Testimony of

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On

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Introduction

Chairman Marino, Ranking Member Johnson, and distinguished members of the Subcommittee, thank you for inviting me to appear before you today to testify and giving me the opportunity to share my views concerning "H.R. 4768: The Separation of Powers Restoration Act," which would demonstrate statutory disapproval of various judge-made doctrines requiring deference to administrative legal positions, including the doctrine commonly associated with the Supreme Court's decision in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[1]

At the outset, I would like to compliment the Subcommittee for devoting time and attention to this matter and to this important piece of legislation. The *Chevron* doctrine and other doctrines of judicial deference to administrative legal positions have enormous practical and theoretical importance in the federal courts, and they are now the source of increasing controversy, confusion, uncertainty, and needless collateral litigation about whether, and to what extent, the doctrines apply. The proposed legislation would be a welcome path out of the ever-growing morass of complex case law that these doctrines have generated over the past several decades.

Importantly, the proposed legislation is admirable in its brevity, filling up less than a page of legislative text and adding a mere two words—"de novo"—plus some accompanying stylistic changes to the first sentence of 5 U.S.C. § 706. While my testimony will make one small stylistic suggestion and one technical suggestion concerning the proposed legislation, my overall view is that the centerpiece of this legislation—the addition of the words "de novo" to the first sentence of § 706—is a highly desirable approach to supplanting the *Chevron* doctrine and other judge-made deference doctrines with a clear, easily understood and theoretically sound principle to govern judicial review of all legal issues arising in administrative cases.

My testimony will be divided into four parts. Part I will address the format of the proposed legislation and will make one small stylistic suggestion. Part II will explain how the proposed legislation is likely to decrease litigation by eliminating the myriad complexities and uncertainties in the current case law governing judicial review of legal issues. Part III will discuss four unobjectionable judicial practices that the proposed legislation would not foreclose. Finally, Part IV will suggest a small technical change to the proposed legislation so that it would apply to all judicial review proceedings, including review proceedings not currently governed by § 706 due to special statutory exemptions such as the one contained in 42 U.S.C. § 7607(d).

I. The Format of the Proposed Legislation.

The proposed legislation provides an elegant solution to the uncertainties and complexities created by the *Chevron* decision and other judge-made deference doctrines. The legislation would insert the words "de novo" into the first sentence of § 706 so that it would begin: "To the extent necessary to decision and when presented, the reviewing court shall decide de novo all relevant questions of law …." That straightforward language would make clear a

[1] 467 U.S. 837 (1984).

congressional intent that existed when the original Administrative Procedure Act (APA) was enacted but that *Chevron* and other decisions have not followed.

Section 10(e) of the original of the APA stated: "So far as necessary to decision and where presented 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 any agency action."[2] The legislative history of the APA leaves no doubt that Congress thought the meaning of this provision plain. As Representative Walter, Chairman of the House Subcommittee on Administrative Law and author of the House Committee Report on the bill, explained to the House just before it passed the bill, the provision "requires courts to determine independently all relevant questions of law, including the interpretation of constitutional or statutory provisions."[3]

The text and structure of the original statute confirm that Representative Walter's interpretation was correct. The plain language of the original statute itself strongly suggests de novo review of statutory issues, for Congress placed the reviewing court's duty to interpret statutory provisions in the same clause as the duty to interpret the Constitution, and courts have never deferred to agencies in reading the Constitution. The overall structure of the original statute also indicates the congressional intent to have courts review legal questions de novo. Section 10(e) of the original statute, which contained the command for courts to decide all questions of law, did include deferential standards for reviewing courts to apply, but none of those deferential standards applied to review of legal questions.

Indeed, so strong are the statutory arguments in favor of a de novo standard of review for legal questions that, when federal courts of appeals have focused on the relevant statutory language, they have interpreted the APA as requiring de novo review of statutory interpretations even in the years after the Supreme Court decided *Chevron*.[4] Commentators in administrative law have also "generally acknowledged" that § 706 seems to require de novo review on

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[2] 60 Stat. 237, 243 (1946).

[3] 92 Cong. Rec. 5654 (1946) (statement of Rep. Walter), reprinted in Staff of Senate Comm. on the Judiciary, Legislative History of the Administrative Procedure Act, S. Doc. No. 79-248, at 370 (1946) [hereinafter, APA Legislative History]. Both the House and the Senate Reports also state that "questions of law are for courts rather than agencies to decide in the last analysis." H.R. Rep. No. 79-1980, at 44 (1946), reprinted in APA Legislative History at 233, 278; S. Rep. No. 79-752, at 28 (1945), reprinted in APA Legislative History at 185, 214. The legislative history also indicates that Congress excepted "interpretative" rules from the APA's notice and comment rulemaking procedures because it believed that "'interpretative' rules—as merely interpretations of statutory provisions—are subject to plenary judicial review." Staff of the Senate Comm. on the Judiciary, 79th Cong., Report on the Administrative Procedure Act (Comm. Print 1945), reprinted in APA Legislative History at 11, 18.

[4] See Velasquez-Tabir v. INS, 127 F.3d 456, 459 n.9 (5th Cir. 1997); DuBois v. USDA, 102 F.3d 1273, 1284 (1st Cir. 1996); Smith v. Office of Civilian Health & Med. Program of the Uniformed Servs., 97 F.3d 950, 955 (7th Cir. 1996); Stupak-Thrall v. United States, 70 F.3d 881, 887 (6th Cir. 1995); and Molina v. Sewell, 983 F.2d 676, 679 n.3 (5th Cir. 1993) (all citing § 706, the codified version of original § 10(e), as requiring de novo review on issues of law). Pre-*Chevron* courts also read the APA this way. See, e.g., Rice v. Wilcox, 630 F.2d 586, 589 (8th Cir. 1980); Hanly v. Kleindienst, 471 F.2d 823, 828 (2d Cir. 1972); SEC v. Cogan, 201 F.2d 78, 86-87 (9th Cir. 1952) ("In enacting the Administrative Procedure Act Congress did not merely express a mood that questions of law are for the courts rather than agencies to decide, it so enacted with explicit phraseology.").

questions of law.[5] So too Justice Scalia, who had previously been an ardent champion of the *Chevron* doctrine, acknowledged in his last full term on the Supreme Court that the APA "contemplates that courts, not agencies, will authoritatively resolve ambiguities in statutes and regulations."[6]

Thus, in changing the current statutory language from "decide all relevant questions of law" to "decide de novo all relevant questions of law," the proposed legislation is not really changing the APA but is instead confirming the statute's original meaning.

The proposed change does, however, create a stylistic issue concerning the language after "all relevant questions of law." The current version of the sentence, as codified in 5 U.S.C. § 706, reads:

> To the extent necessary to decision and when presented, 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.

The proposed legislation would change that text to read (changes to current § 706 are in bold):

> To the extent necessary to decision and when presented, the reviewing court shall decide **de novo** all relevant questions of law, **including the interpretation of** constitutional and statutory provisions **and rules**, and determine the meaning or applicability of the terms of an agency action.

I suggest that the following language might be slightly better stylistically (again changes to current § 706 are in bold):

> To the extent necessary to decision and when presented, the reviewing court shall decide **de novo** all relevant questions of law, **including the interpretation of** constitutional and statutory provisions and **the determination of** the meaning or applicability of the terms of an agency action.

This slight stylistic change would make clear that the questions of law subject to the de novo review standard include both (i) "the interpretation of constitutional and statutory provisions" and (ii) "the determination of the meaning or applicability of the terms of an agency action." The suggested stylistic change does not, however, change the central feature of the proposed legislation, which is the addition of the words "de novo" to clarify the reviewing court's obligation in deciding questions of law. That feature is both effective and elegant.

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[5] Cynthia R. Farina, Statutory Interpretation and the Balance of Power in the Administrative State, 89 Colum. L. Rev. 452, 473 n.85 (1989); see also Thomas W. Merrill, Capture Theory and the Courts: 1967-1983, 72 Chi.-Kent L. Rev. 1039, 1085-86 (1997) (noting the "embarrassing" point that the "APA appears to compel the conclusion" that "courts should decide all questions of law de novo," and finding it "puzzling" that there has been no ""rediscovery' of the language of the APA"); Thomas W. Merrill, Judicial Deference to Executive Precedent, 101 Yale L.J. 969, 995 (1992) (arguing that 706 "suggests that Congress contemplated courts would always apply independent judgment on questions of law").

[6] Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1211 (2015) (Scalia, J., concurring in the judgment).

II. The Proposed Legislation's Ability to Eliminate the Uncertainties and Unnecessary Complexities of Current Case Law.

One of the most important benefits of the proposed legislation is that it would eliminate the uncertainties and needless complexities of current decisional law. The *Chevron* doctrine as it exists today, and indeed the entire set of judge-created doctrines requiring deference to agency legal positions, is riddled with complexities and exceptions. Indeed, so pervasive are the exceptions that it would be wrong to assert that the proposed legislation would overrule or overturn the *Chevron* doctrine or other doctrines requiring judicial deference on legal issues. It is far more accurate to say that the legislation would get rid of *what's left* of those doctrines. And, as discussed below, what's left is not so much in many areas.

Chevron and other doctrines requiring judicial deference on legal issues have come under increasing intellectual scrutiny over the past two decades and, because of the inherent theoretical weakness of those doctrines, the Supreme Court has made exceptions to the doctrines. As a result, the doctrines are both weakened and unpredictable. Below are four examples.

1. *King v. Burwell* and the "Too Big To Defer" Exception.

The Supreme Court's recent decision in *King v. Burwell* held that *Chevron* deference is inapplicable to any issue of "deep 'economic and political significance' that is central to [a] statutory scheme."[7] *King*'s exception to *Chevron*, which might be termed the "too big to defer" exception, creates a major limitation on *Chevron* and also increases the opportunity for more litigation about whether *Chevron* should apply at all in any particular case.

The *King* limitation means that the *Chevron* doctrine can no longer be defended as a desirable rule to help agencies address important national issues. If the issue is deeply significant, the *Chevron* rule might not apply at all. *King* thus dramatically decreases the value of the *Chevron* doctrine to administrative agencies. At the same time, however, *King* also increases the litigation costs of the doctrine. Because *King* did not provide much guidance as to how significant—how big—an issue must be before *Chevron* becomes inapplicable, both the government and parties challenging the administrative actions will now have to spend resources briefing and litigating the scope of the *King* exception *in addition to* briefing and litigating the meaning of the relevant statute.

2. *United States v. Mead* and the Statutory Prerequisite for *Chevron.*

In *United States v. Mead*, the Supreme Court limited the *Chevron* doctrine to situations in which Congress has conferred upon the administrative agency the power "to be able to speak with the force of law."[8] Where an agency does not have such delegated power or has not exercised such a power in a procedurally proper manner, *Mead* held that *Chevron* deference is not appropriate.

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[7] 135 S. Ct. 2480, 2489 (2015).

[8] 533 U.S. 218, 229 (2001).

Mead is an extraordinarily important decision because it reinterpreted the *Chevron* doctrine as being about the proper reach and proper use of agency lawmaking powers—i.e., as a doctrine about delegation rather than deference. While that step was theoretically sound, it also dramatically decreases the value of *Chevron* to agencies and increases the uncertainty and concomitant litigation costs associated with the doctrine.

Ever since *Mead*, administrative agencies cannot treat *Chevron* as a reliable *per se* rule of deference applicable to all administrative interpretations. Rather, *Mead* requires agencies to justify the application of *Chevron* deference in each case by demonstrating the existence and proper application of a statutory power to "speak with the force of law." That approach decreases the value of *Chevron* deference because, where an agency has a statutory power to make law, it typically could prevail in the case if the reviewing court merely affords the agency the proper scope of its delegated power. In other words, a theory of judicial deference to the agency's legal interpretation is less necessary because a delegation theory would suffice in most cases.

Mead, however, increases the litigation costs of the *Chevron* doctrine. While the *Mead* Court identified two *per* se circumstances in which agencies would generally be presumed to have authority to speak with the force of law—where the agency properly engages in rulemaking or in formal adjudication—the Court left uncertain the largest category of administrative actions, informal adjudication.[9]

3. *Chevron*'s Uncertain Application to Agency Interpretive Rules.

Prior to the Supreme Court's decision in *Mead*, the issue whether *Chevron* deference should apply to agency interpretive rules seemed like a non-issue to the D.C. Circuit, the nation's most prominent lower court for reviewing administrative action. That court stated quite clearly that it would "defer to an agency's reasonable interpretation of the laws and regulations it administers none the less because that interpretation appears in an interpretive rather than a legislative rule."[10] That approach also made sense under the original reasoning of the *Chevron* opinion, which seemed to rest on the supposed duty, in the field of statutory construction, of "federal judges—who have no constituency—…to respect legitimate policy choices made by those who do."[11] In other words, if *Chevron* was all about judicial deference to agency legal interpretations, interpretive rules should be at the very bull's eye of the doctrine.

The Court's decision in *Mead*, however, instructed the lower courts that "interpretive rules … enjoy no *Chevron* status as a class."[12] That teaching makes sense under *Mead*'s

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[9] *See id.* at 231 (recognizing that "the want of [a more formal] procedure here does not decide the case, for we have sometimes found reasons for *Chevron* deference even when no such administrative formality was required and none was afforded"); *see also id.* at 239 (Scalia, J., dissenting) (recognizing the *Mead* decision as "an avulsive change in judicial review of federal administrative action" and criticizing the Court majority for having "largely replaced" the relatively clear rule in *Chevron* with the uncertain approach "most feared by litigants who want to know what to expect"—"th' ol' 'totality of the circumstances' test").

[10] Interport Inc. v. Magaw, 135 F.3d 826, 829 (D.C. Cir. 1998).

[11] *Chevron*, 467 U.S. at 866.

[12] *Mead*, 533 U.S. at 232.

reformation of *Chevron* from a doctrine about deference to one about the proper scope of delegated power. Under *Mead*, interpretive rules generally do not get *Chevron* deference, but the very next year after it decided *Mead*, the Court in *Barnhart v. Walton* held that, for the particular interpretive rule at issue in that one litigation, the agency should receive *Chevron* deference due to no fewer than five factors—"[1] the interstitial nature of the legal question, [2] the related expertise of the Agency, [3] the importance of the question to administration of the statute, [4] the complexity of that administration, and [5] the careful consideration the Agency has given the question over a long period of time."[13] The tension between *Mead* and *Barnhart*, and the inherent difficulties generated by those two decisions in determining the proper standard for judicial review of agency interpretive rules, demonstrate the diminished and uncertain stature of the *Chevron* doctrine in current case law.

4. The Uncertainties of Judicial Deference to Agency Interpretation of Rules.

The uncertainties associated with judicial deference to agency legal interpretation extend beyond the *Chevron* doctrine and include also the distinct issue whether courts should defer to an agency's interpretation of its own rules and regulations. Prior to 2012, this issue was controlled by the Supreme Court's 1997 decision in *Auer v. Robbins*,[14] which applied the Court's pre-APA precedent in *Bowles v. Seminole Rock & Sand Co.*[15] to hold that an agency's interpretation of its own regulation is "controlling unless '"plainly erroneous or inconsistent with the regulation."'"[16] In 2012, however, the Supreme Court's decision in *Christopher v. SmithKline Beecham Corp.* emphasized that judicial deference to agency interpretations of regulations is not appropriate where "there is reason to suspect that the agency's interpretation does not reflect the agency's fair and considered judgment on the matter in question," including situations where the agency's interpretation may be merely a "convenient litigating position" or "post hoc rationalizatio[n] advanced by an agency seeking to defend past agency action against attack."[17]

Since the *Christopher* decision, three Justices have expressed dissatisfaction with the entirety of the *Auer*/*Seminole Rock* deference doctrine and a willingness to overrule the doctrine.[18] While one of those three Justices has since passed away, there is good reason to think that at least two additional Justices, and perhaps more, would also be willing to reconsider the Court's *Auer*/*Seminole Rock* doctrine. Thus, the current status of the *Auer*/*Seminole Rock* doctrine is highly uncertain. The Court's *Christopher* decision demonstrates that agencies cannot

[13] 535 U.S. 212, 222 (2002).

[14] 519 U.S. 452 (1997).

[15] 325 U.S. 410 (1945).

[16] *Auer*, 519 U.S. at 461 (quoting Robertson v. Methow Valley Citizens Council, 490 U. S. 332, 359 (1989) (quoting Bowles v. Seminole Rock & Sand Co., 325 U. S. 410, 414 (1945))).

[17] 132 S. Ct. 2156, 2166 (2012) (internal citations and quotations omitted).

[18] Perez v. Mortgage Bankers Assn, 135 S. Ct. 1199, 1210-11 (2015) (Alito, J., concurring in part and concurring in the judgment); *id.* at 1212-13 (Scalia, J., concurring in the judgment); *id.* at 1213 (Thomas, J., concurring in the judgment).

be assured of judicial deference even if the *Auer*/*Seminole Rock* doctrine remains good law, and the entirety of the doctrine might be reconsidered and overruled by the Court.

III. Unobjectionable Practices Not Foreclosed by the Proposed Legislation.

Though it would clearly end judicial deference to agency legal positions, the proposed legislation would not foreclose several unobjectionable judicial practices that are sometimes confused with deference.

First, the proposed legislation would not (and should not) prevent a reviewing court from holding that, where Congress has delegated lawmaking power to an agency, such delegated power permits the agency to fill in the details of the statutory scheme in a reasonable manner—i.e., in a manner that is not arbitrary, capricious or otherwise contrary to law. Such an approach is not, properly considered, a form of judicial deference to the agency but is instead a judicial recognition that some statutory provisions, interpreted de novo, provide an agency with sufficient authority to accomplish the agency's policy objectives. The actual result in the *Chevron* case could have been based on such a judicial recognition of the full scope of the agency's delegated authority.

Second, the proposed legislation would not prevent reviewing courts from adhering to the traditional view that some issues decided by agencies are not pure issues of statutory interpretation but are instead mixed questions of law and fact. For such questions, reviewing courts might provide deference to the agency decision not because of the agency's abilities at statutory interpretation, but because of the agency's superior ability to apply a statutory concept to the specific factual context in that adjudication. This theory of deference was articulated by the Supreme Court in *NLRB v. Hearst Publications, Inc.*,[19] and it provides another proper basis for recognizing the full scope of an agency's statutory authority, without denying to the federal courts their traditional role in deciding issues of law *de novo*. The approach is also consistent with the APA, which permits reviewing courts to grant deference to an agency's factual judgments.

Third, the proposed legislation would not prevent reviewing courts from carefully and fully considering an agency's position as the court resolves an issue of statutory interpretation. As noted by the Supreme Court in *Skidmore v. Swift*, an administrative agency's "rulings, interpretations and opinions …, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance."[20] Importantly, however, such use of agency positions does not constitute deference. Rather, the court affords the agency's view the degree of "weight" merited by "the thoroughness evident in [the agency's] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."[21]

[19] 322 U.S. 111, 130-131 (1944).

[20] 323 U.S. 134, 140 (1944).

[21] *Id.*

The approach required by *Skidmore* is similar in kind, if perhaps different in degree, to the approach that a court might take in considering the views articulated in a prominent treatise or in a thorough law review article written by a professor who also has "power to persuade" but no "power to control." It might also be compared to the pragmatic weight that one circuit court of appeals would give to one of its co-equal circuit courts. Courts of Appeals do not lightly diverge from another circuit's precedent; they do not lightly create circuit splits. Yet no one would say that one federal Court of Appeals, in considering a statutory issue previously decided by another circuit, must grant some sort of deferential weight to the statutory interpretations of the other circuit.

Fourth and finally, in deciding "the meaning or applicability of the terms of an agency action," a reviewing court might take into account an agency's pronouncements as some evidence of what the agency meant to do in its agency action. Thus, for example, a reviewing court might consider an agency's interpretation of its own rules as some evidence of the agency's intended meaning. Such an approach would not be equivalent to the *Auer*/*Seminole Rock* deference doctrine because it would not allow agencies to change views about the meaning of a particular rule or to articulate new views about the meaning of regulations long after they have been promulgated. Moreover, the theory of such a practice would be not that the agency is better than the court at interpreting certain legal texts, but that, as with any author, the agency might be able to give good insights into its intended meaning when it wrote the regulation.

In my prior testimony, I suggested that Congress could write new legislative language to codify principles such as the four listed above. While I continue to believe that such additional legislative language is possible, it is certainly not necessary. The proposed bill is commendable for its simplicity and elegance. Furthermore, an elaborate code of principles to govern the judicial process of resolving legal questions would, to some extent, be in tension with the general point that the Judicial Branch should be viewed as fully capable of interpreting statutes and deciding other questions of law. The proposed legislation as currently drafted merely corrects one inexplicable and unjustified abdication of the courts' traditional role in deciding legal questions. It might be best to make that one correction without trying to codify a compendium of additional principles.

IV. A Final Technical Suggestion.

In its current form, the proposed legislation modifies 5 U.S.C. § 706 to include a *de novo* review standard for all questions of law. That change would cover the vast bulk, but not all, of judicial review proceedings.

Some judicial review proceedings are not subject to § 706 because of special statutory exemptions. A good example is found in § 307 of the Clean Air Act, 42 U.S.C. § 7607(d), which provides that "section 706 of title 5 of the United States Code shall not, except as expressly provided in this subsection, apply to" judicial review of certain EPA rulemakings.[22] Without

[22] Without a comprehensive review of the entire U.S. Code, it is not possible to assess how many statutory provisions create exemptions from § 706.

additional statutory language in H.R. 4768, judicial review proceedings such as those referenced in § 307 of the Clean Air Act might not be affected by the proposed legislation.

To close this gap in coverage, I suggest that H.R. 4768 place the first sentence of § 706, as amended, into a new subsection (a), and that the new subsection (a) include its own "clear-statement" canon of construction that would assure, to the extent possible, the general applicability of the de novo review standard. Specifically, I suggest something such as:

> (a) To the extent necessary to decision and when presented, the reviewing court shall decide de novo all relevant questions of law, including the interpretation of constitutional and statutory provisions and the determination of the meaning or applicability of the terms of an agency action. Notwithstanding any other law, this subsection shall apply in any action for judicial review of agency action authorized under any provision of law, and any prior or subsequent statute exempting an action for judicial review from this section shall be construed as not creating an exemption from this subsection unless such statute expressly references this subsection.

The proposed language, with its requirement that subsequent statutes must "expressly" make any exemptions to new § 706(a), tracks the approach of the original APA, which also includes a clear-statement canon of construction, now codified in 5 U.S.C. § 559, disfavoring modifications of the APA's general statutory framework.[23]

If that suggestion is followed, the remainder of current § 706 should then be placed in a new subsection (b). This suggestion would have the additional benefit of curing a long-running, well-known formatting error in § 706, which currently is missing subsection divisions even though it includes statutory paragraph and subparagraph divisions.

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In closing, I once again commend the Subcommittee for devoting time to this important matter and for devising an elegant way to restore the traditional role of federal courts "to say what the law is."[24]

Thank you all for your time and attention to these issues, and thank you again Mr. Chairman for the invitation to speak to the Subcommittee.

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[23] See 5 U.S.C. § 559 (last sentence). Section 559 would not, in its current form, apply the proposed new language in § 706 to proceedings governed by § 307(d) of the Clean Air Act. Section 559 provides merely that a "[s]ubsequent statute may not be held to supersede or modify [the APA] except to the extent that it does so expressly." 5 U.S.C. § 559. Section 307(d) of the Clean Air Act does, however, expressly supersede § 706 of the APA because it plainly states that § 706 "shall not, except as expressly provided in this subsection, apply to actions to which this subsection applies." 42 U.S.C. § 7607. That language easily satisfies § 559's clear-statement canon and, without a corrective measure, would make all of § 706 inapplicable.

[24] Marbury v. Madison, 5 U.S. 137, 177 (1803).