers Act (IEEPA) and Section 232 of the Trade Expansion Act of 1962, commonly referred as "Section 232." The first IEEPA tariffs targeting Canada, the People's Republic of China, and Mexico were in response to what President Trump identified as the "failures" of the three countries to address issues such as drug and human trafficking and transnational crime. Subsequently, under IEEPA, the Trump Administration imposed a 10% tariff on most trading partners, imposed additional tariffs on China, and proposed country-specific "reciprocal tariffs" addressing bilateral trade deficits. The Trump Administration also expanded steel and aluminum tariffs and imposed new tariffs on automobile and automobile parts under Section 232.

In response to these U.S. tariffs, some countries have imposed or announced potential retaliatory tariffs on U.S. goods, including U.S. agricultural products. In March 2025, Canada imposed retaliatory tariffs that included U.S. agricultural goods. In March 2025, China imposed retaliatory tariffs that included U.S. agricultural goods and, in April 2025, further increased tariffs on all U.S. goods. In May 2025, China temporarily decreased its retaliatory tariffs on U.S. goods following an agreement with the United States. In April 2025, the European Union released a list of U.S. products targeted for retaliatory tariffs effective June 2025.

During the first Trump Administration, beginning in 2018, certain trading partners imposed retaliatory tariffs on U.S. agricultural products in response to tariffs imposed by the United States. In response to the retaliatory tariffs, the U.S. Department of Agriculture (USDA) used administrative authorities to provide approximately $25.7 billion in direct income support payments to farmers, for purchases for agricultural commodities, and in additional support for trade promotion activities.

This report discusses frequently asked questions about retaliatory tariffs on U.S. agriculture and USDA's response to the retaliatory tariffs since 2018. It addresses the agricultural context of recent tariff actions by the United States and subsequent retaliatory tariffs by trading partners, what retaliatory tariffs were imposed on U.S. agriculture in 2018 and 2019 and their effects on trade flows for select agricultural commodities, rationales why foreign trading partners target U.S. agricultural products for retaliation, and the agricultural provisions of the U.S.-China Phase One Agreement. The report also discusses the 2018 and 2019 USDA responses to retaliatory tariffs and the views of these responses.

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Introduction

In March 2025, Canada and the People's Republic of China (hereinafter China) imposed retaliatory tariffs on a range of U.S. exports, including agricultural products, in response to U.S. tariffs imposed in February and March 2025 under the International Emergency Economic Powers Act (IEEPA; 50 U.S.C. §§1701 et seq.).[1] The U.S. tariffs were a response to what President Trump identified as "failures" on the part of Canada, China, and Mexico to address issues such as drug and human trafficking and transnational crimes.[2] Many Members of Congress have an interest in the impact that foreign retaliatory tariffs have on the U.S. agricultural and food sectors, which rely on export markets for additional revenue and economic activity. In addition to the February and March 2025 IEEPA tariffs, the United States has taken other tariff actions that faced retaliatory or threats of retaliatory tariffs on U.S. agricultural exports.

In 2018 and 2019, during the first Trump Administration, China, the European Union (EU), Canada, Mexico, Turkey, and India responded to U.S. tariff actions with retaliatory tariffs on U.S. imports that included agricultural products. In response, the U.S. Department of Agriculture (USDA) used administrative authorities to distribute about $25.7 billion through three programs that, respectively, provided direct income support payments to farmers, purchased agricultural commodities, and supported trade promotion activities. In April 2025, Secretary of Agriculture Brooke Rollins indicated that it would take months to determine whether payments for producers are needed in response to retaliatory tariffs but that USDA is "setting up the infrastructure" to address trade damages.[3]

This report addresses some frequently asked questions (FAQs) grouped into four categories: background, trade actions in 2025, trade actions in 2018-2023, and USDA's response to retaliatory tariffs.

Background

What Are Tariffs?

Tariffs are taxes or duties levied on imported goods. Foreign retaliatory tariffs on U.S. exports make U.S. goods less competitive in foreign markets compared to goods not subject to tariffs, such as substitutable goods produced in the foreign country and goods from other suppliers. Tariffs on agricultural products are commonly applied either at an ad valorem basis (i.e., a

[1] For purposes of this report, *agricultural product* refers to the U.S. Department of Agriculture's (USDA's) definition, which follows the World Trade Organization's (WTO's) definition. The WTO's definition includes most food products but excludes those such as seafood and forestry products. For more information about U.S. tariff authorities and policies in general and the International Emergency Economic Powers Act (IEEPA), see CRS Report R48435, *Congressional and Presidential Authority to Impose Import Tariffs*; CRS In Focus IF11030, *U.S. Tariff Policy: Overview*; CRS Report R45618, *The International Emergency Economic Powers Act: Origins, Evolution, and Use*; and CRS Insight IN11129, *The International Emergency Economic Powers Act (IEEPA), the National Emergencies Act (NEA), and Tariffs: Historical Background and Key Issues*.

[2] Executive Order 14193 of February 1, 2025, "Imposing Duties to Address the Flow of Illicit Drugs Across Our Northern Border," 90 *Federal Register* 9113, February 7, 2025; Executive Order 14194 of February 1, 2025, "Imposing Duties to Address the Situation at Our Southern Border," 90 *Federal Register* 9117, February 7, 2025; and Executive Order 14195 of February 1, 2025, "Imposing Duties to Address the Synthetic Opioid Supply Chain in the People's Republic of China," 90 *Federal Register* 9121, February 7, 2025.

[3] Secretary Rollins is quoted in Marcia Brown, "'We Just Haven't Seen Anything Like This': Farmers Brace for Trump's Trade War," *Politico*, April 4, 2025; see also Andy Castillo, "USDA Says Farm Impact of New Tariffs Unknown Until Fall," *Farm Progress*, April 4, 2025.

percentage of the value of the imported goods) or at a specific basis (i.e., assessed at a fixed amount of money per unit of an imported good).

What Agricultural Products Does the United States Export and Import?

The United States is one of the top exporters of agricultural products in the world, with exports totaling $176.0 billion in 2024. Exports account for about 20% of total U.S. agricultural and food production by value.[4] The USDA Foreign Agricultural Service groups agricultural products into three broad categories:

- Bulk: raw and unprocessed commodities sold in large quantities that are mostly used as inputs (e.g., corn, wheat, cotton, soybeans)
- Intermediate: processed commodities used as inputs in the manufacturing of other products (e.g., soybean meal, ethanol, vegetable oils, essential oils, hides and skins)
- Consumer oriented: a larger collection of agricultural and food products for consumers and retailers (e.g., fruits, vegetables, meat, poultry, dairy, alcoholic beverages)

Bulk commodities are the leading U.S. farm exports. In 2024, over 60% of U.S. agricultural exports by value were to Mexico, Canada, China, the EU, and Japan.

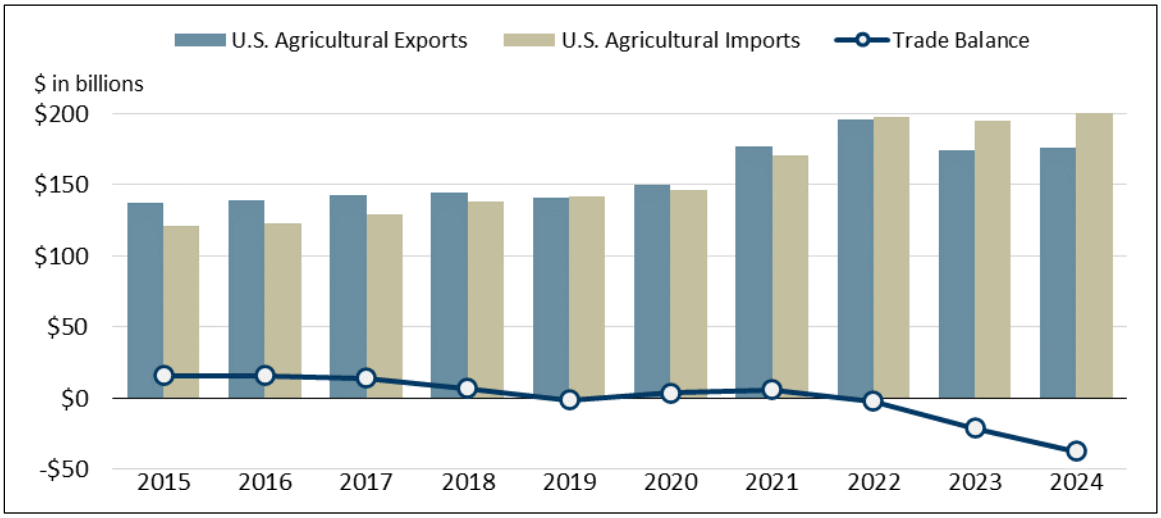
The share of U.S. production that is exported varies by year and type of agricultural product. On average, for the past decade on a quantity basis, for bulk commodities, the United States exported 15% of corn, 46% of rice, 47% of soybeans and wheat, 55% of sorghum, and 84% of cotton produced. For meat products, about 11% of beef and veal, 16% of chicken meat, and 23% of swine meat produced were exported.[5] For tree nuts, the United States exported on average nearly 70% of almonds and walnuts and 64% of pistachios produced. For fresh fruits, the United States exported on average 5% of tangerines/mandarins, 17% of apples, 19% of cherries, and 33% of table grapes produced.

In 2024, the United States imported $213.0 billion in agricultural products, which provided U.S. consumers more choice, variety, and product availability year-round as well as increased competition for certain U.S. producers. Leading imports included fruits, vegetables, vegetable oils, alcoholic beverages (e.g., distilled spirits, wine, beer), beef, and coffee. The top sources of U.S. agricultural imports were Mexico, Canada, and the EU, which accounted for 60% of total agricultural imports. Comparing the value of U.S. agricultural trade exports with imports reveals that the U.S. agricultural trade surplus peaked at $40.1 billion in 2011 and has since fallen, becoming trade deficits in 2019, 2022, 2023, and 2024. In 2024, the agricultural trade deficit was $37.0 billion. See **Figure 1** for U.S. agricultural trade trends in the past decade. See **Table 1** and **Table 2** for trade statistics for the top five U.S. agricultural export markets and top five U.S. agricultural import suppliers for the past decade.

[4] USDA, Economic Research Service (ERS), "U.S. Agricultural Trade – U.S. Agricultural Trade at a Glance," January 7, 2025, https://www.ers.usda.gov/topics/international-markets-us-trade/us-agricultural-trade/us-agricultural-trade-at-a-glance.

[5] Calculated by CRS from USDA production, supply, and distribution quantity data at USDA, Foreign Agricultural Service (FAS), "PSD Online," https://apps.fas.usda.gov/psdonline/app/index.html#/app/home.

Figure 1. Value of U.S. Agricultural Exports and Imports, 2015-2024



Source: Figure created by CRS using U.S. Census Bureau international trade data via U.S. Department of Agriculture (USDA), Foreign Agricultural Service (FAS), "Global Agricultural Trade System Online: GATS Home," https://apps.fas.usda.gov/gats/default.aspx. See Bulk, Intermediate, and Consumer-Oriented Harmonized System-10 (BICO-10) groupings.

Notes: Data are not adjusted for inflation. Trade balance is calculated as imports subtracted from exports.

Table 1. U.S. Agricultural Exports to Top Five Markets, 2015 to 2024

In Billions of Dollars (nominal)

Trading Partner	2015	2016	2017	2018	2019	2020	2021	2022	2023	2024
Mexico	17.9	18.0	18.8	19.3	19.4	18.3	25.5	28.5	28.4	30.3
Canada	22.2	21.4	21.7	22.0	21.9	22.3	25.3	28.7	28.4	28.4
China	20.4	21.7	19.6	9.2	13.9	26.4	32.8	38.1	28.8	24.7
EU-27	11.0	10.2	10.5	12.5	10.8	10.4	11.0	12.3	12.6	12.8
Japan	11.6	11.4	12.1	13.1	12.0	11.7	14.2	14.7	11.9	12.0
Rest of world	54.2	56.2	60.1	68.5	63.1	60.5	67.9	73.4	64.1	67.8
World total	**137.2**	**138.9**	**142.9**	**144.7**	**141.1**	**149.7**	**176.6**	**195.7**	**174.2**	**176.0**

Source: CRS from USDA, Global Agricultural Trade System (GATS) data (BICO-10).

Notes: Data are not just adjusted for inflation. Values may not sum to totals shown because of rounding. EU-27 = the European Union customs union and its 27 member countries.

Table 2. U.S. Agricultural Imports from Top Five Suppliers, 2015 to 2024

In Billions of Dollars (nominal)

Trading Partner	2015	2016	2017	2018	2019	2020	2021	2022	2023	2024
Mexico	22.2	24.1	25.9	27.5	30.2	32.9	38.0	43.3	45.4	48.6
Canada	22.4	22.2	22.9	23.7	24.4	25.3	31.2	37.5	40.1	41.0
EU-27	22.8	23.6	25.1	27.1	28.4	27.4	32.0	35.8	32.9	36.4
Brazil	4.0	3.8	3.9	3.9	4.1	4.0	4.7	6.2	6.2	7.9
China	4.3	4.3	4.5	4.9	3.7	3.8	4.1	4.7	4.7	5.8
Rest of world	45.4	44.6	46.9	50.8	50.8	52.7	60.6	70.6	65.6	73.2
World total	**121.1**	**122.6**	**129.2**	**138.0**	**141.6**	**146.3**	**170.6**	**198.2**	**194.8**	**213.0**

Source: CRS from USDA, GATS data (BICO-10).

Notes: Data are not just adjusted for inflation. Values may not sum to totals shown because of rounding. EU-27 = the European Union customs union and its 27 member countries.

All states export agricultural products, but a fraction of states account for the majority of farm export sales. For calendar year 2023, USDA estimated that over half of total U.S. agricultural exports based on value came from the eight leading agricultural exporting states, which were California, Iowa, Illinois, Minnesota, Nebraska, Texas, Indiana, and Missouri.[6]

Why Would Trading Partners Target U.S. Agricultural Products with Retaliatory Tariffs?

Foreign governments may target U.S. agricultural products for any of several reasons. The United States is one of the largest exporters of agricultural products, and these products represent a large target for retaliation for many trading partners. The value of agricultural products exported to U.S. trading partners that imposed retaliatory tariffs on U.S. agricultural products during the first Trump Administration was more than $76 billion in 2017.

Another reason U.S. trading partners may target U.S. agriculture is because agricultural commodities may be sourced globally from multiple suppliers. Trading partners could source agricultural imports from suppliers other than the United States. Australia, Brazil, Canada, and the EU are examples of major agricultural exporters that compete with the United States for foreign markets.

Retaliating trade partners may consider U.S. domestic politics when determining tariff targets, choosing products from specific regions or states to maximize political pressure. For example, some observers assert that bourbon whiskey was targeted in the 2018 retaliatory tariffs because it was produced in the then-Senate Majority Leader's home state of Kentucky.[7]

[6] USDA, ERS, "State Agricultural Trade Data," January 9, 2025, https://www.ers.usda.gov/data-products/state-agricultural-trade-data.

[7] Thiemo Fetzer and Carlo Schwarz, "Tariffs and Politics: Evidence from Trump's Trade Wars," *The Economic Journal*, vol. 131, no. 636 (May 2021), pp. 1717-1741; and Rob Gillie, "Canada Announces Billions in Retaliatory Tariffs Against US," Associated Press, June 30, 2018.

2025 Trade Actions

What U.S. Trade Actions Precipitated Retaliatory Tariffs in 2025?

Beginning in 2025, the United States has imposed tariffs under IEEPA and Section 232 of the Trade Expansion Act of 1962 (19 U.S.C. §1862), commonly referred as "Section 232."[8] These trade actions provoked foreign retaliatory tariffs that targeted U.S. agriculture as well as other sectors of the U.S. economy. The United States has also proposed additional trade actions under these and other statutory authorities that, if implemented, may lead to further retaliatory actions from U.S. trading partners.

International Emergency Economic Powers Act (IEEPA) Tariffs

Addressing Drug Trafficking and Illegal Immigration

On February 1, 2025, President Trump signed three executive orders imposing tariffs of 25% on imports from Canada (with a lower 10% tariff on energy resources) and Mexico, and a 10% tariff on imports from China, all beginning February 4, 2025.[9] These executive orders cited IEEPA as the underlying authority to impose tariffs. The executive orders cited the "failure" of the three governments in addressing issues such as drug trafficking and other criminal activities. On February 3, President Trump issued executive orders delaying the duties until March 4, citing steps taken by Canada and Mexico to address U.S. concerns on illegal migration and illicit drugs.[10] On March 3, President Trump increased the tariff on imports from China from 10% to 20% effective March 4, stating that China had not adequately addressed the illicit drug crisis.[11]

On March 6, President Trump issued executive orders further amending the original February 1 executive orders for Canada and Mexico by not imposing the additional 25% duties on goods that claim and qualify for preferential treatment under the U.S.-Mexico-Canada Agreement (USMCA) and lowering tariffs for potash imports to 10%.[12] Potash, the main source of potassium in

[8] For more background, see CRS Report R45618, *The International Emergency Economic Powers Act: Origins, Evolution, and Use*; CRS Report R48549, *Presidential 2025 Tariff Actions: Timeline and Status*; CRS Insight IN11129, *The International Emergency Economic Powers Act (IEEPA), the National Emergencies Act (NEA), and Tariffs: Historical Background and Key Issues*; CRS Infographic IG10012, *The International Emergency Economic Powers Act (IEEPA) and the National Emergencies Act: Key Facts*; and CRS Insight IN12519, *Expanded Section 232 Tariffs on Steel and Aluminum*. For more information about U.S.-China tariff actions, see CRS In Focus IF12990, *U.S.-China Tariff Actions Since 2018: An Overview*.

[9] Executive Order 14193 of February 1, 2025, "Imposing Duties to Address the Flow of Illicit Drugs Across Our Northern Border," 90 *Federal Register* 9113, February 7, 2025; Executive Order 14194 of February 1, 2025, "Imposing Duties to Address the Situation at Our Southern Border," 90 *Federal Register* 9117, February 7, 2025; and Executive Order 14195 of February 1, 2025, "Imposing Duties to Address the Synthetic Opioid Supply Chain in the People's Republic of China," 90 *Federal Register* 9121, February 7, 2025. For more information about U.S.-Canada relations and the IEEPA tariffs, see CRS Insight IN12533, *U.S.-Canada Relations amid Tariffs Under the International Emergency Economic Powers Act*.

[10] Executive Order 14197 of February 3, 2025, "Progress on the Situation at Our Northern Border," 90 *Federal Register* 9183, February 10, 2025; and Executive Order 14198 of February 3, 2025, "Progress on the Situation at Our Southern Border," 90 *Federal Register* 9185, February 10, 2025.

[11] Executive Order 14228 of March 3, 2025, "Further Amendment to Duties Addressing the Synthetic Opioid Supply Chain in the People's Republic of China," 90 *Federal Register* 11463, March 7, 2025.

[12] Executive Order 14231 of March 6, 2025, "Amendment to Duties to Address the Flow of Illicit Drugs Across Our Northern Border," 90 *Federal Register* 11785, March 11, 2025; and Executive Order 14232 of March 6, 2025, "Amendment to Duties to Address the Flow of Illicit Drugs Across Our Southern Border," 90 *Federal Register* 11787, March 11, 2025.

fertilizer, is a key input for U.S. farmers. The United States imports about 97% of its potash fertilizer used each year, with Canada accounting for about 85% of imports by quantity.[13] U.S. tariff rates on fertilizer are generally duty-free, including under the United States' USMCA tariff schedule.[14]

China (in February) and Canada (in March) initiated World Trade Organization (WTO) dispute consultations with the United States in response to the IEEPA tariff actions.[15] In the March 24-25, 2025, WTO Committee on Agriculture meeting, Canada questioned whether the United States had considered the negative effects of the tariffs on factors such as food security, economic growth, agricultural sector supply chains, and inflation for food prices.[16] For more information about the WTO and the Agreement on Agriculture, see the text box below.

What Is the World Trade Organization and Agreement on Agriculture?

The World Trade Organization (WTO) is an international organization that administers the rules and agreements negotiated among its members to eliminate trade barriers and govern trade. The WTO provides for a "common institutional framework" to address multilateral trade relations among WTO members and to facilitate trade agreement negotiations, resolve trade disputes, administer trade rules, monitor trade policies, and provide technical assistance. The United States was a leading force behind the WTO's establishment in 1995.

As part of the results of the multilateral negotiations that established the WTO, several agreements covering trade in goods were agreed to among negotiating members. The WTO Agreement on Agriculture's main objective is to "reform agricultural trade so that it is closer to competitive market conditions." Under the Agreement on Agriculture, national agricultural policies—including domestic farm support, agricultural export subsidies, and restrictive import controls—were placed under a multilaterally agreed-upon set of disciplines. WTO members agreed to reform their domestic agricultural support policies, increase access to imports, and reduce export subsidies. The agreement also established a Committee on Agriculture. The Committee on Agriculture oversees and monitors the implementation of the agreement and provides a forum for members to consult with each other on agricultural trade issues as well as raise and address questions related to the agreement.

Source: WTO, *The WTO Agreements Series: Agriculture*, 3rd ed. (WTO, 2016).

Note: For more background on the WTO, see CRS In Focus IF10002, *World Trade Organization*.

"Reciprocal Tariffs" Addressing Trade Deficits

On April 2, 2025, President Trump signed an executive order imposing additional tariffs of 10% on most imports from most U.S. trading partners effective April 5, 2025, and additional country-specific tariffs on 57 trading partners effective April 9, 2025.[17] The April 2 executive order also

[13] Potassium fertilizer usage data from USDA, FAS, "Global Fertilizer Dashboard," September 10, 2024, https://www.fas.usda.gov/data/visualization-global-fertilizer-trade-dashboard. Potassium fertilizer import data from USDA, FAS, Global Agricultural Trade System Online, "Foreign Agricultural Trade of the United States" product grouping.

[14] United States International Trade Commission, "Chapter 31: Fertilizers," in *Harmonized Tariff Schedule (2025)*, March 14, 2025, https://hts.usitc.gov/; and Office of the U.S. Trade Representative (USTR), "Tariff Schedule of the United States," agreement between the United States of America, the United Mexican States, and Canada, July 1, 2020.

[15] WTO, "DS633: United States—Additional Tariff Measures on Goods from China," https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds633_e.htm; and WTO, "DS634:United States—Additional Import Duties on Goods from Canada," https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds634_e.htm.

[16] WTO, "View Question & Answer," in *Agriculture Information Management System*, accessed March 17, 2025, https://agims-qna.wto.org/public/Pages/en/ViewQnA_Validated.aspx?officialID=111129&caller=https://agims-qna.wto.org/public/Pages/en/SearchResult.aspx.

[17] Executive Order 14257 of April 2, 2025, "Regulating Imports with a Reciprocal Tariff to Rectify Trade Practices That Contribute to Large and Persistent Annual United States Goods Trade Deficits," 90 *Federal Register* 15041, April 7, 2025. A list of the country-specific tariffs (inclusive of the 10% imposed on most other trading partners) can be found at https://www.whitehouse.gov/wp-content/uploads/2025/04/Annex-I.pdf.

cited IEEPA as the underlying authority to impose tariffs. The executive order declared a national emergency due to

> underlying conditions, including a lack of reciprocity in our bilateral trade relationships, disparate tariff rates and [nontariff] barriers, and U.S. trading partners' economic policies that suppress domestic wages and consumption, as indicated by large and persistent annual U.S. goods trade deficits.[18]

The April 2 executive order's additional tariffs do not apply to Canada or Mexico. If the February 1 executive orders that imposed the drug-trafficking and illegal-immigration-related IEEPA tariffs on both countries are terminated, then both countries' imports would face a 12% tariff as a result of the April 2 executive order. The April 2 executive order excludes some key agricultural inputs such as potash, peat, veterinary vaccines, and certain pesticides.[19] Tariffs on China are cumulative to previous tariffs imposed. On April 8, 2025, President Trump signed an executive order increasing the "reciprocal tariff" on China from the original 34% to 84% effective April 10 in response to China's April 4 announcement of 34% retaliatory tariffs that went into effect April 10.[20] On April 9, President Trump signed another executive order raising the "reciprocal tariffs" on China to 125% effective April 10 in response to the April 9 announcement by China that it was increasing its retaliatory tariffs from 34% to 84% effective April 10.[21] See "China's Retaliatory Tariffs" for further background.

The April 9 executive order also suspended the country-specific tariffs effective April 10 until July 9, 2025, a total of 90 days. The additional 10% tariff for most trading partners is still in effect.

The Trump Administration applied a novel methodology to calculate the tariffs imposed in accordance with the April 2 executive order. Although the April 2 executive order cites nontariff barriers, including technical barriers to trade (TBT) and "sanitary and phytosanitary [SPS] measures that unnecessarily restrict trade without furthering safety objectives," as factors contributing to the persistent U.S. trade deficit, the methodology of calculating the country-specific "reciprocal tariffs" is not based on estimates of tariff and nontariff barriers implemented by countries on U.S.-specific or broader categories of products.[22] Instead, the "reciprocal tariff" calculations are based on the 2024 bilateral trade deficit with a country divided by the 2024 value of that country's imports into the United States, divided by two, making the assumption that the resulting tariff rate would "offset" any tariff and nontariff policies applied by the foreign country.[23] Many economists have questioned both the use of this methodology to calculate

[18] Executive Order 14257 of April 2, 2025, "Regulating Imports with a Reciprocal Tariff to Rectify Trade Practices That Contribute to Large and Persistent Annual United States Goods Trade Deficits."

[19] Oliver Ward, "Some Key Ag Inputs Exempt from Sweeping New Duties," April 4, 2025; and Ryan Hanrahan, "Key Ag Inputs Exempt from New Reciprocal Tariffs," *Farm Policy News*, April 7, 2025. A full list of products exempt from the April 2 tariffs can be found at https://www.whitehouse.gov/wp-content/uploads/2025/04/Annex-II.pdf.

[20] Executive Order 14259 of April 8, 2025, "Amendment to Reciprocal Tariffs and Updated Duties as Applied to Low-Value Imports from the People's Republic of China," 90 *Federal Register* 15509, April 14, 2025.

[21] Executive Order 14266 of April 9, 2025, "Modifying Reciprocal Tariff Rates to Reflect Trading Partner Retaliation and Alignment," 90 *Federal Register* 15625, April 15, 2025.

[22] USTR, "Reciprocal Tariff Calculations," accessed May 27, 2025, https://ustr.gov/sites/default/files/files/Issue_Areas/Presidential%20Tariff%20Action/Reciprocal%20Tariff%20Calculations.pdf. *Technical barriers to trade (TBT) measures* are related to mandatory compliance with regulatory requirements, voluntary standards, and conformity assessment procedures required by regulations or standards. *Sanitary and phytosanitary (SPS) measures* are laws, regulations, standards, and procedures that governments enforce to protect human, animal, or plant life or health.

[23] USTR, "Reciprocal Tariff Calculations," accessed April 4, 2025, https://ustr.gov/issue-areas/reciprocal-tariff-calculations.

country-specific tariffs and the Administration's claim that the tariff rates capture barriers to U.S. exports.[24] In the past, USDA's Economic Research Service (ERS) and other researchers have estimated the tariff equivalent of TBT and SPS measures for specific agricultural products or product groups, such as in a 2015 study on nontariff measures between the United States and EU.[25]

On May 12, 2025, the United States and China issued a joint statement that reduced U.S. "reciprocal tariffs" to 10% and China's retaliatory tariffs to the "reciprocal tariffs" to 10% effective May 14 for 90 days.[26]

Section 232 Steel, Aluminum, and Automotive Tariffs

On February 10, 2025, President Trump issued proclamations effective March 12, 2025, that modified tariffs on steel and aluminum, authorized under Section 232 of the Trade Expansion Act of 1962.[27] These tariffs were originally imposed during the first Trump Administration. The changes included eliminating country exemptions from tariffs negotiated during the Biden and first Trump Administrations. Effective April 4, 2025, certain beer products as aluminum derivative products were added to the list of imports subject to a Section 232 tariff of 25%.[28]

[24] Glenn Kessler, "Trump White House Cited Economists for Its Tariff Formula. They Pan It," *Washington Post*, April 4, 2025; Robert Farley and D'Angelo Gore, "Fact Check: Trump's Misleading Tariff Chart," *Roll Call*, April 4, 2025; Peter Foster and Sam Fleming, "Donald Trump Baffles Economists with Tariff Formula," *Financial Times*, April 3, 2025; Kevin Corinth and Stan Veuger, "President Trump's Tariff Formula Makes No Economic Sense. It's Also Based on an Error," American Enterprise Institute, April 4, 2025; Brent Neiman, "The Trump White House Cited My Research to Justify Tariffs. It Got It All Wrong," *New York Times*, April 7, 2025; Anjali V. Bhatt, "PIIE Experts React to Trump's Tariffs Announced April 2," Peterson Institute for International Economics, April 3, 2025; and Alan Cole, "Trump's Reciprocal Tariff Calculations Are Nonsense, Will Punish Mutually Beneficial Trade," Tax Foundation, April 3, 2025.

[25] Shawn Arita et al., *Estimating the Effects of Selected Sanitary and Phytosanitary Measures and Technical Barriers to Trade on U.S.-EU Agricultural Trade*, USDA, ERS, November 10, 2015. Other examples of studies estimating tariff equivalents on on-tariff measures include Olivier Cadot et al., *Estimating Ad Valorem Equivalents of Non-Tariff Measures: Combining Price-Based and Quantity-Based Approaches*, Organisation for Economic Co-operation and Development (OECD), OECD Trade Policy Papers No. 215, May 16, 2018; Xin Ning and Jason H. Grant, "New Estimates on the Ad-Valorem Equivalents of SPS Measures: Evidence from Specific Trade Concerns," selected paper prepared for presentation at the International Agricultural Trade Research Consortium's 2019 Annual Meeting, Washington, DC, December 2019; and Rui Mao et al., "Economic and Environmental Impacts of Agricultural Non-Tariff Measures: Evidence Based on *Ad Valorem* Equivalent Estimates," *International Food and Agribusiness Management Review*, vol. 26, no. 3 (2023), pp. 379-396.

[26] White House, "Joint Statement on U.S.-China Economic and Trade Meeting in Geneva," May 12, 2025, https://www.whitehouse.gov/briefings-statements/2025/05/joint-statement-on-u-s-china-economic-and-trade-meeting-in-geneva/.

[27] Proclamation 10896 of February 10, 2025, "Adjusting Imports of Steel into the United States," 90 *Federal Register* 9817, February 18, 2025; and Proclamation 10895 of February 10, 2025, "Adjusting Imports of Aluminum into the United States," 90 *Federal Register* 9807, February 18, 2025. For more information on Section 232 steel and aluminum tariffs, see CRS Insight IN12519, *Expanded Section 232 Tariffs on Steel and Aluminum*.

[28] Department of Commerce, Bureau of Industry and Security, "Implementation of Duties on Aluminum Derivatives Beer and Empty Aluminum Cans Pursuant to Proclamation 10895 Adjusting Imports of Aluminum into the United States," 90 *Federal Register* 14786, April 2025; and U.S. Customs and Border Protection (CBP), *Cargo Systems Messaging Service # 64639013—Guidance: Section 232 Additional Aluminum Derivative Products*, April 3, 2025, https://content.govdelivery.com/bulletins/gd/usdhscbp-3da5025?wgt_ref=usdhscbp_widget_2. CBP indicated that beer classified under the Harmonized Tariff Schedule of the United States not in glass containers would be subject to the 25% tariff under Section 232.

Separately, on March 26, 2025, President Trump announced Section 232 tariffs on U.S. imports of automobiles effective April 3 and certain automobile parts effective May 3.[29]

Some U.S. trading partners, such as Canada and the EU, announced retaliatory tariffs in response to Section 232 steel, aluminum, and automotive tariffs. To date, only the EU retaliatory tariffs have stated plans to target U.S. agricultural exports.[30]

What Retaliatory Tariffs Have Been Imposed on U.S. Agriculture in 2025?

In 2025, Canada, China, and the EU announced and/or imposed retaliatory tariffs that targeted U.S. agriculture.[31]

Canada's Retaliatory Tariffs

On March 4, 2025, Canada implemented retaliatory tariffs of 25% on select U.S. imports in response to the IEEPA tariffs on Canadian imports that went into effect the same day.[32] According to analysis of 2024 Canadian import statistics, these tariffs targeted approximately $5.9 billion in U.S. agricultural goods.[33] By value, about 90% of the U.S. products facing retaliatory tariffs were consumer-oriented goods, including coffee, tea, orange juice, alcoholic beverages (i.e., beer, wine, distilled spirits), pasta, fruits (e.g., oranges, peaches), vegetables (e.g., tomatoes, preserved cucumbers), pecans, poultry, sausages, condiments (e.g., ketchup, mayonnaise, soy sauce), confections, dairy products (e.g., whey, cheese, milk), and tobacco products.

Canada announced its intention to implement a second round of tariffs on a proposed list of additional U.S. goods to be subject to a 25% tariff.[34] Products proposed for additional retaliation include meat (e.g., beef, pork, poultry), additional dairy products (e.g., butter, cheese), baked goods (e.g., toasted bread, waffles), nonbeverage ethanol, additional fruits (e.g., apples, cherries, strawberries), additional vegetables (e.g., onions, asparagus, lettuce), and tree nuts (e.g., almonds, walnuts).

Mexico's Retaliatory Tariffs

President of Mexico Claudia Sheinbaum reportedly planned to announce tariff and nontariff measures in response to the IEEPA tariffs on March 9 but instead held a "festival" to celebrate the

[29] Proclamation 10908 of March 26, 2025, "Adjusting Imports of Automobiles and Automobile Parts into the United States," 90 *Federal Register* 14705, April 3, 2025. For more background, see CRS Insight IN12545, *Section 232 Automotive Tariffs: Issues for Congress*.

[30] In May 2025, the United Kingdom and India notified the WTO of a proposed increase in tariffs on U.S. imports in response to the U.S. Section 232 steel and aluminum tariffs. Similarly, Japan notified the WTO of a proposed increase in tariffs on U.S. imports in response to the U.S. Section 232 tariffs on steel, aluminum, automobiles, and automobile parts. Neither country has released a list of products targeted for retaliation nor imposed retaliatory tariffs.

[31] For more background, see CRS Report R48549, *Presidential 2025 Tariff Actions: Timeline and Status*.

[32] Government of Canada, "List of Products from the United States Subject to 25 Per Cent Tariffs Effective March 4, 2025," March 4, 2025, https://www.canada.ca/en/department-finance/news/2025/03/list-of-products-from-the-united-states-subject-to-25-per-cent-tariffs-effective-march-4-2025.html. Canada originally planned to implement retaliatory tariffs on February 4, 2025, but delayed for another month after the United States delayed its 25% tariffs on Canada.

[33] CRS calculations from Trade Data Monitor and Statistics Canada.

[34] Government of Canada, "Notice of Intent to Impose Countermeasures in Response to United States Tariffs on Canadian Goods," March 7, 2025, https://www.canada.ca/en/department-finance/programs/consultations/2025/notice-intent-impose-countermeasures-response-united-states-tariffs-on-canadian-goods.html.

suspension of U.S. tariffs.[35] On March 7, President Sheinbaum stated that Mexico "would like to avoid imposing reciprocal tariffs" on U.S. goods and continue its dialogue with the United States but also would not rule out retaliatory tariffs.[36]

China's Retaliatory Tariffs

On February 10, China imposed retaliatory tariffs on certain U.S. goods in response to the 10% IEEPA tariffs on imports from China. These included a 10% tariff on U.S. agricultural machinery.[37] On March 10, China imposed additional tariffs of 10% or 15% in response to the United States' March 3 announcement of a 10% increase of tariffs on imported goods from China.[38] These tariffs included mostly agricultural products. According to 2024 import statistics of China, these tariffs targeted about $21.2 billion worth of U.S. agricultural imports.[39] By value, about 80% of the products facing retaliatory tariffs are bulk commodities, such as soybeans, cotton, sorghum, wheat, corn, and pulses. Consumer-oriented products targeted for retaliatory tariffs include beef, pork, poultry, dairy products (e.g., milk albumin, ice cream, cheese), fruit (e.g., cherries, oranges, apples), and tree nuts (e.g., pistachios, almonds, walnuts). Most of these products had faced retaliatory tariffs imposed by China during the first Trump Administration.

On April 4, 2025, in response to the United States' 34% IEEPA "reciprocal tariff" on imports from China, China announced an additional 34% tariff on all U.S. goods effective April 10.[40] On April 9, following the U.S. announcement that the "reciprocal tariff" on imports from China was increasing from 34% to 84%, China announced that it was increasing its original additional 34% tariff on U.S. goods to 84% effective April 10.[41] On April 11, China further increased tariffs on U.S. goods from 84% to 125% effective April 12 in response to the United States' April 10 increase of "reciprocal tariffs" on imports from China from 84% to 125%.[42] On May 12, 2025,

[35] Fabiola Sánchez, "Tens of Thousands of Mexicans Rally with President to Celebrate US Decision to Delay Tariffs," Associated Press, March 9, 2025.

[36] Government of Mexico, "Versión estenográfica. Conferencia de prensa de la presidenta Claudia Sheinbaum Pardo del 7 de abril de 2025 [Stenographic Version. Press Conference of President Claudia Sheinbaum Pardo]," April 7, 2025, https://www.gob.mx/presidencia/articulos/version-estenografica-conferencia-de-prensa-de-la-presidenta-claudia-sheinbaum-pardo-del-7-de-abril-de-2025?idiom=es; and Raul Cortes and Kylie Madry, "Mexico Seeks to Avoid Retaliatory Tariffs Against US, but Not Ruling Them Out," Reuters, April 7, 2025.

[37] Ministry of Finance of the People's Republic of China, "国务院关税税则委员会关于对原产于美国的部分进口商品加征关税的公告 [Announcement of the Customs Tariff Commission of the State Council on Imposing Additional Tariffs on Certain Imported Goods from the United States]," February 4, 2025, https://www.mof.gov.cn/zhengwuxinxi/caizhengxinwen/202502/t20250204_3955222.htm. For more information about U.S.-China tariff actions, see CRS In Focus IF12990, *U.S.-China Tariff Actions Since 2018: An Overview*.

[38] Ministry of Finance of the People's Republic of China, "国务院关税税则委员会关于对原产于美国的部分进口商品加征关税的公告 [Announcement of the Customs Tariff Commission of the State Council on Imposing Additional Tariffs on Certain Imported Goods from the United States]," March 4, 2025, https://gss.mof.gov.cn/gzdt/zhengcefabu/202503/t20250304_3959228.htm.

[39] CRS calculations from Trade Data Monitor and China Customs Statistics.

[40] Ministry of Finance of the People's Republic of China, "国务院关税税则委员会关于对原产于美国的进口商品加征关税的公告 [Announcement of the Customs Tariff Commission of the State Council on Imposing Additional Tariffs on Imported Goods from the United States]," April 4, 2025, https://gss.mof.gov.cn/gzdt/zhengcefabu/202504/t20250404_3961451.htm.

[41] Ministry of Finance of the People's Republic of China, "国务院关税税则委员会关于调整对原产于美国的进口商品加征关税措施的公告 [Announcement of the Customs Tariff Commission of the State Council on Adjusting Tariff Measures on Imported Goods from the United States]," April 9, 2025, https://gss.mof.gov.cn/gzdt/zhengcefabu/202504/t20250409_3961684.htm.

[42] Ministry of Finance of the People's Republic of China, "国务院关税税则委员会关于调整对原产于美国的进口商 (continued...)

China and the United States issued a joint statement that reduced China's retaliatory tariffs to the U.S. "reciprocal tariffs" to 10%, while the United States reduced its "reciprocal tariffs" to 10% effective May 14, 2025, for 90 days.[43] See ""Reciprocal Tariffs" Addressing Trade Deficits" for further background.

European Union Retaliatory Tariffs

On March 12, 2025, the EU announced that it would allow the suspension of its 2018 and 2020 tariff countermeasures against the United States to lapse on April 1, in response to U.S. steel and aluminum tariffs.[44] These tariffs targeted about $1.3 billion worth of U.S. agricultural imports, according to 2024 EU import data.[45] Whiskey products, which were targeted with a 50% tariff, accounted for nearly half of the value of targeted imports. Other products targeted included corn, rice, tobacco products, peanut butter, cranberries, kidney beans, and peanut butter, all of which were subject to a 25% tariff, and essential oils, subject to a 10% tariff.

Additionally, the EU announced that it would gather information from stakeholders to determine which additional U.S. imports to target with tariffs.[46] Proposed additional targets include agricultural products such as poultry, beef, tree nuts, alcoholic beverages (e.g., beer, wine), dairy products, fruits, and vegetables.[47]

On March 20, the European Commissioner for Trade and Economic Security announced that the EU would postpone the first set of tariffs set to be imposed on April 1 to mid-April.[48] The commissioner explained that the EU is considering aligning the timing of the two sets of countermeasures to consult with EU member states on both lists simultaneously in light of proposed additional U.S. tariffs for April 2.

On April 7, 2025, President of the European Commission Ursula von der Leyen stated that the EU is ready to negotiate with the United States and offered "zero-for-zero tariffs for industrial goods."[49] In past trade negotiations, agriculture has been a contentious issue between the two trading partners because of key differences in agricultural regulatory issues (e.g., EU

品加征关税措施的公告 [Announcement of the Customs Tariff Commission of the State Council on Adjusting Additional Tariff Measures on Imported Goods from the United States]," April 11, 2025, https://gss.mof.gov.cn/gzdt/zhengcefabu/202504/t20250411_3961823.htm.

[43] Ministry of Commerce of the People's Republic of China, "中美日内瓦经贸会谈联合声明 [Joint Statement on China-U.S. Economic and Trade Meeting in Geneva]," May 12, 2025, https://www.mofcom.gov.cn/xwfb/ldrhd/art/2025/art_8055948aadb5450598bf73d1aae6828e.html.

[44] European Commission (EC), "Commission Responds to Unjustified US Steel and Aluminium Tariffs with Countermeasures," March 12, 2025, https://ec.europa.eu/commission/presscorner/detail/en/ip_25_740.

[45] CRS calculations from Trade Data Monitor and Eurostat.

[46] EC, "Information Gathering Notice Under Regulation (EU) No 654/2014 on the New US Tariffs on Steel and Aluminium Products, and Possible EU Rebalancing Measures in Response," March 12, 2025, https://policy.trade.ec.europa.eu/consultations/information-gathering-notice-under-regulation-eu-no-6542014-new-us-tariffs-steel-and-aluminium_en.

[47] EC, "EU Countermeasures on US Steel and Aluminium Tariffs Explained," March 11, 2025, https://ec.europa.eu/commission/presscorner/api/files/document/print/en/qanda_25_750/QANDA_25_750_EN.pdf.

[48] EC, "Remarks by Commissioner Šefčovič at the Joint Hearing of the Committee on International Trade on Trade Relations with the United States and a Structured Dialogue," March 20, 2025, https://ec.europa.eu/commission/presscorner/api/files/document/print/en/speech_25_840/SPEECH_25_840_EN.pdf.

[49] EC, "Press Statement by President von der Leyen with Norwegian Prime Minister Støre," April 7, 2025, https://ec.europa.eu/commission/presscorner/api/files/document/print/en/statement_25_996/STATEMENT_25_996_EN.pdf.

biotechnology approval process, use of growth promotants in U.S. meat production, and geographical indications).[50]

On April 10, following the 90-day postponement of the United States' country-specific "reciprocal tariffs," President von der Leyen announced a hold for 90 days on retaliatory tariffs that were set to go into effect April 15.[51] On April 14, the EU released a list of U.S. products to be subject to retaliatory tariffs and suspended all planned tariff measures until July 14, 2025.[52] Bulk commodities targeted include soybeans, corn, durum wheat, and rice. Consumer-oriented products targeted include almonds, beef, processed cranberries, tobacco products, cranberry and orange juices, spices, peanut butter, dried egg yolk, bakery goods and pasta, and ice cream. Tariff rates for agricultural products listed are 25%, except for essential oils, which would face a 10% tariff. The EU-proposed tariffs targeted about $5.3 billion worth of U.S. agricultural products, according to 2024 EU import data.[53]

On May 8, 2025, the EU launched a public consultation on a list of U.S. agricultural and industrial imports that would be subject to retaliatory tariffs.[54] The consultation is in response to U.S. "reciprocal tariffs" and U.S. tariffs on automobiles and certain automobile parts.

2018 Through 2023 Trade Actions

What Retaliatory Tariffs Were Imposed on U.S. Agriculture in 2018 and 2019?

In response to U.S. tariff actions in 2018, certain trading partners of the United States responded with retaliatory tariffs on U.S. goods, including agricultural products.[55] In April 2018, China responded to U.S. Section 232 steel and aluminum tariffs with retaliatory tariffs on certain U.S. imports, including agricultural products (e.g., fruit, ginseng, pork, tree nuts, wine). In June 2018, Mexico, the EU, and Turkey responded to Section 232 tariffs with retaliatory tariffs. The agricultural products targeted included pork products, cheese, apples, potatoes, cranberries, and whiskey by Mexico; corn, rice, sweet corn, kidney beans, certain breakfast cereals, peanut butter, orange juice, cranberry juice, whiskey, cigars, tobacco products, and essential oils by the EU; and tree nuts, rice, and tobacco by Turkey. In July 2018, Canada responded with retaliatory tariffs on U.S. products, including dairy, poultry, and beef products; coffee, chocolate, sugar, and

[50] For more background about U.S.-European Union agricultural trade relations, see CRS Report R47095, *U.S.-EU Trade Relations*; and CRS Report R46241, *U.S.-EU Trade Agreement Negotiations: Trade in Food and Agricultural Products*.

[51] EC, "Statement by President von der Leyen," April 10, 2025, https://ec.europa.eu/commission/presscorner/api/files/document/print/en/statement_25_1036/STATEMENT_25_1036_EN.pdf; and EC, "Commission Proposal to Impose Trade Countermeasures Against US Obtains Necessary Support from EU Member States," April 9, 2025, https://ec.europa.eu/commission/presscorner/api/files/document/print/en/statement_25_1025/STATEMENT_25_1025_EN.pdf.

[52] EC, "EU Pauses Countermeasures Against US Tariffs to Allow Space for Negotiations," April 14, 2025, https://ec.europa.eu/commission/presscorner/detail/en/ip_25_1058. The EU originally planned to implement tranches of retaliatory tariffs effective April 15, May 16, and December 1, 2025, prior to the April 14 postponement announcement.

[53] CRS calculations from Trade Data Monitor and Eurostat.

[54] EC, "Commission Consults on Possible Countermeasures and Readies WTO Litigation in Response to US Tariffs," May 8, 2025, https://ec.europa.eu/commission/presscorner/api/files/document/print/en/ip_25_1149/IP_25_1149_EN.pdf.

[55] For background, see CRS Report R45903, *Retaliatory Tariffs and U.S. Agriculture*; and CRS Report R45929, *China's Retaliatory Tariffs on U.S. Agriculture: In Brief*.

confectionery; prepared food products; condiments; bottled water; and whiskies. India imposed retaliatory tariffs in June 2019 targeting U.S. chickpeas, almonds, walnuts, apples, and lentils.

Separate from the Section 232 tariffs and retaliatory tariffs, the United States also imposed tariffs on China under Title III of the Trade Act of 1974 (19 U.S.C. §§2411-2420), commonly referred as "Section 301," starting in July 2018. Between 2018 and 2019, the United States and China imposed several rounds of tariffs and retaliatory tariffs. Nearly all U.S. agricultural products faced retaliatory tariffs. In September 2019, China announced a tariff exclusion list for certain U.S. products subject to Section 301 retaliatory tariffs, including agricultural products such as alfalfa and whey for feed use.[56] In February 2020, China announced a tariff exclusion process for Chinese companies impacted by the Section 301 retaliatory tariffs on U.S. imports.[57]

According to one analysis, during the 2018/2019 trade conflict, agricultural products accounted for 68% of China's Section 232 retaliation, 22% of China's Section 301 retaliation, 33% of the EU's retaliation, 20% of Canada's retaliation, 79% of Mexico's retaliation, nearly 20% of Turkey's retaliation, and 61% of India's retaliation.[58]

In May 2019, the United States removed Section 232 tariffs on Canada and Mexico, and in turn, Canada and Mexico removed retaliatory tariffs on the United States to facilitate the ratification of USMCA.[59]

Following an October 2021 agreement between the United States and the EU on the Section 232 tariffs, the EU suspended retaliatory tariffs that included U.S. agricultural products from January 2022 to the end of December 2023, and later extended the suspension to the end of March 2025.[60] The EU postponed imposing retaliatory tariffs in order to assess the planned U.S. April 2, 2025, "reciprocal tariffs" announcement and postponed again in response to the U.S. 90-day pause of country-specific "reciprocal tariffs."[61] EU retaliatory tariffs are suspended until July 14, 2025. See "European Union Retaliatory Tariffs" for further background.

The United Kingdom (UK) suspended Section 232 retaliatory tariffs effective June 2022.[62] The UK inherited the original EU retaliatory tariffs when the UK separated from the EU customs union in January 2021.

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[56] USDA, FAS, *Outcome of Batch One of China's Tariff Exclusion Process*, GAIN Report CH19061, September 18, 2019, https://apps.fas.usda.gov/newgainapi/api/Report/DownloadReportByFileName?fileName=Outcome%20of%20Batch%20One%20of%20China%E2%80%99s%20Tariff%20Exclusions%20Process%20_Beijing_China%20-%20Peoples%20Republic%20of_9-17-2019.

[57] USDA, FAS, *China Announces a New Round of Tariff Exclusions*, GAIN Report CH2020-0017, February 26, 2020, https://apps.fas.usda.gov/newgainapi/api/Report/DownloadReportByFileName?fileName=China%20Announces%20a%20New%20Round%20of%20Tariff%20Exclusions_Beijing_China%20-%20Peoples%20Republic%20of_02-18-2020.

[58] Jason H. Grant et al., "Agricultural Exports and Retaliatory Trade Actions: An Empirical Assessment of the 2018/2019 Trade Conflict," *Applied Economic Perspectives and Policy*, vol. 43, no. 2 (June 2021), p. 18.

[59] Ana Swanson and Dan Bilefsky, "United States Reaches Deal to Lift Metal Tariffs on Canada and Mexico," *New York Times*, May 17, 2019.

[60] EC, "EU Prolongs Tariff Suspension for US Products Related to the Steel and Aluminium Dispute," December 19, 2023, https://ec.europa.eu/commission/presscorner/api/files/document/print/en/ip_23_6713/IP_23_6713_EN.pdf.

[61] EC, "EU Countermeasures on US Steel and Aluminium Tariffs Explained," March 11, 2025, https://ec.europa.eu/commission/presscorner/api/files/document/print/en/qanda_25_750/QANDA_25_750_EN.pdf; and EC, "EU Pauses Countermeasures Against US Tariffs to Allow Space for Negotiations," April 14, 2025, https://ec.europa.eu/commission/presscorner/detail/en/ip_25_1058.

[62] Government of the United Kingdom, "UK and US Resolve Steel and Aluminium Tariffs Issue," March 22, 2022, https://www.gov.uk/government/news/uk-and-us-resolve-steel-and-aluminium-tariffs-issue.

In September 2023, India removed retaliatory tariffs on U.S. almonds, apples, chickpeas, lentils, and walnuts following a June 2023 resolution between the United States and India that terminated six nonagricultural WTO disputes.[63]

Were U.S. Agricultural Exports Affected by Retaliatory Tariffs?

The retaliatory tariffs were one of many factors that influenced agricultural exports. **Table 3** displays U.S. agricultural exports to retaliating and non-retaliating trading partners from 2017 to 2020 in nominal values. Although China, Canada, Mexico, the EU, and Turkey imposed retaliatory tariffs in the spring and summer of 2018, total U.S. agricultural exports from 2017 compared to 2018 increased by 1%. While exports to China declined by 53%, other U.S. agricultural export markets (e.g., the EU, Vietnam, South Korea, Egypt) saw an increase of exports that offset the decline in exports to China. The total value of U.S. agricultural exports declined in 2019 and 2020 relative to 2018 levels and remained similar to 2017 levels. Although foreign tariffs impact the competitiveness of U.S. agricultural exports in relation to other foreign suppliers, other factors may contribute to U.S. trade flows because of unique dynamics of specific commodities. This section provides a snapshot of select major U.S. agricultural exports between 2017 and 2020 that were impacted by retaliatory tariffs, to illustrate the role of tariffs and nontariff factors on agricultural trade flows.

Table 3. U.S. Agricultural Exports to Retaliating and Non-Retaliating Trading Partners, 2017 to 2020

In Billions of Dollars (nominal)

Trading Partner	2017	2018	2019	2020
U.S. exports to retaliating trading partners				
China	19.6	9.2	13.9	26.4
Canada	21.7	22.0	21.9	22.3
Mexico	18.8	19.3	19.4	18.3
EU-28	12.4	14.5	12.6	12.1
India	1.9	1.8	2.1	1.7
Turkey	1.8	1.5	1.3	1.2
U.S. exports to non-retaliating trading partners	66.7	76.4	69.9	67.6
Total U.S. agricultural exports	**142.9**	**144.7**	**141.1**	**149.7**

Source: CRS from USDA, GATS data (BICO-10).

Notes: Data are not just adjusted for inflation. Values may not sum to totals shown because of rounding. EU-28 = the European Union customs union and its 28 member countries, which included the United Kingdom until it left in January 2021.

Soybeans

Table 4 presents annual total U.S. soybean exports from 2017 to 2020, broken down by major markets (i.e., China, the EU, Mexico, and Egypt) and the rest of the world combined. China imposed retaliatory tariffs on U.S. soybeans starting in 2018, which is reflected in a 74% decline

[63] USDA, FAS, *Success Story – India Cuts Retaliatory Tariffs on US Almonds-Apples-Walnuts-Chickpeas-Lentils*, GAIN Report IN2023-0066, September 12, 2023 and USTR, "United States Announces Major Resolution on Key Trade Issues with India," June 22, 2023.

in exports by value in 2018 compared to 2017. Between 2009 and 2017, nearly 60% of U.S. soybean exports by value on average were destined for China. Other U.S. trading partners such as the EU, Mexico, and Egypt increased imports of U.S. soybeans but not at levels to replace the shortfall from the decline of China's imports. USDA attributed the increased imports of U.S. soybeans from trading partners other than China to factors such as more competitive prices of U.S. soybeans following China's retaliatory tariffs, Brazil-sourced soybeans commanding a price premium, and tighter supplies from Argentina because of drought.[64] Another factor that may have affected China's imports for soybeans from the United States and other suppliers was dampened demand for animal feed because of the spread of African swine fever in China beginning in the summer of 2018 and the culling of 750,000 to 1.1 million swine.[65]

Table 4. U.S. Soybean Exports, 2017 to 2020

In Millions of Dollars (nominal)

Trading Partner	2017	2018	2019	2020
China	12,224.4	3,119.2	8,004.9	14,065.7
EU-28	1,636.7	3,077.5	1,953.2	1,970.8
Mexico	1,574.2	1,818.0	1,878.1	1,879.8
Egypt	364.5	1,163.5	994.7	1,486.2
Rest of world	5,656.5	7,879.8	5,862.8	6,113.7
Total U.S. soybean exports	**21,456.3**	**17,058.1**	**18,693.6**	**25,516.2**

Source: CRS from USDA, GATS data (BICO-10).

Notes: Data are not adjusted for inflation. Values may not sum to totals shown because of rounding. EU-28 = the European Union customs union and its 28 member countries, which included the United Kingdom until it left in January 2021.

Corn

Annual total U.S. corn exports from 2017 to 2020 are displayed in **Table 5**, broken down by select markets and the rest of the world. China and the EU imposed tariffs on U.S. corn in 2018. In 2018, EU imports initially surged prior to the imposition of June 2018 retaliatory tariffs and dwindled afterward, which resulted in a total of about $320 million of U.S. corn exported to the EU in 2018, which dropped to about $510,000 in 2019. U.S. corn exports to China also saw declines in 2018 and 2019 compared to 2017. Historically, U.S. corn exports to China varied from year to year even before the implementation of retaliatory tariffs. The United States has cited past issues affecting U.S. corn market access into China, including China's biotechnology policy, policy in liquidating domestic corn stocks, and lack of transparency in how China administers its tariff-rate quota for corn (as well as rice and wheat).[66] According to USDA, multiple factors

[64] USDA, FAS, *EU-28: Oilseeds and Products Update – Lowest Rapeseed Crop in Over a Decade*, GAIN Report AU1907, September 12, 2019; USDA, FAS, *Mexico: Oil Seeds and Products Annual: Lack of Supports to Slow Oilseed Production, While Meal and Oil Remain Stable*, GAIN Report MX9014, April 1, 2019; and USDA, FAS, *Egypt: Oilseeds and Products Annual 2019: U.S. Soybean Exports to Egypt Skyrocket, Volume Likely to Continue Through 2020*, GAIN Report EG19004, March 31, 2019.

[65] Stephen Morgan et al., *The Economic Impacts of Retaliatory Tariffs on U.S. Agriculture*, USDA, ERS, January 2022, p. 25; and Fred Gale et al., *How China's African Swine Fever Outbreaks Affected Global Pork Markets*, USDA, ERS, November 2023, p. 12.

[66] USTR, *2019 Report to Congress on China's WTO Compliance*, March 2020, p. A-69; and USTR, *2022 Report to Congress on China's WTO Compliance*, February 2023, pp. 31-32. Tariff-rate quotas (TRQs) are two-tiered (continued...)

contributed to the decline in U.S. corn exports in 2019, including higher U.S. prices due to reduced production and strong domestic use for feed and ethanol, and export competition from Argentina, Brazil, and Ukraine.[67] In 2020, U.S. corn exports to China increased 2,136% from the previous year following the U.S.-China Phase One Agreement and China's exclusions for Section 301 retaliatory tariffs on agricultural products.[68]

Table 5. U.S. Corn Exports, 2017 to 2020

In Millions of Dollars (nominal)

Trading Partner	2017	2018	2019	2020
Mexico	2,645.5	3,060.8	2,735.9	2,685.2
Japan	2,163.4	2,813.0	2,011.2	1,855.5
China	142.0	50.2	55.5	1,240.5
Colombia	784.7	927.3	682.5	879.2
South Korea	705.4	1,355.7	358.7	548.1
EU-28	113.2	319.8	0.5	0.4
Rest of world	2,576.4	3,945.5	1,826.4	2,037.1
Total U.S. corn exports	**9,130.6**	**12,472.4**	**7,670.6**	**9,245.9**

Source: CRS from USDA, GATS data (BICO-10).

Notes: Data are not just adjusted for inflation. Values may not sum to totals shown because of rounding. EU-28 = the European Union customs union and its 28 member countries, which included the United Kingdom until it left in January 2021.

Tree Nuts

Table 6 displays U.S. tree nut exports, broken down by top export markets in addition to Turkey and the rest of the world. Starting in mid-2018, China and Turkey imposed retaliatory tariffs on U.S. tree nuts (e.g., almonds, cashews, pistachios, walnuts). In June 2019, India imposed retaliatory tariffs on U.S. almonds and walnuts. Generally, from 2017 to 2020, U.S. exports of tree nuts by value increased yearly despite the imposition of retaliatory tariffs. USDA attributed strong domestic demand in China and India for tree nuts as driving U.S. export growth.[69] Other factors that favored U.S. tree nut export growth were the United States' share in world production and trade, particularly for almonds and walnuts, as well as a steep drop-off in Iranian pistachio production and exports because of a weather shock in marketing year 2018/2019.[70] Despite Turkey's retaliatory tariffs, the United States was still a major source of almond and walnut imports for Turkey but with decreasing market share after 2018.[71]

applications of tariffs for an imported product. A specified quantity of imports (in-quota) enters the importing country at a reduced tariff rate. Imports that exceed the quantity (out-of-quota or over-quota) typically face higher tariffs.

[67] USDA, FAS, *2019 United States Agricultural Export Yearbook*, July 22, 2020, pp. 5-6.

[68] USDA, FAS, *2020 United States Agricultural Export Yearbook*, April 5, 2021, p. 6; and USDA, FAS, *China: Grain and Feed Annual*, GAIN Report CH2020-0048, April 6, 2020.

[69] USDA, FAS, *2019 United States Agricultural Export Yearbook*, pp. 27-28; and USDA, FAS, *2020 United States Agricultural Export Yearbook*, pp. 29-30.

[70] USDA, FAS, *2019 United States Agricultural Export Yearbook*, p. 28; and USDA, FAS, *2020 United States Agricultural Export Yearbook*, p. 30; and USDA, FAS, *Tree Nuts: World Markets and Trade*, February 2019.

[71] USDA, FAS, *Turkey: Tree Nuts Annual*, GAIN Report TU2020-0031, September 23, 2020.

Table 6. U.S. Tree Nut Exports, 2017 to 2020

In Millions of Dollars (nominal)

Trading Partner	2017	2018	2019	2020
EU-28	2,707.2	2,768.5	3,114.9	2,877.8
India	738.0	662.5	823.2	913.6
China	242.9	328.3	605.4	747.2
Canada	642.7	695.8	697.4	738.2
Turkey	308.4	278.9	340.4	249.8
Rest of world	3,840.0	3,781.3	3,493.2	2,873.0
Total U.S. tree nut exports	**8,479.4**	**8,515.5**	**9,074.5**	**8,399.6**

Source: CRS from USDA, GATS data (BICO-10).

Notes: Data are not just adjusted for inflation. Values may not sum to totals shown because of rounding. EU-28 = the European Union customs union and its 28 member countries, which included the United Kingdom until it left in January 2021.

Pork

Table 7 displays U.S. pork and pork product exports, broken down by the top five export markets and the rest of the world. China and Mexico imposed tariffs on U.S. pork and pork product exports in mid-2018, with Mexico lifting tariffs in mid-2019. U.S. pork exports to China dropped 14% by value between 2017 and 2018. In 2019, U.S. pork exports to China rebounded despite the retaliatory tariffs, which USDA attributes to decreased domestic pork production in China caused by African swine fever outbreaks.[72] U.S. pork exports to Mexico declined 13% by value from 2017 to 2018, while Canada gained market share in 2018.[73] Despite Mexico lifting its tariffs, U.S. pork exports declined from 2018 to 2020, which USDA attributes to strong domestic production, a weak Mexican economy, and depreciation of the peso.[74]

[72] USDA, FAS, *China: Livestock and Products Annual*, GAIN Report CH2019-0205, August 7, 2020; Fred Gale et al., *How China's African Swine Fever Outbreaks Affected Global Pork Markets*, pp. 20-21; and Frank Kyekyeku Nti et al., "Impact of Retaliatory Tariffs on the U.S. Pork Sector," *Choices* (Quarter 4, 2019).

[73] USDA, FAS, *Mexico: Livestock and Products Annual: Higher Pork Consumption Drives Production as Mexico Increases Exports of Pork and Beef*, GAIN Report MX9027, August 15, 2019; and Frank Kyekyeku Nti et al., "Impact of Retaliatory Tariffs on the U.S. Pork Sector."

[74] USDA, FAS, *2019 United States Agricultural Export Yearbook*, p. 17; and USDA, FAS, *2020 United States Agricultural Export Yearbook*, p. 17.

Table 7. U.S. Pork and Pork Product Exports, 2017 to 2020

In Millions of Dollars (nominal)

Trading Partner	2017	2018	2019	2020
China	662.3	570.9	1,300.2	2,279.8
Japan	1,625.9	1,630.5	1,523.4	1,622.9
Mexico	1,514.1	1,310.7	1,278.4	1,162.3
Canada	792.8	764.8	801.8	854.0
South Korea	475.1	670.3	592.9	452.6
Rest of world	1,415.0	1,455.4	1,454.8	1,347.8
Total U.S. pork and pork products	**6,485.1**	**6,402.8**	**6,951.5**	**7,719.6**

Source: CRS from USDA, GATS data (BICO-10).

Notes: Data are not just adjusted for inflation. Values may not sum to totals shown because of rounding.

Were U.S. Farm Sector Sales Affected by Retaliatory Tariffs?

The retaliatory tariffs were one of many factors that influenced U.S. farm sector sales. The farm sector earns revenue from the sales of crops, livestock, and animal products. The total value of these commodities was approximately $370 billion in 2017, $372 billion in 2018, $369 billion in 2019, and $368 billion in 2020 (**Table 8**). Compared to 2017 levels, the total value of crops, livestock, and animal products sold was approximately $1.6 billion higher in 2018, $1.1 billion lower in 2019, and $2.9 billion lower in 2020.

Table 8. Value of Crops, Livestock, and Animal Products Sold, 2017 to 2020

In Billions of Dollars (nominal)

Commodity Type	2017	2018	2019	2020
Crops				
Cotton	$7.57	$7.48	$6.82	$6.81
Feed crops	$53.92	$57.29	$58.42	$57.52
Food grains	$11.20	$12.13	$11.51	$11.78
Fruits and nuts	$30.59	$29.35	$29.19	$27.83
Oil crops	$41.09	$39.47	$36.22	$43.84
Tobacco	$1.38	$1.22	$0.96	$0.82
Vegetables and melons	$20.50	$18.70	$19.11	$21.06
All other crops	$28.62	$30.35	$31.53	$32.83
Livestock and animal products				
Dairy products	$37.94	$35.24	$40.55	$40.36
Cattle and calves	$66.94	$67.18	$66.19	$63.32
Hogs	$21.04	$20.77	$21.76	$19.16
Miscellaneous livestock	$6.86	$6.94	$7.06	$7.00
Poultry and eggs	$42.79	$45.96	$40.00	$35.17
Total	**$370.44**	**$372.07**	**$369.32**	**$367.50**

Source: CRS calculations using USDA, Economic Research Service, "Farm Income and Wealth Statistics—Value Added by the U.S. Agricultural Sector, 2016-2025F," updated February 2025, https://data.ers.usda.gov/reports.aspx?ID=4047.

Notes: Feed crops include barley, corn, hay, oats, and grain sorghum. Food grains include rice, rye, and wheat. Dairy products includes milk.

While the total value of crops, livestock, and animal products sold remained relatively level from 2017 to 2020, sales were variable for all categories of commodities over this period. In 2018, the value of feed grains, food grains, cattle and calves, poultry and eggs, and all other crops increased relative to 2017 levels; the total value of other agricultural commodities sold declined in 2018 relative to 2017 levels (**Table 8**). In 2019, the value of feed grains, food grains, all other crops, dairy, hogs, and miscellaneous livestock increased relative to 2017 levels, while the total value for other agricultural commodities declined relative to 2017 levels.

Changes in market prices between 2017 and 2020 contributed to the changes in the values of commodities sold each year. For example, retaliatory tariffs imposed in 2018 targeted specific agricultural commodities, including almonds, fresh sweet cherries, corn, cotton, hogs, milk, sorghum, soybeans, and wheat. Compared to 2017, 2018 marketing year average prices were higher for corn, upland cotton, sorghum, and wheat and lower for the other targeted commodities (**Table 9**). Compared to 2017, 2019 marketing year average prices were higher for corn, milk, and sorghum and lower for the other targeted commodities. Compared to 2017, 2020 marketing year average prices were higher for fresh sweet cherries, corn, milk, sorghum, soybeans, and wheat and lower for the other targeted commodities.

Table 9. Marketing Year Average Prices for Selected Agricultural Commodities, 2017 to 2020

In Dollars per Unit (Nominal)

Commodity	Unit	2017	2018	2019	2020
Almonds	Pound	$2.53	$2.50	$2.45	$1.71
Cherries (fresh sweet)	Ton	$2.06	$1.83	$1.93	$2.92
Corn	Bushel	$3.36	$3.61	$3.56	$4.53
Cotton (extra long staple)	Pound	$1.39	$1.15	$1.06	$1.19
Cotton (upland)	Pound	$0.69	$0.70	$0.60	$0.66
Hogs	Hundredweight	$53.10	$50.20	$51.40	$46.90
Milk	Hundredweight	$17.69	$16.28	$18.65	$18.16
Sorghum	Hundredweight	$5.75	$5.82	$5.96	$9.00
Soybeans	Bushel	$9.33	$8.48	$8.57	$10.80
Wheat	Bushel	$4.72	$5.16	$4.58	$5.05

Source: CRS using USDA, National Agricultural Statistics Service, "Quick Stats," accessed March 14, 2025.

What Were the Economic Losses to the U.S. Agricultural Sector from Retaliatory Tariffs in 2018 and 2019?

Various studies have estimated losses to the U.S. agricultural sector associated with retaliatory tariffs; these studies employ different methodologies and provide differing estimates of losses

attributable to retaliatory tariffs.[75] Estimates of economic losses made by USDA's Office of the Chief Economist (OCE) in 2018 and 2019 had extra significance for policymakers as they were used to inform USDA's responses to retaliatory tariffs in 2018 and 2019 (see "USDA's Response to Retaliatory Tariffs").[76]

USDA OCE estimated that the 2018 economic losses were between $11 billion and $12 billion.[77] According to USDA figures reported by the Government Accountability Office (GAO), $10.2 billion of the estimated $11 billion to $12 billion were for losses to almonds, fresh sweet cherries, corn, cotton, dairy, hogs, sorghum, soybeans, and wheat.[78] According to USDA figures reported by GAO, USDA OCE estimated that the 2019 economic losses for agricultural and related commodities were approximately $16.9 billion.[79]

In January 2022, USDA ERS published updated estimates of trade losses. ERS reported estimates of approximately $27 billion in trade losses between July 2018 and December 2019.[80] ERS reported that China's retaliatory tariffs reduced the value of U.S. agricultural trade by approximately $25.7 billion, and retaliatory tariffs imposed by other countries reduced the value of U.S. agricultural trade by approximately $1.5 billion. ERS reported estimated annualized losses for some commodities, including $9.35 billion for soybeans, $854 million for sorghum, $646 million for pork, $618 million for fruits, $391 million for dairy, $366 million for cotton, $309 million for wheat, $219 million for tree nuts, $198 million for corn, and $46 million for rice.

USDA OCE estimated economic losses in 2018 and 2019 by projecting hypothetical scenarios of world trade that could have occurred had retaliatory tariffs not been imposed on U.S. agricultural products. USDA OCE made those projections before data on actual exports were available for the year as part of USDA's efforts to "craft a short-term relief strategy to protect agricultural producers" in accordance with Presidential directives.[81] Updating such projections with subsequently available data suggests that USDA OCE may have overestimated trade losses in 2018 and 2019. Actual agricultural exports were approximately $145 billion in 2018 and approximately $141 billion in 2019 (**Table 3**). These values compare to agricultural exports in 2015, 2016, and 2017 of $137 billion, $139 billion, and $143 billion, respectively. USDA's

[75] See, for example, USDA, ERS, *The Economic Impacts of Retaliatory Tariffs on U.S. Agriculture*, ERR-304, January 2022.

[76] USDA, *Cost Benefit Analysis: Market Facilitation Program*, July 24, 2018; USDA, "USDA Announces Support for Farmers Impacted by Unjustified Retaliation and Trade Disruption," press release, May 23, 2019; USDA Office of the Chief Economist (OCE), *Trade Damage Estimation for the Market Facilitation Program and Food Purchase and Distribution Program*, September 13, 2018; and USDA OCE, *Trade Damage Estimation for the 2019 Market Facilitation Program and Food Purchase and Distribution Program*, August 22, 2019.

[77] USDA, "USDA Assists Farmers Impacted by Unjustified Retaliation," press release, July 24, 2018, https://www.usda.gov/about-usda/news/press-releases/2018/07/24/usda-assists-farmers-impacted-unjustified-retaliation. In the press release, USDA stated that they were authorizing "up to $12 billion in programs, which is in line with the estimated $11 billion impact of the unjustified retaliatory tariffs on U.S. agricultural goods."

[78] CRS calculations using data in GAO, "Appendix III: 2018 MFP and 2019 MFP Trade Damage Estimate and Payment Methodologies," in *USDA Market Facilitation Program: Stronger Adherence to Quality Guidelines Would Improve Future Economic Analyses*, GAO-22-468, November 2021, https://www.gao.gov/assets/gao-22-468.pdf.

[79] CRS calculations using data in GAO, "Appendix III: 2018 MFP and 2019 MFP Trade Damage Estimate and Payment Methodologies," in *USDA Market Facilitation Program: Stronger Adherence to Quality Guidelines Would Improve Future Economic Analyses*. Related commodities included distiller's dried grains with solubles, ethanol, peanut butter, infant formula, ice cream, casein, and lactose.

[80] USDA, ERS, *The Economic Impacts of Retaliatory Tariffs on U.S. Agriculture*, ERR-304, January 2022.

[81] USDA, "USDA Assists Farmers Impacted by Unjustified Retaliation," press release, July 24, 2018.

estimated economic losses imply that USDA effectively projected agricultural exports in 2018 and 2019 to be approximately $157 billion in the absence of retaliatory tariffs.[82]

USDA ERS reported estimated trade losses for 2018 and 2019 at levels similar to USDA OCE's estimates. To calculate these estimated trade losses, USDA ERS used estimates published in an academic study with a different methodology than had been used by USDA OCE in 2018 and 2019.[83] This methodology is one of many that are commonly used in the academic literature to estimate economic losses from retaliatory tariffs. Other commonly used methodologies may estimate different losses. For example, a different academic study found that total 2018 and 2019 economic losses for soybeans were $3.2 billion;[84] USDA OCE estimated soybean losses at $3.6 billion for 2018 alone.[85] That study found that USDA overcompensated the agricultural sector by $5.4 billion for soybean losses in 2018 and 2019.[86]

Methods used to estimate trade losses from retaliatory tariffs can produce different estimates depending on the data used. USDA OCE produced estimates in 2018 after spring planting was complete but before 2018 commodities were harvested. In 2019, USDA OCE produced estimates before farmers had finished spring planting. USDA OCE acted at those times in support of the Administration's goal of providing expedited assistance to farmers who experienced trade disruptions with major export markets. Some policymakers may agree with the Administration's decision to provide expedited assistance to farmers in 2018 and 2019. Other policymakers may question the need for expedited assistance in 2018 and 2019 given the availability of other farm support programs.[87]

In addition, methods used to estimate trade losses can produce different estimates depending on the assumptions applied. In their 2021 analysis of the Market Facilitation Program (MFP), GAO found that USDA OCE's 2018 estimates of economic losses "used a justifiable baseline" to model what trade would have been in the absence of retaliatory tariffs.[88] GAO also found that USDA OCE's 2019 estimates of economic losses "used baselines that did not best represent what trade would be absent the retaliatory tariffs, and that increased trade damage estimates." In their response to GAO's 2021 analysis, USDA OCE stated that

> [t]he draft report's finding that the 2019 baseline is not representative and increased trade damage estimates does not take into account that the decision on what is the appropriate baseline depends on the policy goals and that there is not one single most representative baseline. OCE provided alternatives that reflected different options based on the direction of senior USDA decision makers under the previous administration and selection of the baseline was part of the program design and not made by OCE.[89]

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[82] CRS calculations. Actual 2018 trade of $145 billion plus $12 billion in estimated trade losses is $157 billion. Actual 2019 trade of $141 billion plus $16 billion in estimated trade losses is $157 billion.

[83] USDA ERS used estimated product-specific changes in the value of exports as published in Jason H. Grant et al., "Agricultural Exports and Retaliatory Trade Actions: An Empirical Assessment of the 2018/2019 Trade Conflict," *Applied Economic Perspectives and Policy*, vol. 43, no. 2 (June 2021).

[84] Michael Adjemian et al., "Estimating the Market Effect of a Trade War: The Case of Soybean Tariffs," *Food Policy*, vol. 105 (December 2021).

[85] USDA, *Cost Benefit Analysis: Market Facilitation Program*, July 24, 2018.

[86] Michael Adjemian et al., "Estimating the Market Effect of a Trade War: The Case of Soybean Tariffs."

[87] For background on other farm support programs, see CRS In Focus IF12218, *Farm Bill Primer: Farm Safety Net Programs*.

[88] GAO, *USDA Market Facilitation Program: Stronger Adherence to Quality Guidelines Would Improve Future Economic Analyses*.

[89] GAO, "Appendix VIII: Comments from the Department of Agriculture," in *USDA Market Facilitation Program: Stronger Adherence to Quality Guidelines Would Improve Future Economic Analyses*, p. 86.

USDA OCE also noted that their 2018 and 2019 economic analyses adhered to departmental and Office of Management and Budget requirements for economic analyses. Some policymakers may support USDA's senior decisionmakers' reliance on USDA OCE to estimate economic losses in order to be timely and responsive to decisionmakers' requirements. Other policymakers may support the use of independent feedback on USDA OCE's economic analyses used to inform USDA policymaking.

What Were the U.S.-China Phase One Agreement Provisions for Agriculture?

In January 2020, President Trump and China's Vice Premier Liu He signed the "Economic and Trade Agreement Between the Government of the United States of America and the Government of the People's Republic of China" (U.S.-China Phase One Agreement) to reduce U.S.-China trade tensions that escalated in 2018 when the United States imposed several rounds of tariffs on imports from China under Section 232 of the Trade Expansion Act of 1962 and Section 301 of the Trade Act of 1974 authorities.[90] The Phase One Agreement included purchase commitments of U.S. imports by China of no less than $12.5 billion and $19.5 billion above a 2017 baseline in agricultural and seafood products total for 2020 and 2021, respectively.[91] Other provisions in the agreement included China abiding by its WTO obligations by improving its tariff-rate quota administration for wheat, corn, and rice and greater transparency of its domestic support programs.[92] China also agreed to implement a "transparent, predictable, efficient, science- and risk-based regulatory process" for evaluating and authorizing agricultural biotechnology products. The agreement contains SPS-measures-related provisions to facilitate trade for agricultural and food products. Additionally, in March 2020, China implemented a new Section 301 retaliatory tariff exclusion process for imported U.S. agricultural products, although this was not directly associated with the Phase One Agreement.[93] Prior to the March 2020 exclusion process, only certain enumerated products were considered for tariff exclusions.

U.S. export and China's import data show that China did not meet its purchase commitments of U.S. agricultural and seafood products listed in the Phase One Agreement for the years 2020 and 2021, falling short by an estimated total of $13.1 billion (based on U.S. trade data) or $18.1 billion (based on China's trade data) over the two years.[94] Subsequent reports from the Office of

[90] For background, see CRS In Focus IF12125, *Section 301 and China: The U.S.-China Phase One Trade Deal*; and CRS In Focus IF11412, *U.S.-China Phase I Deal: Agriculture*. For the agreement text and agriculture-related fact sheets of the U.S.-China Phase One Agreement, see USDA, FAS, "China Phase One Agreement," https://www.fas.usda.gov/topics/china-phase-one-agreement.

[91] The U.S.-China Phase One Agreement does not explicitly state the 2017 baseline amount. The agreement specifies that both U.S. and Chinese trade data will be used to determine whether the purchase commitment provisions have been implemented. The 2017 baseline amount of approximately $20.9 billion is based on CRS calculations from Trade Data Monitor and U.S. Census Bureau data of U.S. agricultural and seafood product exports to China identified in Annex 6.1 of the U.S.-China Phase One Agreement. The 2017 baseline amount would be approximately $24.1 billion based on CRS calculations from Trade Data Monitor and China Customs Statistics' import data of U.S. agricultural and seafood products. For background on differences in U.S. and China's trade data, see CRS Report RS22640, *What's the Difference?—Comparing U.S. and Chinese Trade Data*.

[92] Separate from and prior to the Phase One Agreement, the United States initiated and won two WTO disputes against China's administration of its TRQs for wheat, corn, and rice and agricultural domestic support policies for rice and wheat. TRQs are two-tiered applications of tariffs for an imported product. A specified quantity of imports (in-quota) enters into the importing country at a reduced tariff rate. Imports that exceed the quantity (out-of-quota or over-quota) typically face higher tariffs.

[93] USDA, FAS, *China Announces a New Round of Tariff Exclusions*, GAIN Report CH2020-0017, February 26, 2020.

[94] CRS calculations from Trade Data Monitor, U.S. Census Bureau, and China Customs Statistics data.

the U.S. Trade Representative assert that China did not fully implement its obligations under the Phase One Agreement, including provisions related to agricultural trade.[95]

USDA's Response to Retaliatory Tariffs

How Did USDA Respond to Retaliatory Tariffs in 2018 and 2019?

In response to foreign trade retaliation targeting U.S. agricultural products in 2018 and 2019, the Secretary of Agriculture used the authorities and funds of the Commodity Credit Corporation (CCC) to provide additional assistance to the farm sector.[96] USDA made available up to $12.0 billion in CCC funding in 2018 and up to $16.0 billion in CCC funding in 2019. USDA determined how much funding to make available each year on the basis of its modeling of economic losses resulting from foreign countries imposing retaliatory tariffs (see "What Were the Economic Losses to the U.S. Agricultural Sector from Retaliatory Tariffs in 2018 and 2019?").

The funds made available in 2018 and 2019 were distributed through three ad hoc programs: the Market Facilitation Program (MFP), the Food Purchase and Distribution Program (FPDP), and the Agricultural Trade Promotion Program (ATP). These programs provided direct income support payments to farmers, purchased agricultural commodities, and supported trade promotion activities, respectively. Support from MFP, FPDP, and ATP supplemented direct income support, commodity purchases, and trade promotion activities authorized by the farm bill and other legislation.[97]

The bulk of the CCC funds were distributed through MFP (**Table 10**). MFP made direct payments to producers of eligible crops, dairy, and hogs. USDA made significant changes to MFP between the first and second rounds of funding, including expanding the commodities eligible for support, increasing payment limits for producers, and shifting from commodity-specific payments to county-specific payments, among other changes.[98]

[95] See USTR, *2024 National Trade Estimate Report on Foreign Trade Barriers*, March 2024, pp. 51-60; and USTR, *2024 Report to Congress on China's WTO Compliance*, January 2025.

[96] For background on the authorities and funds of the Commodity Credit Corporation, see CRS Report R44606, *The Commodity Credit Corporation (CCC)*.

[97] For additional background on income support authorized through the farm bill, see CRS In Focus IF12218, *Farm Bill Primer: Farm Safety Net Programs*. For additional background on USDA's commodity purchasing authorities, see CRS In Focus IF12193, *Farm and Food Support Under USDA's Section 32 Account*. For additional background on trade promotion authorized through the farm bill, see CRS In Focus IF12155, *Farm Bill Primer: Trade and Export Promotion Programs*.

[98] For background on the implementation of MFP in 2018 and 2019, see CRS Report R45310, *Farm Policy: USDA's 2018 Trade Aid Package*; CRS Report R45865, *Farm Policy: USDA's 2019 Trade Aid Package*; and CRS In Focus IF11289, *Farm Policy: Comparison of 2018 and 2019 Market Facilitation Programs*.

Table 10. Funds Available and Program Outlays for USDA Programs Responding to Retaliatory Tariffs

In Millions of Dollars

Program	Funds Available	Program Outlays
USDA trade assistance announced in 2018		
Market Facilitation Program	$10,600	$8,617
Food Purchase and Distribution Program	$1,200	$1,100
Agricultural Trade Promotion Program	$200	$200
2018 subtotal	**$12,000**	**$9,917**
USDA trade assistance announced in 2019		
Market Facilitation Program	$14,500	$14,368
Food Purchase and Distribution Program	$1,400	$1,264
Agricultural Trade Promotion Program	$100	$100
2019 subtotal	**$16,000**	**$15,732**
Grand total	**$28,000**	**$25,650**

Sources: Compiled by CRS using USDA, "USDA Assists Farmers Impacted by Unjustified Retaliation," press release, July 24, 2018, https://www.usda.gov/about-usda/news/press-releases/2018/07/24/usda-assists-farmers-impacted-unjustified-retaliation; USDA, "USDA Announces Details of Assistance for Farmers Impacted by Unjustified Retaliation," press release, August 27, 2018; USDA, "USDA Launches Second Round of Trade Mitigation Payments," press release, December 17, 2018; USDA, "USDA Announces Details of Support Package for Farmers," press release, July 25, 2019; USDA, *USDA Explanatory Notes – Agricultural Marketing Service*, 2022; USDA, Agriculture Marketing Service, "Food Purchase and Distribution Program," https://www.ams.usda.gov/selling-food-to-usda/trade-mitigation-programs; USDA, Office of Inspector General, *Oversight of the Agricultural Trade Promotion Program*, Audit Report 07601-0001-24, August 2022; and Government Accountability Office (GAO), *USDA Market Facilitation Program: Oversight of Further Supplemental Assistance for Farmers Could Be Improved*, GAO-22-104259, February 2022.

Note: Values in the "program outlays" column do not sum to total shown because of rounding applied by CRS.

How Were Market Facilitation Program Funds Distributed?

USDA allocated $25.1 billion for the Market Facilitation Program (MFP) and outlaid approximately $23.0 billion in MFP payments. According to GAO, USDA distributed 2018 MFP payments to 582,596 farms (excluding farms in Puerto Rico) and 2019 MFP payments to 643,965 farms (including farms in Puerto Rico).[99] The average 2018 MFP payment per farm was $14,791 in 2018 and the average 2019 MFP payment per farm was $22,312. In each year, payments varied across farms depending on the commodities produced on the farm, the way 2018 and 2019 MFP payments were structured, and other factors.

MFP payments were available to producers of certain crops and livestock commodities. Eligible livestock commodities for 2018 and 2019 MFP payments included dairy and hogs. Eligible crops varied for 2018 and 2019 MFP, with more commodities of each type eligible for 2019 MFP payments compared to those eligible for 2018 MFP payments. In each year, more than 90% of

[99] GAO, *USDA Market Facilitation Program: Oversight of Further Supplemental Assistance for Farmers Could Be Improved*, GAO-22-104259, January 2022. GAO's report does not discuss 2018 payments to farmers in the U.S. territories in 2018 or 2019 payments to farmers in the U.S. territories excluding Puerto Rico.

MFP payments were distributed to producers of non-specialty crops (**Table 11**).[100] Livestock commodities received about 4% of total MFP payments each year, and specialty crops received about 1% of 2018 MFP payments and 2% of 2019 MFP payments.

Table 11. Distribution of Market Facilitation Program Payments, by Commodity Type

In Millions of Dollars

Commodity Type	2018 MFP Payments	2019 MFP Payments	Total
Non-specialty crops	$8,194	$13,529	$21,723
Livestock commodities	$351	$566	$917
Specialty crops	$72	$274	$346
Total	**$8,617**	**$14,368**	**$22,986**

Source: CRS calculations using GAO, *USDA Market Facilitation Program: Oversight of Further Supplemental Assistance for Farmers Could Be Improved*, GAO-22-104259, January 2022.

Notes: MFP = Market Facilitation Program. Non-specialty crops eligible for 2018 MFP payments were corn, cotton, sorghum, soybeans, and wheat. Non-specialty crops eligible for 2019 MFP payments were alfalfa hay, barley, canola, chickpeas (large and small), corn, cotton (extra long staple and upland), crambe, dried beans, dry peas, flaxseed, lentils, millet, mustard seed, oats, peanuts, rapeseed, rice (long grain, medium grain, and temperate japonica), rye, safflower, sesame seed, sorghum, soybeans, sunflower seed, triticale, and wheat. Livestock commodities eligible for 2018 and 2019 MFP payments were hogs and dairy. Specialty crops eligible for 2018 MFP payments were shelled almonds and fresh sweet cherries. Specialty crops eligible for 2019 MFP payments were almonds, cranberries, cultivated ginseng, fresh grapes, fresh sweet cherries, hazelnuts, macadamia nuts, pecans, pistachios, and walnuts.

In 2018, MFP made payments separately for each commodity.[101] According USDA, about 82% of 2018 MFP payments were for soybeans, 6% for cotton, and 3% each for sorghum and wheat (**Table 12**). Corn, dairy, and hogs each received about 2% of total payments. Fresh sweet cherries and shelled almonds each received less than 1% of total payments.

Table 12. Distribution of 2018 Market Facilitation Program Payments

Commodity	Payment (in $ million)	Share of Total
Corn	$133.52	2%
Cotton	$484.08	6%
Dairy	$182.35	2%
Fresh sweet cherries	$42.69	< 1%
Hogs	$155.59	2%
Shelled almonds	$21.92	< 1%

[100] Statute defines specialty crops as fruits and vegetables, tree nuts, dried fruits, and horticulture and nursery crops (including floriculture) (7 U.S.C. §1621 note). For additional background on specialty crops, see CRS In Focus IF11317, *2018 Farm Bill Primer: Specialty Crops and Organic Agriculture*; and CRS In Focus IF12017, *Farm Bill Primer: Horticulture Title and Related Provisions*.

[101] In 2018, the Market Facilitation Program (MFP) had payment limits of $125,000 for non-specialty crops, $125,000 for specialty crops, and $125,000 for animal products (dairy and hogs). The maximum possible payment for a producer of all three types of commodities was $375,000. Eligibility for 2018 MFP was restricted to (1) applicants whose average adjusted gross income (AGI) was less than $900,000 and (2) applicants whose AGI exceeded $900,000 and at least 75% of the AGI was derived from farming, ranching, or forestry-related activities.

Commodity	Payment (in $ million)	Share of Total
Sorghum	$244.56	3%
Soybeans	$7,069.34	82%
Wheat	$241.62	3%
Total	$8,575.65	**100%**

Source: CRS calculations using USDA *Report to House and Senate Committees on Appropriations and Agriculture*, October 31, 2019.

Notes: USDA reported outlays for 2018 Market Facilitation Program (MFP) payments of approximately $8.576 billion as of October 31, 2019. As of January 2022, program outlays were $8.617 billion. Equivalent data by commodity for the 2019 MFP are not available.

For 2019 MFP for non-specialty crops, USDA made payments separately by county. All non-specialty crops within a county received a common payment rate that varied across counties from $15 per acre to $150 per acre. Payments for non-specialty crops were capped at $250,000.[102]

According to GAO, USDA chose to change its payment calculations to avoid distorting farmers' planting decisions in 2019.[103] County-specific payment rates meant that compensation for the same commodity varied by county. For example, GAO found that corn producers in the Midwest received $61 per acre on average, while corn producers in the South received $69 per acre on average. GAO concluded that USDA's use of the new methodology resulted in 2019 MFP payments that exceeded USDA's estimated trade damages for corn and were less than USDA's estimated trade damages for soybeans, sorghum, and cotton.[104]

For specialty crops, dairy, and livestock, USDA calculated 2019 MFP payments by commodity, similar to its 2018 method. Maximum payments were capped at $250,000 total for all specialty crops and $250,000 total for dairy and hogs. GAO concluded that USDA's use of a single payment rate for tree nuts resulted in 2019 MFP payments that exceeded USDA's estimated trade damages for almonds and pecans and were less than USDA's estimated trade damages for hazelnuts, macadamia nuts, pistachios, and walnuts.[105]

How Were Food Purchase and Distribution Program Funds Distributed?

USDA allocated $2.6 billion for the Food Purchase and Distribution Program (FPDP) and outlaid more than $2.3 billion on purchased commodities. Approximately 136 vendors were awarded

[102] In 2019, MFP had payment limits of $250,000 for non-specialty crops, $250,000 for specialty crops, and $250,000 for animal products (dairy and hogs). The maximum possible payment for a producer of all three types of commodities was $750,000. Eligibility for 2019 MFP was restricted to (1) applicants whose average AGI was less than $900,000 and (2) applicants whose AGI exceeded $900,000 and at least 75% of the AGI was derived from farming, ranching, or forestry-related activities.

[103] GAO, *USDA Market Facilitation Program: Stronger Adherence to Quality Guidelines Would Improve Future Economic Analyses*.

[104] GAO, *USDA Market Facilitation Program: Stronger Adherence to Quality Guidelines Would Improve Future Economic Analyses*.

[105] GAO, *USDA Market Facilitation Program: Stronger Adherence to Quality Guidelines Would Improve Future Economic Analyses*.

contracts under 2018 FPDP.[106] USDA has not released the number of vendors awarded contracts for 2019 FPDP.

Most of the commodities purchased were distributed to states for further distribution to food banks and food pantries that participate in The Emergency Food Assistance Program.[107] Other recipients eligible to receive FPDP commodities included states, for use in the Commodity Supplemental Foods Program; tribes that operate the Food Distribution Program on Indian reservations; and the National School Lunch Program.[108] Additionally, if domestic feeding programs were unable to use commodities purchased through FPDP, USDA had the option to distribute surplus commodities to approved nonprofit entities for distribution to low-income individuals.[109]

Data on actual FPDP purchases in 2018 or 2019 are not available. USDA announced targets for FPDP purchases in 2018 and 2019 (**Table 13**). The selection of targeted commodities varied in 2018 and 2019. In some instances, USDA targeted FPDP purchases of commodities that were also eligible for MFP payments. For example, FPDP targeted $919.70 million worth of dairy products and pork in 2018 and 2019. Producers of milk and hogs also received $917 million in 2018 MFP and 2019 MFP payments (**Table 11**). USDA ceased targeting FPDP purchases for some commodities that were also made eligible for MFP payments in 2019. USDA targeted 12 commodities—cranberries, grapes, hazelnuts, kidney beans, lentils, macadamia nuts, navy beans, peas, pecans, pistachios, rice, and walnuts—for 2018 FPDP purchases but not for 2019 FPDP purchases; these commodities were ineligible for 2018 MFP payments and eligible for 2019 MFP payments. USDA has not provided data that would allow for comparison of the amount of support provided from FPDP and MFP separately for each these commodities. Total FPDP targeted purchases for specialty crops were $390.42 million in 2018 and $282.60 million in 2019 ($673.02 million total). Total 2018 MFP and 2019 MFP payments for specialty crops were $346 million (**Table 11**).

Table 13. Food Purchase and Distribution Program Targeted Commodities, 2018 and 2019

In Millions of Dollars

Commodity	2018 Targeted Purchases	2019 Targeted Purchases	Total
Apples	$93.40	$88.00	$181.40
Apricots	$0.20	$0.10	$0.30
Beef	$14.80	$151.00	$165.80
Blueberries	$1.70	$5.00	$6.70
Citrus	$83.70	$104.00	$187.70
Cranberries	$32.80	$0.00	$32.80
Dairy products	$84.90	$68.00	$152.90

[106] USDA, "Report to House and Senate Committees on Appropriations and Agriculture," October 31, 2019.

[107] USDA, Agricultural Marketing Service, "Food Purchase and Distribution Program," https://www.ams.usda.gov/selling-food-to-usda/trade-mitigation-programs.

[108] USDA, "USDA Announces Details of Support Packaged for Farmers," press release, July 25, 2019.

[109] On July 29, 2019, USDA published a final rule creating the Expanded Domestic Commodity Donation Program, which allowed for disposal of surplus commodities acquired as part of USDA's trade mitigation response to outlets not currently used in existing USDA Food and Nutrition Service programs.

Commodity	2018 Targeted Purchases	2019 Targeted Purchases	Total
Figs	$0.02	$0.10	$0.12
Grapes	$48.20	$0.00	$48.20
Hazelnuts	$2.10	$0.00	$2.10
Kidney beans	$14.20	$0.00	$14.20
Lamb	$0.00	$17.00	$17.00
Lentils	$1.80	$0.00	$1.80
Macadamia nuts	$7.70	$0.00	$7.70
Navy beans	$18.00	$0.00	$18.00
Onions	$0.00	$0.40	$0.40
Peanut butter	$12.30	$0.00	$12.30
Pears	$1.40	$4.00	$5.40
Peas	$11.80	$0.00	$11.80
Pecans	$16.00	$0.00	$16.00
Pistachios	$85.20	$0.00	$85.20
Plums/prunes	$18.70	$22.00	$40.70
Pork	$558.80	$208.00	$766.80
Potatoes	$44.50	$22.00	$66.50
Poultry	$0.00	$432.00	$432.00
Processed foods	$0.00	$200.00	$200.00
Raisins	$0.00	$24.00	$24.00
Rice	$48.10	$0.00	$48.10
Strawberries	$1.50	$2.00	$3.50
Sweet corn	$2.40	$11.00	$13.40
Walnuts	$34.60	$0.00	$34.60
Total	**$1,238.82**	**$1,358.60**	**$2,597.42**

Source: CRS calculations using USDA, "USDA Announces Details of Assistance for Farmers Impacted by Unjustified Retaliation," press release, August 27, 2018; and USDA, "USDA Announces Details of Support Packaged for Farmers," press release, July 25, 2019.

Notes: Citrus includes grapefruit, lemons, limes, oranges, and orange juice. Processed foods include canned tomatoes, pasta, prepared cereals, soups and broths, tomato sauces, and other products. Cranberries, grapes, hazelnuts, kidney beans, lentils, macadamia nuts, navy beans, peas, pecans, pistachios, rice, and walnuts were purchased in 2018 but were not eligible in 2019.

USDA administered FPDP under the rules of USDA's Commodity Procurement Program and required commodities supplied to be sourced from American producers on American farms. For FPDP, the USDA Office of Inspector General (OIG) found no reportable issues related to the type and quantify of commodities purchased but did find reportable issues related to verifying the domestic origin of purchased commodities and other aspects of contract management.[110] In

[110] USDA, Office of Inspector General, *Food Purchase and Distribution Program*, Audit Report 01601-0003-41, August 2023.

response to a congressional directive, USDA noted that six vendors awarded contracts under 2018 FPDP had substantial foreign ownership but that the products purchased for the 2018 FPDP were "100 percent domestically produced and processed."[111] In 2018, the six foreign-owned vendors supplied approximately $459 million in pork, $107 million in potatoes, $1.8 million in blueberries, and $1.4 million in strawberries.

How Were Agricultural Trade Promotion Program Funds Distributed?

USDA allocated $300 million for the Agricultural Trade Promotion Program (ATP) and spent $300 million on trade promotion activities. ATP provided cost-share funds to 59 organizations that support activities to develop new markets for U.S. agricultural and agriculture-related products (e.g., forestry and seafood products).[112] ATP-eligible activities included consumer advertising, public relations, point-of-sale demonstrations, participation in trade fairs and exhibits, market research, and technical assistance. ATP participants were required to contribute 10% for generic promotion activities and 50% for branded promotion activities.[113]

ATP was similar to the Market Access Program (MAP) authorized through the farm bill, which receives annual appropriations of $200 million.[114] Using results from prior analyses of MAP, an academic study estimated that these additional ATP funds could expand U.S. agricultural exports by $8.5 billion and U.S. farm sector cash receipts by $4.8 billion.[115]

USDA OIG audited ATP in 2022. USDA OIG found that USDA awarded funding to applicants "who may not have been the most meritorious based on the announced criteria and program regulations."[116] USDA OIG said they were "unable to attest to the merits of the 59 ATP grants awarded [by USDA Foreign Agricultural Service] in fiscal year (FY) 2019, totaling $300 million."

How Have Agricultural Stakeholders and Oversight Agencies Assessed USDA's Response to Retaliatory Tariffs Imposed in 2018 and 2019?

USDA's ad hoc programs in response to retaliatory tariffs on U.S. agricultural products provided support to the agricultural sector with the goals of increasing farm incomes, increasing domestic

[111] USDA, "Report to House and Senate Committees on Appropriations and Agriculture," October 31, 2019, p. 15. Section 119 of the Continuing Appropriations Act, 2020, and Health Extenders Act of 2019 (P.L. 116-59) required the Secretary of Agriculture to provide an accounting of commodity purchases from substantially foreign-owned companies or their subsidiaries, among other provisions.

[112] For a list of Agricultural Trade Promotion Program (ATP) awardees, see USDA, FAS, "ATP Funding Allocations," https://www.fas.usda.gov/programs/agricultural-trade-promotion-program-atp/atp-funding-allocations.

[113] USDA, Commodity Credit Corporation, "Agricultural Trade Promotion Program," 83 *Federal Register* 4417, August 30, 2018.

[114] For additional background on farm-bill-funded trade promotion programs, see CRS In Focus IF12155, *Farm Bill Primer: Trade and Export Promotion Programs*.

[115] Gary Williams, "The Overlooked Agricultural Trade Promotion Program of the USDA Trade Aid Packages," *Choices* (Quarter 4, 2019).

[116] USDA Office of Inspector General, *Oversight of the Agricultural Trade Promotion Program*, Audit Report 07601-0001-24, August 2022, https://usdaoig.oversight.gov/sites/default/files/reports/2024-11/07601000124FRredactedpublic.pdf.

prices through purchases of agricultural commodities, and diversifying export markets. Farmers reported that MFP helped them manage cash flow on their operations.[117]

In response to congressional requests, GAO published analyses of MFP in 2020, 2021, and 2022.[118] In their 2021 analysis, GAO found that USDA OCE's 2018 estimates of economic losses "used a justifiable baseline" to model what trade would have been in the absence of retaliatory tariffs. GAO also found that USDA OCE's 2019 estimates of economic losses "used baselines that did not best represent what trade would be absent the retaliatory tariffs, and that increased trade damage estimates."[119] GAO also found that USDA's methodology for calculating 2019 MFP payments "addressed some limitations of its 2018 methodology but resulted in (1) producers of the same nonspecialty crop (such as corn and soybeans) being paid differently in different counties, and (2) total payments for a nonspecialty crop different from USDA's estimate of trade damage to the crop."

In their response to GAO's 2021 analysis, USDA OCE stated that

> [t]he draft report's finding that the 2019 baseline is not representative and increased trade damage estimates does not take into account that the decision on what is the appropriate baseline depends on the policy goals and that there is not one single most representative baseline. OCE provided alternatives that reflected different options based on the direction of senior USDA decision makers under the previous administration and selection of the baseline was part of the program design and not made by OCE.[120]

USDA OCE also noted that their 2018 and 2019 economic analyses adhered to departmental and Office of Management and Budget requirements for economic analyses.

In their 2022 analysis, GAO found that USDA's compliance methodology for MFP was not designed to identify high-risk payments for auditing.[121] GAO noted that USDA conducted multiple compliance reviews for MFP eligibility requirements and that the reviews identified significant improper payments in 2018 and 2019. GAO found that the review of 2018 MFP payments was "limited in its usefulness for several reasons" and that USDA discontinued its review of 2019 MFP payments because of competing agency priorities.

USDA OIG audited FPDP in 2023. USDA OIG found no reportable issues related to the type and quantity of commodities purchased but did find reportable issues related to verifying the domestic origin of purchased commodities and other aspects of contract management.[122]

USDA OIG audited ATP in 2022. USDA OIG found that USDA awarded funding to applicants "who may not have been the most meritorious based on the announced criteria and program

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[117] See, for example, witness testimony provided to the House Committee on Agriculture Subcommittee on Livestock and Foreign Agriculture during the hearing "U.S. Agricultural Trade: Stakeholder Perspectives" on March 10, 2020, https://democrats-agriculture.house.gov/uploadedfiles/116-33_-_42601.pdf.

[118] GAO, *USDA Market Facilitation Program: Information on Payments for 2019*, GAO-20-700R, August 2020; GAO, *USDA Market Facilitation Program: Stronger Adherence to Quality Guidelines Would Improve Future Economic Analyses*; and GAO, GAO-22-104259, *USDA Market Facilitation Program: Oversight of Further Supplemental Assistance for Farmers Could Be Improved*, January 2022.

[119] GAO, *USDA Market Facilitation Program: Stronger Adherence to Quality Guidelines Would Improve Future Economic Analyses*.

[120] GAO, "Appendix VIII: Comments from the Department of Agriculture," *USDA Market Facilitation Program: Stronger Adherence to Quality Guidelines Would Improve Future Economic Analyses*, p. 86.

[121] GAO, GAO-22-104259, *USDA Market Facilitation Program: Oversight of Further Supplemental Assistance for Farmers Could Be Improved*, January 2022.

[122] USDA, Office of Inspector General, *Food Purchase and Distribution Program*, Audit Report 01601-0003-41, August 2023.

regulations."[123] USDA OIG said they were "unable to attest to the merits of the 59 ATP grants awarded by [USDA Foreign Agricultural Service] in fiscal year (FY) 2019, totaling $300 million."

For More Information

Congressional staff seeking additional information on any of the key terms, concepts, and answers to the FAQs in this report may contact the authors and/or refer to CRS reports on trade authorities, agricultural trade, and farm support in general, which have been identified in the relevant sections above.

Author Information

Benjamin Tsui
Analyst in Agricultural Policy

Stephanie Rosch
Analyst in Agricultural Policy

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[123] USDA, Office of Inspector General, *Oversight of the Agricultural Trade Promotion Program*, Audit Report 07601-0001-24, August, 2022.

THE CONVERSATION

Academic rigor, journalistic flair

One of the most visible ways that Canada responded to President Donald Trump's tariffs was by sharply restricting U.S. alcohol sales. AP Photo/Jill Colvin

Canada is kicking its US booze habit as trade tensions persist

Published: May 7, 2026 8:20am EDT

https://theconversation.com/canada-is-kicking-its-us-booze-habit-as-trade-tensions-persist-279918

Almost a year and a half after President Donald Trump began slapping tariffs on nearly all U.S. trading partners, Canada's pushback has reordered the economic relationship between Ottawa and Washington.

Canadians are pulling back on U.S. travel, boycotting U.S. goods and protesting in droves - further galvanized by Trump's call for Canada to become the 51st U.S. state.

But the example of one sector in particular, U.S. alcohol, shows how quickly access to an important market can disappear - and how difficult it can be to regain.

From 2022 through 2024, Canada accounted for roughly 35% of U.S. wine exports, more than 15% of U.S. beer exports and as much as 13% of U.S. distilled spirits exports. Within just one year of Trump returning to office, Canada's imports of U.S. alcohol cumulatively have plunged over 70%, thanks to a mix of both tariff and nontariff retaliatory measures.

It's a sharp reversal from Canada's traditional role as a top foreign destination for American beer, wine and spirits. That relationship reflected both long-standing consumer preferences as well as geographic proximity and largely tariff-free access through agreements like the North American Free Trade Agreement and its successor, the United States-Mexico-Canada Agreement.

As an agricultural economist working on trade issues related to alcohol, I see Canada's alcohol sector as a textbook example of how market access for politically exposed goods can quickly unravel. And for American beer, wine and spirits producers - and for the farmers who grow the barley, grapes and corn that go into these products - the recent experience highlights how trade disputes often hit food products hardest. If a trade ban becomes entrenched, it opens a way for consumers to develop a taste for domestic as well as other foreign alternatives.

President Donald Trump's tariffs and talk of Canada as the 51st U.S. state have sparked a sustained backlash by Canadians. These protesters gathered near the Peace Bridge border crossing in Buffalo, N.Y., on April 2, 2025. AP Photo/Adrian Kraus

The Trump tariff shock

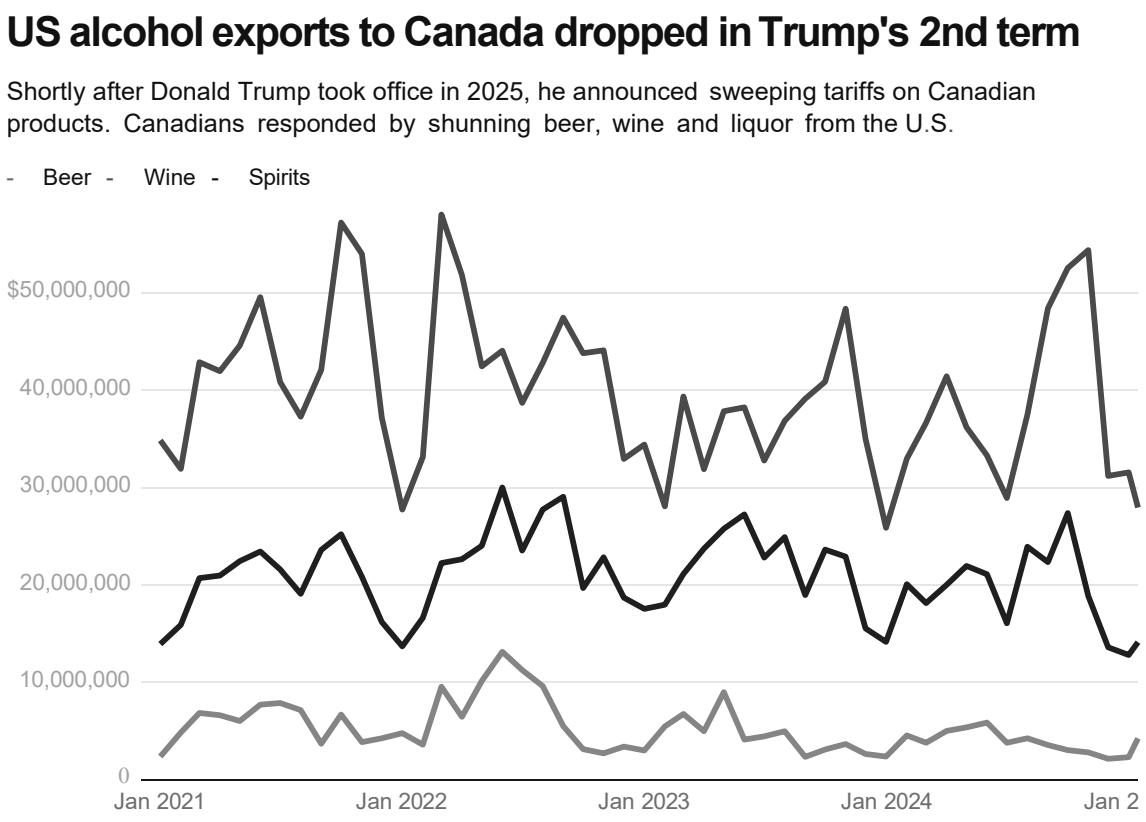
Before Trump's tariffs and talk of Canada as the 51st U.S. state, U.S. alcohol occupied substantial shelf space in major alcohol-consuming provinces such as Ontario, British Columbia and Quebec. In 2024, these exports to Canada constituted more than 20% of Canada's alcohol imports, totaling US$744 million. For most U.S. producers, Canada served not only as a key export destination but as a stable and relatively low-risk entry point into international markets.

That changed in February 2025, when Trump, citing a national security emergency, imposed 25% tariffs on Canada and Mexico. Those tariffs - which were overturned by the Supreme Court in February 2026 - marked the first time that law was used to authorize broad tariffs.

Canada responded by slapping retaliatory tariffs of 25% on roughly $30 billion of U.S. goods and signaling it would significantly expand countermeasures if tensions persisted. It also enacted nontariff countermeasures, most notably by letting provincial liquor authorities remove U.S. beer, wine and spirits from store shelves. These tools, which fall within Canada's system of shared federal and provincial powers, sharply restricted market access for American producers.

Immediately after Trump's announcement, eight of Canada's 10 provinces imposed partial or full bans on U.S. alcohol imports by instructing their liquor boards to stop importing and selling U.S. alcohol altogether. In many cases, American products were physically removed from store shelves and online platforms - sometimes with instructions to target imports from U.S. "red" states that had supported Trump.

U.S. wine exports were hit hardest, plunging from $460 million to just $103 million, while distilled spirits fell from $238 million to $89 million and beer exports from $47 million to $17 million. Collectively, these declines slashed total U.S. alcohol exports to Canada from $744 million to $208 million, wiping out $536 million in trade.



The spat quickly became testy. The alcohol boycott is one of the reasons Trump and White House officials have called Canada "mean and nasty to deal with," in the words of U.S. Ambassador to Canada Pete Hoekstra.

The trade war's latest turn

Those provincial restrictions remained in place even after the two countries reached a partial deal exempting about half of USMCA-compliant goods from ongoing tariffs in summer 2025, leading Canada to scale back some retaliatory levies. However, the de facto trade bans on U.S. alcohol remain in place.

Alcohol resurfaced again recently as a flash point, when the top U.S. trade official, Jamieson Greer, said in April 2026 that existing U.S. levies on Canadian industrial goods would stay in place and might even be toughened until Canada walked back its alcohol restrictions. That threat drew a sharp retort from Canadian Prime Minister Mark Carney.

Meanwhile, the trade dispute hasn't prompted Canadians to drink less alcohol overall. Instead, their consumption has largely shifted to other countries, especially for wine. United Nations trade data shows that in 2024, American wine accounted for 21% of all imported wine in Canada before dropping to only 5% in 2025. That year, imports from major wine exporting countries not only increased but roughly offset the decline in imports from the U.S. For distilled spirits, the U.S. slipped from 24% in 2024 to only 10% in 2025, while beer has dropped from 13% to 5%. At the same time, Canadian imports of beer, wine, and spirits from other countries increased by 9%, 15%, and 7%, respectively.

Canadians bought less US alcohol, and more from elsewhere

In 2025, as Canadian purchases of alcohol from the U.S. plummeted, the country's consumers bought more wine, beer and spirits from other parts of the world.

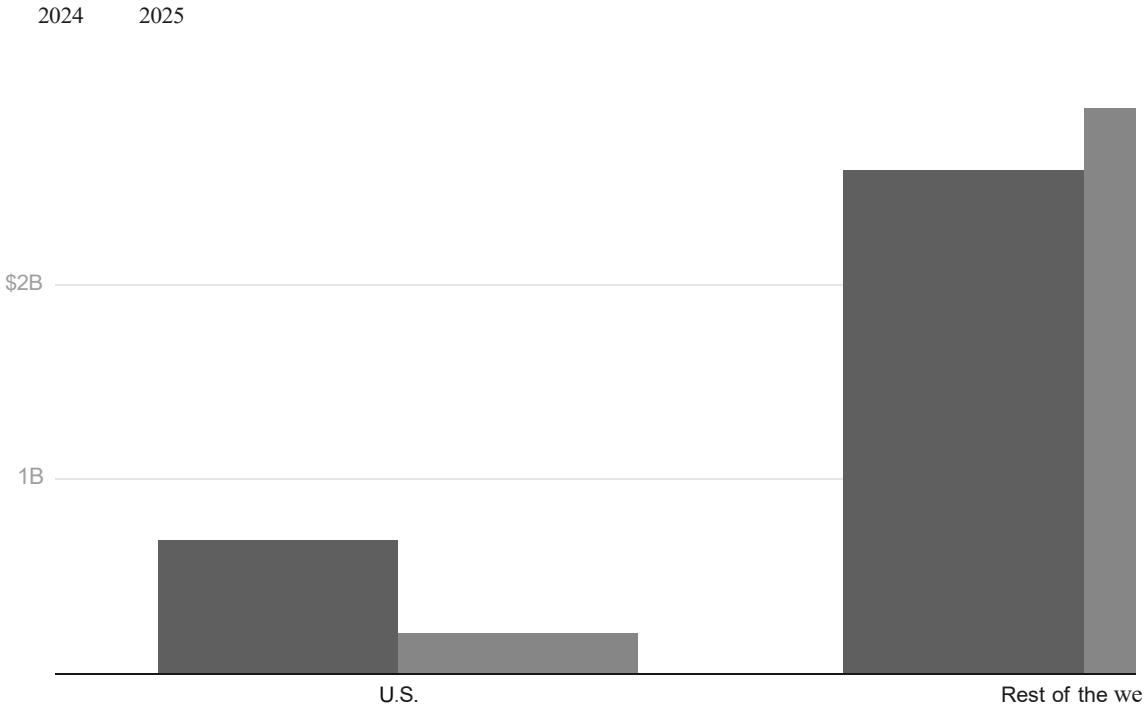


Chart: The Conversation, CC-BY-ND • Source: UN Comtrade • Get the data • Embed • Download image • Created with

"What's different this time is that people aren't just swapping one bottle, they're rethinking the whole bar," said Craig Peters, CEO of Canada's Barnburner Whiskey, in an interview with the online magazine VinePa ir. "Traditionally, those rail spots were locked up by big U.S. brands for decades. Now, we're seeing bars, especially independents, completely reset and go Canadian across the board."

Andrew Muhammad
Professor of Agricultural and Resource Economics, University of Tennessee

DOI

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THE CONVERSATION

Academic rigor, journalistic flair

The Trans-Pacific Partnership agreement covers a broad range of goods and services, including food safety standards. Simon Fanger/Unsplash, CC BY-SA

What American farmers could gain by rejoining the Asia-Pacific trade deal that Trump spurned

Published: May 12, 2021 8:48am EDT

https://theconversation.com/what-american-farmers-could-gain-by-rejoining-the-asia-pacific-trade-deal-that-trump-spurned-152148

The Eiden administration has an opportunity to recalibrate American global trade by rejoining the influential Trans-Pacific Partnership trade agreement. Signing on to this partnership has the potential to deliver powerful diplomatic and economic gains yet politically, the odds appear slim that there will be political consensus to agree to this partnership.

The U.S. began Trans-Pacific Partnership negotiations **in** 2008 during the Bush administration, efforts that were intensified during Barack Obama's presidency. Hammered out between the U.S. and 11 Pacific Rim countries, the intention of joining the partnership was to set trade policy and greatly expand U.S. trade and investment **in** the Asia-Pacific region. President Obama signed the agreement in 2016 and less than a year later, immediately after Donald Trump's inauguration, the U.S. withdrew from the agreement.

Rejoining the partnership, renamed the Comprehensive and Progressive Agreement for Trans-Pacific Partnership in 2018, could signal to the world that the U.S. is back in the global engagement arena. It would also strike a stark contrast to the previous adminstration's bilateral and nationalistic approach, which has resulted in tensions with major U.S. trading partners. Aside from improved trade relations, rejoining the this agreement would counter China's economic and geopolitical influence in the Asia-Pacific region.

Both of us have worked extensively with the U.S. Department of Agriculture on trade policy issues. As economists specializing in international agricultural trade, our research demonstrates that the U.S. would benefit from rejoining the trade accord and, in particular, American agriculture.

Pathway to a Southeast Asia trade agreement

International trade agreements can reduce uncertainty for trading partners in the marketplace. Marco Pregnolato/Unsplash

Regional trade agreements like the Trans-Pacific Partnership can go far beyond tariffs to tackle deeper trade and domestic issues such as investment, labor, migration, competition, intellectual property and, in some cases, key regulatory issues governing food safety standards.

Although agriculture comprises only about 10% of total U.S. exports, the agricultural sector in the U.S. and other countries account for a large share of trade policy considerations. Rejoining the accord has the potential to establish economic ties with emerging economies like Vietnam and Malaysia and embrace the need for improved trade relations in Southeast Asia overall.

Shipping cranes at the Port of Seattle. Andy Li/Unsplash

The Comprehensive and Progressive Agreement for Trans-Pacific Partnership could be the easiest path forward if the U.S. wanted to improve trade relations with Southeast Asia. Joining this partnership could be especially beneficial based on the volume of agricultural trade and expected growth in these markets. At an approximate US$14.3 billion annually, Southeast Asia accounts for a significant amount of U.S. agricultural exports, making it the fourth-leading destination behind China, Canada and Mexico.

US agricultural and related exports to Southeast Asia

Country	2019 trade	RCEP member	CPTPP member
Vietnam	$4.0 billion	Yes	Yes
Philippines	$3.0 billion	Yes	**No**
Indonesia	$2.9 billion	Yes	**No**
Thailand	$1.9 billion	Yes	**No**
Malaysia	$1.2 billion	Yes	Yes
Singapore	$1.0 billion	Yes	**No**

Burma, Cambodia, Brunei, Laos *and Timor-Leste are not listed. Together, these countries account for approximately $250 million in U.S. agricultural and related product exports. RCEP* is *the Regional Comprehensive Economic Partnership. CPTPP* is *the Comprehensive and Progressive Agreement for Trans-Pacific Partnership.*

Table: The Conversation, CC-BY-ND • Source: U.S. Department of Aqriculture • Get the data

A return to global engagement

The Trans-Pacific Partnership was seen as an opportunity for the U.S. to shape regional and global trade rules, potentially influencing economic policies and practices in China. However, there are concerns that need to be addressed if the U.S. were to join the Comprehensive and Progressive Agreement for Trans-Pacific Partnership.

Colorful Japanese wine barrels in Tokyo. Manuel Velasquez/Unsplash

There are important differences between the agreement signed under Obama in 2016 and the Comprehensive and Progressive Agreement for Trans-Pacific Partnership. Provisions important to the U.S. were changed in the subsequent agreem ent, such as the investment and intellectual property P-rovisions that offered improved standards on intellectual property relative to past trade agreements. The provisions fall short of the more stringent requirements in the earlier Trans-Pacific Partnership.

What are the odds?

Like all trade agreements, joining the partnership would require congressional approval. Historically, Republicans have been more supportive of trade agreem ents. But President Trump's rhetoric, that past trade agreements have been "disastrous" for the U.S. econ omy, may have lessened Republican support for an agreement like the Comprehensive and Progressive Agreement for Trans-Pacific Partnership.

President Joe Eiden quickly rejoined the Paris Climate Agreement and reversed President Trump's decision to withdraw from the World Health Organization,showing that the U.S. is back in the global engagement area.

Mega-regional trade agreements offer more than a forum for negotiating trade barriers. They establish procedures that reduce uncertainty in international transactions, make rules that are clear to members and provide an institutional framework to remedy trade concerns or disputes. If the Biden administration wants to signal to the world that the U.S. is pivoting to a more expansive global engagement, joining the Comprehensive and Progressive Agreement for Trans-Pacific Partnership could be an initial step.

[You're smart and curious about the world. So are The Conversation's authors and editors. You can get our highlights each weekend.]

Andrew Muhammad
Professor of Agriculture and Resource Economics, University of Tennessee

Jason Grant
Associate Professor of Agricultural and Applied Economics, Virginia Tech

DOI

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THE CONVERSATION

Academic rigor, journalistic flair

Trump's tariffs on Canada and Mexico could spell trouble for distilled spirits

Published: March 26, 2025 8:40am EDT

Bottles of tequila are displayed at a California Safeway store on March 3, 2025.
Justin Sullivan/Getty Images

https://theconversation.com/trumps-tariffs-on-canada-and-mexico-could-spell-trouble-for-distilled-spirits-251583

If all the tariff drama in the news lately has you reaching for a stiff drink, you're not alone. Unfortunately, those same tariffs might make it harder to get your hands on your favorite brand of tequila.

In early March 2025, U.S. President Donald Trump levied import tariffs of 25% on goods from Canada and Mexico, following through on a promise he made back in November 2024. While he later partially reversed course, suspending tariffs on some goods, tensions remain high. Mexico is largely holding off on retaliation, but Canada quickly fired back with counter-tariffs on billions of dollars' worth of U.S. products.

These trade tensions spell trouble for numerous industries, including the booming spirits market. Canada and Mexico - two of the top U.S. trading partners - accounted for nearly half of the US$9 billion in distilled spirits the U.S. imported in 2024.

As an agricultural economist, I've analyzed how a 25% tariff could affect tequila, whiskey and other distilled spirits - and the results weren't pretty. I found that these tariffs would cost distilled spirit importers over $1 billion in lost trade, with tequila alone taking a more than $800 million hit.

Americans' thirst for imported liquor

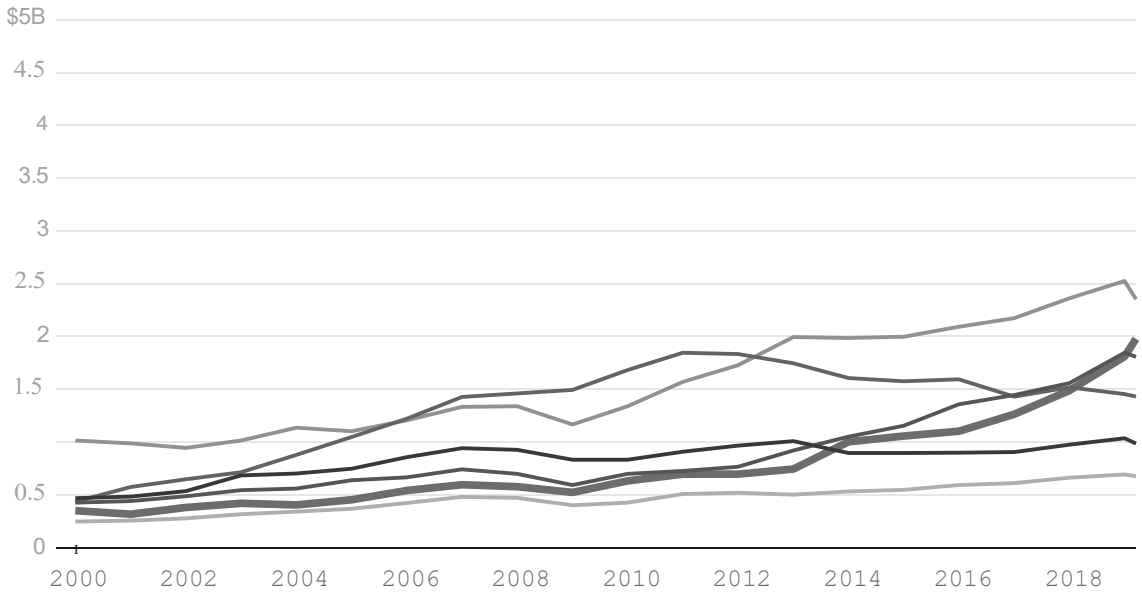
The U.S. imports far more distilled spirits than it exports - five times as much by value, as of 2024.

Since 2000, U.S. imports of distilled spirits have surged by more than 300%, driven largely by the explosive rise in tequila consumption. Between 2000 and 2024, tequila imports rose by 1,400%, skyrocketing from $350 million to $5.4 billion.

Americans increasingly love imported liquor

A comprehensive look at U.S. distilled spirits imports by category suggests the U.S. has developed a taste for tequila since the Obama years.

- Tequila - Whiskey - Liqueurs and cordials - Brandy - Vodka - Other spirits



Note: Tequila includes mescal, *brandy* is *from grapes only, and "other* sprits" *includes gin, rum and distilled spirits not specified elsewhere. All figures in billions of dollars.*

Chart The Conversation, CC-BY-ND • Source: Muhammad, 2025. • Get the data • Embed • Download image· Created with

While imports of whiskey, liqueurs, vodka and brandy also grew, none matched tequila's explosive rise. Tequila now represents 45% of all spirits imported into the U.S., up from 12% in 2000.

Not surprisingly, 99% of tequila and mezcal is imported from Mexico, making it the leading foreign supplier of distilled spirits to the United States. Meanwhile, Canada has supplied between 4% and 6% of U.S. spirits imports over the past two decades, primarily whiskey and liqueurs.

Since distilled spirits are classified as agricultural products, their rising imports have significantly contributed to the U.S. agricultural trade deficit. However, this isn't necessarily a problem. Imports help meet demand from U.S. consumers, generate value-added opportunities for U.S. companies, and support economic activity in bars, liquor stores, restaurants and beyond.

A 25% tariff on Mexican goods is a 25% tax on tequila

In my study, published in February in the peer-reviewed journal Agribusiness and in a follow-up policy brief, I found that 25% tariffs on Mexico and Canada could reduce imports of distilled spirits by $1.2 billion. This loss exceeds the total amount of tax revenue those tariffs can expected to bring in.

How 25% tariffs on Mexico and Canada could change the spirits industry

The Trump administration's plan could deal a big hit to the tequila market.

Product	2024 imports by value	2024 share of imports	Projected imports after tariffs	Projected change in imports after tariffs	Projected tariff revenue
Tequila	$5.358	45%	$4.548	-$810M	$910M
Whiskey	$1.838	15%	$1.738	-$1QOM	$70M
Vodka	$1.21B	10%	$1.088	-$130M	$0
Liqueurs and cordials	$1.418	12%	$1.238	-$1B0M	$70M
Brandy	$1.298	11%	$1.288	-$10M	0
Other imported spirits	$810M	7%	$BOOM	-$10M	$20M
Total	$11.908	100%	$10.68 billion	-$1.238	$1.068

Unsurprisingly, tequila imports would be the hardest hit, falling by $810 million. I found that the tariff revenue from tequila - $910 million - could actually exceed the corresponding fall in imports. That's because demand for tequila, like most alcoholic beverages, is what economists call "inelastic," meaning that when prices rise, consumers are unlikely to change their purchasing decisions by very much.

However, it would be a mistake to consider tequila in isolation. When I factored in other notable decreases, such as a $100 million drop in whiskey imports, I found that the value of total trade losses, in the form of decreased imports, would outweigh the total tariff revenue. I also found that no product category would come out ahead.

In fact, even products like vodka, which are mostly exempt from these tariffs, would be indirectly affected. This is because tariffs can increase the overall cost of importing,leading businesses to reduce all imports, tariffed or otherwise. My research suggests that this "trade destruction" effect, to use an economics term, will be quite significant.

A new era of tariffs

The Trump administration has argued that tariffs will generate a lot of money for the federal government. But my research suggests those gains may not outweigh the economic costs to businesses and consumers.

Contrary to common belief, trade losses don't just affect exporting countries. Domestic consumers also face higher prices and fewer choices - hurting their overall economic welfare. Reducing imports also affects U.S. businesses involved in marketing, distribution and sales.

Trade is more complex than a simple formula of"exports good, imports bad." Research makes it clear that tariffs have negative consequences, including higher consumer prices, reduced product availability and downstream economic disruption. Policymakers would be wise to take those effects seriously. Otherwise, they might find themselves with a serious economic hangover.

Andrew Muhammad
Professor of Agriculture and Resource Economics, University of Tennessee

DOI

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THE CONVERSATION

Academic rigor, journalistic flair

Canadian lumber waits for shipment in a sawmill's yard. Andrej Ivanov/Getty Images

Why higher tariffs on Canadian lumber may not be enough to stimulate long-term investments in US forestry

Published: October 15, 2025 8:52am EDT

https://theconversation.com/why-higher-tariffs-on-canadian-lumber-may-not-be-enough-to-stimulate-long-term-investments-in-us-forestry-265713

Lumber, especially softwood lumber like pine and spruce, is critical to U.S. home construction. Its availability and price directly affect housing costs and broader economic activity in the building sector. The U.S. imports about 40% of the softwood lumber the nation uses each year, more than 80% of that from Canada.

President Donald Trump says that the U.S. has the capacity to meet 95% of softwood lumber demand and directed federal officials to update policies and regulatory guidelines to expand domestic timber harvesting and curb the arrival of foreign lumber.

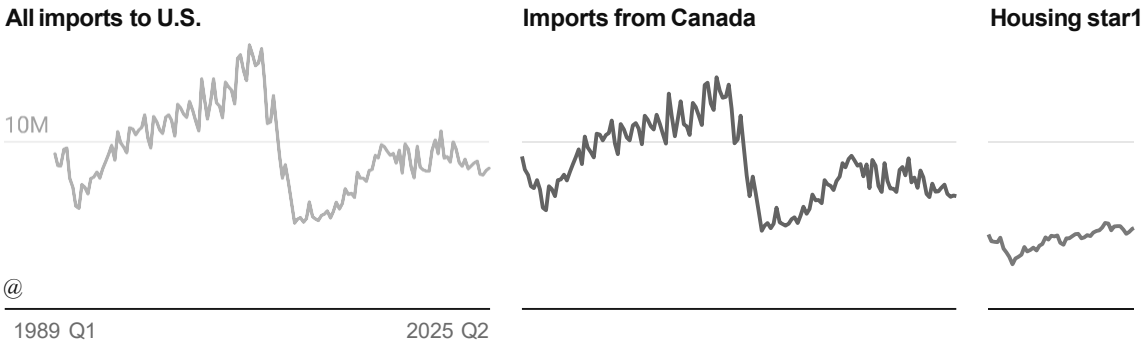
On Sept. 29, 2025, he announced new tariffs on imported timber and wood products, including an additional 10% tariff on Canadian lumber. Those were added to 35% tariffs imposed on Canadian lumber in August. It was the latest phase in a long-standing dispute over the supply of lumber to builders in the U.S., which dates back to the 1980s, when U.S. producers began arguing that Canadian companies were benefiting from unfair subsidies from their government. Starting on Oct. 15, Canadian softwood lumber imports could face tariffs exceeding 45%.

As researchers studying the forestry sector and international trade, we recognize that the U.S. has ample forest resources. But replacing imports with domestic lumber isn't as simple as it sounds.

There are differences in tree species and quality, and U.S. lumber often comes at a higher cost, even with tariffs on imports. Challenges like limited labor and manufacturing capacity require long-term investments, which temporary tariffs and uncertain trade policies often fail to encourage. In addition, the amount of lumber imported tends to mirror the boom-and-bust cycles of housing construction, a dynamic that tariffs alone are unlikely to change.

US lumber imports and housing starts rise and fall together

Since 1989, federal data shows that trends in lumber imports - the vast majority of which are from Canada - track closely with construction of new housing.



Lumber imports data in cubic meters, using Harmonized System classification 4407.

Chart: The Conversation, CC-BY-ND • Source: Lumber imports: U.S. Department of Agriculture, Global Agricultural Trade System; Housing starts: Federal Reserve Bank of St. Louis • Get the data • Embed • Download image· Created with

Trump's moves

To boost U.S. logging, in March, Trump issued an executive order telling the departments of Interior and Agriculture to ease what he called "he avy-handed" regulations on timber harvesting. The executive order and a follow-up memo from Agriculture Secretary Brooke Rollins do not spell out specifics, but officials say more details are in the works that will simplify the timber harvesting process, with the goal of boosting domestic timber production by 25%.

That same month, Trump ordered the Commerce Department to assess how imports of timber, lumber and related wood products affect U.S. national s ecurity.

While that assessment was underway, in July, the Commerce Department published findings from a trade review of 2023 Canadian lumber imports. That inquiry alleged that Canadian companies were selling lumber to the U.S. at unfairly low prices, potentially leaving U.S. producers with lower sales or depressed prices. That finding was cited as the basis for the 35% August tariff announcement.

In its national security investigation initiated in March, the Commerce Department concluded that an overreliance on imported wood products means "the United States may be unable to meet demands for wood products that are crucial to the national defense and critical infrastructure." The September tariff announcement is based on those findings.

Canadian timber harvesting continues, despite uncertainty about trade with the U.S. Artur Widak/NurPhoto via Getty Images

Canadian lumber in the US market

In 1991, the U.S. imported 11.5 billion board feet (27 million cubic meters) of Canadian lumber. Those imports rose to a high of 22 billion board feet (52 million cubic meters) by 2005.

But as housing construction declined - especially during the Great Recession from 2007 to 2009 - imports dropped sharply, to less than 8-4 billion board feet (20 million cubic meters) in 2009. The current volume has not recovered to prerecession levels, rising only to 12 billion board feet (28 million cubic meters) in 2024.

The value of Canadian lumber has also fluctuated. Historically, prices for Canadian lumber have averaged about US$330 per thousand board feet ($140 per cubic meter). During and after the COVID-19 pandemic, import prices soared to almost $800 per thousand board feet ($340 per cubic meter). But since peaking in 2021 and 2022, prices have dropped significantly to $436 per thousand board feet ($185 per cubic meter) by 2024.

In total, in 2024, the U.S. imported more than $11 billion in forest and wood products from Canada. Softwood lumber accounted for almost half of that.

Lumber and housing

As personal income rises and populations grow, people seek to build new homes. As new home construction - called "housing starts" in economic data - increases, so does demand for softwood lumber to build those homes. And when housing starts slow, so does lumber demand.

For instance, housing starts fell during the Great Recession. They declined from a January 2006 peak of 2.3 million to less than 500,000 in January 2009 - a decrease of nearly 80%. In that same period, imports of Canadian lumber fell by more than 60%. Domestic softwood lumber production fell by more than 40%.

Both domestic and imported lumber prices can directly influence the overall cost of building homes, which in turn affects housing affordability. That said, lumber used for framing usually accounts for less than 10% of the total cost to build a new home. The effects of tariffs on new home construction may be significantly less than other factors, such as rising labor costs.

There are different kinds of wood commonly used in building lumber.

A matter of choice

The U.S. has a lot of potential lumber available. Especially in the South, the inventory ofharvestable lumber has grown significantly over many years.

However, the types of wood available in the U.S. are not always the same as what's available from Canadian imports. For framing, contractors may prefer spruce, northern pines and fir, naturally abundant in Canada, because they are lighter and less likely to warp than southern yellow pine, which is abundant in the southern U.S. Southern yellow pine is more commonly used to make utility poles and preservative-treated lumber for outdoor construction projects, such as decks.

Lumber from Idaho, eastern Oregon and eastern Washington, however, does share characteristics with Canadian species and could take the place of at least some Canadian lumber.

As the Trump administration seeks to boost domestic lumber, buyers will be looking not only at where their lumber came from, but what it costs and what type oflumber is best for what they need to accomplish.

Andrew Muhammad
Professor of Agriculture and Resource Economics, University of Tennessee

Adam Taylor
Professor of Natural Resources, University of Tennessee

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The US Beef Industry in a Time of Trade Tensions

Andrew Muhammad, Charles Martinez, and Parker Wyatt

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Since his inauguration in January 2025, President Trump has systematically raised tariffs on imports from nearly all major trading partners. These measures have been enacted under authorities such as the International Emergency Economic Powers Act and Section 232 of the Trade Expansion Act (Burkhart and Hammond, 2025). Tariffs can reduce trade, investment, and output by increasing costs and disrupting supply chains, often leading to long-term inefficiencies. Trade policy uncertainty further amplifies these effects by discouraging business investment and slowing economic decision-making—even in the absence of new tariffs (Luckstead and Devadoss, 2025). For the US beef sector, already grappling with supply constraints and global competition, these trade actions have added pressure to an already strained industry.

The beef sector remains a cornerstone of American agriculture, having undergone notable transformations over the past decade. Both imports and exports play a crucial role in shaping the US beef industry and agricultural trade overall. Although imports account for only 17% of US beef consumption and exports represent 10% of domestic production (USDA-FAS, 2025a), beef consistently ranks among the top 10 agricultural imports and top 5 agricultural exports in the United States (USDA-FAS, 2025b).

Figure 1 shows US beef consumption and trade from 2010 to 2024. Consumption has remained relatively stable, with modest growth, from around 26 billion pounds in 2010–2012 to almost 29 billion pounds in 2024. During this period, imports have grown significantly, rising from about 2.3 billion pounds to 4.6 billion pounds, with the fastest growth occurring in the last few years. Exports also increased overall but at a slower pace, peaking around 2018 before slightly declining. The widening gap between imports and exports in recent years suggests increasing reliance on foreign countries for US demand. It is important to note, however, that most beef imports are different from exports. The US usually imports leaner and lower-cost cuts used for ground beef production, while exports are mostly high-value, grain-fed cuts like steaks and ribs that appeal to premium markets abroad (Brower, 2022).

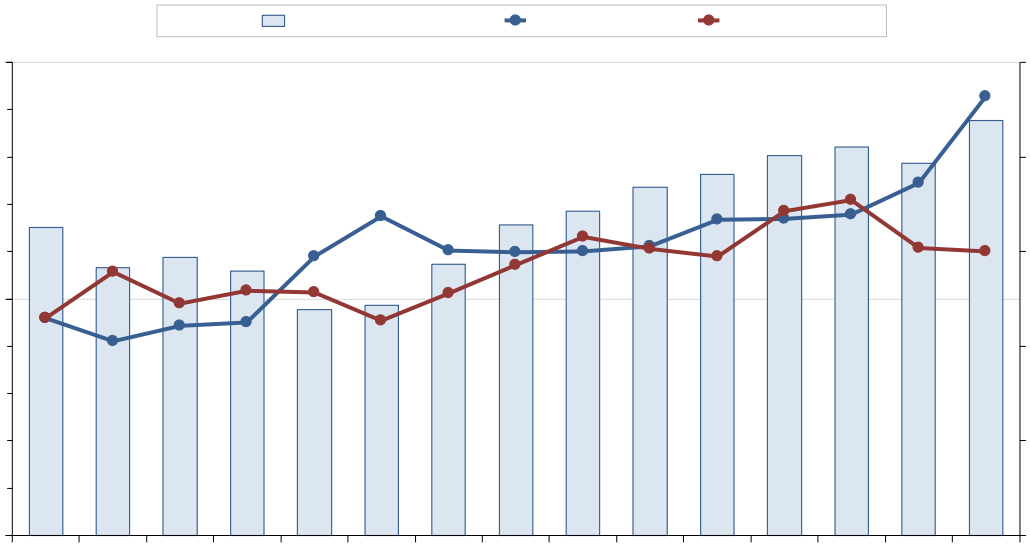
In this article, we examine recent trends in US beef production and trade, highlighting how the sector has adapted to shifting global consumption patterns and domestic supply constraints. We also assess the impact of recent tariffs and trade tensions on US beef imports from key suppliers such as Canada, Mexico, and Brazil. While these policies are often framed as protective measures for American producers, they may inadvertently raise costs for processors and consumers. On the export side, we explore the effects of current trade tensions and how major beef-producing countries like Brazil have expanded their global market share, outcompeting US beef in key international markets.

This article provides a comprehensive overview of how trade tensions, international competition, and shifting supply and demand have collectively influenced the structure and performance of the US beef industry in recent years. Understanding these shifts is essential not only for policymakers and industry stakeholders but also for consumers, whose choices and costs are increasingly shaped by international trade.

Shrinking Herds and Rising Prices

Understanding the current state of US cattle inventory and beef production is essential to evaluating trade dynamics, as domestic supply levels directly influence imports, exports, and prices. The US cattle herd has continued to shrink, marking sixth straight years of decline. According to the USDA January 2025 cattle report (USDA-NASS, 2025), the total number of cattle and calves dropped by about 1% from the previous year, bringing the herd inventory to its lowest level since 1952. This ongoing reduction is part of a broader cattle cycle that began in 2014 and has now lasted 11 years, resulting in the third-longest decline in US history.

Figure 1. US Beef Consumption and Trade, 2010–2024

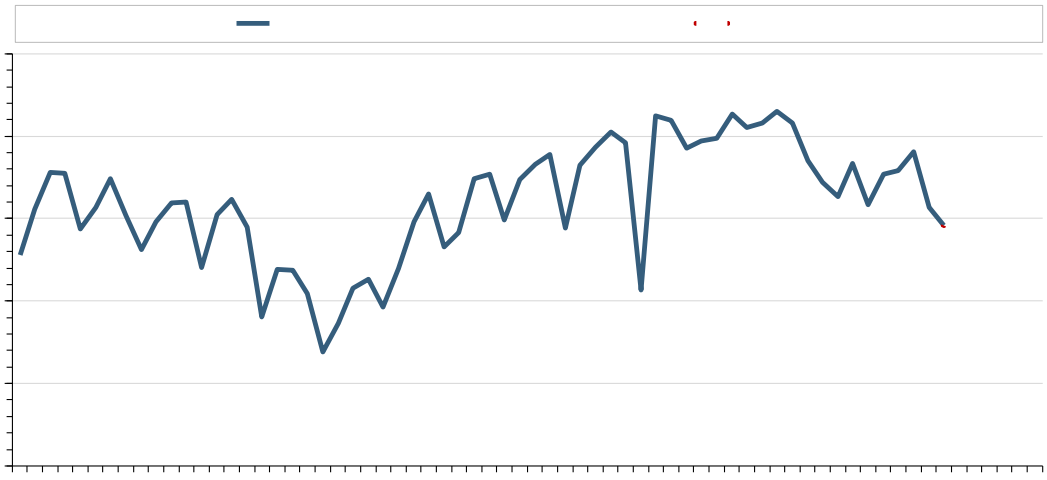


Source: USDA-FAS (2025a).

As expected, lower cattle inventories translate directly into reduced beef production. Figure 2 shows quarterly US beef production from the first quarter of 2010 through the second quarter of 2025, with forecasts extending through the third quarter of 2026 (LMIC, 2025; USDA-AMS, 2025). Production peaked in the third quarter of 2022 at 7.1 billion pounds and has since trended downward. Over the past 15 years, the average quarterly production has been approximately 6.5 billion pounds. The most recent data from the second quarter of 2025 show production at less than 6.4 billion pounds, slightly below the long-term average.

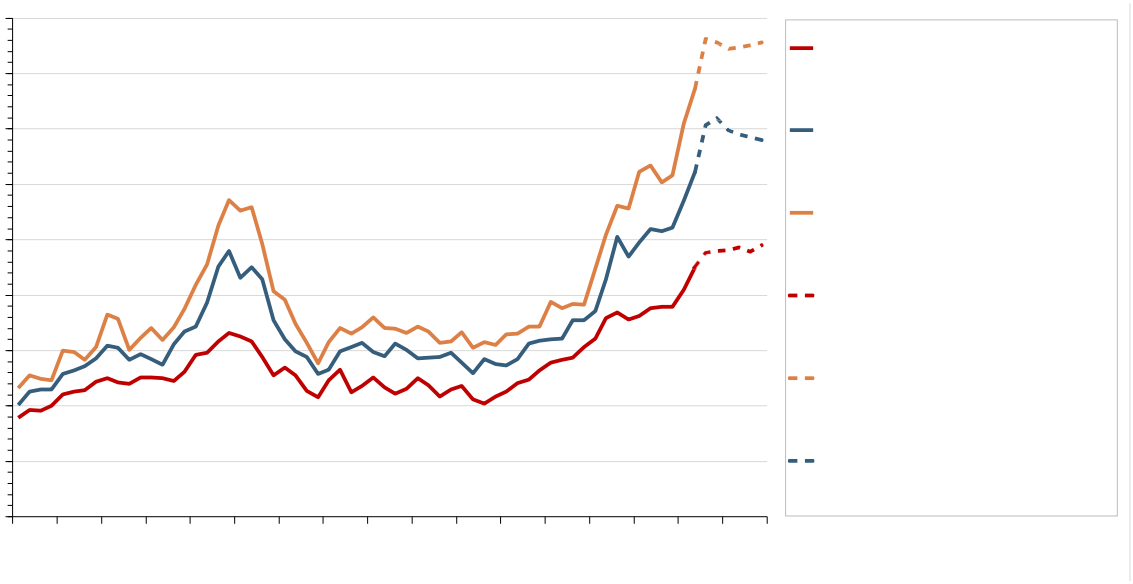
Forecasts for 2025 and 2026 suggest continued declines in production due to two key factors: heifer retention and overall herd reduction. Both contribute to fewer cattle available for slaughter, reinforcing the downward trend in beef supply. These production levels are not surprising given the persistent liquidation of the cattle herd and the structural constraints facing producers (Figure 2).

Figure 2. US Beef Production and Forecasts, 2010:Q1–2026:Q3



Source: USDA-AMS (2025), LMIC (2025).

Figure 3. US Feeder and Slaughter Steer Prices and Forecasts, 2010:Q1–2025:Q3



Source: USDA-AMS (2025), LMIC (2025).

Reduced production has led to noticeable price increases at the retail level. During the first half of 2025, the average price for all fresh beef rose from $8.15 per pound in January to $8.90 per pound in July (USDA-ERS, 2025). Ground beef, a highly consumed product, increased from $5.50 to $6.25 per pound over the same period. These price movements reflect tightening supply and signal broader inflationary pressures within the beef supply chain.

Historically, the US beef industry has relied on the live cattle trade to supplement domestic supply. Imports of feeder calves from Mexico and Canada help offset tight cattle inventories but have faced recent disruptions. In November 2024, the Animal and Plant Health Inspection Service announced restrictions on livestock imports from Mexico due to an outbreak of New World screwworm (NWS) in Mexico's southern region. Feeder cattle typically enter the United States in the spring and fall and account for roughly 5% of total placements annually (Anderson, Maples, and Martinez, 2024). In southern states, that figure rises to approximately 18% (Anderson, 2025).

The November ban resulted in the loss of one month of feeder cattle imports in 2024 and two months in early 2025. Although the border reopened briefly in March, imports were suspended again in May due to rising NWS cases. As of this writing, the ban remains in effect, effectively nullifying a key source of supply for the US beef industry. Live cattle imports from Canada also declined, albeit slightly, in 2025 (USDA, 2025; USDA-FAS, 2025b).

The shortage of domestic and imported feeder cattle has driven prices to record highs. Figure 3 shows quarterly prices for feeder and slaughter steers from the first quarter of 2010 through the second quarter of 2025, with projections through the third quarter of 2026. Steer prices (500–600 lb) rose from around $116 per hundredweight in the first quarter of 2010 to almost $286 in 2014, driven by drought and tight supply. That year also marked the beginning of the current cattle cycle.

Improved prices during the early years of the cycle led to herd expansion, followed by a correction and price declines from 2017 to 2020. Since then, prices have rebounded sharply. In the second quarter of 2025, 500–600 lb steers reached a record $386.73 per hundredweight—a 179% increase over 9 years. Similar trends are observed for 700–800 lb steers and slaughter cattle (Figure 3).

With record-high beef prices and higher costs for replacement cattle, producers are likely to continue liquidating herds rather than rebuilding. This trend is expected to sustain high cattle prices in the near term. Ultimately, factors such as weather conditions, feed costs, and consumer willingness to pay for beef will determine when herd expansion resumes.

Trade Tensions and US Beef Imports

Next, we examine US beef import trends to determine whether recent trade tensions have influenced imports. In 2024, the United States was the second-largest beef-importing country in the world (United Nations, 2025). Beef imports supplement the domestic supply, especially during periods of low cattle inventory or shortages,

Table 1. US Fresh and Chilled and Frozen Beef Imports: 2024 and 2025 Year-to-Date (January–July) Comparison

	Fresh and Chilled				Frozen		
Source	Jan.–July 2024	Jan.–July 2025	%Δ	Source	Jan.–July 2024	Jan.–July 2025	%Δ
	Value ($ billions)				Value ($ billions)		
World (total)	3.21	3.62	12.6	World (total)	2.45	4.05	65.5
Canada	1.36	1.41	3.9	Australia	0.74	1.20	62.6
Mexico	0.96	1.07	11.0	Brazil	0.42	0.89	112.3
Australia	0.56	0.74	31.1	New Zealand	0.69	0.82	18.4
	Quantity (000 MT)				Quantity (000 MT)		
World (total)	387.56	405.14	4.5	World (total)	439.18	655.11	49.2
Canada	183.54	174.34	-5.0	Australia	126.32	178.51	41.3
Mexico	114.60	124.60	8.7	Brazil	86.51	177.50	105.2
Australia	50.08	61.56	22.9	New Zealand	121.61	123.09	1.2
	Unit Value/Price ($/kg)				Unit Value/Price ($/kg)		
World (total)	8.29	8.93	7.7	World (total)	5.58	6.19	10.9
Canada	7.41	8.10	9.4	Australia	5.83	6.71	15.1
Mexico	8.38	8.55	2.1	Brazil	4.84	5.00	3.4
Australia	11.25	12.00	6.6	New Zealand	5.71	6.67	17.0

Note: Fresh and chilled beef is defined according to HS 0201: meat of bovine animals, fresh or chilled; frozen beef is defined according to HS 0202: meat of bovine animals, frozen.
Source: USDA-FAS (2025b).

ensuring consistent availability for consumers (Calil, 2024). Imports of lean beef trimmings are essential for producing ground beef, while feeder cattle from Mexico and Canada support feedlot operations (Brower, 2022; USDA-FAS, 2025b). Imports also help stabilize prices and buffer market disruptions such as droughts and disease outbreaks. While almost all live cattle imports are from Canada and Mexico, beef imports are more diversified (USDA-FAS, 2025b).

Table 1 presents a year-to-date comparison of US imports of fresh and chilled and frozen beef from January to July in 2024 and 2025, detailing changes in import value, quantity, and unit value (price) across major trading partners. Despite recent trade tensions, US beef imports experienced significant growth in 2025, with both fresh and chilled and frozen beef increasing in value and volume. Fresh and chilled beef imports rose by 12.6% in value and 4.5% in quantity, driven by moderate gains from Mexico and Australia. Canada remained the largest supplier in this category, though its volume slightly declined. In contrast, frozen beef imports surged by 65.5% in value and 49.2% in volume, with Brazil and Australia showing the most significant increases. Brazil's frozen beef exports to the US more than doubled in both value and volume, reflecting its growing competitiveness in the global market.

Prices—as measured by unit values—also increased for most sources, suggesting rising demand and possible supply constraints. For example, frozen beef from New Zealand saw a 17% increase in price, while fresh and chilled beef from Canada rose by 9.4%.

The sharp rise in frozen beef imports from countries like Brazil reflects both a response to domestic supply challenges and a shift toward more competitive international suppliers. However, recent trade tensions may begin to dampen this trend. Earlier in 2025, Mexico and Canada faced tariffs of 25% and 35%, respectively, largely due to concerns over border security and drug trafficking. Australia, New Zealand, and Brazil were impacted by the "Liberation Day" tariffs, which began at approximately 10%, while Brazil was hit with an additional 40% tariff due to the prosecution of former President Bolsonaro. Imports from Canada and Mexico may be exempt under USMCA origin provisions, and tariffs on Australia, New Zealand, and Brazil had not yet been implemented at the time of this article (Burkhart and Hammond, 2025). However, we are starting to see the impact of these policies take effect. For instance, frozen beef imports from Brazil and New Zealand in July 2025 were down 25% and 14%, respectively, compared to July 2024 (USDA-FAS, 2025b). This decline suggests that tariffs and resulting trade tensions are starting to impact beef imports.

Recent Trends in US Beef Exports

The United States is one of the largest beef-exporting countries in the world, ranked third in value behind Brazil and Australia in 2024 (United Nations, 2025). While

Table 2. US Fresh and Chilled and Frozen Beef Exports: 2024 and 2025 Year-to-Date (January–July) Comparison

	Fresh and Chilled				Frozen		
Destination	Jan.–July 2024	Jan.–July 2025	%Δ	Destination	Jan.–July 2024	Jan.–July 2025	%Δ
	Value ($ billions)				Value ($ billions)		
World (total)	2.61	2.37	-9.1	World (total)	2.70	2.55	-5.4
South Korea	0.54	0.53	-1.5	South Korea	0.68	0.82	20.6
Mexico	0.52	0.52	-1.1	Japan	0.32	0.40	24.8
Japan	0.54	0.43	-20.1	China	0.70	0.38	-46.0
Canada	0.40	0.36	-9.6				
	Quantity (000 MT)				Quantity (000 MT)		
World (total)	231.00	199.59	-13.6	World (total)	331.67	316.81	-4.5
South Korea	39.88	40.32	1.1	South Korea	87.36	101.12	15.8
Mexico	53.80	47.13	-12.4	Japan	62.17	74.11	19.2
Japan	60.39	47.07	-22.1	China	79.12	43.94	-44.5
Canada	36.35	31.66	-12.9				
	Unit Value/Price ($/kg)				Unit Value/Price ($/kg		
World (total)	11.29	11.88	5.2	World (total)	8.13	8.05	-0.9
South Korea	13.56	13.22	-2.5	South Korea	7.83	8.16	4.2
Mexico	9.74	11.00	12.9	Japan	5.20	5.44	4.7
Japan	8.89	9.12	2.5	China	8.82	8.58	-2.7
Canada	10.90	11.32	3.8				

Note: Fresh and chilled beef is defined according to HS 0201: meat of bovine animals, fresh or chilled; frozen beef is defined according to HS 0202: meat of bovine animals, frozen
Source: USDA-FAS (2025b).

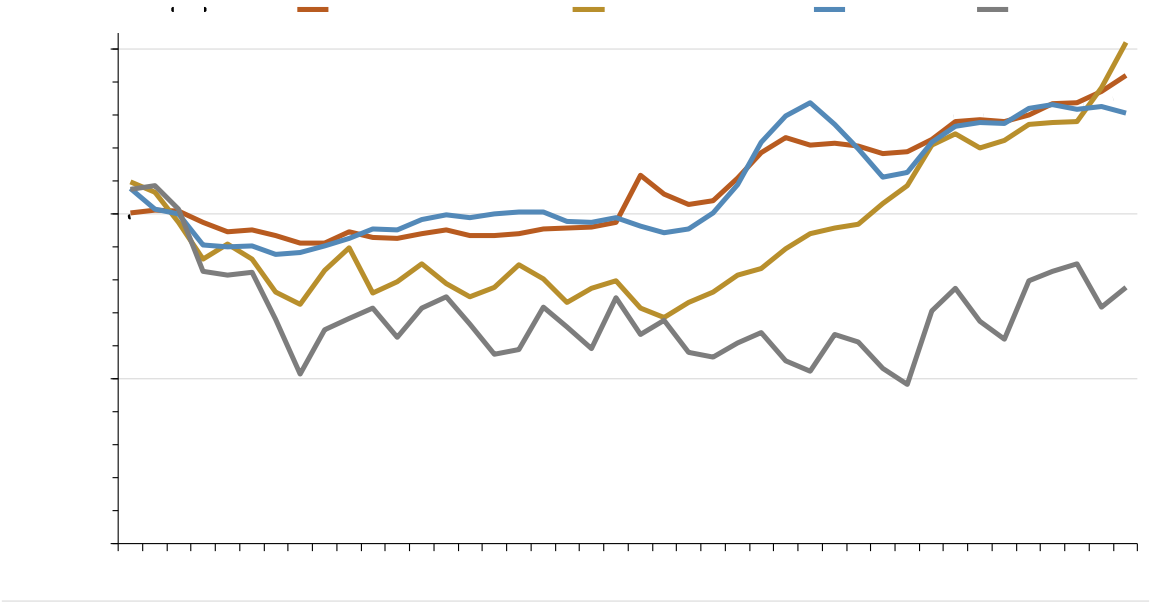
export values are comparable across the three countries—$9.1 billion in fresh, chilled, and frozen beef exports for the United States versus $11.7 billion for Brazil and $9.3 billion for Australia—both Brazil and Australia export significantly more than the United States in terms of quantity. This was due to US beef prices ($9.48/kg) being significantly higher than Brazil ($4.58/kg) and Australia ($6.52/kg) (United Nations, 2025). US beef is grain-finished and is considered higher value in global markets, whereas beef from countries such as Australia, New Zealand, and Brazil is mostly grass-finished, which can reduce quality and consumer appeal (Melton et al., 1982).

Unlike US beef imports, export trends have been more negative in 2025, particularly for fresh and chilled beef and frozen beef exports to China. This may be the result of rising global competition and shifting consumer preferences, but it could also be due to US trade policies, which have introduced uncertainty and increased costs for foreign buyers of American beef.

Table 2 presents a year-to-date comparison of US exports of fresh and chilled, and frozen beef from January to July in 2024 and 2025, detailing changes in import value, quantity, and unit value (price) across major destination countries. US beef exports declined in early 2025, with both fresh and chilled and frozen categories showing year-to-date decreases in value and volume compared to the same period in 2024. Fresh and chilled beef exports fell by 9.1% in value and 13.6% in volume, with notable declines to Japan (–20.1% in value; –22.1% in volume) and Canada (–9.6% in value; –12.9% in volume). Frozen beef exports dropped 5.4% in value, driven largely by a sharp 46% decline in exports to China. However, some markets showed growth in value in 2025: South Korea increased its frozen beef imports by 20.6%, and Japan by 24.8%. Export prices, on the other hand, have been relatively stable compared to import prices.

The significant decline in frozen beef exports to China warrants further discussion. In response to US tariffs, China imposed retaliatory tariffs exceeding 100% earlier this year. Although those tariffs have since been reduced to around 33% (Bown, 2025), the ongoing trade tensions appear to have negatively impact US beef in the Chinese market. In addition, in March 2025, the Chinese government allowed export registrations for nearly 400 beef processing facilities to expire, effectively revoking market access for about 60% of all US facilities authorized to export to China (Marianetti, 2025). According to China customs data, total beef imports from January to July rose by 5.1% compared to the same period last year. Notably, imports from Brazil increased by 19.1%, while imports from the United States declined over the same period (Trade Data Monitor, 2025).

Figure 4. Selected Beef and Cattle Price Indexes and CPI, 2015:Q1–2025:Q2



Source: CPI, both all goods and beef and veal, Bureau of Labor Statistics; Slaughter Steer, USDA Agricultural Marketing Service; Exports and Imports, USDA, Foreign Agricultural Service.

Price Comparisons and Inflation

In this final section, we compare import and export prices, domestic beef prices, and cattle prices to overall inflation. This is important for understanding how trade dynamics and broader economic pressures are influencing costs throughout the beef supply chain. Price indexes from 2015–2025 are reported in Figure 4. Early in the period, retail beef prices (beef and veal CPI) and export prices closely tracked overall inflation (CPI), while slaughter steer prices fell below the inflation rate. Import price indexes also dipped during these years. By 2018–2019, retail beef prices stabilized near CPI, but export prices lagged slightly. The pandemic years (2020–2021) brought sharp disruptions: Retail beef prices climbed above CPI, and export prices rose even faster, driven by strong foreign demand and supply chain constraints. Notably, the most significant increase was observed in steer prices post-pandemic. In contrast, import prices remained relatively flat. From 2022 onward, consumer, export, and steer prices all outpaced CPI, reflecting persistent inflationary pressures and tightening supply in the industry.

Closing Remarks

In this article, we examined the evolving dynamics of the US beef trade, focusing on how domestic production trends, global competition, and trade policy have collectively shaped market outcomes. Recent shifts reflect broader changes in global supply and demand, the emergence of competing exporters, and trade policies dating back to President Trump's first term. The US beef industry continues to face significant challenges, including declining cattle inventories, rising production costs, and shifting trade relationships. Imports have played a vital role in stabilizing domestic supply amid record-high prices and supply chain disruptions. However, recent trade tensions and disease-related restrictions have complicated access to key sources of imported beef, raising concerns about long-term resilience. Retaliatory tariffs and evolving trade partnerships have redirected global beef flows, with countries like China seeking alternative markets to the United States.

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About the Authors: Andrew Muhammad is a Professor and Blasingame Chair of Excellence with the Department of Agricultural and Resource Economics at the University of Tennessee Institute of Agriculture. Charles Martinez is an Assistant Professor with the Department of Agricultural and Resource Economics at the University of Tennessee Institute of Agriculture. Parker Wyatt is a Graduate Student with the Department of Agricultural and Resource Economics at the University of Tennessee Institute of Agriculture.

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Annual Review of Resource Economics

Global Food Demand: Overcoming Challenges to Healthy and Sustainable Diets

Andrew Muhammad,[1] Emiliano Lopez Barrera,[2] and Norbert L.W. Wilson[3]

[1] Department of Agricultural and Resource Economics, University of Tennessee Institute of Agriculnire, Knoxville, Tennessee, USA; email: amuhammad@utk.edu

[2]Department of Agricultural Economics, Texas A&M University, College Station, Texas, USA; email: elopezba@tamu.edu

[3]Duke Divinity School, Wcxld Food Policy Center, and Sanford School of Public Policy, Duke University, Durham, North Carolina, USA; email: norhert.wilsnn@duke.edu

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Keywords

economic models, food security, global food demand, least-cost diet, sustainability

Abstract

We review the research on global food demand and examine modeling efforts to address the complexities of dietary transitions. We also highlight challenges affecting the economic feasibility of dietary targets aimed at promoting both human health and environmental sustainability (e.g., EAT-*Lancet).* The relationships among income, prices, and food demand play an important role in understanding how economic growth impacts nutrition and sustainability. As colmtries become more affluent, and food accow1ts for a smaller share of income, dietary transitions often lead to increased consumption of both resource-intensive and energy-dense foods. Modeling strategies must account for these dynamics to accurately project future resource needs and nutritional outcomes. Research should also consider the cost of healthy diets within the context of both food and nonfood expenditures. When both are considered, considerably fewer people can afford proposed sustainable diets. Economic, environmental, and health perspectives should all be integrated when developing strategies to promote healthy and sustainable diets.

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1. INTRODUCTION

Transforming food systems to address public health and environmental challenges calls for a comprehensive understanding of the factors driving global food demand. While the consumption of healthy foods has improved globally, there has also been an increase in the consumption of unhealthy foods, as well as animal-based proteins and vegetable oils, which are only considered healthy at lower intake levels (Costlow et al. 2025, Imamura et al. 2015). This trend has contributed to global health issues, including the simultaneous rise of undernutrition and obesity. Micronutrient deficiencies affect more than 5 billion people (Passarelli et al. 2024), contributing to child stunting and wasting (WHO 2023). Simultaneously, the prevalence of overweight and obesity among children has surged, primarily due to increased intake of highly processed, energy-dense foods (Lopez Barrera & Shively 2022, WHO 2023). Dietary patterns are also fueling a rise in adult obesity, particularly in middle- and low-income countries (NCD-Risk Factor Collab. 2016), contributing to the increased risk of noncommunicable diseases such as cardiovascular disease and diabetes (Afshin et al. 2019, Murray et al. 2020). Addressing tl1ese challenges requires that individuals choose healthier diets. However, healthy food choices depend on both access and affordability (Headey & Alderman 2019, Wallingford et al. 2024).

As health and nutrition issues have intensified, global patterns have increasingly impacted the environment. The intensification of agricultural production to meet growing demand places pressure on natural resources, w1dermining global environmental resilience (Campbell et al. 2017, Cordell & White 2014, Rockstrom et al. 2009). The global food system also relies heavily on freshwater resources, and nutrient runoff from farming activities further compounds environmental challenges (Foley et al. 2005, Hoekstra & Wiedmann 2014). If unchecked, production trends could threaten ecosystems and biodiversity, highlighting the need for sustainable practices and policies to mitigate environmental degradation. In this context, food loss and waste pose another challenge (30-40% of food production) (FAO 2013, Lopez Barrera & Hertel 2021). This waste accounts for about 24% of freshwater use and 23% of global cropland (Kummu et al. 2012).

When addressing the critical goal of providing a growing global population with safe and nutritious foods, it is essential to consider the economic and social factors that shape global food demand **(Figure 1).** These factors are important for promoting healthy food choices and mitigating the environmental degradation caused by food production (Fan et al. 2021). Understanding these factors is pivotal for tl1e following:

- Projecting future food needs (Bodirsky et al. 2015, Valin et al. 2014),
- Addressing global food security (Regmi & Meade 2013),
- Managing natural and agricultural resources to meet growing demand (Keating et al. 2014, Sands et al. 2023),
- Assessing the environmental consequences of increased demand (Tilman et al. 2011),
- Evaluating how economic instability and prices impact vulnerable populations (Kallruhl et al. 2016), and
- Structuring incentives and policies aimed at promoting healthier diets and improving associated public healtl1 and environmental outcomes (Bodirsky et al. 2015).

Without a clear w1derstanding of what people eat and why, along with the economic and cultural influences affecting food choices globally, we cannot effectively address food-related challenges such as malnutrition and food insecurity. This knowledge is also essential for developing sustainable diet solutions.

In this article, we review the research on global food demand and dietary transitions and examine past and current modeling efforts to address the complexities of these transitions. In this

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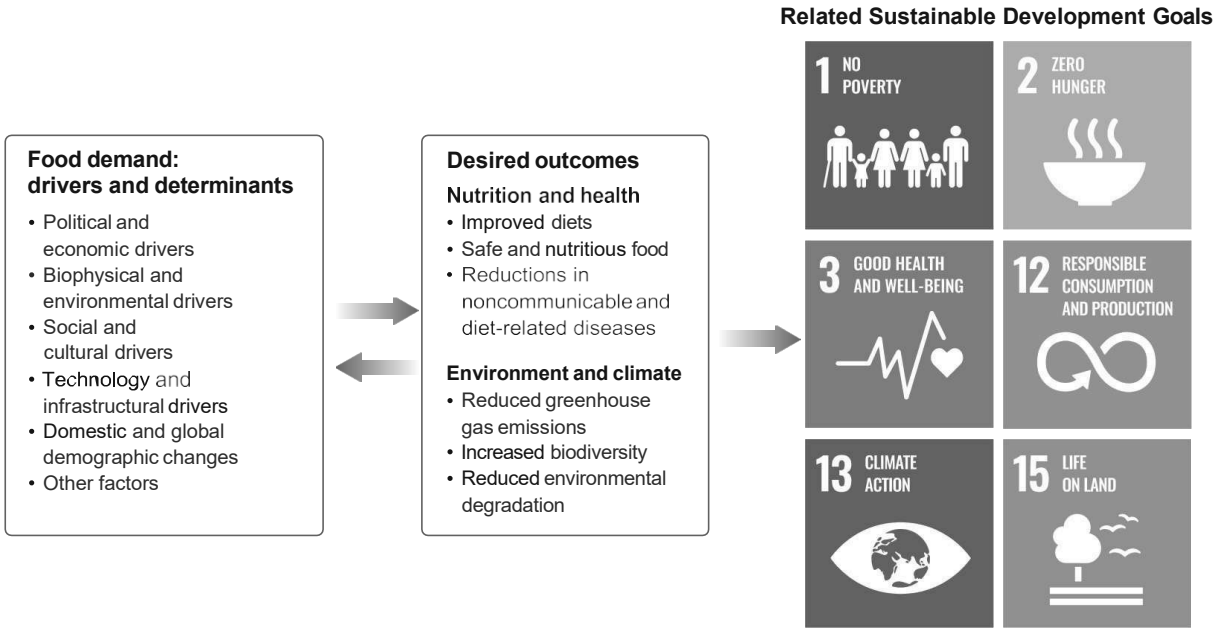

Figure 1

Overview of food demand drivers, desired outcomes, and related United Nations Sustainable Development Goals. Information is based on the various studies reviewed in the article. Related Sustainable Development Goals reproduced from the United Nations Department of Economic and Social Affairs, Sustainable Development **(https://sdgs.un.org/goals).**

context, we also review research on challenges impacting the economic feasibility of dietary targets designed to promote both human health and environmental sustainability (e.g., *EAT-Lancet).* Economic and cultural factors shaping food demand globally can work against sustainable diet solutions. Regarding this issue, we discuss the economic factors that determine dietary choices around the world, considering the primary drivers of affordability and access: income and prices. Here we consider how income or national affluence and prices have shaped food spending and consumption across the full spectrum of countries, from the least-developed to the highest-income nations.

Economic growth can lead to dietary shifts toward more resource-intensive foods, with notable implications for economic, environmental, and health dimensions. Modeling frameworks that effectively integrate these dimensions offer valuable insights for addressing these challenges. We review the traditional modeling approaches to assessing the impacts of dietary transitions and consider how modeling frameworks have been used to assess the impacts of diets on human health and environmental wellbeing.

We then discuss the economic feasibility of sustainable dietary frameworks. Drawing from the planetary boundaries framework, the *EAT-Lancet* Commission used "the latest available science to make a global assessment of the food system and set global scientific targets for healthy diets and sustainable food production" (Willett et al. 2019, p. 452). We discuss the affordability of nutritionally adequate diets with a focus on the affordability of the *EAT-Lancet* diet (henceforth the *Lancet* diet). We point out challenges as well as potential ways forward for achieving sustainable and nutritious diets globally.

We close the review with a discussion of policy interventions-such as taxes on resource-intensive foods, subsidies for sustainable alternatives, and incentives to reduce food waste-and their potential to promote healthier, more sustainable food consumption bundles. We further critique computable general equilibrium (CGE) and partial equilibrium (PE) models in this context,

assessing their ability to simulate complex dietary transitions and highlighting future directions for analysis and model refinement.

2. ECONOMICS OF GLOBAL FOOD DEMAND

The factors affecting food demand within and across countries include income, prices, culture, tastes, and preferences, among others. These factors must also be considered in the context of anthropometric food requirements (i.e., dietary needs based on body dimensions) (Bodirsky et al. 2020). The literature has been consistent on issues of income and prices. Individuals in higher-income countries allocate a significantly smaller share of their total budget to food compared to those in the poorest countries (less than 10% versus more than 50%). For example, US food expenditures account for about 5% of gross domestic product (GDP), whereas in countries such as South Sudan, Nepal, and Somalia, this figure can exceed 50% (World Bank 2024). Consequently, income and prices can exert a stronger influence on food demand and diets in lower-income countries than in higher-income countries (Clements et al. 2006; Cranfield et al. 1998; Muhammad et al. 2011, 2017; Regmi & Meade 2013; Seale et al. 2003; Selvanathan & Selvanathan 2003). "Whereas in the lowest-income countries, a percentage increase in income will cause an increase in spending on starchy staples by more than half the proportional increase in income, the resulting increase in higher-income countries is usually negligible and can even be negative (Muhammad et al. 2011, Seale et al. 2003).

Identifying global consumption patterns due to tastes and preferences or noneconomic factors has proven to be more elusive (Clements et al. 2006, Gao 2012). However, studies have identified changing cultural trends such as consumers in lower-income countries adopting more westernized diets (Liang et al. 2024). For example, recent data show significant shifts in dietary patterns in countries such as China and Brazil, where rising incomes have led to increased consumption of meat and dairy products (Delgado 2003, Parlasca & Qaim 2022, Vecchia & Majem 2015). Evidence also shows that diet quality and healthy food choices increase with education in most world regions (Miller et al. 2022).

Other factors such as taste and preferences are, in part, reflected by changing demand estimates related to income and price (Gao 2012, Lusk 2017, Selvanathan & Selvanathan 2003). For instance, food demand responsiveness to income and prices has been found to vary with age, sex, and regional influences (Muhammad et al. 2017). The notion that preferences and other factors could affect demand estimates has important implications for the effectiveness of taxes and subsidies in different populations and countries and how other policies such as information campaigns and nutrition education might influence structural change in food demand responsiveness (Guthrie et al. 2015).

In this section, we review studies of global food demand and discuss the economic factors that determine dietary choices around the world. Although we primarily focus on the effects of income and national affluence, as they are considered important drivers of food demand (Fukase & Martin 2020), we also consider how prices have shaped demand. Fundamental to this discussion is how food spending and consumption vary across the full spectrum of countries, from the least-developed to tl1e highest-income nations. On this point, the literature has focused on food demand overall, i.e., the demand for food relative to other major spending categories such as health care, education, and housing (Clements et al. 2006, Selvanathan & Selvanathan 2003, Theil 1996), as well as the demand for individual food categories (Cranfield et al. 1998, Liang et al. 2024, Muhammad et al. 2011, Seale et al. 2003). By exploring these various factors, we gain a comprehensive understanding of how income and prices shape global food demand.

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2.1. Country Affluence and Global Diets

Understanding the relationship between food demand and income can inform how economic growth and national affluence might contribute to (or undermine) nutrition and sustainability goals. Data suggest that income growth does not necessarily lead to greater demand for healthier and more nutritious foods, nor does it ensure a reduced intake of foods associated with negative health and environmental outcomes (Finaret & Masters 2019, Herforth & Ahmed 2015, Masters et al. 2022). In fact, when considering the factors that influence overall diet quality and sustainability, policy interventions have been argued to be necessary even in the highest-income cow1tries (Steenson & Buttriss 2021).

How does income influence food spending across countries and food categories, and what are the implications for global nutrition and sustainable diets? Evidence suggests that income growth could result in dietary changes that are not consistent with sustainability goals. For instance, sustainable diet recommendations outlined by Willett et al. (2019) suggest reduced intake of reel meat and dairy products and increased consumption of fruits and vegetables. However, rising incomes worldwide often result in food trends that contradict these recommendations.

Using recent data from the International Comparison Program (ICP) of the World Bank, a global initiative that collects detailed price and expenditure data at the country level (World Bank 2024), we estimate the predicted food shares for selected food categories for countries included in both tl1e 2017 and 2021 ICP data round. Predicted food shares are derived using a conditional demand model following Working (1943), (I:;E;, $= ci; + A$ln(L; *Eic)),* where *E;c* is the expenditure on the ith food category in country *c.*[1] Results are reported in **Figure** 2. *As* the figure shows, the share of food expenditures allocated to meat and dairy significantly rises with national affluence, particularly at the early stages of income growth. Meat expenditure shares increase from less than 15% in the lowest-income countries to more than 20% when per capita income reaches US$10,000 [adjusted for purchasing power parity (PPP)]. Dairy expenclinire shares increase from less than **1**% to more than 10% when per capita income reaches $20,000.

According to Willett et al. (2019) and Lang & Barling (2013), even small increases in reel meat or dairy consumption could hinder sustainability goals. Unfortunately, rising incomes lead to substantial increases in spending on these products, particularly at the lower encl of the income spectrwn. Nate that 43% of the global population is in countries where annual per capita income is less than $10,000. Depending on the country, tl1is translates to only $3,000 to $5,000 on a market exchange rate basis (i.e., not adjusted for PPP) (World Bank 2024). The increase in spending on meat and dairy as countries become more affluent is most significant among these lower-income countries and tends to level off in the early stages of the global income distribution. For instance, meat expenditure increased from around 13% in the lowest-income countries (approximately $65 per person) to about 20% as per capita income reaches $5,000 (around $113 per person in lower-middle-income countries) but remains around 20% thereafter.

Although dietary recommendations include increased consumption of fruits and vegetables, fruit expenditure shares remain constant across countries regardless of income (< 10% globally), with only a modest increase at the lower encl of the income spectrwn. The share of spending on vegetables tends to decline with a country's affluence, decreasing from around 30% in the lowest-income cow1tries (armmcl $132 per person) to less tlian 15% in tl1e highest-income cow1tries (around $319 per person). Spending on vegetables decreases mainly at lower-income levels, yet the decline also continues throughout the middle-income level **(Figure 2).** The results for vegetables

[1]The above specification was estimated using a maximum likelihood procedure for equation systems. We assumed average or fixed prices for estimation.

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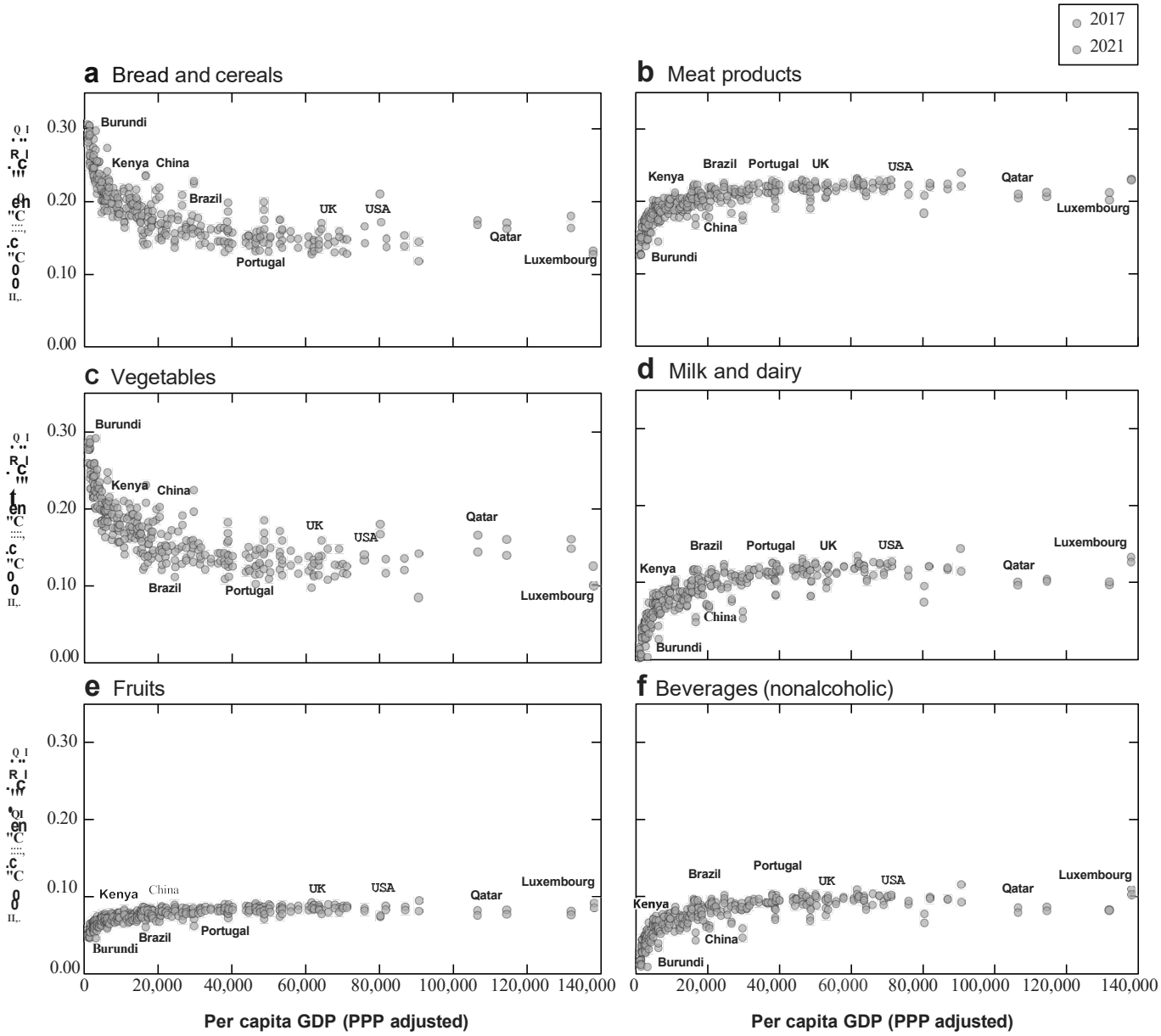

Figure 2

Predicted food budget shares for selected categories across 162 countries. Spending shares and gross domestic product (GDP) are purchasing power parity (PPP) adjusted. Predicted food shares are derived using a conditional demand model by Working (1943), (=*a;*+ A ln(L; *Eh-)),* where *E;c* is the expenditure on the ith food category and *L; E;c* is total food spending **in** country *c.* Estimates are derived using data from the International Comparison Program (ICP), World Bank (2024) **(https://www.worldbank.org/en/programs/icp/ data).**

could be misleading because tubers and legumes are included among vegetables (World Bank 2020). Observed declines could be due, in part, to decreased spending on these categories.

Expenditures on breads and cereals, being the most staple-dominated category, decline as national affluence increases, ranging from approximately 30% in Burundi (the lowest-income country according to our data) to 13% in Luxembourg (the highest-income country), with most of this reduction happening at lower-income levels **(Figure 2).** This category includes basic staples such as rice and grains (World Bank 2020), so the overall decline is not surprising. However, this

category also includes whole grains, which are considered nutritionally beneficial (Willett et al. 2019).

2.2. Income Elasticities Across Countries

Income elasticities are widely used measures of food demand responsiveness. They quantify the percentage change in the quantity demanded for a specific good or consumption category in response to a percentage change in income. Because elasticities are based on percentage changes rather than unit changes, they are comparable across spending categories and countries.

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Food, as an aggregate, is both a normal good (income elasticity > 0) and a necessity (1 > income elasticity > 0), as noted in studies going back more than a half century. For example, Tobin (1950) examined US urban and rural households as early as 1918 and found income elasticity estimates ranging from as low as 0.35 for farm households in 1941 to 0.68 for urban households in 1927-1928. Similarly, Houthakker (1957) reported estimates ranging from 0.71 for blue collar households in The Netherlands and in the western United States to 0.34 for middle-class households in the United Kingdom. This phenomenon, known as Engel's (1857) law, suggests that as income grows, the proportion of income spent on food decreases (Engel 1857, Houthakker 1957). This relationship has been repeatedly confirmed within and across countries (Bodirsky et al. 2015, Chai & Monera 2010, Clements et al. 2006, Cranfield et al. 1998, Fukase & Martin 2020, Goldberger & Gamaletsos 1970, Liang et al. 2024, Muhammad et al. 2011, Regmi & Meade 2013, Seale et al. 2003, Selvanathan & Selvanathan 2003, Theil 1996).

While understanding the impact of income on aggregate food demand is important, knowing the demand responsiveness of individual food categories (e.g., fruit, meat, dairy) to income changes is even more important for developing sustainable diet solutions. The demand for individual food categories is often estimated as a function of total food expenditures (conditional demand), which can result in expenditure elasticities that differ notably from corresponding income elasticities. However, we can indirectly assess how an individual food category will respond to income changes by multiplying the conditional expenditure elasticity for a category by the income elasticity for food (Seale et al. 2003). Given that the income elasticity for food tends to be less than one, income elasticities for individual food categories are usually smaller than the expenditure elasticities reported in the literature.

Income elasticity estimates throughout the literature provide further evidence that rising incomes will result in dietary changes that are inconsistent with sustainability goals. On average, income elasticities are higher for meat (0.73) and dairy products (0.72) compared to cereals and grains (0.45) (Femenia 2019). Income elasticities can also vary by national affluence. In lower-income countries, estimates are around 0.80 for meat and dairy products, but 0.50 for cereals. However, in higher-income countries, estimates are around 0.50 for meat and dairy products and near zero or even negative for cereals (Muhammad et al. 2011, Seale et al. 2003). Income elasticities for fruits and vegetables average around 0.60 but can be as low as 0.30 in higher-income countries. The most sensitive category to income changes is nonalcoholic beverages, with elasticities greater than one in poor countries, implying that nonalcoholic beverages are luxury goods in these countries (Femenia 2019, Muhammad et al. 2011, Seale et al. 2003). When food intake is considered (as opposed to food spending), income growth still has a significantly larger effect on milk, red meat, and sugar-sweetened beverages, especially in lower-income countries, but no significant effect on staples and vegetables (Muhammad et al. 2017).

Worldwide, individuals tend to diversify away from starchy staples and consume more animal products as their incomes rise (Gouel & Guimbard 2019). The difference in income elasticities for

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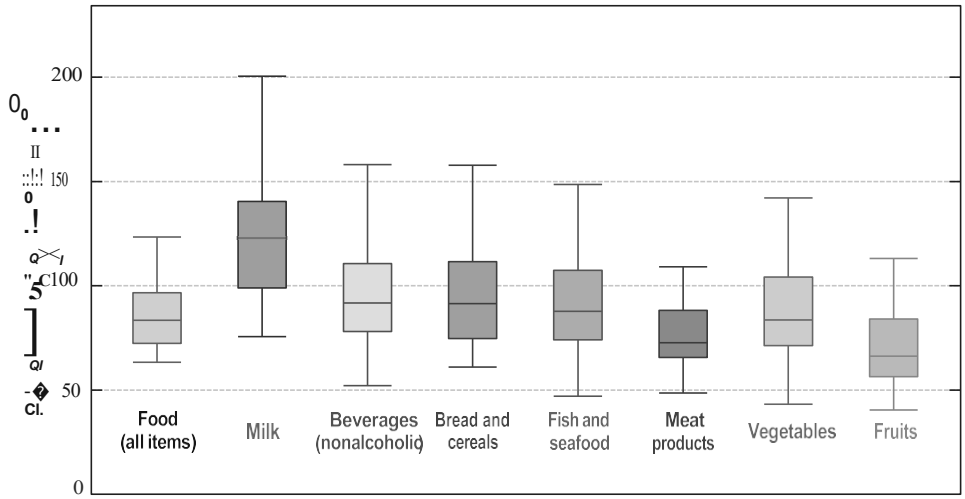

Figure 3

Price level indices by selected food categories in lower-income countries. Data are based on countries in the bottom quartile according to purchasing power parity (PPP)-adjusted per capita gross domestic product (GDP). Data from the International Comparison Program (ICP), World Bank (2017 data; **https://www.worldbank.org/en/programs/icp/data).**

meat and dairy versus cereals supports this notion and conforms Bennett's law; that is, the share of starchy staples in diets tends to decrease with income (Bennett 1941, Timmer et al. 1983).

2.3. Price Elasticities Across Countries

How do food prices vary around the world? **Figure 3** shows box and whisker plots for selected food price indices (world= 100) in the poorest countries (lowest-income quartile). While median prices for food overall and most food categories in low-income countries are below the global average (< 100), the interquartile range exceeds the global average for beverages, breads and cereals, fish and seafood, and vegetables. Interestingly, the interquartile range for meat products and fruits is less than 100, indicating that these products tend to be less expensive in lower-income countries. Milk and dairy stand out as being considerably more expensive in poor countries, with an interquartile range above 100 and extreme values, indicating that dairy products can be twice as expensive in the lowest-income countries. The values in **Figure 3** do not account for PPP differences across countries. Food prices are even higher in lower-income countries when PPP differences are considered (World Bank 2024).

Price elasticities can inform strategies to promote healthier and more sustainable diets. For instance, if the demand for an unhealthy food category is highly elastic, meaning consumers are very sensitive to price changes, then even a small price increase (e.g., through taxes) could reduce spending and consumption. Overall, the demand for food (as an aggregate) is inelastic (lelasticityl < 1) throughout the world but can vary by affluence. Income and national affluence directly affect how sensitive food demand is to price changes; elasticities range from approximately -0. 70 in lower-income countries to approximately-0.30 in countries such as the United States (Muhammad et al. 2011, Seale et al. 2003).

Price elasticities can vary notably across food categories and countries, indicating that low-income countries would be the most impacted by taxes or subsidies (Cornelsen et al. 2015). However, most studies have found the demand to be inelastic, with a few noted exceptions (e.g., beverages and food away from home in lower-income countries) (Andreyeva et al. 2010,

Green et al. 2013, Muhammad et al. 2011). A meta-analysis of more than 130 studies and 160 countries, comprising more than 3,000 data points, identified differences in own-price elasticities between low-income and high-income countries (Green et al. 2013). Across studies, the own-price elasticity for cereals ranged from around -0.61 in low-income cow1tries to about -0.43 in high-income conntries; for meat, from -0.78 to -0.60; for fruits and vegetables, from -0.72 to -0.53; and for dairy, from about -0.78 to approximately -0.60 (Green et al. 2013). A recent study of consumers in selected African countries (Malawi, Niger, Nigeria, Tanzania, and Uganda) found food demand to be highly elastic for the poorest consumers (e.g., -1.38 for rice, -2.44 for poultry, and -3. 94 for dairy in Malawi). However, demand became significantly more inelastic as incomes increased from less than $2.00/day to more than $5.50/day (McCullough et al. 2024).

Price responsiveness across countries can differ when considering intake instead of expenditures. In the poorest countries, some products (e.g., processed meat, fruit, fruit juice) are highly elastic. However, as national income increases, price sensitivity mostly declines. Although milk spending can be highly elastic, actual milk intake across countries has relatively lower price sensitivity, whereas fruit juice intake is highly sensitive to price changes (elastic demand) regardless of national income or global region (Muhammad et al. 2017).

Overall, research findings highlight the importance of economic factors in determining food choice. Both income and price estimates suggest dietary transitions that are inconsistent with nutrition and sustainability goals. This must be considered when developing sustainable diet solutions.

3. ASSESSING HEALTH AND ENVIRONMENTAL IMPACTS

In the previous section, we explored how dietary shifts are driven by income and prices. This section examines key methodologies used to assess the environmental and health effects of food demand. We synthesize methodologies that connect diets, health, and environmental sustainability. These include lifecycle assessments (LCAs), which provide detailed insights into environmental impacts, and CGE and PE models, which capture broader economic and policy dynamics. Together, these approaches underscore critical dimensions of food systems, revealing the prevalence of unhealthy and unsustainable food consumption trajectories and contributing to discussions on global food system challenges.

3.1. Quantifying Environmental and Health Impacts of Diets

LCAs provide essential insights into the environmental and health impacts of food systems by quantifying emissions, resource use, and dietary health outcomes. For instance, Drewnowski & Popkin (1997) examine dietary shifts in low-income countries, identifying the rising prevalence of obesity and chronic diseases. Their findings underscore how tl1ese changes contribute to unhealthy and unsustainable diets, particularly in developing regions, and highlight tl1e need to align dietary recommendations with both environmental and health objectives. With the rise of environmental concerns, researchers began integrating health and sustainability factors into food system analyses.

Horrigan et al. (2002) expand the scope of analysis by connecting sustainable agriculture practices to both environmental and health outcomes. They emphasize how industrial farming exacerbates ecological degradation and public health challenges, underscoring the importance of transitioning to sustainable agricultural practices. Similarly, Eshel & Martin (2006) evaluate energy use and greenhouse gas (GHG) emissions linked to various diets, quantifying the environmental costs of resource-intensive dietary choices, particularly those involving animal-based products. This pioneering work laid the foundation for subsequent data-driven studies,

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illustrating the outsized impact of meat-heavy diets on sustainability metrics. Building on this foundation, Stehfest et al. (2009) and Friel et al. (2009) employ global climate models and health impact assessments to explore the effects of reduced meat consumption. These studies demonstrate how plant-based diets not only reduce GHG emissions but also improve public health by addressing issues such as cardiovascular diseases. This convergence of health and environmental modeling has opened new avenues for understanding global food system transitions.

LCAs have since become indispensable tools for systematically comparing the environmental impacts of various food products. Nijdam et al. (2012) conduct a meta-analysis of LCAs, emphasizing the environmental benefits of reducing animal product consumption. Their findings consistently demonstrate that plant-based diets have lower environmental footprints, particularly regarding emissions and resource use. Similarly, Scarborough et al. (2012) use epidemiological data to model the health impacts of sustainable diets, illustrating how dietary changes benefit both human health and the environment.

Westhoek et al. (2014) apply scenario modeling to examine regional effects of reducing meat and dairy consumption in Europe, identifying solutions tailored to local contexts. Their research highlights tl1e importance of targeted interventions that address region-specific environmental and health challenges. Tilman & Clark (2014) extend this analysis by projecting future dietary patterns and illustrating their potential to reduce emissions and prevent chronic diseases. These findings underscore the interconnectedness of local and global scales in addressing food system challenges. Springmann et al. (2016) build on this by using comparative risk assessment and LCA-based emissions data to quantify the health and environmental impacts of dietary shifts, highlighting tl1eir potential to reduce mortality rates and food-related GHG emissions.

Godfray et al. (2018) present a detailed analysis of the trade-offs between meat consumption, health, and environmental sustainability. Their work acknowledges the complexity of dietary transitions, balancing the benefits of plant-based diets with the cultural and economic factors influencing meat consumption. In a more comprehensive global context, Springmann et al. (2018) propose the planetary health diet (PHD), integrating healtl1 and environmental objectives to provide a practical framework for balancing human nutritional needs with planetary boundaries. LCAs and aggregate-level analyses provide robust methodologies for quantifying the environmental and health impacts of dietary choices. By consistently exposing the unsustainable and unhealthy nature of current consumption patterns, these approaches offer a critical foundation for understanding the global implications of food demand. Furthermore, this evidence-based framework highlights tl1e potential of aligning dietary recommendations witl1 sustainability and public health objectives, paving the way for actionable strategies to transform food systems.

3.2. Insights from Broader Economic Models

Although LCAs excel at capturing detailed environmental and health metrics, they often fall short of addressing broader economic and social dynamics, such as impacts on food prices, employment, or market interactions. This necessitates the use of more comprehensive frameworks. CGE and PE models address these gaps by offering complementary strengths in simulating economic and policy impacts. As Valin et al. (2014) emphasize, CGE models provide economy-wide perspectives, capturing cross-sectoral and regional interactions, while PE models deliver detailed, sector-specific analyses. This complementarity is particularly valuable for understanding variations in food demand projections influenced by income elasticities, price responses, and regional contexts. By complementing LCAs, these economic modeling techniques provide a more holistic understanding of the systemic implications of dietary transitions and their broader socioeconomic impacts.

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The integration of environmental outcomes into economic models began with pioneering work such as the dynamic integrated climate-economy (DICE) and regional integrated climate-economy (RICE) models (Nordhaus 1992, Nordhaus & Yang 1996). These models represent a breakthrough in general equilibrium (GE) modeling by linking economic activity with environmental and climate dynamics. They enable policymakers to explore the long-term effects of climate change and evaluate mitigation strategies, such as carbon pricing, on a global scale (Nordhaus 2017). By incorporating environmental externalities into the broader economic framework, Nordhaus's work illustrates the potential for GE models to extend beyond traditional economic analysis, addressing pressing global challenges and providing a foundation for subsequent advancements in economic-environmental modeling.

Building on this foundation, GE models have evolved to explore critical intersections between economic systems and sustainability, including their application to the diet-health-environment trilemma. Economic modeling techniques, particularly the CGE and PE models, have proven essential in capturing complex market interactions and assessing the broad effects of dietary changes, public health policies, and environmental sustainability initiatives. CGE models simulate economy-wide impacts, considering interlinkages across sectors, making them ideal for analyzing the broader effects of policies or shocks (Hertel 1997). In contrast, PE models focus on specific sectors, holding others constant, offering more targeted and detailed insights into sector-specific changes (Hertel & Baldos 2016). Together, these models not only complement LCAs by extending their scope to broader systemic impacts but also build on earlier advances such as DICE and RICE to provide a more integrated view of how policies influence individual sectors and the wider economy.

Baldos & Hertel (2014) develop the SIMPLE (simplified international model of agricultural prices, land use, and the environment) PE model, incorporating a food security module based on the Food and Agriculture Organization of the United Nations (FAO) Prevalence of Undernourishment methodology. Their projections for global food security up to 2050 under various agricultural productivity and climate change scenarios suggest that sustained productivity growth plays a key role in reducing undernutrition. Conversely, stagnation or adverse climate impacts are associated with exacerbated food insecurity. This analysis complements the broader findings of Frank et al. (2019), showing how productivity and environmental interventions are interlinked in addressing food security. Together, these studies highlight the multifaceted nature of food system challenges.

By addressing both supply-side and demand-side dynamics, these studies emphasize the multidimensional nature of food system challenges. The integration of CGE and PE models with other methodologies, such as LCAs, strengthens the analytical framework for understanding interdependencies between dietary choices, environmental sustainability, and food security. This integrative approach also allows for policy interventions that account for systemic trade-offs and cobenefits, enabling more informed decision-making.

3.3. Integrating Insights for Policy and Practice

LCAs can highlight the health and environmental burdens of current dietary trajectories, capturing detailed metrics such as emissions, resource use, and dietary health outcomes. Broader economic models, such as CGE and PE frameworks, complement these analyses by examining systemic dynamics, including market interactions, policy trade-offs, and socioeconomic impacts. Together, these methods provide a comprehensive perspective on the challenges posed by dietary trends, emphasizing their contribution to ecological pressures and public health challenges. The insights derived from these methodologies emphasize the prevalence of unhealthy and

unsustainable diets, offering valuable tools for understanding the multifaceted impacts of food demand. These tools lay a foundation for identifying key leverage points in global food systems, setting the stage for further examination of targeted solutions in subsequent sections.

4. GLOBAL FOOD DEMAND: TOWARD SUSTAINABLE AND HEALTHY DIETS

One of the key leverage points is to develop potential diets that balance sustainability concerns and human health. For example, the *EAT-Lancet* Commission developed scientific targets based on the planetary boundaries framework (Steffen et al. 2015) to recommend healthy diets from sustainable food production and consumption (Willett et al. 2019). The key takeaway from the Commission's findings is that the world should aim to reduce the consumption of unhealthy foods, such as red meat and sugar, by at least half and double the intake of healthy foods, namely fruits, vegetables, legumes, and nuts, with some regional variations.

The Commission's efforts are part of a long-standing initiative to acknowledge the interdependence of sustainable diets, climate change, and human health through the promotion of a PHD (Blackstone et al. 2018; Chaudhary & Krishna 2019; Gephart et al. 2016; Gussow & Clancy 1986; Myers et al. 2014; Scarborough et al. 2012; Springmann et al. 2016, 2018; Tilman & Clark 2014; Vermeulen et al. 2012). Overall, research suggests that climate change reduces the nutritive value of foods, red meat decreases human health and produces GHGs, and fruits and vegetables are healthy, with lower environmental harm. The studies, as mentioned in the Commission's effort (Willett et al. 2019), do not include economic or social aspects (such as culture and animal welfare) of the food system. Critically, food access is not a prominent outcome across these studies. The lack of focus on food access in PHDs raises important questions about how to interpret and assess these diets.

4.1. Food Access

The clearing of global food and agricultural markets is neither a necessary nor a sufficient condition for food security where "all people, at all times, have physical and economic access to sufficient, safe and nutritious food to meet their dietary needs and food preferences for an active and healthy life" (FAO 1996). The FAO et al. (2023) report that in 2022, 29.6% of the global population was moderately or severely food insecure, which was more than the share of 25.3% before the COVID-19 pandemic. The *2024 Global Report on Food Crises* notes that the outlook for food insecurity looks bleak in 2024 in countries/territories with an identified food crisis because of conflict, weather (El Nino), high food prices, and decreasing humanitarian funding (FSIN & Glob. Netw. Against Food Crises 2024). In the United States, the prevalence of food insecurity has risen since the pandemic, reaching 13.5% in 2023 (Rabbitt et al. 2024). As noted across these reports, food markets, namely prices, are critical to food security and poverty. However, this narrative is complicated depending on whether households are net producers of foods, where net producers are often the cause of, and can benefit from, high food prices (Deaton 1989, Headey & Fan 2008, Headey & Martin 2016). In addition to food prices, low income is a critical reason for food insecurity. Thus, efforts to address tl1e sustainability of food markets must consider the influence of income, especially in the most vulnerable populations.

The previous section highlighted modeling results that could inform how global agricultural and food markets could adjust to achieve various sustainability or climate goals. However, this literature does not consider how solutions address the equity or feasibility of policies for all consumers. To incorporate tl1e needs of these consumers, the burgeoning literature on affordability,

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and the cost of a healthy diet, could serve as a benchmark for evaluating the social implications of these sustainability efforts (Herforth et al. 2020).

4.2. Least-Cost Diet Developments

The least-cost diet is one of the ways economists have determined whether markets provide foods that meet nutritional adequacy and affordability. George Stigler, who is often cited as one of the earliest progenitors of the least-cost diet, took a production economics approach to determine the least-cost diet that is nutritionally adequate (Stigler 1945). His work appears to be a retort to the work of dieticians from the US Department of Agriculture (Carpenter & Stiebeling 1936, Rose 1938, Stiebeling & Clark 1939), who estimated a higher minimum cost for a nutritionally adequate diet. These early measurements of an affordable, nutritious diet were mostly descriptive, but they pointed to the expenditure levels necessary to provide a nutritionally adequate diet.

Stigler (1945, p. 313) argues that "dieticians take account of the palatability of foods, variety of diet, prestige of various foods, and other cultural facets of consumption." Potgieter (1947, p. 768) counters Stigler (1945), stating that he "neglected to consider certain important physiological, chemical, dietetic, geographical, seasonal, and cultural factors." While the inclusion of these factors may appear unscientific and more expensive, they made the diet nutritionally adequate and tolerable (Potgieter 1947). These early debates point to the ongoing tensions in developing least-cost diets: complex diets that reflect dietary patterns and localized market prices versus tractable, replicable models of nutrients in foods given standardized, comparable prices across regions.

Subsequent economists have worked to incorporate constraints into the least-cost dietary framework to move the optimal diet closer to what people actually eat (O'Brien-Place & Tomek 1983, Smith 1959, Wilde & Llobrera 2009). Nevertheless, the debate about the palatability and appropriateness of tl1e selected foods in a least-cost diet persists today (e.g., Allen 2017, Babb 2024, Bai et al. 2021, Davis & You 2011, Maillot et al. 2010, Rose 2007, Schneider et al. 2023, Wilde & Llobrera 2009, Zhao et al. 2025).

Underlying the least-cost diets is nutrition research leveraging household-level surveys of foods consumed, national or international guidelines of dietary needs, and national or subnational prices. The data used in international comparative studies are usually food prices from the World Bank's ICP. The nutrient content of foods is based on the US Department of Agriculture's National Nutrient Database for Standard Reference, while the dietary reference intake requirements for 20 nutrients and energy balance are from the US National Academy of Medicine (Bai et al. 2020, 2021, 2022; FAO et al. 2020; Herforth et al. 2020; Hirvonen et al. 2020). Researchers model commonly consumed baskets of foods at the lowest cost to construct the least-cost diet (Gupta et al. 2021, Headey et al. 2023, Herforth et al. 2024). However, following the agricultural economics literature more closely (O'Brien-Place & Tomek 1983, Smith 1959, Stigler 1945), researchers have used a linear programming approach to develop the lowest-cost combination of foods that meet the nutrition needs of a healthy, active person. Least-cost diet calculations serve as a benchmark to delineate unaffordability from other barriers against nutritional access (Bai et al. 2022). The medical and nutrition literature has also used a linear programming approach to determine nutritional adequacy at least cost (Briend & Darmon 2000, Briend et al. 2003, Darmon et al. 2006). The modeling of foods was not intended to represent ideal diets (Hirvonen et al. 2020, Stigler 1945), but the cost necessary for survival (Allen 2017). To this end, Allen (2017) calculates the least-cost diet to establish a more accurate poverty line, representing the minimum amount of money needed to cover essential food and nonfood items for basic living.

Many least-cost diet models use a minimization model of costs within the country (price times quantity) subject to constraints that represent upper and lower limits of nutrients and energy

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needs (Bai et al. 2020, 2021, 2022; Bai & Masters 2024; Hirvonen et al. 2020; Schneider 2022; Schneider et al. 2023). The authors of this literature seek to identify global or national variation in nutritional needs caused by cost5, i.e., the cost of nutrient adequacy (CoNA), to determine the least-cost diets. This CoNA provides "a cost metric of nutrient adequacy," not a recommended diet, which would require further constraints to capture variety and cultural relevance (Schneider 2022, p. 5). Nutritional adequacy is useful for survival but inadequate to reflect the complex food environments and cultural foodways. Further, researchers must make simplifying assumptions that may not fully capture the market inefficiencies such as externalities and transaction costs.

In both global and national comparisons, the overarching theme is that a nutritionally adequate diet remains unaffordable for significant portions of the population. Schneider (2022) focuses on Malawian households, documenting a least-cost diet of $2.32/person/day, which is ahove the $1.90 poverty line and available for only 60% of households. Schneider et al. (2023) highlight differences in affordability for individuals versus households and the seasonality of foods affecting the affordability of nutrients over time. Using "high-frequency, high-density price observations," Bai et al. (2020, p. 6) show that the variability of prices clue to seasonality of crops affects affordability of nutritional adequacy in Malawi, Tanzania, and Ethiopia.

The cross-country comparisons of Bai et al. (2020) point to the power of the least-cost method using the CoNAindex. By comparing the CoNA with the cost of calorie adequacy across 177 countries, Bai et al. (2021) find that the world's poorest cannot afford a nutritionally adequate diet at $1.35 per day. The cost of the diet is more than twice the cost of starchy staples at $0.57, with little variation by national income. Relatedly, using ICP data, Bai et al. (2022) find the median cost of a healthy diet in 2017 to be $2.32, witl1 variation by demographic groups across 172 countries. The median cost for low-income countries was above the international poverty line of $2.10.

Under the banner of least-cost diets is the related cost of a healthy diet (CoAHD) construct. Herforth et al. (2024, p. 2) define the CoAHD as "the minimum cost of purchasing a healthy diet in the market, defined as a diet that adheres to food-based dietary guidelines (FBDG)." The CoAHD is not derived from an optimization model; rather, it is the collection ofleast-cost foods across categories that meet dietary requirements, given market prices or indices. The country case studies, conducted with national statistical services, in Herforth et al. (2024) highlight differences in national and subnational CoAHD versus global metrics because of country-specific prices, healthy diet standards, and income/affordability data.

4.3. Least-Cost Diets and Sustainability

Prior to the release of the *Lancet* diet, researchers have used the least-cost diet method to address nutritionally adequate diets that mitigate GHG emissions. Macdiarmid et al. (2012) combine data from LCAs of foods to minimize GHG emissions subject to cost and nutrient constraints for an adult woman in the United Kingdom. They find a so-called acceptable diet, with less meat and more fruits and vegetables, that meets all nutrient requirements with a 36% reduction in GHG emissions relative to a 1990 baseline at a cost of $46 per week. This cost was 89% of UK food expenditures, excluding products such as tea, coffee, and alcohol. For New Zealand, Wilson et al. (2013) report a "more familiar meals" diet that lowers GHG emissions by nearly half and is nearly 40% of the cost of the typical New Zealand diet. Perignon et al. (2016) minimize the difference of optimized and observed cost of consumption to simulate in the least-cost framework lower GHG emissions. They find reductions of GHG emissions of 30% that produce culturally acceptable diets in France at equivalent or lower costs of the observed diet. Higher reductions in GHG emissions would require drastic changes in diets compared to current consumption at lower costs. In contrast, He et al. (2021) find a least-cost diet that lowers GHG emissions but is

not affordable for lower-income households, particularly for Black and Hispanic households in the United States. These findings suggest that in developed countries, a nutritionally adequate diet with reduced GHG emissions may be affordable, but it is important to consider household diversity and income differences within these countries.

For developing countries, researchers use least-cost diets to illustrate the challenges of affording a base level of nutrients generally. Specifically, a cadre of researchers uses the least-cost diet to address the affordability of the *Lancet* diet (Willett et al. 2019). Drawing attention to the *EAT-Lancet* Commission's self-recognized omission of cost and affordability in their diet, Hirvonen et al. (2020) demonstrate that the *Lancet* diet has an estimated cost of $2.84 per day in international dollars. The *Lancet* diet costs 6.1% of high-income countries' per capita income and 89.1% of low-income countries' per capita income. The cost of the *Lancet* diet exceeds the incomes of 1.6 billion people, 80% of whom live in middle-income countries. The *Lancet* diet is 1.6 times more expensive than the minimum CoNA. Although the least-cost diet and *Lancet* diet emphasize fruits, vegetables, and legumes, the cost difference is driven by the demand for more animal source proteins in the *Lancet* diet, which are not required based on nutrient adequacy in the least-cost diet. In a related study using similar methods shaping *The State of Food Security and Nutrition in the World 2020* (FAO et al. 2020), Herforth et al. (2020) find that 3 billion people in the world cannot afford a nutritionally adequate diet, with a global median cost of $3.75 per person per clay and the *Lancet* diet costing $3.31-$3.61.

Given the cost and affordability studies (FAO et al. 2020, Herforth et al. 2020, Hirvonen et al. 2020), Gupta et al. (2021) extend the method of the cost and affordability of a healthy diet and reevaluate the *Lancet* diet specifically for rural India. The extension centers on the data used. Gupta et al. (2021) argue that the ICP data are at the national level and do not account for subnational prices that rural people actually face. Further, these studies do not address the seasonality and regionality of prices. "While these differences in data can matter, Gupta et al. (2021) find that the *Lancet* diet costs $3.30/day relative to the $0.60 to $1.00 cost oflocal diets. Fruits, vegetables, and animal proteins are substantial cost factors in the *Lancet* diet. The cost of the *Lancet* diet ranges from $2.90 to $3.70 depending on the season. Further, Herforth et al. (2024) extend this effort to country-level analysis around the world. Although several studies point to the unaffordability of PHDs, Springmann et al. (2021) find a that PHD-which incorporates different dietary patterns, food waste, and full cost accounting-is up to one-third lower in cost than current consumption in most countries. Thus, the affordability of prescribed diets such as the *Lancet* diet or other PHDs is more challenging and nuanced than indicated in previous global comparison studies.

Headey et al. (2024) further the critique of the least-cost method while reinforcing the importance of evaluating the cost of a nutritionally adequate diet. Focusing on methods developed by FAO et al. (2020), Herforth et al. (2020), Hirvonen et al. (2020), and Headey et al. (2024) point out innovations in the least-cost method that would more accurately estimate the number of people who are unable to afford a nutritionally adequate diet. The authors' innovation is to simulate demographic differences to more accurately develop the cost of the diet. This innovation lowers the number of people who cannot afford the *Lancet* diet by 143 million (a 2.1-percentage-point difference) compared to replicated values informed by Hirvonen et al. (2020), updated with the 2017 ICP data.

Across the PHD and least-cost diet literature, when the affordability of the diets is mentioned, cost and food prices are the central concern. However, prices are only part of the economics story, as consumers must have an adequate income to afford foods given market prices. Consumers in low-income households have challenges with food access beyond economic access to food such as crop failures, disasters, political and social conflict, and war. Thus, a critical literature to consider

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focuses on interventions to increase incomes or subsidy programs to support families from low-income households assessed through CGE and PE models.

5. ADVANCING MODELS FOR DIETARY TRANSFORMATION: POLICY INTERVENTIONS AND FUTURE DIRECTIONS

5.1. Insights from CGE and PE Modeling

Gatto et al. (2023) use the MAGNET CGE model to explore the spillover effects of transitioning to sustainable diets, such as the *Lancet* diet. They find that while such dietary shlfts reduce GHG emissions and agricultural land use, they can also lead to economic disparities, particularly for agricultural workers in low-income regions, who might experience wage declines. Their findings emphasize the importance of designing policies that simultaneously promote environmental sustainability and mitigate social inequities. Similarly, Gatto & Chepeliev (2024) employ an environmentally extended multi-regional input-output (MRIO) model to assess the public health and environmental impacts of reducing global food loss and waste. They demonstrate that reducing food loss significantly lowers air pollutants, such as sulfur dioxide (SO_2) and fine particulate matter (PM2.5), resulting in substantial public health benefits. However, they caution that rebound effects-where savings from reduced food consumption are redirected toward more environmentally harmful activities-could offset these gains, highlighting the need for integrated policy frameworks.

Recent studies increasingly explore dietary shifts using various policy tools within CGE models, including differentiated value added taxes (VATs), subsidies at the consun1er and value chain levels, and trade policies. For example, using a CGE framework, Springmann & Freund (2022) analyze the effects of increasing VAT on high-impact foods such as meat while reducing it for low-impact foods such as fruits and vegetables in the United Kingdom and Germany. Bouyssou et al. (2024) examine the potential impact of a GHG tax on food consumption through country-specific scenarios, considering cross-price effects, GE responses, and associated GHG and health outcomes. Additionally, Springmann & Freund (2022) explore the reform of agricultural subsidies to promote healthier and more environmentally sustainable food options. Their findings suggest that reallocating subsidies could lower GHG emissions, improve health outcomes globally, and enhance sustainable food systems without negatively affecting economic welfare.

Focusing on food waste, Lopez Barrera & Hertel (2021) apply the SIMPLE PE model to evaluate how reducing food waste improves food affordability and reduces environmental pressures, particularly in emerging economies. Their analysis demonstrates that cutting food waste reduces land use and GHG emissions, underscoring the environmental benefits of addressing food waste. Expanding on this, Lopez Barrera & Hertel (2023) introduce the prevalence of overacquisition in the SIMPLE PE model to better capture overconsumption and food waste. They assess the healtl1 and environmental impacts of shlfting to sustainable diets, such as healthy dietary guidelines and flexitarian diets, breaking down the effects into three components: changing diet composition, reducing food waste, and cutting excessive intake. Their findings reveal that food waste reduction has the greatest impact on lowering natural resource pressures, reinforcing its critical role in improving global health and sustainability. Moreover, these findings contribute to an evolving w1derstanding of tl1e interplay between food purchasing reductions, dietary transitions, and sustainability outcomes, offering innovative perspectives compared to prior research.

CGE and PE models offer valuable insights into the economic, social, and environmental impacts of policies such as taxes, subsidies, and food waste reduction, highlighting pathways for dietary transitions. However, key limitations in these models remain, warranting further advancements to better simulate complex, large-scale dietary transformations.

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5.2. Rethinking Economic Models for Dietary Shifts and Policy Design

A key challenge faced by CGE and PE models lies in their limited ability to capture heterogeneous policy impacts across diverse populations and regions. Bourguignon & Spadaro (2006) highlight the transformative potential of microsimulation models in addressing this limitation by accounting for individual-level differences and behavioral responses to policy changes. They emphasize the importance of incorporating dynamic elements, such as life-cycle impacts and evolving preferences, to improve long-term predictions and policy assessments. As Peichl (2008) suggests, integrating microsimulation with CGE and PE models enables more detailed, disaggregated analyses. This approach provides critical insights into the distributional effects of dietary policies, particularly for vulnerable populations, while enhancing the granularity and relevance of policy evaluations.

Another significant notable of CGE and PE models is their reliance on relatively rigid assumptions about consumer preferences, which often fail to capture behavioral adaptations and evolving consumption patterns. This restricts their ability to accurately simulate large-scale dietary shifts over time. Addressing these limitations requires rethinking demand structures and incorporating advanced policy frameworks. Latka et al. (2021) highlight that although market-based instruments such as taxes and subsidies are effective, achieving significant dietary shifts necessitates substantial tax levels and more sophisticated frameworks, such as nested demand systems, to account for food group interactions and substitution effects. They emphasize the importance of coherent policy packages that integrate nutrition and sustainability goals. Complementing this perspective, Bodirsky et al. (2022) advocate for structural transformations-such as transitioning to needs-based food systems, implementing equitable income distribution, and integrating GHG pricing-as essential strategies for creating GHG-neutral food systems and improving nutritional outcomes. Together, these studies underscore the need for advancing economic models to design and evaluate policies that align health and sustainability objectives effectively.

Beaussier et al. (2019) underscore the transformative potential of coupling economic models with environmental tools, such as LCAs and material flow analysis, to enhance the granularity and comprehensiveness of policy evaluations. They emphasize the importance of incorporating feedback loops and systemic interactions to capture the multidimensional impacts of policies on socioeconomic and environmental outcomes. These advanced frameworks address a critical gap by prioritizing regional and sectoral granularity, enabling more targeted and equitable policy interventions. Building on these principles, spatially explicit biophysical-economic models integrate high-resolution geographic data, allowing localized assessments of policy impacts and systemic interactions (Haqiqi & Hertel 2025). In this context, advanced computational techniques further enhance these models' capabilities. Artificial intelligence-driven tools and deep learning methods, such as deep equilibrium nets (Azinovic et al. 2022), can improve parameter estimation and predictions under uncertainty, bridging gaps between technical advancements and practical applications to support policies aligned with health and sustainability goals.

6. SUMMARY AND CLOSING

In this article, we provide a comprehensive review addressing key aspects of global dietary issues such as how economic factors influence food demand and diets across countries, the need for modeling frameworks that adequately capture the complexities of dietary transitions, and the feasibility of dietary solutions that are both nutritionally sufficient and environmentally sustainable. If policymakers are to develop effective strategies to promote sustainable diets and mitigate the negative impacts of dietary changes on both human health and the environment, economic, environmental, and health perspectives must be considered.

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The relationship between income, prices, and food demand plays an important role in understanding how economic growth impacts nutrition and sustainability. Despite the relatively high cost of foods in lower-income countries, global income growth has outpaced the rise in food prices. However, higher incomes and increased affordability do not always lead to healthier food choices. As nations grow wealthier, diets improve, but they also shift toward more resource-intensive foods. Adopting healthier and more sustainable diets is crucial for addressing global health and sustainability challenges. However, the key question is how economic trade-offs will unfold. To achieve a balance between health and environmental sustainability, interventions are needed to address the complex challenges within global food systems in a way that is economical and equitable.

Economic modeling frameworks have substantially advanced our understanding of the interactions between diets, health, and the environment. These models have highlighted how dietary shifts and policies influence economic, environmental, and health outcomes, showcasing synergies and trade-offs between health and sustainability goals. However, to better capture the complexities of the diet-health-environment trilemma, future research should enhance model flexibility by incorporating more refined representations of consumer behavior and regional heterogeneity. Expanding the use of microsimulations and integrating advanced computational techniques, such as artificial intelligence-driven tools like deep equilibrium nets, can improve parameter estimation and uncertainty reduction, strengthening the predictive capacity of CGE and PE frameworks in dietary policy analysis.

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Why Are Eggs so Expensive? Understanding the Recent Spike in Egg Prices

Andrew Muhammad, Charles Martinez, and Abdelaziz Lawani

JEL Classifications: Q02, Q11
Keywords: Avian influenza, Eggs, Energy, Feed, Prices

Throughout 2022, U.S. consumers faced persistent increases in egg prices. According to the Bureau of Labor Statistics (BLS), the average retail price of eggs (grade A, not seasonally adjusted) reached a record high of $4.25/dozen in December 2022, up 138% from December 2021 ($1.79/dozen) (BLS, 2023). Comparable increases have been observed in the egg producer price index (PPI), which is a measure of the average price paid to U.S. egg producers (see Figure 1). Soaring egg prices have garnered attention from policy makers and researchers and have been the subject of recent news reports including the *Wall Street Journal, New York Times*, and *The Economist*. Further indication of increased interest is the intensity of Internet searches: Over the last year, the number of searches on egg-price-related terms increased by more than 5,000% (Google Trends, 2023).

Noted causes of the recent surge in egg prices include supply-chain disruptions due to the COVID-19 pandemic, increased egg demand during the holiday season, and overall inflation (Malone, Schaefer, and Lusk, 2021; Oh and Vukina, 2022). However, most articles have cited recent outbreaks of highly pathogenic avian influenza (HPAI) (i.e., bird flu) as the primary cause (Lusk, 2023). Overall, the price of eggs has increased significantly more than food prices (USDA, 2023b), which raises the question: Why are eggs currently so expensive? Egg prices have been so high, in fact, that policy makers and advocacy groups have called on the Federal Trade Commission to investigate whether producers have improperly manipulated prices (e.g., Funk and the Associated Press, 2023). Although one could never rule out nefarious actions or collusion on the part of suppliers, we do not have to resort to conspiracy theories to explain the recent surge in egg prices. In this article, we show that economic factors—particularly on the production side—adequately explain the current situation, even beyond the oft-cited cause: unprecedented bird losses due to avian influenza.

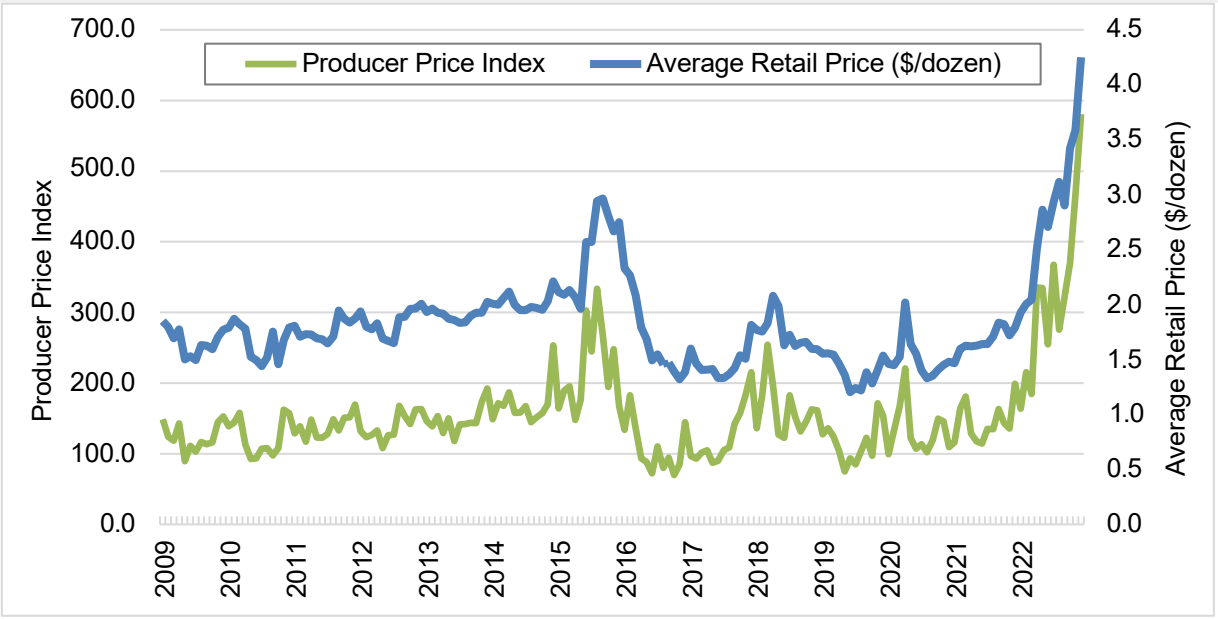
HPAI Outbreaks and Bird Loss

Since current reports have cited bird loss due to avian influenza as the primary cause of rising egg prices, it is important to provide some background on recent outbreaks and their consequences. As part of its safeguarding mission, the USDA manages the national response to major animal disease events like HPAI outbreaks to reduce disease spread and to limit negative economic impacts on the poultry sector. Since HPAI is highly contagious and can affect humans, the USDA euthanizes both infected birds and affected flocks to prevent spread. Thus, avian influenza outbreaks have significant impacts on commercial bird populations in affected areas.

Specific to the U.S. commercial table egg layer flock, the first reported HPAI case was on February 22, 2022, in New Castle County, Delaware, affecting over a million birds. Since late February, more than 44 million commercial layers have been lost due to the disease and related depopulation protocols, accounting for about 77% of all depopulated birds for commercial use in 2022 (e.g., layers, broilers, meat birds, turkeys) (USDA, 2023a).

Figure 2 shows the monthly bird loss (actual and five-period average) and the U.S. table egg layer flock from January 2009–December 2022. The monthly bird loss data from USDA-NASS include all commercial layers (table eggs and otherwise). Thus, the bird loss numbers in Figure 2 are somewhat higher than reported losses for table egg layers only. Bird loss is a natural occurrence and simply a cost of doing business. Since January 2009, average bird loss was about 9.5 million layers per month. Prior to the last major outbreak in 2015, averaged monthly losses were about 7.8 million layers. Thereafter (2016–2021), monthly losses averaged 10.7 million layers. However, this increase in the latter period was in proportion to increases in overall flock size.

Figure 1. Producer Price Index (PPI) and Average Retail Prices for Eggs in the United States: January 2009–December 2022



Note: PPI for eggs for fresh use, not seasonally adjusted (1984:12 = 100). The average retail price ($/dozen) is the U.S. city average price for large grade A eggs per dozen, not seasonally adjusted.

Source: Producer Price Index and Average Price Data databases from the U.S. Bureau of Labor Statistics (2023).

Periods of major disease outbreaks and resulting bird loss (e.g., 32 million birds lost in May 2015 and 27 million birds lost in March 2022) have had significant impacts on overall flock size (Figure 2). Figure 2 also shows that replacing lost birds is not a fast process and takes time. Following the 2015 HPAI outbreak, the table egg laying flock shrunk to 276 million birds by June 2015. Flock sizes then increased to 342 million birds in March 2019, which was the largest monthly average during this period. As a result of HPAI outbreaks in 2022, the table egg laying flock shrunk to 299 million birds. Disease response protocols reduced the size of the U.S. egg laying flock in 2022 by about 5% compared to the previous year.

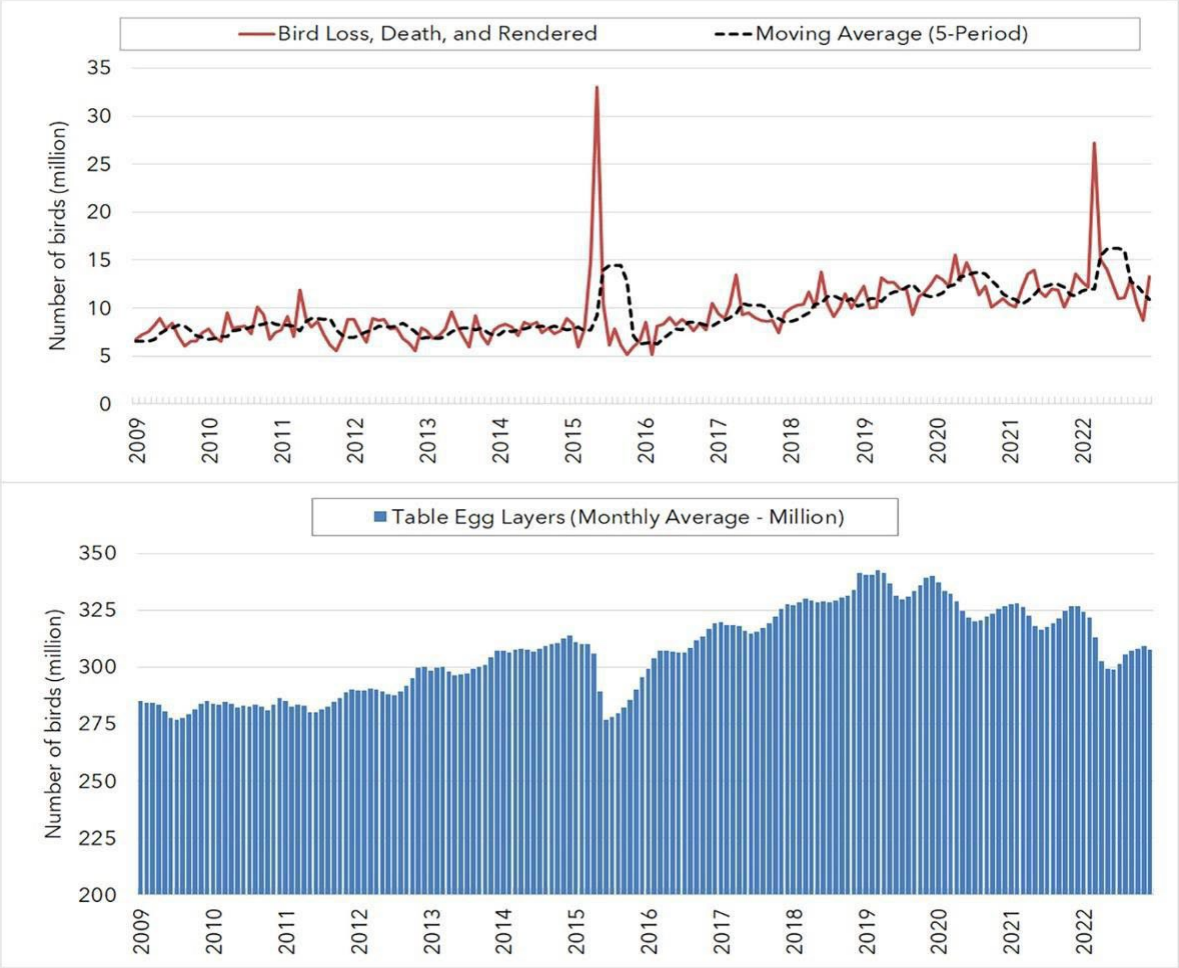
Month-to-month fluctuations in flock size are due to various market dynamics. Historically, the U.S. egg laying flock expands in the winter and early spring due to increased demand around Christmas and Easter, then contracts when demand declines during the summer months. More recently, the downward trend in flock size was due to the COVID-19 pandemic and supply chain issues that altered grocery store demand. Although grocery demand rose during the pandemic, the egg supply chain was not initially set up to shift large volumes into the retail space. Compounding the pandemic challenges was an increase in the egg PPI, which was due to higher input costs (Malone, Schaefer, and Lusk, 2021).

Data and Analysis

Using data from January 2009–December 2022, we estimated a basic vector autoregression (VAR) model of egg prices at both the producer and retail level. While the details of the VAR model and resulting estimates are beyond the scope of this article, there are a few issues that we considered for the analysis, requiring a brief discussion for clarity. First, the prices paid to U.S. egg producers (as measured by the egg PPI) and average retail prices (measured in cents per dozen for the VAR procedure) were determined by the model, while the commercial bird feed cost index, natural gas price index, and relative bird loss were treated as predetermined. Depending on the U.S. region and season, natural gas is the primary energy input in egg production, although electricity is also used (Matthews and Sumner, 2015). Since natural gas and electricity prices are highly correlated, we did not include electricity prices in the model. Since bird loss is a routine monthly occurrence, we used a five-period moving average of relative bird loss for the analysis (i.e., bird loss relative to the size of the egg laying flock). This allowed for smoothing out routine month-to-month changes and negated changes in bird loss due to changes in overall flock size and allowed for significant bird losses to still have an impact, even beyond the month of occurrence.

Table 1 reports the VAR estimates. Based on the Schwartz BIC, we assumed two-period lags for the producer price index (PPI) and average retail price (ARP). The lag estimates indicate that producer prices have a positive and significant effect on average retail prices, which is to be expected. However, the effect of average retail prices on producer prices is insignificant when both lag periods are considered (note that the sum of ARP(t–1) and ARP(t–2) is not significant in the PPI equation). The effects of the predetermined (exogenous) variables on producer and retail prices are all positive, which is to be expected, and highly significant. Since these variables directly affect production, the estimates are relatively larger in the PPI equation. Note that Bird Loss has the largest estimated impact on producer

Figure 2. Bird Loss and Table Egg Layer Inventories in the United States: January 2009–December 2022



Source: USDA (2023c) and LMIC (2023).

prices (18.79) and average retail prices (4.28), significantly higher than the estimates for the natural gas price index and feed cost index. Although our analysis was limited to just three exogenous variables (feed cost index, natural gas price index, and relative bird loss), these variables—along with two-period lagged dependent variables—adequately explained 74% and 94% of the variation in producer price index and average retail prices, respectively.

Responsiveness of Egg Prices to Input Prices and Bird Loss

Table 2 reports elasticity estimates (percentage responsiveness of egg prices to a percentage change in natural gas prices, feed cost, or relative bird loss). For the long-run elasticities, we set $y(t) = y(t\text{-}1) = y(t\text{-}2)$ (y is either PPI or ARP). Consequently, the long-run estimates account for the total effects of the predetermined variables on egg prices. For instance, the long-run elasticity for average retail prices with respect to changes in relative bird loss includes

Table 1. VAR Model Estimates for Producer and Retail Egg Prices

	Constant	*PPI*(*t*-1)	*PPI*(*t*-2)	*ARP*(*t*-1)	*ARP*(*t*-2)	P_{NG}	P_{FEED}	*Bird Loss*
PPI	-110.64	0.74	0.12	-0.74	0.79	0.12	0.25	18.79
	(27.2)***	(0.11)***	(0.11)	(0.31)**	(0.23)***	(0.05)**	(0.10)**	(4.98)***
ARP	-20.96	0.31	-0.06	0.23	0.46	0.05	0.10	4.28
	(8.84)**	(0.04)***	(0.04)	(0.10)**	(0.08)***	(0.02)***	(0.03)***	(1.62)***

Note: Single, double, and triple asterisks (*, **, ***) denote significance at the 10%, 5%, and 1% level, respectively. Standard errors are in parentheses. Schwarz BIC = 1,474.43. The R^2 for the *PPI* and *ARP* are 0.74 and 0.94, respectively. *PPI* is the producer price index, *ARP* is the average retail price (measured in cents per dozen), P_{NG} is the natural gas price index, P_{FEED} is the feed cost index, and *Bird Loss* is the five-period moving average of relative bird loss.

Table 2. Percentage Responsiveness of Egg Prices to a 1% Change in Natural Gas Price, Feed Cost, and Relative Bird Loss		
	Producer Price Index	**Average Retail Prices**
Short Run		
Natural Gas Index	0.08**	0.03***
Feed Cost Index	0.30**	0.12***
Bird Loss Share	0.40***	0.09***
Long Run		
Natural Gas Price Index	0.30*	0.32**
Feed Cost Index	1.15*	1.27**
Bird Loss Share	1.51**	1.46***

Note: Estimates can be interpreted as the percentage responsiveness of producer or retail prices to a percentage change in the exogenous variables. Single, double, and triple asterisks (*, **, ***) denote significance at the 10%, 5%, and 1%, respectively.

the effect through producer prices in addition to any direct effect. Like the VAR estimates, relative bird loss is the most important determinant of producer and retail egg prices, particularly in the long run. Note that a 1% increase in bird loss (relative to flock inventories) results in a 1.5% increase in both producer and retail egg prices. The responsiveness of producer and retail prices to feed costs is also relatively large (1.2% and 1.3%, respectively), albeit smaller than the bird loss estimates. Although statistically significant, natural gas prices had the smallest effect on egg prices (0.3% at both the producer and retail level).

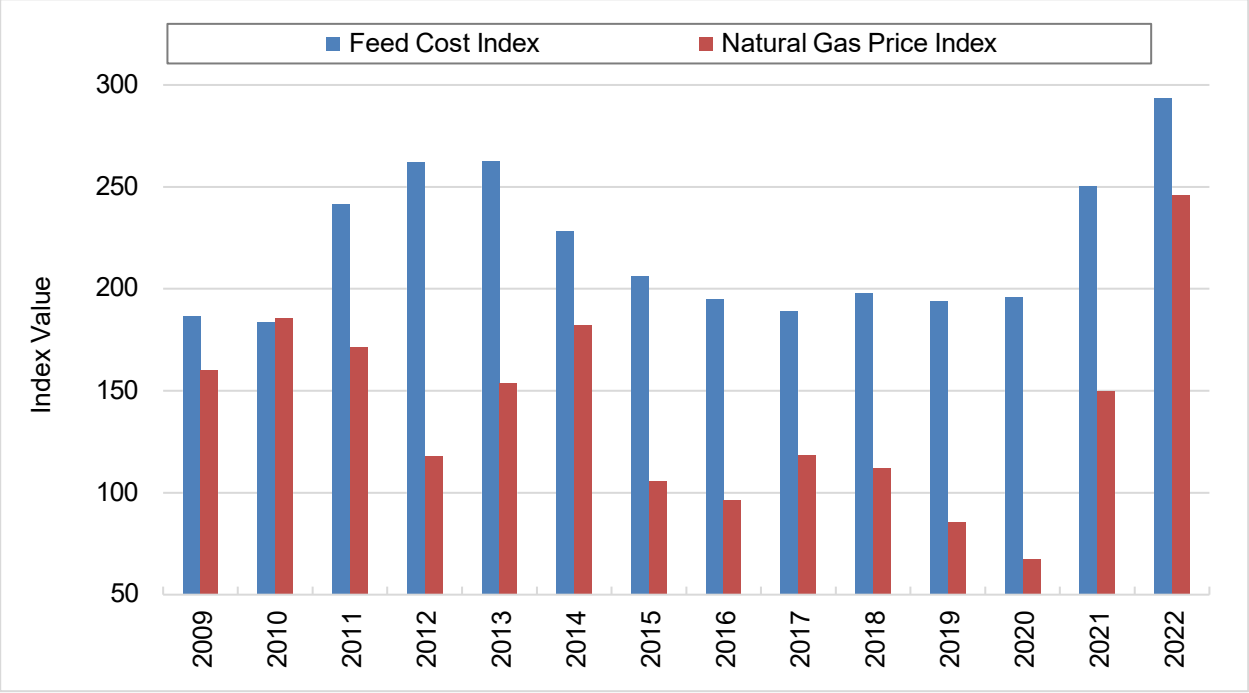
To break down the impact of natural gas prices, feed costs, and bird loss on the recent surge in egg prices, we first compare all variables in 2022 to their 3-year averages (2019–2021) (See Table 3). Then we apportion the increase in retail egg prices based on the observed percentage changes in the exogenous variables. The benefit of doing an annual comparison (versus a monthly comparison) is that we can ignore month-to-month changes due to seasonal factors affecting supply and demand. In comparing 2022 to the previous period (2019–2021), the egg producer price index rose from 131 to 323, which is a 146.6% increase, and retail prices increased to $2.86/dozen in 2022, up 87.3% compared to the previous period average ($1.53/dozen). Note that during the same period, the natural gas price index increased by 143.3% and feed cost by 37.4%, and relative bird loss increased by 19.4%. Taking a much longer view on commercial bird feed and natural gas prices, we see that both reach record levels in 2022 (see Figure 3). Interestingly, both natural gas prices and feed cost were significantly lower in 2015, when the last major HPAI outbreak occurred. This could explain why egg prices did not increase as much in 2015 despite significant bird loss that year.

We break down the change in retail egg prices for each exogenous variable (natural gas prices, feed cost, and bird loss) (see Figure 4). Using the long-run elasticity estimates for average retail prices (Table 2) and the corresponding percentage changes in the determining variables, we find that 38.0% of the total price increase is due to the increase in natural gas prices, 38.8% is due to the increase in feed cost, and 23.1% in due to relative bird loss. Applying these percentages to the increase in average retail egg prices in 2022 relative to the 3-year average (2019–2021) ($1.33 = $2.86 - $1.53) we can apportion this increase by determining factor. Based on our estimates, $0.31 of the overall price increase was due to relative bird loss, $0.51 was due to natural gas prices, and $0.52 was due to the increase in feed cost (all three increases combined is slighter higher by $0.01 due to rounding error). While bird loss was the most important determinant based on the estimated impact, it was not most important in explaining the annual increase in prices. Of the three exogenous variables, the change in bird loss was smaller overall, 19.4% versus 37.4% and 143.3% for feed cost and natural gas prices, respectively.

Table 3. 2022 and 2019–2021 (3-Year Average) Comparison and Percentage Change			
Variable	**3-Year Average (2019–2021)**	**2022**	**Percentage Change**
Egg Producer Price Index (1991 = 100)	131.03	322.56	146.2
Average Retail Price ($/dozen)	1.53	2.86	87.3
Natural Gas Price Index (1982 = 100)	100.99	245.74	143.3
Feed Cost Index (1986 = 100)	213.42	293.29	37.4
Bird Loss Share (loss ÷ inventory × 100)	3.65	4.36	19.4

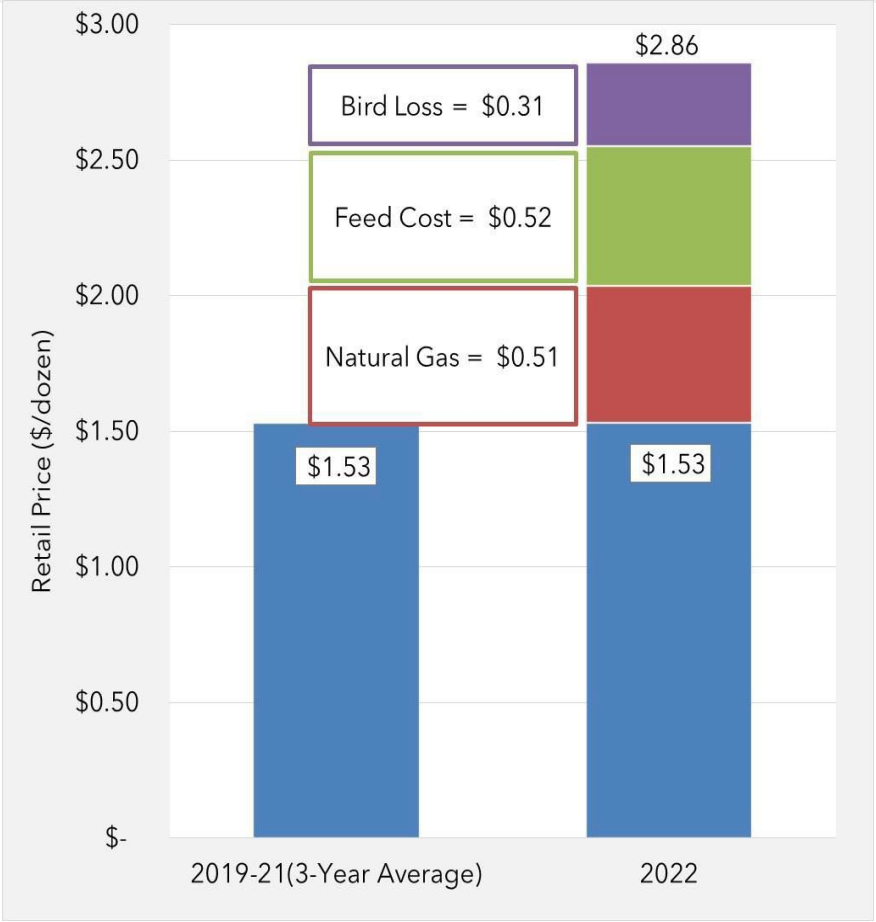
Source: Data are based on estimates derived using USDA (2023c) and BLS (2023) databases.

Figure 3. Feed Cost Index and Natural Gas Price Index: 2009–2022



Note: 1984:12 = 100 for the feed cost index, and 1982 = 100 for the natural gas price index.
Source: U.S. Bureau of Labor Statistics (2023), Producer Price Index database.

Figure 4. Retail Egg Prices in 2022 versus 2019–2021 (3-Year Average) and Change by Determining Factor



Note: The sum of the based price ($1.53) and determinant-specific price increases is $2.87, due to rounding error.
Source: Based on elasticity estimates derived from USDA (2023c) and BLS (2023).

Conclusion

The goal of this article was to assess the causes of high egg prices. Our analysis indicated that claims of price gouging may not be warranted given the influence of the price of natural gas, feed cost, and bird loss on both producer and retail egg prices. Although, the elasticity for natural gas prices was only 0.30, natural gas prices increased by 143.3% in 2022 compared to the previous period 3-year average (2019–2021), resulting in a relatively larger estimated impact on egg prices. In 2022, input prices were high overall, putting upward pressure on egg prices. Recent reports and news articles often cite avian influenza and bird loss as the primary cause of high prices. These reports are not necessarily wrong. However, our analysis reveals a very important issue that has not been thoroughly discussed. That is, current decreases in flock size due to avian influenza may be compounding the effects of higher input prices.

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Author Information: Andrew Muhammad is Professor and Blasingame Chair of Excellence in Agricultural Policy, Department of Agricultural Resource Economics, University of Tennessee Institute of Agriculture, Knoxville, Tennessee. Charles Martinez is Assistant Professor, Department of Agricultural Resource Economics, University of Tennessee Institute of Agriculture, Knoxville, Tennessee. Abdelaziz Lawani is Assistant Professor, Department of Agricultural and Environmental Sciences, Tennessee State University, Nashville, Tennessee.

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CHOICES

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Uncovering the Impacts of Steel Tariffs on the Canned Foods Sector: Reevaluating Trade Policy Winners and Losers

Andrew Muhammad and Carlos J.O. Trejo-Pech

JEL Classifications: F13, Q11, Q17
Keywords: Canned foods, Steel, Tariffs, Trade war

Producers and users of steel are a perfect example of competing special interests: Both groups have lobbied the government on behalf of their sectors, respectively arguing for and against the tariffs on imported steel imposed by the Trump administration in 2018. One group on the "against" side is the U.S. canned food sector, which has relied on imported tinplate (tin-plated steel) for production. Tin-plated steel has been subject to both tariffs and quotas since 2018. In this article, we explore the impacts of these tariffs and their implications for canned food prices and domestic food security.

Economists are more likely to argue for complete trade liberalization (i.e., free and open trade) than for the protectionist policies favored by President Trump. As noted by Friedman and Friedman (1997), "Ever since Adam Smith there has been virtual unanimity among economists, whatever their ideological position on other issues, that free trade is in the best interests of trading countries and of the world." However, arguments for trade liberalization are often framed in the context of *producers* versus *consumers*, where protection benefits special interests (producers) at the expense of the broader, general interest of society. Consequently, protectionism is often viewed through the concentrated benefits/diffused costs lens, where the concentrated group (i.e., producers) has far more incentive to lobby for protection than the diffused group (i.e., consumers) to lobby against it. However, this does not fully apply to specific trade actions where there are competing special interests and concentrated gains (or losses) and lobbying efforts on both sides of the issue.

The current tariff situation and lobbying efforts of the U.S. canned food and steel sectors provide an ideal case for examining trade protections in this context (i.e., competing special interests). In the United States, the canned food sector was valued at an estimated $17.8 billion in 2019 (Statista, 2023), with tin-plated steel being the primary packaging material. The data suggest that the impacts of the section 232 tariffs on the canned food sector have not been negligible. However, more research is needed for a more quantitative assessment of their impacts and implications.

Background

During his time in office, President Trump advocated for greater trade protections, imposing tariffs on a broad range of products. In March 2018, President Trump signed a proclamation to impose a 25% tariff on all imported steel, based on a Department of Commerce report that indicated that imports had the potential to threaten U.S. national security. Section 232 of the Trade Expansion Act of 1962 allows the president to use trade barriers for national security concerns (The White House, 2022). A major concern was the unprecedented growth in China's crude steel production, which exceeded 1 billion metric tons in 2020, accounting for more than half of global production. Note that the next highest country (India) produced around 100 million metric tons and the United States produced around 70 million metric tons (World Steel Association, 2022). While higher prices via import quotas and tariffs benefited the U.S. steel sector, the negative impacts on downstream steel-consuming companies exceeded any gains. For instance, 75 times as many jobs were estimated to have been lost in downstream steel-consuming sectors compared to jobs gained in the steel-producing sector (Russ and Cox, 2020).

Food canning can be traced back to the 18th century in France, and the basic principles have not changed significantly since. Clearly, the direct benefit of canning is food preservation, in that the process allows for converting perishable food items into shelf-stable food, allowing for quality and nutritional properties to be maintained for years after being processed (Canned Food Alliance, 2023). The long-lasting nature of canned foods reduces food waste, common for fresh and perishable food items. Food waste and loss—caused by many factors from the farm through the final consumer and representing 30%–40% of the food supply—is a

problem because a significant amount of food is sent to landfills, which also contributes to greenhouse gas emissions from activities prior to and during disposal (U.S. Department of Agriculture, 2023).

Food preservation and convenience make canned foods suitable for food security in times of crisis, such as natural disasters or pandemics. For instance, at the beginning of the COVID-19 pandemic, households could secure food by increasing canned food purchases when restaurants were in lockdown and trips to grocery stores were less frequent (Hillen, 2021; Pigott, 2022). Unfortunately, the steel tariffs lasted throughout the pandemic, a time when consumers would have benefited from relatively lower prices for shelf-stable food items. As discussed in the next section, canned food prices significantly increased after the steel tariffs were imposed in 2018, exceeding overall inflation in recent years.

U.S. Steel Tariffs and the Canned Foods Sector

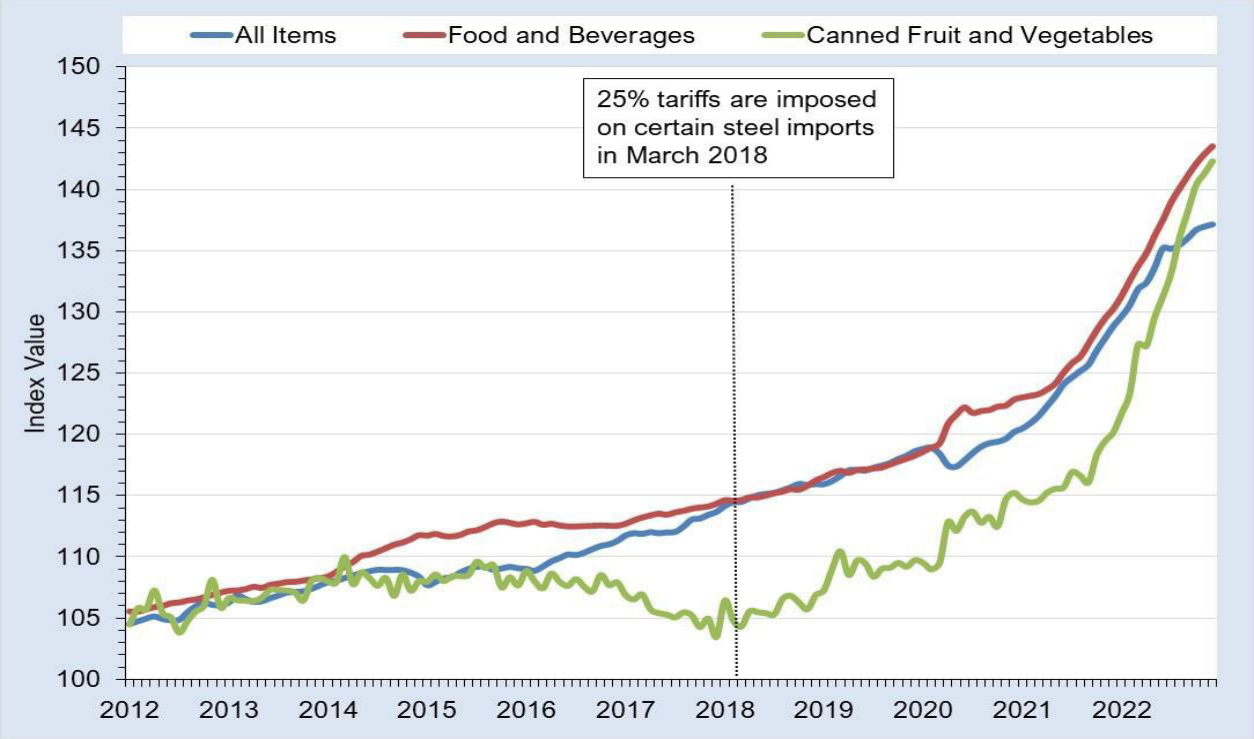
It was fitting that when the steel tariffs were first introduced, then-Commerce Secretary Wilbur Ross used a canned food item to defend the tariffs, suggesting a negligible impact on consumers and prices. In 2018, Secretary Ross noted (Horowitz, 2018),

> *This is a can of Campbell's soup, there's about 2.6 cents, 2.6 pennies, worth of steel. So, if that goes up by 25 percent, that's about six-tenths of one cent on the price of the can of Campbell's soup.*

Interestingly, canned food prices increased by more than Secretary Ross speculated they would. We asked the CEO of a U.S. canned food company why have prices increased significantly more than "six-tenths of one cent." He indicated that due to the tariffs, companies were paying significantly more for cans for several reasons. First, he noted the difficulties in transporting empty cans: shipping empty cans is tantamount to shipping air. Therefore, can manufacturing should be as close as possible to canning facilities. Import restrictions and tariffs make purchasing steel and producing cans more difficult, causing canned food companies to contract with can production facilities at greater and greater distances. Additionally, tinplate makes up a small share of U.S. steel production, and there is limited capacity to expand. This limited capacity has resulted in regional market power, allowing for higher mark-ups and putting additional upward pressure on prices.

To better understand how the steel tariffs might have affected canned food prices, we examined the consumer price indices for all items (CPI), food and beverages, and canned fruit and vegetables over the last decade

Figure 1. Consumer Price Indexes for All Items, Food and Beverages, and Canned Fruit and Vegetables, January 2012–December 2022



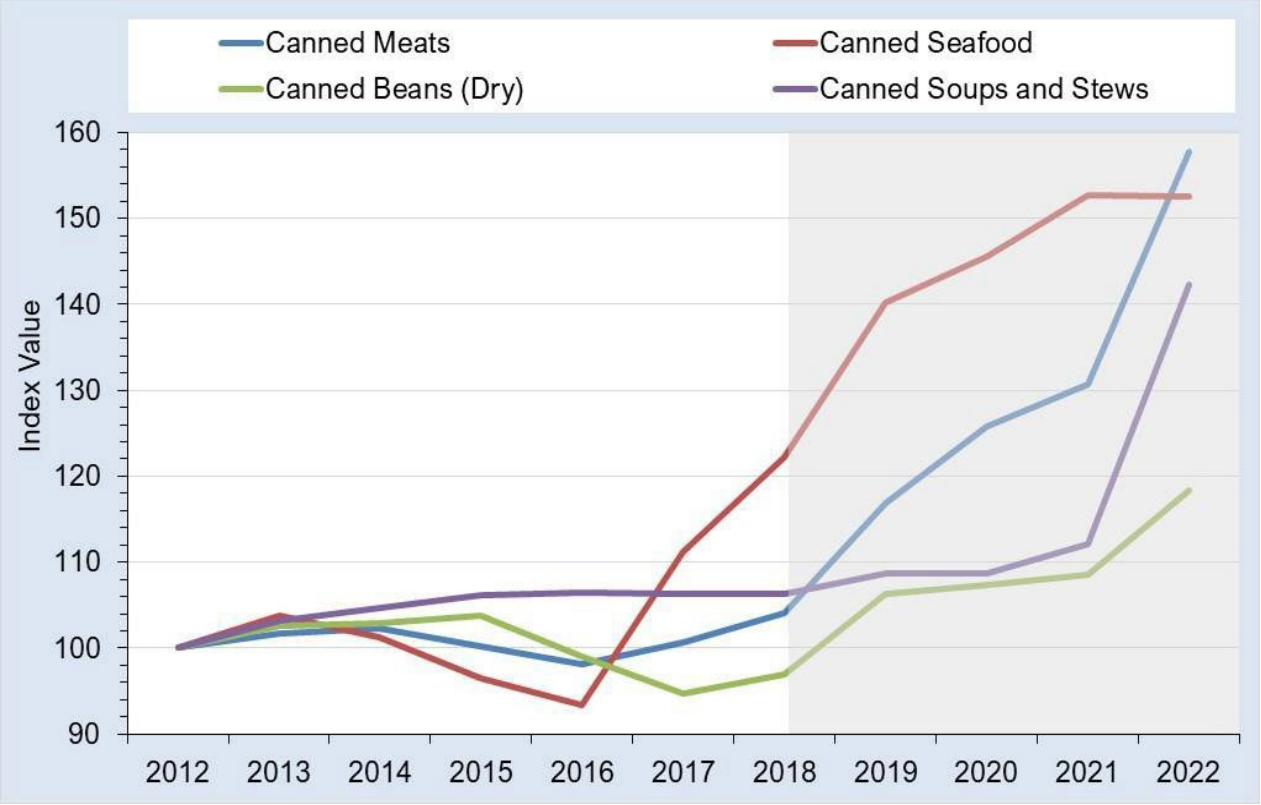
Note: Index values are the U.S. city average and seasonally adjusted. The indexes were rescaled based on the 2010 monthly average for comparison purposes.

Source: Bureau of Labor Statistics (2023).

(January 2012–December 2022) (see Figure 1). If the steel tariffs were inconsequential, then it could be argued that canned food prices would have followed a similar pattern as the CPI or food prices overall. Interestingly, the canned fruit and vegetables price index decreased from 2015 to 2018, even as the price indices for all goods and food and beverages increased. Even more interesting, the canned fruit and vegetables price index persistently declined right up to the point when the steel tariffs were imposed in March 2018, suggesting that the steel tariffs resulted in relatively higher canned food prices. Since the COVID-19 pandemic also caused prices to rise, Figure 1 might be capturing both the effects of the pandemic and the tariffs. However, the relatively faster price growth and the increase during 2018 and 2019 are likely due to the steel tariffs. Note that similar patterns occurred for other canned foods. Figure 2 shows the producer price indices for canned meats, seafood, beans, and soups and stews. Although canned seafood prices were rising before 2018 and the price of canned soups and stews did not significantly increase until 2022, both canned meats and canned bean prices (at the producer level) followed a similar pattern as the price index for canned fruits and vegetables: steady or decreasing prices until 2018, followed by a persistent upward trend thereafter. This provides even further evidence that the steel tariffs increased canned food prices.

Last, we considered U.S. tin-plated steel imports since 2012, as defined by three Harmonized System (HS) categories (72101200, 72121000, and 72101100) (see Figure 3). The Netherlands, Germany, and Canada supply a major share of U.S. tinplate imports, but South Korea and China also account for a significant share. The data show that imports were trending upward until 2018 and then declined and remained low throughout 2020. Compared to 2017, U.S. tinplate imports during this three-year period (2018–2020) were down 19% overall and down 35% for imports from South Korea, 23% for Germany, 15% for China, 13% for the Netherlands, and 9% for Canada. The relatively smaller decline in imports from Canada could be due to their tariffs being lifted in 2019. Interestingly, imports have fully recovered in recent years, which could be due to the United States and European Union reaching an agreement that converted the steel tariffs to tariff-rate quotas (Fefer, 2021). Is it important to note that Figure 3 includes tin-plated steel for all uses, so it is not clear whether the recovery in imports benefited the canned food sector specifically.

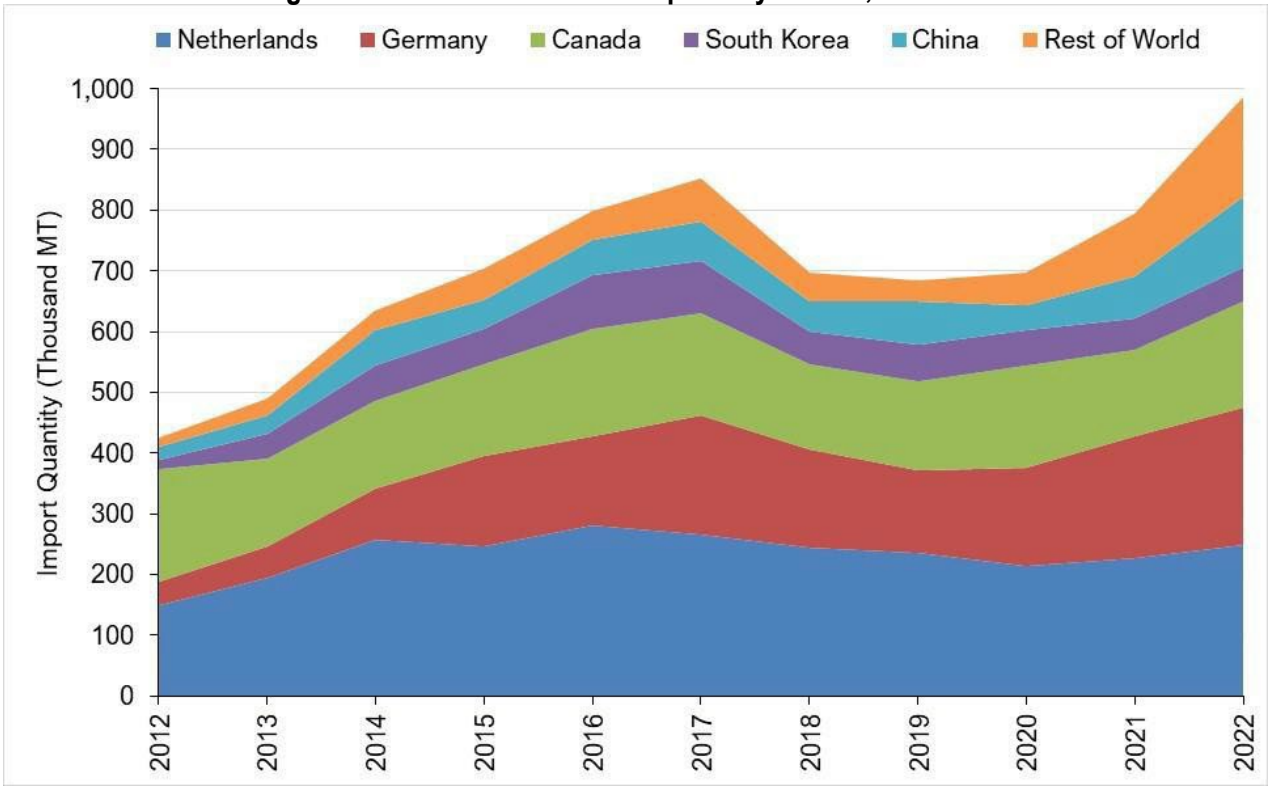
Figure 2. Producer Price Indexes for Select Canned Food Items, 2012–2022



Note: Index values were rescaled to 2012 for comparison purposes. Shaded area denotes the period when the steel tariffs were imposed.

Source: Bureau of Labor Statistics (2023).

Figure 3. U.S. Tin Plated Steel Imports by Source, 2012–2022



Note: Imports are an aggregation of the following Harmonized System (HS) categories: 72101200 *Iron/nonalloy steel, width ≥ 600mm, flat-rolled products, plated or coated with tin, less than 0.5 mm thick*, 72101100 *Iron/nonalloy steel, width ≥ 600mm, flat-rolled products, plated or coated with tin, thickness ≥ 0.5 mm*, and 72121000 *Iron/nonalloy steel, width ≤ 600mm, flat-rolled products, plated or coated with tin.*

Source: U.S. International Trade Commission (2023).

Closing

Producers in the U.S. canned food industry compete on price, making the industry one of the lowest-margin sectors (Wood, 2023). Thus, the proclamation by President Trump imposing 25% tariffs on imported steel caused concern for the canned food sector. The data in this study show that sector was likely impacted beyond the negligible expectations of the previous administration. This was in part evidenced by the relatively larger increases in canned food prices since 2018 compared to overall food prices and inflation. Downstream industries like the canned food sector that faced steel tariffs experienced declines due to higher production costs, decreased profits, and even decreased sales due to higher prices. However, a more quantitative assessment is needed to assess the degree to which all of these have occurred.

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Author Information: Andrew Muhammad is Professor and Blasingame Chair of Excellence with the Department of Agricultural and Resource Economics at the University of Tennessee Institute of Agriculture. Carlos J.O. Trejo-Pech is Associate Professor with the Department of Agricultural and Resource Economics at the University of Tennessee Institute of Agriculture, Knoxville, Tennessee.

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SOUTHERN AG TODAY

How the Trade War Is Hitting American Beer, Wine, and Spirits in Canada

Thursday, April 9, 2026

We often forget that beer, wine, and spirits are fundamentally agricultural products, rooted in the cultivation of corn, barley, rye, wheat, grapes, and other farm commodities. As a result, disruptions to alcohol trade are not just shocks to beverage markets, but direct blows to farmers, rural communities, and the wider agricultural economy that supplies these products (Muhammad et al., 2025). This broader agricultural story now runs straight through Canada, where trade tensions transformed alcohol import demand into a geopolitical statement. Canada has long been an important export destination for U.S. beer, wine, and spirits, supported by geographic proximity, integrated supply chains, and decades of tariff-free trade. In 2024, for instance, Canada was the leading

market for U.S. wine exports and the second leading market for U.S. distilled spirits and beer exports (USDA, 2026). This relationship shifted abruptly in 2025 when trade tensions escalated beyond conventional tariff retaliation and entered the retail marketplace.

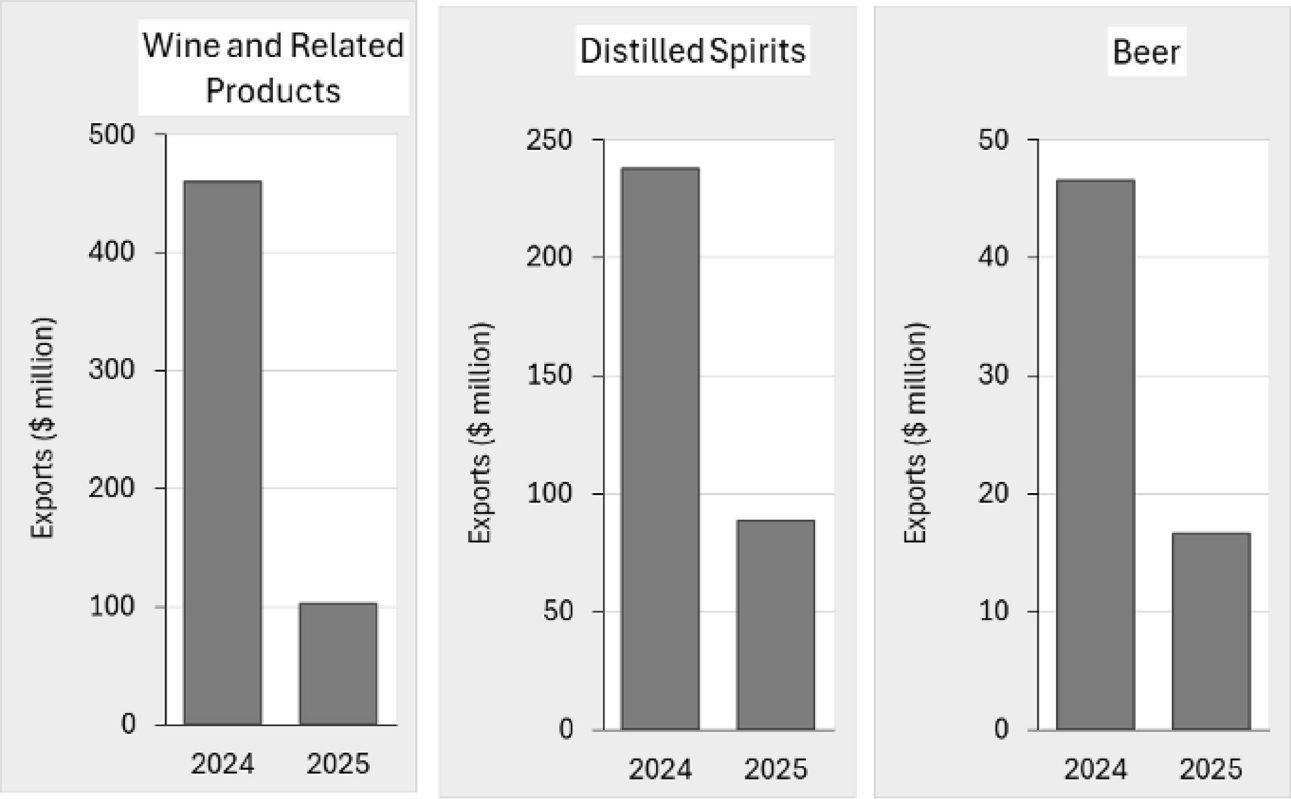
At the heart of the disruption was Canada's decision to remove American alcohol from store shelves entirely. Rather than relying solely on retaliation through tariffs, multiple provinces instructed their liquor authorities to stop purchasing and selling American beer, wine, and spirits. In early February 2025, the United States announced broad tariffs on Canadian imports. Canada responded in March with retaliatory tariffs on a range of U.S. goods, including alcohol (Kitamura, 2026). Provincial governments escalated further by directing liquor boards in Ontario, Quebec, British Columbia, Nova Scotia, and other provinces to halt purchases of U.S. alcohol and remove existing products from shelves and digital platforms. Throughout the spring and summer of 2025, these delistings remained largely in place, with only limited reversals in select provinces (DISCUS, 2026).

Figure 1 summarizes the year-over-year change in U.S. beer, wine, and distilled spirits exports to Canada between 2024 and 2025, reflecting the impact of the trade war on each product category. As shown in the figure, wine and related products experienced the largest decline, falling from $460 million in 2024 to $103 million in 2025, a 77.6% reduction or a $357 million loss. Distilled spirits exports declined from $238 million to $89 million, a 62.7% decrease, resulting in a $149 million loss. Beer exports also dropped sharply, falling from $47 million to $17 million, a 64.4% decline or $30 million loss. Taken together, total U.S. alcohol exports to Canada fell from $744 million to $208 million, a 72% decrease amounting to an overall dollar loss of $536 million.

These shelf removals sent a clear political signal to U.S. policymakers while simultaneously encouraging Canadian consumers to substitute toward domestic

or non-U.S. products. It also exposed the vulnerability of exporters operating in markets where governments control distribution infrastructure, demonstrating how trade wars can extend beyond borders and tariffs to reshape retail availability itself. Even as some punitive measures were later eased, this episode underscored how quickly trade relationships built over decades can be disrupted when retaliation targets market access rather than prices alone.

Figure 1. U.S. Beer, Wine, and Spirits Exports to Canada: 2024 and 2025



Source: U.S. Department of Agriculture, Foreign Agricultural Service, Global Agricultural Trade System (GATS) (USDA, 2026)

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SOUTHERN AG TODAY

U.S. **Agricultural Export Trends: Stability, Growth, and a China-Driven Rollercoaster**

Thursday, March 12, 2026

Now that the December 2025 trade data have been released, we can look back over the past fifteen years to evaluate how U.S. agricultural exports have evolved across major markets and how shifting global dynamics, especially the dramatic rise and subsequent decline of exports to China, have shaped overall performance. U.S. agricultural exports from 2010 through 2025 reveals a story of both stability and notable volatility. Total agricultural exports rose from $119 billion in 2010 to a high of $196 billion in 2022, before settling at $171 billion in 2025. Exports in 2025 were more than $5.0 billion lower than the previous year, driven primarily by reduced soybean shipments, along with declines in coarse grains, beef, wine, and rice. Much of the variation in U.S. agricultural trade can be

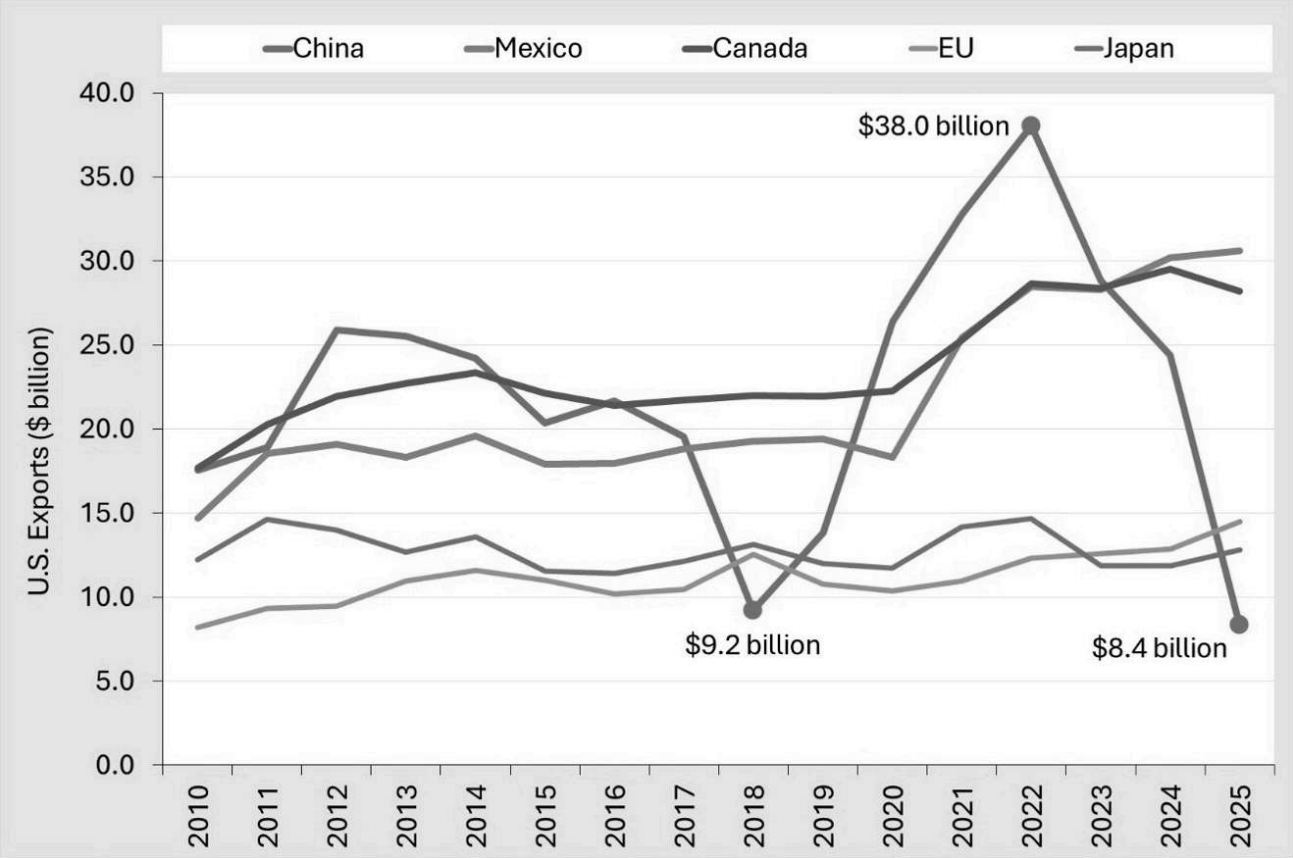
traced to the dramatic rise and fall of U.S. exports to China, a market that transformed from the leading U.S. destination to a source of sharp decline. Indeed, the widening U.S. agricultural trade deficit, which grew from -$37.6 billion in 2024 to -$41.7 billion in 2025, stems largely from the steep collapse in exports to China (USDA, 2026).

Figure 1 shows U.S. agricultural exports to the major destinations-China, Mexico, Canada, the European Union, and Japan. With the exception of China, most major U.S. export markets exhibit steady or gradually increasing demand, even during periods of heightened trade tensions and uncertainty. However, it's hard to ignore the extremely volatile path of U.S. agricultural exports to China. Beginning at $18 billion in 2010, exports to China climbed substantially, peaking at $38 billion in 2022, primarily due to rising exports from the Phase One Trade Agreement and relatively high commodity prices. However, exports to China have significantly declined since, falling to just $8 billion in 2025, representing a loss of $30 billion in only three years. No other major market exhibits such a rollercoaster pattern. This deterioration also helps explain why total U.S. exports fell from $196 billion in 2022 to $171 billion in 2025, despite persistent exports elsewhere.

In contrast, exports to nearly every other major destination remained stable or even trended upward. Mexico increased from $15 billion in 20l Oto $31 billion in 2025. Canada remained consistently strong, rising from $18 billion to $28 billion over the same period. The EU and Japan both show moderate, incremental increases, with none experiencing sharp swings comparable to China. Overall, recent trends illustrate two simultaneous dynamics: the inherent volatility of U.S. agricultural trade with China and the remarkable stability of U.S. exports to virtually every other major market. While the collapse in Chinese demand resulted in a noticeable drop in total exports after 2022, the resilience of other destinations helped buffer the decline. These trends highlight both the

opportunities and the vulnerabilities that come with relying heavily on a single, now-unpredictable trading partner.

Figure I. U.S. Agricultural Exports to the Top Destination Markets: 2010-2025



Source: U.S. Department of Agriculture, Foreign Agricultural Service, Global Agricultural Trade System (GATS) (USDA, 2026)

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When China Stops Buying: Is this the New Reality for U.S. Cotton?

Thursday, February 26, 2026

U.S. cotton is among the most export-dependent agricultural commodities, with more than 80% of annual production moving into global markets rather than being used domestically (U.S. Department of Agriculture, 2026a). Although China has not always been a consistent buyer, importing less than 15% of U.S. cotton exports in some years and more than 30% in other years, it has nevertheless remained a somewhat reliable partner, accounting for nearly 30% of U.S. cotton exports in more recent years (2020-2024) (U.S. Department of Agriculture, 2026b).

Once the most important market for U.S. cotton, China has become a far less reliable partner in 2025, as recent import patterns show greater volatility and reduced engagement with the U.S. agricultural sector. In 2025, China's purchases of U.S. cotton fell from $1.5 billion to just $0.2 billion, an 85% decline, while its import volume dropped at nearly the same rate, from 0.8 million metric tons (MMT) to 0.1 MMT. In contrast, exports to markets outside China expanded substantially over the same period. The value of U.S. cotton exports to non-China destinations rose from $3.5 billion to $4.6 billion, a 32% increase, while quantities surged 51%, from 1.7 MMT to 2.6 MMT (Table 1) (U.S. Department of Agriculture, 2026b).

Why did China sharply reduce its imports of U.S. cotton? While the trade war and subsequent political tensions certainly accelerated the decline, the underlying shift runs deeper than tariffs. China's overall import strategy has fundamentally changed as its domestic cotton sector has undergone major structural adjustments since 2010. Over the past decade, China has increased production, drawn down its massive state-held stockpiles, and reduced its dependence on foreign fiber. Since 2021 alone, domestic output has risen by more than 30% (U.S. Department of Agriculture, 20250). As a result, China is increasingly able to meet the needs of its textile and apparel industry with domestic cotton rather than imports. Taken together, these developments suggest that China's reduced reliance on U.S. cotton is not simply a temporary response to trade tensions but part of a longer-term realignment.

Table2 makes clear that the steep decline in U.S. cotton exports to China was not simply the result of tariffs or bilateral tensions, but part of a much broader contraction in China's overall import demand. China's total cotton import value fell from $5.3 billion in 2024 to $1.9 billion in 2025, while import volumes dropped from 2.6 million to 1.1 million metric tons. Every major supplier experienced significant losses: Brazil's shipments fell by more than 50%, India's collapsed by over 90%, and Australia also recorded substantial reductions.

The across-the-board declines underscore a structural shift in China's sourcing strategy rather than a U.S.-specific outcome.

Table I. U.S. Cotton Exports: 2024 and 2025

	2024	2025	Change	%Change
	Value ($ billion)			
China	$1.5	$0.2	-$1.3	-85.1%
Total (w/o China)	3.5	4.6	1.1	32.0%
Total (w/ China)	5.0	4.8	-0.l	-2.8%
	Quantity (million metric tons)			
China	0.8	0.1	-0.6	-84.6%
Total (w/o China)	1.7	2.6	0.9	51.0%
Total (w/ China)	2.5	2.7	0.2	9.6%

Source: U.S. Department of Agriculture (2026b)

Table 2. China's Cotton Imports (Major Exporting Countries): 2024 and 2025

	2024	2025	Change	%Change
	Value ($ billion)			
Total	$5.3	$1.9	-$3.4	-63.6%
Brazil	2.2	0.8	-1.4	-63.4%
U.S.	1.9	0.2	-1.6	-87.8%

Australia	0.7	0.6	-0.1	-13.8%
India	0.1	0.0	-0.1	-91.1%
Turkey	0.1	0.1	0.0	3.7%
	Quantity (million metric tons)			
Total	2.6	1.1	-1.5	-59.2%
Brazil	1.1	0.5	-0.6	-57.8%
U.S.	0.9	0.1	-0.8	**-86.8%**
Australia	0.3	0.3	0.0	0.2%
India	0.1	0.0	-0.1	-90.9%
Turkey	0.1	0.1	0.0	**-4.1%**

Source: Trade Date Monitor®(2026)

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Recent Trade Tensions Cause U.S. Beef to Lose Ground in China, Spurs Gains for Australia and Brazil

Thursday, October 30, 2025

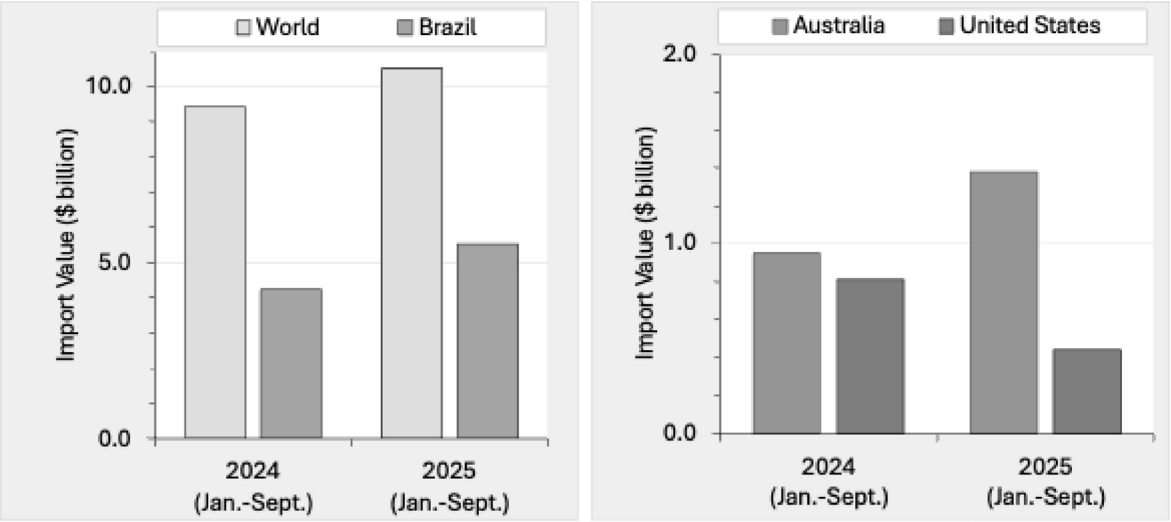
Over the past decade, China has gone from a minor player to the world's largest beef importer, with purchases rising from around a $100 million in 2010 to nearly $18 billion in 2022, which is a staggering increase of over 17,000%. This surge isn't just about spending more. The actual volume of beef purchased has grown by more than 8,000%, driven by rising incomes, urban lifestyles, and shifting diets that favor beef over traditional staples like pork. The outbreak of African Swine Fever in 2018, which devastated China's pig population, further accelerated the shift, while government dietary guidelines have promoted beef as a healthier

option. Due to rising demand and imports, coupled with lifting the import restriction on U.S. beef in 2017, China is now the third largest foreign market for U.S. beef-around $1.5 billion in 2024. This rise has been highlighted in previous Southern Ag Today articles (For example, see: https://southernagtoday.org/2025/04/17/high-tariffs-could-halt-u-s-beef-exports-to-china/).

Rising trade tensions between the U.S. and China, which started earlier this year, raised concerns for U.S. beef exporters. Chinese tariffs on American beef soared as high as 145%, making it far more expensive than beef from countries like Brazil and Australia. Although those tariffs were later lowered to around 33%, the decline had already begun. On top of that, China let export approvals expire for nearly 400 U.S. beef processing plants in March, about 60% of all facilities allowed to ship beef to China, effectively blocking a large portion of U.S. supply (Marianetti, 2025). This move, seen as a non-tariff barrier, has created uncertainty, shaking confidence in the reliability of U.S. beef exports.

In 2025, rising trade tensions quickly took a toll on American beef in China (see Figure 1). From January to September, U.S. beef exports fell sharply-from $814 million in 2024 to $442 million in 2025-a 46% drop driven mostly by lower volumes. The decline was even steeper in the second and third quarters, after China let key export approvals expire, with U.S. beef falling nearly 70%. This happened even as China's overall beef imports grew in value. Meanwhile, Australia and Brazil gained ground: Australia's exports to China rose 42%, and Brazil's increased nearly 25%. In 2024, the U.S. held about 9% of China's beef import market, compared to Brazil's 48% and Australia's 9%. By the third quarter of 2025, the U.S. share had dropped to less than 1%, while Brazil and Australia accounted for 59% and 13%, respectively. It's a clear sign that when trade tensions rise, other suppliers are quick to take the lead.

Figure I. Chinese Beef Imports: 2024 and 2025 (Year-to-date: January-September)



Note: Imports are defined according to the Harmonized System (HS) classification HS 0202 *meat of bovine animals, frozen.* Frozen beef accounts for over 90% of China's beef imports.
Source: Trade Data Monitor®

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China's Agricultural Imports **from** U.S. **and Brazil Decline in** 2025 - **But the** U.S. **Faces** Sharper Losses

Thursday, October 2, 2025

The decline in U.S. agricultural exports to China has made headlines, most notably due to China's decision not to purchase U.S. soybeans this season. Soybeans are the largest agricultural export for the United States, and China has traditionally been the top foreign buyer of U.S. soybeans, making this shift particularly significant for American producers. While stories have been mostly about declines in U.S. exports to China, it is important to note that China's agricultural imports-including related products like forestry, biodiesel, and

seafood-are down overall in 2025 compared to 2024, reflecting a broader contraction in trade.

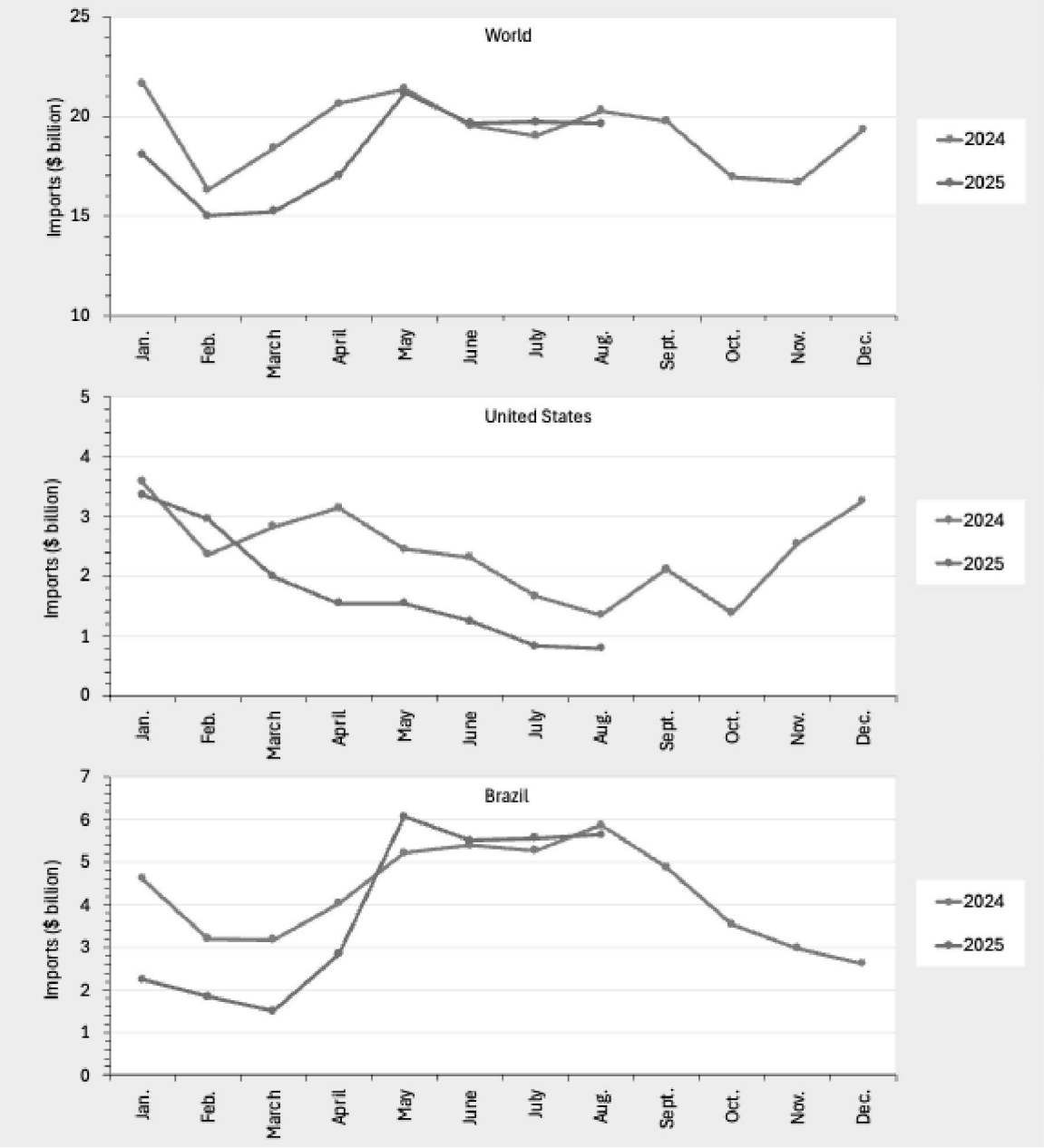
Figure l shows China's total agricultural imports from global sources, including the United States and Brazil. Overall, total imports declined in 2025 compared to 2024, with the most significant drop occurring during the first half of the year. For example, imports in January 2025 fell to approximately $18 billion, down from $22 billion in January 2024. A year-to-date comparison (January-August) shows total imports decreased from $157 billion in 2024 to $145 billion in 2025, a reduction of $12.l billion, or 7.5%. In terms of quantity or volume, the decline was even steeper-nearly 12% (Trade Data Monitor®, 2025), suggesting that lower import values were not solely driven by price changes but also by reduced quantities.

Although China's agricultural imports declined overall, imports from the United States experienced a sharper and more sustained drop, beginning later in the year. In January 2025, imports from the U.S. were down by only $220 million compared to the previous year, and in February, they were up by nearly $600 million. However, starting in March, imports consistently fell below 2024 levels. By August, year-to-date China's imports of U.S. agriculture and related products had dropped from $20 billion in 2024 to $14 billion in 2025, a decline of more than $5 billion, or 27.5%.

Brazil also experienced a decrease in agricultural export sales to China in 2025, though the decline was less severe than that of the United States. As of August 2025, imports from Brazil fell from $36.7 billion in 2024 to $31.2 billion, representing a 15.0% decrease. Month-to-month comparisons show sharper early-year declines: imports were down 51% in January, 43% in February, and 53% in March compared to the same months in 2024. However, beginning in May 2025, import levels from Brazil became more comparable to the previous year and even exceeded 2024 figures in some months. This mid-year rebound

suggests that Brazil is benefiting from seasonal demand as well as favorable trade conditions.

Figure I. China's total agricultural imports from the World, United States, and Brazil: January 2024 - August 2025



Note: Agricultural import values include related products like forestry, biodiesel, and seafood.
Source: Trade Data Monitor® (2025)

Reference

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Outlook for U.S. Agricultural Trade in 2025: Exploring the Recent August Forecasts

Thursday, September 4, 2025

The August 2025 *Outlook for U.S. Agricultural Trade* provides a snapshot of the current challenges and opportunities in global markets (USDA, 2025a). The quarterly report has long been a valuable tool for understanding how international trends affect the U.S. farm economy. In the past, it included both data and written commentary to explain possible causes behind trade shifts. However, the May 2025 report sparked controversy when its release was delayed. The issue centered on explanatory text that linked rising agricultural trade deficits to tariffs (Ingwersen & Douglas, 2025). As a result, the USDA removed the commentary and now publishes only data tables. This change has

raised concerns about transparency and the loss of expert interpretation that helped make sense of complex trade dynamics.

The August report shows that the U.S. will continue to import more agricultural goods than it exports. However, the projected trade deficit for fiscal year (FY) 2025-running from October to September-was revised downward from $49.5 billion in the May report to $47.0 billion. This adjustment was driven by an upward revision in forecasted exports, while the import forecast remained unchanged from May at $220 billion. For FY2025, exports are now expected to reach $173 billion, with imports holding at $220 billion.

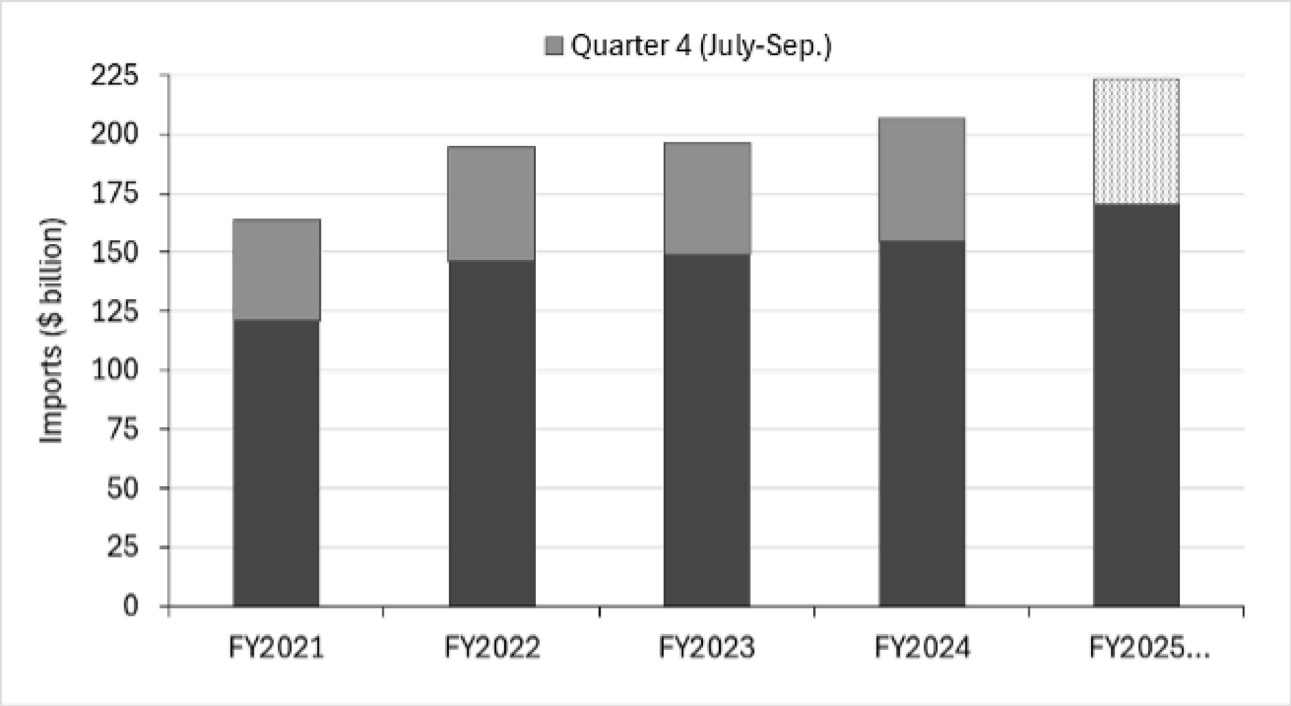
These revisions raise important questions. Are they justified based on the available data? Most notably, is there clear evidence of increased export activity to support the upward revision? And given current trends, should the import forecast have been adjusted as well-either upward or downward? A closer look at recent trade is needed to assess whether these changes reflect actual market conditions or optimism.

Year-to-date (October to June) export values are reported in Table 1. The data suggest that the value of agricultural exports will remain relatively flat. During the first three quarters of the fiscal year, export values increased slightly from $135.0 billion in 2024 to $135.7 billion in 2025, which is a modest 0.6% rise. However, the volume of exports grew significantly, increasing from 162.4 million metric tons (MMT) to 175.9 MMT, an 8.3% increase. This growth in quantity was offset by a 7.2% decline in average prices (unit value), which fell from $831/MT to $772/MT, suggesting lower prices per unit across many commodities. Depending on prices, the upward revision in the export forecast could be justified despite current trade tensions (USDA, 2025b).

Assuming fourth-quarter imports in FY2025 will follow patterns seen in recent years, available data suggest that total imports could reach $223 billion. This

supports the decision to hold the official import forecast steady at $220 billion given the small $3 billion difference (USDA, 2025b). If ongoing trade tensions continue, it would not be surprising if actual imports were lower than $220 billion.

Figure I. U.S. Agricultural Imports: FY2021-FY2025



Note: FY is the fiscal year (October - September)
Source: U.S. Department of Agriculture, Foreign Agricultural Service, Global Agricultural Trade System (GATS) (2025b)

Table I. U.S. Agricultural Exports: FY2024 and FY2025 (year-to-date: October - June)

Exports	Oct. -June 2024	Oct. - June 2025	%Change
Value ($ billion)	$135.0	$135.7	0.6%
Quantity (MMT)	162.4	175.9	8.3%

Unit Value ($/MT)	$83 l. l	$777 .5	-7.2%

Note: FY is the fiscal year (October - September)
Source: U.S. Department of Agriculture, Foreign Agricultural Service, Global Agricultural Trade System (GATS) (2025b

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ARTIFICIAL INTELLIGENCE & LEGAL ETHICS: "TELELAW" –THE [NEXT] FRONTIER[1,2 3]

GARRETT COUTS, *Lubbock*
Brady & Hamilton LLP

The National Agricultural Law Center & NASDA Foundation
13TH ANNUAL MID-SOUTH AGRICULTURAL AND ENVIRONMENTAL LAW CONFERENCE
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[1] Portions of this paper were quoted or adapted from the following paper: *Tech Basics – Tools for Solo and General-Practice Practitioners*, GARRETT COUTS & AL HARRISON, State Bar of Texas 22nd Annual Summer School Course (July 16 - 18, 2020).
[2] Portions of this paper were quoted or adapted from the following paper: *"Telelaw" – The [Next] Frontier*, GARRETT COUTS, American Agricultural Law Association 44th Annual Agricultural Law Educational Symposium (November 9-11, 2023).
[3] Portions of the ELECTRONIC DOCUMENTS & SIGNATURES section of this paper are quoted from or adapted from the following paper: *"Telelaw" – The [Next] Frontier*, GARRETT COUTS & CHRISTINA JENKINS, State Bar of Texas 24th Annual Summer School Course (July 21-23, 2022).

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ARTIFICIAL INTELLIGENCE & LEGAL ETHICS: "TELELAW" –THE [NEXT] FRONTIER

I. INTRODUCTION

Firms big and small are now in a world awash with technology. For better or worse, this is the ***"telelaw"*** age. There is no shortage of reactions to these technological advancements. Practitioners and clients react anywhere within a range from early adopters who would digitize the world if possible, to defiant holdouts that would ban technology if they could. The reality is our individual interests and preferences only matter to a limited point. After that, what clients want – quick, easy, accessible technology – is what clients get.

In addition, our ethical obligations and overall governance of our profession now include obligations related to technology, client privacy and safety, and other tech-related aspects. So, ready or not, it's time to tech-up. Hopefully by the end of this paper, you will feel more prepared to transition some tech-savvy tactics into your practice.

II. ETHICS

A. Ethics & Disciplinary Rules

Numerous states, courts, bar associations, legal-administrative bodies, and other regulatory agencies or authorities with oversight of the legal profession have adopted ethics or disciplinary rules regarding the use of technology.

As you might expect, the approach of regulating technology use in the legal profession varies widely given that each state has its own system for licensing and regulation. Some states have mandatory bar associations, others are directly regulated by the state supreme court, and yet others are subject to oversight by a board elected or appointed as part of the state government.

In addition to individual states, the American Bar Association has also adopted standards regarding the use of technology in legal practice. Primarily, the ABA adopted Comment 8 to Model Rules of Professional Conduct 1.1, which reads as follows:

> [8] To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, ***including the benefits and risks associated with relevant technology***, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.[1]

This amendment has been substantively adopted – in some, relatively similar form – in many states. So, for the *"early adopters"* out there – rejoice. For the *"late-comers"* of technology, don't despair, but you might consider a technology-based CLE or technology class.

The expanse of this requirement will differ from firm to firm and lawyer to lawyer, but it is a requirement all the same. Ms. Elizabeth A. Rogers provided an excellent review of the Texas version of this amendment in the May 2019 edition of the Texas Bar Journal.[2] Ms. Rogers summarized the amendment as follows:

> [T]he ethical duty of technology competence may be discharged differently for lawyers in medium to large firms versus lawyers in small firms or solo practitioners.
> . . .
> For small firm lawyers and solo practitioners, the ethical duty of technology competence can present a challenge because most lawyers are not technologists

[1] MODEL RULES OF PROF'L CONDUCT r. 1.1 cmt. 8 (emphasis added).
[2] Elizabeth A. Rogers, *Technology Matters*, Vol. 82, No. 5 Tex. B.J., 325 (May 2019).

> and often lack training and experience in security. Nevertheless, like the duty of legal competence, lawyers in small firms and solo practitioners will be expected to comply with the ethical duty of technology competence by taking continuing legal education courses focused on technology for law practice management and/or by outsourcing information security services to other professionals who are competent in the area or both. These steps will likely be regarded as minimum standards, and failure to comply with them may constitute unethical conduct.[3]

Numerous other states have enacted similar rules regarding technology in the legal profession. The District of Columbia and Puerto Rico have also enacted technology-competency rules.[4] The nine states without a specific technology- competency rule are the following:

1. Alabama
2. Georgia
3. Maine
4. Maryland
5. Mississippi
6. Nevada* (*see footnote 5)
7. New Jersey
8. Oregon
9. Rhode Island[5]

> However, many such rules simply obligate attorneys to "keep abreast of changes in the law and its practice, engage in continuing study and education and comply with all continuing legal education requirements to which the attorney is subject."[6] Therefore CLE obligations could impose technology competency even if the ethics rules do not explicitly include technology competency.

B. Member Benefits and Services - Technology

Luckily, many bar associations and other organizations offer numerous resources regarding technology readiness and education, including ***The State Bar of Texas Computer and Technology Section*** and its widely-viewed ***Tech Bytes*** short videos. Tech Bytes are "byte size" (pun intended) videos providing you an understanding of various technology issues and ways to implement strategies and related tools and techniques to effectively address them. The videos can be found at the following URL on the State Bar of Texas website: https://www.texasbar.com/AM/Template.cfm?Section=articles&ContentID=37530&Template=/CM/HTMLDisplay.cfm.

Additionally, many bar associations have negotiated with numerous *"**Preferred Provider**"* vendors for discounts and benefits for association members. In Texas, the services provided by these vendors

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[3] *Id.*

[4] Robert Ambrogi, *Tech Competence: 40 States, D.C. and P.R. Have Adopted the Duty of Technology Competence*, LAWSITES, https://www.lawnext.com/tech-competence (last visited April 18, 2026).

[5] *Id.*; SD ST RPC APP CH 16-18 Rule 1.1, Cmt. 6 (South Dakota – Competence). *See also,* AL R RPC Rule 1.1 (Alabama – Competence), GA R BAR Rule 4-102, RPC Rule 1.1 (Georgia – Competence), ME R RPC Rule 1.1 (Maine – Competence), MD R ATTORNEYS Rule 19-301.1 (Maryland – Competence), MS R RPC Rule 1.1 (Mississippi – Competence), NV ST RPC Rule 1.1 (Nevada – Competence), N.J. Rules Prof'l Conduct R. 1.1 (New Jersey – Competence), OR R PROF COND Rule 1.1 (Oregon – Competence), RI R S CT ART V RPC Rule 1.1 (Rhode Island – Competence). *But see* Paul Matteoni, Esq., *2020 - Our Duty of Technology Competence*, NEV. LAW. 4 (2020) (article by then President of the State Bar of Nevada arguing that Technology Competence applies in Nevada); ME R RPC Rule 4.4 (Maine - Respect for Rights of Third Persons; Inadvertent Disclosures) ("The Task Force also recognized the advent of new technologies may alter the nature of some inadvertent disclosures.[…]").

[6] *E.g.*, MD R ATTORNEYS Rule 19-301.1, cmt. 6.

include the following seven categories: (1) *Lifestyle*, (2) *Office*, (3) *Travel*, (4) *Insurance and Finance*, (5) *Professional Liability*, (6) *Regional Offers*, and (7) ***Technology***. These vendors provide a litany of services from billing and online client portals to encrypted email and other cybersecurity services. They also can provide inputs such as computers and other devices for your practice.

C. Malpractice Insurance Coverage

Many malpractice-insurance carriers include ***cybersecurity*** breaches and threats in their coverage. However, you should check with your carrier to ensure you have the coverage needed for your particular practice needs. In addition, many providers will require that you have certain policies, practices, tools, or technological defenses in place in order to obtain a policy or assert a valid claim – such as a ***Document Retention and Destruction Policy***. You should contact your carrier to confirm your coverage and review your policy to ensure you have all of the practices and procedures in place to qualify for coverage should you need to file a claim.

According to the American Bar Association, as of 2022, 46% of respondents reported their firms have cyber liability insurance. "Respondents from firms of 10-49 attorneys are the most likely to have cyber liability insurance (56%), followed by 43% of firms more than 100 attorneys, 42% firms of 2-9 attorneys, 40% firms of 50-99, and 38% for solo attorneys."[7]

III. ENCRYPTED EMAIL & DOCUMENTS

A. Introduction

A primary example of a technology required under the ethical duty of "relevant technology" is ***encryption*** of documents, emails, and other information transmitted electronically or in digital form/medium. As the practice of law has become increasingly reliant upon electronic-based technology for communication with clients, and receipt, transfer, and storage of client information, confidentiality and security associated therewith has unavoidably become critically important.

Have you ever received an email response from opposing counsel or a third-party with that ugly little box stating something like **"CAUTION: External email"**? Or, have you ever been prompted to login to a profile or program in order to see an email or download a document? Each of these is an example of an encrypted email or document system.

It is likely you have seen an increasing number of these emails or encrypted documents from other attorneys – that's no accident. Under many states' ethics rules and opinions, encrypted email and document transmission are now a **requirement** for many practitioners. As always, there are exceptions.

The American Bar Association reports that 49% of respondents utilize file encryption and 40.1% of respondents indicated that email encryption was available.[8]

"Law firms with 2-9 lawyers were at the low end with 30.4%. The percentage increased as the law firm size increased with 500 or more lawyers being at 53.3%. Larger law firms tend to have encrypted email as part of their email service, while the solo and small firm lawyers tend to take advantage of the secure communications capabilities within their practice management system."[9]

For a brief overview of sample encryption duties and types of encryption, review the *Encryption Made Easy (For Lawyers And Clients)* Tech Bytes video at the following URL: https://www.texasbar.com/AM/Template.cfm?Section=articles&ContentID=37530&Template=/CM/HTMLDisplay.cfm.

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[7] AMERICAN BAR ASSOCIATION, 2022 CYBERSECURITY, https://www.americanbar.org/groups/law_practice/publications/techreport/2022/cybersecurity/ (last visited April 18, 2026).

[8] *Id.*

[9] *Id.*

1. **Why it matters**

As of 2022, approximately 64% of Americans had experienced a cybersecurity breach regarding their personal data.[10] Additionally, Americans have grown less confident in the security of their data as technology has progressed. As of 2019, approximately 70% of Americans believed their personal information is less secure than it was just five years earlier.[11] Approximately 52% of Americans will refuse to use a product or service if they are concerned about the exposure of their personal information.[12] Specifically for law firms, 25% of ABA Survey respondents reported an experience with a firm data breach.[13]

2. Breach Notification & Data Privacy Laws

Many states have enacted ***Breach Notification Laws*** regarding breaches in cybersecurity, ***Data Privacy Laws*** regarding minimum security measures for customer data, or both.

a. **Brach Notification Laws**

Currently, all 50 states, as well as the District of Columbia, Guam, Puerto Rico and the U.S. Virgin Islands, have ***Breach Notification Laws***.[14] For example, Texas has enacted the ***Identity Theft Enforcement and Protection Act***.[15] A Texas business, including a law firm, which ***collects*** or ***maintains*** "*sensitive personal information"* in the regular course of business "*shall implement and maintain reasonable procedures, including taking any appropriate corrective action*" to protect the information from unlawful use or disclosure.[16]

Depending upon the extent of the breach, there are varying notification requirements. Many states put thresholds – number of customers affected or amount of data breached – while others apply notification requirements on an individual basis. The requirements of notification can be extensive and the scope of their application broad.

For example, under Texas law, there is no exception, protection, or safe harbor regarding hackers or third-party attacks against your firm's cybersecurity.[17] Meaning, if your clients' personal information or data is stolen by a third-party, you are still subject to the Breach Notification requirements.[18] However, there is an exception for the theft or loss of ***encrypted*** data, which is ***not*** considered "***sensitive personal information".***[19]

b. **Data Privacy Laws**

Additionally, many states have enacted legislation regarding the collection, storage, and use of customer data. As of April 2026, the following 21 states have enacted a data-privacy law in some form:

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[10] Aaron Smith, *Americans & Cybersecurity*, PEW RESEARCH CENTER (Jan. 26, 2017), https://www.pewresearch.org/internet/2017/01/26/americans-and-cybersecurity/.

[11] Brooke Auxier, *How Americans see digital privacy issues amid the COVID-19 outbreak*, PEW RESEARCH CENTER (May 4, 2020), https://www.pewresearch.org/fact-tank/2020/05/04/how-americans-see-digital-privacy-issues-amid-the-covid-19-outbreak/.

[12] *Id*.

[13] AMERICAN BAR ASSOCIATION, 2022 CYBERSECURITY, https://www.americanbar.org/groups/law_practice/publications/techreport/2022/cybersecurity/ (last visited April 18, 2026).

[14] *Security Breach Notification Laws*, NAT'L CONFERENCE OF STATE LEGISLATURES (last updated Jan. 17, 2022), https://www.ncsl.org/technology-and-communication/security-breach-notification-laws#:~:text=All%2050%20states%2C%20the%20District,information%20involving%20personally%20identifiable%20information (last visited April 18, 2026,).

[15] TEX. BUS. & COM. CODE § 521.001.

[16] TEX. BUS. & COM. CODE § 521.052.

[17] *See id*.

[18] TEX. BUS. & COM. CODE § 521.053.

[19] TEX. BUS. & COM. CODE § 521.002(a)(2).

1. Alabama
2. California
3. Colorado
4. Connecticut
5. Delaware
6. Indiana
7. Iowa
8. Kentucky
9. Maryland
10. Minnesota
11. Montana
12. Nebraska
13. New Hampshire
14. New Jersey
15. Oklahoma
16. Oregon
17. Rhode Island
18. Tennessee
19. Texas
20. Utah
21. Virginia[20]

Scope. These statutes can vary widely by state – primarily in their scope and their specific security requirements. Some states have narrowly tailored laws only applicable to large-scale businesses (with large data collection practices), while other states have enacted legislation with a broad scope, essentially encompassing most businesses generally. Many states place revenue and data thresholds, while others have sweeping application with limited exceptions for small businesses.

Additionally, these laws may not apply in all contexts. Many such laws only apply to consumers or consumer transactions and do not apply in a commercial or employment context.[21]

Definitions. It is crucial to determine what definitions are applicable in your state. For example, while many states do not include anonymous data or data that is not directly linked to a particular person's identity in their definition of "***Personal Data***" or "***Private Data***", other states do include such data. Texas does include such randomized data if that data can be associated with other information that "can be reasonably linked" to an identified or identifiable individual or that individual's electronic device. "Identified or identifiable individual" means "a consumer who can be readily identified, directly ***or indirectly***."[22]

At first glance, you may believe your firm is beyond the scope of these laws, but a careful review of the definitions may be enlightening. For example, in Texas, subject to exemptions, the following are within the scope of the law:

> a person that:
> (1) conducts business in this state or produces a product or service consumed by residents of [Texas];
> (2) processes or engages in the sale of personal data; and

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[20] *See* C. Kibby, *US Privacy Legislation Tracker*, INT'L ASS'N OF PRIV. PROS. (Updated April 20, 2026), https://iapp.org/resources/article/us-state-privacy-legislation-tracker/ [https://perma.cc/5QRD-JK3V] (Last visited May 1, 2026).

[21] *E.g.*, TEX. BUS. & COM. CODE ANN. § 541.001(7)("Consumer" means "an individual who is a resident of this state acting only in an individual or household context. The term does not include an individual acting in a commercial or employment context.").

[22] *E.g.*, TEX. BUS. & COM. CODE ANN. § 541.001(19).

(3) is not a small business as defined by the United States Small Business Administration, [with exceptions].[23]

You might think that because your firm does not sell your client's personal data that you are not subject to this law. But, surprise, the definition of "process" or "processing" means "*an operation or set of operations performed, whether by manual or automated means, on personal data or on sets of personal data, such as the* ***collection, use, storage, disclosure, analysis, deletion, or modification of personal data****[,]*" which practically encompasses any amount of information that you might collect in your representation of a client. For example, in an estate-planning matter you may collect any or all of the following: Social-security numbers, birthdates, legal names, mailing addresses, children's names, etc., etc., etc. Depending upon your state's definition of "***Personal Data***" any number of these items could qualify as information that is subject to protection from disclosure – and most certainly subject to limitations in its sale.

It is important to determine how your firm's role would be defined under the statute. Different roles have different obligations regarding the consumer data. For example, in Texas, a "***Controller***" means "an individual or other person that, alone or jointly with others, determines the purpose and means of processing personal data[,]" while a "***Processor***" means "a person that processes personal data on behalf of a controller."[24]

Exemptions. Generally, many groups are exempt from these laws, such as the following: healthcare providers which are subject to HIPAA and other federal laws; nonprofits; higher education institutions; governmental agencies and political subdivisions; financial institutions subject to federal regulation or law; some utility providers; and small businesses (as defined by the United States Small Business Administration) but subject to limitations.[25]

Consumer Rights. These laws generally provide consumers with delineated rights regarding their data which usually include rights similar to the following:

(1) confirm whether a controller is processing their personal data and access that data;
(2) correct inaccuracies in their personal data;
(3) request deletion of their data (whether the personal data was provided by the consumer or obtained about the consumer);
(4) obtain a portable copy of their personal data;
(5) opt out of processing for the purposes of targeted advertising, sale of personal data or profiling; and
(6) appeal a controller's refusal to take action on a consumer request to exercise their rights.[26]

3. **Types of Encryption**

Attempting to boil down the exact meaning of "***encryption***" is similar to attempting to objectively determine which ice cream is better, chocolate or vanilla. You will find an answer on either side and several answers in-between.

Merriam-Webster Dictionary defines "*encryption*" as follows:

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[23] TEX. BUS. & COM. CODE ANN. § 541.002.
[24] TEX. BUS. & COM. CODE ANN. § 541.001(8),(23).
[25] *E.g.*, TEX. BUS. & COM. CODE ANN. § 541.002.
[26] *E.g.*, TEX. BUS. & COM. CODE ANN. § 541.051(b); Natasha G. Kohne, Michelle A. Reed, Molly E. Whitman, Rachel Claire Kurzweil, Joseph Hold*, Texas Data Privacy Act: What Businesses Need to Know*, AKIN GUMP STRAUSS HAUER & FELD LLP (July 28, 2023) (https://www.akingump.com/en/insights/alerts/texas-data-privacy-act-what-businesses-need-to-know).

> *[T]he act or process of encrypting something; a conversion of something (such as data) into a code or cipher.*[27]

There are two primary types of encryption, ***Single-Key*** and ***Paired Public/Private Key***. *The Tech Bytes – Encryption for Lawyers* video provided by *The State Bar of Texas Computer and Technology Section* provides a practical introduction to these encryption types. The video can be found at the following URL: https://www.texasbar.com/AM/Template.cfm?Section=articles&ContentID=37530&Template=/CM/HTMLDisplay.cfm. Below is a brief synopsis of information provided by the *Tech Bytes – Encryption for Lawyers* video.

a. Single-Key Encryption

Single-Key Encryption is simpler and typically accessible on most mainstream programs, etc. You or your client are less likely to need special software or programs to use this type of system.

Single-Key is what most people think of when you say "encryption." It is a single password which both deciphers and provides access to the document or data you have encrypted. However, the simplicity which makes this type of encryption appealing is also its greatest vulnerability. If an unauthorized person gains access to the password, they could gain full access to the information. In other words, the single password is a "single-line-of-defense" system. If the first line of defense is breached, there is no secondary defense in place.

b. Paired Public/Private Key Encryption

A Paired Public/Private Key Encryption is more secure than a Single-Key Encryption, but also far more complex. Think of it like the cliché two-keys needed to push the proverbial "big red button" in an action movie. To launch the rocket, you need both keys and two people in the command room turning the keys in unison.

You would have two "keys," a "private" key and a "public" key. Your client – or the recipient of the document or data you are sending – would have their own private and public key. Four keys in total. When you transmit the information, the public keys are exchanged. The receiving party will need the sender's public key, which was transmitted to them with the document or data, and their own private key. A computer program, whichever program the recipient is using to view the document or data, will match their private key with the public key received from the sender.

If you're thinking "that sounds complicated," you are correct. Nevertheless, it is a secure form of data transmission. The downside is its complexity and the need for software or programs compatible with this form of encryption. You, your client, or both may need to obtain suitable software and walk through prerequisite administrative steps to properly establish your "keys" before this encryption protocol may be used.

c. Practice Tip

Have adequate password-management in place. One option is to maintain a consistent method for generating the passwords specific to a client, or you can save the password in a secure location and reference it later in order to access the encrypted files. There are also a number of password-management applications and software programs which can maintain your passwords for you.

B. Ethics Opinion

If you are scratching your head or contemplating how your clients' data may be at risk, you are not alone. There have been several ethics opinions published throughout the country on various questions of

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[27] *Encryption*, MERRIAM-WEBSTER DICTIONARY (online), https://www.merriam-webster.com/dictionary/encryption?src=search-dict-hed (last visited April 18, 2026).

data security. For example, *The Professional Ethics Committee* for the *State Bar of Texas* (the "*Committee*") has issued multiple opinions specifically addressing lawyer concerns over the interplay of technology and their clients' data and information.

1. Use of Email for Communicating Confidential Information

a. **Yes, but proceed with caution**

In Ethics Opinion No 648, the Committee of the State Bar of Texas addressed the following question:

> Under the Texas Disciplinary Rules of Professional Conduct, may a lawyer communicate confidential information by email?

The opinion even considered ***unencrypted*** email. The short answer is yes, but it's not quite that simple. In general, considering the present state of technology and email usage, a lawyer may communicate confidential information by email.[28]

The committee begins by clarifying that The Texas Disciplinary Rules of Professional Conduct do not specifically address the use of email in the practice of law[.]"[29] However, Rule 1.05(a) already imposes a substantial obligation on attorneys to protect the confidential information of their clients, including both ***privileged*** and ***unprivileged*** information.[30] This obligation applies to the transmission of information via email.[31]

The standard under the rule is whether a lawyer "***knowingly***" reveals the information to an unpermitted person.[32]

The Terminology section of the Rules states that "'[k]nowingly' . . . denotes actual knowledge of the fact in question" and that a "person's knowledge may be inferred from circumstances." A determination of whether a lawyer violates the Disciplinary Rules, as opposed to fiduciary obligations, the law, or best practices, by sending an email containing confidential information, requires a case-by-case evaluation of whether that lawyer knowingly revealed confidential information to a person who was not permitted to receive that information under Rule 1.05.[33]

The Committee noted that several other state-bar committees have found the use of email, ***both encrypted and unencrypted***, as a proper communication medium for confidential information, including the following committees or bar associations:

1. American Bar Association
2. California
3. Maine
4. New York
5. Alaska
6. Illinois
7. North Dakota
8. South Carolina
9. Vermont[34]

There are two primary points supporting this determination: (1) all communication mediums have an inherent risk of unauthorized access, and (2) persons have a reasonable expectation of privacy in the receipt of email.

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[28] TEX. COMM. ON PROFESSIONAL ETHICS, Ethics Opinion No 648 (2015).
[29] *Id*.
[30] *Id*.; TEX. DISCIPLINARY R. PROF. CONDUCT Rule 1.05(a).
[31] TEX. COMM. ON PROFESSIONAL ETHICS, Ethics Opinion No 648 (2015).
[32] *Id.*; TEX. DISCIPLINARY R. PROF. CONDUCT Rule 1.05(a).
[33] TEX. COMM. ON PROFESSIONAL ETHICS, Ethics Opinion No 648 (2015).
[34] *Id.*

However, there are certain circumstances that would require an attorney to assess the prudence of ***encrypting*** the email communication, such as the following:

1. communicating highly sensitive or confidential information via email or unencrypted email connections;
2. sending an email to or from an account that the email sender or recipient shares with others;
3. sending an email to a client when it is possible that a third person (such as a spouse in a divorce case) knows the password to the email account, or to an individual client at that client's work email account, especially if the email relates to a client's employment dispute with his employer (see ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 11-459 (2011));
4. sending an email from a public computer or a borrowed computer or where the lawyer knows that the emails the lawyer sends are being read on a public or borrowed computer or on an unsecure network;
5. sending an email if the lawyer knows that the email recipient is accessing the email on devices that are potentially accessible to third persons or are not protected by a password; or
6. sending an email if the lawyer is concerned that the NSA or other law enforcement agency may read the lawyer's email communication, with or without a warrant.[35]

The committee also noted that this standard may change with the advent of new technologies and technology risks, and that attorneys should consider obtaining a client's informed consent for the use of email.[36] Finally, there may be other authorities, such as *HIPAA*, that prevent the use of email for transmission of client information.

b. **Practice Tips**

Encryption services are readily available. You most likely have received an encrypted email. Financial institutions are required to encrypt almost all of their communications, as are many governmental institutions. You can even have a "***blanket" encryption system*** which encrypts each and every email that you send. Alternatively, you can have individual emails encrypted as necessary.

Also, if you intend to use digital mediums, it is best – although not always required – to get the informed consent of your client. This is beneficial not only from an ethical standpoint, but also from an enforceability perspective. There are numerous other requirements and considerations regarding the use of e-signatures with clients, which we will discuss later in this paper.

2. Use of Cloud-Based Services

a. **Yes, But Proceed with Caution**

You have almost certainly heard about, or use, a cloud-based service of one kind or another either personally or professionally. Cloud computing has essentially revolutionized how we transport, share, store, and maintain files. Because of its essentially limitless capacity, cloud computing has become a staple for managing mass quantities of data and information. Law firm and client data, of course, are no exception to this prevalent phenomenon.

In Ethics Opinion No 680, the Committee addressed the following question:

> Under the Texas Disciplinary Rules of Professional Conduct may a lawyer use cloud-based client data storage systems or use cloud-based software systems for the creation of client-specific documents where confidential client information is stored or submitted to a cloud-based system?[37]

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[35] *Id.*
[36] *Id.*
[37] TEX. COMM. ON PROFESSIONAL ETHICS, Ethics Opinion No 680 (2018).

Similar to the Committee's consideration of email, Rule 1.05(a) provides the crux of the determination. The short answer is yes, but, again, we have to have those stereotypical-lawyer caveats.

Considering the present state of technology, its common usage to store confidential information, and the potential cost and time savings for clients, a lawyer may use cloud-based electronic data systems and document preparation software for client confidential information[.][38]

Enter stage right, the caveats. The Committee imposed a sort of "inquiry" and "assessment" duty on a lawyer when using cloud-based services.[39]

> [L]awyers should remain continually alert to the vulnerability of cloud-based vendors and systems to data breaches and whether a particular vendor or system appears to be unusually vulnerable, based on systemic failures by that vendor or system of which the lawyer should be aware. In certain circumstances, a lawyer may decide that some client confidential information is too vulnerable to unauthorized access or disclosure to risk its storage or use in a cloud-based electronic system or too vulnerable to such risk without that data being adequately encrypted or without additional technological safeguards in place.[40]

The Committee again emphasized that technology and circumstances change, and attorneys should consider obtaining the informed consent of clients when using cloud-based services, remain aware of such changes, and alter their practices when necessary.[41]

Finally, the Committee delineated six "precautions" which attorneys should implement when using cloud-services for the ***storage*** or ***creation*** of ***client-specific documents which include client confidential information***. *Id*. Those precautions are as follows:

(1) acquiring a general understanding of how the cloud technology works;
(2) reviewing the "terms of service" to which the lawyer submits when using a specific cloud-based provider just as the lawyer should do when choosing and supervising other types of service providers;
(3) learning what protections already exist within the technology for data security;
(4) determining whether additional steps, including but not limited to the encryption of client confidential information, should be taken before submitting that client information to a cloud-based system;
(5) remaining alert as to whether a particular cloud-based provider is known to be deficient in its data security measures or is or has been unusually vulnerable to "hacking" of stored information; and
(6) training for lawyers and staff regarding appropriate protections and considerations.[42]

The Committee's summary of the precautions provides a great rule-of-thumb regarding many of the technology topics we have discussed:

> These precautions do not require lawyers to become experts in technology; ***however, they do require lawyers to become and remain vigilant about data security issues from the outset of using a particular technology in connection with client confidential information.***[43]

b. **Practice Tips**

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[38] *Id.*
[39] *Id.*
[40] *Id.*
[41] *Id.*
[42] *Id.*
[43] *Id*. (emphasis added).

Many service providers will have a ***Privacy Policy*** readily available for your review. Better yet, especially if you are paying for the service, contact them and request evidence of your state or bar association's required security measures.

It may also be wise to include specific language in your *Engagement Letters/Agreements* if there are particular services, or types of services, that you frequently use which are based upon a cloud platform. An example might be the use of an electronic or digital signatures platform. Many times, the document you are transmitting for signature is not simply attached to a message and sent, but upload to the service-providers server and a link to the document is then provided to your client. Therefore, obtaining your client's consent could prove prudent.

Finally, if you heavily use third-party vendors for information storage and/or transmission, you may consider maintaining an inventory or spreadsheet of all these vendors, their contact information, their privacy policies, etc.

IV. ELECTRONIC DOCUMENTS & SIGNATURES[44]

A. Introduction

Portions of the ELECTRONIC DOCUMENTS & SIGNATURES article of this paper are quoted from or adapted from the following paper: *"Telelaw" – The [Next] Frontier*, GARRETT COUTS & CHRISTINA JENKINS, State Bar of Texas 24th Annual Summer School Course (July 21-23, 2022). I want to give a special thanks to ***Christina Jenkins*** for all of her hard work on this topic.

Electronic signatures are woven into the fabric of the U.S. Economy. Although most practitioners use electronic signatures on a daily basis, fewer of us see them under a microscope. And then, every once in a while, something occurs that requires us to re-visit the concept of electronic signatures. In 2020, that event was COVID when governors, legislators, and practitioners across the country moved business operations, real estate closings, and notarizations online to avoid in person contact.

B. Scope

This paper addresses the law of electronic signatures generally. The law of individual states and circumstances of e-signature use may vary the applicable standards or rules. This paper will primarily discuss the *Uniform Electronic Transactions Act* and the federal *Electronic Signatures in Global and National Commerce Act*, and provide example cases, primarily from Texas, demonstrating the various challenges, issues, and errors regarding those laws.

C. Legal Framework

1. UETA and ESIGN

The legal framework for electronic signatures began in 1999 with the creation of the *Uniform Electronic Transactions Act* by the National Conference of Commissioners on Uniform State Laws (NCCUSL) ("***UETA***"), and in 2000 when Congress enacted the *Electronic Signatures in Global and National Commerce Act* ("***ESIGN***").[45]

a. UETA and ESIGN Similarities.

While not identical in nature, the common purpose of UETA and ESIGN is to supply the same legal validity to electronic closings and signatures as exists for in person closings and wet signatures. Neither UETA nor ESIGN operate to limit, alter, or otherwise affect any requirement imposed by a statute, regulation, or rule of law relating to the rights and obligations of persons under such statute, regulation, or

[44] Portions of the ELECTRONIC DOCUMENTS & SIGNATURES section of this paper are quoted from or adapted from the following paper: "Telelaw" – The [Next] Frontier, GARRETT COUTS & CHRISTINA JENKINS, State Bar of Texas 24th Annual Summer School Course (July 21-23, 2022). I want to give a special thanks to ***Christina Jenkins*** for all of her hard work on this topic.

[45] 15 U.S.C.A. §7001, *et. seq.*

rule.[46] Both UETA and ESIGN are technology neutral, meaning they do not adopt a particular form of technology but rather operate to "provide[e] a solid legal framework that allows for the continued development of innovative technology to facilitate electronic transactions".[47] Notarization and acknowledgment requirements under both laws are substantially the same.

b. **UETA and ESIGN Differences.**

UETA applies to transactions where the parties have already agreed to engage in an electronic transaction.[48] ESIGN, however, sets forth requirements for effective consent and agreement to enter into electronic transactions. UETA takes a procedural approach and provides practical steps to guide unsophisticated parties dealing in electronic transactions. ESIGN focuses on the disclosures required and methods of obtaining a consumer's affirmative consent to engage in electronic transactions.[49]

c. **Federal Preemption.**

ESIGN encourages uniform adoption of UETA by allowing the states to "modify, limit, or supersede" the consumer disclosure provisions of ESIGN by either: i) adopting UETA without changes ("first option"), or ii) enacting their own procedures that comply with ESIGN (and specifically state the intent to supersede ESIGN if the state law was enacted after 6-30-00). When enacting ESIGN, Congress commented that "any variation or deviation from the exact UETA document reported and recommended for enactment… will not qualify for superseding ESIGN under the first option."

UETA – or some version of it - has been adopted in some form by 49 states, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands.[50] The state of New York, the lone holdout, has enacted its own Electronic Signatures and Records Act (ESRA).[51]

No state has adopted UETA without changes; most states have adopted UETA ***with*** changes; and only one state, North Carolina, has enacted its own procedures that are substantially similar to those in ESIGN. The question of whether a state has effectively opted out of the consumer disclosure requirements of ESIGN is eclipsed by general business practices, which have essentially standardized the use of ESIGN's consent disclosure requirements. Residential mortgage transactions salable to Fannie Mae must also comply with ESIGN.

2. UETA Definitions

Defined Terms. Understanding the terminology related to electronic signatures is critical to understanding the overall concept of electronic signatures for legal documents. For the purposes of this paper, the following UETA definitions are important to know:

> "***Agreement***" means the bargain of the parties in fact, as found in their language or inferred from other circumstances and from rules, regulations, and procedures given the effect of agreements under laws otherwise applicable to a particular transaction. (In some states, an agreement may be in writing or otherwise. Practice Tip - practitioners should obtain an agreement to engage in electronic transactions for avoidance of doubt as to the intentions of the parties.)
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> "***Automated transaction***" means a transaction conducted or performed, in whole or in part, by electronic means or electronic records, in which the acts or records of one or both parties are not

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[46] 15 U.S.C.A. §7001(b)(1).
[47] *See* Prefatory Note to the Uniform Electronic Transactions Act of 1999.
[48] *See* UETA § 5(b).
[49] 15 U.S.C.A. §7001(c).
[50] Uniform Law Commission, *Electronic Transactions Act* (https://www.uniformlaws.org/committees/community-home?CommunityKey=2c04b76c-2b7d-4399-977e-d5876ba7e034) (last visited May 2, 2026).
[51] N.Y. State Tech. Law §§ 301-309.

reviewed by an individual in the ordinary course in forming a contract, performing under an existing contract, or fulfilling an obligation required by the transaction.

"***Computer program***" means a set of statements or instructions to be used directly or indirectly in an information processing system in order to bring about a certain result.

"***Contract***" means the total legal obligation resulting from the parties' agreement as affected by this [Act] and other applicable law. (Generally, the substantive Law of Contracts applies to contracts entered into electronically.)

"***Electronic***" means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

"***Electronic agent***" means a computer program or an electronic or other automated means used independently to initiate an action or respond to electronic records or performances in whole or in part, without review or action by an individual.

"***Electronic record***" means a record created, generated, sent, communicated, received, or stored by electronic means.

"***Electronic signature***" means an electronic sound, symbol, or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record.

"***Information***" means data, text, images, sounds, codes, computer programs, software, databases, or the like.

"***Information processing system***" means an electronic system for creating, generating, sending, receiving, storing, displaying, or processing information.

"***Record***" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

"***Security procedure***" means a procedure employed for the purpose of verifying that an electronic signature, record, or performance is that of a specific person or for detecting changes or errors in the information in an electronic record. The term includes a procedure that requires the use of algorithms or other codes, identifying words or numbers, encryption, or callback or other acknowledgment procedures.

"***Transaction***" means an action or set of actions occurring between two or more persons relating to the conduct of business, commercial, or governmental affairs.[52]

3. <u>Scope of Electronic Transactions Subject to the UETA</u>.

Just as the UETA is altered in each state, the scope of its application also varies widely. So, the rule of thumb is this – check what transactions can be executed electronically in the jurisdiction with legal authority over the transaction **<u>and</u>** the parties. If your transaction is crossing state lines – check both states.

As an example, Texas is one of a handful of states that substantially adopted UETA's provisions but also included other state specific provisions. The Texas UETA provides that it modifies, limits, or

[52] UETA § 2.

supersedes the provisions of ESIGN, and so is the controlling law in Texas to the extent that it is consistent with ESIGN.[53]

Unlike many states which have enacted statutes authorizing electronic wills, excluded from the Texas UETA are transactions governed by laws that control the creation and execution of wills, codicils, or testamentary trusts and many of the provisions of the Uniform Commercial Code.[54] Sales and Leases under the Uniform Commercial Code, Chapters 2 and 2A respectively, are subject to the Texas UETA.[55] Certain court reporter or shorthand reporting firm documents used in the state or federal judicial system; or governed by rules adopted by the Texas supreme court, including the electronic filing system established by the court, are excluded from coverage under the Act as it relates to the transmission, preparation, completion, enforceability, or admissibility of those documents.[56] The Texas UETA does not apply to any notice of: i) the cancellation or termination of utility services (including water, heat, and power); ii) default, acceleration, repossession, foreclosure, or eviction, or the right to cure, under a credit agreement secured by, or a rental agreement for, a primary residence of an individual; iii) the cancellation or termination of health insurance or benefits or life insurance benefits (excluding annuities); or iv) recall of a product, or material failure of a product, that risks endangering health or safety; or v) any document required to accompany any transportation or handling of hazardous materials, pesticides, or other toxic or dangerous materials.[57] Further, it does not authorize any activity that is prohibited by the Texas Penal Code.[58]

Covered Transactions and Method of Agreement.
The UETA does not require the use of electronic transactions and only applies to transactions where the parties have already agreed to conduct transactions by electronic means.[59] Agreement is determined from the context and surrounding circumstances, including the parties' conduct. The critical element is the intent of a party to conduct a transaction electronically. This is different from ESIGN which explains in detail the process needed for obtaining consent to engage in electronic transactions. A party that agrees to conduct a transaction by electronic means has a right, which cannot be waived by agreement, to refuse to conduct other transactions by electronic means.[60] Unless specifically prohibited within the UETA, the effect of any of its provisions may be varied by agreement.[61] Whether an electronic record or electronic signature has legal consequences is decided by the UETA and other applicable law.[62]

Construction and Application. The UETA must be construed and applied to i) facilitate electronic transactions consistent with other applicable law; ii) be consistent with reasonable practices concerning electronic transactions and with the continued expansion of those practices; and iii) to effectuate its general purpose to make uniform the law with respect to the subject of this [Act] among States enacting it.[63]

Legal Recognition of Electronic Records, Electronic Signatures, and Electronic Contracts – The Millennials' Dream Come True. Millennials, brace yourselves. One of your dreams is coming true:

1. **Legal Effect**. A record or signature may not be denied legal effect or enforceability solely because it is in electronic form.[64]

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[53] TEX. BUS. & COM. CODE § 322.019.
[54] *See* TEX. BUS. & COM. CODE § 322.003(b).
[55] *See id*.
[56] *See id*.
[57] 15 U.S.C.A. § 7003(b),
[58] TEX. BUS. & COM. CODE § 322.020.
[59] UETA § 5(b).
[60] UETA § 5(c).
[61] UETA § 5(d).
[62] UETA § 5(e).
[63] UETA § 6.
[64] UETA § 7(a).

2. **Contracts**. A contract may not be denied legal effect or enforceability solely because an electronic record was used in its formation.[65]
3. **Writing**. If a law requires a record to be in writing, an electronic record satisfies the law.[66]
4. **E-Signature**. If a law requires a signature, an electronic signature satisfies the law.[67]
5. **Evidence**. In a proceeding, evidence of a record or signature may not be excluded solely because it is in electronic form.[68]
6. **Notarization**. If a law requires a signature or record to be notarized, acknowledged, verified, or made under oath, the requirement is satisfied if the electronic signature of the person authorized to perform those acts, together with all other information required to be included by other applicable law, is attached to or logically associated with the signature or record.[69] Electronic notarizations will be discussed in greater detail below.
7. **Record Retention**. If a law requires: (i) that a record be retained; (ii) a record to be presented or retained in its original form, or provides consequences if the record is not presented or retained in its original form; (iii) retention of a check (practice tip – front and back); or (iv) a person to retain a record for evidentiary, audit, or like purposes (unless the law specifically prohibits electronic records and was enacted after UETA), such law/requirement is satisfied by retaining an electronic record of the information in the record which:
   a. accurately reflects the information in the record after it was first generated in its final form as an electronic record or otherwise; and
   b. remains accessible for later reference.[70]

   This does not apply to any information the sole purpose of which is to enable the record to be sent, communicated, or received.[71] A person may satisfy the above requirements by using the services of another person so long as the service is compliant.[72]

Presentation of Records. All electronic records must be capable of retention by the recipient at the time of receipt.[73] An electronic record is not capable of retention by the recipient if the sender or its information processing system inhibits the ability of the recipient to print or store the electronic record.[74] Furthermore, if a sender inhibits the ability of a recipient to store or print an electronic record, the electronic record is not enforceable against the recipient.[75]

If another law requires a record (i) to be posted or displayed in a certain manner, (ii) to be sent, communicated, or transmitted by a specified method, or (iii) to contain information that is formatted in a certain manner, the following rules apply:

1. The record must be posted or displayed in the manner specified in the other law.
2. The record must be sent, communicated, or transmitted by the method specified in the other law.
3. Subject to limited exceptions, the record must contain the information formatted in the manner specified in the other law.[76]

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[65] UETA § 7(b).
[66] UETA § 7(c).
[67] UETA § 7(d).
[68] UETA § 13.
[69] UETA § 11.
[70] UETA § 12.
[71] UETA § 12(b).
[72] UETA § 12(c).
[73] UETA § 8(a).
[74] *Id.*
[75] UETA § 8(c).
[76] UETA § 8(b).

For example, a disclosure required to be in 12-point bold font and delivered before any other document is signed must have the font and priority required by applicable law.

The above requirements cannot be varied by agreement except in the following instances:

1. to the extent a law other than UETA requires information to be provided, sent, or delivered in writing but permits that requirement to be varied by agreement, the above requirement that the information be in the form of an electronic record capable of retention may also be varied by agreement; and
2. a requirement under a law other than UETA to send, communicate, or transmit a record by first-class mail, postage prepaid or regular United States mail, may be varied by agreement to the extent permitted by the other law.[77]

Attributing Electronic Records and Signatures to a Person. An electronic record or electronic signature is attributable to a person if it was the act of the person.[78] The act of the person may be shown in any manner, including a showing of the efficiency of any security procedure applied to determine the person to which the electronic record or electronic signature was attributable, e.g., a "click-through" method.[79] The effect of an electronic record or electronic signature attributed to a person is determined from the context and surrounding circumstances at the time of its creation, execution, or adoption, including the parties' agreement, if any, and otherwise as provided by law.[80]

Changes or Errors in Electronic Records. If a change or error in an electronic record occurs in a transmission between parties to a transaction, the following rules apply. Assume that the parties have agreed to use a security procedure to detect changes or errors and one party has conformed to the procedure, but the other party has not. If the nonconforming party would have detected the change or error, had it also conformed to the procedure, then the conforming party may avoid the effect of the changed or erroneous electronic record.[81]

In an automated transaction involving an individual, the individual may avoid the effect of an electronic record that resulted from an error made by the individual in dealing with the electronic agent of another person if the electronic agent did not provide an opportunity for the prevention or correction of the error and, at the time the individual learns of the error, the individual:

1. promptly notifies the other person of the error and that the individual did not intend to be bound by the electronic record received by the other person;
2. takes reasonable steps, including steps that conform to the other person's reasonable instructions, to return to the other person or, if instructed by the other person, to destroy the consideration received, if any, as a result of the erroneous electronic record; and
3. has not used or received any benefit or value from the consideration, if any, received from the other person.[82]

If neither of the above scenarios apply to the change or error, then such change or error has the effect provided by other law, including the law of mistake, and any contract between the parties.[83] The provisions relating to automated transactions involving an individual and the application of other law to a change or error cannot be varied by agreement.[84]

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[77] UETA § 8(d).
[78] UETA § 9(a).
[79] *Id.*
[80] UETA § 9(b).
[81] UETA § 10(1).
[82] UETA § 10(2).
[83] UETA § 3.
[84] UETA § 4.

A party acting through an electronic agent should build in safeguards which enable the customer to prevent sending records with errors. One suggestion in UETA is that the electronic agent be programmed to provide a confirmation screen to be approved by a customer before finalizing the transaction. Electronic signature platforms should establish a procedure for errors or changes and have the customer agree to such procedures.

Automated Transactions. A contract may be formed by the interaction of electronic agents of the parties, even if no individual was aware of or reviewed the electronic agents' actions or the resulting terms and agreements.[85] A contract may be formed by the interaction of an electronic agent and an individual, acting on the individual's own behalf or for another person, including by an interaction in which the individual performs actions that the individual is free to refuse to perform and which the individual knows or has reason to know will cause the electronic agent to complete the transaction or performance.[86] The terms of the contract are determined by the substantive law applicable to it.[87]

An "***electronic agent***" means a computer program or an electronic or other automated means used independently to initiate an action or respond to electronic records or performances in whole or in part, without review or action by an individual.[88]

Time and Place of Receipt of Electronic Records. Unless otherwise agreed between the sender and the recipient, an electronic record is ***sent*** when it:

1. is addressed properly or otherwise directed properly to an information processing system that the recipient has designated or uses for the purpose of receiving electronic records or information of the type sent and from which the recipient is able to retrieve the electronic record;
2. is in a form capable of being processed by that system; and
3. enters an information processing system outside the control of the sender or of a person that sent the electronic record on behalf of the sender or enters a region of the information processing system designated or used by the recipient which is under the control of the recipient. [89]

Unless otherwise agreed between a sender and the recipient, an electronic record is ***received*** when:

1. it enters an information processing system that the recipient has designated or uses for the purpose of receiving electronic records or information of the type sent and from which the recipient is able to retrieve the electronic record; and
2. it is in a form capable of being processed by that system.[90]

This applies even if the place the information processing system is located is different from the place the electronic record is deemed to be received under the UETA; and even if no individual is aware of its receipt.[91] Receipt of an electronic acknowledgment from an information processing system establishes that a record was received but, by itself, does not establish that the content sent corresponds to the content received.[92]

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[85] UETA § 14(1).
[86] UETA § 14(2).
[87] UETA § 14(3).
[88] UETA § 2(6).
[89] UETA § 14(a).
[90] UETA § 14(b).
[91] UETA § 14(c),(e).
[92] UETA § (f).

Unless otherwise expressly provided in the electronic record or agreed between the sender and the recipient, an electronic record is deemed to be sent from the sender's place of business and to be received at the recipient's place of business pursuant to the following rules:

1. if the sender or recipient has more than one place of business, the place of business of that person is the place having the closest relationship to the underlying transaction;
2. if the sender or the recipient does not have a place of business, the place of business is the sender's or recipient's residence, as the case may be.[93]

If a person is aware that a record was not sent or received, then the legal effect of whether it was sent or received is determined by other applicable law.[94]

Unless permitted by other applicable law, these requirements regarding time and place of electronic records may not be varied by agreement.[95]

Transferable Records. A "***transferable record***" means an electronic record that:

1. would be a promissory note under the UCC, or
2. a document under the UCC if the electronic record were in writing; and
3. the issuer of the electronic record expressly has agreed is a transferable record.[96]

A person has control of a transferable record if a system employed for evidencing the transfer of interests in the transferable record reliably establishes that person as the person to which the transferable record was issued or transferred.[97]

A system satisfies this requirement, and a person is deemed to have control of a transferable record, if the transferable record is created, stored, and assigned in such a manner that:

1. a single authoritative copy of the transferable record exists which is unique, identifiable, and, except as otherwise provided below, unalterable;
2. the authoritative copy identifies the person asserting control as the person to which the transferable record was issued; or if the authoritative copy indicates that the transferable record has been transferred, the person to which the transferable record was most recently transferred;
3. the authoritative copy is communicated to and maintained by the person asserting control or its designated custodian;
4. copies or revisions that add or change an identified assignee of the authoritative copy can be made only with the consent of the person asserting control;
5. each copy of the authoritative copy and any copy of a copy is readily identifiable as a copy that is not the authoritative copy; and
6. any revision of the authoritative copy is readily identifiable as authorized or unauthorized.[98]

If requested by a person against whom enforcement is sought, the person seeking to enforce the transferable record shall provide reasonable proof that the person is in control of the transferable record.[99] Proof may include access to the authoritative copy of the transferable record and related business records

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[93] UETA § 14(d).
[94] UETA § 14(g).
[95] *Id*.
[96] UETA § 16(a).
[97] UETA § 16(b).
[98] UETA § 16(c).
[99] UETA § 16(f).

sufficient to review the terms of the transferable record and to establish the identity of the person having control of the transferable record.[100]

Electronic Documents – Government Agencies. Under the UETA, state agencies have discretion on whether to create and retain electronic records and/or convert written records to electronic records.[101]

However, you may find that your state has specifically instructed agencies to conduct electronic transactions or to utilize electronic records or they have prohibited such practices in certain contexts (*i.e*, audits). One federal example would be the *National Archives and Records Administration's Federal Electronic Records Modernization Initiative (FERMI)*.

Common Issues of, Errors of, and Challenges to Electronic Signatures

Practitioners should be aware of how electronic transactions impact everyday practice, from drafting emails to client engagement to negotiating real estate deals. The law of electronic signatures has developed among state trial and appellate courts that have consistently upheld the validity of electronic signatures in accordance with the Construction and Application provisions of the UETA.

For demonstration purpose, the following examples are sourced from Texas case law.

When does an email communication qualify as an electronic signature? This question has generated significant discussion and diverging viewpoints among the courts, and many courts of last resort have yet to directly address the issue.[102]

In cases where there is no dispute that a document was signed electronically, common law generally accepts the legally binding nature of an electronic signature.[103]

Statute of Frauds Defenses. A common challenge to electronic signatures is that they are not a "writing" under the statute of frauds. These cases are fact and state specific. However, as an example, the "from" field in an email is a signature under the Texas UETA that is attributed to the sender, thereby satisfying the Statute of Frauds requirement that an agreement be (1) in writing; and (2) signed by the person to be charged with the promise or agreement.[104] Not all emails, however, will satisfy the statute of frauds. In *Bujnoch v. Copano Energy, LLC*, an email that did not identify the parties to an agreement did not contain all the essential terms of the agreement and did not satisfy the statute of frauds.[105]

Signature Placement or Appearance. Challenges to electronic signatures-based placement or appearance are decided based on the facts of each case and, as described below, the court that hears it. An email containing a signature block without a signature within it is not an electronic signature when no evidence suggests that the information was typed purposefully rather than generated automatically, that the sender intended the typing of her name to be her signature, or that the parties had previously agreed that this action would constitute a signature. Thus, the signature would not satisfy the writing requirement for a Rule 11 Agreement under the TEXAS RULES OF CIVIL PROCEDURES.[106] It's worth mentioning that the court in

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[100] *Id.*

[101] UETA § 17.

[102] *See e.g.*, *Williamson v. Bank of New York Mellon*, 947 F. Supp. 2d 704, 709 (N.D. Tex. 2013) (venturing an "Erie guess" that the Texas Supreme Court would consider typed names and signature blocks in emails as signatures). *Bujnoch v. Copano Energy, LLC*, 581 S.W.3d 262 at 271, 2017 Tex. App. LEXIS 12048 (Tex. App. Corpus Christi—Dec. 28, 2017), rev'd in part, 593 S.W.3d 721, 2020 Tex. LEXIS 49 (Tex. 2020).

[103] *E.g.*, *Navari, LLC v. Sysco Cent. Tex., Inc.*, No. 03-18-00006-CV, 2019 Tex. App. LEXIS 1002 (Tex. App. Austin Feb. 13, 2019) (Restaurant owner's digital signature on the personal guaranty was sufficient to support a finding of liability because such a signature was legally binding).

[104] *Khoury v. Tomlinson*, 518 S.W.3d 568 (Tex. App. Houston 1st Dist.—Mar. 30, 2017, no pet.); TEX. BUS. & COM. CODE ANN. § 26.01(a)(1)- (2), (b)(2).

[105] *Bujnoch v. Copano Energy, LLC*, 581 S.W.3d 262, 2017 Tex. App. LEXIS 12048 (Tex. App. Corpus Christi Dec. 28, 2017), rev'd in part, 593 S.W.3d 721, 2020 Tex. LEXIS 49 (Tex. 2020).

[106] *Cunningham v. Zurich* American Ins. Co. 352 S.W.3d 519, 530 (Tex. App.—Fort Worth 2011, pet. denied).

Khoury v. Tomlinson disagreed with the holding in *Cunningham*, stating that the holding "*offered no explanation for why physically typing in a signature line at the time of drafting the e-mail should be required for a 'signature block' to constitute a signature.*"[107]

A real estate option contract formed by emails that were signed "*David*" or "*Debbie*" and that set forth the terms, offers, and counteroffers of the parties satisfied the statute of frauds the parties' conduct indicated an intent to conduct the transaction electronically.[108]

"*Thank you, Clyde*" at the end of a Company VP's emails was an electronic signature that, along with the content of the emails themselves, established his acknowledgment of the debt and his intention and willingness to pay it. Further, the court found that the emails were an acknowledgement of the debt extending the statute of limitations under Texas statute.[109]

Contract Offer and Acceptance. Once a signature is determined to be electronic, the courts will look to the context and surrounding circumstances, including the parties' conduct for evidence of an intent to conduct a transaction electronically.[110]

An independent contractor agreement that was emailed to and signed by just one of the parties is a binding contract when, combined with surrounding circumstances (most conversations of the parties were by email), there is evidence of an intent to transact business electronically.[111]

Computer Programs and Other Electronic Agents. Texas courts generally uphold the legal validity of computer programs or electronic agents that include Security procedures to authenticate and record the acts of individual users. This is especially true when backed by pattern, practice, policy and procedure. An employee that electronically signs an arbitration agreement embedded in another document establishes a valid agreement to arbitrate, even if the employee did not see or read the form.[112] The act of an employee using his confidential associate identification number and password, accessing the company's training computer program, clicking through the training, and clicked to acknowledge his completion of the module was sufficient evidence of the employee's agreement to conduct the transaction by electronic means.[113] Evidence of an employer's online application with an arbitration agreement was conclusive proof that an employee consented to the online arbitration agreement by electronically signing it.[114] Employer's evidence of its proprietary hiring computer program, including that the hiring process cannot be complete unless all documents are electronically signed was sufficient to overcome an employee's testimony that he did not execute an arbitration agreement.[115]

Perhaps one of the clearest explanations of the evidentiary hurdle an employee faces against a computer program or electronic agent backed by company policy of mandatory use was in the Burger King Case, where the court stated:

> For Silva to have raised a fact issue, a person would have to conclude the following: Silva completed a paper application although all other Burger King employees completed online

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[107] *Khoury v. Tomlinson*, 518 S.W.3d 568, 575 (Tex. App.—Houston [1st Dist.] 2017, no pet.).
[108] *See Dittman v. Cerone*, No. 13-11-00196-CV, 2013 Tex. App. LEXIS 13404 (Tex. App. Corpus Christi—Oct. 31, 2013).
[109] *Parks v. Seybold*, No. 05-13-00694-CV, 2015 Tex. App. LEXIS 7685 (Tex. App. Dallas—July 23, 2015).
[110] UETA § 5(b).
[111] *Unique Staff Leasing, LLC v. Onder*, No. 13-09-00213-CV, 2010 Tex. App. LEXIS 9751 (Tex. App. Corpus Christi—Dec. 9, 2010).
[112] *H-E-B, LP v. Saenz*, No. 01-20-00850-CV, 2021 Tex. App. LEXIS 8283 (Tex. App. Houston 1st Dist.—Oct. 12, 2021).
[113] *Wal-Mart Stores, Inc. v. Constantine*, No. 05-17-00694-CV, 2018 Tex. App. LEXIS 3023 (Tex. App. Dallas Apr. 30, 2018).
[114] *Fries Rest. Mgmt., LLC v. Silva*, No. 13-18-00596-CV, 2020 Tex. App. LEXIS 5970 (Tex. App. Corpus Christi—July 30, 2020) ("*Burger King Case*").
[115] *Aerotek, Inc. v. Boyd*, 624 S.W.3d 199 (Tex. 2021).

> applications and Burger King utilizes a paperless application system; (2) Silva's paper application disappeared from her personnel file; (3) Burger King somehow anticipated Silva would sue Fries such that someone other than Silva forged an online job application using her name, personal contact information, social security number, education, job history, e-mail address, and personal references; (4) someone other than Silva signed the online application on Silva's behalf and retroactively applied a date and time stamp to coincide with the date she claims she filled out a paper application; (5) and Arteaga managed to include Silva on payroll even though she did not fill out the required online forms. Fries' evidence proves that such a set of events is highly unlikely such that it was sufficient to raise a genuine issue of material fact.[116] In other words, the evidence presented by Fries conclusively establishes the opposite of Silva's testimony.[117]

In *Holmes v. Air Liquide USA LLC*, the court states that "[w]hile it is conceivable that someone else could have used Holmes' unique log in information to access her computer, her email, and her HR site, and then signed the ADR agreement on her behalf, Defendants' evidence proves that such a set of events would be highly unlikely."[118]

Not all courts agree with the above analysis. In denying Kmart's motion to compel arbitration, The Eighth District Court of Appeals in El Paso ("El Paso court") held that hearing testimony from an employee denying that she ever received or knew about the agreement created a genuine fact issue on notice that the trial court could have resolved in her favor, even though Kmart's electronic records purportedly show her unique login credentials were used to access and acknowledge the agreement on the online portal. Refusing to overturn the decision of the trial court, The El Paso court continued: "[w]e trust in the ability of the lower courts to resolve factual discrepancies, to discern the truth, and to ferret out dishonest or perjurious attempts by employees to avoid the ramifications of failing to read employer notices."[119]

Multiple Electronic Documents. Electronic signatures on emails may bind parties in a transaction. Whether or not a contract exists could depend on the combined content of one or more emails. In the Dittman case, electronic signatures on emails exchanged between the parties created a real estate option contract that satisfies the statute of frauds because the conduct of the parties in three emails, read together, indicated an intent to conduct the transaction electronically.[120] In so holding, the Dittman court stated that "[i]t is well-established law that instruments pertaining to the same transaction may be read together to ascertain the parties' intent."[121] "This rule is echoed in statute of frauds jurisprudence: in order to satisfy a statute of frauds, multiple documents can be read together."[122] "The multiple documents need not contain all of the terms; instead, only the essential terms are required."[123]

A Sample Challenge – Texas - *Aerotek V. Boyd*

Providing a comprehensive review of the various cases brought throughout the country regarding e-signatures would be a daunting task to say the least and most certainly would cause time-constraints on the author's career with the certainty of fame that would come with having cured insomnia.

So, instead, the Aerotek case from Texas will be used as a single sample of how e-signatures can face varied and unique challenges.

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[116] *See Holmes v. Air Liquide USA LLC*, No. H-11-2580, 2012 U.S. Dist. LEXIS 10678, 2012 WL 267194, *3 (S.D. Tex. Jan. 30, 2012), aff'd on other grounds, 498 Fed. Appx. 405 (5th Cir. 2012)).
[117] *Id*. at 9-10.
[118] *Id.*
[119] *Kmart v. Ramirez*, 510 S.W.3d 559 (Tex. App.— El Paso 2016, pet. denied).
[120] *See Dittman v. Cerone*, No. 13-11-00196-CV, 2013 Tex. App. LEXIS 13404 (Tex. App. Corpus Christi Oct. 31, 2013).
[121] *City of Houston v. Williams*, 353 S.W.3d 128, 137 (Tex. 2011) (citing *Fort Worth Indep. Sch. Dist., 22* S.W.3d at 840) [*11] (internal quotations omitted).
[122] *Id*. at 137 n.9 (citing the Restatement (Second) of Contracts § 132).
[123] *Id*. at 137.

On May 28, 2021, the Texas Supreme Court decided the Aerotek case. The issue before the court was "how the efficacy of a security procedure is shown and, once it is, whether the alleged signatory's simple denial that he signed the record is sufficient to prevent attribution of an electronic signature to him".[124]

Why Aerotek Matters

What makes Aerotek important is that the court took the opportunity to hear this case, a task it had been leaving to lower courts to decide for years. First, the Court settled the question of whether an employee's affidavit denying the intent to create an electronic agreement to arbitrate, without any further evidence, is sufficient to overcome an employer's showing of that employee's use of a Computer program and/or Electronic agent backed by Security procedures to authenticate and record the acts of individual users and company policy, pattern, and practice. Spoiler Alert: It isn't. Second, the Court reaffirmed the Texas UETA and used its analysis to demonstrate the relationship between the Texas UETA and other applicable law. The Texas UETA provides the set up. Common law fills in the blanks. Third, the opinion confirms that, for the most part (except for in this case), Texas lower courts have gotten it right.

Factual Background. Aerotek is an employment agency that supplies contract labor to its clients. Aerotek's hiring process is all electronic. Job candidates may only apply online using Aerotek's proprietary Computer program and Electronic agent that it purchased from Smart ERP and hired a developer to create it as an add-on to its existing HRIS system.

> Aerotek's hiring application automatically sends a welcome email to the email address the candidate has provided during the recruitment and initial interview process. The welcome email includes a unique hyperlink for the candidate to use to navigate to the hiring application's online account-registration page. Once there, the candidate creates a unique user ID and password and selects security questions. To later log in to the hiring application, the candidate must enter this user ID, password, and security-question combination correctly. This login process takes place each time the candidate leaves and returns to the hiring application.[125]

Four men applied for contract positions at Aerotek using the online application process. One of them needed assistance and so went into Aerotek's corporate office to complete his online application. The Court described the online process as follows:

> The first document requiring an electronic signature is an Electronic Disclosure Agreement (EDA). By signing the EDA, the candidate consents to "be bound" by Aerotek's electronic hiring documents "as though . . . signed . . . in writing." After the candidate signs the EDA, the application presents other documents to the candidate for completion and signature. These documents ask for personal information, such as addresses and emergency contacts. The application requires candidates to complete and electronically sign the documents in a particular order. After the candidate completes the initial documents, the application unlocks four additional documents, including a Mutual Arbitration Agreement (MAA). The candidate may electronically sign these documents in any order, but he must complete all four before the computerized application will allow him to continue and complete the hiring process.[126]

All four men were hired and fired by Aerotek in short order. Thereafter, they sued Aerotek (and others) for racial discrimination and retaliation. Aerotek filed a motion to compel arbitration attaching a copy of all four electronically signed Electronic Disclosure Agreements and Mutual Arbitration Agreements.

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[124] *Aerotek, Inc. v. Boyd*, 624 S.W.3d 199 (Tex. 2021).
[125] *Id*. at 201.
[126] *Id.*

Procedure. The trial court, after hearing testimony and weighing the evidence, denied Aerotek's motion to compel arbitration. The appeals court affirmed. The supreme court reversed the judgment of the court of appeals and remanded the case back to the trial court for further proceedings.

The Opinion (and Dissent). The court found that Aerotek conclusively established that the Employees signed, and therefore consented to, the MAAs by providing uncontroverted evidence of the Security procedures it uses to authenticate electronic records. The court began by stating that "[t]he efficacy of the security procedure provides the link between the electronic record stored on a computer or in a database and the person to whom the record is attributed. A record that cannot be created or changed without unique, secret credentials can be attributed to the one person who holds those credentials".[127]

From there, the court turned to the evidence presented by the parties, noting that it must defer to the trial court's factual finding that the Employees did not sign the MAAs if that finding is "supported by evidence". The court found that the employees admitted to completing Aerotek's computerized hiring application and electronically signing all other documents but the MAA.

> Aside from their denials, the employees offered no evidence to support their allegation that they did not electronically sign the MAAs that Aerotek introduced into evidence. Instead, they simply argue that Aerotek's evidence fell short of establishing the efficacy of the hiring application's security procedures. According to the Employees, the trial court was free to disregard Aerotek's witnesses.
>
> Aerotek's evidence showing the security procedures its hiring application used to verify that a candidate electronically signed his MAA was uncontroverted. To enter the application, a candidate was required to create for himself a unique identifier, a user ID, a password, and security questions, all unknown to Aerotek. The candidate was required to Texas Electronic Signatures enter personal information and sign documents by clicking on them. The application recorded and timestamped the candidate's every action. The application's business rules made it so that the application could not be submitted until all steps were completed and all required signatures provided, including on the MAA. Once a candidate submitted his application, Aerotek could not modify its contents. Aerotek provided the signed MAAs marked with timestamps identical to those in its database records showing each Employee's progress through the application.[128]

In finding that Aerotek had met its burden, the court established that the testimony of Aerotek's program manager and administrative assistant was not diminished because they were not experts. Moreover, the court was persuaded by the program manager's demonstration of the security procedures built into the platform in open court, along with testimony that the hiring application's rules would have prevented the employees from completing the hiring process until all documents were electronically signed. Likewise, the administrative assistant's testimony that "hundreds of times" she used the same "very strict" and "very structured" procedure to help applicants apply for jobs, specifically by showing the how to: i) retrieve Aerotek's welcome email, ii) create username and password, iii) input biographical information, and iv) sign the arbitration agreement. After the process is complete, she made sure everything was entered and signed electronically making sure to get renew consent to continue with each step of the process to completion.[129]

From here, Aerotek looks like the lineup of trial and appellate cases holding that a valid electronic signature supported by Security procedures to authenticate and record the acts of individual users; and

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[127] *Id*. at 200 (quoting TEX. BUS. & COM. CODE § 322.009(a)).
[128] *Id*. at 205.
[129] *See Id.* at 207-208.

further supported by pattern, practice, policy and procedure results will prevail over an affidavit that does not challenge those Security procedures.

It is worth noting that Aerotek's dissenting opinion issued a pointed rebuke of the Aerotek majority.

> To put things bluntly, someone here testified under oath to facts that cannot be true. Either the employees were wrong (or lying) when they denied that they ever saw or signed the arbitration agreement, or Aerotek's program manager was wrong (or lying) when she described how the electronic-onboarding process works.
>
> Under our well-established standard of review, this Court's assessment of the truth is irrelevant.[130]

Last Words on Aerotek. Four months after Aerotek was decided, it was heavily relied on in *Knox Waste Serv., LLC v. Sherman*, where the court held, consistent with Aerotek, that an affidavit of denial alone is not sufficient to create a fact issue to be decided by a trial court.[131]

In the author's sole opinion, the Aerotek case sets the stage for a battle of the evidence in future cases. You do not need the best evidence to trump the worst (or no) evidence, but prepared Texas Electronic Signatures practitioners will know to produce something more than an affidavit of denial. How much evidence is enough? I guess we'll just have to wait and see.

Lessons Learned And Best Practices From The Aerotek Case

Practitioners should avoid the temptation to dismiss Aerotek as just another arbitration case. This supreme court decision affects all electronic signatures and transactions in some way. Attorneys use Computer programs and Electronic agents every day to correspond with clients, conduct business, and communicate legal issues via document preparation, client management software, and email, to name a few.

After Aerotek, what we know is:

1. A sworn affidavit denying the existence of an electronic agreement will not stand up against Computer programs or Electronic agent with verifiable Security procedures for attributing and electronic signature to a person coupled with evidence of policy, pattern, and practice that back up those procedures;
2. Plaintiffs seeking to challenge electronic signatures obtained through a Computer program or Electronic agent must produce evidence that discredits the technology or the reliability of the policy pattern, or practice;
3. Expert testimony (or even testimony by the architect of a Computer program or Electronic agent) is not necessary.
4. While the Texas UETA itself is technology neutral, certain Security procedures have been upheld by the courts. Some examples are assigning a unique identifier to a user and then tying that identifier to the user's actions; maintaining a single, secure system for tracking user activities that prevents unauthorized access to electronic records, business rules that require users to complete all steps in a program before moving on or completing it; and timestamps showing when users completed certain actions. These examples are illustrative and not exclusive under Section 322.009(a).[132]
5. It is still true that Texas courts have upheld electronic signatures and transactions based on less than the most sophisticated Computer programs and Electronic agents. As noted by the Aerotek court, While handwritten signatures are unique to an individual, electronic signatures sometimes

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[130] *Id*. at 212.
[131] *Knox Waste Serv., LLC v. Sherman*, 2021 Tex. App. LEXIS 8010 (Tex. App. Eastland Sept. 30, 2021).
[132] *Aerotek, Inc. v. Boyd,* 624 S.W.3d 199, 205-206.

involve nothing more than clicking a box online and recording the information in an electronic database.[133]

Practice Tips. Among the ways practitioners can protect themselves and their clients from the unintended consequences of engaging in electronic transactions (e.g., creation of unintended contracts and discoverable evidence) are the following.

1. **Get it in writing!** Making sure that all electronic agreements include a consent to engage in electronic transactions and to be bound by the terms of the electronic agreement. While some state UETA statutes do not require a disclosure similar to that required by ESIGN, case law holdings show that parties with written or system documented evidence of an electronic agreement tend to prevail.
2. **Reviewing company or law firm electronic communication methods for risk exposure**. Deciding if there is a need for permission levels, limitations of use, or agreements (both internally (think HR) and externally) to limit any discovered risk. For example, if a firm uses an electronic document vendor so that clients can electronically sign contracts and engagement letters, review the consent agreement attached to each transaction and revise it as necessary.
3. **Creating an email use and communication policy that describes the circumstances under which electronic signatures can be used**. Ensuring that the written policy is consistent with internal operations. *See also Developing an Effective Electronic Signature Policy* published by Adobe and accessible at: https://www.adobe.com/content/dam/dx-dc/pdf/ue/wp-document-cloud-esignature-policy-ue.pdf
4. **Training** employees on acceptable forms of communication when using customer facing Electronic agents, such as emails and customer relationship management (CRM) platforms.
5. **Security Procedures and Features**. Ensuring that Computer programs or Electronic agents used by the firm for hiring, contracts, engagements, etc., include Security procedures and features found to be acceptable by statute and applicable case law. If outsourced, asking the vendor for substantiation of the Security procedures, whether they have ever been breached, and whether there is a notification procedure in place to advise (or prepare a report for) the firm if there ever is a breach of the Security procedures.
6. **Review.** Reviewing Computer program and Electronic agents used by the firm to ensure that they supply the best evidence of consent to enter into electronic transactions. For example, figure out whether the user should be required to sign every document, scroll to the bottom of the page and sign before moving on to the next document, etc. Note that in the Aerotek case, the employees did not challenge the Electronic Disclosure Agreement, which was the first document they signed, set apart from all others, and required their consent to be bound by the electronic documents before advancing to the next group of documents.
7. **Storage & Retrieval.** Reviewing electronic records to ensure they follow the storage and retrieval requirements of the UETA.
8. **Choice of Law**. Considering the law governing electronic transactions when drafting (or reviewing) choice of law provisions in contracts.

Electronic Documents & Signatures - Conclusion

There is no question that electronic signatures make our lives easier. Attorneys using electronic technology can engage clients, draft documents, work, and litigate cheaper, faster, and more efficiently in today's world. Although technology innovation moves at a faster pace than the laws regulating it, practitioners with a working knowledge of the laws affecting electronic signatures are better positioned to reap the benefits of engaging in electronic transactions without experiencing the burdens of the unintended consequences we see in case law. The good news is that resources abound for attorneys to conduct safe and

[133] *See id.* at (quoting *Realogy Holdings Corp. v. Jongebloed,* 957 F.3d 523, 527 & n.1, 528, 532 (5th Cir. 2020)).

efficient electronic transactions; and there are good, cost-effective vendors that outsource electronic platforms specifically designed for law firm management, legal services, document drafting, document execution, and more.

V. ELECTRONIC NOTARIES

A. Background

As you might expect, with the proliferation of electronic signatures has come the same demand for electronic notarization. Because practically, what use is an electronic signature if the document must be physically notarized? Zero. The answer is zero.

Notaries are generally governed by a combination of statutory authorities and regulations imposed by the Secretary of State (or equivalent office) in each state.

Currently, 47 states and the District of Columbia have laws allowing remote e-notarization.[134] The National Association of Secretaries of State has adopted e-notarization standards to provide guidance to the states and many of the state laws incorporate those standards, but of course specific requirements and procedures vary among states.[135]

Federally, legislation has been introduced in the House (HR 1777) to authorize e-notaries and remote notarization nationwide.[136]

The National Association of Secretaries of State ("*NASS*") has published an *eNotarization Implementation Guide ("iGuide")*.[137] NASS also provides numerous resources regarding the *Revised Uniform Law on Notarial Acts (2021) ("RULNA")*.

Although RULNA is intended to be a uniform law, because notary publics are regulated by the individual states, the implementation of e-notarization varies widely and many states substantially deviate from the RULNA provisions or heavily supplement them with regulation.

B. General Requirements

Although there are numerous nuances to the requirements for licensure of e-notaries and use of e-notarization, a brief recitation will likely serve you best at this point. So, here is a brief summarization of the requirements for online notaries based upon the e-notarization law of Texas[138]:

(1) Many states require that e-notaries already be a licensed Notary Public (and have met all of those licensure requirements).
Example - **Texas**:
(a) Notary identification number assigned by Secretary of State
(b) Date of birth;
(c) Last four digits of social security number;
(d) Last name; and
(e) Valid email address; and
(f) Must not have been convicted of a felony or a crime involving moral turpitude.

(2) Must have or obtain the following the proper electronic certificates, seals, and markings etc.:
Example – **Texas**:
(a) Digital Certificate

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[134] *Remote Electronic Notarization*, NAT'L ASS'N OF SEC'YS OF STATE, https://www.nass.org/initiatives/remote-electronic-notarization (last visited May 2, 2026).
[135] *Id*.
[136] *Id*.
[137] *NASS eNotarization Implementation Guide*, *Version 1.0*, NAT'L ASS'N OF SEC'YS OF STATE (Feb. 18, 2017), https://www.nass.org/sites/default/files/surveys/2017-08/NASS-NPA-iGuide-v1.0-0217.pdf.
[138] TEX. GOV'T CODE ANN. §§ 406.101-113; 1 TEX. ADMIN. CODE §§ 87.40-87.44; TEX. ADMIN. CODE §§ 87.50-87.54.

(i) Must be issued by a third-party provider
(ii) Must use Public Key Infrastructure (PKI) technology and be X.509 compliant
(iii) Must make any changes to a document, made after the Certificate is affixed, evident.

(b) Electronic Seal

(i) Requirements elements/contents:

(A) The words "Notary Public, State of Texas" around a star of five points;
(B) The notary public's name;
(C) The notary public's identifying number; and
(D) Date the notary public's commission expires
(online notary public commissions expire on the same date as the notary public's traditional commission).

(ii) Appearance:

(A) circular form no more than two inches (2 inches) in diameter; or
(B) rectangular form not more than one-inch (1 inch) width by two-and-one-half inches (2.5 inches) length; and
(C) must have a serrated or milled edge border

(c) Ability to do the following:

(i) Maintain an electronic record of the online notarization, including a recording and backup of the audio-visual conference.

(A) Record Keeping:

(1) the date and time of the notarization;
(2) the type of notarial act;
(3) the type, the title, or a description of the electronic document or proceeding;
(4) the printed name and address of each principal involved in the transaction or proceeding;
(5) evidence of identity of each principal involved in the transaction or proceeding in the form of:

(a) a statement that the person is personally known to the online notary public;
(b) a notation of the type of identification document provided to the online notary public;
(c) a record of the identity verification made under Section 406.110, if applicable; or
(d) the following:

(i) the printed name and address of each credible witness swearing to or affirming the person's identity; and
(ii) for each credible witness not personally known to the online notary public, a description of the type of identification documents provided to the online notary public;

(6) a recording of any video and audio conference that is the basis for satisfactory evidence of identity and a notation of the type of identification presented as evidence; and
(7) the fee, if any, charged for the notarization.

(ii) Use a third party to perform ***Identify Proofing*** and ***Credential Analysis***

(A) Third-party provider (Sec. of State SOS will not provide or suggest one); and
(B) Using ***Dynamic Knowledge-Based Authentication*** (KBA) technology

(3) Must acknowledge they will comply with the required procedures (as they generally administer oaths also):
Example – **Texas**:
(a) Will comply with the standards for *Identify Proofing and Credential Analysis*.
(b) Will use a third-party provider meeting the requirements for such provider
(c) Will, upon request by the secretary of state, promptly provide any necessary instructions or techniques supplied by a vendor that allow the online notary public's digital certificate and seal to be read and authenticated.
(d) Meet the eligibility requirements to be commissioned as a Texas notary public by being at least 18 years of age, a resident of the State of Texas, and having not been convicted of a felony or a crime involving moral turpitude.

(4) Some states also require the notary to execute their own oath of office. Example – Texas – download, and sign (digitally), save, and upload back to the Secretary of State the ***Statement of Officer***.

(5) Upload or submit seal, meeting the requirements for such seal.

(6) Pay the applicable fees – if any.

C. Terms & Technologies of E-Notaries

1. Digital Certificates - "Electronic notarial certificate"

There is no definition of "***Electronic notarial certificate***" under RULNA. In Texas, "***Electronic notarial certificate***" means the portion of a notarized electronic document that is completed by an online notary public and contains the following:

(A) the online notary public's electronic signature, electronic seal, title, and commission expiration date;
(B) other required information concerning the date and place of the online notarization; and
(C) the facts attested to or certified by the online notary public in the particular notarization.[139]

2. Official Stamps & Electronic Seals

RULNA uses the terms "***Official Stamp***," which means "a physical image affixed to or embossed on a tangible record or an electronic image attached to or logically associated with an electronic record."[140]

"***Electronic seal***" means information within a notarized electronic document that confirms the online notary public's name, jurisdiction, identifying number, and commission expiration date and generally corresponds to information in notary seals used on paper documents.[141]

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[139] TEX. GOV'T CODE ANN. § 406.10(4).
[140] RULNA § 2(8).
[141] TEX. GOV'T CODE ANN. § 406.101(5).

3. Identify Proofing and Credential Analysis & Dynamic Knowledge-Based Authentication (KBA) Technology

"***Identity proofing***" means a process or service by which a third person provides a notary public with a means to verify the identity of a remotely located individual by a review of personal information from public and private data sources. RULNA § 14A(a)(3).

There is no definition for "***Credential analysis***" under RULNA. In Texas, "***Credential analysis***" means a process or service operating according to criteria approved by the secretary of state through which a third person affirms the validity of a government-issued identification credential through review of public and proprietary data sources. TEX. GOV'T CODE ANN. § 406.101(1)

There is no definition for "***Dynamic Knowledge-Based Authentication (KBA) Technology***" in RULNA or any express obligation to use it. "***Dynamic Knowledge-Based Authentication (KBA) Technology***" is "a process in which the principal is asked a series of questions about the principal's identity and personal history. In order to pass, the principal must answer at least 80% of the questions correctly. If the principal fails their first attempt, they may retake the quiz once within 24 hours. If the principal fails a second attempt they are prohibited from retrying with the same notary for at least 24 hours." Identity Proofing and Credential Analysis, Texas Secretary of State, https://www.sos.state.tx.us/statdoc/identityproofing.shtml (last visited 5.26.2022).

4. Other Definitions

NASS provides a brief summation of common e-notary terms, which can be found here as part of the *NASS eNotarization Implementation Guide* ("*iGuide*") (adopted February 18, 2017), which can be found online here: https://www.nass.org/sites/default/files/surveys/2017-08/NASS-NPA-iGuide-v1.0-0217.pdf .

D. Other Electronic-Notary Resources

1. NASS and individual Secretary of State Offices

As previously mentioned, NASS has numerous resources regarding eNotarization which may provide you with useful insights. Additionally, your state's Secretary of State (or equivalent) office, which commonly holds regulatory authority over notaries in your state, likely has resources with specific authorities applicable to your practice.

2. Third-Party Online Notary Vendors

In addition, there are numerous third-party vendors that can provide online-notary services for a fee. However, many of these vendors, and their prices, are focused on high-volume clientele – such as title companies, banks, and other high-volume users. So, you may need to shop around before you find a provider with reasonable and useful pricing and services for your practice.

E. Practice Tip

If this all seems overwhelming to you, don't worry. Any vendor worth their salt should be able to verify that their service meets each of these requirements. You should request confirmation from your e-Notary vendor, in writing, of each of the requirements above or as provided in your state's laws and regulations or resources provided by your Secretary of State (or equivalent authority).

VI. ELECTRONIC RECORDING

A. Background

So, now you have an electronic document, with an electronic signature, which is electronically notarized. All these technological advances can be useful, but if a court, clerk, or other authority will not recognize them, what good are they? Zero. We are back to zero.

This is a challenge practitioners must face on a daily basis. To this day, you will find many courts, clerks, or other authorities refusing electronic documents, signatures, or other "new-fangled" filings or recordings. However, there is statutory authority supporting the authenticity and enforceability of electronic documents, signatures, and transactions.

In addition to the UETA, ESIGN, and RULNA there is a uniform law regarding electronic recordings – as in recording documents in the county records, not Taylor Swift re-recording her hit albums. ***The Uniform Real Property Electronic Recordings Act*** or "***URPERA***" ("***URPERA***" or "***Recording Act***") provides a baseline template for states to consider when implementing e-recording capabilities.

Currently, 38 states, as well as the U.S. Virgin Islands and District of Columbia, have enacted some version of URPERA.[142] Massachusetts has introduced a bill substantially adopting URPERA.[143]

The following definitions apply under URPERA:

(1) "***Document***" means information that is:
  (A) inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form; and
  (B) eligible to be recorded in the real property records maintained by the [recorder].
(2) "***Electronic***" means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.
(3) "***Electronic document***" means a document that is received by the [recorder] in an electronic form.
(4) "***Electronic signature***" means an electronic sound, symbol, or process attached to or logically associated with a document and executed or adopted by a person with the intent to sign the document.
(5) "***Paper document***" means a document that is received by the [recorder] in a form that is not electronic.[144]

B. General Requirements

The Recording Act provides that a recorder **may** conduct the following actions:

(1) receive, index, store, archive, and transmit electronic documents;
(2) provide for access to, and for search and retrieval of, documents and information by electronic means;
(3) convert paper documents accepted for recording into electronic form;
(4) convert into electronic form information recorded before the [recorder] began to record electronic documents;
(5) accept electronically any fee [or tax] that the [recorder] is authorized to collect; and
(6) agree with other officials of a state, a political subdivision thereof, or the United States on procedures or processes to facilitate the electronic satisfaction of prior approvals and conditions precedent to recording and the electronic payment of fees [and taxes].[145]

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[142] *Real Property Electronic Recording Act*, UNIF. LAW COMM'N https://www.uniformlaws.org/committees/community-home?communitykey=643c99ad-6abf-4046-9da4-0a6367da00cc (last visited April 18, 2026).

[143] *Id.*; An Act relative to uniform real property electronic recordings, H. 1602, 194th Sess. (Mass. 2026), https://malegislature.gov/Bills/194/H1602/BillHistory (latest action: "Accompanied a study order, see H5281 (under House Rule 27)" as of March 26, 2026).

[144] URPERA §§ 2(1)-(4), 4(a).

[145] URPERA § 4(b)(2)-(3),(5)-(8).

However, recorders **must** (1) conduct these actions pursuant to rules and standards established by the applicable commission or agency having authority over the recorder in the applicable state.[146] For example, in Texas, the *Texas State Library and Archives Commission* sets recording standards.[147]

Additionally, the recorder **must** (1) continue acceptance of paper documents and (2) record electronic and paper documents into the same index.[148]

The Recording Act provides that if a law requires an "original" document to "be on paper or another tangible medium, or be in writing" for recording purposes, that an electronic document meets those requirements, so long as it meets the other requirements of the Act.[149] This may seem a bit counter-intuitive since a digital document is not "on paper" or generally "tangible."

Additionally, the Recording Act provides that if a law requires a document to be signed for recording purposes, an electronic signature satisfies the signature requirement – essentially incorporating or, at least, supporting the purposes of UETA and ESIGN.[150]

Finally, the Recording Act provides that if a law requires a document to be notarized, acknowledged, verified, witnessed, or made under oath for recording purposes, an electronic signature of the notary or witness, etc. satisfies the requirement. However, the electronic document or signature must also contain all of the other information required, such as a date, etc., to be "attached to or logically associated with the document or signature."[151] No stamp, impression, or seal is necessary for the electronic signature.[152]

The Recording Act supersedes ESIGN (15 U.S.C. Section 7001 *et seq*.), with the exception of (1) Section 101(c) (15 U.S.C. Section 7001(c)) and (2) notices described in Section 103(b) (15 U.S.C. Section 7003(b)).[153]

C. Practice Tip

Notice that implementation of electronic recording is **optional** for recorders. URPERA § 4(b). So, if you have documents that you ultimately intend to record, before you have a client execute electronic versions, you should investigate whether the recorder in each applicable jurisdiction will accept electronic recordings. Additionally, if a recorder's office has not implemented electronic recording, you likely **cannot force the issue** – at this time or under the current statutory language.

You will also need a vendor or program to provide you with electronic-recording capabilities. There are multiple vendors with varying prices. However, you generally will be charged a fee per recording in addition to the recording fees assessed by the recorder.

Finally, as previously discussed, an electronic notary is required to have and apply an electronic seal. Therefore, regardless of URPERA § 3(c), it is likely best practice to ensure that a seal **is included** with the notary block.

VII. ARTIFICIAL INTELLIGENCE

A. Background

Use of artificial intelligence in the practice of law is in an on-going stage of fluctuation. So, my goal is to provide you with, at least, some food-for-thought in how A.I. could be implemented into your practice, or if it should be implemented at all.

A.I. is not a new technology, but it has recently hit its large-scale, mass-adoption stride. However, it still has many "kinks" to be resolved. Specifically, from a legal perspective, A.I. generators or engines do

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[146] URPERA § 4(b)(1).
[147] *See* TEX. LOC. GOV'T CODE ANN. § 191.009 (Electronic Filing and Recording); TEX. LOC. GOV'T CODE ANN. CHAPTER 195 (Electronic Filing of Records with and Recording by County Clerks); and 13 TEX. ADMIN. CODE §§ 7.141-145 (Electronic Filing and Recording).
[148] URPERA § 4(b)(4).
[149] URPERA § 3(a).
[150] URPERA § 3(b).
[151] URPERA § 3(c).
[152] *Id*.
[153] URPERA § 7.

not have a perfect record of informational accuracy or reliability. So, let's review some A.I. Wins and Losses.

A.I. can have many definitions, but the American Bar Association utilizes the following definition:

> [I]ntelligence displayed by machines such as when a machine mimics human cognitive functions like reasoning, learning, or natural language processing.[154]

Although news coverage of the prolific spread of A.I. seems to be endless and ubiquitous, A.I. adoption in the law has progressed at a slow pace, although it does still progress. Brace for statistical stimulus.

Law firms utilizing A.I. tools crossed the 30% threshold in 2024 (30.2%).[155] Firms with the highest adoption employ 500 or more lawyers (47.8% A.I. adoption). Adoption decreases for firms with 10-49 lawyers (29.5%), and the lowest adoption rates are held by firms with 2-9 attorneys (24.1%) and solo practitioners (17.7%).[156]

The most-common A.I. tools for these groups were as follows: ChatGPT® (52.1%), Thomson Reuters® CoCounsel® (26.0%), and Lexis+ AI® (24.3%).[157]

Tools utilized by small firms (less than 50 lawyers), but not larger firms were as follows: Westlaw® AI, Microsoft Copilot®, Summize™, DocDraft™, and Alexi™. [158]

Tools utilized by large firms (50 or more lawyers), but not by small firms were as follows: Paxton AI™, Henchman™, Blue J Legal®, and Robin AI®.[159]

Benefits of A.I. Adoption	***Percentage of Respondents***
Saving time/increasing efficiency	54.4%
Document management/document review	9.1%
Reducing costs	4.5%
Not enough information to answer the question	17.4%

[160]

Concerns about A.I. Adoption	***Percentage of Respondents***
Accuracy	74.7%
Reliability	56.3%
data privacy and security	47.2%
costs of implementation	22.1%,
amount of time required to learn	21.3%

[161]

Role playing Nostradamus, attorneys' predictions of the adoption of A.I. are as consistent as your favorite college football's team's championship record – ranging from precarious to nonexistent.

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[154] Mark Calaguas, *2024 Artificial Intelligence Tech Report*, American Bar Association (April 25, 2025), https://www.americanbar.org/groups/law_practice/resources/tech-report/2024/2024-artificial-intelligence-techreport/.

[155] *Id*.

[156] *Id*.

[157] *Id*.

[158] *Id*.

[159] *Id*.

[160] *Id*.

[161] *Id*.

A.I. Adoption Prediction	*Percentage of Respondents*
Already "mainstream"	12.8%
"watershed moment" within 3 years	45.3%
"mainstream" within 4 to 5 years	16.3%
"mainstream" within 6 to 10 years	6.4%

[162]

B. A.I. Terminology

Below are only a few of terms applicable to the A.I. industry.

Artificial Intelligence – Generally

Artificial Intelligence

> Artificial Intelligence (AI) is a term coined in 1955 by John McCarthy, Stanford's first faculty member in AI, who described it as "the science and engineering of making intelligent machines." Today it is a broad term for computer systems that can perform tasks with human-like intelligence, such as understanding language, recognizing images, learning from data, reasoning, and making decisions. Modern AI often works by finding patterns in large amounts of data and using those patterns to generate predictions or responses. It can be narrow (good at a specific task) or more general-purpose, like today's large language models that can handle many tasks.[163]

Artificial General Intelligence:

> [M]eans an AI system with general, human-level (or beyond) ability to learn, reason, and apply knowledge across a wide range of tasks and domains. AGI systems conceivably could handle novel situations, not just perform well on a single, narrow task. The term is controversial in several ways, including that different people mean different things by "human-level intelligence," and there's no universally accepted test, so claims are hard to verify. There are also safety and ethical concerns debated by AI experts.[164]

Types of Artificial Intelligence

Agentic AI – Agentics or Agents

> Agentic AI refers to AI systems designed to act as autonomous or semi-autonomous agents: they can set or interpret goals, plan and sequence actions, use tools (like web browsers, code, or APIs), make decisions based on feedback, and adapt over time to complete tasks. Unlike a purely reactive chatbot that only responds turn-by-turn, agentic AI is oriented around ongoing task execution—breaking down objectives, coordinating steps, and sometimes operating with minimal human oversight within defined constraints.[165]

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[162] *Id*.

[163] *What is Artificial Intelligence (AI)?,* STANFORD UNIVERSITY HUMAN-CENTERED ARTIFICIAL INTELLIGENCE, (https://hai.stanford.edu/ai-definitions/what-is-artificial-intelligence-ai) (last visited May 2, 2026).

[164] *What is AGI (Artificial General Intelligence)?,* STANFORD UNIVERSITY HUMAN-CENTERED ARTIFICIAL INTELLIGENCE, (https://hai.stanford.edu/ai-definitions/what-is-agi-artificial-general-intelligence) (last visited May 2, 2026).

[165] *What is Agentic AI?,* STANFORD UNIVERSITY HUMAN-CENTERED ARTIFICIAL INTELLIGENCE, (https://hai.stanford.edu/ai-definitions/what-is-agentic-ai) (last visited May 2, 2026).

Generative AI

Generative AI (or GenAI) refers to AI systems that can create new content like text, images, music, code, or video. These systems learn patterns from training data and generate novel outputs that resemble the original data, often powered by architectures like GANs, transformers, diffusion models, and variational autoencoders. These models power applications including chatbots, code generation, and creative tools. They also raise questions about the potential for misuse including creating misinformation and deepfakes.[166]

Large Language Model (LLM)

A Large Language Model is an AI system trained on massive amounts of text data to understand and generate human-like language. It uses deep learning techniques, specifically neural networks with billions of parameters, to predict and produce coherent text, answer questions, translate languages, write code, and perform various other language-based tasks.[167]

Artificial Intelligence - Processes, Procedures, and Pitfalls

Hallucination

Hallucinations in AI refers to instances where an artificial intelligence system generates information or responses that are incorrect, misleading, or entirely fabricated but presented as factual. This often happens in language models or image generation when the AI produces outputs not supported by the training data or real-world facts.[168]

Inference

In artificial intelligence, Inference is when a trained AI model makes predictions or decisions on new data it hasn't seen before. More specifically, it is the step where the model takes what it knows and gives you answers, suggestions or results in real-world situations.[169]

Synthetic Data

Synthetic Data is artificially generated information created by algorithms or simulations rather than collected from real-world events or observations. It's used to train AI models when real data is scarce, expensive, privacy-sensitive, or difficult to obtain, while mimicking the statistical properties and patterns of authentic data. Synthetic data is particularly valuable for addressing data gaps, testing edge cases, and protecting privacy in fields like healthcare, autonomous driving, and financial modeling. Critics say that Synthetic Data may introduce biases, fail to capture real-world complexity and edge cases, or create "model

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[166] *What is Generative AI?,* STANFORD UNIVERSITY HUMAN-CENTERED ARTIFICIAL INTELLIGENCE, (https://hai.stanford.edu/ai-definitions/what-is-generative-ai) (last visited May 2, 2026).

[167] *What is a Large Language Model (LLM)?,* STANFORD UNIVERSITY HUMAN-CENTERED ARTIFICIAL INTELLIGENCE, (https://hai.stanford.edu/ai-definitions/what-is-a-llm) (last visited May 2, 2026).

[168] *What are Hallucinations (in AI)?,* STANFORD UNIVERSITY HUMAN-CENTERED ARTIFICIAL INTELLIGENCE, (https://hai.stanford.edu/ai-definitions/what-are-hallucinations) (last visited May 2, 2026).

[169] *What is Inference?,* STANFORD UNIVERSITY HUMAN-CENTERED ARTIFICIAL INTELLIGENCE, (https://hai.stanford.edu/ai-definitions/what-is-inference) (last visited May 2, 2026).

> collapse" when AI systems are trained predominantly on AI-generated content.[170]

Training Data

> Training Data is the collection of examples—such as text, images, audio, or other information—used to teach machine learning models how to perform specific tasks. The model learns by analyzing patterns, relationships, and features within this data, adjusting its internal parameters to make accurate predictions or decisions. The quality, quantity, and diversity of training data largely determine how well an AI system will perform, making it one of the most critical components of machine learning.[171]

C. A.I. Wins

A.I. has had plenty of success, including passing the Uniform Bar Exam ("***UBE***"). The A.I. generator out performed humans in five of seven subject areas of the Exam, scored an average of 4.2/6.0 on the Multistate Essay Exam ("***MEE***") and Multistate Performance Test ("***MPT***") portions of the UBE, and scored approximately 297/400 points – satisfying passage thresholds for all UBE jurisdictions.[172]

The A.I. generator not only exceeded the average score of the human test takers, but landed near the 90th percentile of test takers for both the multiple-choice Multistate Bar Exam ("***MBE***") and MEE sections.

> As demonstrated by the zero-shot performance results we report herein, GPT-4 can "pass the Bar" in all UBE jurisdictions.
> …
> As the demand for better, faster, and more affordable legal services is only increasing in society, the need for supporting technology is becoming more acute. Further research on translating the capabilities of LLMs like GPT-4 into real public and private applications will be critical for safe and efficient use. GPT-4, like prior models, may still hallucinate sources, incorrectly interpret facts, or fail to follow ethical requirements; for the foreseeable future, application should feature "human-in-the-loop" workflows or similar safeguards. However, it appears that the long-awaited legal force multiplier is finally here.[173]

D. A.I. Losses

Despite these advancements, A.I. has gained a reputation for "***hallucinating***" sources and results. Although it is a bit of an oversimplification, this means that the generator essentially invents the information – makes it up, lies, [insert synonym of your choice here].

1. Let the Lawsuits Begin

The first private action against the creator of an A.I. generator regarding this "hallucination" effect was filed on June 5, 2023, in the Superior Court of Gwinnett County, Georgia, by Mark Walters against Open AI, L.L.C., the owner and operator of Chat GPT®.[174]

A journalist used ChatGPT® to investigate a federal lawsuit pending in the Western District of Washington. The journalist asked ChatGPT® to summarize the accusations in the complaint filed in that

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[170] *What is Synthetic Data?,* STANFORD UNIVERSITY HUMAN-CENTERED ARTIFICIAL INTELLIGENCE, (https://hai.stanford.edu/ai-definitions/what-is-synthetic-data) (last visited May 2, 2026).

[171] *What is Training Data?,* STANFORD UNIVERSITY HUMAN-CENTERED ARTIFICIAL INTELLIGENCE, (https://hai.stanford.edu/ai-definitions/what-is-training-data) (last visited May 2, 2026).

[172] *GPT-4 Passes the Bar Exam*, KATZ, DANIEL MARTIN AND BOMMARITO, MICHAEL JAMES AND GAO, SHANG AND ARREDONDO, PABLO (March 15, 2023) (Available at SSRN: https://ssrn.com/abstract=4389233 or http://dx.doi.org/10.2139/ssrn.4389233)

[173] *Id*. (internal citations omitted).

[174] *Walters v. OpenAI LLC*, Ga. Super. Ct., 23-A-04860-2.

lawsuit, and ChatGPT® responded with the following:

> [I]s a legal complaint filed by [Plaintiff], the founder and executive vice president of [Company], against ***Mark Walters***, who is accused of defrauding and embezzling funds from the [Company]. The complaint alleges that Walters, who served as the organization's treasurer and chief financial officer, misappropriated funds for personal expenses without authorization or reimbursement, manipulated financial records and bank statements to conceal his activities, and failed to provide accurate and timely financial reports and disclosures to the [Company]'s leadership. The plaintiff seeks various forms of relief, including the recovery of misappropriated funds, damages for breach of fiduciary duty and fraud, and removal of Walters from his position as a member of the [Company] 's board of directors.

The issue – Walters is not a party to that lawsuit or in any way associated with that lawsuit. When asked to substantiate this information ChatGPT® "hallucinated" a false Complaint that was completely fabricated and did not match the actual Complaint on file in the lawsuit. Summary Judgment was ultimately granted in OpenAI®'s favor in May 2025.

One primary legal issue and defense in tort cases against technology or internet-based platforms and companies is Section 230 of the *Communications Decency Act*.[175] Among other provisions, Section 230 provides that an "interactive computer service(s)" is "not the publisher or speaker of information provided by another information content provider" and provides protection regarding the following:

> (A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or
> (B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).[176]

This same defense is frequently relied upon by social-media and internet giants such as X™, Facebook™, Google®, and others regarding claims filed against them based upon the content posted on their platforms.

Section 230 came before the United States Supreme Court twice in the October 2022 Term, but both cases were decided under provisions of the *Antiterrorism Act (ATA)* and Section 230 was never substantively addressed in either opinion.[177]

2. A.I. In the Practice of Law - Early Lessons Learned – *Mata*, *Payne*, & *Whiting*

a. Mata v. Avianca, Inc.

For lawyers utilizing A.I. in practice, "hallucinated" results can be a perilous pitfall. The seminal case for the perils of "hallucinated" A.I. results in legal practice is the ***Avianca*** case from New York, which has become the red-alert warning for lawyers.

In *Mata v. Avianca, Inc.*, the Plaintiff filed suit alleging that his left knee was struck by a metal serving cart during a flight from El Salvador to John F. Kennedy Airport.[178]

After numerous other filings and removal of the case from state to federal court, counsel for the Plaintiff Mata filed an *Affirmation in Opposition to a Motion to Dismiss*, which had been filed by Defendant,

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[175] *See* 47 U.S.C.A. § 230.
[176] 47 U.S.C.A. § 230(c)(2).
[177] *See Gonzalez v. Google LLC*, 598 U.S. 617, 143 S. Ct. 1191, 215 L. Ed. 2d 555 (2023), *Twitter, Inc. v. Taamneh*, 598 U.S. 471, 143 S. Ct. 1206, 1209, 215 L. Ed. 2d 444 (2023). *See also* 18 U.S.C. § 233 (Antiterrorism Act (ATA)).
[178] *Mata v. Avianca, Inc.*, No. 22-CV-1461 (PKC) (S.D.N.Y. Jun. 22, 2023), *Opinion and Order on Sanctions*.

Avianca, Inc., on March 1, 2023.[179] In said Affirmation, the following nine cases were cited:

1. Varghese v. China Southern Airlines Co., Ltd., 925 F.3d 1339 (11th Cir. 2019).
2. Shaboon v. Egyptair, 2013 IL App (1st) 111279-U (Ill. App. Ct. 2013).
3. Peterson v. Iran Air, 905 F. Supp. 2d 121 (D.D.C. 2012).
4. Martinez v. Delta Airlines, Inc., 2019 WL 4639462 (Tex. App. Sept. 25, 2019).
5. Estate of Durden v. KLM Royal Dutch Airlines, 2017 WL 2418825 (Ga. Ct. App. June 5, 2017).
6. Miller v. United Airlines, Inc., 174 F.3d 366, 371-72 (2d Cir. 1999)
7. Zicherman v. Korean Air Lines Co., Ltd., 516 F.3d 1237, 1254 (11th Cir. 2008).
8. Ehrlich v. American Airlines, Inc., 360 N.J. Super. 360 (App. Div. 2003).
9. In re Air Crash Disaster Near New Orleans, LA., 821 F.2d 1147, I 165 (5th Cir. 1987).[180]

Counsel for the Defendant raised concerns about the validity of the cited cases in a *Reply Memorandum in Support* of the *Motion to Dismiss* filed on March 15, 2023.[181]

On April 11, 2023, the Court ordered counsel for Plaintiff to "file an affidavit annexing copies" of eight of these cases.[182] The Court issued another order adding an additional case to the list on April 12, 2023.[183]

Counsel requested an extension of time in order to produce the annexed copies because he was "currently out of the office on vacation and will be returning April 18, 2023."[184] This was later determined to be false.[185]

On April 25, 2023, counsel annexed copies or excerpts of cases which were purported to be the cases required by the Court's Orders of April 11 and 12, with the exception of the *Zicherman* cases, which counsel stated he was unable to locate.[186]

On May 25, 2023, counsel for Plaintiff filed an *Affidavit in Opposition* to the *Motion to Dismiss* in which they began to "***dribble out the truth***" according to Judge Castel.[187]

Ultimately, it was discovered that the cases cited were either completely fabricated or were cited for a proposition which the case did not actually state or support.[188] Counsel had used an A.I. Generator in drafting the Affirmation and the cases had been provided by that generator.[189] The generator created the false cases, or at least false citations to non-existent cases, but named real judges as the authors.[190]

The "Varghese", "Miller", "Peterse[o]n", "Shaboon", "Martinez", and "Durden" cases do not exist. These fabricated cases were set apart by quotation marks, while the other cases – cited for propositions they did not support – did not include quotations in their citations.[191]

Additionally, it was discovered that the "opinions" and "decisions" annexed and provided to the Court on April 25, 2023, had a litany of issues and were themselves fabricated.[192]

The drafting attorney stated at the sanctions hearing on June 8, 2023, that he was "operating under the false perception that this website [i.e., ChatGPT[®]] could not possibly be fabricating cases on its own."[193] However, the Court wholly rejects the counsel's numerous attempts to claim ignorance of the authenticity

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[179] *Id*.
[180] *Id*.
[181] *Id*.
[182] *Id*.
[183] *Id*.
[184] *Id*.
[185] *Id*.
[186] *Id*.
[187] *Id*.
[188] *Id*.
[189] *Id*.
[190] *Id*.
[191] *Id*.
[192] *Id*.
[193] *Id*.

issue of the A.I. results because of the numerous issues raised by opposing counsel and the Court itself along this saga.[194]

Counsel also attempted to argue that he followed-up with the A.I. generator and asked "[i]s Varghese a real case" and "[a]re the other cases you provided fake", along with other prompts.[195] The generator responded that the Varghese case "does indeed exist" and provided other reassurances of its results.[196]

> Technological advances are commonplace and there is nothing inherently improper about using a reliable artificial intelligence tool for assistance. But existing rules impose a gatekeeping role on attorneys to ensure the accuracy of their filings. Rule 11, Fed. R. Civ. P. [Attorneys and firm] abandoned their responsibilities when they submitted non-existent judicial opinions with fake quotes and citations created by the artificial intelligence tool ChatGPT[®], then continued to stand by the fake opinions after judicial orders called their existence into question.
>
> Many harms flow from the submission of fake opinions. The opposing party wastes time and money in exposing the deception. The Court's time is taken from other important endeavors. The client may be deprived of arguments based on authentic judicial precedents. There is potential harm to the reputation of judges and courts whose names are falsely invoked as authors of the bogus opinions and to the reputation of a party attributed with fictional conduct. It promotes cynicism about the legal profession and the American judicial system. And a future litigant may be tempted to defy a judicial ruling by disingenuously claiming doubt about its authenticity.[197]

The Court ordered sanctions against both of the individual lawyers representing the Plaintiff, as well as their firm as a whole.[198] Part of the sanctions issued by Judge Castel included an obligation to send letters to the judges falsely identified as the authors of the fake opinions.[199] It is important to note that Judge Castel did not make the ruling exclusively on the use of A.I., but considered the specific conduct of the lawyers.[200]

> The narrative leading to sanctions against Respondents includes the filing of the March 1, 2023 submission that first cited the fake cases. But if the matter had ended with Respondents coming clean about their actions shortly after they received the defendant's March 15 brief questioning the existence of the cases, or after they reviewed the Court's Orders of April 11 and 12 requiring production of the cases, the record now would look quite different. Instead, the individual Respondents doubled down and did not begin to dribble out the truth until May 25, after the Court issued an Order to Show Cause why one of the individual Respondents ought not be sanctioned.
>
> …
>
> At no time has any Respondent written to this Court seeking to withdraw the March 1 Affirmation in Opposition or advise the Court that it may no longer rely upon it.[201]

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[194] *See id*.
[195] *Id*.
[196] *Id*.
[197] *Id*.
[198] *Id*.
[199] *Id*.
[200] *Id*.
[201] *Id*.

Ultimately, Judge Castel found the attorneys had acted with "subjective bad faith" and issued numerous sanctions under Rule 11 and Rule 3.3(a)(1) of the New York Rules of Professional Conduct, 22 N.Y.C.R.R. § 1200.0. The sanctions included the following:

1. A $5,000 fine;
2. A letter to the opposing party; and
3. Letters to be sent to the judges falsely identified as authors of the fake cases - "Varghese", "Shaboon", "Petersen", "Martinez", "Durden" and "Miller" opinions.[202]

The law firm voluntarily imposed mandatory CLE programming on technology competence and A.I. programs, as well as training on notarization practices.[203]

b. ***Payne v. State of Georgia***

In *Payne v. State of Georgia*, the trial court's *Order Deny Motion for New Trial* contained multiple "hallucinations" including fabricated cases and real cases cited for legal propositions which are not established or supported by such cases. [204] During oral arguments, the District Attorney stated to the Georgia Supreme Court that although she prepared the Order for the trial court, such hallucinations were not contained in her draft order, to which the Court responds that the same such citations were also included in the State's initial Brief to the trial court opposing the *Motion for New Trial*.[205]

c. ***Whiting v. City of Athens, Tennessee***

In *Whiting v. City of Athens, Tennessee*, the United States Court of Appeals for the Sixth Circuit upheld the district courts denial of a *Motion to Recuse* as well as a *Sanctions Order* against the Plaintiff/Appellant regarding the filing of "frivolous" lawsuits.[206] The history of the cases was nothing short of a cascade of barbs between the Court and the counsel for Appellants.[207] By separate Order, the Court addressed sanctions against Appellant's counsel.[208]

Upon appeal from the trial court and receipt of initial briefs, the Sixth Circuit Court consolidated multiple cases.[209] The Court found the brief submitted by one Appellant "misrepresented the nature of the district court's sanctions" and contained "over two dozen" citations to cases that either (1) did not exist, (2) did not support the legal proposition for which they were cited, or (3) did not include the quotations stated in the Appellant's brief and attributed to such cases.[210] The Court issued a *Show Cause Order* instructing the attorneys to take the following actions:

> (1) explain why they should not be sanctioned for citing fake cases,
> (2) provide a copy from Westlaw® or LexisNexis® of all the cases and authorities cited in all of the briefs filed across the three appeals,
> (3) highlight any material that they quoted from those cases,
> (4) tell us who wrote the briefs in each case,
> (5) tell us whether the briefs were ghostwritten in whole or in part,
> (6) tell us whether they used generative AI to write the briefs, and

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[202] *Id*.
[203] *Id*.
[204] *S26A0459 Payne v. State of Georgia Oral Arguments* at 32:45, SUPREME COURT OF GEORGIA, (https://www.gasupreme.us/oral-arguments-march-18-2026/).
[205] *Id*.
[206] *Whiting v. City of Athens, Tennessee*, 170 F.4th 439, 445, 454 (6th Cir. 2026).
[207] *See id.* at 445-446 n.4.
[208] *Id*. at 442 n.1.; *Whiting v. City of Athens Tennessee*, 170 F.4th 455 (6th Cir. 2026).
[209] *Whiting v. City of Athens Tennessee*, 170 F.4th 455, 458 (6th Cir. 2026).
[210] *Id*.

(7) explain how they cite-checked the briefs.[211]

In response, or lack thereof, the attorneys argued the *Show Cause Order* was "void on its face for failing to include a signature of an Article III judge," was "motivated by harassment of the Respondent attorneys," and "reflect[ed] illegal ex-parte [sic] communications within this Court."[212]

Ultimately the court issued the following sanctions

> 1. [Attorneys] must jointly and severally reimburse appellees in full for their reasonable attorneys' fees on appeal in all three appeals.
> 2. [Attorneys] must jointly and severally pay double costs to appellees for costs incurred under 28 U.S.C. § 1920 on appeal in all three appeals.
> 3. Appellees must file an accounting of their costs and attorneys' fees on appeal, with supporting documentation, no later than seven days from the date of this order. [Attorneys] shall file any responses or objections to appellees' requests for costs and attorneys' fees on appeal no later than seven days thereafter. There will be no replies.
> 4. [Attorneys] must each separately and individually pay $15,000 to the registry of this court as punitive sanctions for the proceedings in this court in all three appeals.
> 5. The clerk will forward a copy of this order to the chief judge to consider disciplinary proceedings under Sixth Circuit Local Rule 46.
> 6. If [Attorneys] are financially unable to comply with some or all of the requirements of this order, they must file an affidavit under seal describing their financial situation along with their objections to appellees' fee requests.[213]

The Court was less than pleased to say the least, and showed its frustration not only in its ruling, but also in its footnotes and Appendix.

> This is a conservative estimate. We call something a "fake citation" or "misrepresentation of fact" only when it is clearly so. We do not include typos or sloppy citations. "As those mistakes could be attributed to simple sloppiness in drafting, as opposed to a failure to comply with the basic obligations of legal counsel, they are not the subject of this" opinion. Davis v. Marion Cnty. Super. Ct. Juv. Detention Ctr., No. 1:24-CV-01918-JRS-MJD, 2025
> WL 2502308, at *1 n.1 (S.D. Ind. Sept. 2, 2025). If we included typos and other errors that are arguably, but not clearly, a misrepresentation or fake citation, we would be looking at far more misstatements of fact and law.[214]

The Court attempted to restrain their ire by only sanctioning the attorneys and not the Appellant himself and by foregoing a finding of contempt:

> [W]e choose not to sanction Whiting himself because we have no evidence that Whiting participated in the misconduct […] Finally, we could have held Irion and Egli in contempt because they flagrantly ignored our order to show cause.[]

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[211] *Id*. at 459.
[212] *Id*.
[213] *Id*. at 466-67.
[214] *Id*. at 458 n.1.

> But we do not think additional sanctions are necessary to send the message we send here."[215]

However, it is not difficult to conclude that the Court wished for the ability to impose a more severe punishment:

> We could have gone much further. Other courts have dismissed cases, disqualified lawyers, or revoked their pro hac vice status for similar conduct.[] But only the chief judge can suspend or disbar a lawyer from practice before this court, see 6th Cir. Local Rule 46(c)(4)(C), so those sanctions are not available to us[.][216]

E. Court Orders & Rules

Multiple courts have imposed standing or local rules regarding the use of A.I. in their courts. Most of these rules involve some kind of signed statement by counsel, imposed under the "Duty of Candor" and proper pleadings, that they either (1) did not use A.I. technology in drafting the filing or (2) that if A.I. was used, the results were verified by a human. Conversely, some courts have specifically declined to impose A.I.-specific disclosures or procedures.[217]

> Some courts have issued standing orders or local rules prohibiting the use of generative AI to draft legal filings or at least requiring certain forms of disclosure; others have declined to issue any such rules at all. *Compare* N.D. Tex. LR 7.2(f) (disclosure rules for briefs prepared using generative artificial intelligence), *with* "Court Decision on Proposed Rule" (5th Cir. June 10, 2024) (declining to adopt special rule regarding the use of artificial intelligence in drafting briefs).[218]

Many of these rules are based – at least in part – on the "Duty of Candor" imposed by applicable ethic rules, such as ABA Model Rule 3.3:

> **Rule 3.3: Candor Toward the Tribunal**
> Advocate
> (a) A lawyer shall not knowingly:
>
> (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
>
> (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

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[215] *Id*. at 467 n.5.
[216] *Id*.
[217] *See* TEX. COMM. ON PROFESSIONAL ETHICS, Op. 705 (2025) (https://www.legalethicstexas.com/resources/opinions/opinion-705/) ("*Compare* N.D. Tex. LR 7.2(f) (disclosure rules for briefs prepared using generative artificial intelligence), *with* "Court Decision on Proposed Rule" (5th Cir. June 10, 2024) (declining to adopt special rule regarding the use of artificial intelligence in drafting briefs)").
[218] TEX. COMM. ON PROFESSIONAL ETHICS, Op. 705 (2025) (https://www.legalethicstexas.com/resources/opinions/opinion-705/).

> (3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.
>
> (b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.
>
> (c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.
>
> (d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.[219]

F. A.I. Guidance & the Ethics of A.I. Use

1. The Model Rules

Where do A.I. use and ethics rules collide? Off-the-bat, we have already discussed the "Tech Competency" obligations imposed by the ethics rules of many jurisdictions as well as the "Duty of Candor".[220] In addition, the following ABA Model Rules of Professional Conduct are directly implicated in A.I. use:

> **Rule 1.1: Competence**
> Client-Lawyer Relationship
> A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.[221]
>
> **Rule 1.6: Confidentiality of Information**
> Client-Lawyer Relationship
> (a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).
>
> (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
>
> (1) to prevent reasonably certain death or substantial bodily harm;
>
> (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of

[219] MODEL RULES OF PROF'L CONDUCT r. 3.3.
[220] *See* MODEL RULES OF PROF'L CONDUCT r. 3.3.
[221] MODEL RULES OF PROF'L CONDUCT r. 1.1.

another and in furtherance of which the client has used or is using the lawyer's services;

(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(4) to secure legal advice about the lawyer's compliance with these Rules;

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;

(6) to comply with other law or a court order; or

(7) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.[222]

Rule 5.1: Responsibilities of Partners, Managers, and Supervisory Lawyers

Law Firms And Associations

(a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.

(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

(c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:

(1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its

[222] MODEL RULES OF PROF'L CONDUCT r. 1.6.

> consequences can be avoided or mitigated but fails to take reasonable remedial action.[223]

For example, the United States District Court Northern District of Texas has issued the following Local Rule:

> LR 7.2 Briefs [New Rule]
> * * *
> (f) Disclosure of Use of Generative Artificial Intelligence.
> (1) A brief prepared using generative artificial intelligence must disclose this fact on the first page under the heading "***Use of Generative Artificial Intelligence***." If the presiding judge so directs, the party filing the brief must disclose the specific parts prepared using generative artificial intelligence.
> (2) "***Generative Artificial Intelligence"*** means a computer tool (whether referred to as "*Generative Artificial Intelligence*" or by another name) that is capable of generating new content (such as images and text) in response to a submitted prompt (such as a query) by learning from a large reference database of examples.
> (3) A party who files a brief that does not contain the disclosure required by subsection (f)(l) of this rule certifies that no part of the brief was prepared using generative artificial intelligence.[224]

Westlaw®, and likely numerous other platforms, has launched a search engine and database specific to orders and rules on A.I. use.[225] Currently the platform shows orders and rules from 28 states comprised of 186 state orders and 8 federal orders.[226]

2. Guidance? Maybe?

Many State Bar organizations across the country have attempted to tackle the "ethical-use of A.I." debate and to provide guidance to their members. One such effort was conducted by the State Bar of Texas "*Taskforce for Responsible AI in the Law (TRAIL).*"[227] The 2023-2024 Taskforce made several recommendations to the State Bar of Texas in its final report including the following: mandatory training for newly-licensed lawyers, continuing legal education on A.I. for current lawyers, negotiation by the State Bar of Texas with technology vendors regarding A.I. services and tools, publication of guidance regarding A.I. use for pro-se litigants, as well as recommendations for the judiciary and paralegals. The report also requested an ethics opinion to be issued by the Texas Professional Ethics Committee, to which the Committee complied by publishing Opinion 705.[228]

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[223] MODEL RULES OF PROF'L CONDUCT r. 5.1.
[224] N.D. Tex. LR 7.2(f).
[225] *Thomson Reuters Westlaw Statutes & Court Rules: AI Court Rules*, THOMSON REUTERS (https://auth.thomsonreuters.com/u/login/identifier?state=hKFo2SBhenloRVNQeTRkT28zbVhGVDFyZGsxampwS1RteUt1OaFur3VuaXZlcnNhbC1sb2dpbqN0aWTZIFhIcUdPRFczRHhtaEpnSHliNm93TW9sOE5jdGQ2MWNBo2NpZNkgVDRLN0txa09Gb0NXNG4yenliekU4QVlYQkRCYVhPUmk&ui_locales=en).
[226] *Id*. (as of April 25, 2026).
[227] *See Taskforce for Responsible AI in the Law: 2023-2024 Year-End Report*, STATE BAR OF TEXAS (https://www.texasbarpractice.com/wp-content/uploads/2025/04/TRAIL-2023-24-Year-End-Report.pdf).
[228] *Id.*; TEX. COMM. ON PROFESSIONAL ETHICS, Op. 705 (2025) (https://www.legalethicstexas.com/resources/opinions/opinion-705/).

The 2024-2025 Taskforce then released an "AI Toolkit" for Texas lawyers (or really anyone with an internet connection) to utilize in implementing A.I. in legal practice.[229]

3. An Ethics Opinion Appetizer – the "*Texas Sampler*"

The Texas Professional Ethics Committee published Ethics Opinion 705, which posed the apex question:

> *What ethical issues are raised under the Texas Disciplinary Rules of Professional Conduct by a lawyer's use of generative artificial intelligence in the practice of law?*[230]

The Opinion cited numerous prior opinions as well as drawing upon guidance issued by other Bar associations, including those of the District of Columbia, Florida, and California. Unsurprisingly, the Opinion focused on the following ethical duties: (1) *Competence*, (2) *Confidentiality*, and (3) *Oversight*/*Supervision*.[231] However, somewhat surprisingly, the Opinion also addressed *Fees*.[232]

Some notable findings from the Opinion included the following:

1. *Competence*: Use isn't mandatory. However, if utilized, *proper* use is mandatory:

The Committee noted that "competence" under Rule 1.01(a) of the Texas Disciplinary Rules of Professional Conduct includes the obligation of "technological competence" (a/k/a "tech competency" as we have already discussed") as well as the preservation of client confidential information (essentially tying "competency" to the confidentiality ethical duty). [233]

> Rule 1.01 almost certainly does not *require* the use of generative AI for any particular purpose in the practice of law, especially at the present moment where the technology is still developing and the cost-benefit analysis remains somewhat unclear. Still, lawyers should not "unnecessarily retreat[] from the use of new technology that may save significant time and money for clients." Opinion 680; *see also* comment 8 to Rule 1.01. What's clear even now is that *if* a lawyer opts to use a generative AI tool in the practice of law, the lawyer must have a reasonable and current understanding of the technology—because only then can the lawyer evaluate the associated risks of hallucinations or inaccurate answers, the limitations that may be imposed by the model's use of incomplete or inaccurate data, and the potential for exposing client confidential information. *Cf.* Opinion 680 (lawyer should acquire a general understanding of how cloud computing works before using in practice of law); Opinion 665 (similar for metadata).[234]

2. *Confidentiality*: Client consent before use? Maybe:

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[229] *AI Tookit*, State Bar of Texas (https://www.texasbarpractice.com/artificial-intelligence-toolkit/). *See also* Lowell Brown, *State Bar Board Update: State Bar of Texas Unveils AI Tookit, Texas Bar Journal*, September 2025 (https://lsc-pagepro.mydigitalpublication.com/article/STATE+BAR+BOARD+UPDATE/5026719/850944/article.html).

[230] TEX. COMM. ON PROFESSIONAL ETHICS, Op. 705 (2025) (https://www.legalethicstexas.com/resources/opinions/opinion-705/) .

[231] *Id*.

[232] *Id*.

[233] *Id* (citing TEX. COMM. ON PROFESSIONAL ETHICS, Op. 680 (2018) (addressing cloud-computing systems); TEX. COMM. ON PROFESSIONAL ETHICS, Op. 665 (2016) (addressing metadata in electronic documents).

[234] *Id*.

Regarding confidentiality specifically, the Committee notes that the "unthinking use" of A.I. in relation to client information is one the "greatest risks."[235] Texas Disciplinary Rules of Professional Conduct Rule 1.05 prohibits "knowingly" disclosing client information – whether privileged or otherwise – other than to permitted persons.

The compounding complexity of confidentiality and A.I. is that a practitioner must have a baseline understanding of how a particular A.I. tool works in order to assess whether their duty of confidentiality is implicated.[236]

I believe it is helpful to categorize A.I. use in practice into three categories: (1) research, (2) drafting or deliverables, or (3) brainstorming.

(a) Research

It is possible to use A.I. tools for "general research purposes" without revealing client confidential information, and in fact you likely will have little choice in the matter in the near future.[237] Many research databases have A.I. tools and systems which likely will become standard – or at least industry standard – in the future, such as LexisNexis® tools and Westlaw®'s CoCounsel® and AI Deep Research™. Eventually, you may have no choice but to allow A.I. into your research tasks.

In most instances, much like your current legal research, these searches can avoid the use of client information – other than your entry of a "client" in the tracking portion of those systems for billing purposes. However, you must of course check any results your receive. Many of these systems will contain disclaimers to that effect, including Westlaw® which states as follows:

> Westlaw AI Deep Research uses large language models - a type of agentic AI - and focuses the models on the language of cases, statutes, regulations, administrative law decisions, Practical Law content, select secondary sources and current awareness content to improve accuracy.
>
> All cited sources are referenced in the response with the actual language from the source and links to read the full document. Even with these and other precautions, Westlaw AI Deep Research can occasionally produce inaccuracies, so it should always be used as part of the research process, with additional research to fully understand the nuance of the issues and further improve accuracy.
>
> The AI-generated response can be extraordinarily useful for getting an overview of the issues and citations to authority, but it should ***never*** be used to advise a client, write a brief or motion for a court, or otherwise be relied on without doing further research.
>
> Use it to accelerate thorough research. Don't use it as a replacement for thorough research.[238]

(b) Drafting or Deliverables, but Oregonians beware (*Willams v. Honl*)

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[235] *Id*.
[236] *See id*.
[237] *See id*.
[238] *Thomson Reuters Westlaw Advantage Westlaw AI Deep Research: how Westlaw AI Deep Research works*, THOMSON REUTERS (https://auth.thomsonreuters.com/u/login/identifier?state=hKFo2SBhenloRVNQeTRkT28zbVhGVDFyZGsxampwS1RteUt1OaFur3VuaXZlcnNhbC1sb2dpbqN0aWTZIFhIcUdPRFczRHhtaEpnSHliNm93TW9sOE5jdGQ2MWNBo2NpZNkgVDRLN0txa09Gb0NXNG4yenliekU4QVlYQkRCYVhPUmk&ui_locales=en).

From a bare-basics perspective, all A.I. tools require the user to input a prompt or request containing some level of relevant facts, information, and circumstances in order for the tool to generate the response or output sought.[239] That level of detail is heightened when you are requesting the A.I. tool generate a draft, document, or other deliverable. Many such requests could be anonymous or contain agnostic information, but many – such as a demand letter or settlement agreement (both examples used by the Committee) – will require a greater level of detail.[240]

For example, due to my math-skills deficiency, I requested Microsoft Copilot® to generate an amortization schedule with the following prompt:

> Can you create an Excel[®] amortization schedule using the following parameters?
> 1. Initial Principal of $1,527,973.20;
> 2. Interest of 4.57% annual percentage rate;
> 3. Ten-year (10 year) term;
> 4. Payments begin June 15th and continue monthly; and
> 5. Annual interest payments of accrued interest due and payable on or before each December 31?

The results? The program did generate an Excel® meeting my request with only minor deviations. Overall, it was what I needed. Note that none of the information provided would be considered "confidential."

However, conversely, consider if I had asked the tool to generate the Promissory Note, Security Agreement, or other documents for the transaction. In theory, I could either omit certain information about my client or use fictional information and manually edit the documents produced by the A.I. – which I should do regardless of the results. However, I must be cognizant of the information I am injecting into the A.I. system when making such a request.

Note, while many courts and jurisdictions permit A.I. drafting – subject to attorney review and disclosure under local rules as discussed above – at least one court has taken the position that ***any*** drafting by A.I. is not "competent practice of law."[241]

> Finally, so that the clear does not become cloudy, we state the obvious: Using generative artificial intelligence to generate legal briefs and then simply cite-checking them bears no resemblance to the competent practice of law. *See Mattox*, 807 F Supp 3d at 1353 ("When lawyers trade reflection for automation, they surrender the very quality that makes their words worthy of belief."). Although cite checking is, of course, an important part of producing reliable, competent briefs, it is not the type of work that requires a law degree. Law is a profession:
>
> > "a calling requiring specialized knowledge and often long and intensive preparation including instruction in skills and methods as well as in the scientific, historical, or scholarly principles underlying such skills and methods, maintaining by force of organization or concerted opinion high standards of achievement and conduct, and committing its members to continued study and

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[239] *See* TEX. COMM. ON PROFESSIONAL ETHICS, Op. 705 (2025) (https://www.legalethicstexas.com/resources/opinions/opinion-705/).
[240] *See id*.
[241] *Williams v. Honl*, 348 Or. App. 505, 513 (2026).

> to a kind of work which has for its prime purpose the rendering of a public service—see LEARNED PROFESSION."
>
> *Webster's Third New Int'l Dictionary* 1811 (unabridgeded.2002) (defining "profession"). As veteran Oregon lawyers have advised new lawyers for years, an Oregon lawyer develops and maintains the specialized knowledge required of the profession by reading the cases relevant to the lawyer's practice in the Advance Sheets (in print or on the appellate courts' website) and discussing them with colleagues. A person who uses generative artificial intelligence in lieu of reading, writing, and talking about the law—the very processes by which a lawyer acquires and [] retains the specialized knowledge and skills required of the profession—risks losing claim to the title of lawyer.[242]

(c) Brainstorming

Perhaps one of the most useful applications of A.I. following research is for brainstorming points and counterpoints to your arguments. However, much like the discussion on drafting and deliverables, great care should be taken in regard to what information your "prompt" and responses with A.I. includes.

(d) Committee Summary – Confidentiality

> If a lawyer intends to use confidential information in conjunction with generative AI tools, the lawyer should consider informing clients about the associated risks and may need to secure client consent. The State Bar of California Standing Committee on Professional Responsibility and Conduct has recommended that lawyers inform their clients if generative AI tools will be used as part of their representation. *See* State Bar of California, Standing Committee on Professional Responsibility and Conduct, *Practical Guidance for the Use of Generative Artificial Intelligence in the Practice of Law* (Nov. 16, 2023). Ethics opinions from the ABA and the Florida Bar go a step further and suggest that lawyers should obtain informed consent before using these tools. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 512 (2024) ("Generative Artificial Intelligence Tools"); Florida Bar Ethics Opinion 24-1 (2024). This Committee, in Opinion 680 concerning the risks of cloud-computing software, stated "[i]n some circumstances it may be appropriate to confer with a client regarding these risks as applicable to a particular matter and obtain a client's input regarding or consent to using" such new technology. At a minimum, Texas lawyers should engage in the same thoughtful analysis with respect to generative AI tools.[243]

3. *Oversight/Supervision*: The Buck Stops here:

> A lawyer's failure to verify generative AI outputs can implicate a host of Rules, including Rule 1.01 (Competent and Diligent Representation), Rule 3.01 (Meritorious Claims and Contentions), Rule 3.03 (Candor Toward the Tribunal), and Rule 3.04 (Fairness in Adjudicatory Proceedings), among others. The best practice here, as with many other efficiency-enhancing tools in the law: AI-generated outputs can be used as a starting point for a lawyer's work, but must always be carefully analyzed for accuracy and quality. That said, a lawyer's duties require more than merely detecting and eliminating false AI-

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[242] *Williams v. Honl*, 348 Or. App. 505, 513–14 (2026).

[243] TEX. COMM. ON PROFESSIONAL ETHICS, Op. 705 (2025) (https://www.legalethicstexas.com/resources/opinions/opinion-705/).

> generated results—the lawyer is ultimately responsible for ensuring that the content is accurate and supports the client's interests.[244]

4. *Fees*: Actual ~~Damages~~ [Time and Expenses]

> It's not hard to imagine how the effective use of generative AI tools might impact the fees that lawyers charge—after all, one of the most promising aspects of these tools is the possibility for lawyers to provide legal services more efficiently. In most typical hourly arrangements (depending on the agreement), a lawyer will likely be able to charge the client for the actual time the lawyer spends using a generative AI program for purposes of the representation, including to refine the program's outputs and check the work. A lawyer may not, however, charge hourly fees for the time that was "saved" by using the generative AI program. As the District of Columbia Bar Association explained:
>
> > '[I]t goes without saying that a lawyer who has undertaken to bill on an hourly basis is never justified in charging a client for hours not actually expended. If a lawyer has agreed to charge the client on this basis (i.e., hourly), and it turns out that the lawyer is particularly efficient in accomplishing a given result, it nonetheless will not be permissible to charge the client for more hours than were actually expended on the matter. When that basis for billing the client has been agreed to, the economies associated with the result must inure to the benefit of the client.'[245]
>
> If the lawyer pays per use for a particular generative AI program, the lawyer may be able to collect those expenses from the client, as allowed by law and if the client accepts that arrangement. See Opinion 594. When a lawyer incurs per-use fees associated with a generative AI program, one could imagine a client agreeing to reimburse those expenses in much the same way some clients agree to pay for the use of traditional online research tools like Westlaw® and LexisNexis®. The lawyer will generally not be permitted to recover more than the amount of expenses actually incurred and paid to the generative AI provider.[246]

4. Whodunit? When the Client Uses A.I. – *U.S. v. Heppner*

Beyond a lawyer's use of A.I. within their practice, what happens when a client takes information, documents, or advice from a lawyer and inputs that information, document, or advice into a third-party A.I. tool? Well, at least one outcome is the potential loss of Attorney-client Privilege.[247]

In *United States v. Heppner*, the United States District Court for the Southern District of New York faced the following question of first impression:

> [W]hether, when a user communicates with a publicly available AI platform in connection with a pending criminal investigation, are the AI user's communications protected by attorney-client privilege or the work product doctrine?[248]

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[244] *Id*.
[245] *Id*. (quoting D.C. Legal Ethics Opinion 388 (2024)).
[246] *Id*. (citations omitted).
[247] *United States v. Heppner*, No. 25 CR. 503 (JSR), 2026 WL 436479, at *2-3 (S.D.N.Y. Feb. 17, 2026).
[248] *Id.* at *1.

The answer?

> For the reasons that follow, the answer is no.[249]

In October 2025, Heppner, an executive for multiple corporate entities, was indicted for several fraud and conspiracy charges in relation to his alleged misconduct in defrauding investors "out of more than $150 million by making false representations about, and causing [the corporation] to enter into undisclosed self-serving transactions concerning, two privately held companies that Heppner controlled[.]"[250]

In November 2025, Heppner was arrested and plead guilty to the charges. The FBI seized documents and electronic devices from Heppner's home, including 31 documents containing communications between Heppner and Anthropic®'s Claude® A.I. platform.[251] These A.I. communications occurred after Heppner had received a grand jury subpoena and after "it was clear with discussions with the government that Mr. Heppner was the target of this investigation."[252]

> Without any suggestion from counsel that he do so, Heppner "prepared reports that outlined defense strategy, that outlined what he might argue with respect to the facts and the law that we anticipated that the government might be charging." []Thus, counsel asserted, Heppner "was preparing these reports in anticipation of a potential indictment."[][253]

Heppner and his counsel claimed privilege over the A.I. documents based on the following:

> (1) Heppner had input[] into Claude[®], among other things, information that Heppner had learned from counsel; (2) Heppner had created the AI Documents for the purpose of speaking with counsel to obtain legal advice; and (3) Heppner had subsequently shared the contents of the AI Documents with counsel.[254]

Heppner's counsel "did not direct" Heppner to utilize the A.I. tool.[255]

The Court began its analysis by reiterating that attorney-client privilege is narrowly construed and consists of three elements:

> It is well established that the attorney-client privilege attaches to, and protects from disclosure, "communications (1) between a client and his or her attorney (2) that are intended to be, and in fact were, kept confidential (3) for the purpose of obtaining or providing legal advice.[256]

Ultimately, the Court held that the communications were not privileged and provided three bases for its reasoning: (1) Claude® is not an attorney, (2) the communications were not confidential, and (3) the communications were not for the purpose of obtaining legal advice.[257]

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[249] *Id.*
[250] *Id.*
[251] *Id.*
[252] *Id.*
[253] *Id.* (citations omitted).
[254] *Id.* at *2.
[255] *Id.*
[256] *Id.* (quoting United States v. Mejia, 655 F.3d 126, 132 (2d Cir. 2011)).
[257] *Id.* at *2-3.

> Applying these principles here, the AI Documents lack at least two, if not all three, elements of the attorney-client privilege.[258]

The Court's first basis is both simple and dispositive.

> In the absence of an attorney-client relationship, the discussion of legal issues between two non-attorneys is not protected by attorney-client privilege.[259]
> […]
> Because Claude® is not an attorney, [] that alone disposes of Heppner's claim of privilege.[260]

Commentators argued that A.I. was similar to "other Internet-based software, such as cloud-based word processing applications[.]" but the Court not only was unconvinced by these arguments, but reiterated that those applications too call into question attorney-client privilege.[261]

Second, the Court reasoned that the communications were not confidential, both because they were communicated with the third-party A.I. platform and because of that platform's privacy policy.[262]

> [T]he written privacy policy to which users of Claude[®] consent provides that Anthropic[®] collects data on both users' "inputs" and Claude[®]'s "outputs," that it uses such data to "train" Claude[®], and that Anthropic[®] reserves the right to disclose such data to a host of "third parties," including "governmental regulatory authorities."[263]

Meaning, not only is the attorney's or client's conduct relevant to the evaluation of privilege, but also the conduct (or policies dictating conduct) of the third-party.[264] If an A.I. tool is to be utilized, you may be responsible for a more in-depth or comprehensive understanding of how the data you input is stored, utilized, or shared.[265]

Finally, although admitting this to be a "closer call," the Court ultimately determined that the communications were not for the purpose of obtaining legal advice.[266] While you might be tempted to reason that with all of A.I.'s risks – many we have discussed in this paper – it would be dangerous to recommend a client utilize A.I., the Court's reasoning here cuts against the grain. The Court found that because Heppner utilized the A.I. tool "of his own volition" and without the express direction of counsel to do so, he could not have been obtaining legal advice.[267]

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[258] *Id.* at *2.
[259] *Id.* at *2 (quoting *In re OpenAI, Inc.*, Copyright Infringement Litig., 802 F. Supp. 3d 688, 699 (S.D.N.Y. 2025)).
[260] *Id.* (citation omitted).
[261] *Id.* ("[T]he argument that [Claude®] is like any other form of software only cuts against the invocation of privilege because all '[r]ecognized privileges' require, among other things, 'a trusting human relationship,' such as, in the attorney-client context, a relationship 'with a licensed professional who owes fiduciary duties and is subject to discipline.' See Ira P. Robbins, Against an AI Privilege, JOLT Dig., Harvard L. Sch. (Nov. 7, 2025), https://jolt.law.harvard.edu/digest/against-an-ai-privilege.")
[262] *Id.*
[263] *Id.* (citing Anthropic, Privacy Policy (as of February 19, 2025), https://www.anthropic.com/legal/archive/a2eecf43-807a-4a53-89dd-04c44c351138).
[264] *See id.*
[265] *See id.*
[266] *Id.* at *3.
[267] *Id.*

> Claude[®] disclaims providing legal advice. Indeed, when the Government asked Claude[®] whether it could give legal advice, it responded that "I'm not a lawyer and can't provide formal legal advice or recommendations" and went on to recommend that a user "should consult with a qualified attorney who can properly assess your specific circumstances."[268]

G. Practice Tips

So, if you are going to use A.I. in your practice, here are few tips:

5. Double check results.
6. Use for ideas only, not submission-ready documents or drafting.
    a. Ex: the first prompt used by counsel in *Avianca* was "argue that the statute of limitations is tolled by bankruptcy of defendant pursuant to [M]ontreal [C]onvention". That likely would have been acceptable to generate counter-arguments for counsel to consider when making his arguments. However, in this instance the generator made up law and made assertions without legal citations. When the generator was pressed to substantiate its stated positions, it hallucinated information.
7. Be careful about disclosing confidential information or breaching other ethics rules when submitting prompts or questions to the generator.
8. Discuss the use of A.I. with your clients both from a consent (your use of A.I.) and educational (their use of A.I. in relation to their legal matter) standpoint – ex: *U.S. v. Heppner*.
9. Be careful of breaching local rules or standing orders, etc.

H. A.I. Headlines

A.I. is rapidly changing. From the time this section is drafted to the date of the conference, several A.I. advancement will likely have been announced. So, here are a few headlines of A.I. news from the past few months:

1. A.I. & the Labor Market: A.I. Companies Self-report & Tattletale

Two of the most iconic A.I. companies in the world have published reports on the impacts of the technology and tools they are producing.

In March 2025, Anthropic® (the producer of "Claude®" A.I. systems) published a report titled "*Labor market impacts of AI: A new measure and early evidence*."[269] Anthropic® utilized data from the following sources: (1) The O*NET database, which is operated by the U.S. Department of Labor, Employment and Training Administration, (2) Anthropic®'s own data, and (3) estimates from research conducted and published by Tyna Eloundou, Sam Manning, Pamela Mishkin, and Daniel Rock entitled *GPTs are GPTs: An Early Look at the Labor Market Impact Potential of Large Language Models (2023)*.[270]

The report covers several topics, but some of the key takeaway statements were as follows:

> AI is far from reaching its theoretical capability: actual coverage remains a fraction of what's feasible

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[268] *Id.*

[269] Maxim Massenkoff and Peter McCrory, *Labor market impacts of AI: A new measure and early evidence*, ANTHROPIC (March 5, 2026) (https://www.anthropic.com/research/labor-market-impacts) (available in PDF: https://cdn.sanity.io/files/4zrzovbb/website/2b5bbaf2c1eb81dbf6e6fb813c1a24e35a64d376.pdf).

[270] *Id.* at 3. *See also* O*NET 30.2 Database and the U.S. Department of Labor, Employment and Training Administration (https://www.onetcenter.org/database.html#overview); TYNA ELOUNDOU, SAM MANNING, PAMELA MISHKIN, and DANIEL ROCK, *GPTs are GPTs: An Early Look at the Labor Market Impact Potential of Large Language Models*, Cornell University (August 22, 2023) (https://arxiv.org/abs/2303.10130) .

> Occupations with higher observed exposure are projected by the BLS to grow less through 2034
>
> Workers in the most exposed professions are more likely to be older, female, more educated, and higher-paid
>
> We find no systematic increase in unemployment for highly exposed workers since late 2022, though we find suggestive evidence that hiring of younger workers has slowed in exposed occupations[.][271]

One interesting aspect of the report was Anthropic®'s attempt to compare A.I.'s "theoretical LLM capability" and the "actual automated usage" occurring in various occupations.[272] In other words, what is expected to be possible for A.I. in a given industry – say, legal services – versus how much A.I. technology is actually be utilized in that industry. Anthropic® admits that there remains a "large gap" between what A.I. is anticipated to provide and what it is currently providing, including in the legal industry.[273]

The report indicated that 68% of work tasks – as categorized by O*NET – could be fully automated to A.I., with just 3% of work tasks being "not feasible" for A.I. use.[274] This means that "97% of the tasks observed […] fall into categories rated as theoretically feasible by Eloundou et al. (β=0.5 or β=1.0)."[275] The "most exposed occupations" according to the report were as follows:

> Computer programmers
> Customer service representatives
> Data entry keyers
> Medical record specialists
> Market research analysts and market specialists
> Sales representatives, wholesale and manufacturing, except technical and scientific products
> Financial and investment analysts
> Software quality assurance analysts and testers
> Information security analysts
> Computer user support specialists[276]

As for the legal industry specifically, the report showed that law is exposed, but far-less than some other occupations.[277]

> [M]any tasks, of course, remain beyond AI's reach—from physical agricultural work like pruning trees and operating farm machinery to legal tasks like representing clients in court.

Roughly one month later, Anthropic®'s primary competitor – OpenAI® – published a report titled "*Industrial Policy for the Intelligence Age: Ideas to Keep People First*", which proposes "a slate of people-

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[271] *Id.* at 2.
[272] *Id.*
[273] *Id*.
[274] *Id.* at 4.
[275] *Id.* at 5.
[276] *Id.* at 7.
[277] *Id.* at 8 (BLS projected employment growth from 2024-2034 vs. AI exposure).

first policy ideas" for governments to consider implementing in response to "superintelligence" tools.[278] It is notable that this report was published shortly after OpenAI® received immense public backlash for rushing to the altar to ink a deal with the U.S. Department of Defense after Anthropic® and the administration had a "falling out" over how the military intended to use Anthropic®'s technology.[279] Anthropic® filed a lawsuit in federal court in San Francisco on March 9, 2026, regarding its dispute with the Defense Department.[280] So if you are thinking this OpenAI® report might be a public-relations crisis-management tool, this author would agree. Regardless, the report does have some useful insights.

> While we strongly believe that AI's benefits will far outweigh its challenges, we are clear-eyed about the risks—of jobs and entire industries being disrupted; bad actors misusing the technology; misaligned systems evading human control; governments or institutions deploying AI in ways that undermine democratic values; and power and wealth becoming more concentrated instead of more widely shared.[281]

The report makes several recommendations, including – notably – proposals for mass restructuring of the U.S. economy akin to the New Deal and including increases of capital-gains and corporate taxes.[282]

> On this path to superintelligence, there are clear steps we need to take today. People are already concerned about what AI will mean for their lives—whether their jobs and families will be safe, and whether data centers will disrupt their communities and raise energy prices. AI data centers should pay their own way on energy so that households aren't subsidizing them; and they should generate local jobs and tax revenue. Governments should implement common-sense AI regulation—not to entrench incumbents through regulatory capture but to protect children, mitigate national security risks, and encourage innovation.[283]

2. A.I. Legislation or Regulation?

Governmental bodies around the globe have taken action to address the exponential evolution of A.I. – such as the EU Artificial Intelligence Act[284] However, thus far, legislation and regulation of A.I. in the United States has been largely disregarded, with the exception of some individual states.[285] There is a growing friction between states that wish to impose regulations and the current administration's preference to permit A.I. to grow unhindered.

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[278] *Industrial Policy for the Intelligence Age: Ideas to Keep People First*, OPEN AI (April 2026) (https://openai.com/index/industrial-policy-for-the-intelligence-age/) (available in PDF: https://cdn.openai.com/pdf/561e7512-253e-424b-9734-ef4098440601/Industrial%20Policy%20for%20the%20Intelligence%20Age.pdf).

[279] *E.g.*, MICHAEL LIEDTKE and DAVID KLEPPER, What to know about the clash between the Pentagon and Anthropic over military's AI use, Associated Press (Updated 4:30 PM CDT, February 28, 2026) (https://apnews.com/article/anthropic-pentagon-ai-dario-amodei-hegseth-0c464a054359b9fdc80cf18b0d4f690c).

[280] *Anthropic PBC v. U.S. Department of War et al*, 3:26-cv-01996-RFL (N.D.C.A. (San Francisco) filed March 9, 2026).

[281] *Supra* note 278, at 3.

[282] *E.g.*, *id* at 3-4, 6.

[283] *Id.* at 4.

[284] Artificial Intelligence Act (Regulation (EU) 2024/1689) (available at https://eur-lex.europa.eu/eli/reg/2024/1689/oj). *See also* https://artificialintelligenceact.eu/.

[285] *E.g.*, *Texas Responsible Artificial Intelligence Governance Act, HB 149, 89th Reg. Sess. (Tex. 2025); See generally,* TEX. BUS. & COM. CODE ANN. §§ 551.001-554.103.

3. **A.I. in Education, Law Schools, and Early Careers**
   - "Cognitive offloading is described as a phenomenon where people want to offload cognitive tasks and have AI help them do it rather than doing it themselves"[286]
   - "How are law schools using AI and how will AI shape the future of legal practice?"[287]
   - "Perfect homework, blank stares: Why colleges are turning to oral exams to combat AI"[288]
   - "AI case study for law professors: How to build complimentary teaching tools"[289]

4. **A.I. in Agriculture – a few examples…**
   - Virtual Fencing[290]
   - Packers and processors - mass production operations, monitoring, testing, logistics, inspections, etc.[291]

5. **A.I.'s Next Leap**
   - Launch of Anthropic®'s Mythos™ model and "Project Glasswing" for a limited set of institutional, industrial, and governmental users. Prompting an emergency meeting of the U.S. Federal Reserve, U.S. Department of the Treasury, and numerous CEOs of America's largest banks.[292]

VIII. SUMMARY

Now, [take a breath], if you are feeling a bit overwhelmed by the lightning pace of these changes to the practice of law, do not fret.

> One step at a time is all it takes to get you there.[293]

You can do this.

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[286] Mandie Haney, *Tech students question AI's cognitive impact*, THE DAILY TOREADOR (https://www.dailytoreador.com/article/74508eb5-e616-4920-8824-5582499030cd) (March 31, 2026) (quoting Shan Xu, Associate Professor for Public Relations & Strategic Communication Management, Texas Tech University).

[287] Clarity, *How are law schools using AI and how will AI shape the future of legal practice?* (Feb. 23, 2026) (https://podcasts.apple.com/us/podcast/how-are-law-schools-using-ai-and-how-will-ai-shape/id1415134527?i=1000751121385).

[288] Jocelyn Gecker, *Perfect homework, blank stares: Why colleges are turning to oral exams to combat AI*, Associated Press (April 22, 2026) (https://apnews.com/article/college-oral-exam-ai-chatgpt-77954a19f5304bfc6e76dc92d4bef3ad).

[289] Natalie Runyon, *AI case study for law professors: How to build complimentary teaching tools*, Thomsom Reuters (March 17, 2026) (https://www.thomsonreuters.com/en-us/posts/legal/ai-law-professors/).

[290] *E.g.*, https://www.halterhq.com/.

[291] *E.g.*, Cargill, *Artificial Intelligence* (https://www.cargill.com/about/artificial-intelligence) (last visited May 1, 2026).

[292] Aimee Picchi and Richard Escobedo, *Fed Chair Jerome Powell, Treasury's Bessent and top bank CEOs met over Anthropic's Mythos model*, CBS News MoneyWatch (April 10, 2026) (https://www.cbsnews.com/news/mythos-anthropic-ai-cybersecurity-risks-powell-bessent/); ANTHROPIC, Project Glasswing (https://www.anthropic.com/glasswing).

[293] Emily Dickinson.

Materials

WOTUS Update: EPA & Corps Propose New Definition

NALC Staff Attorney, Brigit Rollins

On November 17, 2025, the Environmental Protection Agency ("EPA") together with the United States Army Corps of Engineers ("the Corps") announced a proposed rule to redefine the term "waters of the United States" under the Clean Water Act ("CWA"). The intent of the proposal is to bring the definition of waters of the United States, commonly referred to as WOTUS, in line with the United States Supreme Court 2023 decision ***Sackett v. EPA*, 566 US 120 (2023)**. This proposal marks the sixth time since 2015 that the regulatory definition of WOTUS has changed and is likely to prompt litigation after it is formally finalized. The proposal has been published the Federal Register and is currently open for public comment through January 5, 2026.

Background CWA, Current WOTUS Rule, and *Sackett*

The CWA of 1972 is the leading federal water pollution statute in the United States. The purpose of the Act is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). To achieve this goal, the CWA has established permitting programs to limit the amount of pollution discharged into waters and wetlands. Under the National Pollution Elimination System ("NPDES") program, it is illegal for anyone to discharge a pollutant from a discernable, concrete source into "navigable waters" without first receiving a permit from EPA. 33 U.S.C. § 1342. Similarly, the 404 permitting program prohibits the discharge of "dredged or fill material" into "navigable waters" without a permit from the Corps. 33 U.S.C. § 1344. Crucially, both the NPDES and 404 permitting programs cover activities that occur within "navigable waters." Although the term "navigable waters" is a legal term of art which is generally understood to refer to waters which can be used to facilitate interstate or foreign commerce, the CWA defines the term as "waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7). However, the CWA does not define the term "waters of the United States." Instead, it has been left up to EPA and the Corps to define the term.

In the decades since the CWA was passed, crafting a lasting definition of WOTUS has been a struggle for the agencies and courts, and the formal regulatory definition has changed several times. A full timeline of the different definitions of WOTUS is available here. Most recently, the definition of WOTUS was revised in 2023, first through a finalized rulemaking conducted by EPA during the Biden administration, and then again following the Supreme Court's ruling in *Sackett v. EPA*. Under the initial 2023 final rule, the definition of WOTUS included five categories of waters: (1) traditional navigable waters that could be used in

interstate for foreign commerce, the territorial seas, and interstate waters including interstate wetlands; (2) impoundments of waters otherwise identified as WOTUS; (3) tributaries of traditionally navigable waters or impoundments that met either the relatively permanent standard or significant nexus test articulated by the Supreme Court in ***Rapanos v. US*, 547 US 715 (2006)**; (4) wetlands adjacent to any WOTUS with "adjacent" understood to mean neighboring, bordering, or contiguous; and (5) all other lakes, ponds, streams, and wetlands that satisfied either the relatively permanent standard or significant nexus test. Further information on the initial 2023 WOTUS definition can be found here.

The initial 2023 WOTUS rule fully incorporated both the relatively permanent standard and the significant nexus test which stem from the Supreme Court's decision in *Rapanos v. US*. In that case, the Supreme Court was asked to consider the degree to which wetlands could be included in the definition of WOTUS. The Court was unable to reach a majority opinion, instead issuing a plurality opinion and a concurring opinion. The plurality opinion articulated the relatively permanent standard which would extend the definition of WOTUS to those waters which are "relatively permanent, standing or continuously flowing" and then to those wetlands which share a "continuous surface connection" with such waters. The concurring opinion, on the other hand, crafted the significant nexus test which extended the WOTUS jurisdiction to those wetlands that share a "significant nexus," with a water that is already recognized as a WOTUS. A significant nexus would exist if a wetland "significantly affect[s] the chemical, physical, and biological integrity" with a recognized WOTUS.

Weeks after the first 2023 definition of WOTUS was finalized, the Supreme Court released its decision in *Sackett v. EPA*. Like in *Rapanos v. US*, the Court in *Sackett v. EPA* was asked to consider to what extent wetlands should be included in the WOTUS definition. Specifically, the plaintiffs specifically asked the Supreme Court to formally overturn the significant nexus test and adopt the relatively permanent standard. Ultimately, the Court did just that, concluding that the term "waters" in "waters of the United States" refers to "only those relatively permanent, standing or continuously flowing bodies of water [...] described in ordinary parlance as streams, oceans, river, and lakes" and to wetlands that are "indistinguishable" from such waters due to a continuous surface connection.

Following the Supreme Court's decision in *Sackett v. EPA*, EPA issued what is known as the Conforming Rule to revise the WOTUS definition in light of the Court's ruling. Issued in August 2025, the Conforming Rule cut references to the significant nexus test from the WOTUS definition and clarified that the word "adjacent" with respect to adjacent wetlands meant "having a continuous surface connection." The rule also noted that only those

tributaries of navigable waters which satisfy the relatively permanent standard would be considered WOTUS. To learn more about the Conforming Rule, click here.

When the Trump administration took office in 2025, it announced an intention to revisit numerous environmental regulations, including the definition of WOTUS. After holding a series of listening sessions with stakeholders across the county, EPA and the Corps have released their latest proposal to redefine the term.

Proposed WOTUS Definition

According to EPA, its latest WOTUS proposal has two primary goals: to bring the definition in line with *Sackett v. EPA* and to provide more clarity to landowners and the public as to which waters fall under the CWA's permitting jurisdiction. To that end, it is proposing to include five categories of waters in the definition of WOTUS and is introducing new definitions intended to clarify when a water is relatively permanent and what constitutes a continuous surface connection.

Under the proposal, the following categories of waters would be considered WOTUS:

(1) Traditionally navigable waters which may be used to facilitate interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide and the territorial seas.
(2) Impoundments of waters otherwise identified as WOTUS.
(3) Tributaries of traditionally navigable waters which are relatively permanent, standing or continuously flowing.
(4) Wetlands adjacent to a traditionally navigable water or tributary.
(5) Lakes and ponds that do not fall into the above categories but which are relatively permanent, standing or continuously flowing and share a continuous surface connection with a traditionally navigable water or tributary.

Importantly, the proposal would not include interstate waters as a category of WOTUS. This is a departure from previous WOTUS definitions, almost all of which have included interstate waters as WOTUS. These categories also differ from previous WOTUS definitions by specifying that waters which fall under category five must not only be relatively permanent but must also share a continuous surface connection with a traditionally navigable water or tributary to be considered WOTUS. Under past definitions, the continuous surface connection standard was applied only to wetlands.

Along with making changes to the categories of waters considered WOTUS, the proposed rule also includes new definitions for the terms "relatively permanent," "continuous surface connection," and "tributary." Under the proposed rule, "relatively permanent" would be defined as "standing or continuously flowing bodies of surface water that are

standing or continuously flowing year-round or at least during the wet season." EPA notes that "the wet season" would refer to a predictable and extended period of time when surface water is present in a geographical feature in response to an annual wet season when precipitation is greater than average. However, that would not include what are known as "ephemeral waters" which are geographic features that contain surface water only in direct response to precipitation. Under this definition of relatively permanent, a river which periodically dries out in the late summer months, but which flows during the winter and spring after increased rain and snowmelt could be considered a WOTUS, while a creek that is dry most of the time and flows only after a heavy rain would likely not be considered a WOTUS.

The proposed rule would define "continuous surface connection" as "having surface water at least during the wet season and abutting (*i.e.*, touching) a jurisdictional water." EPA clarifies that this definition presents a two-pronged test which requires a wetland or waterbody to both: (1) abut, as in directly touch, a traditionally navigable water or tributary; and (2) have surface water at least during the wet season. Wetlands or waters with a sub-surface connection to a recognized WOTUS – meaning connected to a WOTUS by water that is not on the surface but is not deep enough underground to be considered groundwater – would not be considered a WOTUS under this definition. Additionally, EPA notes that CWA permitting jurisdiction would only be extended to the portion of a wetland which retains surface water at least during the wet season.

Finally, the proposal would define "tributary" as "a body of water with relatively permanent flow, a bed and bank, that connects to a downstream traditional navigable water or the territorial seas, either directly or through one or more waters or features that convey relatively permanent flow." Under this definition, a tributary to a traditionally navigable water that has a discernable bank and bed, and which has surface water at least during the wet season could be considered a WOTUS. However, a water without a bank and bed, such as a grassed waterway, would likely not be considered a WOTUS even if it held surface water year-round.

Besides defining what a WOTUS is, the proposal also strengthens language describing what a WOTUS is not. Particularly relevant to agriculture, the proposal would strengthen existing exclusions for prior converted cropland. The term "prior converted cropland" comes from the Wetland Conservation provisions of the 1985 Farm Bill, better known as Swampbuster. Prior converted cropland refers to wetland areas which were converted to agricultural land capable of producing a crop prior to December 23, 1985. Although prior converted cropland is currently excluded from the definition of WOTUS, the proposed rule would clarify that such land would only lose that exclusion and become subject to CWA

jurisdiction if it were abandoned and reverted to a wetland that met the definition of "adjacent wetland" under WOTUS.

Next Steps

The proposed rule was published in the Federal Register on November 20, 2025, formally initiating a period of public comment that is currently set to end on January 5, 2026. While public comments may address any part of the proposal, EPA is specifically requesting comment on the following: whether WOTUS should be limited to only traditionally navigable waters and those wetlands that share a continuous surface connection with such waters; whether "relatively permanent" should include only those waters that contain surface water year-round instead of waters that contain surface water at least during an annual wet season; and whether a wetland must have a continuous surface connection with a navigable water or tributary year-round to be considered a WOTUS.

After the period of public comment concludes, EPA and the Corps will review the comments it receives before drafting and issuing a final rule. Once the rule becomes finalized, it is very likely that it will be challenged in court. Since 2015, all final regulations defining WOTUS have led to lengthy legal battles that often result in separate WOTUS definitions being applied across the country as the court cases proceed. Importantly, the last time a court was asked to consider whether the regulatory definition of WOTUS complied with the text of the CWA, the doctrine of *Chevron* deference was still the law of the land. Under *Chevron* deference, courts were instructed to defer to agency interpretations of ambiguous statutory language so long as the interpretation was reasonable. However, in 2024, the Supreme Court overturned *Chevron* deference in its landmark decision ***Loper Bright Enters. v. Raimondo*, 603 US 369 (2024)**. According to the Supreme Court, judges should not defer to agency statutory interpretations but should themselves state what the law is. This means that judges asked to consider whether a future WOTUS definition complies with the CWA may rely on judicial interpretations of the statute rather than agency interpretations.

The new proposed WOTUS definition has kicked off another cycle of attempting to define a crucial, but ambiguous term that determines when someone needs a CWA permit and when they do not. Whether the final definition will satisfy EPA's goals of crafting a durable definition remains to be seen.

The Deal With Dicamba: Products Registered, Lawsuit Filed
NALC Staff Attorney, Brigit Rollins

On February 6, 2026, the Environmental Protection Agency ("EPA") announced that it had re-registered three dicamba-based herbicides for direct, over-the-top use on dicamba-resistant soybeans and cotton. The decision came exactly two years after a federal court in Arizona overturned the previous registration decision for over-the-top use of dicamba and ruled that the decision violated the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"). EPA's latest registration decision marks the fourth time that the agency has approved dicamba for over-the-top use since 2016. All three of the previous registration decisions have faced legal action, a trend that will hold true for the latest registration which is already facing a lawsuit. Currently, over-the-top dicamba products will be available during the 2026 and 2027 growing seasons.

Background

The herbicide dicamba has been used in the United States since the 1960s to target broadleaf plant species. More recently, it has been used to control palmer amaranth, also known as pigweed, which has become resistant to glyphosate. Before 2016, dicamba was used as a pre-emergent. It was primarily applied in late winter or early spring before crops had been planted. This limitation was largely due to dicamba's tendency to volatize, a process by which a pesticide evaporates into the air and can drift far off target. However, in 2016, EPA for the first time approved a new, low volatility dicamba product developed by the pesticide manufacturer Monsanto (now owned by Bayer) for use directly on soybean and cotton seeds that had been genetically modified to resist dicamba.

Ultimately, EPA's decision to register dicamba for over-the-top use in 2016 lead to the registration of additional low volatility dicamba products such as BASF's Engenia and Syngenta's Tavium. It also resulted in a series of lawsuits filed by environmental groups who claimed that EPA's 2016, 2018, and 2020 decisions to approve low volatility dicamba herbicides for use directly on crops violated both FIFRA and the Endangered Species Act ("ESA"). Under FIFRA, a pesticide product can only be sold and distributed in the United States after being approved by EPA. EPA may only approve a pesticide product for use after concluding that the product will not cause "unreasonable adverse effects on the environment." 7 U.S.C. § 136a(c)(5)(C). The ESA requires all federal agencies to ensure that their proposed actions will not jeopardize the existence of threatened and endangered species by engaging in consultation with the United States Fish and Wildlife Service. 16 U.S.C. § 1536(a). The plaintiffs who challenged EPA's 2016, 2018, and 2020 dicamba registrations decisions claimed that EPA failed to meet both those standards.

In 2020, the Ninth Circuit Court of Appeals issued a ruling to overturn EPA's 2018 registration decision after concluding that the agency had failed to show that registration of over-the-top dicamba would not cause "unreasonable adverse effects on the

environment." The ruling was issued in June of that year, creating uncertainty for farmers who had purchased dicamba-resistant seeds to use with dicamba herbicides during that growing season. EPA ultimately reapproved over-the-top dicamba products for use later that year. That decision faced another lawsuit again filed by plaintiffs who claimed that EPA had violated both FIFRA and the ESA. That lawsuit also resulted in a win for the plaintiffs when a federal court in Arizona overturned EPA's decision after concluding that the agency had failed to comply with the procedural requirements of FIFRA. That decision was issued in February 2024.

Following the Arizona court's ruling, over-the-top dicamba was not approved for use during the 2024 and 2025 growing seasons. During that time, Bayer, BASF and Syngenta all resubmitted applications to EPA to have their low volatility dicamba formulations once again registered for use on dicamba-resistant soybean and cotton crops. In August 2025, EPA proposed to register three dicamba products for over-the-top use. The proposal included various new use restrictions intended to further reduce volatility and limit pesticide exposure to wildlife species. EPA sought an unconditional registration for the products, meaning that they would be available for at least fifteen years. Following a period of public comment, EPA issued a final registration decision on February 6, 2026.

Final Registrations

The final registration decision covers three dicamba herbicides: Stryax, manufactured by Bayer, previously known as XtendiMax; Engenia, manufactured by BASF; and Tavium, manufactured by Syngenta. Each of the three products has been approved for use on both dicamba-resistant soybean and cotton crops. The registration decision includes a variety of use requirements which will be included on the labels for each of the three products. Some of those requirements have been carried over from past dicamba approval decisions while others have been introduced for the first time. Importantly, in a departure from the initially proposed registration rule, the final decision approves a conditional registration decision which will expire on February 6, 2028, which means that the approved products will be available only for the 2026 and 2027 growing seasons.

The newly approved labels for over-the-top dicamba include various use requirements that are intended to ensure that applying dicamba directly to crops will not cause "unreasonable risk to human health or the environment." Many of the requirements are aimed at reducing spray drift and volatility. Carry over requirements that were included on previous over-the-top dicamba labels include:

- Mandatory use of an approved drift reduction agent;
- Maintaining a 240-ft spray drift buffer during application;

- A prohibition on applications during a temperature inversion, within 48 hours of a forecasted rainfall, if the soil is saturated, or within on hour after sunrise or after two hours before sunset;
- A requirement that applications take place only when wind speed is between 3-10 miles per hour;
- A complete prohibition on aerial applications.

Along with these carry over requirements, the recently approved labels include new restrictions intended to further reduce drift and to satisfy new conservation requirements under EPA's Herbicide Strategy. More information on that policy is available here. The new requirements include:

- An annual limit of two applications of 0.5 lbs of dicamba per acre – this is a reduction from the previous annual limit of four applications;
- Use of a volatility reduction agency at 40 oz. per acre for every application;
- Achieving 3 runoff mitigation points from EPA's certified conservation practices menu with the possibility of 6 points needed in designated pesticide use limitation areas – this requirement is in compliance with EPA's Herbicide Strategy;
- A prohibition on applications is the temperature is forecasted to be at or above 95°F.

A more complete look at the various application requirements that will appear on the labels for the three over-the-top dicamba products can be found here, in EPA's initial announcement, and here in documents from the final rule.

In a departure from the proposed registration decision made available last fall, the final registration decision has been issued conditionally for a period of two years. Under FIFRA, EPA may grant a conditional registration when it concludes that there is enough evidence to suggest that registering the pesticide product temporarily will not cause unreasonable adverse reactions to human health or the environment, but that more data is needed before EPA can make the decision to register the pesticide unconditionally. To date, all registrations of over-the-top dicamba have been conditional. According to the 2026 registration decision, the dicamba products will be available for the 2026 and 2027 growing seasons. EPA will need to make another registration decision if over-the-top dicamba is to remain available in 2028 and beyond. More information on the difference between conditional and unconditional pesticide registrations is available here.

New Lawsuit

Shortly after the new over-the-top dicamba labels were approved, a coalition of environmental groups initiated a legal challenge against EPA for its decision. The plaintiffs are the same groups who successfully saw prior over-the-top dicamba approval decisions

overturned by courts in 2020 and 2024. The lawsuit has been filed directly in the Ninth Circuit Court of Appeals. Typically, lawsuits challenging final agency decisions will be filed in federal district courts, but FIFRA grants citizens the right to challenge pesticide registration decisions directly with circuit courts.

At the moment, it is too early to say how the case will resolve or even what the specific arguments raised by the plaintiffs will be. The case was initiated by the plaintiffs filing a petition with the Ninth Circuit asking the court to review EPA's registration decision for allegedly violating both FIFRA and the ESA. The plaintiffs will lay out the reasons why they believe the registration decision violates federal law when they submit their opening brief to the court. Currently, the plaintiffs' opening brief is due on May 11 and EPA's response brief defending their registration decision is due on June 10. These dates may be adjusted if either party requests additional time to file. The court will not rule until it has seen arguments from both sides.

Lawsuits challenging federal decisions often take some time to move through the court system. When these same plaintiffs challenged EPA's original 2016 decision to approve a dicamba product for over-the-top use, the lawsuit failed to reach the trial stage before the two-year conditional approval expired. When the plaintiffs filed again to challenge EPA's 2018 registration decision for over-the-top dicamba, they asked the court to grant an expedited trial so that the challenge could be heard before the 2018 decision expired. It is possible that the plaintiffs could make such a request here so that the case can be heard by a judge while the 2026 approval decision is still active. If the court hears the case before the recent approval decision expires, it is possible that the court could overturn EPA's approval and over-the-top dicamba could once again be made unavailable as the result of a court decision. On the other hand, the court could uphold EPA's approval decision which could provide insight into future availability. If the case is not expedited, it is possible that the 2026 approval decision expires before the court can hear the matter. Whatever the outcome of this lawsuit, it could have an impact on continued availability of over-the-top dicamba.

What Next?

Currently, three over-the-top dicamba products are available for use in 2026 and 2027. While this provides clarity for the next two growing seasons, additional EPA action will be necessary if over-the-top dicamba is to remain available after February 6, 2028. Although this decision has provided greater certainty after two years where over-the-top dicamba was unavailable, the recently filed lawsuit could call that certainty into question as it moves through the court system.

Federal Court Strikes Down 2019 & 2024 ESA Regulations

NALC Staff Attorney, Brigit Rollins

On March 30, 2026, a federal court in California issued a ruling to overturn several Endangered Species Act ("ESA") regulations adopted by the Trump administration in 2019 and the Biden administration in 2024. The plaintiffs in ***Ctr. for Biological Diversity v. U.S. Dep't of Interior*, No. 24-cv-04651 (N.D. Cal. Mar. 30, 2026)** challenged six rules in total with the court ultimately concluding that four violated the statutory text of the ESA. Earlier this year, the United States Fish and Wildlife Service ("FWS") together with the National Marine Fisheries Service ("NMFS") proposed a slate of new ESA regulations intended to restore the rules established under the first Trump administration. While those rules have yet to be finalized, it is possible that the recent court ruling may offer some insight into how courts may ultimately treat those regulations.

ESA Overview

The ESA was enacted in 1973 for the purpose of conserving species at risk of extinction and the habitats upon which those species depend. 16 U.S.C. § 1531(b). The statute is jointly administered by FWS and NMFS (collectively, "the Services") which are responsible for creating and maintaining a list of species that are classified as either "threatened" or "endangered" depending on the level of risk those species face. 16 U.S.C. § 1533. Once a species is added to that list, it becomes protected under the ESA.

When the Services list a species for protection under the ESA, they must also designate critical habitat for the species. 16 U.S.C. § 1533(a)(3)(A)(i). The ESA defines critical habitat as specific geographical areas which are "occupied by the species, at the time it is listed [...] on which are found those physical or biological features essential to the conservation of the species" or areas which are not occupied by the species at the time of listing but the Services have determined are "essential for the conservation of the species." 16 U.S.C. § 1532 (5)(A).

Along with requiring the Services to list species under the ESA and designate critical habitat for those species, the ESA also requires all other federal agencies to consult with the Services to avoid harming listed species or designated critical habitat. Specifically, the ESA requires each federal agency to ensure that any action it "authorize[s], fund[s], or carrie[s] out" is "not likely to jeopardize the continued existence of any [listed] species or result in the destruction or adverse modification of" critical habitat. 16 U.S.C. § 1536(a)(2). To initiate this process, the agency taking action will determine whether its action "may affect" listed species. 50 C.F.R. § 402.13. If the agency concludes that its action "may affect" a listed species, it must reach out to the Services to determine whether the action is

"likely to adversely affect" the species. 50 C.F.R. § 402.13 If so, then the Services must engage in formal consultation, a process which requires the consulting Service to prepare a document known as a Biological Opinion ("BiOp"). 50 C.F.R. § 402.13 The BiOp will evaluate more thoroughly the expected impacts of the agency's action and if it concludes that the action is likely to jeopardize the continued existence of a protected species or result in the destruction or adverse modification of critical habitat, it must also include mitigation measures the agency can take to avoid causing such negative impacts. 50 C.F.R. § 402.13. When making a determination about the impacts an agency action may have on listed species, the Services must base their conclusions on "the best scientific and commercial data available." 16 U.S.C. § 1536(a)(2).

Background to the Case

Since 2019, the ESA has experienced several rounds of regulatory changes. In August 2019, the Services issued final rules to change the procedures related to the listing of species under the ESA and the consultation process between the Services and other federal agencies. A closer look at those changes is available here. The plaintiffs in *Ctr. for Biological Diversity v. U.S. Dep't of Interior* filed a lawsuit to challenge those 2019 regulations. However, following a change in Presidential administration, the court sent the matter back to the Services for review, bringing that lawsuit to an end. In 2024, the Services adopted new regulations which, according to the plaintiffs, resolved some of their concerns with the 2019 regulations but ultimately retained certain issues while introducing others. More information on the 2024 regulatory changes can be found here.

After the new regulations were finalized in 2024, the plaintiffs filed the current lawsuit to challenge six specific provisions that had been either introduced in 2019 and retained in 2024 or introduced for the first time in 2024. Following another change in Presidential administration in 2025, the Services sought to have the case either paused or dismissed, citing another round of updated ESA regulations that had been proposed in 2025 which the Services expect to finalize before the end of 2026. However, the court concluded that neither pausing or dismissing the case would be appropriate, noting that it would be better for the court to "provide the [Services] with its reading" before the new regulations are final so that the Services can take into account any "problems" the court might find.

Many of the regulatory changes proposed in 2025 were identical to those that had been made in 2019 before being modified in 2024. Although various lawsuits were filed to challenge the 2019 rules, they were largely paused or dismissed after the Services announced that they would revisit those regulations following the transition from the Trump administration to the Biden administration. For that reason, no court ever fully considered whether the 2019 rules complied with the ESA. The recent decision in *Ctr. for Biological*

Diversity v. U.S. Dep't of Interior represents the first time a court has considered the legality of those regulations and may provide some insight into how the rules proposed in 2025 may be viewed by courts after they are finalized.

Recent Court Decision

The plaintiffs in *Ctr. for Biological Diversity v. U.S. Dep't of Interior* asked the court to review six ESA regulations and consider whether they violated the statutory requirements of the ESA. Four of those regulations are related to the consultation process while the other two are concerned with the designation of critical habitat. Of those six, the court found that four violated the ESA and should be overturned. The other two were upheld.

"Effects of the Action"

During agency consultation with the Services, the ESA requires the Services to evaluate the effects of the agency action on listed species and critical habitat to determine whether jeopardy of a species or the destruction or adverse modification of critical habitat is likely to occur. 16 U.S.C. § 1536. Before 2019, the ESA regulations defined "effects of the action" as "the direct and indirect effects of an action on the species or critical habitat." 50 C.F.R. § 402.02 (2018). The 2019 rules changed the definition of "effects of the action" to "all consequences to listed species or critical habitat that are caused by the proposed action" and clarified that a "consequence is caused by the proposed action if it would not occur but for the proposed action and it is reasonably certain to occur." 50 C.F.R. § 402.02 (2019). The Services left this definition in place when it amended the regulations in 2024.

The plaintiffs argue that this violates the ESA's requirement that the Services rely on the best scientific data available when considering the impacts an agency's action may have on listed species and that it the phrase "reasonably certain to occur" conflicts with the ESA requirement that the Services consider whether jeopardy of a species is "likely" to occur. The court agreed with the plaintiffs on both arguments. First, the court concluded that the 2019 rule violates the ESA's "best available data" requirement because the ESA "imposes a mandatory duty on the Services to analyze the likelihood of jeopardy or harm to habitat using the best available data." According to the court, the best scientific data available may not be the same as impacts that are "reasonably certain to occur." Next, the court concluded that the provision of the 2019 regulation that requires the Services to only consider those impacts to species and habitat which are "reasonably certain to occur" is contrary to the ESA requirement that Services consider whether jeopardy of a species or harm to habitat is "likely." Because what is "likely" may not necessarily include what is "reasonably certain to occur," the court held that this regulation violated the ESA and should be overturned.

Consideration of Mitigation Measures

When drafting a BiOp, the ESA regulations require the Services to take into account "any beneficial actions" taken or proposed to be taken by the action agency. 50 C.F.R. § 402.14(g)(8). The purpose of this rule is to ensure that the Services consider any activities that are beneficial to listed species that the consulting agency plans to include as part of its proposed action when determining what the impacts of that action could be to protected wildlife. In 2019, the Services amended the ESA rules to clarify that the Services should take such beneficial activities into consideration without "any additional demonstration of binding plans." 50 C.F.R. § 402.14(g)(8). In other words, the 2019 rules require the Services to give proposed beneficial activities the same consideration as any other portion of the agency action even if the agency has not committed to carrying out those activities.

The plaintiffs argued that this violates the ESA's requirement that the Services "insure" against jeopardy of listed species by "forcing them to consider amorphous, non-binding mitigation plans in making no-jeopardy findings." In it's opinion, the court agreed with the plaintiffs, concluding that the 2019 rule violated the ESA because it does not satisfy the statutory requirement that the Services "insure" against harm to species or habitat. According to the court, the ESA requires beneficial activities to be excluded from consideration unless they are binding.

Definition of "Destruction or Adverse Modification"

Under the ESA, the Services must "insure" that federal agency actions will not cause jeopardy to listed species or "destruction or adverse modification" to designated critical habitat. 16 U.S.C. § 1536(a)(2). Prior to 2019, the ESA regulations defined "destruction or adverse modification" as "a direct or indirect alteration that appreciably diminishes the value of critical habitat for the conservation of a listed species." 50 C.F.R. § 402.02 (2018). In 2019, that definition was amended to "a direct or indirect alteration that appreciably diminishes the value of critical habitat *as a whole* for the conservation of a listed species." 50 C.F.R. § 402.02 (2019). That definition was retained in the 2024 regulations.

The plaintiffs argue that introducing the language "as a whole" violates the ESA by replacing the statutory requirement to avoid all destruction or adverse modification of critical habitat with a regulatory provision that allows at least some destruction or adverse modification of critical habitat. The court agreed, concluding that the text of the ESA "prohibits adverse modification entirely" and that the 2019 rule violated that requirement by permitting at least some adverse modification to critical habitat.

Duty to Request Reinitiation of Consultation

Before 2024, the ESA regulations concerning agency consultation required both the agency taking action or the consulting Service to request reinitiation of consultation under certain circumstances. 50 C.F.R. § 402.16(a) (2023). In 2024, the Services amended their regulations so that only the agency taking action is required to request reinitiation of consultation. The plaintiffs claim that the Services unlawfully rescinded their duty to request reinitiation of consultation, arguing that the Services failed to provide adequate reasons to support amending the regulations. In 2024, the Services stated that they were amending the regulation to clarify that only the action agency has the authority and responsibility to initiate or reinitiation consultation. The court was not persuaded by that reasoning. According to the court, while the text of the ESA does not allow the Services to compel any federal agency to engage in consultation, nothing in the pre-2024 rule gave the Services that authority. The rule required the Services to request reinitiation in certain circumstances but did not grant the Services the authority to require the federal agency to reinitiate consultation. Because the Services failed to provide a persuasive reason for changing a rule that had been in place for 25 years, the court found the change to be unlawfully arbitrary and concluded that it should be overturned.

Rules Upheld

Finally, the court considered the last two regulations challenged by the plaintiffs. While the court overturned the first four regulations it considered, it upheld the last two after concluding that they did not violate the ESA.

The ESA defines "threated species" as "any species which is likely to become an endangered species within the foreseeable future[.]" 16 U.S.C. § 1532(20). Before 2024, the ESA regulations required the Services to defined "foreseeable future" as extending "only so far into the future as the Services can reasonably determine that both the future threats and the species' responses to those threats are likely." 50 C.F.R. § 424.11(d) (2023). In 2024, the Services amended that definition to "as far into the future as the Services can make reasonably reliable predictions about the threats to the species and the species' responses to those threats." 50 C.F.R. § 424.11(d) (2025). In making this change, the Services replaced language requiring that they "reasonably determine" that threats to a species are "likely" with language that the Services make "reasonably reliable predictions" about those same threats. The plaintiffs argued that the new language contradicts the ESA requirement that the Services base their conclusions on the "best available data," but the court disagreed. In its ruling, the court concluded that the two phrases "appear synonymous" and that to determine whether an effect is "likely" requires making a "reliable prediction" about that effect. Because the court determined that the pre-2024 rule and the amended rule are functionally equivalent, it concluded that the rule should be upheld.

Finally, the court considered the plaintiffs' challenge to an ESA regulation concerning the designation of critical habitat. The text of the ESA requires the Services to designate critical habitat at the same time it lists a species "to the maximum extent prudent and determinable." 16 U.S.C. § 1533(a)(3). Before 2024, the ESA regulations identified two limited circumstances where designating critical habitat at the same time a species is listed would not be prudent and determinable. In 2024, the Services modified the regulation to include two other circumstances where designating critical habitat would not be necessary. The plaintiffs argue that the new rule violates the ESA by unlawfully expanding the conditions under which the Services may find that designating critical habitat is not prudent and determinable. However, the court disagreed, citing previous court decisions which held that the Services could only make a not-prudent finding with respect to critical habitat would be beneficial to the species. Because the two additional circumstances outlined in the 2024 ruling described situations where reaching a not-prudent finding would be beneficial to the species, the court found that the regulation complied with the ESA and should be upheld.

Going Forward

Since 2019, the ESA has seen several rounds of regulatory updates. So far, this is the first time a court has reviewed any of the updated rules on the merits to consider whether they comply with the statutory requirements of the ESA. In 2025, the Services launched a new round of regulatory changes, many of which mirror the changes made in 2019. While those rules have yet to be finalized, the ruling in *Ctr. for Biological Diversity v. U.S. Dep't of Interior* may offer some insight into how courts will treat those regulations once they are final. For those who are regulated under the ESA, remaining informed on regulatory changes is helpful to understand how the law will be implemented going forward.

2026 Update on State Pesticide Liability Limitation Bills

NALC Staff Attorney, Brigit Rollins

The 2026 legislative session is currently in process for most states and legislative trends have begun to emerge. One of those trends, familiar from the 2025 and 2024 legislative sessions, focuses on state regulation of pesticide labels. At least six states have introduced bills to limit the liability of pesticide companies in injury and product liability lawsuits by establishing uniformity between federal and state pesticide labeling requirements. Additionally, the draft farm bill recently introduced to the federal Congress includes a provision to clarify the authority of states under the Federal Insecticide,

Fungicide, and Rodenticide Act ("FIFRA"). While not all of these bills are guaranteed to pass, they indicate a legislative trend that is relevant to those in the agricultural industry.

Background

Over the last decade, there has been a marked increase in the number of lawsuits filed by plaintiffs who claim that exposure to a particular pesticide product caused them to suffer an injury or illness. The best known of these cases have involved plaintiffs who claim that glyphosate, the active ingredient in the widely used herbicide Roundup, have caused them to develop non-Hodgkin's lymphoma. However, cases have also been filed over exposure to paraquat, chlorpyrifos, and various other commonly used pesticide products. Regardless of the specific pesticide implicated in a particular lawsuit, across the board the plaintiffs in pesticide liability litigation raise similar legal claims which arise out of state law. One of those legal claims, the claim that pesticide manufacturers failed to warn consumers about the health risks allegedly associated with exposure to a certain pesticide product, has become central to pesticide liability litigation.

Failure to warn claims arise out of state law and are most often brought by plaintiffs in product liability lawsuits to claim that the manufacturer of a particular product failed to warn consumers about potential injuries that can result from normal use of the product. For example, a plaintiff who alleges failure to warn in a pesticide liability lawsuit involving glyphosate will argue that Bayer, the manufacturer of glyphosate, failed to warn consumers that exposure to the herbicide could cause the user to develop cancer. Pesticide manufacturers have pushed back on these claims by arguing that pesticides are regulated under FIFRA, a federal law that requires all pesticides bear a federally approved label to be legally sold in the United States. FIFRA specifically prohibits states from adding language to a federally registered pesticide label that is "in addition to or different from" federal requirements. 7 U.S.C. § 136v(b). Additionally, part of registering a pesticide label requires the Environmental Protection Agency ("EPA") to conduct a human health risk assessment for the pesticide and make a carcinogenicity classification. Pesticide manufacturers such as Bayer have argued that failure to warn claims in pesticide injury lawsuits should be categorically dismissed because the only way to avoid the claims would be for the manufacturer to add warning statements to their pesticide products that are not required under federal law.

The question of whether failure to warn claims should be permitted in pesticide liability lawsuits continues to make its way through the court system, with the United States Supreme Court announcing in early 2026 that it would hear the issue. In the meantime, some states are looking to pass legislation that would make a federally registered pesticide label a complete defense to failure to warn claims. In 2025, Georgia and North Dakota both

passed laws to make a federally registered pesticide label a complete defense to state law failure to warn claims. More states may follow in 2026.

Pesticide Liability in 2026

So far, at least six states and the federal government have introduced bills to limit liability for pesticide manufacturers in 2026. The bills are largely similar, with a handful of differences.

Florida

Florida introduced HB 443 in November 2025. It states that any state law action based on failure to warn "may not be brought or maintained" against a pesticide product that has been registered by EPA under FIFRA so long as the label for such pesticide has been approved by EPA, is consistent with the most recent human health risk assessment performed under FIFRA, or is consistent with EPA's carcinogenicity classification for the pesticide. In other words, should HB 443 become law, a federally approved pesticide label would be a complete defense against a state law claim that the pesticide manufacturer failed to warn consumers about an alleged health risk of using the pesticide. Importantly, HB 443 would not shield a pesticide manufacturer from liability if EPA determines that the manufacturer "knowingly withheld, concealed, misrepresented, or destroyed material information" regarding the human health impacts of the pesticide in order to obtain a federally approved label.

HB 443 is currently before the Florida House of Representatives Civil Justice & Claims Subcommittee. An identical bill, SB 518, was introduced to the Florida Senate in January 2026. State lawmakers will often introduce identical bills to both chambers of their legislature to make the process of passing legislation quicker and more efficient. Florida introduced similar legislation in 2025 but failed to pass it. The Florida legislature will adjourn on March 13. If HB 443 becomes law, it will go into effect July 1, 2026.

Kansas

HB 2476 was introduced to the Kansas legislature on January 20, 2026. Like the Florida bill, HB 2476 provides that a pesticide product will satisfy any state law requirements for health and safety warnings so long as it bears a federally registered label that is either consistent with the most recent human health assessment performed for the pesticide under FIFRA or is consistent with EPA's carcinogenicity classification for the pesticide. The bill would apply only to legal claims related to failure to warn. It would not provide a defense against claims that are unrelated to product warnings or labeling.

HB 2476 passed the Kansas House of Representatives on January 30, 3036 and is currently before the Kansas Senate Committee on Agriculture and Natural Resources. If HB 2476 passes the Kansas Senate and is signed into law by the state's governor, it would become law as soon as it is officially published in the Kansas code. The Kansas legislature will adjourn on March 10.

Kentucky

Legislators in Kentucky introduced SB 199 on February 13, 2026. Should it become law, SB 199 would amend Kentucky law so that a federally registered pesticide label would be considered a "sufficient warning label" for any state law concerning the duty to warn. Like the bill introduced in Kansas, SB 199 would only make a federally registered pesticide label a defense against failure to warn claims. Legal causes of action that arise out of state law other than failure to warn would not be prohibited should SB 199 become law. Similarly, SB 199 clarifies that the defense to failure to warn claims would not apply if EPA has determined that a pesticide manufacturer "knowingly withheld, conceal, misrepresented, or destroyed" information related to the human health risks of a particular pesticide product.

SB 199 is currently with the Kentucky Senate but has not been assigned a committee for an initial hearing. The Kentucky legislature is set to adjourn on April 15.

Missouri

Lawmakers in Missouri pre-filed HB 2712 in early January before the start of the legislative session. Under HB 2712, a pesticide label that is approved by EPA, or consistent with the EPA carcinogenicity classification for the pesticide would satisfy any state requirement regarding cancer warning labels. Importantly, it would not provide complete immunity from liability to pesticide manufacturers. HB 2712 would only provide a defense to claims that the pesticide does not bear a necessary cancer warning.

This is the third year in a row that Missouri has considered a bill to limit liability for pesticide manufacturers facing failure to warn claims. In both 2024 and 2025, Missouri failed to pass the proposed legislation. Currently, HB 2712 is before the Missouri House of Representatives. The Missouri legislature will adjourn on May 30.

Tennessee

HB 809 was introduced to the Tennessee legislature in February 2025. It has been carried over into the 2026 legislative session. HB 809 provides that the manufacturer or seller of a pesticide that has been registered by EPA under FIFRA would not be liable for any civil action related to the labeling of the pesticide including failure to warn so long as the

pesticide bore a label approved by EPA at the time of sale. Like the bill introduced in Florida, HB 809 clarifies that it would not apply if EPA determines that a pesticide manufacturer "knowingly withheld, concealed, misrepresented, or destroyed material information" related to the human health risks of a pesticide to have the product federally registered.

At the moment, HB 809 is before the Tennessee House of Representatives Judiciary Committee. Identical legislation was introduced to the Tennessee Senate as SB 527 in January 2025 and passed the chamber on April 7, 2025. Should HB 809 be passed in the Tennessee House of Representatives, it appears likely to become law and would go into immediate effect upon being signed into law. The Tennessee legislature is set to adjourn on April 26.

Wyoming

While the other states that have introduced pesticide liability legislation this year have all been in regular session, Wyoming is currently in a budget session. During a budget session, the Wyoming legislature will typically focus on legislation involving the state budget. Other bills may be proposed, but non-budget legislation will only be formally introduced to the legislature if two thirds of the chamber vote to introduce it. SF 74 was received for introduction in the Wyoming Senate on February 6. The bill provides that health and safety labels for any pesticide sold in Wyoming "shall not vary in material respects" from the pesticide's federally registered label and would supersede any state law requirements related to pesticide labels or warnings.

Ultimately, SF 74 did not pass a vote to be introduced to the Wyoming Senate. It is unlikely that the bill will be further considered by the Wyoming legislature this term.

Federal Congress

On February 13, 2026, the House Committee on Agriculture released a draft Farm Bill that is currently before the Committee. The bill includes a provision titled "Uniformity of Pesticide Labeling Requirements" which, if passed into law, would limit the ability of states to modify federally registered pesticide labels. Specifically, the provision would prohibit any state or court from requiring a pesticide manufacturer to include language on a federally registered pesticide label that differs from the language approved by EPA under FIFRA. Additionally, the bill would prevent a court from holding a pesticide manufacturer liable for failing to include language on a pesticide label that differs from the language approved by EPA.

In an announcement that accompanied the release of the draft Farm Bill, the House Committee on Agriculture Chairman Glen "GT" Thomson stated that the Committee would

being marking up the bill on February 23. Following the mark up, the Committee will vote on whether to advance the bill to the full House of Representatives. If the House votes to pass the bill, it would progress to the Senate. The future of the bill is uncertain as it has been reported that several lawmakers consider the current draft to contain "poison pills" which they would be unwilling to vote for, including the pesticide labeling uniformity provision. It is unclear whether the bill will advance out of committee.

Going Forward

With the legislative session now underway for most states, the trend which emerged in 2024 and 2025 regarding pesticide labeling is continuing into 2026. So far, at least six states have introduced bills to make a federally registered pesticide label a complete defense to any state level claims that a pesticide manufacturer failed to warn consumers about a potential health risk of using a particular pesticide. Congress has also introduced language that would further limit the ability of states to require pesticide labeling language that differs from what is required by EPA. While it remains unclear which states will successfully pass a pesticide liability limitation bill in 2026, it is possible that the Supreme Court could render any further actions from states unnecessary following its decision to hear a case which directly asks whether federal pesticide law should preempt state law claims of failure to warn.

Supreme Court Agrees to Hear Pesticide Preemption Lawsuit
NALC Staff Attorney, Brigit Rollins

The United States Supreme Court has announced that it will hear oral arguments in *Durnell v. Monsanto*, a case filed by a Missouri plaintiff who claims that exposure to the herbicide Roundup and its active ingredient glyphosate caused him to develop non-Hodgkin's lymphoma. The case is one of thousands that have been filed over the last decade against Monsanto Company (now owned by Bayer) by plaintiffs who claim that using Roundup caused them to develop cancer and that Monsanto failed to warn consumers about the alleged health risk. For its part, Bayer has argued that the state law claims raised by plaintiffs in these cases are preempted by federal pesticide law and should be dismissed. After years of litigation, that question will now be presented to the Supreme Court. However the Court rules in this case will have an impact not only on ongoing litigation involving Roundup and glyphosate but may set a precedent for lawsuits involving other pesticide products.

Background: Roundup Lawsuits and *Durnell*

Roundup is one of the most widely used herbicides in the United States. It was developed in the 1970s and has been available in the United States for decades. Glyphosate, the active ingredient in Roundup, was first approved by the Environmental Protection Agency ("EPA") since 1974. Roundup is used both in agricultural and non-agricultural settings. Since the 1990s, Roundup has been an essential part of Monsanto's Roundup Ready system which paired use of the herbicide with glyphosate-resistant crop seeds to allow direct applications during the growing seasons. Commercial formulations of Roundup have been used in home and municipal landscaping for years.

Since 2015, tens of thousands of lawsuits have been filed against Bayer by plaintiffs claiming that the use of Roundup caused them to develop cancer. These cases have been filed in state courts and raise what products liability claims that arise out of state law, specifically the civil tort of failure to warn. In response, Bayer has argued that federal pesticide law preempts state law products liability claims and that such claims should be dismissed. While only a handful of the cases filed against Bayer have gone to trial, juries and judges alike have been split on the issue. While some juries have issued verdicts in favor of Bayer, finding that the pesticide manufacturer complied with the law and is not liable for a plaintiff's injuries, others have returned verdicts in favor of the plaintiffs and awarded damages in amounts exceeding $2 billion. Similarly, of the three circuit courts that have been asked to determine whether federal pesticide law preempts the plaintiffs' state law claims, the Third Circuit has held that the claims are preempted while the Ninth and Eleventh Circuits have held that they are not.

The plaintiff in *Durnell* originally filed his lawsuit against Bayer in 2019. He filed his case in state court in Missouri where he lives and where Monsanto is headquartered. Like other plaintiffs in pesticide liability cases, the plaintiff in *Durnell* raised several state law products liability claims including failure to warn. At trial, the jury concluded that Monsanto had failed to warn the plaintiff of possible health risks of using Roundup and awarded him $1.25 million. Bayer appealed that verdict to the Missouri Court of Appeals which affirmed the jury order and held that the plaintiff's failure to warn claim was not preempted by federal law. Bayer then attempted to appeal that ruling to the Missouri Supreme Court which declined to hear the case. Now, the matter comes before the United States Supreme Court.

Arguments Before the Supreme Court

Both the plaintiff and Bayer have made arguments to the Supreme Court that have become familiar to those keeping up with how pesticide liability cases have evolved in recent years. Each argument focuses on the text of the Federal Insecticide, Rodenticide, and Fungicide

Act ("FIFRA") and a previous Supreme Court case to either support or refute the argument that federal pesticide law preempts state law claims of failure to warn.

FIFRA is the primary federal law regulating pesticide use in the United States. Under FIFRA, a pesticide cannot be sold or distributed in the United States until it has been approved for use by the Environmental Protection Agency ("EPA"). To approve a pesticide, EPA must determine that the product will not cause "unreasonable adverse effects" on the environment when used as intended. 7 U.S.C. § 136a(c)(5)(C). FIFRA defines "unreasonable adverse effects" as "any unreasonable risk to man or the environment, taking into account the economic, social, and environmental costs and benefits of the use of any pesticide[.]" 7 U.S.C. § 136(bb). To meet this standard, EPA will assess the human health impacts of pesticides it is seeking to register, including assessing the carcinogenicity of the product and its active ingredients.

Along with providing for the registration of pesticide products, FIFRA also describes the authority that states have to regulate approved pesticides. Under FIFRA, a state may "regulate the sale or use of any federally registered pesticide[.]" 7 U.S.C. § 136v(a). However, FIFRA also provides that states "shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from" those required by federal law. 7 U.S.C. § 136v(b). In other words, while FIFRA allows states to regulate the sale and use of federally registered pesticides, it does not allow states to set requirements for the labeling or packaging of a registered pesticide that differs from the labeling and packaging approved by EPA. Additionally, FIFRA prohibits the sale and distribution of any pesticide which is "misbranded." 7 U.S.C. § 136j(a)(1)(E). Under FIFRA, a pesticide is considered misbranded if its label does not include a warning statement which may be necessary to protect health and the environment. 7 U.S.C. § 136(q)(1)(G).

Failure to warn is a type of civil tort that is typically raised in products liability cases. As with most civil torts, failure to warn arises out of state law and is enforced at the state level. When a plaintiff raises a claim of failure to warn, they are not arguing that a product they used was defective, but rather that the product manufacturer failed to provide adequate warnings or instructions about the safe use of the product. To succeed on failure to warn, a plaintiff will generally need to demonstrate two things. First, that the manufacturer did not adequately warn consumers about a particular risk, and second that the risk was either known or knowable in light of the best available knowledge at the time the product was manufactured and distributed.

In the past, the Supreme Court has only once addressed FIFRA's prohibition on states to impose labeling requirements that differ from those approved by EPA and how it interacts with products liability claims that arise under state law. In ***Bates v. Dow Agrosciences***

***LLC*, 544 U.S. 431**, the Supreme Court held that a pesticide labeling requirement imposed by state law would be preempted by FIFRA if the requirement is "in addition to or different from" the labeling and packaging requirements imposed under FIFRA. The Court noted that a state law requiring a pesticide label to include the word "DANGER" when its federally registered label is required to include the word "CAUTION" would be preempted by FIFRA. However, the Court also noted that a state requirement for pesticide labeling would not be preempted if it was "equivalent to, and fully consistent with, FIFRA's misbranding provisions."

In appealing *Durnell* to the Supreme Court, Bayer asked the Court to consider whether FIFRA preempts the plaintiff's state law failure to warn claim. Bayer argues that the claim is preempted. It first cites FIFRA's requirement that states may not require a pesticide's label to bear language that is "in addition to or different from" federal labeling requirements. According to Bayer, the only way it could fully resolve the plaintiff's claims would be to amend the label for Roundup products sold in Missouri to include a cancer warning which is not required by the federal label. Not only does the federal label for Roundup not include a cancer warning, Bayer also notes that EPA has never made a finding that either Roundup or glyphosate are carcinogenic to humans. Relying on the ruling in *Bates*, Bayer argues that the plaintiff's failure to warn claims should be preempted because to resolve them, Bayer would be required to put a cancer warning on its Roundup labels which would differ from the labeling language required under federal law.

The plaintiff argues exactly the opposite. According to the plaintiff, his failure to warn claims are not preempted by FIFRA because they run parallel to FIFRA's misbranding provisions. Also relying on *Bates*, the plaintiff in *Durnell* argues that Supreme Court precedent has already established that a state law products liability claim will not be preempted by FIFRA if it is equivalent to and consistent with FIFRA's prohibition on the sale of misbranded pesticides. According to the plaintiff, his failure to warn claim is consistent with FIFRA's misbranding prohibitions because FIFRA considers a pesticide to be misbranded if it does not include a warning necessary to protect health and the claim of failure to warn was raised to argue that Bayer failed to provide a necessary health warning to users of Roundup. Because failure to warn raises a claim that is consistent with FIFRA's misbranding provisions, the plaintiff asks the Supreme Court to rule that the claim is not preempted.

While these arguments directly mirror claims raised by Bayer and other plaintiffs in other cases involving federal preemption of failure to warn claims in pesticide liability cases, *Durnell* adds a twist that slightly differentiates it from those cases. Unlike other plaintiffs, the plaintiff in *Durnell* asserts that his failure to warn claims were not brought over the

labels affixed to each individual unit of Roundup, but rather to the marketing materials that Monsanto used to advertise Roundup in the 1990s and 2000s. The plaintiff claims that he bought and used Roundup based on commercials and print advertising that stated using Roundup was completely safe and featured people applying Roundup while wearing only tee shirts and shorts. Because FIFRA applies only to pesticide labeling, not marketing materials, the plaintiff argues that his lawsuit differs from previous litigation where the question of whether FIFRA preempts failure to warn has been raised. Bayer maintains that there is no difference between *Durnell* and prior preemption cases because it would still need to update labels for units of Roundup sold in the state of Missouri to include a cancer warning to fully redress the plaintiff's claim.

Going Forward

As of the publication of this article, the Supreme Court has not scheduled a date to hear oral arguments in *Durnell*. It is not yet clear when a final ruling in the case can be expected. Whatever the outcome, whether the Court agrees with the plaintiff and finds that FIFRA does not preempt the state law claim of failure to warn or sides with Bayer and finds that FIFRA does preempt such claims, the final decision in this lawsuit will affect not only the thousands of currently pending pesticide liability cases but is also likely to affect any such lawsuits filed in the future. While the bulk of pesticide liability cases filed over the last decade have involved Roundup and glyphosate, other pesticides such as paraquat and chlorpyrifos have also been the focus of such lawsuits. Despite settling thousands of pesticide liability lawsuits, Bayer still has thousands more actively pending against it. The company has indicated that if the matter is not resolved, it could threaten the future availability of Roundup for agricultural uses.

Although it is too early to predict how the Supreme Court will rule, prior to agreeing to hear *Durnell*, the Court asked the federal government to weigh in. In December, the Solicitor General filed an amicus brief both urging the Supreme Court to take up the case and clarifying that the federal government believes that FIFRA preempts the plaintiff's failure to warn case.

Supreme Court Asked to Revisit Definition of WOTUS
NALC Staff Attorney, Brigit Rollins

The United States Supreme Court is currently considering whether to take up a case from the Second Circuit Court of Appeals concerning the definition of "waters of the United States" and the scope of wetlands jurisdiction under the Clean Water Act ("CWA"). The case, ***Andrews v. United States*, No. 25-668 (2026)**, focuses on a dispute between a

landowner and the Environmental Protection Agency ("EPA") over an alleged CWA violation to occurred when the landowner filled in wetlands located on his property without a CWA permit. Directly before the Court is the question of whether the Second Circuit incorrectly interpreted the definition of "waters of the United States," or WOTUS, following the Supreme Court's 2023 decision in ***Sackett v. EPA*, 598 U.S. 651 (2023)**. It is currently unclear whether the Court will agree to hear the case.

The Clean Water Act & WOTUS

The CWA is the primary federal law regulating water pollution in the United States. The purpose of the CWA is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters" which is largely accomplished through permitting programs administered by EPA and the United States Army Corps of Engineers ("the Corps"). 33 U.S.C. § 1251(a). The CWA prohibits the "discharge of any pollutant by any person" into a "navigable water" from a "point source" without a valid CWA permit. 33 U.S.C. § 1311(a). Additionally, the CWA requires a permit for "the discharge of dredged or fill material" into "navigable waters." 33 U.S.C. § 1344(a).

The phrase "navigable waters" is a legal term that is typically used to refer to waters that can be used as a highway for interstate commerce. However, the CWA specifically defines "navigable waters" as "the waters of the United States, including the territorial seas." 33 U.S.C. § 1362. Understanding which waters qualify as "waters of the United States" is crucial to implementing the CWA because only those waters that are considered WOTUS are subject to the CWA's permitting authority. Despite the importance of the term, Congress chose not to include a statutory definition of WOTUS in the text of the CWA. Instead, it has been the responsibility of EPA and the Corps to set a regulatory definition for the term "waters of the United States." This has proven to be a challenging task, with the last decade in particular seeing several different rulemaking efforts to change the definition. A full timeline of the definition of WOTUS is available here.

Courts have also weighed in on determining the limits of WOTUS. Most recently, the Supreme Court issued the decision *Sackett v. EPA* in 2023 where the Court concluded that WOTUS extended to "those relatively permanent, standing or continuously flowing bodies of water [...] described in ordinary parlance as streams, oceans, rivers, and lakes" and to wetlands that share a "continuous surface connection" with such waterbodies. A full breakdown of the Court's ruling can be found here. After the *Sackett v. EPA* decision was issued, EPA updated the definition of WOTUS to reflect the Court's conclusion. The agency then initiated another rulemaking effort in 2025 to bring the definition of WOTUS even more inline with the Supreme Court's decision. That rulemaking is currently on-going. Until that effort is finalized, the definition of WOTUS includes the following:

- Traditional navigable waters which are currently used or may be used to facilitate interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide, the territorial seas, and all interstate waters (collectively, "traditional navigable waters");
- Impoundments of waters otherwise defined as WOTUS;
- Tributaries of traditional navigable waters that are themselves relatively permanent, standing, or continuously flowing;
- Wetlands that are adjacent to traditional navigable waters, or relatively permeant, standing, or continuously flowing tributaries of such waters;
- Intrastate lakes and ponds that do not fall into any of the above categories, but that are relatively permanent, standing, or continuously flowing bodies of water that share a surface connection with a recognized WOTUS.

For the purposes of wetlands, the current definition defines "adjacent" as "having a continuous surface connection."

***EPA v. Andrews*: Background & Lower Court Rulings**

The CWA case currently on petition to the Supreme Court was initially filed in 2020 by EPA against the defendant for allegedly discharging dredged and fill material into wetlands located on his property without a valid CWA permit. The Corps, which is the agency responsible for issuing CWA permits for dredge and fill activity, initially visited the defendant's property in 2011 and informed the defendant that he would need a permit for filling in the wetlands to avoid violating the CWA. According to the Corps, the wetlands feel under CWA jurisdiction because they were adjacent to another waterbody that is itself a WOTUS. The Corps referred the matter to EPA in 2017. Over the next two years, EPA sent the defendant several notification letters regarding possible CWA violations but did not receive a reply. Ultimately, EPA obtained an administrative warrant from a federal court in 2019 to inspect the defendant's property. As a result of that inspection, EPA filed a lawsuit against the defendant in 2020, asking a federal court in Connecticut to require the defendant to halt his unauthorized dredge and fill activities and to pay civil penalties for his CWA violations.

The federal district court ruled in favor of EPA in June 2023, concluding that the defendant's unpermitted deposition of dredge and fill material into the wetlands on his property was a violation of the CWA. The court based its ruling on a finding that the wetlands at issue were WOTUS and subject to CWA permitting jurisdiction. In its decision, the district court noted that following the Supreme Court's decision in *Sackett v. EPA*, only those wetlands which share a "continuous surface connection" with a water already recognized as a WOTUS such that it is "difficult to determine where the 'water' ends and the 'wetland' begins"

would also be considered a WOTUS. EPA claimed that the wetlands filled in by the defendant met that "continuous surface connection" standard because the wetland shared "continuous surface flow paths" with a relatively permanent water recognized as a WOTUS. Because the defendant did not dispute that the wetland was a WOTUS subject to CWA jurisdiction or that he had filled in those wetlands without a CWA permit, the district court ruled in favor of EPA and ordered the defendant to cease all unpermitted dredge and fill activities, restore the disturbed wetlands, and pay appropriate civil penalties.

Following the district court's decision, the defendant appealed the ruling to the Second Circuit Court of Appeals. On appeal, the defendant argued that the case against him should have been dismissed because "there is no surface water on his property." The Second Circuit disagreed, citing evidence showing that there was surface water on the property. Because the defendant failed to show that the lower court's conclusion that he had discharged dredge and fill material into wetlands that fall under CWA jurisdiction without a valid CWA permit, the Second Circuit affirmed the district court's decision. Following that ruling, the defendant petitioned the case to the Supreme Court.

Petition to Supreme Court

Currently, *Andrews v. United States* is on petition for certiorari to the Supreme Court. This means that the petitioner, Andrews, has asked the Supreme Court to hear the matter, but the Court has yet to decide whether it will accept the case for review. Both Andrews and EPA have submitted briefs to the Court making arguments as to why the Court should or should not agree to hear the dispute.

In his petition to the Supreme Court, Andrews asks the Court to consider whether the Second Circuit was correct to extend CWA jurisdiction over wetlands that are not "as a practical matter indistinguishable" from a water recognized as a WOTUS. According to the petitioner, the Second Circuit misapplied *Sackett v. EPA* in upholding the lower court's conclusion that Andrews had violated the CWA. In *Sackett v. EPA*, the Supreme Court held that "the CWA extends to those wetlands that are 'as a practical matter indistinguishable from waters of the United States[.]'" The Court explained that WOTUS included only those wetlands adjacent to a waterbody that itself constitutes a WOTUS and that adjacency is established when a wetland "has a continuous surface connection with that water, making it difficult to determine where the 'water' ends and the 'wetland' begins." Andrews argues that *Sackett v. EPA* established "indistinguishability" as the key requirement for extending CWA jurisdiction to wetlands and that the Second Circuit failed to consider whether the wetlands on his property were "indistinguishable" from the WOTUS to which they are adjacent. Instead, the Second Circuit upheld the lower court's finding that the wetland shared "continuous surface connection" with the WOTUS because evidence showed that

there were continuous surface flow paths linking the wetlands with the WOTUS. Andrews argues that this is not enough and that to satisfy *Sackett v. EPA*, the wetlands should be "indistinguishable" from the WOTUS. Andrews urges the Supreme Court to take up his case and clarify that the test for establishing a wetland as a WOTUS relies on "indistinguishability."

In response, EPA argues that the case should not be taken up by the Supreme Court both because Andrews did not raise the argument of "indistinguishability" at either the district court or the Second Circuit Court of Appeals, and because EPA is currently carrying out a rulemaking to bring the definition of WOTUS inline with the Court's decision in *Sackett v. EPA*. In general, courts will only hear arguments on appeal if the argument was raised before a lower court. Here, EPA argues that Andrews forfeit the right to raise the question of "indistinguishability" to the Supreme Court because he did not bring that matter to the Second Circuit. Instead, he argued that the Second Circuit should overturn the district court's ruling because there was no surface water present on his property. Because Andrews did not argue that *Sackett v. EPA* established an "indistinguishability" requirement to the Second Circuit, EPA argues that the timing is not right for the Supreme Court to now hear that question. Additionally, EPA notes that it is currently in the process of rewriting the definition of WOTUS and that there is "no sound reason for this Court to intervene while the agencies' rulemaking is ongoing."

What Next?

As of the date of publication of this article, the Supreme Court has not yet determined whether it will hear *Andrews v. United States*. If the Court declines to hear the case, then *Sackett v. EPA* will remain the Supreme Court's most recent ruling on the definition of WOTUS and jurisdiction under the CWA. However, should the Court agree to take up the case, the Court may choose to clarify the scope of its ruling in *Sackett v. EPA* which could ultimately impact EPA's current effort to revise the regulatory definition of WOTUS. That effort is on-going, with a public comment period on the proposed definition having closed on January 5, 2026. If the Court agrees to take up *Andrews v. United States*, it is likely that a final decision would come after a final WOTUS rule has been issued unless EPA chose to stay the final rule in anticipation of a Supreme Court decision.

EPA Announces Draft Fungicide Strategy

NALC Staff Attorney, Brigit Rollins

In April 2026, the Environmental Protection Agency ("EPA") released a draft version of its Fungicide Strategy, the most recent move in the agency's effort to reduce pesticide

exposure to endangered wildlife. The draft Fungicide Strategy is similar to both the Herbicide and Insecticide Strategies that EPA issued in 2024 and 2025 which focus on reducing pesticide spray drift and runoff to better protect wildlife species listed as threatened or endangered under the Endangered Species Act ("ESA"). EPA initially launched its effort to reduce pesticide exposure to listed species in 2022 after years of mounting litigation targeting the agency's failure to fully comply with its ESA responsibilities when registering pesticide products under the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"). The goal of EPA's new approach is to create stronger pesticide labels while reducing impacts to listed species.

Background

In 2022, EPA published a document titled Balancing Wildlife Protection and Responsible Pesticide Use: How EPA's Pesticide Program Will Meet its Endangered Species Act Obligations. That document, paired with an update released later that year, described EPA's plan to begin introducing new mitigation measures to pesticide labels aimed at reducing exposure to threatened and endangered species. The plan is centered around creating individual strategy documents for herbicides, insecticides, fungicides, and rodenticides, that limit pesticide exposure to endangered wildlife by requiring additional application restrictions. According to EPA, the new policy approach is necessary to address what the agency has described as a "decades-old challenge" to satisfy the agency's obligations under both the ESA and FIFRA.

The ESA is the predominant federal wildlife protection law in the United States, while FIFRA is the nation's primary federal statute regulating pesticide use. Under the ESA, all federal agencies, including EPA, are required to consult with the United States Fish and Wildlife Service ("FWS") to ensure that the actions that federal agencies fund, authorize, or carry out will not "jeopardize" the continued existence of species protected under the ESA. 16 U.S.C. § 1536(a)(2). The consultation process can be time consuming because it requires FWS to examine the impacts to any listed species affected by an agency's proposed action. To learn more about the consultation process, click here to view NALC's ESA Manual.

EPA takes hundreds of actions under FIFRA each year, including but not limited to registering new pesticide products, conducting registration review of existing products, and authorizing new uses of registered pesticide products. Since the ESA was enacted in 1973, EPA has struggled to fully satisfy its consultation responsibilities when carrying out FIFRA actions. As a result, the agency has faced numerous lawsuits filed primarily by environmental groups seeking to compel EPA to complete ESA consultation on FIFRA actions. Because courts tend to strictly interpret the ESA's consultation requirements, most of these lawsuits have resulted in either a judge requiring EPA to complete the

consultation process, or a settlement agreement where EPA has agreed to complete consultation. Currently, EPA believes it will take into the 2030s to finalize all the FIFRA-related ESA consultations that are under a judicially enforced deadline.

To both better protect endangered wildlife from pesticide exposure and create pesticide labels that are less likely to be challenged in court, EPA launched its new approach to satisfying its ESA responsibilities when carrying out actions under FIFRA. As part of this effort, EPA has sorted all registered pesticides into broad groups - herbicides, insecticides, fungicides, and rodenticides – and for each group developed mitigation measures designed to reduce pesticide exposure to protected species. EPA issued the final version of its Herbicide Strategy in 2024, and its final Insecticide Strategy in 2025. Both Strategies outline spray drift and runoff mitigations that the agency expects to include on herbicide and insecticides labels going forward. Now, the agency has released a draft version of its Fungicide Strategy which seeks to reduce the potential impacts of agricultural fungicides to listed species.

Draft Fungicide Strategy

Like both the Herbicide and Insecticide Strategies, the draft Fungicide Strategy proposes to reduce fungicide exposure to listed species by identifying new mitigation measures that will be added to the labels of agricultural fungicides. Similar to the previous Strategies, the draft Fungicide Strategy outlines mitigations that are intended to limit pesticide exposure by reducing spray drift and runoff. However, where the Herbicide and Insecticide Strategies focused on impacts to species which are similar to the target pests of the pesticides (*i.e.*, the Herbicide Strategy focused on impacts to listed plant species while the Insecticide Strategy focused on invertebrate species), the draft Fungicide Strategy evaluates potential impacts to all taxonomic groups of listed species. This is because fungicides can exhibit direct toxicity of multiple taxonomic groups while herbicides tend to exhibit toxicity primarily to plants and insecticides primarily to invertebrates. Additionally, the draft Fungicide Strategy considers that fungicide use is more localized than use of either herbicides or insecticides. Fungicides tend to be used more frequently in areas with high precipitation such as the Mississippi Delta region or around the Great Lakes, while herbicides and insecticides are prevalent throughout the country. EPA has taken this into account and given consideration to areas where usage of fungicides are low and may therefore present less of a threat to endangered wildlife.

Despite those differences, the draft Fungicide Strategy employs the three-step framework described in the previous Strategy documents. Under the first step, EPA will determine whether a particular fungicide has the potential to have population-level impacts to any listed species. Possible outcomes include “not likely,” “low,” “medium,” or “high.” If a

fungicide is determined to have either low, medium, or high levels of population-level impacts, then the product will require some degree of additional mitigation. To make that determination, EPA will consider how a fungicide is used, how it behaves in the environment, and overall toxicity thresholds for different species. Ultimately, the amount of required mitigation measures will increase when population-level threats are greater.

After making the final determination under step one, EPA will proceed to step two. There, EPA will assign mitigation measures to a particular fungicide based on the product's degree of population-level impacts to listed species. As with the Herbicide and Insecticide Strategies, mitigation measures included in the draft Fungicide Strategy are aimed at limiting spray drift and runoff. To reduce spray drift, EPA is primarily focused on requiring increase spray buffers, with the buffer zone increasing according to the level of mitigation required. The agency has also proposed allowing the use of drift reducing adjuvants to limit spray drift while cutting down on the required buffer distance. To reduce fungicide runoff, EPA is relying on the Mitigation Menu established under the two previous Strategies. The Mitigation Menu, which can be found here, shows a variety of different mitigation measures that have been assigned a point value. Based on its conclusion from step one, EPA will assign each fungicide an amount of runoff mitigation points necessary to make an application. Applicators will then review the Mitigation Menu and identify measures they could take to achieve the necessary number of runoff points. The Mitigation Menu is extensive and includes a wide range of activities that are intended to provide pesticide applicators with a high degree of flexibility in choosing which mitigation measures are best for them.

While mitigation measures for spray drift and runoff identified in the draft Fungicide Strategy mirror those identified in the Herbicide and Insecticide Strategies, the Fungicide Strategy differs from the prior Strategies by including mitigation measures for species that may be present on agricultural fields. In the Herbicide and Insecticide Strategies, EPA concluded that the greatest degree of risk to listed species came from pesticides traveling off-field because endangered plants and vertebrates are unlikely to be in or on agricultural sites. However, EPA has identified eleven listed species that may be present on agricultural fields and could face population-level impacts following fungicide applications. To mitigate risks to those species, EPA is considering application timing restrictions to avoid exposure to species of concern. Those restrictions include prohibiting applications of fungicides from the time a crop begins to flower until the petals drop, or between sunrise and sunset during bloom when pollinators are more likely to be active.

Finally, under step three, EPA will determine the geographic areas where mitigation measures will be required. In some instances, EPA expects that a mitigation measure will

be required across a fungicide's entire use area. If that is the case, EPA will likely include mitigation requirements on the fungicide's general label. However, in other cases, EPA expects that the mitigation requirements will be geographically limited to protect a certain species. When that occurs, EPA will rely on its website Bulletins Live! Two to inform applicators to the specific geographic areas where mitigations are required. EPA will include language on a fungicide's label to direct applicators to check Bulletins Live! Two for any active bulletins in the area.

Next Steps

The draft Fungicide Strategy is currently open for a 60-day public comment period that will conclude on June 29, 2026. EPA has stated that its intention is to publish a final version of the Strategy by the end of November. Like the Herbicide and Insecticide Strategies, the Fungicide Strategy will not be self-implementing. Instead, EPA will apply the Fungicide Strategy to new fungicide products put forward for registration and to currently registered products that come up for registration review.