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INTRODUCTION

Judicial review of administrative agency decisions is an important topic in the fields of both administrative and appellate law. Any significant agency action is likely to be tested in court, so judicial review is often an unofficial necessity before a new regulation or adjudicative decision can truly be considered "settled law."[1] The applicable standards of review in an eventual appeal also influence how an agency must approach its decision-making. One might expect fairly uniform standards and procedures for appellate review of an agency action, just as there are for appeals of trial court decisions.

Procedurally, however, an administrative appeal is a fundamentally different creature from a judicial appeal. Indeed, an administrative appeal is not even a true "appeal," but rather an action invoking a court's original jurisdiction.[2] Moreover, while an appeal of a trial court's ruling involves a superior tribunal reviewing the decision of an inferior one within the same branch of government, a court reviewing an agency's decision sits in judgment of the policy decisions of a coordinate branch of government and is constrained by separation-of-powers principles.

Federal and Maryland law treat administrative appeals similarly—except when they don't. And their differences are notable.[3] For instance, Maryland courts possess a significant measure of the autonomy that federal courts arguably lack: Congress (along with the federal courts themselves) has shielded several small but important categories of agency acts from federal court review, whereas Maryland courts have held that the legislature cannot divest courts of their inherent authority to review even "unreviewable" agency acts.[4] Likewise, federal review is often characterized by a significant and robust set of deference principles that courts must adhere to. While

1. *See infra* Section II.A.

2. *See infra* Part IV.

3. *See, e.g.*, Arthur Earl Bonfield, *The Federal APA and State Administrative Law*, 72 VA. L. REV. 297, 300–02 (1986) (describing the development and iterations of the Model State Administrative Procedure Act as drawing from, but not necessarily replicating, the federal APA).

4. *See infra* Section II.B.3.

Maryland courts defer to agencies as well, it is more a matter of comity than judicial restraint, and courts always retain the final word on the law they are reviewing.[5]

The scholarly treatment of *federal* administrative law has been, to put it mildly, extensive. But even though state regulation is "no less important" than federal regulation,[6] the regulatory review procedures of Maryland (and other states) receive far less attention. Maryland,[7] like the federal system,[8] has well-developed judicial-review principles governed by an administrative procedure act ("APA"), the Maryland Rules, and an extensive body of case law.[9]

The purpose of this Article is to provide a basic analysis of the ways both federal and Maryland courts review the actions of administrative agencies. The landscape of administrative law is vast, and this Article is focused on one small but important corner of that landscape. It describes the judicial review process under each system, and examines some important similarities and distinctions between federal and Maryland regulatory appellate practice, particularly in light of recent decisions by the Supreme Court of the United States and the Court of Appeals of Maryland.[10]

The natural question raised by this examination is how these two systems differ in actual operation. The surprising—and unsatisfying—answer is that it is difficult to say for sure. The vernacular of administrative law is filled with capacious terms like "arbitrary," "capricious," "excess," or "unlawful," to which it is impossible to assign concrete values.[11] This means similar-sounding concepts may actually be dissimilar. For example, Maryland and federal courts both examine whether certain agency actions

5. *See infra* Part III.

6. *See, e.g.*, PAUL TESKE, REGULATION *IN THE* STATES 8 (2004) ("Sometimes state regulation is extremely innovative. . . . Other times it leads to colossal failures. Perhaps most often, it leads to more subtle effects on state economies that are often overlooked . . . ."); Jonathan H. Adler, *When is Two a Crowd? The Impact of Federal Action on State Environmental Regulation*, 31 HARV. ENV'T L. REV. 67, 68–70 (2007) (stressing the interrelatedness of state and federal environmental regulations).

7. MD. CODE ANN., STATE GOV'T §§ 10-101–10-305 (West 2022).

8. Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended at 5 U.S.C. §§ 551–59 (2018)).

9. *See, e.g.*, Christopher J. Walker, *The Lost World of the Administrative Procedure Act: A Literature Review*, 28 GEO. MASON L. REV. 733, 734–35 (2021) ("The APA . . . has evolved considerably over the decades. Indeed, the statutory text bears little resemblance to modern regulatory practice. The Supreme Court and the lower courts—with the D.C. Circuit playing a prominent role—have substantially rewritten the rules of the road.").

10. In November 2022, Marylanders will vote on whether to ratify a constitutional amendment renaming the State's two appellate courts as the Supreme Court of Maryland and the Appellate Court of Maryland. *See* H.B. 885, 2021 Gen. Assemb., Reg. Sess. (Md. 2021).

11. *See infra* Part II.B.2.c.

were "arbitrary or capricious," but as we will see, the way they frame that analysis varies appreciably. While we highlight conceptual differences between the two systems, we do not attempt to predict where they would or would not lead to different results. That important empirical question—if it can be answered—is worthy of further exploration.[12]

We start in Part I by introducing the foundational rulemaking–adjudication dichotomy that heavily influences the trajectory of judicial review. Part II then draws out the nuances of when and in what form judicial review is available for agency actions. Part III identifies key distinctions in how the courts in each jurisdiction exercise their substantive review of an agency's legal interpretation. Finally, Part IV describes the methods of invoking judicial review in the Maryland and federal systems.

I. DETERMINING WHAT KIND OF ACTION IS BEING REVIEWED: THE RULEMAKING–ADJUDICATION DICHOTOMY

Identifying the type of agency action being challenged is essential to determining the standards that will govern an appeal. Most agency actions fall into two categories: rulemaking and adjudication.[13] This dichotomy exists in both federal and Maryland law, although Maryland courts describe agency actions as "quasi-legislative" and "quasi-judicial." The distinction between rulemaking (or quasi-legislative action) and adjudication (or quasi-judicial action) is crucial. In addition to dictating the procedure an agency must follow—which can significantly affect the arguments available on appeal—the type of action will determine the source of the court's authority to review it, the procedure for invoking review, and the appropriate standard of review. Because the law applicable to a particular administrative appeal depends upon the kind of action at issue, that question is the starting point of the analysis.

Identifying whether a particular agency decision resulted from an adjudication or a rulemaking can be surprisingly contentious, the distinction

12. An existing body of empirical research into administrative agency review may serve as the starting point for such exploration. *See, e.g.*, Amy Semet, *Statutory Interpretation and* Chevron *Deference in the Appellate Courts: An Empirical Analysis*, 12 U.C. IRVINE L. REV. 621 (2022); Carly L. Hviding, *What Deference Does it Make? Reviewing Agency Statutory Interpretation in Maryland*, 81 MD. L. REV. ONLINE 12 (2021); Kent Barnett & Christopher J. Walker, Chevron *in the Circuit Courts*, 116 MICH. L. REV. 1 (2017); Cynthia Barmore, Auer *in Action: Deference After* Talk America, 76 OHIO STATE L. J. 813 (2015).

13. U.S. DEP'T OF JUST., ATT'Y GEN.'S MANUAL ON THE ADMIN. PROC. ACT 14 (1947) [hereinafter ATT'Y GEN.'S MANUAL]. To this we can add an important third category for informal actions, though review of those is rare due to a lack of final agency action. *See, e.g.*, ALFRED C. AMAN, JR. & WILLIAM T. MAYTON, ADMINISTRATIVE LAW 355 (3d ed. 2014) ("To determine when these various standards of review apply . . . it is important to note that the APA divides the world of agency action into three parts, differentiating among rules, orders and informal actions.").

subtle and elusive.[14] There are nonetheless certain clear examples that can make it easier to understand the distinction. The classic example of a rulemaking is when an agency promulgates a new regulation. Examples of adjudications can include the disposition of complaints brought before an agency, the award of a contract, or the issuance of a license. However, many agency actions fall somewhere in between. Agencies do things like issue interpretive rulings, grant petitions for declaratory ruling, and make decisions that affect discrete classes of individuals outside the context of evidentiary hearings.

Reviewing courts regularly grapple with which category these kinds of actions fall in. For example, in *Neustar, Inc. v. Federal Communications Commission*,[15] the D.C. Circuit had to determine whether the FCC's selection of a company to administer a database of phone numbers was a rule or an adjudication.[16] The petitioner argued that the decision was a rule, and that the FCC had not followed the correct procedure for issuing a rule.[17] Although the FCC's decision arguably bore certain hallmarks of a rule, the court ultimately determined that it was an adjudication, and thus that the FCC was not required to follow rulemaking procedures.[18] Thus, while the question is in some sense highly academic, it can have significant, even dispositive practical consequences.

Although the question of whether a given action constitutes a rulemaking or an adjudication can be knotty and complex, there are relatively clear statutory and decisional rules that spell out which factors go into that analysis. We start, in Section I.A, with the Constitution, which obligates state and federal governments to provide procedural protections before engaging in adjudications—but not rulemakings—before explaining, in Section I.B, how the Federal APA and Maryland APA implement the dichotomy.

A. U.S. Constitution—Legislative and Adjudicative Actions

Apart from the statutory requirements of the Maryland APA and the Federal APA, the rulemaking–adjudication dichotomy carries constitutional

14. *Cf., e.g.*, William D. Araiza, *Agency Adjudication, the Importance of Facts, and the Limitations of Labels*, 57 WASH. & LEE L. REV. 351, 404 (2000) ("In labeling some agency actions 'adjudications' we may have succeeded only in confusing ourselves by suggesting that there is a fundamental identity between what courts do and what agency 'adjudicators' do.").

15. 857 F.3d 886 (D.C. Cir. 2017).

16. *Id.* at 891–92.

17. *Id.*

18. *Id.* at 894; *see also* Md. Bd. of Pub. Works v. K. Hovnanian's Four Seasons at Kent Island, LLC, 425 Md. 482, 513–14, 42 A.3d 40, 58–59 (2012) (considering proper characterization—and thus proper standard of review—of Maryland Board of Public Works' decision denying a permit to dredge on State wetlands).

importance under the Fifth and Fourteenth Amendment Due Process Clauses.[19] As explained in two century-old Supreme Court opinions—predating the APA's statutory conceptions of rules and adjudications—the government owes individualized due process (i.e., an adjudication) before singling people out and depriving them of property, but does not owe any additional process before acting legislatively.[20] Thus, in *Londoner v. City & County of Denver*,[21] the Court held that the Denver City Council, acting as a board of equalization, had engaged in de facto adjudication in establishing a tax assessment district requiring a small group of landowners to pay to pave a street abutting their properties.[22] In contrast, in *Bi-Metallic Investment Co. v. State Board of Equalization*,[23] the Court upheld the Colorado State Board of Equalization's legislative decision to increase the valuation of all taxable property in Denver by forty percent.[24] Explaining the distinction, Justice Holmes noted that "[w]here a rule of conduct applies to more than a few people it is impracticable that every one should have a direct voice in its adoption."[25]

Aside from pointing to the number of persons affected by an agency act, neither Supreme Court decision provides significant guidance on how to draw the line between rulemaking and adjudications for purposes of the Due Process Clauses,[26] and the federal courts of appeals have recognized that "the line between legislative and adjudicative action for purposes of procedural due process analysis is not always easy to draw."[27] Thus, lower federal appellate court decisions have evaluated factors such as the function performed by the decisionmaker (for example, resolving disputes of facts as an adjudicator versus disputes of policy as a legislator)[28] or the generality and prospective effect of the challenged action.[29] Though the decision to make

19. U.S. CONST. amend. V ("No person shall be . . . deprived of life, liberty, or property, without due process of law . . . ."); U.S. CONST. amend. XIV, § 1 ("No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . .").

20. Londoner v. City & Cnty. of Denver, 210 U.S. 373, 385–86 (1908); Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441, 443 (1915).

21. 210 U.S. 373 (1908).

22. *Id.* at 385–86.

23. 239 U.S. 441 (1915).

24. *Id.* at 443.

25. *Id.* at 445.

26. *Cf., e.g.*, 75 Acres, LLC v. Miami-Dade Cnty., 338 F.3d 1288, 1293, 1296 n.11 (11th Cir. 2003) (declining to "adopt a hard-and-fast rule for distinguishing between legislative and adjudicative action").

27. *See, e.g.*, Garcia-Rubiera v. Fortuno, 665 F.3d 261, 274 (1st Cir. 2011).

28. *E.g.*, Thomas v. City of New York, 143 F.3d 31, 36 n.7 (2d Cir. 1998).

29. *See, e.g.*, L C & S, Inc. v. Warren Cnty. Area Plan Comm'n, 244 F.3d 601, 604 (7th Cir. 2001).

policies using rules or adjudications will only rarely implicate the Due Process Clause, in light of the statutory procedural protections discussed below,[30] it remains an important constraint on the form of agency decision-making.[31]

B. Federal Statutory Law—Rulemakings and Adjudications

The Federal APA defines a rulemaking as an "agency process for formulating, amending, or repealing a rule,"[32] and defines a rule as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy."[33] An adjudication, in turn, is an "agency process for the formulation of an order,"[34] with an order being "the whole or a part of a final disposition . . . of an agency in a matter other than rule making."[35] Rules announce generally applicable policies with future effect only,[36] whereas

30. *See* M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383, 1409 (2004) ("In the broad run of federal regulation, the Due Process Clause does not require an adjudicatory hearing.").

31. *Compare, e.g.*, Jones v. Governor of Fla., 975 F.3d 1016, 1048 (11th Cir. 2020) (en banc) ("The felons were deprived of the right to vote through legislative action, not adjudicative action. . . . This [Florida] constitutional provision is a law 'of general applicability' that plainly qualifies as legislative action." (quoting *75 Acres*, 338 F.3d at 1296–97)), *with, e.g.*, *id.* at 1061 n.1 (Martin, J., dissenting) ("Because the Division[] [of Elections'] determinations are necessarily individualized and fact-specific, Florida's voter reenfranchisement scheme is one for which 'persons [are] . . . exceptionally affected, in each case upon individual grounds' and entitled to due process." (quoting Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441, 446 (1915) (second alteration in original)).

32. 5 U.S.C. § 551(5).

33. *Id.* § 551(4).

34. *Id.* § 551(7).

35. *Id.* § 551(6).

36. *See* Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 216 (1988) (Scalia, J., concurring) ("[R]ules have legal consequences only for the future."); *see also* ATT'Y GEN.'S MANUAL, *supra* note 13, at 14 ("Rule making is agency action which regulates the future conduct of either groups of persons or a single person; it is essentially legislative in nature, not only because it operates in the future but also because it is primarily concerned with policy considerations. The object of the rule making proceeding is the implementation or prescription of law or policy for the future, rather than the evaluation of a respondent's past conduct.").

adjudications can have both future and retroactive effect[37] and can decide the rights of specific parties based on individual factors.[38]

The facial simplicity of these statutory directives for choosing between rulemaking or adjudication is belied by the gray area resulting from over seventy years of Supreme Court precedent deferring to agencies' decisions about which mechanism to employ in achieving a particular objective.[39] Under the doctrine set forth in *SEC v. Chenery Corp.* (*Chenery II*),[40] agencies have wide latitude to announce new principles of general applicability in an adjudication, even if the resulting policy change would be equally or more appropriately suited for rulemaking.[41] In *Chenery II*, for example, the Securities and Exchange Commission ("SEC"), while considering a company's reorganization plan, prohibited controlling stockholders from purchasing preferred stock during the reorganization—a classic example of an adjudicatory process.[42] As the Court held, "the choice made between proceeding by general rule or by individual, *ad hoc* litigation is one that lies primarily in the informed discretion of the administrative agency."[43]

37. Adjudication is concerned with the determination of past and present rights and liabilities. Normally, there is a decision as to whether past conduct was unlawful, so that the proceeding is characterized by an accusatory flavor and may result in disciplinary action. Or, it may involve the determination of a person's right to benefits under existing law so that the issues relate to whether they are within the established category of persons entitled to such benefits. ATT'Y GEN.'S MANUAL, *supra* note 13, at 14–15; *see also Bowen*, 488 U.S. at 216–17 (Scalia, J., concurring) ("Adjudication—the process for formulating orders . . . —has future as well as past legal consequences, since the principles announced in an adjudication cannot be departed from in future adjudications without reason." (internal citation omitted)).

38. *See, e.g.*, Neustar, Inc. v. FCC, 857 F.3d 886, 895 (D.C. Cir. 2017) (holding that agency action was adjudication because "the Order under review determined the rights and obligations of two parties" and "applied existing rules and regulations" to determine the winner of a contract "in a fact-intensive determination that occurred on a case-by-case basis").

39. *See* SEC v. Chenery Corp. (*Chenery II*), 332 U.S. 194, 203 (1947); NLRB v. Wyman-Gordon Co., 394 U.S. 759, 764–66 (1969) (plurality opinion); *Bowen*, 488 U.S. at 221.

40. 332 U.S. 194 (1947).

41. *See, e.g.*, M. Elizabeth Magill, *supra* note 30, at 1418–19, 1418 n.120 (describing Judge Friendly's frustration with the National Labor Relations Board's failure to engage in rulemaking, while still enforcing its orders). *But see* Katie R. Eyer, *Administrative Adjudication and the Rule of Law*, 60 ADMIN. L. REV. 647, 649–51, 649 n.4 (2008) (responding to "more than a half century" of "sustained academic critique" and arguing that "adjudicative lawmaking theoretically has the potential to further a number of important rule-of-law goals").

42. *Chenery II*, 332 U.S. at 203.

43. *Id.* at 203. Agencies have many incentives to make policy through informal mechanisms or individual adjudications, freed from the burdens of having to solicit and consider the viewpoints of all interested parties. *See, e.g.*, Nicholas Bagley, *The Procedure Fetish*, 118 MICH. L. REV. 345, 348 (2019) (criticizing, among other things, "[t]he judicially imposed rigors of notice-and-comment rulemaking"). Some agencies, such as the Federal Trade Commission ("FTC"), must use even more burdensome formal rulemaking procedures and almost exclusively implement policy via enforcement actions. *See, e.g.*, Elysa M. Dishman, *Settling Data Protection Law: Multistate Actions and National Policymaking*, 72 ALA. L. REV. 839, 842, 842 n.16 (2021) (explaining that the FTC

C. Maryland Law—Quasi-Legislative and Quasi-Judicial Actions

Although the Maryland APA does not define the terms "quasi-judicial" and "quasi-legislative," the Maryland Open Meetings Act does.[44] A quasi-legislative function is "the process or act of . . . adopting, disapproving, amending, or repealing a rule, regulation, or bylaw that has the force of law, including a rule of a court; . . . approving, disapproving, or amending a budget; . . . or approving, disapproving, or amending a contract."[45] A quasi-judicial function means "a determination of . . . a contested case; . . . a proceeding before an administrative agency for which Title 7, Chapter 200 of the Maryland Rules would govern judicial review; . . . or a complaint by the [Open Meetings Law Compliance] Board."[46]

Maryland courts have also written extensively on the distinction between quasi-judicial and quasi-legislative actions. The test is whether a decision "is one making a new law—an enactment of general application prescribing as new plan or policy—or is one which merely looks to or facilitates the administration, execution, or implementation of a law already in force and effect."[47] Maryland courts also emphasize the nature of an agency's decision-making process in evaluating the type of action. For instance, a quasi-judicial decision is one that is "reached on individual, as opposed to general, grounds, and scrutinizes a single property . . . and [where] there is a deliberative fact-finding process with testimony and the weighing of evidence."[48]

The parameters of judicial review under both federal and Maryland law depend on whether an agency acted in a rulemaking/quasi-legislative or adjudicative/quasi-judicial capacity. But federal and state courts look to different factors to categorize a particular agency action. Federal law places great emphasis on an act's prospective or retrospective effect, whereas

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does not use "rulemaking to regulate data practices" because its rulemaking authority "is so procedurally burdensome that it is largely ineffective"); *cf.* Rohit Chopra & Lina M. Khan, *The Case for "Unfair Methods of Competition" Rulemaking*, 87 U. CHI. L. REV. 357, 369 (2020) (explaining that, unlike the hurdles that apply to its "unfair or deceptive acts or practices" rulemaking authority, "the FTC has authority to engage in participatory rulemaking" to interpret "unfair methods of competition" and criticizing the FTC for not exercising that authority).

44. The Maryland Open Meetings Act is a statute within the General Provisions article of the Annotated Code which requires certain State bodies to hold public meetings. *See* MD. CODE ANN., GEN. PROVISIONS § 3-301 (West 2022). Although it is distinct from the Maryland APA, the two overlap in the sense that they both spell out certain procedural rules for how agencies operate. Federal law contains the analogous Federal Sunshine Act. *See* 5 U.S.C. § 552b.

45. MD. GEN. PROVISIONS § 3-101(j) (West 2022).

46. *Id.* § 3-101(i). Contested cases are discussed *infra* at Section II.B.1.a.

47. Md. Bd. of Pub. Works v. K. Hovnanian's Four Seasons at Kent Island, LLC, 425 Md. 482, 514, 42 A.3d 40, 59 (2012).

48. *Id.* at 515, 42 A.2d at 59.

Maryland law stresses the character of the decision-making process that led to the act: "[T]he greater a decisionmaker's reliance on general, 'legislative facts,' the more likely it is that an action is legislative in nature. Likewise, the greater a decision-maker's reliance on property-specific, 'adjudicative facts,' the more reasonable it is to term the action adjudicatory in nature."[49]

Because these different formulations would appear to give Maryland agencies less flexibility than federal agencies in how they announce rules of general applicability, one would expect the *Chenery II* doctrine to exist, if at all, only in a weaker form in Maryland jurisprudence. But the Maryland Court of Appeals has embraced *Chenery II*, while only occasionally suggesting certain limitations.[50] Whether Maryland's articulation of the rulemaking–adjudication dichotomy and its approach to *Chenery* has any practical effect—on either Maryland agencies' selection of one form of policymaking over another in a particular instance or the success of challenges to that selection—remains an unsettled question.

II. OBTAINING JUDICIAL REVIEW AND IDENTIFYING THE APPROPRIATE STANDARD

Obtaining judicial review of an agency action isn't as straightforward as appellate court review of a trial court action. Even deciding when an agency action is complete can be challenging.[51] Agencies may keep a rulemaking docket open for years, drag their feet in implementing a statutory mandate, or prescribe elaborate internal review processes before a decision is finalized. These are just a few scenarios where an aggrieved party may lack clarity on when they are entitled to judicial review. And once an agency action is properly before the court, the court will review it for compliance with statutory procedural and substantive requirements. There may even be a category of agency actions that a court may be unable (or unwilling) to review altogether.

49. Talbot Cnty. v. Miles Point Prop., LLC, 415 Md. 372, 387, 2 A.3d 344, 353 (2010).

50. *See, e.g.*, Balt. Gas & Elec. Co. v. Pub. Serv. Comm'n of Md., 305 Md. 145, 168, 501 A.2d 1307, 1319 (1986) (citing *Chenery II* as "a well settled principle of administrative law"); CBS Inc. v. Comptroller of the Treasury, 319 Md. 687, 693–99, 575 A.2d 324, 327–30 (1990) (acknowledging *Chenery II* but suggesting it would follow a narrower interpretation, invalidating a decision of the Comptroller to "announce a substantially new generally applicable policy" in an adjudication and retroactively apply that policy to the company before it); Md. Ins. Comm'r v. Cent. Acceptance Corp., 424 Md. 1, 31, 33 A.3d 949, 967 (2011) (applying *Chenery II* and holding that "*CBS* is confined . . . to situations where the agency's adjudication changed substantially the application or effect of an existing law or regulation, not to an agency's interpretation of a stand-alone statute.").

51. *See infra* Section II.A.

As explained below, Maryland and federal courts have articulated—and perhaps implemented—different approaches to several of these important issues, reflecting different philosophies regarding the respective roles of the courts and the agencies created by the political branches.

A. The Finality and Exhaustion Requirements (or Not)

Finality and exhaustion are two threshold requirements for obtaining judicial review of both Maryland and federal agency decisions, designed to give agencies a full opportunity to complete their decision-making processes. Though closely related, finality and exhaustion are distinct concepts:[52]

> [T]he finality requirement is concerned with whether the initial decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury; the exhaustion requirement generally refers to administrative and judicial procedures by which an injured party may seek review of an adverse decision and obtain a remedy . . . .[53]

Maryland and federal courts employ essentially the same standard for when an agency action is final,[54] though they articulate it slightly differently. Under federal law, to be final, an action must (1) "mark the consummation of the agency's decisionmaking process" and "not be of a merely tentative or interlocutory nature"; and (2) be an action "by which rights or obligations have been determined, or from which legal consequences will flow."[55] Under Maryland law, a decision is final when it "dispose[s] of the case by deciding all question[s] of law and fact and leave[s] nothing further for the administrative body to decide."[56]

Even after an agency action is final, a party might still be required to pursue additional remedies within the agency—such as seeking

52. Darby v. Cisneros, 509 U.S. 137, 144 (1993) ("We have recognized that the judicial doctrine of exhaustion of administrative remedies is conceptually distinct from the doctrine of finality . . . ."); Priester v. Baltimore County, 232 Md. App. 178, 193, 157 A.3d 301, 310 (2017) ("The rule of finality overlaps the rule of exhaustion.").

53. Williamson Cnty. Reg'l Plan. Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 193 (1985), *overruled on other grounds by* Knick v. Township of Scott, 139 S. Ct. 2162 (2019).

54. *See* 5 U.S.C. § 704 (allowing courts to review "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court"); Willis v. Montgomery County, 415 Md. 523, 534, 3 A.3d 448, 455 (2010) ("As a general rule, an action for judicial review of an administrative order will lie only if the administrative order is final." (quoting Holiday Spas v. Montgomery Cnty. Hum. Rels. Comm'n, 315 Md. 390, 395, 554 A.2d 1197, 1199 (1989))).

55. Bennett v. Spear, 520 U.S. 154, 178 (1997) (internal quotation marks omitted) (quoting Port of Bos. Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic, 400 U.S. 62, 71 (1970)).

56. *Willis*, 415 Md. at 535, 3 A.3d at 455–56. A petitioner cannot seek interlocutory review of an agency decision—even one alleged to be *ultra vires* or illegal—absent statutory authorization. *Priester*, 232 Md. App. at 195, 157 A.3d at 311.

reconsideration or appealing a bureau-level decision to a full agency—before pursuing relief in the courts. Exhaustion requirements can be statutory[57] or court-made,[58] but where a statute spells out specific criteria for appealability, courts may not impose further exhaustion requirements.[59] Thus, because the Federal APA provides that "final agency action" is "subject to judicial review"[60] and that an agency action is final "whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or . . . to superior agency authority,"[61] the Supreme Court has held that "[w]hen an aggrieved party has exhausted all administrative remedies expressly prescribed by statute or agency rule, the agency action is [final and appealable]."[62] Agencies may occasionally attempt to impose additional exhaustion requirements beyond those set forth in their codified regulations, but courts are generally unreceptive to such arguments.[63]

Maryland administrative law also contains an exhaustion requirement, which is "[i]ntertwined with the doctrine of the separation of powers"[64] embodied in the Maryland Constitution,[65] and which courts treat "*like* a jurisdictional issue."[66] Under Maryland's version of the exhaustion rule, "[w]hen a legislature provides an administrative remedy as the exclusive or primary means by which an aggrieved party may challenge a government action," an aggrieved party must "exhaust the prescribed process of

57. *See* Peter A. Devlin, Note, *Jurisdiction, Exhaustion of Administrative Remedies, and Constitutional Claims*, 93 N.Y.U. L. REV. 1234, 1239 (2018).

58. *See* Darby v. Cisneros, 509 U.S. 137, 144–45 (1993) ("Whether courts are free to impose an exhaustion requirement as a matter of judicial discretion depends, at least in part, on whether Congress has provided otherwise . . . ."); William Funk, *Exhaustion of Administrative Remedies—New Dimensions Since* Darby, 18 PACE ENV'T L. REV. 1, 6 (2000) (discussing availability of court-made exhaustion requirements in APA and non-APA contexts).

59. *Darby*, 509 U.S. at 143.

60. 5 U.S.C. § 704.

61. *Id.*

62. *Darby*, 509 U.S. at 146.

63. *See, e.g.*, McCarthy v. Madigan, 503 U.S. 140, 144 (1992) ("[W]here Congress has not clearly required exhaustion, sound judicial discretion governs."); *cf.* Funk, *supra* note 58, at 10–11 (describing the case law regarding exceptions to agency exhaustion requirements in APA cases as "hopelessly confused"). Though separate from exhaustion, the doctrine of primary jurisdiction provides one means for a court with proper jurisdiction to nonetheless defer to an agency decision-making process. *See generally* City of Osceola v. Entergy Ark., Inc., 791 F.3d 904, 908–09 (8th Cir. 2015) (noting the doctrine and briefly discussing relevant case law).

64. Montgomery Cnty. Off. of Child Support Enf't *ex rel.* Cohen v. Cohen, 238 Md. App. 315, 334, 192 A.3d 788, 799 (2018).

65. MD. CONST., DECLARATION OF RTS. art. 8.

66. Priester v. Baltimore County, 232 Md. App. 178, 190, 157 A.3d 301, 308 (2017) (internal quotation marks omitted); Bd. of Educ. v. Hubbard, 305 Md. 774, 787, 506 A.2d 625, 631 (1986) ("While the failure to invoke and exhaust an administrative remedy does not ordinarily result in a trial court's being deprived of fundamental jurisdiction, nevertheless, because of the public policy involved, the matter is for some purposes treated *like* a jurisdictional question.").

administrative remedies before seeking" other remedies or invoking the jurisdiction of the court.[67] The rule overlaps with the requirement for a final agency decision by requiring a party to wait "until he or she receives a final decision from the agency *at the utmost level of the administrative hierarchy*."[68]

Maryland cases recognize five exceptions to the general exhaustion requirement: (1) when the legislature has indicated exhaustion is not a requirement; (2) when there is a direct attack on the power of the legislature to enact the legislation from which relief is sought; (3) when an agency requires a party to follow—"in a manner and to a degree that is significant"—an unauthorized procedure; (4) when the agency cannot provide a remedy "to any substantial degree"; and (5) when the object of a judicial proceeding only tangentially or incidentally concerns matters that the agency was created to solve, and does not in a meaningful way call for the application of the agency's expertise.[69] There is also a statutory exception to the exhaustion requirement: Any person may "file a petition for declaratory judgment" to challenge "the validity of any regulation, whether or not the person has asked the [agency] to consider the validity of the regulation."[70]

When these exceptions are viewed as a whole, two themes emerge: Maryland courts do not require exhaustion either when an agency action is in some way unlawful, or when judicial intervention would not interfere with an agency's ability to operate within its area of expertise. As we will see, these two concerns—correcting illegal agency actions while deferring to agency expertise—also animate courts' substantive review of agency actions.[71]

67. *Priester*, 232 Md. App. at 193, 157 A.3d at 310.

68. *Id.* at 194, 157 A.3d at 310 (emphasis added).

69. *Id.* at 201 n.16, 157 A.3d at 314–15 n.16 (citing Prince George's County v. Blumberg, 288 Md. 275, 418 A.2d 1155 (1980)). The Court of Special Appeals, however, has noted that one of these exceptions—the "unauthorized procedure exception . . . has very limited viability today," *Priester*, 232 Md. App. at 202, 157 A.3d at 315, and the Court of Appeals has described the exception as "dicta" that is "supported by the citation of only one case," suggesting that the "unauthorized procedure" exception may not exist at all. Md. Comm'n on Hum. Rels. v. Bethlehem Steel Corp., 295 Md. 586, 594 n.10, 457 A.2d 1146, 1150 n.10 (1983). Indeed, it would be curious if challenges to an unlawful procedure were exempt from the exhaustion requirement, because one of the statutory bases for seeking judicial review is if an agency decision "results from an unlawful procedure." MD. CODE ANN., STATE GOV'T § 10-222(h)(3)(iii) (West 2022). That provision appears alongside other bases for judicial review that are not exempt from exhaustion, and nothing in the statute suggests it is singled out for special treatment. *See id.*

70. STATE GOV'T § 10-125(a)(1).

71. *See infra* Sections II.B, III.B.

Challenges to an agency's delay or inaction in the face of a petition for agency action or a statutory mandate present special difficulties of finality.[72] Environmental legislation, for example, often mandates agency action by specified deadlines,[73] and agencies may impose deadlines on themselves.[74] The Federal APA provides for judicial review to "compel agency action . . . unreasonably delayed."[75] But absent a missed deadline or evidence of a "pattern of inaction,"[76] federal courts are likely to be "circumspect" in reviewing an agency's failure to act.[77] As a practical matter, even where inaction is reviewable, the most likely relief is not a mandate to rule in the petitioner's favor, but a remand for prompt consideration.

Maryland courts, on the other hand, have held that agency *inaction* is just as subject to judicial review under the courts' inherent authority as agency action. The Court of Appeals of Maryland recognizes that "a court's inherent power of judicial review, under appropriate circumstances, may reach an administrative agency's inaction as well as its action," and that "[w]hen an agency . . . fails to act on a matter committed to its discretion by . . . statute, there is as much aggrievement and potential for abuse or prejudice as when an agency affirmatively announces an adverse decision."[78] This language suggests that Maryland law has a greater predilection for reviewing agency inaction than federal law. It is also consistent with the broader theme, present throughout Maryland administrative law, that courts possess inherent authority to review certain types of agency conduct. As we discuss throughout, this notion that courts have some irreducible minimum of authority to review agency actions is one of the most significant conceptual differences between Maryland and federal judicial review.

72. *See, e.g.*, Nat'l Parks Conservation Ass'n v. Norton, 324 F.3d 1229, 1237–38 (11th Cir. 2003) (collecting cases).

73. *See, e.g.*, Daniel P. Selmi, *Jurisdiction to Review Agency Inaction under Federal Environmental Law*, 72 IND. L.J. 65, 131, 131 n.304 (1996).

74. *See, e.g.*, Telecomms. Rsch. & Action Ctr. v. FCC, 750 F.2d 70, 80–81 (D.C. Cir. 1984) (retaining jurisdiction over unresolved matters pending before the FCC where the Commission "fail[ed] to meet its self-declared prior deadlines" and directing the Commission to file regular progress reports with the court of appeals).

75. 5 U.S.C. § 706(1); *see also id.* § 551(13) (defining "agency action" to include the "failure to act").

76. *Nat'l Parks Conservation Ass'n*, 324 F.3d at 1238.

77. *Telecomms. Rsch. & Action Ctr.*, 750 F.2d at 79.

78. Harvey v. Marshall, 389 Md. 243, 276–77, 884 A.2d 1171, 1191 (2005).

B. Methods of Review—How the Different Kinds of Agency Action Get Before Courts and the Standards that Apply

1. Maryland Law

Judicial review of an agency decision can be obtained by statute where available. Absent an explicit statutory right of review, it can be obtained via courts' inherent powers by bringing an original action such as a declaratory judgment action or a writ of mandamus.[79]

All judicial review proceedings in Maryland begin in the circuit court. This requirement is a matter of constitutional law, because, under the Maryland Constitution, the jurisdiction of the Court of Appeals and Court of Special Appeals of Maryland is exclusively appellate.[80] Judicial review of agency decisions is, therefore, technically "an exercise of original jurisdiction and not of appellate jurisdiction."[81]

a. Quasi-Judicial

The Maryland APA only provides for judicial review of "contested case[s],"[82] which are formal hearings before agencies.[83] Not all hearings are contested cases; to meet the definition, the hearing must be required by law. If a statute or regulation does not expressly require an agency to hold a hearing *consistent with the provisions of the Maryland APA*, a proceeding will not be considered a contested case, even if it bears certain hallmarks

79. Armstrong v. Mayor of Baltimore, 169 Md. App. 655, 666, 906 A.2d 415, 421–22 (2006) (citing Crim. Injs. Comp. Bd. v. Gould, 273 Md. 486, 500, 331 A.2d 55 (1975)). Similar devices were developed at common law for review of government actions prior to the adoption of the Federal and state APAs. *See, e.g.*, Louis L. Jaffe, *The Right to Judicial Review I*, 71 HARV. L. REV. 401, 403 (1958) ("When Lord Holt finally established in 1700 the power to review official action by certiorari and mandamus his decision was simply one aspect of the limits set upon monarchy."); John J. Coughlin, *The History of the Judicial Review of Administrative Power and the Future of Regulatory Governance*, 38 IDAHO L. REV. 89, 92 (2001) ("Traditionally, judicial review has afforded an important check on the exercise of administrative power.").

80. Shell Oil Co. v. Supervisor of Assessments, 276 Md. 36, 41, 343 A.2d 521, 524 (1975); Edward A. Tomlinson, *The Maryland Administrative Procedure Act: Forty Years Old in 1997*, 56 MD. L. REV. 196, 217 (1997).

81. *Shell Oil*, 276 Md. at 43, 343 A.2d at 525.

82. MD. CODE ANN., STATE GOV'T § 10-222 (West 2022); *see also* MD. RULE 7-201 (governing actions for judicial review where authorized by statute).

83. Specifically, a contested case involves a "proceeding before an agency to determine" either: (1) "a right, duty, statutory entitlement, or privilege of a person that is required by statute or constitution to be determined only after an opportunity for an agency hearing"; or (2) "the grant, denial, renewal, revocation, suspension, or amendment of a license that is required by statute or constitution to be determined only after an opportunity for an agency hearing." STATE GOV'T § 10-202(d)(1). A contested case does not include an agency hearing required only by regulation unless the regulation specifies that the hearing must be held in accordance with the Maryland APA. *Id.* § 10-202(d)(2).

such as reviewing facts and in-person interviews.[84] Likewise, even subsequent proceedings following a contested case—such as a decision to reinstate a license that was previously revoked—are not themselves contested cases unless there is a statutory or regulatory requirement for an APA-compliant hearing.[85]

Since this type of formal hearing is only a small portion of the work agencies do, judicial review would be significantly limited if it were only available in this narrow category of cases. Fortunately, this is not the case, as courts have always possessed inherent authority to review quasi-judicial decisions absent statutory authority, and the Maryland Rules have been amended to codify that power.[86] Invoking the principle that the legislature cannot divest courts of their inherent power to review arbitrary, illegal, or capricious agency actions,[87] the Court of Appeals has long recognized that "[c]ourts have the inherent power, through the writ of mandamus, by injunction, or otherwise," to review agency decisions without express statutory authority, and that "[w]here the statute or ordinance makes no provision for judicial review, an implied limitation upon an administrative board's authority is that its decisions be supported by facts and that they be not arbitrary, capricious or unreasonable."[88] And, in 2006, an "administrative mandamus" procedure was added to the Maryland Rules to govern judicial review of all quasi-judicial decisions for which there is no explicit statutory review procedure.[89] Under Maryland Rule 7-401(a), administrative mandamus is available for "a quasi-judicial order or action of an administrative agency where review is not expressly authorized by law."[90]

Statutory review of contested cases and administrative mandamus are both initiated by filing a petition for judicial review, governed by Maryland

84. *See, e.g.*, Greenberg v. Md. State Bd. of Physicians, No. 1465, 2021 WL 5706857, at *3 (Md. Ct. Spec. App. Dec. 1, 2021) (holding that the Board decision on reinstatement of physician's license was not a contested case—and thus that petitioner did not have a statutory right of review—because there was no requirement of a hearing in accordance with the Maryland APA); STATE GOV'T § 10-202(d)(2) (providing that even where an agency's regulation requires a hearing, the proceeding will not be considered a contested case unless the regulation expressly or by clear implication requires the hearing to be held in accordance with the Maryland APA).

85. *Greenberg*, 2021 WL 5706857, at *5–6.

86. MD. RULE 7-401.

87. *See infra* notes 178–181 and accompanying text.

88. Heaps v. Cobb, 185 Md. 372, 379–80, 45 A.2d 73, 76 (1945); *see also* Reese v. Dep't of Health and Mental Hygiene, 177 Md. App. 102, 144 n.21, 934 A.2d 1009, 1033–34 n.21 (2007) (explaining non-statutory judicial review of adjudicative decision-making).

89. *See* MD. RULE 7-401(a); *see also* Talbot County v. Miles Point Prop., LLC, 415 Md. 372, 394, 2 A.3d 344, 357 (2010) (discussing history of administrative mandamus).

90. MD. RULE 7-401(a).

Rules 7-202 and 7-203.[91] Review of a contested case must be brought in the circuit court for a county in which any party resides or has a principal place of business,[92] whereas the administrative mandamus rules do not contain an explicit venue provision, and simply require the petition to be filed in "a circuit court authorized to provide the review."[93]

A circuit court's powers are essentially the same whether reviewing an action under the Maryland APA or a petition for administrative mandamus. Both procedures allow a court to set aside an action that is unconstitutional; exceeds the statutory authority or jurisdiction of the agency or decisionmaker; results from an unlawful procedure; is affected by any error of law; is unsupported by competent, material, and substantial evidence in light of the entire record; or is arbitrary or capricious.[94] The administrative mandamus rules also allow a court to overturn an agency action if it is an abuse of discretion,[95] and the Maryland APA allows a court to set aside a decision in a contested case involving termination of employment or employee discipline if the agency "fails to reasonably state the basis for the termination or the nature and extent of the penalty."[96]

Judicial review of a quasi-judicial determination is narrow: A court's role is "limited to determining if there is substantial evidence in the record as a whole to support the agency's findings and conclusions, and to determine if the administrative decision is premised upon an erroneous conclusion of law."[97] When reviewing an agency's findings of fact, courts apply the substantial evidence standard, which requires them to "defer[] to the facts

91. *See* MD. RULE 7-202–7-203 (governing administrative review proceedings); MD. RULE 7-402(a) (requiring mandamus petition to comply with Rules 7-202 and 7-203).

92. MD. CODE ANN., STATE GOV'T § 10-222(c) (West 2022).

93. MD. RULE 7-202(a). In some contested cases, an administrative law judge, acting out of the Office of Administrative Hearings ("OAH"), may have taken the final action that leads to a petition for judicial review. However, for judicial-review purposes, the relevant agency is not the OAH, but the agency that made the underlying decision that OAH reviewed. Brown v. Wash. Suburban Sanitary Comm'n, 250 Md. App. 531, 537, 250 A.3d 1117, 1120 (2021). That agency—not the OAH and not the petitioner—is responsible for transmitting the record to the circuit court when a petition for judicial review has been filed. MD. RULE 7-206(d); *Brown*, 250 Md. App. at 536, 250 A.3d at 1119.

94. *Compare* STATE GOV'T § 10-222(h)(3)(i)–(v), (vii) (contested case), *with* MD. RULE 7-403(A)–(F) (administrative mandamus).

95. MD. RULE 7-403(G). This is a significant inclusion, because the Court of Appeals has clarified that section 10-222(h) of the State Government Article *does not* permit courts to review decisions for abuse of discretion. *See* Md. Transp. Auth. v. King, 369 Md. 274, 290, 799 A.2d 1246, 1255 (2002) (noting that "[n]either the Administrative Procedure Act nor general Maryland administrative law principles authorize" abuse-of-discretion review).

96. STATE GOV'T § 10-222(h)(3)(vi).

97. Md. Aviation Admin. v. Noland, 386 Md. 556, 571, 873 A.2d 1145, 1154 (2005) (quoting United Parcel Serv., Inc. v. People's Couns. for Balt. City, 336 Md. 569, 577, 650 A.2d 226, 230 (1994)).

found and inferences drawn by the agency when the record supports those findings and inferences."[98] In conducting this review, the court decides "whether a reasoning mind reasonably could have reached the factual conclusion the agency reached,"[99] and a court defers to the agency's fact finding and inferences if they are supported by the record.[100] Agencies' findings are prima facie correct, and are reviewed in the light most favorable to the agency.[101]

For matters committed to agency discretion, reviewing courts apply the arbitrary and capricious standard,[102] which, although highly dependent on context, is "extremely deferential" to the agency.[103] Under arbitrary and capricious review, "generally the question is whether the agency exercised its discretion 'unreasonably or without a rational basis.'"[104] And, "[d]espite some unfortunate language that has crept into a few . . . opinions, a court's task on review is *not* to substitute its judgment for the expertise of those persons who constitute the administrative agency."[105] Arbitrary and capricious review under the Maryland APA "do[es] not include disproportionality or abuse of discretion."

> As long as an administrative sanction or decision does not exceed the agency's authority . . . and is supported by competent . . . evidence, there can be no judicial reversal or modification of the decision based on disproportionality or abuse of discretion unless [it was] so extreme and egregious that the reviewing court can properly deem the decision to be "arbitrary or capricious."[106]

98. Md. Dep't of the Env't v. Cnty. Comm'rs (*MDOE*), 465 Md. 169, 201, 214 A.3d 61, 81 (2019).

99. *Noland*, 386 Md. at 571, 873 A.2d at 1154 (citations omitted) (quoting Bulluck v. Pelham Wood Apts., 283 Md. 505, 512, 390 A.2d 1119, 1123 (1978)).

100. *Id.*

101. *Id.*

102. *MDOE*, 465 Md. at 202, 214 A.3d at 81.

103. *Id.*

104. *Id.* (quoting Harvey v. Marshall, 389 Md. 243, 297, 884 A.2d 1171, 1204 (2005)).

105. Md. Aviation Admin. v. Noland, 386 Md. 556, 571–72, 873 A.2d 1145, 1154 (2005) (internal quotation marks omitted) (quoting United Parcel Service, Inc. v. People's Couns. for Balt. City, 336 Md. 569, 576–77, 650 A.2d 226, 230 (1994)). A corollary of the rule that courts do not substitute their judgment for the agency's is the rule that courts cannot *affirm* an agency's decision except based on the *agency's* findings and the reasons stated by the agency. United Steelworkers of Am. AFL-CIO, Local 2610 v. Bethlehem Steel Corp., 298 Md. 665, 679, 472 A.2d 62, 69 (1984). This is in accord with federal practice, see SEC v. Chenery Corp. (*Chenery I*), 318 U.S. 80 (1943), though it stands in contrast to judicial review of trial court decisions, where appellate courts will sustain a judgment for any reason apparent on the record, whether or not it was expressly relied on by the trial court. *United Steelworkers*, 298 Md. at 679, 472 A.2d at 69.

106. Md. Transp. Auth. v. King, 369 Md. 274, 291, 799 A.2d 1246, 1255–56 (2002).

Thus, all quasi-judicial decisions—whether or not the result of a formal hearing—are reviewed under essentially the same standards. And while there are multiple enumerated bases for reversing a quasi-judicial decision, they all ultimately boil down to whether the agency acted with legal authority or based its decision on facts that are not supported by the record.

b. Quasi-Legislative

Quasi-legislative actions are challenged through a declaratory judgment action or other invocation of the circuit court's inherent authority. "A person may file a petition for a declaratory judgment on the validity of any regulation, whether or not the person has asked the [agency] to consider the validity of the regulation."[107] Although section 10-125 only applies to "regulation[s]," the Maryland APA defines "regulation" broadly to encompass any "statement or . . . amendment or repeal of a statement" including a guideline, rule, standard, statement of interpretation, or statement of policy.[108] This definition would appear to capture almost any action that could be considered quasi-legislative.

An action under section 10-125 must be brought in "the circuit court for the county where the petitioner resides or has a principal place of business."[109] The court "may determine the validity of any regulation if it appears to the court that the regulation or its threatened application interferes with or impairs or threatens to interfere with or impair a legal right or privilege of the petitioner."[110] Specifically, the court "shall declare a provision of a regulation invalid if [it] finds that" (1) the regulation "violates any provision of the United States or Maryland Constitution"; (2) the regulation "exceeds the [agency's] statutory authority"; or (3) "the [agency] failed to comply with statutory requirements" for adopting the regulation.[111]

At the same time, Maryland courts have also held that quasi-legislative actions are "subject to court review, by invoking the court's original jurisdiction . . . through the writ of mandamus, by injunction, [by]

107. MD. CODE ANN., STATE GOV'T § 10-125(a)(1) (West 2022). Notably, section 10-125 relief is unavailable for regulations of certain executive agencies. *See id.* § 10-120. One of the agencies listed is the Public Service Commission. *Id.* § 10-120(a)(6). However, since 2004, Public Service Commission regulations *are* reviewable under section 10-215, "[n]otwithstanding § 10-120 of the State Government Article." MD. CODE ANN, PUB. UTIL. § 3-201(a) (West 2022); *see also* Sprenger v. Pub. Serv. Comm'n, 171 Md. App. 444, 450 n.3, 910 A.2d 544, 548 n.3 (2006) (noting 2004 change in statute).

108. STATE GOV'T § 10-101(g)(1).

109. *Id.* § 10-125(a)(2).

110. *Id.* § 10-125(b).

111. *Id.* § 10-125(d).

declaratory action, or by certiorari."[112] Of these options, courts have specifically recognized declaratory actions under Courts and Judicial Proceedings section 3-403 as appropriate to challenge agency regulations.[113] Review of quasi-legislative actions under the court's inherent power is limited to whether the agency "was acting within the scope of its statutory authority,"[114] which courts have also articulated as whether the agency "was acting within its legal boundaries."[115]

Therefore, while State Government section 10-125 provides a *specific* mechanism for challenging regulations, it is not the *exclusive* mechanism.[116] However, judicial review is functionally the same whether brought under section 10-125 or more generally through the court's inherent power. While inherent authority review is limited to whether the agency exceeded its authority, the statutory bases for invalidating a regulation are essentially the same: whether the regulation violates the Constitution, the regulation exceeds the agency's authority, or the agency failed to comply with statutory requirements for adopting the provision.[117] Courts have applied the "legal boundaries" standard that applies for inherent authority review to proceedings brought under section 10-125 as well.[118]

112. *See, e.g.*, Bethel World Outreach Church v. Montgomery County, 184 Md. App. 572, 597, 967 A.2d 232, 247 (2009) (quoting Armstrong v. Mayor of Baltimore, 169 Md. App. 655, 667, 906 A.2d 415, 422 (2006)). The Court of Appeals' decision in *Talbot County v. Miles Point Property*, 415 Md. 372, 2 A.3d 344 (2010), however, casts doubt on whether common law mandamus can ever be available to challenge an agency's legislative functions. The Court noted that mandamus only applies to "ministerial" acts and only when "an official's duties are absolute, certain, and imperative, involving merely the execution of a set task," and thus "does not lie" when a body is "acting in a legislative capacity, and not a ministerial one." *Id.* at 397–98, 2 A.3d at 359 (internal quotation marks omitted) (quoting James v. Prince George's County, 288 Md. 315, 326, 418 A.2d 1173, 1179 (1980)). It appears uncontroversial, however, that a declaratory judgment action is an appropriate vehicle for challenging quasi-legislative administrative acts. Dugan v. Prince George's County, 216 Md. App. 650, 659 n.13, 88 A.3d 896, 902 n.13 (2014) ("A declaratory judgment action is appropriate when there is no judicial review by statute and the action was quasi-legislative in nature . . . .").

113. *See, e.g.*, Christ *ex rel.* Christ v. Md. Dep't of Nat. Res., 335 Md. 427, 433 n.5, 644 A.2d 34, 36 n.5 (1994) ("The plaintiff's action is generally authorized by the Maryland Uniform Declaratory Judgment Act . . . and more specifically by the Maryland Administrative Procedure Act, . . . [State Government] § 10-125 . . . ."); *see also* Oyarzo v. Md. Dep't of Health & Mental Hygiene, 187 Md. App. 264, 272, 978 A.2d 804, 809 (2009) (identifying Declaratory Judgment Act and section 10-125 as sources of the court's jurisdiction).

114. Lewis v. Gansler, 204 Md. App. 454, 473, 42 A.3d 63, 75 (2012).

115. *Bethel World Outreach Church*, 184 Md. App. at 597, 967 A.2d at 247.

116. *See supra* notes 112–115 and accompanying text.

117. MD. CODE ANN., STATE GOV'T § 10-125(d) (West 2022).

118. *See, e.g.*, Medstar Health v. Md. Health Care Comm'n, 376 Md. 1, 20–21, 827 A.2d 83, 95 (2003) ("Pursuant to State Government Article, § 10-125, . . . [o]ur scope of review . . . is limited to assessing whether the agency was acting within its legal boundaries." (footnote omitted) (internal quotation marks omitted) (quoting Adventist v. Suburban, 350 Md. 104, 124, 711 A.2d 158, 167 (1998))).

As later sections of this Article will show,[119] the differential treatment of quasi-judicial and quasi-legislative decisions is one of the significant distinctions between Maryland and federal administrative review. Whereas judicial review of quasi-legislative decisions under Maryland law is "so narrow that it may be inappropriate to describe it as 'judicial review,'" federal judicial review statutes apply the same procedural requirements for appeal and standards of review to all final agency actions.[120] Of course, federal law distinguishes between adjudications and rulemakings in critical ways—certain standards of review under the Federal APA depend on the type of action being challenged, and the procedure for seeking review can likewise vary for different kinds of agency decisions—but these procedural nuances do not reflect the same kind of structural division that Maryland law embodies. The more important distinctions between rulemakings and adjudications under the Federal APA relate to the substance of an agency's decision and the merits of an appeal.

2. Federal Law

Like in Maryland, review of a federal agency decision can be either statutory or non-statutory.[121] Under federal law, however, a complex patchwork of statutes provides the basis for review. Although the Federal APA establishes procedures for judicial review, it does not confer subject-matter jurisdiction or create a right of action.[122] Thus, although the Federal APA provides that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action . . . is entitled to judicial review thereof,"[123] they must generally look to the organic statute of the specific agency whose action they are challenging to determine the mechanism for seeking that review.[124] In particular, an agency's organic statute determines the venue and timing for a judicial review proceeding.

119. See discussion *infra* Section II.B.2.

120. *See* Tomlinson, *supra* note 80, at 199, 214 (describing the APA as prescribing "a unitary system of review applicable to all final agency action").

121. ADMIN. CONF. OF THE U.S. & AM. BAR ASS'N, *Judicial Review of Agency Action*, FED. ADMIN. PROC. SOURCEBOOK (2021), https://sourcebook.acus.gov/wiki/Judicial_Review_of_Agency_Action/view [hereinafter *Judical Review of Agency Action*]. Arguably, a distinct third type of review is judicial review of an enforcement action. *Id.*

122. Califano v. Sanders, 430 U.S. 99, 105 (1977).

123. 5 U.S.C. § 702.

124. *See, e.g.*, 15 U.S.C. § 57a(e) (providing for review of FTC actions); 47 U.S.C. § 402 (providing for review of FCC actions).

Often, federal law provides for review directly in the federal courts of appeals,[125] or even one specific court of appeals.[126]

a. APA Review

Where judicial review of federal agency decisions is permitted, the Federal APA authorizes a reviewing court to "hold unlawful and set aside agency action, findings, and conclusions" of law[127]—without distinguishing between rulemaking and adjudication—that the court finds to be (1) "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"; (2) "contrary to constitutional right, power, privilege, or immunity"; (3) "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right"; or (4) "without observance of procedure required by law."[128] In formal agency hearings, a court can set aside a decision if it was not supported by substantial evidence.[129]

The Federal APA's judicial review criteria largely overlap with the criteria for review of quasi-judicial decisions spelled out under Maryland law.[130] However, unlike the limited enumerated bases for reviewing quasi-judicial actions under Maryland law, the Federal APA provides for the same general standards of review of both rulemakings and adjudications (with the noteworthy substantial evidence standard applicable to formal adjudication). With respect to rulemaking (or quasi-legislative acts), federal and Maryland law thus differ in a significant respect: Maryland courts can only set aside an agency's quasi-legislative action when the agency exceeded its legal

125. *See, e.g.*, 28 U.S.C. § 2342(1) (providing for review of certain FCC decisions in "[t]he court of appeals").

126. For example, 28 U.S.C. § 2342 gives the courts of appeals jurisdiction over certain decisions of a handful of agencies including the FCC, the Departments of Agriculture and Transportation, and the Atomic Energy Commission. Venue for those proceedings is in the circuit where the petitioner resides or has its principal office, or in the D.C. Circuit. *Id.* § 2343. Other statutes, however, sometimes allow for review only in the D.C. Circuit. *See, e.g.*, 42 U.S.C. § 4915(a) (providing for appeals of EPA and FAA decisions exclusively in D.C. Circuit); 47 U.S.C. § 402(b) (providing for review of certain enumerated types of FCC decisions in D.C. Circuit). The timing for filing a petition for review (and even the name of the petition to be filed) can also vary by agency or type of decision. *Compare* 28 U.S.C. § 2344 (providing sixty days to file petition for review), *with* 47 U.S.C. § 402(b), (c) (providing thirty days to file notice of appeal).

127. 5 U.S.C. § 706(2).

128. *Id.* § 706(2)(A)–(D). In making these determinations, however, § 706 cautions courts that "due account shall be taken of the rule of prejudicial error." *Id.* § 706.

129. *Id.* § 706(2)(E). A final, rarely invoked provision, § 706(2)(F), allows for de novo review of factual findings when an agency's factfinding procedures are inadequate or "when issues that were not before the agency are raised in a proceeding to enforce nonadjudicatory agency action." Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 415 (1971), *abrogated by* Califano v. Sanders, 430 U.S. 99 (1977).

130. *See supra* Section II.B.1.a.

authority,[131] whereas in federal administrative review, exceeding an agency's authority is one of several bases for reversal.[132]

Though the Federal APA differs significantly from the Maryland APA by applying the same standards of review for challenges to rulemakings and adjudications, the rulemaking/adjudication distinction remains critical, even case dispositive in federal administrative appeals. Though it does not determine the standard of review as it does under Maryland law, the dichotomy dictates what procedures the agency was required to follow to reach that decision.[133]

b. APA Rulemaking Exceptions

As we have explained, an important aspect of review of agency rulemaking is ascertaining whether the agency followed the notice-and-comment procedures set forth in the APA. Yet the Federal APA carves out several important areas—interpretive rules; general policy statements; internal agency organization and policies; rules for which prior notice and comment would be "impracticable, unnecessary, or contrary to the public interest";[134] agency management and personnel; matters relating to public

131. *See supra* notes 114–118 and accompanying text.

132. *See* 5 U.S.C. § 706(2)(C) (allowing reversal of decision "in excess of statutory jurisdiction, authority, or limitations"); *see, e.g.*, Associated Indus. of N.Y. State, Inc. v. U.S. Dep't of Lab., 487 F.2d 342, 350 (2d Cir. 1973) ("While we still have a feeling that there may be cases where an adjudicative determination not supported by substantial evidence . . . would not be regarded as arbitrary or capricious, . . . in the review of rules of general applicability made after notice and comment rulemaking, the two criteria do tend to converge." (footnote omitted) (citation omitted)); Richard A. Posner, *What Is Obviously Wrong with the Federal Judiciary, Yet Eminently Curable Part I*, 19 GREEN BAG 2D 187, 198 (2016) ("There are multiple standards for deciding how much weight to give the decision or findings of a district judge or an administrative agency—the main ones are substantial evidence, abuse of discretion, clearly erroneous, arbitrary and capricious, reasonableness, and de novo. But all but the last are as a practical matter synonyms.").

133. Most notably, agencies must publish notice of proposed rulemakings in the Federal Register and allow interested parties an opportunity to comment. 5 U.S.C. § 553. Where an agency does not follow the notice-and-comment requirement, the resulting agency action will be "without observance of procedure required by law," *id.* § 706(2)(D), and thus subject to reversal—unless the action turns out to be an adjudication, for which the notice-and-comment requirement does not apply, see, for example, Neustar, Inc. v. FCC, 857 F.3d 886, 896 (D.C. Cir. 2017) (rejecting challenge to FCC decision that was not the product of notice-and-comment rulemaking, where court determined agency action constituted adjudication), or subject to one of the enumerated exceptions in 5 U.S.C. § 553(b), see *infra* note 134 and accompanying text. *See also, e.g.*, Nat'l Educ. Ass'n v. DeVos, 379 F. Supp. 3d 1001, 1006–07 (N.D. Cal. 2019), *appeal dismissed*, No. 19-16260, 2019 WL 4656199 (9th Cir. Aug. 13, 2019) (vacating the Department of Education's rule suspending the implementation of the Obama Administration's rule requiring additional disclosures for online universities because the Department failed to comply with the "negotiated rulemaking" requirements of the Higher Education Act, which require the formation of a representative committee to negotiate proposed rules).

134. 5 U.S.C. § 553(b)(B) (providing that the notice provisions do not apply to these categories).

property, grants, and contracts; and military and foreign affairs[135]—from its rulemaking procedures. Aimed at areas for which the benefits of notice and comment may (arguably) be outweighed by the costs (e.g., interpretive rules and policy statements)[136] and areas where special considerations may make prior notice inappropriate (e.g., military and "good-cause"),[137] these exceptions allow federal agencies to make important policy decisions without following rulemaking procedures.[138]

Though these statutory exceptions form a critical component of federal administrative practice, they are notably absent from Maryland law.[139] Further, in contrast with the Federal APA, the Maryland APA definition of "regulation" expressly *includes* guidelines, policy statements, interpretation statements, and statements governing agency organization and practices,[140] and the internal management exclusion is narrow in scope.[141]

A detailed examination of the Federal APA rulemaking exceptions, which are already the subject of extensive academic commentary,[142] is beyond the scope of this Article. Among all of these important exceptions, however, the exception for interpretive rules may carry the greatest potential for misuse by agencies seeking to carry out their political agenda while circumventing the burdensome notice-and-comment procedures. At least in part, the potential for misuse is the result of the lack of any statutory definition of "interpretive rule" and the Supreme Court's refusal to "wade into" the debate over the proper scope of the exception.[143]

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135. *Id.* § 553(a) (excluding these areas from the APA's rulemaking requirements).

136. *Id.* § 553(b)(B). As Judge Richard Posner once surmised: "Every governmental agency that enforces a less than crystalline statute must interpret the statute, and it does the public a favor if it announces the interpretation in advance of enforcement . . . ." Hoctor v. U.S. Dep't of Agric., 82 F.3d 165, 167 (7th Cir. 1996). Allowing agencies to forgo notice and comment theoretically encourages them to regularly issue and update such guidance. *See also, e.g.*, Richard J. Pierce, Jr., *Distinguishing Legislative Rules from Interpretative Rules*, 52 ADMIN. L. REV. 547, 550 (2000) ("The advantages of the rulemaking process come at a high price, however. The courts have adopted expansive interpretations of the elements of the rulemaking process that have had the effect of making it long and costly.").

137. 5 U.S.C. § 553(a)(1), (b)(B).

138. *See, e.g.*, Tomlinson, *supra* note 80, at 230.

139. MD. CODE ANN., STATE GOV'T § 10-101(g)(2)(i) (West 2022); *see* Tomlinson, *supra* note 80, at 230–31. Maryland law does exempt statements that "concern[] only internal management" as well as responses to petitions for adoption of a regulation and declaratory rulings from the definition of "regulation," and thus the rulemaking process. STATE GOV'T § 10-101(g)(2)(i)–(iii).

140. STATE GOV'T § 10-101(g)(1)(iii)–(iv).

141. *See* Tomlinson, *supra* note 80, at 229.

142. *See, e.g.*, *id.* at 230.

143. Perez v. Mortg. Bankers Ass'n, 575 U.S. 92, 96 (2015) (collecting authorities); *see, e.g.*, Guilford Coll. V. Wolf, No. 1:18CV891, 2020 WL 586672, at *5 (M.D.N.C. Feb. 6, 2020) ("[T]he distinction between legislative and interpretive rules is 'enshrouded in considerable smog.'" (quoting Gen. Motors Corp. v. Ruckelshaus, 742 F.2d 1561, 1565 (D.C. Cir. 1984))).

Interpretive rules are supposed to allow agencies "to advise the public of the agency's construction of the statutes and rules which it administers."[144] Unlike a rule issued after notice and comment, interpretive rules lack "the force and effect of law."[145] But there lies the rub, because interpretive rules may have a binding effect anyway under the elaborate body of deference principles courts have developed.[146]

Because interpretive rules are not subject to the notice-and-comment requirement, they are a popular method for agencies to clarify policies. However, agencies that attempt to skirt the notice-and-comment requirements by couching new rules as "interpretive rules" do so at risk of having to start the rulemaking process from square one if a court determines that the rule goes beyond merely clarifying existing statutes and regulations.[147] Courts have offered myriad formulations of the standard for where a rule exceeds the bounds of the interpretive exemption, such as where it "supplements a statute, adopts a new position inconsistent with existing regulations, or otherwise effects a substantive change."[148] Whether to take on the substantial cost of notice and comment or instead proceed via interpretive rule turns on "eminently practical" considerations.[149] As one scholar described this balancing act: "The agency knows that its interpretative rules are much more vulnerable to judicial rejection in an enforcement proceeding, and that it is more likely to err when it issues a rule without going through the notice and comment procedure."[150] It is far easier, however, for an agency to change course when it is displeased with the effect of an interpretive rule—a detriment for an agency that may be looking to

144. *Perez*, 575 U.S. at 97 (quoting Shalala v. Guernsey Mem'l Hosp., 514 U.S. 87, 99 (1995)).

145. *Id.*

146. *Id.* at 109–110 (Scalia, J., concurring) (noting that while an "agency may not use interpretive rules to *bind* the public . . . because it remains the responsibility of the court to decide whether the law means what the agency says it means," courts have "revolutionized the import of interpretive rules' exemption from notice-and-comment rulemaking" by developing "an elaborate law of deference to agencies' interpretations"); *see, e.g.*, Walker, *supra* note 9, at 746 ("Whether agency guidance is actually nonbinding on regulated parties—formally or at least functionally—is subject to debate.").

147. *See, e.g.*, *Guilford Coll.*, 2020 WL 586672, at *1, *5 (enjoining the Trump Administration from applying its "interpretive rule" that would have caused holders of certain immigration visas (such as student visas) to be deemed unlawfully present "not at the time an individual is formally found to be out of status," as was the case prior to the new interpretation, "but from the time an adjudicator determines the status violation first occurred." Notice-and-comment rulemaking was required because the rule sought to "achieve a substantive policy outcome" and "implement" the Immigration and Naturalization Act "rather than merely interpret it." (citations omitted)).

148. *Id.* at *5 (quoting Children's Hosp. of the King's Daughters, Inc. v. Azar, 896 F.3d 615, 620 (4th Cir. 2018)).

149. Pierce, *supra* note 136, at 553–54.

150. *Id.*

carry lasting influence after an administration change, and a benefit for an agency looking to keep its options open and test the benefits of a particular policy.

Cases at the margins may pose difficult questions under federal law, but the issue is more clear-cut in Maryland, where policy statements are, by definition, regulations. The narrow rulemaking exemption for "internal management" is unlikely to apply to many interpretive rules, because interpretive rules nearly always "affect how agency staff treat members of the *public*."[151]

c. Arbitrary and Capricious Review

Without doubt, one of the most productive and frequently invoked APA standards is the arbitrary-and-capricious standard. Although courts do not review agencies' policy determinations, arbitrary-and-capricious review allows litigants to come close to challenging policy decisions in court by challenging the *reasoning* agencies employ to reach their policy decisions. Courts have provided numerous examples of conduct fitting that standard. Normally, an action would be arbitrary or capricious if:

> [T]he agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.[152]

In addition, to survive arbitrary-or-capricious review, an agency must examine the relevant data and articulate a satisfactory explanation for its action.[153] It is also arbitrary and capricious for an agency to depart from its prior policy without acknowledging and explaining the departure: "An agency may not, for example, depart from a prior policy *sub silentio* or simply disregard rules that are still on the books."[154]

Because arbitrary-and-capricious review targets an agency's decision-making process, it is a particularly powerful tool for challenging a regulation's substance without asking a court to disagree with an agency's policy determinations. An agency's failure to consider a particular argument

151. Tomlinson, *supra* note 80, at 231 (emphasis added).

152. Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

153. *See, e.g.*, *id.*; FCC v. Fox Television Stations, Inc., 556 U.S. 502, 513 (2009).

154. *Fox Television Stations*, 556 U.S. at 515 (noting that "the requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it *is* changing position").

presented in public comments, or negative consequences of a policy enactment, can provide the basis for arbitrary-and-capricious review. A new administration's efforts to repeal policies put in place by its predecessor can, likewise, supply the basis for arbitrary-and-capricious review if the agency does not do a good enough job laying the factual groundwork[155] or relies upon a flawed analysis to justify a policy change.[156]

Appropriately, judicial review of an agency's decision-making process is usually limited to the administrative record relied upon by the agency.[157] Nonetheless, where a petitioner can muster strong evidence of "bad faith or improper behavior,"[158] courts may order extra-record discovery into the actual reasons that may have motivated an agency's decision, which may, in turn, be used to support arguments that the decision was arbitrary and capricious.[159] Maryland likewise recognizes the administrative record rule, subject to what it describes as a "narrow exception" for "evidence of alleged procedural irregularities at the agency level,"[160] though Maryland courts have produced "little decisional guidance" on the scope of this exception.[161]

One apparent distinction between Maryland and federal administrative review is their respective treatments of the arbitrary and capricious standard.

155. *See, e.g.*, Dep't of Com. v. New York, 139 S. Ct. 2551, 2575–76 (2019) (vacating the Trump Administration's decision to reinstate a citizenship question in the census where the stated basis—to assist with Department of Justice ("DOJ") Voting Rights Act enforcement—was "contrived" and, in fact, the evidence showed that "Commerce went to great lengths to elicit the request [for citizenship information] from DOJ").

156. *See, e.g.*, Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1912 (2020) (vacating the Trump Administration's recission of the Deferred Action for Childhood Arrivals ("DACA") program for failing to explain its new legal conclusion—*contra* that of previous administrations—that DACA is illegal).

157. *See, e.g.*, *Dep't of Com.*, 139 S. Ct. at 2573 (citing Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519, 549 (1978)).

158. *Id.* at 2574.

159. *Id.* (approving of extra-record discovery into inclusion of the citizenship question in the census where the administrative record undermined the stated explanation). *But cf.* Trump v. Hawaii, 138 S. Ct. 2392, 2420 (2018) (agreeing that the Court could consider extrinsic evidence in evaluating an Establishment Clause challenge to the Trump Administration's decision to bar entry from predominantly Muslim countries, but declining to give that evidence meaningful weight in light of the rational basis standard and deference owed to the President in immigration matters).

160. Erb v. Md. Dep't of Env't, 110 Md. App. 246, 267, 676 A.2d 1017, 1028 (1996). Maryland law also recognizes that evidence of inconsistent decisions of a particular agency may be admissible and "highly reliable and probative" in the arbitrary and capricious analysis. *Id.* (internal quotation omitted).

161. Geier v. Md. Bd. of Physicians, No. 0709, 2015 WL 5921325, at *12 (Md. Ct. Spec. App. July 31, 2015). One published decision has offered that "[d]iscovery in circuit court should not be permitted when a remand to the administrative agency is a viable alternative." Venter v. Bd. of Educ., 185 Md. App. 648, 684, 972 A.2d 328, 349 (2009) (internal quotation marks omitted) (quoting Montgomery County v. Stevens, 337 Md. 471, 481–82, 654 A.2d 877 (1995)).

As shown above,[162] Maryland and federal courts articulate the standard very differently: Federal courts emphasize the agency's logic and decision-making, whereas Maryland courts emphasize the limits of the agency's legal authority and treat arbitrary-and-capricious review as highly deferential.

As a practical matter, the federal articulation of arbitrary-and-capricious review seems to offer challengers more flexibility because it is not limited to whether the agency exceeded its legal authority. A petitioner is free to argue that a disputed regulation is illogical or that it overlooks something the petitioner thinks is important. A court may or may not agree with these arguments, but they are not foreclosed by the standard of review.

Yet despite these apparent differences, the Maryland Court of Appeals "has characterized the arbitrary or capricious standard as similar to the standard under federal administrative law,"[163] and has held that "[f]or guidance, a reviewing [Maryland] court may look to case law applying the similar standard in federal administrative law."[164] Thus, there appears to be a tension in Maryland's concept of arbitrary and capricious review: While the standard on its face focuses on different elements and appears much narrower than the federal standard, federal law—which Maryland cases consider "similar"—remains a relevant guide.

d. Federal-Question Review

Where a statute does not expressly provide a right of review—that is, "in the absence or inadequacy" of "the special statutory review proceeding relevant to the subject matter in a court specified by statute," judicial review is still generally available "in a court of competent jurisdiction."[165] Such non-statutory review is almost always brought in the district courts, pursuant to their federal question jurisdiction under 28 U.S.C. § 1331.[166]

C. Actions Committed to Agency Discretion: Unreviewable, and "Unreviewable"

Under both Maryland and federal law, a certain category of decisions—those involving areas committed to an agency's discretion—are largely unreviewable by courts. Federal and Maryland law differ, however, both in terms of the source of this rule and how strictly it applies.

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162. *See supra* notes 130–131 and accompanying text.

163. Md. Off. of People's Couns. v. Md. Pub. Serv. Comm'n, 461 Md. 380, 399, 192 A.3d 744, 755 (2018).

164. *MDOE*, 465 Md. 169, 202, 214 A.3d 61, 81 (2019).

165. 5 U.S.C. § 703; *see also id.* § 704 ("Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review.").

166. *Judicial Review of Agency Action*, *supra* note 121.

The Federal APA provides for judicial review of agency decisions "except to the extent that statutes preclude judicial review; or agency action is committed to agency discretion by law."[167] This exemption from APA review is narrow, applying only "in those rare instances where statutes are drawn in such broad terms that in a given case there is no law to apply."[168] An alternate formulation of this standard is that an agency decision is unreviewable when there are "no judicially manageable standards . . . for judging how and when an agency should exercise its discretion."[169]

The Supreme Court's recent opinion mandating further explanation from the Trump Administration to support its (eventually omitted) citizenship question for the 2020 census demonstrates just how narrow this exception has become.[170] Despite the broad discretion conferred upon the Secretary of Commerce,[171] with limited restrictions on "the form and content of the census,"[172] the Court concluded that the questionnaire was not committed to agency discretion. Rather, "by mandating a population count that will be used to apportion representatives, . . . the Act imposes 'a duty to conduct a census that is accurate and that fairly accounts for the crucial representational rights that depend on the census and the apportionment.'"[173] The citizenship question was "amenable to review for compliance with those and other provisions of the Census Act, according to the *general requirements of reasoned agency decisionmaking*"[174]—a standard that, if taken at face value, could swallow the exception in nearly every situation.

167. 5 U.S.C. § 701(a) (internal paragraph numbers omitted).

168. Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 410 (1971) (internal quotation marks omitted) (quoting S. REP. NO. 79-752, at 212 (1945)), *abrogated by* Califano v. Sanders, 430 U.S. 99 (1977); *see also* Heckler v. Chaney, 470 U.S. 821, 826 (1985) (noting that exception "should be invoked only where the substantive statute [leaves] the courts with no law to apply" (internal quotation marks omitted) (quoting Chaney v. Heckler, 718 F.2d 1174, 1184 (1983)).

169. Speed Mining, Inc. v. Fed. Mine Safety & Health Rev. Comm'n, 528 F.3d 310, 317 (4th Cir. 2008) (quoting *Heckler*, 470 U.S. at 830) (alteration in original). In this respect, the "committed to agency discretion" exception can be seen as a version of the Article III prohibition on courts deciding political questions committed to coordinate branches of government. *See* Nixon v. United States, 506 U.S. 224, 228 (1993) (noting that political questions are nonjusticiable where, *inter alia*, there are no "judicially . . . manageable standards" for deciding them).

170. Dep't of Com. v. New York, 139 S. Ct. 2551, 2568 (2019).

171. *See id.* (noting that the Census Act "leave[s] much to the Secretary [of Commerce's] discretion," such as a provision instructing the Secretary to take a census "in 'such form and content as he may determine, including the use of sampling procedures and special surveys'") (quoting 13 U.S.C. § 141(a)).

172. *Id.* (noting restrictions on statistical sampling and on the ability to collect information via direct inquiries when administrative records are available).

173. *Id.* at 2568–69 (quoting Franklin v. Massachusetts, 505 U.S. 788, 819–20 (1992)) (citations omitted).

174. *Id.* at 2569 (emphasis added).

Furthermore, except where Congress has expressly precluded review, the agencies' own rules and informal policy statements can establish the standards required for judicial review.[175] Just as federal agencies can avail themselves of this essentially unbridled discretion where it is available, so too can they constrain themselves. Though setting forth such standards in substantive regulations may limit an agency's informal decision-making, it may also have the salutary benefit of negating an agency's ability to evade judicial review in the future. In a dispute over the Department of Health and Human Services' ("DHS") authority to strip an organization of a grant for a teenage pregnancy prevention program, then-District Judge Ketanji Brown Jackson first set forth the general rule that "a federal agency's allocation of congressionally-appropriated grant funding is the type of discretionary action that is presumptively unreviewable."[176] But DHS could not rely on that rule to avoid judicial review of its decision (apparently animated by its opposition to sex education) to pull the plug on the grant. Rather, the court could review the agency's decision for compliance with the agency's regulations governing the grant program.[177] So while there are important swaths of federal agency actions that, by default, will not be subject to judicial review under the APA, agencies have some incentive to cabin their discretion and make it more onerous for future administrations to reverse their policies.

Notwithstanding the possibility that self-regulation can provide a focus for judicial review, the fact that Congress can remove certain agency decision-making from federal courts' jurisdiction is a significant distinction between federal and Maryland administrative review. Although Maryland law does contain a principle, similar to that found in federal law, that an agency's decision in an area committed to agency discretion is *ordinarily*

175. Myriad efforts by the Trump Administration to avoid or limit judicial review were stymied by regulations promulgated during previous administrations. *See, e.g.*, Physicians for Soc. Resp. v. Wheeler, 956 F.3d 634, 640 (D.C. Cir. 2020) (holding that the EPA directive prohibiting grant recipients from serving on EPA advisory committees was reviewable where governing regulations provided that the agency head "must . . . [a]ssure that the interests and affiliations of advisory committee members are reviewed for conformance with applicable conflict of interest statutes [and regulations]") (alterations in original); Pol'y & Rsch., LLC v. U.S. Dep't of Health & Hum. Servs., 313 F. Supp. 3d 62, 76 (D.D.C. 2018), *appeal dismissed*, No. 18-5190, 2018 WL 6167378 (D.C. Cir. Oct. 29, 2018) (concluding that HHS's decision to terminate Teen Pregnancy Prevention Program grants was reviewable because HHS regulations limited the agency's discretion to terminate monetary awards).

176. *Pol'y & Rsch., LLC*, 313 F. Supp. 3d at 68; Complaint for Declaratory and Injunctive Relief at 15–16, Pol'y & Rsch., LLC v. U.S. Dep't of Health & Hum. Servs., 313 F. Supp. 3d 62 (D.D.C. 2018) (No. 1:18-cv-00346).

177. *Pol'y & Rsch., LLC*, 313 F. Supp. 3d at 68.

unreviewable,[178] a court may still overturn such an action if the agency acts arbitrarily or capriciously, which, as discussed above, means "unreasonably or without a rational basis."[179] Indeed, Maryland courts have held that—even though "there generally must be a legislative grant of the right to seek judicial review"—the Legislature cannot divest the courts of the inherent power they possess to review and correct actions by an administrative agency which are arbitrary, illegal, capricious or unreasonable."[180] The inherent power to review administrative decisions absent statutory authorization is "extremely limited,"[181] and courts exercising their inherent authority must "take[] [care] not to interfere with the legislative prerogative or with the exercise of sound administrative discretion, where discretion is clearly conferred,"[182] but it prevents the legislature from removing a category of administrative decisions entirely from the jurisdiction of Maryland courts. As the Court of Appeals' decision in *Linchester* clarifies, at bottom, the rule that agencies' discretionary actions are "unreviewable" can be seen as an alternate articulation of the rule that, in reviewing agency decisions, courts do not substitute their judgment for that of the agency.[183] Maryland's position shows an even stronger reluctance to allow any agency decision to avoid judicial scrutiny, though it is an open question whether such limited review provides any meaningful constraints on agency discretion.

III. DEFERENCE

Administrative deference is the principle under which courts will defer to agencies' interpretations of the law under certain circumstances. Without question, deference is one of the most debated topics in administrative law because it implicates the limits of courts' authority over agencies and thus

178. *See, e.g.*, Bd. of Educ. v. Sanders, 250 Md. App. 85, 96, 245 A.3d 1108, 1114 (2021) (noting that agency's summary decision not to interfere with previous decision—as distinct from decision in which agency considers new evidence—is discretionary and not subject to review).

179. *MDOE*, 465 Md. 169, 202, 214 A.3d 61, 81 (2019) (quoting Harvey v. Marshall, 389 Md. 243, 297, 884 A.2d 1171, 1204 (2005). This rule stems from Maryland's constitutional separation of powers requirement, however, and not from a legislative restriction on courts' authority, Dep't of Nat. Res. v. Linchester Sand & Gravel Corp., 274 Md. 211, 225, 334 A.2d 514, 524 (1975), and the Maryland Constitution simultaneously provides courts "constitutionally-inherent power to review, within limits" agency decisions. *Id.* at 223, 334 A.2d at 523.

180. Harvey v. Marshall, 389 Md. 243, 273, 275, 884 A.2d 1171, 1189, 1190 (2005) (quoting Crim. Injs. Comp. Bd. v. Gould, 273 Md. 486, 500–01, 331 A.2d 55, 65 (1975)).

181. *Id.* at 277, 884 A.2d at 1191.

182. *Id.* at 275, 884 A.2d at 1190 (quoting Hurl v. Bd. of Educ., 107 Md. App. 286, 304–05, 667 A.2d 970, 979 (1995)).

183. *Linchester Sand & Gravel Corp*., 274 Md. at 226, 334 A.2d at 524 (citing State Ins. Comm'r v. Nat'l Bureau of Cas. Underwriters, 248 Md. 292, 310, 236 A.2d 282, 292 (1967) in support of the conclusion that discretionary actions are unreviewable, and for the proposition that the reviewing court may not "make independent findings of fact or substitute its judgment for that of the agency").

dramatically affects the reach of agencies' power. It is tempting to think of deference as a kind of standard of review, and it is true that the deference a court applies in a given situation can often determine the outcome of a case, just like the degree of appellate scrutiny applicable to a particular legal challenge can. But it is more precise to think of deference as a rule of construction, which determines how courts ascertain the meaning of ambiguous laws.

Deference principles are rooted in the notion—perhaps a legal fiction—that when legislatures delegate lawmaking power to agencies, they intend the agencies, in their expertise, to resolve ambiguities and fill in gaps in the legislative scheme.[184] Federal courts have developed a detailed taxonomy of deference principles that apply to various kinds of ambiguous laws, and the level of deference—if any—depends on first identifying what kind of law is being interpreted.

A. Federal Deference

Judicial deference to federal agencies turns primarily on two questions: (1) What is the agency interpreting (its organic statute, its regulations, or something else)? and (2) What is the form of the agency's interpretation (a rule or adjudication, or something less formal)? These two factors have spawned countless opinions, books, and permutations, but have coalesced into the three deference doctrines discussed below.[185]

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184. A recurring criticism of deference is that it is inconsistent with the Federal APA's mandate that "the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action." 5 U.S.C. § 706; *see, e.g.*, Kisor v. Wilkie, 139 S. Ct. 2400, 2432–34 (2019) (Gorsuch, J., concurring). But as the Supreme Court recently held, even when deferring to an agencies' interpretations, courts do not abdicate their § 706 obligation, because they "determine the meaning" of the law by deferring to an agency's reasonable interpretation. *Kisor*, 139 S. Ct. at 2418–20 (majority opinion).

185. The *Chevron* and *Auer* doctrines have been the subject of extensive academic and judicial criticism, such that one potential strategy on appeal is to argue for their abrogation. *See* Christopher J. Walker, *Attacking* Auer *and* Chevron *Deference: A Literature Review*, 16 GEO. J.L. & PUB. POL'Y 103, 104 (2018) ("In recent years, we have seen a growing call from the federal bench, on the Hill, and within the legal academy to rethink administrative law's deference doctrines to federal agency interpretations of law."). *Skidmore* deference remains malleable and ill-defined, see, for example, Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern* Skidmore *Standard*, 107 COLUM. L. REV. 1235, 1310 (2007) ("[W]ithin the realm of cases applying the sliding-scale conception of *Skidmore*, consistency and coherence is lacking. Courts blur distinctions between factors and often appear uncertain of the rationale underlying the various factors."), and it, too, has received judicial criticism. *See, e.g.*, J. Lyn Entrikin Goering, *Tailoring Deference to Variety with a Wink and a Nod to* Chevron*: The Roberts Court and the Amorphous Doctrine of Judicial Review of Agency Interpretations of Law*, 36 J. LEGIS. 18, 61 n.384 (2010) (quoting Justice Scalia's criticism of *Skidmore* as "a farce" and "moosh").

1. Chevron *Deference—the Statute the Agency Administers*

Surely the most familiar deference rule, *Chevron* deference—spelled out in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[186]—applies to an agency's interpretation of the statute it administers.[187] Thus, for example, *Chevron* deference applies to the FCC's interpretations of the Communications Act or the EPA's interpretations of the Clean Air Act. Under *Chevron*, courts employ a two-step test to determine whether to defer to the agency's interpretation of its organic statute. First, *Chevron* deference is only available when the statutory provision being interpreted is ambiguous—in other words, where "Congress has directly spoken to the precise question at issue . . . that is the end of the matter."[188] Where Congress has *not* clearly spoken to the question, courts will defer to an agency's interpretation where it is "based on a permissible construction of the statute."[189] The Court subsequently clarified, in *United States v. Mead Corp.*,[190] that *Chevron* deference only applies "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority."[191] Because these elements are a prerequisite to a court according *Chevron* deference, some courts and scholars have taken to referring to them as "*Chevron* step zero."[192]

A surprising feature of *Chevron* deference is that it applies even when an agency's interpretation conflicts with an earlier judicial interpretation of the statute at issue. In *National Cable & Telecommunications Ass'n v. Brand X Internet Services*,[193] the Court held that "[a] court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion."[194] Though subject to significant criticism from sitting

186. 467 U.S. 837 (1984).

187. *Id.* at 842–43. Conversely, *Chevron* deference does not apply to agency interpretations of statutes that apply to multiple agencies and are not specially administered by any agency. Special Feature, *A Blackletter Statement of Federal Administrative Law*, 54 ADMIN. L. REV. 1, 39 (2002).

188. *Chevron*, 467 U.S. at 842.

189. *Id.* at 843. *Chevron* cautions, however, that "[t]he judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent." *Id.* at 843 n.9.

190. 533 U.S. 218 (2001).

191. *Id.* at 226–27.

192. *See, e.g.*, Doe v. Tenenbaum, 127 F. Supp. 3d 426, 446 n.6 (D. Md. 2012).

193. 545 U.S. 967 (2005).

194. *Id.* at 982. This is really just an application of *Chevron* step one, which provides that deference is not afforded where Congress has clearly spoken to an issue.

Supreme Court justices (including Justice Thomas, its author),[195] the *Brand X* doctrine serves to ensure that an accident of timing (e.g., an early decision by a court) does not usurp the policymaking functions of an agency. Conversely, *Brand X* can entice agencies to refuse to interpret an ambiguous statutory term, leaving regulatory uncertainty and requiring practitioners to relitigate the interpretation on a case-by-case basis in the U.S. courts of appeals.[196]

2. Auer *Deference—the Agency's Own Regulations*

Courts also defer to agencies' interpretations of their own regulations. For instance, the FCC receives deference when interpreting Title 47 of the Code of Federal Regulations, and the FTC receives deference when interpreting Title 16. This form of deference, known as *Auer*[197] deference or, sometimes, *Seminole Rock*[198] deference, may be less well-known than *Chevron* deference, but it has been the subject of significant litigation,[199] culminating in the Supreme Court's 2019 decision, *Kisor v. Willke*,[200] in which the Court ultimately decided not to overturn *Auer*.[201] The Court did, however, provide a detailed exposition of its *Auer* jurisprudence.

Kisor clarified that *Auer* deference applies only to the interpretation of regulations that are genuinely ambiguous,[202] as determined using traditional

195. *See* Baldwin v. United States, 140 S. Ct. 690, 691 (2020) (Thomas, J., dissenting from denial of certiorari) ("*Brand X* appears to be inconsistent with the Constitution, the Administrative Procedure Act (APA), and traditional tools of statutory interpretation. . . . My skepticism of *Brand X* begins at its foundation—*Chevron* deference.").

196. *See, e.g.*, Nat'l Cable & Telecomms. Ass'n, Inc. v. Gulf Power Co., 534 U.S. 327, 338 (2002) ("Respondents are frustrated by the FCC's refusal to categorize Internet services . . . ."); Charter Advanced Servs. (MN), LLC v. Lange, 903 F.3d 715, 719 n.3 (8th Cir. 2018) ("We note that while the FCC would be able to announce a classification decision regarding VoIP, it has so far declined to do so. . . . Here the agency has decline[d] to provide guidance for well over a decade, so that we may, in our discretion, proceed according to [our] own light." (alterations in original) (internal quotation marks omitted) (citations omitted) (quoting Owner-Operator Indep. Drivers Ass'n, Inc. v. New Prime, Inc., 192 F.3d 778, 785 (8th Cir. 1999))).

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

198. Bowles v. Seminole Rock & Sand Co., 325 U.S. 410 (1945).

199. *See, e.g.*, G.G. *ex rel.* Grimm v. Gloucester Cnty. Sch. Bd., 822 F.3d 709, 721 (4th Cir. 2016), *vacated*, 137 S. Ct. 1239 (2017) (applying *Auer* deference to Department of Education letter interpreting Title IX regulations).

200. 139 S. Ct. 2400 (2019) (plurality opinion).

201. For a general discussion of *Kisor* and its potential effect on future cases, see John Grimm & Mark Davis, Kisor v. Wilkie *and the Next Chapter in Administrative Deference*, MD. APP. BLOG (July 24, 2019), https://mdappblog.com/2019/07/24/kisor-v-wilkie-and-the-next-chapter-in-administrative-deference/#more-3730.

202. *Kisor*, 139 S. Ct. at 2415.

tools of statutory construction.[203] Like with *Chevron* deference, if the regulation's meaning is clear, courts must give effect to that meaning.[204] If the regulation is ambiguous, a court still must determine if the agency's interpretation is reasonable, the boundaries of which are again aided by the use of traditional tools of construction.[205] Finally, a court must conduct an "independent inquiry into whether the character and context of the agency's interpretation entitle[] it to [deference]."[206] Essentially, this step requires courts to examine an assortment of qualitative factors to ensure that deference is appropriate under the circumstances.

First, courts should only defer to an agency's "authoritative or official position," and not to ad hoc statements that do not reflect the agency's official views.[207] The agency's position need not come from the actual top decision-maker, but it must "emanate" from the agency head using established procedures.[208] Second, the interpretation must implicate the agency's substantive expertise, since a fundamental justification for deference principles is the need to account for this expertise.[209] Some interpretive questions might fall more appropriately under the ambit of a court—such as a construction that involves common-law principles—and for those questions, a court should not defer to an agency's interpretation.[210] Finally, an agency's interpretation of its own rules does not receive deference unless it reflects a "fair and considered judgment."[211] Under this principle, courts do not generally defer to after-the-fact rationalizations or positions adopted

203. *Id.* A court cannot declare a regulation "ambiguous" simply because it is confusing or subject to multiple potential interpretations at first blush. *Id.* at 2416.

204. *Id.* at 2415.

205. *Id.* The interpretation "must come within the zone of ambiguity the court has identified after employing all its interpretive tools." *Id.* at 2416.

206. *Id.*

207. *Id.* (internal quotation marks omitted). Examples of "informal" views are myriad and varied, from former FCC Chairman Ajit Pai's "Harlem Shake" video opposing net neutrality, Daily Caller, *PSA from Chairman of the FCC Ajit Pai*, YOUTUBE (Dec. 13, 2017), https://www.youtube.com/watch?v=LFhT6H6pRWg, to agency blogs, *Business Blog*, FED. TRADE COMM'N, https://www.ftc.gov/business-guidance/blog, to educational documents prepared solely for the convenience of the public, U.S. SENT'G COMM'N, OFF. OF GEN. COUNS., PRIMER ON DRUG OFFENSES (2021), https://www.ussc.gov/sites/default/files/pdf/training/primers/2021_Primer_Drugs.pdf. None of these somewhat extreme examples would warrant *Auer* deference. Other examples collected by Justice Kagan in her plurality opinion in *Kisor* include a speech of a mid-level official, an informal memorandum of a telephone conversation, and a regulatory guide disclaiming authoritativeness. *Kisor*, 139 S. Ct. at 2416–17.

208. *Kisor*, 139 S. Ct. at 2416.

209. *Id.* at 2417.

210. *Id.*

211. *Id.* (quoting Christopher v. SmithKline Beecham Corp., 567 U.S. 142, 155 (2012)).

in litigation.[212] Courts should also protect parties' reliance interests, and thus not defer to interpretations that create "unfair surprise to regulated parties."[213]

3. Skidmore *Deference—Everything Else*

A final type of "deference" applies when no other form of deference is available. Under *Skidmore v. Swift & Co.*,[214] courts will defer to an agency's legal conclusions to the extent it has "power to persuade, [even] if lacking power to control."[215] It is fair to question whether *Skidmore* deference is really deference at all, since a court is always free to adopt a conclusion it finds persuasive.[216] But, however it is characterized, *Skidmore* deference reflects courts' respect for agencies' specialized expertise and willingness to allow agencies to help resolve legal issues. Even where no strict rule of deference applies, a party challenging an agency decision must still convince a court that the agency's reasoning is not persuasive.[217]

B. Maryland Deference

Deference principles also exist under Maryland administrative law, and they are generally analogous to their federal counterparts, but less strictly defined.[218] As Court of Special Appeals Judge Friedman put it, "[i]n the Maryland state system, we don't have such a rigid taxonomy of deference, but we generally apply the same kinds of deference to the same kinds of administrative agency legal decisions."[219]

Under Maryland law, "an administrative agency's interpretation and application of the statute which the agency administers should ordinarily be

212. *Id.* However, the Court did not shut the door on deferring to agencies' litigation positions altogether, noting that it had "not entirely foreclosed th[e] practice" of "giv[ing] deference to agency interpretations advanced for the first time in [their] legal briefs." *Id.* at 2417–18 n.6; *see, e.g.*, Bible v. United Student Aid Funds, Inc., 799 F.3d 633, 650 (7th Cir. 2015) (deferring to Secretary of Education's interpretation of the Higher Education Act set forth in an amicus brief).

213. *Kisor*, 139 S. Ct. at 2418 (internal quotation marks omitted) (quoting Long Island Care at Home, Ltd. v. Coke, 551 U.S. 158, 159 (2007)).

214. 323 U.S. 134 (1944).

215. *Id.* at 140.

216. *See* Hickman & Krueger, *supra* note 185, at 1251–55 (collecting authorities advancing this view); Hviding, *supra* note 12, at 15 (noting that "[s]ome scholars have said that *Skidmore* review is just as ad hoc as de novo review," and collecting citations).

217. *Skidmore* itself serves as an example where, though not legally binding, the Court was persuaded by an agency's amicus brief taking the position that firefighters who lived on premises at a packing plant were owed wages under the Fair Labor Standards Act whenever they were on-call and expected to be available for company service. *Skidmore*, 323 U.S. at 139–40.

218. For a comprehensive analysis of deference principles in Maryland, see generally Hviding, *supra* note 12.

219. Comptroller of Md. v. FC-Gen Operations Invs., LLC, No. 0946, 2022 WL 325940, at *7 n.1 (Md. Ct. Spec. App. Feb. 3, 2022) (Friedman, J., concurring).

given considerable weight."[220] Yet, while a court must "give careful consideration to the agency's interpretation" of "a law that the agency has been charged to administer,"[221] it is "never binding upon the courts."[222] On the contrary, courts "assess how much weight to accord that interpretation,"[223] and it is "always within [the court's] prerogative to determine whether an agency's conclusions of law are correct, and to remedy them if wrong."[224] *Chevron*-style deference in Maryland is variable, and "[t]he weight to be accorded an agency's interpretation of a statute depends upon a number of considerations,"[225] including whether the interpretation has been applied consistently for a long period of time, the extent to which the agency engaged in a "process of reasoned elaboration" in reaching its interpretation, and whether the interpretation is the product of neither contested adversarial proceedings nor formal rulemaking (in which case it is entitled to little weight).[226]

Maryland law also embodies a version of *Auer* deference: "Reviewing courts should give special deference to an agency's interpretation of its own regulations because the agency is best able to discern its intent in promulgating those regulations."[227] One notable distinction, however, is that agencies receive *greater* deference under Maryland law when interpreting their own regulations than when interpreting the statute they administer,[228]

220. Md. Aviation Admin. v. Noland, 386 Md. 556, 572, 873 A.2d 1145, 1154 (2005) (collecting cases).

221. *MDOE*, 465 Md. 169, 203, 214 A.3d 61, 81 (2019).

222. Balt. Gas & Elec. Co. v. Pub. Serv. Comm'n, 305 Md. 145, 161, 501 A.2d 1307, 1315 (1986).

223. *MDOE*, 465 Md. at 203, 873 A.3d at 82.

224. Schwartz v. Md. Dep't of Nat. Res., 385 Md. 534, 554, 870 A.2d 168, 180 (2005). *Chevron* does note that "[t]he judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent." Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 n.9 (1984). But this is just an articulation of the first step of the *Chevron* analysis: determining whether a statute is ambiguous. The Maryland-law principle that agency interpretations are never binding on the courts, therefore, is fundamentally distinct from federal law, which allows agencies to "authoritatively resolve ambiguities in statutes and regulations." Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1211 (2015) (Scalia, J., concurring).

225. *Balt. Gas & Elec. Co.*, 305 Md. at 161, 501 A.2d at 1315.

226. *Id.* at 161–62, 501 A.2d at 1315; *see also MDOE*, 465 Md. at 203–04, 214 A.3d at 82.

227. Kim v. Md. State Bd. of Physicians, 196 Md. App. 362, 372, 9 A.3d 534, 540 (2010). Additionally, at least one Maryland case has directly cited *Auer* for the proposition that "[i]t is well-settled that an administrative agency is entitled to deference in the interpretation of its own propounded regulations unless the agency's interpretation is clearly erroneous or inconsistent with the regulation." Para v. 1691 Ltd. P'ship, 211 Md. App. 335, 389, 65 A.3d 221, 253 (2013) (citing Auer v. Robbins, 519 U.S. 452, 461 (1997)).

228. Md. Comm'n on Hum. Rels. v. Bethlehem Steel Corp., 295 Md. 586, 593, 457 A.2d 1146, 1150 (1983) ("Because an agency is best able to discern its intent in promulgating a regulation, the agency's expertise is more pertinent to the interpretation of an agency's rule than to the

whereas in *Kisor*, the Court clarified that agencies do not receive any greater deference under *Auer* than under *Chevron*.[229]

One interesting question is whether Maryland and federal law's different concepts of deference yields different outcomes. Here, it is possible to draw some empirical conclusions. One scholar recently calculated that Maryland agencies' statutory interpretations were upheld in 63% of quasi-judicial cases and 62% of quasi-legislative cases, but when agencies interpreted their own regulations, they won in *100%* of cases.[230] A study of federal agency review found that agencies won 77.4% of the time under *Chevron*, 56% of the time under *Skidmore*, and 38.5% under a *de novo* review.[231] And another study found that since 2011, federal courts of appeals applied *Auer* deference in an average of 75% of cases.[232] These studies involved different methodologies and corpora of cases, so a healthy measure of caution is appropriate, but these numbers generally comport with the ways Maryland and federal courts describe their principles of deference: *Chevron* deference is stronger than the deference Maryland courts afford agency statutory interpretations, whereas federal courts are significantly less deferential than Maryland courts concerning agencies' interpretations of their own regulations.

IV. THE ROLE PATH TO THE APPELLATE COURTS

Although administrative appeals follow various courses depending on the kind of action being reviewed and whether review is sought in federal or state court, all roads usually lead, eventually, to an appellate court. In the federal system, where statutes variously vest jurisdiction in district courts and courts of appeals, an appellate court is often the first and—unless the Supreme Court agrees to hear a case—last stop.

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interpretation of its governing statute."). In *NRG Energy, Inc.* v. *Maryland Public Service Commission*, 252 Md. App. 680, 684 n.1, 260 A.3d 770, 773 n.1 (2021), however, the Court of Special Appeals considered an interesting question: whether an agency is "entitled to deference when addressing an issue of first impression on which it has yet to develop precedent, consistent rulings or expertise." The court did not specifically answer this question, but the implications are significant. If Maryland agencies are entitled to less deference on novel legal questions, it would mark a significant departure from federal deference principles. *See supra* Section III.A.

229. Kisor v. Wilkie, 139 S. Ct. 2400, 2416 (2019) (plurality opinion) ("Some courts have thought . . . that . . . agency constructions of rules receive greater deference than agency constructions of statutes. . . . But that is not so." (citations omitted)).

230. Hviding, *supra* note 12, at 30.

231. Barnett & Walker, *supra* note 12, at 30.

232. Barmore, *supra* note 12, at 830. The circuit-by-circuit numbers varied considerably, ranging from as low as 50% in the Seventh Circuit to 92% in the Fifth Circuit. *Id.* The D.C. Circuit, famous for hearing a high volume of administrative cases, applied *Auer* deference 65% of the time, in 31 cases—the second lowest rate for any circuit. *Id.*

But in Maryland, where all review proceedings begin in the circuit court, further review is often available in at least one appellate court. Technically, review in the Court of Special Appeals is only available where allowed by statute and, as a general rule, appeals are *not* permitted from "final judgment[s] of a court entered or made in the exercise of appellate jurisdiction in reviewing the decision of . . . an administrative agency."[233] Thus, by default, there is not a guaranteed right of further review beyond the circuit court. However, under the Maryland APA, any party "aggrieved by a final judgment of a circuit court . . . may appeal to the Court of Special Appeals,"[234] and courts have also held that administrative mandamus decisions in the circuit court are appealable to the Court of Special Appeals.[235] The upshot is that for all APA and administrative mandamus review proceedings, Maryland law allows for a tripartite system of judicial review with two layers of review as a matter of right.[236] For non-APA appeals, review beyond the circuit court is only available where permitted by statute.

An important feature of judicial appellate review in both Maryland and federal administrative law is that appellate courts "look through" the trial court's decision[237] and review the underlying agency decision itself.[238] This

233. MD. CODE ANN., CTS. & JUD. PROC. § 12-302(a) (West 2022). Although technically the circuit court does not exercise *appellate* jurisdiction over administrative agencies, courts have held that the restriction in section 12-302 still applies. *See* Gisriel v. Ocean City Bd. of Supervisors of Elections, 345 Md. 477, 496, 693 A.2d 757, 766–67 (1997) ("[W]hen a circuit court proceeding in substance constitutes ordinary judicial review of an adjudicatory decision by an administrative agency . . . § 12-302(a) is applicable, and an appeal to the Court of Special Appeals is not authorized . . . .").

234. MD. CODE ANN., STATE GOV'T § 10-223(b)(1) (West 2022).

235. Matthews v. Hous. Auth. of Balt. City, 216 Md. App. 572, 582, 88 A.3d 852, 857 (2014).

236. *See generally* Glenn T. Harrell, Jr., *Too Much Judicial Review of Administrative Agency Decisions?*, ADMIN. L. NEWS, Nov. 2013, at 2, https://cdn.laruta.io/app/uploads/sites/7/legacyFiles/uploadedFiles/MSBA/Member_Groups/Sections/Administrative_Law/AdminLawNov13.pdf.

237. The "look-through" rule can be a slight over-simplification of what is actually before the appellate court: Although the appellate court ultimately reviews the underlying agency decision, it may still have occasion to rule on aspects of the circuit court's ruling as well. For example, in *Board of Education of Harford County v. Sanders*, the Court of Special Appeals upheld as unreviewable the *agency's* decision to summarily deny a petition for rehearing, and in doing so, held that the *circuit court* had erred in remanding the matter to the agency for further consideration. 250 Md. App. 85, 93, 248 A.3d 1108, 1112 (2021). Indeed, by the time a petition for judicial review reaches the Court of Special Appeals, any number of decisions by the circuit court—such as remand orders, or rulings on dispositive motions—may also be subject to review. *See id.*

238. Safari Club Int'l v. Zinke, 878 F.3d 316, 325 (D.C. Cir. 2017) ("[W]e review the administrative action directly, according no particular deference to the judgment of the District Court." (quoting Holland v. Nat'l Mining Ass'n, 309 F.3d 808, 814 (D.C. Cir. 2002)); Kenwood Gardens Condos., Inc. v. Whalen Props., LLC, 449 Md. 313, 324, 144 A.3d 647, 654 (2016) ("In reviewing the final decision of an administrative agency . . . we look through the circuit court's and

has led some to question whether review by an intermediate appellate court serves a real purpose, since it is performing the same function as the trial court below it.[239] Commentators have suggested eliminating one layer of review—either at the circuit court[240] or Court of Special Appeals[241] stage. Both proposals would be problematic. Eliminating circuit court review would be unconstitutional because it would result in the Court of Special Appeals impermissibly exercising original jurisdiction over agency decisions.[242] On the other hand, eliminating review in the Court of Special Appeals—which, unlike the circuit courts, issues binding, statewide opinions—would hurt the development of administrative-law jurisprudence and place a greater burden on the Court of Appeals to resolve inter-circuit conflicts.[243]

In Maryland, where judicial review is initiated by filing the appropriate petition in the circuit court, there is no special procedure for appealing the circuit court's decision. An appeal is commenced the same way as for any decision of the circuit court, by filing a notice of appeal under Maryland Rule 8-201.[244] In federal court, however, where courts of appeals have original jurisdiction to review an agency decision, review is obtained by filing a "petition for review," which differs from a notice of appeal.[245] Unlike a notice of appeal, which is filed with the district court,[246] a petition for review is filed directly in the court of appeals.[247]

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intermediate appellate court's decisions, although applying the same standards of review, and evaluate[] the decision of the agency." (internal quotation marks omitted) (quoting People's Couns. for Balt. Cnty. v. Loyola Coll., 406 Md. 54, 66, 956 A.2d 166, 173 (2008)).

239. As Judge Harrell observed, because each reviewing court reviews the original agency decision, multiple layers of judicial review provides "for up to three levels of judicial review . . . on the same record and under the same standards of review." Harrell, *supra* note 236, at 2. In order to justify the expense to litigants and burden on the courts, Judge Harrell argues that subsequent stages of review ought to "serve ideally some tangible and higher purpose independent from the first tier." *Id.* at 3. Under the current system, however, Judge Harrell maintains that successive tiers of review allow only the utility of "an assumedly 'fresh' and un-jaded set of eyes." *Id.*

240. *Id.* at 3 (citing Tomlinson, *supra* note 80, at 217–18).

241. *Id.* at 4.

242. *See supra* note 80 and accompanying text.

243. Joel A. Smith, *Sitting in Review of the Watchman: The Importance of Judicial Review of Administrative Decisions*, ADMIN. L. NEWS, Nov. 2013, at 6, 7–8, https://cdn.laruta.io/app/uploads/sites/7/legacyFiles/uploadedFiles/MSBA/Member_Groups/Sections/Administrative_Law/AdminLawNov13.pdf. Eliminating intermediate appellate review of administrative decisions would place Maryland in a minority of states: thirty-two states allow two-tier appellate review as a matter of right, compared to only nine in which review in an appellate court is discretionary. *Id.* at 6, 7–8.

244. MD. RULE 8-201 (providing procedure for filing notice of appeal).

245. FED. R. APP. P. 15.

246. FED. R. APP. P. 3(a)(1).

247. FED. R. APP. P. 15(a)(1).

CONCLUSION

A comparison between Maryland and federal administrative review procedures reveals interesting aspects of the nature of judicial review itself. Although both function similarly, their differences reflect the competing principles of judicial independence, legislative priority, and executive decision-making. Federal courts reviewing agency decisions are circumscribed both by statutory limits and an extensive body of court-made deference principles. Maryland courts have similar limitations, but retain ultimate authority to review agency actions, with somewhat more flexibility in their review.

In a sense, comparing Maryland and federal administrative appeals also sheds light on the development of administrative law generally. While federal administrative review has deep common-law roots, modern federal administrative law is almost entirely codified by the APA and agency regulations, aided by a body of highly developed case law. Maryland law, in contrast, reflects a greater balance between statutory and common-law rules, with some procedures being codified for the first time as recently as fifteen years ago. In this respect, Maryland law can be a useful illustration of how modern administrative law evolved from earlier principles.

Yet, while federal administrative law is stable, it is not static. Recent cases—particularly challenges to Trump Administration actions—reveal a renewed appetite to look closely at agency decisions, agency characterizations of their actions, and, in extreme cases, look beyond their stated rationale to assess for pretext.[248] Courts must constantly resolve the tension between skepticism of the administrative state and deference to the decision making of the political branches; at times, one viewpoint prevails more strongly over the other, all based on judicial doctrines that have little or no anchoring in the Federal APA. The constant churn of agency policymaking (amid changing administrations) and the philosophical debate within courts will continue to provide grist for federal and Maryland courts to develop and refine the law of administrative review.

248. *See, e.g.*, *supra* notes 147, 155–159, 171–177 and accompanying text.