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Federal Circuit Bar Journal

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Brief of the Federal Circuit Bar Association as *Amicus Curiae* Supporting Petitioners in *Bufkin v. McDonough**

Christopher J.C. Herbert, Brian T. Burgess,† Jenny J. Zhang

Interest of the *Amicus Curiae*[1]

The Federal Circuit Bar Association ("FCBA") is a national organization for the bar of the United States Court of Appeals for the Federal Circuit. The organization unites different groups across the nation that practice before the Federal Circuit, seeking to strengthen and serve the court. As part of its efforts, the FCBA helps facilitate pro bono representation for veterans appealing decisions of the Department of Veterans Affairs to the Court of Appeals for Veterans Claims and the Court of Appeals for the Federal Circuit, with a view to strengthening the adjudication process at both stages of review. The benefit-of-the-doubt rule at issue in this case is ceᵒntral to the adjudication of veterans' claims, but its practical benefit to veterans is being diminished by the Federal Circuit's narrow reading of the scope and standard of review available to veterans at the Court of Appeals for Veterans Claims.

The FCBA has an interest in assisting this Court by submitting its views on cases that implicate subject matter within the appellate jurisdiction of the Federal Circuit. These submissions further the FCBA's commitment to promoting the health of the legal system in furtherance of the public interest. It is with that interest in mind that the FCBA submits this amicus brief in support of Petitioners.

Because the respondent in this case is part of the federal government, FCBA members and leaders who are employees of the federal government have not participated in the Association's decision-making regarding whether to participate as an amicus in this litigation, developing the content of this brief, or the decision to file this brief.

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* This Brief of Amicus Curiae was originally submitted to the Supreme Court. Brief of the Federal Circuit Bar Association as Amicus Curiae Supporting Petitioners, Bufkin v. McDonough (U.S. 2024) (No. 23-713). It is reprinted herein in its original form, with minimal editing and formatting changes.

† Counsel of Record.

[1] No counsel for a party authored any part of this brief, and no person other than *amicus curiae*, its members, or its counsel made a monetary contribution intended to fund its preparation or submission.

Summary of Argument

The Department of Veterans Affairs ("VA") is required, by statute, to afford claimant veterans the "benefit of the doubt" when the evidence on a material issue is "in approximate balance." 38 U.S.C. § 5107(b). This rule is central to the administration of veterans' claims, as it places the risk of error on the government rather than on the veterans the agency was created to serve. Meaningful judicial enforcement of the rule requires independent review of the evidence before the agency to determine whether there were close issues on which the veteran should have received the benefit of the doubt. The question presented here is whether the Court of Appeals for Veterans Claims ("Veterans Court") must undertake the independent, non-deferential review of the record necessary to make that determination.

The language and history of the statute confirm the answer is "yes." In 1988, Congress codified the benefit-of-the-doubt rule in the same legislation that created the Veterans Court as a specialized Article I tribunal dedicated to the review of VA decisions. The court became the first and only independent forum for veterans to seek review of both the agency's compliance with the law and its findings of fact. Veterans' Judicial Review Act ("VJRA") Pub. L. No. 100-687, Div. A., § 4061, 102 Stat. 4105, 4115 (1988). Congress understood that the availability of this review was critical as a check to ensure the risk of error in assigning veterans benefits is placed on the government rather than on veterans.

But the Veterans Court and the Federal Circuit applied the statute in a manner that undermined its impact, interpreting the clear-error standard prescribed for review of factual findings to absolve the Veterans Court of any authority or obligation to independently assess the factual record in detail or to disturb any VA finding that had a "plausible basis." *Hensley v. West*, 212 F.3d 1255, 1263–64 (Fed. Cir. 2000); *see also Wensch v. Principi*, 15 Vet. App. 362, 366–68 (2001). In 2002, Congress "overrule[d]" those decisions by adding a new provision to the Veterans Court's governing statute. *See* 148 Cong. Rec. 22,597 (2002) (Explanatory Statement On House Amendment to Senate Bill, S. 2237 discussing *Wensch* and *Hensley*); 148 Cong. Rec. 22,913 (2002) (statement of Sen. Rockefeller discussing *Hensley*); S. Rep. No. 107-234, at 16 (2002) (discussing *Hensley*). That provision mandates that, in deciding every appeal from the VA's Board of Veterans Appeals ("BVA"), the Veterans Court "*shall* review the record of proceedings before the Secretary and the [BVA]" and "shall take due account of the Secretary's application of [the benefit-of-the-doubt statute]." 38 U.S.C. § 7261(b)(1) (emphasis added). According to members of Congress, the provision was adopted to give "full force to the 'benefit of doubt' provision" by empowering the Veterans Court to conduct more "searching appellate review" of VA decisions. 148 Cong. Rec. 22,597 (2002).

In the face of this focused congressional action, the Federal Circuit has construed Congress's instruction in § 7261(b)(1) as essentially hortatory, holding that the Veterans Court's authority to enforce the benefit-of-the-doubt rule is limited to the deferential, clear-error review of the VA's factual findings that already existed in the pre-amendment version of the statute. Thus, in each of the Petitioners' cases, the Federal Circuit held that the Veterans Court rightly affirmed the BVA's findings merely because it had given a plausible explanation for why it was "persuaded" by the evidence against the veteran; according to the Federal Circuit, the Veterans Court was neither required nor authorized to independently consider whether there was an approximate balance in the underlying evidence that should have led the VA to afford the benefit-of-the-doubt to the veteran. Pet. App. 10a-11a, 15a-16a.

In adopting its narrow reading of the Veterans Court's authority under § 7261(b)(1), the Federal Circuit made two key errors.

First, the Federal Circuit assumed that the same considerations normally constraining Article III courts from making independent empirical assessments of the agency record should extend to the Veterans Court. But Congress created the Veterans Court and deliberately vested specialized, narrow, and exclusive jurisdiction in that Article I tribunal to avoid the limitations of Article III review of agency action. And although Congress made clear that the Veterans Court was not a "trial" court authorized to take additional evidence "de novo," the court is expressly authorized to "reverse" the VA's findings based on the court's review of the evidence before the agency without remanding to the agency for new findings—a power generally not available to Article III courts. *See* 38 U.S.C. §§ 7261(c), 7261(a)(4); *Sec. & Exch. Comm'n v. Chenery Corp.*, 318 U.S. 80, 88 (1943). All this is consistent with Congress's choice to entrust the Veterans Court with the authority in every appeal to review the record before the VA and assess the approximate balance of the evidence without blind deference to the VA's conclusion that the evidence cuts against the veteran.

Second, the Federal Circuit misread § 7261(c) as prohibiting the Veterans Court from reviewing the existing evidentiary record de novo for compliance with the benefit-of-the-doubt rule. But subsection (c) prohibits only a "trial de novo"—*i.e.*, the taking of new evidence on material facts—which is conceptually distinct from the standard of review.

I. Argument

A. The History of Section 7261(b)(1) Supports Robust Enforcement of the "Benefit of the Doubt" Rule By the Veterans Court

Congress has twice sought to ensure that veterans have fair and meaningful judicial review of denials of their benefits claims. Congress first did so

in 1988 by enacting the VJRA. There, Congress codified the benefit-of-the-doubt rule—to make sure that the VA errs in favor of veterans—and created the Veterans Court, which is supposed to hold the VA to account for any improper applications of that rule. In 2002, in response to decisions narrowly circumscribing the Veterans Court's authority to scrutinize the agency record, Congress enacted the Veterans Benefits Act expressly to direct the Veterans Court to review the entire VA record and "take due account" of the agency's application of the benefit-of-the-doubt rule. But current precedent limiting the Veterans Court to clear-error review of the benefit-of-the-doubt rule has again compromised those congressional efforts to ensure that veterans receive the fair and meaningful judicial review that they are owed.

1. The Veterans Court Is a Specialized Tribunal With Distinct Responsibilities Compared to an Article III Court

This Court has acknowledged the "singular characteristics of the review scheme that Congress created for the adjudication of veterans' benefits claims," central to which is the solicitude for veterans reflected in laws placing "a thumb on the scale in the veteran's favor." *Henderson v. Shinseki*, 562 U.S. 428, 440 (2011). In the VJRA, Congress codified a long-standing principle that the VA must afford veterans "the benefit of the doubt" in adjudicating the factual elements of their claims. 38 U.S.C. § 5107. This provision reflects Congress's intent that veterans be afforded the full scope of benefits to which they can reasonably be found to be entitled, and the government should bear the cost of uncertainty and error in the system. *See Gilbert v. Derwinski*, 1 Vet. App. 49, 54 (1990) ("It is in recognition of our debt to our veterans that society has through legislation taken upon itself the risk of error….").

The VJRA was the culmination of decades of hearings and reports emphasizing the need for judicial review of VA determinations. While the VA maintained that the agency's non-adversarial, pro-veteran system of adjudication did not align with the adversarial posture of judicial review, Congress ultimately concluded that outside review was needed to hold the VA accountable to its obligations to veterans, including the duty to afford veterans the benefit of the doubt on factual disputes. This was especially critical in the face of competing structural incentives within the agency.

In committee hearings, veterans service organizations testified about the tendency for VA decisions "during periods of fiscal restraint" to be "shaped more through the influence of the Office of Management and Budget and blatant political pressure than the intent of Congress."[2] Legislators echoed

[2] *Judicial Review of Veterans' Affairs: Hearing Before the H. Comm. on Veterans' Affs.*, 100th Cong. 319 (1988) (statement of Gordon Mansfield, Associate Exec. Dir. for Gov't Relations, Paralyzed Veterans of America).

concerns that VA decisions may be motivated by executive branch pressures to reduce costs to the detriment of the veterans served by the agency.[3] One representative, explaining the need for judicial review, pointed to a quota system implemented by the BVA that provided its judges with a 5 percent salary increase for completing an average of at least 40 cases per week, incentivizing them to dispose of cases quickly without meaningful engagement with the full record.[4] Against this backdrop, legislators called for "outside review by the independent branch of government established in our constitutional framework with the special responsibility of determining whether governmental action is legal and whether it is fundamentally fair."[5]

But while recognizing a need for judicial review, veterans service organizations and several representatives of the judiciary raised concerns about vesting already over-burdened Article III courts with review of veterans claims, especially because most appeals would focus on factual issues idiosyncratic to veterans benefits law.[6] An early Senate bill proposed to address this by substantially narrowing the standard of review applied to factual issues. Under the Senate proposal, courts could only set aside a VA finding "so utterly lacking in a rational basis in the evidence that a manifest and grievous injustice would result"—a standard that legal commentators suggested might never be met in practice. S. 11, 100th Cong. (1988); 134 Cong. Rec. 17,448-17,483 (1988) (Senate consideration of S. 11).

Congress ultimately rejected that proposal, opting instead for a compromise that vests primary review of VA determinations in a new specialized Article I court limited to review of appeals from the VA. Judges serve 15-year terms and are appointed by the President, subject to the advice and consent of the Senate. 38 U.S.C. § 7253. Litigants may appeal the Veterans Court's decisions to the Federal Circuit, where the review is limited to legal and constitutional questions, not factual findings or the application of law to facts. 38 U.S.C. § 7292(d)(2).

In Congress's view, this new system provided two key benefits. First, Congress expected that the new Veterans Court "would quickly acquire

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[3] *Judicial Review Legislation: Hearing Before the S. Comm. on Veterans' Affs. on S.11 & S.2292*, 100th Cong. 109-122 (1988) (statement of Sen. Alan Cranston, Chairman, S. Comm. on Veterans' Affs.).

[4] *Judicial Review of Veterans' Affairs: Hearing Before the H. Comm. on Veterans' Affs.*, 100th Cong. 191 (1988) (opening statement of Rep. James J. Florio).

[5] *Judicial Review Legislation: Hearing Before the S. Comm. on Veterans' Affs. on S.11 & S.2292*, 100th Cong. 114 (1988) (opening statement of Sen. Alan Cranston, Chairman, S. Comm. on Veterans' Affs.).

[6] *Judicial Review of Veterans' Affairs: Hearing Before the H. Comm. on Veterans' Affs.*, 100th Cong. 193-224 (1988) (prepared statement of Hon. Morris S. Arnold and Hon. Stephen G. Breyer on behalf of the Judicial Conference of the United States).

expertise in the subject matter of benefits' appeals and should be able to make decisions more quickly and on the basis of a better understanding of the record than a court of general jurisdiction."[7] As one Congressman explained in supporting the compromise, the new court, "because of its special focus," would be "in a far better position to assess whether the BVA properly understood its statutory obligation and acted correctly." 134 Cong. Rec. 31,770-31,7711 (1988) (statement of Rep. G.V. Montgomery). Second, Congress emphasized that the new tribunal would be truly "independent," resolving prior concerns that agency decisions were based on budgetary and political considerations rather than on the merits of any particular case. *See id.*

Accordingly, with its combination of specialized expertise and independence, Congress entrusted the new Veterans Court with a more rigorous standard of review than is typically applicable to generalist Article III courts reviewing agency action. For example, one legislator noted that prior concerns over "maintaining the BVA's role as expert arbiter" became less compelling given the new court's very limited jurisdiction consisting entirely of reviewing the VA's benefits decisions. 134 Cong. Rec. 31,459 (1988) (statement of Sen. George Mitchell). And, he continued, because the Veterans Court's "single role" would be "adjudicating veterans' cases," there was "little reason" to "assiduously limit the number of appeals of factual questions that" it could consider. *Id.* Congress thus enacted a "markedly wider" standard of review over factual questions than had been contemplated in the earlier Senate proposal. 134 Cong. Rec. at 31,478 (Explanatory Statement on the Compromise Agreement on S.11, as Amended, the Veterans' Judicial Review Act).

The resulting "clearly erroneous" standard of review was chosen because it was "not [ ] particularly restrictive" and permitted courts to engage in a "more expansive" and "full and fair review of BVA decisions on factual issues." *Id.* at 31,461, 31,471, (statements of Sen. Arlen Specter and Sen. Alan Cranston). And while no "trial de novo" was permitted, the Veterans Court is authorized to "conduct a full review of the decision based on the BVA record," and may "modify or reverse" the BVA decision based on the existing record. *Id.* at 31,470; 38 U.S.C. § 7261(a)(4), (c). This "full review" includes a searching

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[7] *Judicial Review of Veterans' Affairs: Hearing Before the H. Comm. on Veterans' Affs.*, 100th Cong. 215 (1988) (prepared statement of Hon. Morris S. Arnold and Hon. Stephen G. Breyer on behalf of the Judicial Conference of the United States); *see also* 134 Cong. Rec. 31,765-31,790 (1988) (House concurrency to the Senate amendment to S. 11 with additional amendments); 134 Cong. Rec. 31,770 (1988) (statement of Rep. G.V. Montgomery, "The new Court of Veterans' Appeal (CVA) established by the compromise agreement would not be burdened with matters which often require a district court to delay a decision in a case. The sole function of this court is to decide, on the record, whether the VA and the BVA decided a matter correctly; the court will develop expertise on such matters and its decisions will be uniform.").

review of "all legal issues, including ... the fairness of BVA ... adjudication procedures and operations." 134 Cong. Rec. at 31,460.

At the same time, Congress limited the extent to which any other tribunal could revisit the details of the VA's administrative record and the agency's application of law to facts. Thus, although Congress vested the Federal Circuit with jurisdiction to review Veterans Court decisions, it precluded the Article III court from reviewing "(A) a challenge to a factual determination, or (B) a challenge to a law or regulation as applied to the facts of a particular case." 38 U.S.C. § 7292(d)(2). Consistent with this legislative command, the Federal Circuit has held that § 7292(d)(2) prevents it from considering the merits of whether the VA complied with the benefit-of-the-doubt rule in individual cases. *See, e.g.*, *Ferguson v. Principi*, 273 F.3d 1072, 1076 (Fed. Cir. 2001). Accordingly, the Federal Circuit routinely dismisses appeals from the Veterans Court challenging the BVA's application of the benefit-of-the-doubt rule, holding that it lacks jurisdiction to hear them. *See, e.g.*, *Soodeen v. McDonough*, No. 2023-1575, 2023 WL 8467508, at *1 (Fed. Cir. Dec. 7, 2023) (citing *Ferguson* in holding that § 7292(d)(2) "preclude[s] review of the challenge to the application of the benefit-of-the-doubt rule of § 5107(b)"); *Chapman v. McDonough*, No. 23-1834, 2024 WL 1132218, at *2 (Fed. Cir. Mar. 15, 2024); *Gonzalez v. McDonough*, No. 23-1347, 2024 WL 503739, at *3 (Fed. Cir. Feb. 9, 2024).

As a result, in the review scheme Congress adopted, the Veterans Court occupies a unique role in providing veterans with their *only* opportunity for any judicial oversight of the VA's compliance with the benefit-of-the-doubt rule in its weighing of evidence in a given case.

2. Congress Enacted Section 7261(b)(1) To Overturn Case Law Unduly Restricting the Veterans Court's Review of the Factual Record

Despite Congress's directive that the Veterans Court ensure veterans receive the benefit of any doubt, in the decade following the enactment of the VJRA, both the Veterans Court and the Federal Circuit substantially restricted the scope of the Veterans Court's review. One report by the Senate Committee on Veterans Affairs described the courts' narrowing of clear error review in the decade after the VJRA's enactment:

> More than a decade of experience with [the Veterans Court's] application of the "clearly erroneous" standard suggests that [the Veterans Court] is not consistently performing thorough reviews of BVA findings and that the Congressional intent for a broad standard of review has often been narrowed in application.

S. Rep. No. 107-234, at 16 (2002). The Senate committee was particularly troubled by the holding in *Hensley v. West*, 212 F.3d 1255, 1264 (Fed. Cir. 2000), which criticized the Veterans Court for "dissecting the factual record in minute detail" and affirming the BVA decision based on the court's

independent review of the evidence rather than remanding to the BVA. The Federal Circuit deemed such independent analysis problematic because it believed the Veterans Court, as an appellate tribunal, was limited to reviewing BVA findings with "substantial deference" and could not make independent factual determinations based on its own review of the record. 212 F.3d at 1263.

Legislators were also troubled by the Veterans Court's decision in *Wensch v. Principi*, 15 Vet. App. 362 (2001). *See* 148 Cong. Rec. 22,597 (2002) (Explanatory Statement on House Amendment to Senate Bill, S.2237 discussing *Wensch*). There, the record contained conflicting evidence over whether a veteran's debilitating back pain was connected to scarring from a gunshot wound to his left leg. *Wensch*, 15 Vet. App. at 363–66. The BVA found that a VA examiner's conclusion of no service connection was more probative than multiple reports by independent examiners that supported a service connection. *Id.* at 366. Without independently evaluating the balance of the evidence, the Veterans Court affirmed the VA's finding, reasoning that the agency had adequately articulated a plausible basis in the record for favoring one medical opinion over others. *Id.* at 366–68. The court held that it was the VA's prerogative alone to weigh the evidence under § 5107(b) and determine "whether the evidence supports the [appellant's] claim," "is in relative equipoise," or "whether a fair preponderance of the evidence is against the claim." *Id.* at 367.

Reflecting on the state of case law at the time, a representative of the veterans service organization Disabled American Veterans lamented that "under current law…, a veteran can be deprived of benefits whenever there is some slight evidence that gives the Government a plausible reason for denial," which "renders the benefit of the doubt rule meaningless." *Pending Legislation: Hearing Before the S. Comm. on Veterans' Affs.*, 107th Cong. 47 (2002) (statement of Joseph A. Violante, Nat'l Legis. Dir., Disabled American Veterans).[8] This echoed a general concern among veterans service organizations over the "lack of searching appellate review of BVA decisions" and the general observation that "the large measure of deference that [the Veterans Court] affords BVA fact-finding is detrimental to claimants" by undermining consideration of the bene-fit-of-the-doubt rule. S. Rep. No. 107-234, at 17 (2002). Veterans service organizations also expressed broader frustration with the Veterans Court's reluctance under prevailing case law to "actually decid[e]" individual claims on the merits of the facts, opting instead to "decid[e] finer

[8] *See also Pending Benefits Legislation: Hearing Before the S. Comm. on Veterans' Affs.*, 107th Cong. 6970 (2001) ("[I]f it only takes that much to uphold a factual finding when they are supposed to rule in favor of the veteran unless a preponderance of the evidence is against the veteran, then that makes that standard unenforceable and, thus, in some instances, meaningless.") (Testimony of Mr. Rick Surrat, Deputy Nat'l Legis. Dir., Disable American Veterans).

points of law that it can elucidate in scholarly discourse or … send[ ] cases back to BVA on procedural grounds." *Pending Legislation: Hearing Before the S. Comm. on Veterans' Affs.*, 107th Cong. 49 (2002) (statement of Joseph A. Violante, Nat'l Legis. Dir., Disabled American Veterans).

In 2002, Congress responded to these concerns by enacting the Veterans Benefits Act, which "modif[ied] the requirements of the review the court must perform when making determinations under section 7261(a) of title 38." 148 Cong. Rec. 22,913 (2002). The statute did so in two key ways.

First, Congress added new language to § 7261, directing the Veterans Court to "take due account" of the VA's application of the benefit-of-the-doubt rule. 38 U.S.C. § 7261(b)(1). In adopting that provision, legislators made clear that it was intended to "overrule" *Hensley v. West*, which restricted the Veterans Court's authority to "only limited, deferential review of BVA decisions, and stated that BVA fact-finding 'is entitled on review to substantial deference.'" 148 Cong. Rec. at 22,913, 22,917. Congress explained that the new provision would "provide for more searching appellate review of BVA decisions, and thus give full force to the 'benefit of doubt' provision." *Id.* Under the new provision, the Veterans Court "would be specifically required to examine the record of proceedings—that is, the record on appeal before the Secretary and BVA." *Id.* at 22,917. That "judicial process" would place "special emphasis" on the benefit-of-the-doubt provision when the Veterans Court "makes findings of fact in reviewing BVA decisions." *Id.*

Congress's instruction for the Veterans Court to "take due account" of the VA's application of § 5107 parallels the preexisting duty assigned to the Court in § 7261(b)(2). Under that provision, the Veterans Court must "take due account of the rule of prejudicial error." As with § 7261(b)(2), in enacting § 7261(b)(1), Congress instructed the Veterans Court to independently "review the record of proceedings before the Secretary and the [BVA]," 38 U.S.C. § 7261(b), *i.e.*, to assess the role that different pieces of evidence played in the outcome of the proceedings, in taking "due account" of the benefit-of-the-doubt rule.

Second, Congress clarified the Veterans Court's authority to decide factual issues on the merits by reversing rather than remanding cases based on its review of the factual record. As originally enacted, § 7261(a)(4) permitted the Veterans Court to "hold unlawful and set aside" any "finding of material fact" "if the finding is clearly erroneous." Pub. L. No. 100-687, Div. A., § 4061 (1988). In the Veterans Benefits Act, Congress added the words "or reverse" after "and set aside." This addition, Congress explained, was meant "to emphasize that [the Veterans Court] should reverse clearly erroneous findings when appropriate, rather than remand the case." 148 Cong. Rec. 22,913 (2002); *see* Veterans Benefits Act of 2002, Pub. L. No. 107-330, Tit. IV, § 401, 116 Stat. 2832 (codified at 38 U.S.C. § 7261(a)(4)).

Altogether, the text and history of the Veterans Benefits Act make clear Congress's intent that deference to the VA's findings should not preclude the Veterans Court from meaningfully reviewing the record, including to ensure the benefit-of-the-doubt rule is honored. Rather, Congress chose to entrust the Veterans Court with authority to review the VA's application of the benefit-of-the-doubt rule based on the Veterans Court's own searching, independent review of the agency record.

B. The Narrow Reading of Section 7261(b)(1) in *Bufkin* Nullifies Congress's Directive to the Veterans Court

In interpreting § 7261(b)(1), the Federal Circuit held that "the statutory command that the Veterans Court 'take due account' of the benefit of the doubt rule does not require the Veterans Court to conduct any review of the benefit of the doubt issue beyond the clear error review required by § 7261." Pet. App. 15(a). That interpretation contravenes Congress's intent for the role of the Veterans Court. By holding that the provision's mandate is satisfied by ordinary clear-error review of the BVA's findings, and by prohibiting the Veterans Court from conducting an "independent, non-deferential review" of the record, the Federal Circuit's interpretation shields from meaningful review the very cases that the benefit-of-the-doubt rule was meant to address.

Petitioners' cases are illustrative. In each, the record contained multiple medical reports offering competing opinions on the veteran's diagnosis and its connection to his service. The BVA declined to afford the benefit of any doubt to either veteran because it found the reports of the independent examiners supporting the veterans' claims less persuasive than the reports of the VA medical examiner. Pet. App. 60a-61a, 77a-86a. The Veterans Court affirmed in each case without independently considering the balance of evidence because it found no clear error in the BVA's explanations for why it was persuaded by the VA examiner's reports. Pet App. 25a, 42a-43a. According to the Federal Circuit, the Veterans Court satisfied its obligation to review the record and take "due account" of the benefit-of-the-doubt rule by "not[ing]" the BVA's "consideration of conflicting medical opinions" and its "conclusion that the [medical opinion showing no diagnosis] is more persuasive than the opinion showing a diagnosis" and finding no clear error in that determination. Pet. App. 10a-11a.

This thin review perpetuates the same problems that Congress sought to rectify when it enacted the Veterans Benefits Act. Indeed, the Federal Circuit decisions below effectively reinstate the deferential review scheme articulated in *Hensley* and *Wensch* under which veterans can be deprived of benefits based on any evidence plausibly justifying that result. *Compare* Pet. App. 15a ("'take due account' [provision] of the benefit of the doubt rule does not require the Veterans Court to conduct any review of the benefit of the doubt issue beyond the clear error review"), *with Hensley*, 212 F.3d at 1263 ("conclusion

rest[ing] on factual matters... is entitled on review to substantial deference"), *and Wensch*, 15 Vet. App. at 367 (determination that benefit-of-the-doubt rule did not apply "was not clearly erroneous").

Under that standard, the benefit-of-the-doubt requirement becomes meaningless. As numerous veterans service organizations recognized in urging enactment of § 7261(b)(1), when there is probative evidence on both sides, the agency can nearly always articulate some plausible basis for finding the evidence on one side more persuasive. *See* pp. 206-07, *supra*. And these cases evade review because the agency has no obligation or incentive to explain that "the case was in fact a close call" when it "determines that the evidence 'persuasively' forecloses a veteran's claim." *Lynch v. McDonough*, 21 F.4th 776, 783 (Fed. Cir. 2021) (Reyna, J., dissenting). As a result, the agency's decision to place the risk of error on the veteran is essentially unchecked. A standard of review that asks only whether the agency's finding is plausibly justified sidesteps the core question of whether the relevant evidence was close enough for the government to bear the risk of error as Congress directed in § 5107(b).

C. The Narrow Reading of Section 7261(b)(1) in Bufkin Rests Upon Flawed Reasoning

In holding that § 7261(b)(1) does not mandate any review "beyond ... clear error review," the Federal Circuit relied in part on § 7261(c), Pet. App. 15a, 10a— which precludes the Veterans Court from conducting a "trial de novo"—and on an assumption that determining whether the benefit-of-the-doubt rule applies is "committed to the discretion of the" agency, *see Deloach v. Shinseki*, 704 F.3d 1370, 1380 (Fed. Cir. 2013). Both lines of reasoning are incorrect, and the latter traces back to precedent predating the Veterans Benefits Act. Neither justifies defying Congress's clear instruction to permit the Veterans Court to engage in an independent, non-deferential review of the record to ensure a proper application of the benefit-of-the-doubt rule.

1. Section 7261(c)'s Bar Against Trial De Novo Does Not Preclude Independent Review of the Existing Agency Record

Despite Congress's direction that the Veterans Court "review the record" to "take due account of the" benefit-of-the-doubt rule, the Federal Circuit has read § 7261(c)'s blanket prohibition on "trial de novo" as preventing the Veterans Court from independently weighing factual findings. *See* Pet. App. 10a. Specifically, in interpreting § 7261(b)(1), the Federal Circuit has held that, because "§ 7261(c) expressly prohibits de novo review," "the Veterans Court properly review[s] the [BVA's] factual determination[s] for clear error while taking due account of [its] application of the benefit of the doubt rule." *See* Pet. App. 10a (citing *Roane v. McDonough*, 64 F.4th 1306, 1310–11 (Fed. Cir. 2023)). The Government adopted this reasoning in its certiorari-stage brief, contending that § 7261(c) precludes the Veterans Court from

"de novo reconsideration of factual findings" and thus "confine[s] the scope of the Veterans Court's own consideration of the benefit-of-the-doubt rule." Br. for Respondent 11.

But that view conflates "trial de novo"—the phrase Congress used in § 7261(c)—with "de novo review"—an altogether different concept. Congress understood this distinction, and the language it selected for § 7261(c) cannot be read to preclude the independent and searching review of the existing administrative record specifically prescribed in § 7261(b).

1. "The term 'trial de novo' has a long-standing and well-established meaning." *Timmons v. White*, 314 F.3d 1229, 1233 (10th Cir 2003). As courts have explained, "[a] trial de novo is a trial which is not limited to the administrative record—the plaintiff 'may offer any relevant evidence available to support his case, whether or not it has been previously submitted to the agency.'" *Kim v. United States*, 121 F.3d 1269, 1272 (9th Cir. 1997) (quoting *Redmond v. United States*, 507 F.2d 1007, 1011–12 (5th Cir. 1975)); *Affum v. United States*, 566 F.3d 1150, 1160 (D.C. Cir. 2009) (same). A trial de novo contemplates "the taking of additional evidence or even rehearing the testimony of key witnesses." *Abrams v. Johnson*, 534 F.2d 1226, 1228 (6th Cir. 1976). The term "trial de novo" thus speaks to the form that a reviewing court's inquiry may take— specifically whether it can accept new evidence.

De novo review, on the other hand, addresses the level of independence or deference with which the reviewing court will test an agency's (or lower court's) decision-making, typically based on the existing record on appeal. In applying de novo review, courts "make an independent determination of the issues." *Heggy v. Heggy*, 944 F.2d 1537, 1539 (10th Cir. 1991); *see Ornelas v. United States*, 517 U.S. 690, 697–98 (1996) (equating de novo review with "independent appellate review"). This means "that the reviewing court 'do[es] not defer to the lower court's ruling but freely consider[s] the matter anew.'" *Dawson v. Marshall*, 561 F.3d 930, 933 (9th Cir. 2009) (quoting *United States v. Silverman*, 861 F.2d 571, 576 (9th Cir. 1988)); *see Salve Regina College v. Russell*, 499 U.S. 225, 238 (1991) ("When de novo review is compelled, no form of appellate deference is acceptable").

Thus, trial de novo and de novo review are distinct concepts—a court can engage in de novo review of an existing agency record without conducting trial de novo on any of the agency's factual findings. *See, e.g.*, *Stein's Inc. v. Blumenthal*, 649 F.2d 463, 466 (7th Cir. 1980) ("there is a difference between the 'de novo review' ... and a "trial de novo"); *Greenlaw v. Garrett*, 59 F.3d 994, 999 (9th Cir. 1995) ("After proceeding administratively, a claimant is entitled to a trial de novo in federal court, meaning a trial on the merits; not de novo review of an administrative record."); *Luby v. Teamsters Health, Welfare, & Pension Tr. Funds*, 944 F.2d 1176, 1185 (3d Cir. 1991) (acknowledging difference between "trial de novo" and "de novo review"); *cf. United States v. Raddatz*, 447 U.S. 667, 674 (1980) (distinguishing between "de

novo determination" and "de novo hearing").[9] In the classic example of de novo review, a reviewing court takes "a 'fresh look' at the administrative record but does not consider new evidence or look beyond the record that was before the" agency or lower court. *See, e.g.*, *Wilkins v. Baptist Healthcare Sys., Inc.*, 150 F.3d 609, 616 (6th Cir. 1998); *cf. Dep't of Commerce v. N.Y.*, 588 U.S. 752, 780 (2019) ("in reviewing agency action, a court is ordinarily limited to evaluating the agency's contemporaneous explanation in light of the existing administrative record"). Indeed, "de novo review of the record before the lower decisionmaker is [a] well-established meaning of de novo." *See Perry v. Simplicity Eng'g, a Div. of Lukens Gen. Indus., Inc.*, 900 F.2d 963, 966 (6th Cir. 1990).

2. Congress enacted the VJRA against the backdrop of this well-established distinction between "trial de novo" and "de novo review." *See F.A.A. v. Cooper*, 566 U.S. 284, 292 (2012) ("[W]hen Congress employs a term of art, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken.") (citation and quotation marks omitted); *N.L.R.B. v. Amax Coal Co., a Div. of Amax*, 453 U.S. 322, 329 (1981) ("[w]here Congress uses terms that have accumulated settled meaning under either equity or the common law" "a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms."). Legislative history confirms that Congress was well aware of this backdrop when passing the VJRA, with a member of Congress explaining that "nothing in the new language is inconsistent with the existing section 7261(c), which precludes the court from *conducting trial de novo* when reviewing BVA decisions, *that is, receiving evidence that is not part of the record before BVA*." *See* 148 Cong. Rec. 22,913 (2002) (emphases added).

Beyond the VJRA, Congress has demonstrated its understanding of these concepts as distinct across broad ranging legislation. In permitting or

[9] Relatedly, courts have expressly recognized that trial de novo does not require de novo review, underscoring that these are different concepts. The U.S. Tax Court, for instance, will in some cases "conduct[ ] a 'trial de novo' and consider evidence not included in the administrative record," but "appl[y] an abuse of discretion standard of review in that trial de novo proceeding." *Comm'r v. Neal*, 557 F.3d 1262, 1263 (11th Cir. 2009); *see, e.g.*, *Porter v. Comm'r*, 130 T.C. 115, 122 (2008) ("Review for abuse of discretion does not ... preclude us from conducting a de novo trial."); *Ewing v. Comm'r*, 122 T.C. 32, 40 (2004) ("Our longstanding practice has been to hold trials de novo in many situations where an abuse of discretion standard applies."). The D.C. Circuit has also considered the question "whether 'trial de novo' ... always means 'de novo review.'" *See Affum*, 566 F.3d at 1160. Answering "[w]e think not," the court there held that the Food Stamp Act required the district court to conduct a trial de novo into the Secretary of Agriculture's choice to impose one penalty over another; "[b]ut the controlling standard of review is abuse of discretion." *Id.* at 1160–61.

prohibiting a trial de novo, Congress regularly specifies that the provision governs the form of the reviewing court's proceedings rather than prescribing the standard of review. *See* 7 U.S.C. § 2023(a)(15) ("The suit in the United States district court or State court shall be a trial de novo by the court ... except" one category, which "shall be a review on the administrative record'"); *see also* 28 U.S.C. § 657(c); 47 U.S.C. § 504(a). In other statutes, Congress expressly prescribes de novo review while remaining silent about the form of the reviewing court's proceedings. *E.g.*, 12 U.S.C. § 1828(c)(7)(A); 12 U.S.C. § 1849(b)(1); 15 U.S.C. § 3414(b)(6)(F); 16 U.S.C. § 823b(d)(3)(B); 18 U.S.C. § 3613A(b)(1); 22 U.S.C. § 4140(b)(2); 28 U.S.C. § 2265(c)(3); 30 U.S.C. § 1300(j)(4)(ii)(I); 42 U.S.C. § 2282a(c)(3)(B); 42 U.S.C. § 5851(b)(4); 42 U.S.C. § 6303(d)(3)(B). And, in a third category, Congress has addressed both issues, providing for de novo review while also specifying that the reviewing court may conduct a trial on the merits, *i.e.*, a trial de novo. *See, e.g.*, 12 U.S.C. § 5567(c)(4)(D)(i); 15 U.S.C. § 2087(b)(4); 21 U.S.C. § 399d(b)(4)(A); 49 U.S.C. § 20109(d)(3); 49 U.S.C. § 31105(c). To nonetheless equate the VJRA's restriction against "trial de novo" with a limit on the scope of review would conflict with the structure of these statutes. *See, e.g.*, *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 669 (2007) (cautioning "against reading a text in a way that makes part of it redundant").

In short, there is no support for the Federal Circuit's view that § 7261(c) prohibits "independent and non-deferential review of the facts to take due account of the Board's application of the benefit of the doubt rule." *Roane v. McDonough*, 64 F.4th 1306, 1310 (Fed. Cir. 2023). The Federal Circuit's reasoning improperly conflates distinct concepts.

2. Congress Did Not Commit to Agency Discretion the Identification of Close Factual Questions in the Agency Record

The Federal Circuit has also justified its benefit-of-the-doubt holdings by assuming that determining whether record evidence is close enough to trigger the rule is "committed to the discretion of the" agency and lies outside the purview of the Veterans Court as an "appellate tribunal[ ]." *Deloach*, 704 F.3d at 1380. But this reasoning traces back to precedent, such as *Hensley*, 212 F.3d at 1263, that was directly abrogated by Veterans Benefits Act.

In Hensley, the Federal Circuit invoked the Chenery doctrine in holding that the Veterans Court, as an appellate body, could not affirm or reverse a VA decision based on its own findings from a detailed examination of the factual record. *See* 212 F.3d at 1263–64 & n.7. This was based on the principle in Chenery that "an appellate court cannot intrude upon the domain which Congress has exclusively entrusted to an administrative agency" in affirming or reversing an agency's orders. 318 U.S. at 88.

As discussed, pp. 205-06, *supra*, Congress responded to Hensley by adopting the Veterans Benefits Act, which amended the statutory language to clarify that the Veterans Court has authority to "reverse" the BVA, 38 U.S.C. § 7261(a)(4)—a departure from the ordinary remand rule, reflected in the *Chenery* doctrine. *See, e.g.*, *Calcutt v. FDIC*, 598 U.S. 623, 629 (2023). Nevertheless, the Federal Circuit has repeatedly fallen back on inapplicable administrative law principles in concluding that the Veterans Court may not make any independent determinations when enforcing the benefit-of-the-doubt rule. *See Deloach*, 704 F.3d at 1380 (citing *Hensley*, 212 F.3d at 1264, in holding that the Veterans Court lacked authority to "independently weigh the evidence" and reverse the VA's decision); *Roane*, 64 F.4th at 1310 (citing Deloach in holding that the Veterans Court, as an appellate tribunal, can only "review the Board's weighing of the evidence" and "may not weigh any evidence itself") (emphasis in original); Pet. App. 10a (citing *Roane*, 64 F.4th at 1310). This reflexive invocation of deference conflicts with the text and history of § 7261(b)(1), which show that Congress intended for the Veterans Court to exercise independent assessments of the factual record and provide a robust check on the agency's determinations.

Notably, the Federal Circuit's approach to § 7261(b)(1) conflicts with its application of similar language in § 7261(b)(2), which directs the Veterans Court to review the agency record and "take due account" of the rule of prejudicial error. In cases interpreting that provision, the Federal Circuit has recognized that the Veterans Court's "statutory obligation" under § 7261(b)(2) "permits the Veterans Court to go outside of the facts as found by the [VA] to determine whether an error was prejudicial by reviewing 'the record of the proceedings before the Secretary and the Board.'" *Mlechick v. Mansfield*, 503 F.3d 1340, 1345 (Fed. Cir. 2007) (citing *Newhouse v. Nicholson*, 497 F.3d 1298, 1302 (Fed. Cir. 2007)). The court has concluded that this authority does not violate the Chenery principle because the statutory mandate in § 7261(b)(2) made clear that the prejudicial error determination was not one "which the VA alone is authorized to make." *Newhouse*, 497 F.3d at 1301. Thus, the Veterans Court could "give[ ] effect to the choices Congress made in crafting the applicable judicial review provisions" by undertaking the independent determination authorized by Congress. *Mlechick*, 503 F.3d at 1345.

This same reasoning should apply to the Veterans Court's authority under § 7621(b)(1). Congress created the Veterans Court as a tribunal particularly suited to evaluating the proper allocation of the risk of error on a given agency record. Indeed, this Court has acknowledged the Veterans Court's unique experience in reviewing "sufficient case-specific raw material in veterans' cases" to make these types of "empirically based" judgments in an informed way. *Shinseki v. Sanders*, 556 U.S. 396, 412 (2009). And to remove all doubt over the Veterans Court's intended role, Congress enacted § 7261(b)(1) to charge the court with reviewing the agency record in enforcing

the benefit-of-the-doubt rule. The Court must give effect to that clear statutory command.

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The Federal Circuit's interpretation of § 7261(b)(1) reads the provision out of the statute, eroding the scope of judicial review available to veterans and the protection offered by the benefit-of-the-doubt rule. This Court should reverse.

Conclusion

The decisions of the Court of Appeals for the Federal Circuit should be reversed.[10]

[10] The U.S. Supreme Court is currently set to hear oral arguments in *Bufkin v. McDonough* on October 16, 2024. U.S. Sup. Ct., Supreme Court of The United States October Term 2024 (July 26, 2024), https://www.supremecourt.gov/oral_arguments/argument_calendars/MonthlyArgumentCalOctober2024.pdf [https://perma.cc/M46S-CWPK].

Circumventing Statutory Limitations: Potential Legal Challenges to President Biden's Solar Tariffs Proclamation

Jacob Ide*

Introduction

On June 6, 2022, President Biden declared a national emergency regarding electricity production in the United States (the "Proclamation"), arguing that the war in Ukraine and climate change had threatened energy markets and domestic production capacity.[1] As part of the declaration, President Biden simultaneously invoked Section 318(a) of the Tariff Act of 1930 ("Section 318(a)") to allow solar products from Southeast Asia to be imported into the United States free of duties that would otherwise be applied.[2] This move threatened domestic solar manufacturers, who would be significantly harmed by the presence of cheap foreign alternatives, and resulted in potential legal challenges.[3] These challenges would likely contend that Section 318(a) cannot be applied to a national electricity emergency, that President Biden failed to properly invoke the National Emergencies Act ("NEA"), and that the language of Section 318(a) does not allow for the duty-free import of solar products.[4]

This Note examines these potential arguments and concludes that the aforementioned textualist argument is likely meritorious and has the best chance of success if the United States Court of Appeals for the Federal Circuit ("Federal Circuit") hears such a legal challenge to President Biden's Proclamation. Therefore, this Note argues that the June 6, 2022 Proclamation likely exceeded the President's statutory authority under Section 318(a). While analysis reveals that the President has broad authority to declare an emergency, and that this

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[1] Proclamation No. 10414, 87 Fed. Reg. 35067, 35068 (June 9, 2022) [hereinafter Proclamation].

[2] *See id.* at 35068.

[3] Kelsey Tamborrino, *Biden Moves to Ease Trade Turmoil Threatening His Solar Energy Ambitions*, Politico (June 6, 2022), https://www.politico.com/news/2022/06/06/biden-solar-power-equipment-imports-00037359.

[4] *See* discussion *infra* Section I.C.

particular emergency was properly declared, Section 318(a) does not go so far as to allow the duty-free import of any product related to any national emergency.

Section I of this Note provides a comprehensive background on the state of the solar industry in the United States and developments in the enforcement of antidumping and countervailing duties on imported solar products. It also examines the impetus for and the aftermath of President Biden's Proclamation. Section II evaluates potential legal arguments that could be made by domestic challengers to the Proclamation, including the argument that the national emergency was not properly declared under the National Emergencies Act, and ultimately reaching the conclusion that the national emergency was appropriately declared. Section II also applies a textual analysis of the statute using traditional canons of statutory construction to find that solar cells and modules do not fit within the list of products that may be imported free of duty. Finally, Section III recommends that the Federal Circuit follow precedent in reviewing *ultra vires* presidential actions, adopt the above interpretation of the statute to serve as a check on the President's emergency power, and avoid reading the statute to give the Executive unfettered discretion on when they may import products free of duty.

I. Background

A. The United States Solar Industry and Related Trade Remedy Investigations by the Department of Commerce

In 2011, in response to petitions submitted by SolarWorld Industries America Inc., the United States Department of Commerce ("Commerce Department") initiated both antidumping ("AD") and countervailing duty ("CVD") investigations into photovoltaic ("PV") cells and modules from China.[5] In the United States, an AD case against a foreign producer or exporter may be filed by a domestic-industry petitioner who alleges that the foreign entity is "dumping" their product in the United States, or selling at less than

[5] *See* Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the People's Republic of China: Initiation of Antidumping Duty Investigation, 76 Fed. Reg. 70960 (Nov. 16, 2011); *see also* Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the People's Republic of China: Initiation of Countervailing Duty Investigation, 76 Fed. Reg. 70966 (Nov. 16, 2011); *Photovoltaic Cell and Module Design*, U.S. Dep't of Energy (Last Accessed Apr. 3, 2024), https://www.energy.gov/eere/solar/photovoltaic-cell-and-module-design#:~:text=What%20is%20PV%20Cell%20and,known%20as%20modules%20or%20panels [https://perma.cc/KLK6-LPT8] ("Photovoltaic (PV) devices contain semiconducting materials that convert sunlight into electrical energy. A single PV device is known as a cell, and these cells are connected together in chains to form larger units known as modules or panels.").

"normal value," thereby harming domestic competitors who produce or sell that product.[6] Similarly, a CVD case may be filed by a petitioner who alleges that the foreign entity (or the foreign industry more broadly) is receiving subsidies from their government in the form of direct cash payments, favorable loans, and more.[7] Following an affirmative finding that the product is being unfairly dumped or subsidized, the Secretary of Commerce issues an AD or CVD order applying a tariff on that product to be enforced by United States Customs and Border Protection ("CBP").[8] Tariffs are imposed to counteract the value of this dumping or subsidization, "thereby leveling the playing field for domestic industries injured by such unfairly traded imports."[9]

In 2012, the Commerce Department issued final affirmative determinations in both of the 2011 investigations, finding that Chinese producers and exporters were dumping solar cells at less than fair value in the United States and receiving countervailable subsidies from their government.[10] While Proponents of the tariffs lauded the determinations as "'standing up against Big China Solar,'" critics, such as the Coalition for Affordable Solar Energy, lamented the move as "'a heavy blow to America's solar industry.'"[11] Other commentators noted that the tariffs would only apply to products comprised of Chinese solar cells specifically, potentially blunting their overall impact on the industry.[12]

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[6] *Antidumping* and *Countervailing Duties (AD/CVD) Frequently Asked Questions*, U.S. Customs & Border Prot. (July 29, 2022) [hereinafter *AD/CVD FAQs*], https://www.cbp.gov/trade/priority-issues/adcvd/antidumping-and-countervailing-duties-adcvd-frequently-asked-questions#:~:text=What%20is%20the%20purpose%20of,by%20such%20unfairly%20traded%20imports [https://perma.cc/DD8N-8PAP]; *see also* 19 U.S.C. § 1673 (imposition of antidumping duties).

[7] *See AD/CVD FAQs, supra* note 6; *see also* 19 U.S.C. § 1677(5)(D) (financial contribution).

[8] *See Understanding Antidumping & Countervailing Duty Investigations*, USITC, https://www.usitc.gov/press_room/usad.htm [https://perma.cc/M48X-ZDHM] (last accessed May 16, 2024).

[9] *AD/CVD FAQs, supra* note 6.

[10] *Fact Sheet: Commerce Finds Dumping and Subsidization of Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules from the People's Republic of China*, Int'l Trade Admin., U.S. Dep't of Com., https://enforcement.trade.gov/download/factsheets/factsheet_prc-solar-cells-ad-cvd-finals-20121010.pdf [https://perma.cc/5J5F-TNPZ] (last accessed May 16, 2024).

[11] *See* Matt Daily, *U.S. Sets New Tariffs on Chinese Solar Imports*, Reuters (May 17, 2012), https://www.reuters.com/article/us-china-trade/u-s-sets-new-tariffs-on-chinese-solar-imports-idUSBRE84G19U20120517.

[12] *See* Wendy Koch, *U.S. Finalizes Steep Tariffs on China's Solar Panels*, USA Today (Nov. 7, 2012), https://www.usatoday.com/story/news/nation/2012/11/07/us-tariffs-china-solar-panels/1689177/ [https://perma.cc/6L9J-NK95].

By 2013, the total number of Chinese solar cell and module manufacturers fell below 100, compared with over 300 manufacturers in 2011.[13] Following the Commerce Department's determinations from 2012, China retaliated by investigating American dumping and subsidizing of solar products and found that the dumping margin for American polysilicon—the main ingredient for making solar cells—was over 50%.[14] However, solar manufacturing jobs in the United States remained relatively flat in the two years immediately following the Commerce Department's determinations given that "the majority of PV cells and modules [were] made overseas."[15] As of 2016, about 15% of all solar-industry jobs in the United States were in the manufacturing sector, with about 0.7% of that total employed in the production of solar cells and modules.[16] Overall, domestic production of PV cells and modules rose by 24% between 2012 and 2016 as demand for those products increased dramatically.[17]

Despite this increase in domestic production, the American solar industry continued to rely heavily on imports of solar cells and modules, leading to concern that this reliance would stifle the domestic industry and increase the prices of imported solar materials.[18] As a result of this concern, large domestic producers filed a petition at the International Trade Commission ("ITC") in 2017 calling for safeguard protections,[19] allowing for the temporary imposition of import relief when a domestic injury is threatened by substantially increased quantities of the foreign product.[20] The petitioners alleged that foreign producers could avoid the aforementioned AD and CVD tariffs on China by shifting their production to other countries before exporting to the United States.[21] The ITC ultimately ruled that the relevant solar products were

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[13] Michaela D. Platzer, Cong. Rsch. Serv., R42509, U.S. Solar Photovoltaic Manufacturing: Industry Trends, Global Competition, Federal Support 14 (2015) (citing International Energy Agency, PVPS Annual Report 47 (2013)), https://iea-pvps.org/wp-content/uploads/2020/01/IEA-PVPS-AR2013_web.pdf [https://perma.cc/F4W2-ZQCH]) (This decline was partly caused by global price pressures, as several U.S. solar manufacturers went bankrupt during this timeframe as well).

[14] *See* Mark Wu & James Salzman, *The Next Generation of Trade and Environment Conflicts: The Rise of Green Industrial Policy*, 108 Nw. U. L. Rev. 401, 438–39 (2015).

[15] Platzer, *supra* note 13, at 13.

[16] Michaela D. Platzer, Cong. Rsch. Serv., 7-5700, Domestic Solar Manufacturing and New U.S. Tariffs 1 (2018).

[17] *Id.*

[18] *See id.* ("According to one estimate, imports of solar cells and modules supplied 88% (roughly 13 gigawatts) of U.S. domestic demand in 2017.").

[19] *See* Joshua E. Kurland, *Dusting-Off Section 201: Re-Examining a Previously Dormant Trade Remedy*, 49 Geo. J. Int'l L. 609, 654 (2018).

[20] *See* 19 U.S.C. § 2251.

[21] *See* Kurland, *supra* note 19, at 654–55.

"being imported into the United States in such increased quantities as to be a substantial cause of serious injury to the domestic industry," and recommended that President Trump take action to counteract this injury.[22] President Trump obliged,[23] imposing new temporary safeguard tariffs in 2018.[24] The move fomented mixed reaction within the solar industry; domestic manufacturers argued that the safeguards were critical to their very survival, while downstream distributors and others who benefitted from low-priced foreign imports claimed the tariffs would inhibit the expansion of solar power in the United States in general.[25]

Two years after the safeguard proclamation was issued, the ITC issued a check-in report on the state of the domestic solar industry, which found that "prices for [. . .] cells and modules declined in a manner consistent with historical trends but were higher than they would have been without the safeguard measure."[26] President Trump "determined that the domestic industry ha[d] begun to make positive adjustment to import competition," leading him to remove several exemptions from the safeguard tariffs and increase the overall rates.[27] While the safeguard tariffs have remained in place since then, "[t]hese trade actions have not led to greater domestic CS PV cell production."[28] Indeed, since the institution of the safeguards, nearly all domestic cell production facilities have closed.[29] Despite that fact, in 2022, President Biden extended the safeguard measures for another four years and expanded the number of exemptions in contrast to ITC recommendations.[30]

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[22] U.S. International Trade Commission, Crystalline Silicon Photovoltaic Cells (Whether or Not Fully Assembled into Other Products), 82 Fed. Reg. 55393–94 (Int'l Trade Comm'n Oct. 31 2017) (Inv. No. TA-201-75).

[23] *See* Platzer, *supra* note 16, at 2.

[24] *See* 19 U.S.C. § 2251.

[25] *See* Kurland, *supra* note 19, at 655.

[26] Proclamation 10101: To Further Facilitate Positive Adjustment to Competition from Imports of Certain Crystalline Silicon Photovoltaic Cells (Whether or Not Partially or Fully Assembled Into Other Products), 85 Fed. Reg. 65639 (Oct. 10, 2020).

[27] *See id.* at 65640–41.

[28] Manpreet Singh, Cong. Rsch. Serv., R47093, U.S. Solar Photovoltaic Manufacturing (2022) (Summary).

[29] *See id.* at 14.

[30] *See id.* at 14–15; *see also* To Continue Facilitating Positive Adjustment to Competition from Imports of Certain Crystalline Silicon Photovoltaic Cells (Whether or Not Partially or Fully Assembled into Other Products), 87 Fed. Reg. 7357, 7359 (Feb. 4, 2022).

B. The Circumvention Inquiry and President Biden's Proclamation

1. Initiation of the Circumvention Inquiry

A circumvention inquiry may expand the scope of an AD or CVD order to cover a product which "before importation into the United States . . . is completed or assembled in another foreign country from merchandise which is subject to such [an AD/CVD] order."[31] Essentially, a circumvention inquiry is designed to crack down on foreign producers attempting to dodge an already-existing AD/CVD order. Auxin Solar ("Auxin"), a domestic producer, filed a circumvention inquiry request on February 8, 2022. Auxin alleged that solar cells and modules produced in Cambodia, Malaysia, Thailand, and Vietnam, which were not subject to the 2012 AD/CVD orders, were using components made in China, thereby circumventing the Commerce Department's AD and CVD orders.[32] On April 1, 2022, the Commerce Department initiated its circumvention inquiry.[33]

The initiation of the circumvention inquiry created a great deal of controversy.[34] The Solar Energy Industries Association ("SEIA") claimed that its survey indicated that 80% of domestic manufacturers expected the inquiry to have "severe or devastating impacts" on their United States business and that 70% of respondents expected that at least half of their workforce would be placed at risk by the inquiry.[35] Auxin argued that China was not deterred by the 2012 orders, evident from their "continued . . . assault on domestic producers" through the use of "relentless predatory pricing."[36] Auxin claimed that Chinese imports had been "completely" replaced by imports from third countries, and the value of these replacement imports had risen by 868%

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[31] 19 U.S.C. § 1677j(b)(i).

[32] *See* Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, From the People's Republic of China: Initiation of Circumvention Inquiry on the Antidumping Duty and Countervailing Duty Orders, 87 Fed. Reg. 19071 (Apr. 1, 2022) [hereinafter Circumvention Initiation].

[33] *See id.*

[34] *See, e.g.*, Solar Energy Indus. Assoc., *Impact of the Auxin Solar Tariff Petition*, 9, 12 (Apr. 26, 2022), https://seia.org/sites/default/files/2022-04/FINAL%20Auxin%20Impact%20Analysis%202022-04-26.pdf [https://perma.cc/NDN4-3QPB]; *see also, e.g.,* Letter from Cassidy Levy Kent LLP to Gina Raimondo, U.S. Sec'y Com. 1 (Feb. 8, 2022), https://www.seia.org/sites/default/files/2022-02/Circumvention%20Petition%20Filed%202.8.22.pdf [https://perma.cc/WSW8-8XLL].

[35] *See* Solar Energy Indus. Assoc., *supra* note 34, at 9, 12.

[36] Letter from Cassidy Levy Kent LLP to Gina Raimondo, U.S. Sec'y Com., *supra* note 34, at 1.

since the imposition of the 2012 orders.[37] As a result, Auxin argued, "[a] circumvention finding is needed to restore the integrity of the remedy that Commerce and the ITC determined was necessary to protect the domestic industry a decade ago."[38]

2. President Biden's Proclamation

On June 6, 2022, President Biden issued a proclamation declaring a national emergency with respect to electricity production and directed the Secretary of Commerce:

> to permit, until 24 months after the date of this proclamation or until the emergency declared herein has terminated . . . the importation, free of the collection of duties and estimated duties . . . of certain solar cells and modules, exported from the Kingdom of Cambodia, Malaysia, the Kingdom of Thailand, and the Socialist Republic of Vietnam.[39]

As the basis for declaring a national emergency, President Biden referenced "[m]ultiple factors [that] are threatening the ability of the United States to provide sufficient electricity generation to serve expected customer demand," including climate change and disruption to energy markets caused by Russia's invasion of Ukraine.[40] President Biden noted the "unavailability" of solar cells and modules in the United States "threaten[s] the availability of sufficient electricity generation capacity to serve expected customer demand."[41] The Proclamation suggested that the current tariffs on solar products from Southeast Asia led to a shortage of such products in the United States and the cancellation or postponement of various solar projects nationwide.[42] As the statutory basis for his "emergency authority," President Biden cited Section 318(a) of the Tariff Act of 1930.[43] Section 1318(a) provides:

> Whenever the President shall by proclamation declare an emergency to exist by reason of a state of war, or otherwise, he may authorize the Secretary of the Treasury to extend during the continuance of such emergency the time herein prescribed for the performance of any act, and may authorize the Secretary of the Treasury to permit, under such regulations as the Secretary of the Treasury may prescribe, the importation free of duty of food, clothing, and medical, surgical, and other supplies for use in emergency relief work. The Secretary of the Treasury shall report to the Congress any action taken under the provisions of this section.[44]

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[37] *See id.* at 2–3.

[38] *Id.* at 2.

[39] Proclamation, *supra* note 1, at 35068.

[40] *Id.* at 35067.

[41] *Id.*

[42] *See id.* at 35067–68.

[43] *Id.* at 35068.

[44] 19 U.S.C. § 1318(a).

This statute has been invoked sparingly by presidents throughout the years.[45] In a 1946 proclamation, President Truman referenced the statute allowing the duty-free importation of lumber in response to a housing shortage following World War II.[46] Moreover, President Roosevelt utilized the statute allowing the duty-free importation of jerked beef into Puerto Rico to combat a famine in 1942.[47] President Trump recently invoked Section 318(a) to ease the import of personal protective equipment responding to the national emergency caused by the COVID-19 pandemic.[48]

Invoking Section 318(a) to lift duties on imported goods has historically resulted in disparate reactions.[49] While American companies that rely on imported goods benefit from the lower costs, the free import of foreign products typically places the domestic industry at a competitive disadvantage.[50] President Biden's Proclamation followed this trend, drawing sharp criticism from some domestic solar manufacturers while earning praise from many environmental groups.[51]

Environmentalist groups, such as the Sierra Club and Greenpeace, applauded the Proclamation as a "necessary action to support the solar industry . . . and our national climate goals" and as a "win" that will "help unlock the potential of renewable energy."[52] President Biden's Proclamation referenced

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[45] *See* Joseph L. Barloon et al., *Biden Pauses New Duties on Solar Imports From Southeast Asia, Takes Action To Bolster Domestic Industry*, Skadden Publication (June 13, 2022), https://www.skadden.com/insights/publications/2022/06/biden-pauses-new-duties-on-solar-imports [https://perma.cc/ELK5-7ZDY] ("The Declaration relied on a statutory authority that has only been invoked a handful of times in the last century: Section 318(a) of the Tariff Act of 1930.").

[46] *See* Proclamation No. 2708, 11 Fed. Reg. 12695 (Oct. 29, 1946).

[47] *See* Proclamation No. 2545, 7 Fed. Reg. 2611 (Apr. 7, 1942).

[48] *See* Exec. Order No. 13916, 85 Fed. Reg. 22951 (Apr. 18, 2020).

[49] *See* Elizabeth Goitein, *COVID-19 Special Edition: Part I: Who's in Charge?: Emergency Powers, Real and Imagined: How President Trump Used and Failed to Use Presidential Authority in the COVID-19 Crisis*, 11 J. Nat'l Security L. & Pol'y 27, 54 (2020) (While President Trump's use of Section 318(a) during the pandemic "provided relief for U.S. companies that rely heavily on importation, domestic industry associations argued that it actually worsened the economic distress of companies that rely on domestic production").

[50] *See id.*

[51] *See, e.g.*, Press Release, Sierra Club, Biden Takes Necessary Action on Solar as Commerce Investigation Continues (June 6, 2022), https://www.sierraclub.org/press-releases/2022/06/biden-takes-necessary-action-solar-commerce-investigation-continues [https://perma.cc/M52L-HRTP]; Tamborrino, *supra* note 3.

[52] *See* Press Release, Sierra Club, *supra* note 51; *see also* Tamborrino, *supra* note 3; *see also* Greenpeace USA (@greenpeaceusa), Twitter (June 6, 2022), https://twitter.com/greenpeaceusa/status/1533842424342056960.

climate change and described the increased importation of solar products as "critical to reducing our dependence on electricity produced by the burning of fossil fuels."[53] This statement aligns with the Biden Administration's clean energy agenda, which includes efforts to increase solar power production nationwide.[54]

By contrast, some domestic solar manufacturers have sharply criticized the move and stated that President Biden did not consult the industry before issuing the Proclamation.[55] A senior member of the pro-manufacturing group Coalition for a Prosperous America stated that "[y]ou can't say that you want to spur domestic production, and then allow the Chinese to continue to dump product, which is a direct threat and something that is working against increasing domestic production."[56] Auxin's CEO similarly stated that "[b]y taking this unprecedented—and potentially illegal—action, [President Biden] has opened the door wide for Chinese-funded special interests to defeat the fair application of U.S. trade law," and claimed that "President Biden is significantly interfering in the Commerce Department's quasi-judicial process."[57]

These critiques were brought to the fore when Congress passed legislation in May of 2023 to reinstate tariffs on solar products from the four countries exempted by Biden's Proclamation.[58] The bipartisan legislation was aimed at "level[ing] the playing field for workers and manufacturers" and standing up to China, according to Senators who supported the measure.[59] However, President Biden vetoed the law shortly after its passage, citing concerns that the reinstatement of tariffs would create uncertainty for American workers in the solar industry and accusing the legislation's supporters of "bet[ting] against American innovation."[60] The White House also stressed that allowing the importation of the products exempted by the Proclamation is necessary

[53] Proclamation, *supra* note 1, at 35067.

[54] In September 2021, the United States Department of Energy ("DoE") released the Solar Futures Study, which set a goal of meeting about 40% of electricity demand through solar power by 2035. *See* Off. of Energy Efficiency and Renewable Energy, U.S. Dep't of Energy, Solar Futures Study 6–7 (2021).

[55] *See* Tamborrino, *supra* note 3.

[56] *Id.*

[57] *Id.*

[58] Ana Swanson, *Congress Clashes With Biden Over Tariffs on Illegal Chinese Solar Panels*, N.Y. Times (May 3, 2023), https://www.nytimes.com/2023/05/03/us/politics/senate-tariffs-chinese-solar-panels.html.

[59] *Id.*

[60] Zolan Kanno-Youngs, *Biden Vetoes Legislation That Would Reinstate Tariffs on Some Solar Panels*, N.Y. Times (May 16, 2023), https://www.nytimes.com/2023/05/16/us/politics/biden-solar-tariffs-veto.html.

for companies building solar panels in response to the Inflation Reduction Act, which provides billions of dollars in incentives for companies to do so.[61]

3. The Commerce Department's Final Regulations and Final Determination

Following President Biden's Proclamation, the Commerce Department issued regulations pursuant to the duty-free import of solar cells and modules from the four designated Southeast Asian countries on September 16, 2022.[62] In accordance with the Proclamation, these regulations waive any application of AD/CVD duties to the relevant products that would have been enforced "in the event of an affirmative preliminary or final determination in the anti-dumping and countervailing duty (AD/CVD) circumvention inquiries."[63]

In its final regulations, the Commerce Department defended its actions against numerous public comments submitted following the promulgation of the proposed rule.[64] Notably, the regulations discuss several commentors' argument that the Commerce Department does not have the authority to waive duties on solar cells and modules because the products do not fit within the definition of "supplies for use in emergency relief work" found in Section 318(a) of the Tariff Act.[65] The Commerce Department rejected this narrow conception of "supplies for use in emergency relief work," instead asserting the phrase should be read broadly to encompass all goods that could conceivably be used in emergency relief efforts.[66] Specifically, the Commerce Department stated that "'[w]hat supplies might be needed for use in emergency relief work will depend on the circumstances of a specific declared emergency and the particular needs of persons affected by that emergency.'"[67] This allows solar cells and modules to fit within the statute because electricity is a "basic necessity of life" and provides relief from the national emergency declared by President Biden.[68]

The significant implications of President Biden's Proclamation were realized on August 18, 2023, when the Commerce Department issued its final

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[61] *See id.*

[62] *See* Procedures Covering Suspension of Liquidation, Duties and Estimated Duties in Accord With Presidential Proclamation 10414, 87 Fed. Reg. 56868 (Sept. 16, 2022) (to be codified at 19 C.F.R. pt. 362) [hereinafter Final Regulations].

[63] *Id.*

[64] *See id.* at 56871–82.

[65] *Id.* at 56871–72.

[66] *Id.*

[67] *Id.* at 56871–72 (quoting Procedures for Importation of Supplies for Use in Emergency Relief Work, 71 Fed. Reg. 63230, 63231–33 (Oct. 30, 2006)).

[68] *See* Procedures Covering Suspension of Liquidation, Duties and Estimated Duties in Accord With Presidential Proclamation 10414, 87 Fed. Reg. at 56872.

determination in the circumvention inquiry.[69] The determination found that Chinese producers are indeed circumventing existing AD/CVD duties on solar products by shipping their products through all four Southeast Asian countries under investigation.[70] Specifically, the Commerce Department found that five companies "were attempting to avoid the payment of U.S. duties by completing minor processing in third countries."[71] The Commerce Department stated that the findings were a win for the U.S. solar industry and that they "underscore Commerce's commitment to holding China accountable for its trade distorting actions, which undermine American industries, workers, and businesses."[72] Finally, Commerce recognized that the findings would not have an immediate impact given the moratorium on tariffs imposed in President Biden's Proclamation.[73]

4. Legal Challenges to the Proclamation

On December 29, 2023, Auxin and another solar product manufacturer, Concept Clean Energy, Inc., filed a legal challenge to President Biden's Proclamation in the Court of International Trade.[74] The Auxin challenge argues that there is no legal basis for the "ill-begotten tariff holiday" established by the Biden Proclamation and claims that the tariff moratorium provides a win for Chinese solar producers to the detriment of American solar manufacturers.[75] The companies referred to the "tariff holiday" as an "existential threat" to domestic solar manufacturers and claimed that both the Proclamation and the Commerce Department's regulations "failed to follow established law."[76] In doing so, Auxin is asking the CIT to put an end to the Proclamation's two-year pause on tariffs, which would open the door to the application of retroactive duties on solar products from the four Southeast Asian countries exempted by the Proclamation.[77]

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[69] Press Release, U.S. Dep't of Com., Department of Commerce Issues Final Determination of Circumvention Inquiries of Solar Cells and Modules from China (Aug. 18, 2023), https://www.commerce.gov/news/press-releases/2023/08/department-commerce-issues-final-determination-circumvention-inquiries [https://perma.cc/9CZW-5F8K].

[70] *Id.*

[71] *Id.*

[72] *Id.*

[73] *Id.*

[74] Jennifer A. Dlouhy, *Biden Solar-Tariff Holiday Challenged, Adding New Industry Risk*, Bloomberg News (Jan. 4, 2024), https://www.bnnbloomberg.ca/biden-solar-tariff-holiday-challenged-adding-new-industry-risk-1.2017924.

[75] *Id.*

[76] *Id.*

[77] *See* Kelley Pickerel, *Federal government asks International Court to dismiss Auxin's latest lawsuit*, Solar Power World (Jan. 30, 2024), https://www.solarpowerworldonline.

In response, nine parties have filed motions to intervene in the case in support of the Commerce Department and the federal government.[78] The federal government and supporting parties have filed several motions to dismiss Auxin's suit, arguing "lack of subject-matter jurisdiction" and that the time for Auxin to appeal the Commerce Department's final determinations has passed, given that Auxin already had the opportunity to raise its concerns during the initial investigation and regulation period.[79] Because the CIT must first address these arguments before resolving the questions raised by Auxin in its lawsuit, the case has continued beyond June 6, 2024, the date on which the Proclamation's moratorium ended.[80] Because the case extended beyond that date, the "real issue being argued is whether to apply tariffs on [solar] panels that had been imported during the two-year pause" on duties.[81]

C. Potential Legal Challenges to President Biden's Proclamation

President Biden's sweeping Proclamation may well be subject to further legal challenges brought by domestic solar manufacturers, who would have benefitted if circumvention duties were actually levied against the Southeast Asian countries.[82] As discussed, Auxin immediately expressed its displeasure with the Proclamation, slamming the move as "potentially illegal."[83] The Proclamation and the Commerce Department's subsequent regulations could be challenged on numerous grounds, several of which were addressed in the regulations in an attempt to head off such arguments.[84]

1. Challenges Regarding the Legitimacy of the National Emergency Declaration

First, potential legal challenges might argue that there is no obvious national emergency that warrants the invocation of Section 1318(a), and that President Biden's declaration of a national emergency relating to electricity production does not rise to the level necessary to trigger the statute's emergency powers. Section 1318(a) does not define the sorts of national emergencies that warrant the lifting of duties, and instead merely states that these powers may be invoked "[w]henever the President shall by proclamation

com/2024/01/federal-government-asks-international-court-to-dismiss-auxins-latest-lawsuit/ [https://perma.cc/AZR4-XT8V].

[78] *Id.*

[79] *Id.*

[80] *See id.*

[81] *Id.*

[82] *See* discussion *supra* Section I.B.iv.

[83] Tamborrino, *supra* note 3.

[84] *See* discussion *supra* Section I.B.iii.

declare an emergency to exist by reason of a state of war, or otherwise."[85] A legal challenge might contend that this language limits appropriate emergency declarations to those surrounding "a state of war," and that the broad, catch-all term "or otherwise" is constrained by this context.

The Commerce Department addressed this argument in its final regulations and responded by emphasizing the necessity of imported solar products to combat the burgeoning electricity shortages across the United States.[86] The Commerce Department also found public commentors' argument that there is no true electricity emergency to be "unpersuasive."[87] Nevertheless, neither the Commerce Department nor the White House have addressed the argument regarding Section 318(a)'s potential constraint of national emergencies head-on, potentially opening the door to a legal challenge based on statutory interpretation of this point.

2. Challenges Regarding Invocation of the NEA

Second, a legal challenge to the Proclamation could assert that the President's emergency declaration is invalid because it fails to invoke the NEA.[88] Such a challenge might argue that Section 318(a), on its own, does not provide the President with the authority to declare a national emergency, and that emergency declarations must invoke the NEA to be valid.[89] This argument would likely center around the fact that Section 318(a) simply lists certain powers that the President may utilize "whenever" they have declared an emergency, and does not expressly grant the authority to *declare* that emergency utilizing the Tariff Act alone.[90]

The Commerce Department discussed this argument cursorily in its final regulations, stating simply that the Department "do[es] not agree that Proclamation 10414 fails to conform with the requirements of the National Emergencies Act."[91] However, the Commerce Department provided little analysis on this point and made only the conclusory statement that "19 U.S.C. 1318(a) recognizes that the President has authority to declare emergencies arising under the Tariff Act."[92]

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[85] 19 U.S.C. § 1318(a).

[86] *See* Final Regulations, *supra* note 62, at 56872–74.

[87] *Id.* at 56873.

[88] *See* 50 U.S.C. §§ 1601–1651.

[89] *See* discussion *infra* Section II.B.

[90] *See* 19 U.S.C. § 1318(a).

[91] Final Regulations, *supra* note 62, at 56875.

[92] *Id.*

Presidential authority regarding national emergencies and their declaration is generally broad and ill-defined.[93] Presidential scholars have noted that the NEA does not define a "national emergency" or list criteria or circumstances that would justify an emergency declaration.[94] Courts have expressed similar interpretations of presidential emergency authority, with some recent opinions noting that the NEA "does not provide a definition of national emergency, nor even specify when one should be declared."[95] Nevertheless, a legal challenge to President Biden's Proclamation would likely rely heavily on the legislative history of the NEA, which explicitly demonstrates that the legislation was enacted with the goal of "reign[ing] in the President's emergency powers" in response to the executive's previous ability "to declare national emergencies with virtually unfettered discretion."[96] However, at the time of the NEA's passage, the Senate Committee on Government Operations demurred on the point of emergency declaration, deciding that "the definition of when a President is authorized to declare a national emergency should be left to the various statutes which give him extraordinary powers."[97]

3. Challenges Regarding Textual Interpretation of Section 318(a)

Finally, domestic solar manufacturers could make the aforementioned argument that solar cells and modules do not fit within the definition of "supplies for use in emergency relief work" found in Section 318(a).[98] As discussed, the Commerce Department rejected this argument and offered a broad conception of that portion of the statute, instead asserting that such "supplies" can be defined by whatever sort of emergency has been declared by the President.[99] In other words, the Commerce Department defended the Proclamation and its subsequent regulations from this potential attack by arguing that any supplies may be imported free of duty under the statute provided that those supplies are related in some way to the declared national emergency.[100]

Legal challenges to the Proclamation by domestic solar producers would likely be based on principles of statutory interpretation, arguing that this clause of Section 318(a) is limited by the surrounding portions of the statute,

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[93] *See* Elizabeth Goiten, *President Biden Shouldn't Declare Climate Change a National Emergency*, Brennan Ctr. For Just. (Jan. 29, 2021), https://www.brennancenter.org/our-work/analysis-opinion/president-biden-shouldnt-declare-climate-change-national-emergency [https://perma.cc/2MVS-WVKQ].

[94] *See id.*

[95] El Paso Cnty. v. Trump, 982 F.3d 332, 369 (5th Cir. 2020) (Dennis, J., dissenting).

[96] *Id.* at 369–70 (citing S. Rep. No. 93-1170, at 2 (1974)).

[97] S. Rep. No. 94-1168, at 3 (1976).

[98] *See* discussion *supra* Section I.B.iii; *see also* 19 U.S.C. § 1318(a).

[99] *See* Final Regulations, *supra* note 62, at 56871–72.

[100] *See id.*

especially in the immediately preceding phrase providing the examples of "food, clothing, and medical, surgical" supplies.[101] While the Commerce Department directly rejects these contentions in its final regulations, it does not engage in the sort of in-depth statutory analysis that might be raised by a challenging party, leaving the door open to such an argument.

D. Judicial Review of Presidential Actions

The President generally has broad authority in matters of international policy and trade.[102] In *United States v. Curtiss-Wright Export Corp.*,[103] the Supreme Court of the United States emphasized the President's expansive responsibilities as the "sole organ of the federal government in the field of international relations."[104] The Supreme Court stated that this power is gleaned from the Constitution itself and "does not require as a basis for its exercise an act of Congress."[105] Moreover, the Federal Circuit held in *Motions Systems Corp. v. Bush*[106] that when Congress has delegated authority to the Executive, judicial review of presidential action is not available "'when the statute in question commits the decision to the discretion of the President.'"[107] However, when the claim in question argues that the President has exceeded their statutory mandate, judicial review is available.[108]

In *Dalton v. Specter*,[109] the Supreme Court noted that while not every presidential action is subject to judicial review, claims that the President has violated a statutory mandate may occur when the statute does not grant unfettered discretion to the President.[110] Accordingly, under the Court's holding in *Dalton*, challenges to allegedly *ultra vires* actions by the President are not precluded from receiving judicial review.[111] The Federal Circuit applied this holding in *Motions Systems*, establishing that judicial review is available when a challenging party claims that the President's actions exceed his statutory authority or misconstrue statutory provisions.[112] Other circuit courts have

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[101] 19 U.S.C. § 1318(a).

[102] *See, e.g.*, United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 320 (1936).

[103] 299 U.S. 304 (1936).

[104] *Id.* at 320.

[105] *Id.*

[106] 437 F.3d 1356 (Fed. Cir. 2006).

[107] *Id.* at 1360 (quoting *Dalton v. Specter*, 511 U.S. 462, 474 (1994)).

[108] *See id.* (in *Dalton*, "[t]he Court did not address the extent of available review of Presidential action for violation of a 'statutory mandate,' assuming that some such review was available.").

[109] 511 U.S. 462 (1994).

[110] *Id.* at 474.

[111] *Id.* at 477–78 (Blackmun, J., concurring).

[112] *Motions Sys.*, 437 F.3d at 1364 (Gajarsa, J., concurring) (internal citations omitted).

reinforced the reviewability of *ultra vires* presidential actions, holding that "[c]ourts remain obligated to determine whether statutory restrictions have been violated [. . .] the Supreme Court has indicated generally that review is available to ensure that [presidential acts] are consistent with constitutional principles and that the President has not exceeded his statutory authority."[113]

E. The NEA and Presidential Emergency Authority

The NEA was enacted by Congress with a general intent to "reign in" the President's emergency powers.[114] As a result, a party challenging a President's use of emergency authority— including President Biden's use of that authority here—would likely contend that the national emergency in question was not properly declared or that the President's related emergency powers were not properly triggered by the alleged emergency.[115] However, a review of the NEA's legislative history and courts' interpretations of the law demonstrates that the NEA provides little guidance on when emergencies may be declared or when related powers may be invoked, instead granting the President broad discretion in these areas.

1. Legislative History of the NEA

The NEA was not intended to establish the specific circumstances in which a President may declare an emergency, but instead to place procedural limitations on the powers that the President may utilize after an emergency has been declared.[116] The only suggestion of any boundaries to emergency declaration found in the NEA's legislative history is its assurance that "'emergency authority, intended for use in crisis situations [. . .], would no longer be available in non-crisis situations'" and instead would be available "'only when emergencies actually exist.'"[117] The lengthy accompanying report by the Senate Committee on Government Operations fails, however, to provide any guidance on the circumstances that would definitively establish that such an emergency "actually exists."[118] Instead, the Committee states that "the defini-

[113] Mountain States Legal Found. v. Bush, 306 F.3d 1132, 1136 (D.C. Cir. 2002); *see also* Hawaii v. Trump, 878 F.3d 672, 683 (9th Cir. 2017) ("When, as here, Plaintiffs challenge the President's statutory authority to issue the Proclamation, we are provided with an additional avenue by which to review these claims.").

[114] El Paso Cnty. v. Trump, 982 F.3d 332, 369–70 (5th Cir. 2020) (Dennis, J., dissenting).

[115] *See* discussion *supra* Section I.C.

[116] *See generally* S. Rep. No. 94-1168 (1976).

[117] *El Paso*, 982 F.3d at 370 (Dennis, J., dissenting) (quoting S. Rep. No. 93-1170, at 2 (1974)).

[118] *See generally* S. Rep. No. 94-1168 (1976).

tion of when a President is authorized to declare a national emergency should be left to the various statutes which give him extraordinary powers."[119]

Relevant legislative history on emergency declaration, then, suggests that the President may declare a national emergency in any situation that might give rise to the numerous emergency powers granted to them by statute, including those established by Section 318(a).[120] Legislation such as the NEA was not intended to limit these circumstances, but rather to establish "procedures and safeguards" for the *exercise* of emergency powers granted to the President by other statutes.[121] As a result, Presidents may issue virtually unfettered national emergency declarations that address a wide variety of perceived emergencies.[122]

2. Court Decisions and the Text of the NEA Itself

Courts have been similarly hesitant to specify precisely when the President may declare a national emergency.[123] In 1977, the United States Court of Appeals for the Tenth Circuit ("Tenth Circuit") held that "[a] national emergency must be based on conditions beyond the ordinary. Otherwise it has no meaning."[124] The Tenth Circuit noted that the United States is constantly under some degree of threat from other world powers and from global affairs generally, adding that "[t]he position of the United States is such that daily occurrences around the globe affect it in varying degrees."[125] Thus, the Tenth Circuit's only guidance on this point is that a national emergency must be generated by some threat or occurrence beyond the usual geopolitical or other hardships facing the United States.[126]

Lower court decisions have elaborated on the lack of guardrails for presidential emergency declarations. In *Sierra Club v. Trump*,[127] in which plaintiffs challenged President Trump's emergency declaration authorizing the construction of a border wall, the United States District Court for the Northern District of California examined congressional actions on this point and

[119] *Id.* at 292.

[120] *See generally* S. Rep. No. 94-1168 (1976).

[121] *Id.*

[122] *See*, *e.g.*, Mark P. Nevitt, *Is Climate Change a National Emergency?*, 55 UC Davis L. Rev 591, 618 (2021) ("Critically, 'national emergency' is not defined within the NEA statutory scheme. In practice, this allows the President to invoke this authority capaciously to address a remarkably diverse set of emergencies.").

[123] *See, e.g.*, United States v. Bishop, 555 F.2d 771 (10th Cir. 1977); Sierra Club v. Trump, 379 F. Supp. 3d 883 (N.D. Cal. 2019).

[124] *Bishop*, 555 F.2d at 777.

[125] *Id.*

[126] *See id.*

[127] 379 F. Supp. 3d 883 (N.D. Cal. 2019).

determined that "Congress neither defined the term 'national emergency,' nor 'ma[de] any attempt to define when a declaration of national emergency is proper.'"[128] Moreover, the court noted that the House of Representatives rejected a proposed amendment to the NEA that would have defined what constitutes a national emergency.[129] Overall, there is a notable "lack of any intelligible principle to guide the President in determining when an emergency exists."[130]

II. Analysis

A legal challenge to President Biden's Proclamation by an aggrieved domestic solar manufacturer would almost certainly argue that the President exceeded his authority on a variety of grounds, as briefly described above. This section begins by analyzing whether such a challenge would be properly subject to judicial review before scrutinizing each of these arguments in turn, which reveals that a legal challenge is not likely to succeed by asserting that the Proclamation does not properly declare a national emergency using the NEA, nor by arguing that Section 318(a) itself only applies to certain kinds of emergencies.[131] However, a thorough textual analysis of Section 318(a) suggests that a challenging party *would* likely succeed by arguing that solar cells and modules do not fit within the statute's definition of "supplies for use in emergency relief work," and that the Proclamation thus exceeded President Biden's statutory authority.[132]

A. President Biden's Proclamation is Properly Subject to Judicial Review

As an initial matter, a legal challenge claiming that President Biden's Proclamation was *ultra vires* would be subject to judicial review by the Federal Circuit.[133] The Supreme Court and the federal courts of appeal have repeatedly held that when a legal challenge asserts that the President exceeded his

[128] *Id.* at 899 (quoting Comm. on Gov't Operations & the Special Comm. on Nat'l Emergencies & Delegated Emergency Powers, 94th Cong., 2d Sess., The National Emergencies Act (Public Law 94–412) Source Book: Legislative History, Texts, and Other Documents, at 9, 278–92).

[129] *Id.*

[130] El Paso Cnty. v. Trump, 982 F.3d 332, n.8 (5th Cir. 2020) (Dennis, J., dissenting). Note that the opinion cited here uses the phrase "lack of any intelligible principle" to refer generally to the lack of guidance for the President when declaring a national emergency, and not to invoke the "intelligible principle" or nondelegation doctrines.

[131] *See* discussion *infra* Section II.B.

[132] 19 U.S.C. § 1318(a).

[133] *See* discussion *infra* Section II.A.

statutory authority or misconstrued a statutory provision, as challengers to Biden's Proclamation would here, that challenge is properly subject to judicial review.

President Biden's Proclamation invoking Section 318(a) is properly subject to judicial review because any legal challenge to the Proclamation would necessarily argue that the President acted outside the statutory authority granted to him by the Tariff Act.[134] The Supreme Court has repeatedly indicated that judicial review is available in these circumstances, demonstrated by its review of presidential decisions for *ultra vires* actions.[135] For instance, while the majority in *Dalton v. Specter*[136] stated that it "do[es] not support the proposition that *every* action by the President" is subject to judicial review, some claims that the President has violated a statutory mandate are judicially reviewable so long as the statutory mandate in question does not grant unfettered discretion to the President, thereby permitting judicial review of allegedly *ultra vires* actions.[137] This holding was later elucidated by the United States Court of Appeals for the District of Columbia ("D.C. Circuit") in *Chamber of Commerce of the United States v. Reich*,[138] in which the court clarified that *Dalton's* holding merely states that judicial review is not available when a statute "contains *no* limitations on the President's exercise of that authority."[139] The D.C. Circuit firmly rejected the argument that "there are no judicially enforceable limitations on presidential actions" other than those found in the Constitution itself.[140] The same rationale can apply here, where a legal challenge to President Biden's Proclamation would contend that the President acted outside the guardrails established by Section 318(a).[141]

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[134] *See* discussion *supra* Section I.C.

[135] *See* Dalton v. Specter, 511 U.S. 462, 474 (1994); *see also* United States v. California, 436 U.S. 32 (1978) (reviewing a Presidential Proclamation expanding a national monument); *see also* Cappaert v. United States, 426 U.S. 128 (1976).

[136] 511 U.S. 462 (1994).

[137] *Dalton*, 511 U.S. at 472, 478 (Blackmun, J., concurring) (emphasis added) (Under the Court's holding, "neither a challenge to *ultra vires* exercise of the President's statutory authority nor a timely procedural challenge is precluded" from receiving judicial review).

[138] 74 F.3d 1322 (D.C. Cir. 1996).

[139] *Id.* at 1331 (emphasis added).

[140] *Id.* at 1332.

[141] *See* discussion *supra* Section I.C.

The Federal Circuit and sister circuits have reiterated this point. [142] In *Motions Systems Corporation v. Bush*,[143] the Federal Circuit clarified that judicial review is available for claims that the President has exceeded their statutory authority, distinguishing such claims from cases in which the President is granted broad discretion by statute and where there "is no colorable claim" of abuse of authority.[144] Further, the Federal Circuit has applied judicial review to trade-related actions by the President, holding *in Motions Systems* that "trade-related actions of the President taken pursuant to authority delegated by Congress are subject to review to determine whether that action 'falls within his delegated authority, whether the statutory language has been properly construed, and whether the President's action conforms with the relevant procedural requirements.'"[145] Each of these questions are present in the instant case, rendering President Biden's Proclamation judicially reviewable.

President Biden may claim that Section 318(a) does grant him broad discretion to remove tariffs on emergency supplies and that his action is, therefore, not reviewable.[146] However, the standard for reviewability under existing Federal Circuit doctrine is quite lenient.[147] As long as there is a "colorable claim" that the President has exceeded his statutory authority, judicial review is properly available.[148] Here, the statute does not grant the President unlimited authority to remove tariffs in response to an emergency, instead providing a constraining list of products that may be imported duty-free. Moreover, a challenge to President Biden's Proclamation would raise a colorable claim over whether this "trade-related action" declared an unwarranted emergency and "whether the statutory language has been properly construed."[149] Therefore,

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[142] *See* Motions Sys. Corp. v. Bush, 437 F.3d 1356, 1360 (Fed. Cir. 2006); *see also* Hawaii v. Trump, 878 F.3d 662, 682 (9th Cir. 2017) ("When, as here, Plaintiffs challenge the President's statutory authority to issue the Proclamation, we are provided with an additional avenue by which to review these claims.").

[143] 437 F.3d 1356, 1360 (Fed. Cir. 2006).

[144] *Id.* at 1360.

[145] *Id.* at 1364 (Gajarsa, J., concurring) (citing Florsheim Shoe Co. v. United States, 744 F.2d 787, 795 (Fed. Cir. 1984); Maple Leaf Fish Co. v. United States, 762 F.2d 86, 89 (Fed. Cir. 1985); Humane Soc'y v. Clinton, 236 F.3d 1320, 1330 (Fed. Cir. 2001)).

[146] *See* Chamber of Commerce of the United States v. Reich, 74 F.3d 1322, 1331 (D.C. Cir. 1996) (emphasizing that "when a statute entrusts a discrete specific decision to the President and contains no limitations on the President's exercise of that authority, judicial review of an abuse of discretion claim is not available").

[147] *See Motions Sys.*, 437 F.3d at 1360 (focusing on whether the statute at issue unquestionably grants the President broad discretion to determine whether the action is or is not in the economic or security interests of the United States).

[148] *See id.*

[149] *Id.* at 1364 (Gajarsa, J., concurring) (internal citations omitted).

under the existing Federal Circuit doctrine, the challenge would be properly reviewable.[150]

B. The National Electricity Emergency Likely Satisfies both the NEA and Section 318(a)'s Provisions

A legal challenge to President Biden's Proclamation would likely argue that the declared national emergency is insufficient to trigger Section 318(a)'s broad tariff-lifting powers and is suspect because it fails to invoke the NEA.[151] Such an argument would likely hinge on the legislative history of the NEA, which demonstrates a clear Congressional intent to "reign in the President's emergency powers,"[152] as well as the language of Section 318(a) itself, which does not explicitly grant the President the authority to declare an emergency using that statute alone and seems to suggest on its face that relevant emergencies must be related to states of war.[153] However, this argument would be unlikely to succeed because the statutes do not explicitly establish parameters for emergency declarations, and courts have displayed consistent hesitancy to limit when or how a President may declare a national emergency.[154] Nevertheless, the validity of the emergency declaration can still be overcome by a showing that the Proclamation was an *ultra vires* action that exceeded the President's statutory authority under Section 318(a).[155]

1. The Emergency Declaration Satisfies the NEA

Both the legislative history and court interpretation of the NEA suggest that a legal challenge to President Biden's Proclamation would be unsuccessful in arguing that (1) the declared emergency is insufficient or (2) that the emergency declaration is invalid for failing to invoke the NEA.[156] Under existing Congressional constraints on emergency executive powers, no definition or limit exists regarding *when* the President may declare such an emergency.[157] Moreover, courts at all levels have declined to establish such parameters themselves and have endorsed the notion that emergency declarations are proper when made under "the various statutes which give [the

[150] *See generally id.*

[151] *See* discussion *supra* Section I.C.

[152] El Paso Cnty. v. Trump, 982 F.3d 332, 370 (5th Cir. 2020) (Dennis, J., dissenting).

[153] *See* 19 U.S.C. § 1318(a) ("Whenever the President shall by proclamation declare an emergency to exist by reason of a state of war, or otherwise. . .").

[154] *See* discussion *supra* Section I.E.ii.

[155] *See* discussion *infra* Section I.D, II.C.

[156] *See generally* discussion *supra* Section I.E.

[157] *See* discussion *supra* Section I.B.ii; *see also* 19 U.S.C. § 1318 (providing only that "whenever the President shall by proclamation declare an emergency" without defining when a President may declare a national emergency).

President] extraordinary powers."[158] In the instant case, this interpretation of congressional intent suggests that President Biden operated well within his authority by declaring the national emergency and solely invoking Section 318(a) of the Tariff Act, which provides him with the "extraordinary" power to lift duties on certain items.[159]

The text of the NEA itself supports this reading as well.[160] Subchapter II of the NEA, entitled "Declarations of Future National Emergencies," says only that "the President is authorized to declare such national emergency" when they do so "[w]ith respect to Acts of Congress authorizing the exercise, during the period of a national emergency, of any special or extraordinary power."[161] The text of the NEA and more recent court decisions taken together suggest that the President need not invoke the NEA when declaring a national emergency and that any national emergency is appropriately declared when it relates to a statute that grants the President emergency powers. These conditions are met by President Biden's emergency declaration regarding electricity, which was made in conjunction with his invocation of Section 318(a) of the Tariff Act.[162]

2. Section 318(a) Itself Suggests Broad Emergency Powers

Any speculative arguments that emergency declarations under Section 318(a) must be related to "a state of war"[163] are equally unconvincing. Legal challenges to the Proclamation might contend that even if President Biden's emergency declaration properly invoked only Section 318(a) as the basis for its authority,[164] the electricity shortages cited by the declaration are insufficient to trigger the powers granted by the statute because its first clause limits proper declarations to those that surround "a state of war, or otherwise."[165] Three arguments demonstrate that this reading of the statute is incorrect or, at best, unconvincing.

First, the presence of the broad catch-all term "or otherwise" following the specific example of "a state of war" does not necessarily limit that phrase to circumstances similar to war. While the Supreme Court has held in cases of statutory interpretation that catch-all terms at the end of a list should be "limited to persons or things similar to those specifically enumerated,"[166] the

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[158] S. Rep. No. 94-1168, at 292 (1976).

[159] *See id.*; 19 U.S.C. § 1318(a).

[160] *See* 50 U.S.C. § 1621.

[161] *Id.*

[162] *See* Proclamation, *supra* note 1.

[163] *See* 19 U.S.C. § 1318(a).

[164] *See* Proclamation, *supra* note 1, at 35068.

[165] 19 U.S.C. § 1318(a); *see* discussion *supra* Section I.C.

[166] United States v. Turkette, 452 U.S. 576, 581 (1981).

list of "specifically enumerated" things in this clause of Section 318(a) is a list of one. This is distinguishable from cases in which lists of multiple specific examples represent a single category of "things" and thereby provide clear insight into congressional intent. Here, the presence of "a state of war" and the subsequent catch-all "or otherwise" suggests that the statute contemplates two emergency scenarios: wartime and non-wartime. No list of multiple "enumerated" examples exists from which to infer a congressionally intended category of national emergency. As a result, "or otherwise" is likely not limited by "a state of war," and instead should be read more broadly.[167] Taking the statute at its word, that its powers are activated "[w]henever the President shall by proclamation declare an emergency to exist,"[168] is the reading of the statute more likely to be accepted by a reviewing court.[169]

Second, presidents have historically invoked Section 318(a) to import certain goods free of AD/CVD duties in non-wartime scenarios. President Truman, for instance, utilized the statute to import timber, lumber, and lumber products free of duty in response to a national emergency related to a housing shortage for WWII veterans.[170] President Roosevelt also invoked Section 318(a) to allow the duty-free import of "jerked beef" to distribute to consumers in Puerto Rico in 1942.[171] These examples indicate that there is precedent for utilizing the statute in response to non-wartime emergencies, suggesting that a narrow reading of its language is historically unsupported.[172] This augments the argument that President Biden's invocation of Section 318(a) to respond to an "electricity" shortage is permissible.[173]

Finally, in response to the contention that invoking Section 318(a) is improper when the declared emergency is not sufficiently pressing, President Biden could simply state that the emergency was declared in large part due to the ongoing conflict in Ukraine.[174] In fact, the Proclamation itself references the war in Ukraine as a significant reason for the electricity emergency, citing Russia's invasion of the country as creating "disruptions to energy markets."[175] These points are reinforced by the explanations provided by the Commerce Department in its Final Regulations. There, the Commerce Department underscored the pressing nature of the national electricity emergency, stating

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[167] *See generally id.* (catch-all terms should be "limited to persons or things similar to those specifically enumerated," but here, only one thing is specifically enumerated).

[168] 19 U.S.C. § 1318(a).

[169] *See* discussion *supra* Section II.B.ii.

[170] Proclamation No. 2708, 11 Fed. Reg. 12695 (Oct. 29, 1946).

[171] Proclamation No. 2545, 7 Fed. Reg. 2611 (Apr. 7, 1942).

[172] *See id.*; Proclamation No. 2708, 11 Fed. Reg. 12695 (Oct. 29, 1946).

[173] *See generally* Proclamation, *supra* note 1.

[174] *See, e.g.*, Proclamation, *supra* note 1, at 35067.

[175] *Id.*

that "the war in Ukraine and extreme weather events exacerbated by climate change are threatening the United States' ability to provide sufficient electricity generation."[176] As a result, the proclamation does ostensibly declare the national emergency "by reason of a state of war."[177] Therefore, the Biden Administration could argue, the Proclamation satisfies even the narrowest reading of Section 318(a).

C. Solar Cells and Modules do Not Fall Within the Meaning of "Supplies for Use in Emergency Relief Work" Under Section 318(a)

In contrast to the above, likely unsuccessful challenges, a claim by a challenging party that the text of Section 318(a) does not cover solar cells and modules would likely be meritorious.[178] Section 318(a) provides that "[w]henever the President shall by proclamation declare an emergency to exist by reason of a state of war, or otherwise, he may [. . .] prescribe, the importation free of duty of *food, clothing, and medical, surgical, and other supplies for use in emergency relief work*."[179] Accordingly, items designated to be imported free of duty in response to a national emergency must logically fall within the prescribed categories. A textual analysis of the statute suggests that each of the traditional textual canons of construction discussed below suggests that the breadth of items that may be imported "free of duty" is confined to only "emergency relief" items used in the rapid response to an emergency at a basic level for the purpose of survival.[180]

1. Ejusdem Generis

The first textual canon supporting this reading is *ejusdem generis*.[181] *Ejusdem generis* counsels that when there is a general or catch-all term at the end of a list of more specific items, that general term should be read as being similar to the more specific items on the list.[182] Put differently, "where general words follow a specific enumeration of persons or things, the general words should be limited to persons or things similar to those specifically enumerated."[183]

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[176] *Id.*

[177] 19 U.S.C. § 1318(a); *see id.* (justifying the proclamation due to the disruptions to the energy market because of the state of war in Ukraine).

[178] *See* discussion *infra* Section II.C.

[179] 19 U.S.C. § 1318(a) (emphasis added).

[180] *See* discussion *infra* Section II.C.

[181] *See* discussion *infra* Section II.C.i.

[182] *See* United States v. Turkette, 452 U.S. 576, 581 (1981).

[183] *Id.*

In *Yates v. United States*,[184] for instance, the Supreme Court interpreted a statutory list that provided sentencing guidelines for anyone who "knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any *record, document, or tangible object* with the intent to impede, obstruct, or influence {an} investigation."[185] Yates, a fisherman who was illegally harvesting undersized fish, had been charged under the statute for tossing the fish overboard to prevent detection.[186] While the government argued that he may be convicted under the statute because a fish qualifies as a "tangible object," the Supreme Court used *ejusdem generis* to reject this interpretation.[187] The Court held that "tangible object" should be interpreted to be similar to the more specific examples in the list, namely "records" and "documents."[188] Because of this, the Court stated that "{h}ad Congress intended the latter 'all encompassing' meaning . . . it is hard to see why it would have needed to include the examples at all."[189] Essentially, the Court ruled that giving a broad meaning to the general term at the end of a list creates a problem of redundancy.[190] In other words:

> Had Congress intended "tangible object" in [the statute] to be interpreted so generically as to capture physical objects as dissimilar as documents and fish, Congress would have had no reason to refer specifically to "record" or "document." The Government's unbounded reading of "tangible object" would render those words misleading surplusage.[191]

After all, there would be no need for the inclusion of "record" or "document" if *all* tangible objects were captured by the list, as both of those examples are tangible objects themselves. The rule of *ejusdem generis* therefore instructs that a general term at the end of a more specific list must be read to apply only to similar items on the list.[192]

In the context of Section 318(a), the relevant list in question is the "importation free of duty of *food, clothing, and medical, surgical, and other supplies for use in emergency relief work*."[193] The principle of *ejusdem generis* may be properly applied here because the list includes "a general or collective term following

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[184] 574 U.S. 528 (2015).

[185] *Id.* at 531 (citation omitted) (emphasis added).

[186] *Id.*

[187] *See id.* at 545–46.

[188] *Id.* at 546.

[189] *Id.* at 545.

[190] Yates v. United States, 574 U.S. 528, 546 (2015).

[191] *Id.*

[192] *Cf.* CSX Transp., Inc. v. Ala. Dep't of Revenue, 562 U.S. 277, 295 (2011) ("We typically use *ejusdem generis* to ensure that a general word will not render specific words meaningless.").

[193] 19 U.S.C. § 1318(a) (emphasis added).

a list of specific items to which a particular statutory command is applicable (*e.g.*, 'fishing rods, nets, hooks, bobbers, sinkers, and other equipment')," and is not "one of [. . .] several distinct and independent prohibitions."[194] In this context, the canon supports the reading that the catch-all phrase in Section 318(a), "and other supplies," refers to supplies that are similar to other, more specific items on the list; it refers to supplies that are as urgently necessary to basic survival as "food" and "clothing."[195] Any alternative reading of this list would violate the rule against surplusage and create redundancy.[196] For instance, if the term "other supplies for use in emergency relief work" applied so broadly as to include anything the President deems appropriate, it would be entirely redundant to include food, clothing, and medical supplies in the list, because those products are so obviously useful in emergency relief work.[197] Just as the phrase "tangible objects" in *Yates* was interpreted to apply only to items similar to records and documents, the phrase "other supplies" in Section 318(a) should be interpreted to apply only to items which are similar to food, clothing, and medical supplies.[198] Otherwise, it would "render those words misleading surplusage."[199] Accordingly, the canon of *ejusdem generis* mandates that the phrase "other supplies for use in emergency relief work" be applied narrowly.[200] Under this reading of the statute, permitting the duty-free import of solar cells and modules would likely fall outside the intended ambit of Section 318(a) because these products are not basic necessities of human survival in the same sense as clothing, food, or medical supplies.[201]

This application of *ejusdem generis* is distinguishable from its application to Section 318(a)'s phrase "[w]henever the President shall by proclamation declare an emergency to exist by reason of a state of war, or otherwise."[202]

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[194] *CSX Transp.*, 562 U.S. at 294–95 (quoting United States v. Aguilar, 515 U.S. 593, 615 (1995) (Scalia, J., concurring in part and dissenting in part)).

[195] *Cf.* United States v. Turkette, 452 U.S. 576, 581 (1981) (finding that *ejusdem generis* is "wholly applicable" when there is "no uncertainty in the meaning to be attributed" to the phrase in question).

[196] *See* Yates v. United States, 574 U.S. 528, 546 (2015).

[197] *See id.*

[198] *See id.*

[199] *Id.*

[200] *See Turkette*, 452 U.S. at 581.

[201] *See*, *e.g.*, AJ Willingham, *What is Maslow's hierarchy of needs? A psychology theory, explained*, CNN (Aug. 15, 2023), https://www.cnn.com/world/maslows-hierarchy-of-needs-explained-wellness-cec/index.html [https://perma.cc/4QA7-JJTJ](noting that in the hierarchy of human needs, physiological needs "that keep us alive, like food, water, shelter and air" are most important to basic survival. Solar panels do not appear on the hierarchy.) [hereinafter *Maslow's Hierarchy*].

[202] 19 U.S.C. § 1318(a).

There, as discussed above, there is no list of multiple "enumerated" examples from which to infer congressional intent, and only the two dichotomous circumstances—"a state of war" and "otherwise"—are provided.[203] By contrast, the phrase "food, clothing, and medical, surgical, and other supplies for use in emergency relief work" provides numerous examples of the same kind from which to infer that Congress intended the statute to apply only to products similar to those in the list itself.[204] Further, even the catch-all phrase "other supplies for use in emergency relief work" is constrained to products used to combat an emergency, while "or otherwise" is clearly much broader in scope.[205] In this way, *ejusdem generis* may be properly applied to the former phrase to narrow its scope to products used to ensure basic survival, while "or otherwise" is not appropriately subject to the same limitation.[206]

2. Noscitur a Sociis

The second textual canon supporting a narrow reading of the statute is that of *noscitur a sociis*. [207] *Noscitur a sociis* provides that a word or phrase in a list can be "known by the company it keeps."[208] More specifically, "a word is given more precise content by the neighboring words with which it is associated" and should be read to "avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words, thus giving unintended breadth to the Acts of Congress."[209]

In *Yates*, the Supreme Court applied this concept to "tangible objects" to provide it with a meaning that was similar to "records" and "documents." [210] The Court noted that "'[t]angible object' is the last in a list of terms that begins 'any record [or] document.' The term is therefore appropriately read to refer, not to any tangible object, but specifically to the subset of tangible objects involving records and documents, *i.e.,* objects used to record or preserve information."[211] In holding that "tangible object" must be limited to objects similar to those listed before, the Court essentially sought to avoid the absurd result of expanding the meaning of the statute beyond Congress' intention to encompass such disparate objects as files and fish.[212]

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[203] *Id.*; *see also* discussion *supra* Section II.B.

[204] 19 U.S.C. § 1318(a).

[205] *Id.*

[206] *See* United States v. Turkette, 452 U.S. 576, 581 (1981).

[207] *See* Yates v. United States, 574 U.S. 492, 543 (2015).

[208] *Id.*

[209] *Id.*

[210] *See id.* at 544.

[211] *Id.*

[212] *See id.* at 550 ("But who wouldn't raise an eyebrow if a neighbor, when asked to identify something similar to a 'record' or 'document,' said 'crocodile'?") (Alito, J., concurring).

Noscitur a sociis can similarly be applied to Section 318(a) to find that "other supplies" must include only items that are similar to "food, clothing, medical, [and] surgical" supplies. [213] Using this canon, it is once again apparent that "other supplies" must refer to supplies used to urgently respond to emergencies on a very basic level; food, clothing, and medical supplies provide basic survival, and therefore "other supplies" must fall within that category as well.[214] Just as in *Yates*, where the phrase in question "[was] therefore appropriately read to refer, not to any tangible object, but specifically to the subset of tangible objects involving records and documents,"[215] Section 318(a) is appropriately read to refer only to these basic emergency provisions, and not to some broader category of downstream supplies that might include solar cells and modules, which would only tangentially be related to an emergency or to emergency relief work. [216] Indeed, the language of *Yates* regarding *noscitur a sociis* can be neatly applied to Section 318(a): here, "[other supplies for use in emergency relief work] is therefore appropriately read to refer, not to any [supplies], but specifically to the subset of [supplies] involving [food, clothing, and medical supplies], *i.e.,* objects used to [provide basic survival]."[217] The application of *noscitur a sociis* to Section 318(a), then, further supports a narrow reading of the statute that allows for the duty-free import of only those supplies that are similar to the basic necessities of food, clothing, and medicine. [218]

3. Expressio Unius est Exclusio Alterius

The interpretive canon *expressio unius est exclusio alterius* counsels that in drafting a statutory list, "expressing one item of [an] associated group or series excludes another left unmentioned."[219] For the proper application of the "expression-exclusion" rule, the statute must include "a series of two or more terms or things that should be understood to go hand in hand, which [are] abridged in circumstances supporting a sensible inference that the term left out must have been meant to be excluded."[220] In *Poulakis v. Rogers*,[221] the United States Court of Appeals for the Eleventh Circuit ("Eleventh Circuit")

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[213] *See* 19 U.S.C. § 1318(a).

[214] *See Maslow's Hierarchy*, *supra* note 201.

[215] *Yates*, 574 U.S. at 544.

[216] *See Maslow's Hierarchy*, *supra* note 201 (explaining that once a person has all they need to "survive, function, and understand their position in the world and their community," they can explore their "self-actualization needs" that go beyond just basic survival).

[217] *Yates*, 574 U.S. at 544.

[218] *See* discussion *supra* Section II.C.ii.

[219] Chevron U.S.A. Inc. v. Echazabal, 536 U.S. 73, 80 (2002) (citation omitted).

[220] *Id.* at 81.

[221] 341 Fed. Appx. 523 (11th Cir. 2009).

applied this canon to a law specifying the locations in a car in which firearms may be permissibly contained by an individual with a concealed-carry permit.[222] There, the statute enumerated several specific parts of the car in which firearms could be carried, including the glove compartment, but did not list the center console, where the defendant was containing their firearm.[223] The court held that the expression-exclusion canon suggested that by failing to mention the center console, "the legislature may have intended to exclude center consoles from the locations in which a firearm could be securely encased."[224] While the canon is by no means conclusive evidence of legislative intent, in *Poulakis*, the omission of the center console "at least contribute[d] to some ambiguity regarding whether the statutory exception extends to firearms in the center console of vehicles."[225]

Here, the canon can be applied to Section 318(a) to suggest that Congress intended to exclude infrastructure products like solar cells and modules when it crafted the list including food, clothing, and medical supplies. [226] Had Congress intended to include these items within the scope of "other supplies for use in emergency relief work," *expressio unius est exclusio alterius* implies that they would have done so; the omission of infrastructure products, connected only in a downstream manner to basic survival, was ostensibly intentional when viewed in this light.[227] Though the canon applies "only when in the natural association of ideas in the mind of the reader that which is expressed is so set over by way of strong contrast to that which is omitted that the contrast enforces the affirmative inference,"[228] this precondition applies to the reading of Section 318(a). Food, clothing, and medicine are so distinct from solar cells and modules as to render the theoretical inclusion of the latter incomprehensible.[229] The contrast between these basic material elements of human survival and products used to craft solar panels, which are then used to generate electricity, warrants the application of this textual

[222] *See generally id.* at 530 (discussing the "five specific instances" of when a firearm is considered "securely encased" under Fla. Stat. § 790.25(25)).

[223] *See id.*

[224] *Id.*

[225] *Id.*

[226] *See* 19 U.S.C. § 1318(a).

[227] *See* Chevron U.S.A. Inc. v. Echazabal, 536 U.S. 73, 79 (2002).

[228] *Id.* at 81 (internal quotation omitted).

[229] *See id.* (rejecting Echazacal's argument because there is no "natural association of ideas of the mind of the reader" including "threats to others and threats to self" from which it could appear that Congress made a deliberate choice in omitting threats to self as a "signal of the affirmative defense's scope.").

canon and the subsequent omission of solar products from the intended meaning of the statute.[230]

4. Whole Code Rule

Such a reading would also be consistent with a fourth canon of construction known as the "whole code rule" or "whole code canon."[231] This canon instructs that "where a statute leaves a term undefined, courts should assume that the legislative body intended to define that term as it is defined elsewhere in the legal code."[232] Using this canon, "courts construe terms across different statutes consistently."[233] Here, because Section 318(a) does not define "national emergency," the rule can be properly applied such that the term aligns with definitions offered elsewhere in United States Code ("U.S.C.").[234] If "national emergency" was interpreted to be consistent with the definition provided by 42 U.S.C. § 5122(1), a statute regarding federal disaster relief, a reviewing court might find that such an emergency must require urgent government assistance to "save lives and to protect property and public health and safety, or to lessen or avert the threat of a catastrophe in any part of the United States."[235] This statutory interpretation further suggests that a national emergency must include relief efforts designed to save lives and avert catastrophe, efforts requiring a rapid response in order to ensure the survival of American citizens at a basic level.[236] Consequently, the whole code rule may also suggest a reading of Section 318(a) that cabins "other supplies" within the subsection of items used to "save lives" and protect "public health and safety."[237]

5. Commerce's Interpretation of Section 318(a) is Too Broad

As previously noted, the Commerce Department addressed concerns about the limitations of Section 318(a) in its final regulations and provided an extremely broad interpretation of the statute.[238] Rejecting the argument by some public commentators that the statute does not apply to solar products, the Commerce Department stated that "'[w]hat supplies might be needed for use in emergency relief work will depend on the circumstances of a specific

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[230] *Cf. id.* at 80–81 (finding the statutory language including "threat to other" provisions was "spacious" and gave the agency a "good deal of discretion" in setting the limits of permissible qualification standards).

[231] *See* United States v. Harmon, 474 F. Supp. 3d 76, 92 (D.D.C. 2020).

[232] *Id.*

[233] K.L. v. Rhode Island Bd. of Educ., 907 F.3d 639, 646 (1st Cir. 2018) (citation omitted).

[234] *See Harmon*, 474 F. Supp. 3d at 92.

[235] 42 U.S.C. § 5122(1).

[236] *See Maslow's Hierarchy*, *supra* note 201.

[237] *See* 42 U.S.C. § 5122(1).

[238] *See* discussion *supra* Section I.B.iii.

declared emergency and the particular needs of persons affected by that emergency.'"[239] This expansive assessment of the statute simply cannot be a correct interpretation of Congress' intent.[240]

First, such a reading would provide the President with the unlimited authority to allow the duty-free import of any good at any time, so long as that product is conceivably connected to any national emergency. [241] Because the President has virtually unfettered power to declare a national emergency in a wide variety of situations,[242] this conception of Section 318(a) would permit the President to remove at will any tariffs duly applied through AD/CVD proceedings.[243] Utilizing this reading of Section 318(a) would also run directly contrary to the longstanding goals of Congress to "reign in" presidential emergency powers, and to make certain that "'emergency authority, intended for use in crisis situations[], would no longer be available in non-crisis situations.'"[244] To ensure that Presidents do not stray quite this far outside their statutory bounds is the duty of the judiciary, and to claim otherwise is to "adopt[] an indefensibly cramped view of the judiciary's constitutional role as a check and balance to its coordinate and coequal branches of government."[245]

III. Solution

President Biden's Proclamation and the lifting of all duties on Southeast Asian solar products caused significant disruption to the domestic solar industry, and American solar manufacturers will almost certainly be harmed by an influx of cheap imported alternatives.[246] The above analysis suggests that the President's conduct exceeded the scope of his statutory authority under Section 318(a) of the Tariff Act, and an aggrieved solar manufacturer could effectively challenge the Proclamation by arguing that it went beyond the bounds of the statute's textual limits, as illustrated by the challenge brought by Auxin.[247] When confronted with such a legal challenge, the Federal Circuit should find that the Proclamation was *ultra vires*; thereby providing the solar

[239] Final Regulations, *supra* note 62, at 56871–72 (quoting Procedures for Importation of Supplies for Use in Emergency Relief Work, 71 Fed. Reg. 63230, 63231–33 (Oct. 30, 2006)).

[240] *See* discussion *infra* Section II.C.v.

[241] *See* Final Regulations, *supra* note 62, at 56871–72.

[242] *See* discussion *supra* Section I.E.

[243] *See* Final Regulations, *supra* note 62, at 56871–72; *see generally* 19 U.S.C. § 1318(a).

[244] El Paso Cnty. v. Trump, 982 F.3d 332, 370 (5th Cir. 2020) (Dennis, J., dissenting) (quoting S. Rep. No. 93-1170, at 2 (1974)).

[245] Motions Sys. Corp. v. Bush, 437 F.3d 1356, 1376 (Fed. Cir. 2006) (Gajarsa, J., concurring).

[246] *See* discussion *supra* Section I.B.i.

[247] *See* discussion *supra* Section II.C.

industry with much-needed clarity while avoiding the need to grant unfettered emergency authority to the President.

One instinctive ground for challenging the Proclamation is to argue that an electricity shortage is not a sufficiently pressing national emergency, and that Section 318(a) was not intended to cover emergencies of this kind. However, this argument faces significant obstacles and is unlikely to succeed before the Federal Circuit. While the legislative history of the NEA demonstrates clear congressional intent to curb presidential emergency powers, the NEA and Section 318(a) itself do not provide any guardrails for when the President may declare an emergency, nor do they specify the kinds of emergencies that properly trigger associated emergency powers.[248] Section 318(a), for instance, states broadly that its authority may be invoked when an emergency is declared "by reason of a state of war, or otherwise."[249] Moreover, courts have been consistently hesitant to place any limits on when a President may declare an emergency or describe which circumstances are sufficiently exigent as to qualify.[250] Thus, each of these authorities suggest that the President's power to declare emergencies is extraordinarily broad and associated emergency powers are easily invoked.[251] A challenge to the Proclamation is thus unlikely to succeed by arguing that the President exceeded his authority by declaring the national emergency in the first place.[252]

However, a challenging party would likely succeed by asserting that the court should hold the President and Commerce within the textual limits of Section 318(a).[253] Numerous traditional canons of statutory interpretation, including *ejusdem generis*, *noscitur a sociis*, *expressio unius est exclusio alterius*, and the whole code rule suggest that the statute should be read narrowly and that only those products that are similar to food, clothing, and medical supplies may be imported duty-free under the Tariff Act.[254] While the Commerce Department has argued that the statute should be construed broadly, that interpretation faces significant logical and practical obstacles and is almost certainly not subject to *Chevron* deference.[255]

As applied here, the textual canons of *ejusdem generis* and *noscitur a sociis* both utilize context to suggest that Section 318(a)'s phrase "other supplies

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[248] *See* discussion *supra* Section I.E.

[249] 19 U.S.C. § 1318(a).

[250] *See, e.g.,* United States v. Bishop, 555 F.2d 771, 777 (10th Cir. 1977); Sierra Club v. Trump, 379 F. Supp. 3d 883 (N.D. Cal. 2019) (citations omitted); *see also* discussion *supra* I.E.ii.

[251] *See Bishop*, 55 D.2d at 777; *Sierra Club*, 379 F. Supp. 3d. at 899.

[252] *See* discussion *supra* Section II.B.

[253] *See* discussion *supra* Section II.C.

[254] *See* discussion *supra* Section II.C.

[255] *See* discussion *supra* Section II.C.v.

for use in emergency relief work"[256] is limited by the surrounding words and phrases of the statute.[257] *Ejusdem generis* counsels that a catch-all term at the end of a list—in this case, the term "other supplies"—should be limited to apply to things similar to the list's specifically enumerated items.[258] Here, that broad term should properly be read narrowly to include only things similar to food, clothing, and medical supplies, as laid out by Section 318(a) itself.[259] *Noscitur a sociis*, too, provides that terms in a statute should be interpreted to have similar meanings to their surrounding terms and should not be read broadly.[260] As with *ejusdem generis*, this canon mandates that "other supplies" be read narrowly such that the term encompasses only those items that are similar to food, clothing, and medical supplies.[261] Each of these canons is designed to avoid expanding a statute's meaning beyond congressional intent, and here, the text is clear that Congress intended Section 318(a) to apply only to supplies that are urgently necessary to ensure basic survival, a characteristic clearly shared by food, clothing, and medical supplies.[262] These two canons likely constitute the strongest textual grounds for arguing that President Biden's Proclamation exceeded his authority under Section 318(a), and can be used in tandem by a challenging party to suggest a narrow reading of the statute.[263]

The expression-exclusion canon and the "whole code rule" also support a narrow reading of Section 318(a), though neither tool should be used exclusively to demonstrate clear congressional intent.[264] The expression-exclusion canon states that when a statute addresses some specific items and not others, the excluded items were likely left out of the statute on purpose.[265] As applied to Section 318(a), the explicit enumeration of basic elements of survival and the exclusion of infrastructure components such as solar cells and modules is ostensibly intentional, suggesting that Congress did not intend the statute to

[256] 19 U.S.C. § 1318(a).

[257] *See* discussion *supra* Section II.C.i–ii.

[258] *See* United States v. Turkette, 452 U.S. 576, 581 (1981).

[259] *See* discussion *supra* Section II.C.i.

[260] *See* Yates v. United States, 574 U.S. 528, 543 (2015).

[261] *See* discussion *supra* Section II.C.ii.

[262] *See* discussion *supra* Section II.C.i–ii.

[263] *See generally Yates*, 574 U.S. at 543–44 (utilizing *ejusdem generis* together with *noscitur a sociis* to narrowly construe a criminal statute).

[264] *See* discussion *supra* Section II.C.iii–iv; *see also* Poulakis v. Rogers, 341 Fed. Appx. 523, 530 (11th Cir. 2009) (citing Wilhelm Pudenz, GmbH v. Littlefuse, Inc., 177 F.3d 1204, 1209 n.5 (11th Cir. 1999) in recognizing that courts do not usually rely only on the expression-exclusion cannon of statutory construction).

[265] *See* Chevron U.S.A. v. Echazabal, 536 U.S. 73, 81 (2002) (citation omitted).

apply so broadly as to cover solar products.[266] Similarly, the whole code rule utilizes definitions found elsewhere in the U.S.C. to contextualize a term in question;[267] Here, other statutory definitions of "national emergency" suggest that efforts to combat emergencies must be designed to save lives and fundamentally avert catastrophe.[268] Taken together, these canons imply that Section 318(a) is likely designed to allow only for the duty-free import of supplies urgently needed to save lives and ensure basic survival, and not to include downstream components used in the eventual production of electricity.[269] While neither of these two canons is controlling, they may be utilized in combination with *ejusdem generis* and *noscitur a sociis* to conclude that Section 318(a) should be read narrowly.[270] In short, each of these traditional textual canons of construction demonstrate that President Biden's invocation of Section 318(a) to justify lifting tariffs on solar products was improper because these products are highly dissimilar from supplies generally used in emergency relief work. If a challenging party utilized this approach, they would likely succeed in convincing the Federal Circuit that President Biden's Proclamation exceeded his statutory authority and cut against Congress' intent in drafting Section 318(a).[271]

The Federal Circuit should adopt this interpretation and find in favor of the challenging party if confronted with such a case. A ruling that the President exceeded his statutory authority would provide the domestic solar industry with both security and clarity, mitigating the already-drastic decline in domestic production and ensuring that the affirmative finding of circumvention by the Commerce Department would properly take effect. [272] The above analysis demonstrates that the President likely did exceed his statutory remit, and a ruling to that effect would hold the Executive within the bounds of congressional intent.[273] Moreover, it would allow the Commerce Department's finding of circumvention to apply and would ensure that China and other circumventing countries are held responsible for flouting U.S. trade rulings.[274]

Additionally, adopting this interpretation would allow the Federal Circuit to avoid the pitfalls of the view advanced by the Commerce Department that the President may direct the duty-free import of any product at any time.[275]

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[266] *See id.*; *see also* discussion *supra* Section II.C.iii.

[267] *See* United States v. Harmon, 474 F. Supp. 3d 76, 92 (D.D.C. 2020) (citations omitted).

[268] *See* discussion *supra* Section II.C.iv.

[269] *See* discussion *supra* Section II.C.iii–iv.

[270] *See* discussion *supra* Section II.C.i–iv.

[271] *See generally* discussion *supra* Section II.C.

[272] *See* discussion *supra* Section I.A.

[273] *See generally* discussion *supra* Section II.C.

[274] *See* Swanson, *supra* note 58.

[275] *See* discussion *supra* Section II.C.v.

Such a reading would "giv[e] unintended breadth to the Acts of Congress"[276] and undoubtedly open a Pandora's box of constitutional questions, especially surrounding the separation of powers.[277] For instance, this reading would allow the President to supersede the decisions of the Commerce Department and the courts regarding AD/CVD duties on any product relating to any conceivable national emergency, or for political or other reasons.[278] For instance, the President could lift duties on all lumber products from a certain country in tandem with a purported housing emergency, on all produce items in response to an alleged food shortage, or on all steel products to combat a supposed transportation emergency.[279] Because the President has essentially unlimited authority to declare national emergencies, these scenarios, too, are without limit.[280] Therefore, the Federal Circuit should avoid this result by placing proper limits on the President's emergency powers and find that President Biden's Proclamation exceeded the scope of Section 318(a).

Conclusion

The President has broad, nearly unlimited power to declare a national emergency and a veritable arsenal of associated emergency powers.[281] Nevertheless, while President Biden's Proclamation appropriately declared a national emergency regarding electricity, its efforts to combat that emergency by lifting all duties on Southeast Asian solar products went beyond the authority granted by Section 318(a) of the Tariff Act and are ultimately *ultra vires*.[282] Traditional textual canons demonstrate that Congress intended the statute to apply only to the most basic products needed for human survival, and that solar products were not part of this intent.[283] A domestic solar manufacturer bringing a legal challenge under this textual argument would very likely succeed before the Federal Circuit. Adopting this view would allow the Federal Circuit to appropriately serve as a check on the President while avoiding interpretations that would grant the Executive excessive emergency powers.

[276] Yates v. United States, 574 U.S. 492, 543 (2015).
[277] *See* discussion *supra* Section II.C.v.
[278] *See* discussion *supra* Section II.C.v.
[279] *See* discussion *supra* Section II.C.v.
[280] *See* discussion *supra* Section I.E.
[281] *See* discussion *supra* Section I.E.
[282] *See* discussion *supra* Section II.B–C.
[283] *See* discussion *supra* Section II.C.

Regulatory Takings on the Reservation: Energy Development on Tribal Land and the Mismanagement of the Permitting Process

Sam Rutzick*

Introduction

Native Americans living on reservations are substantially more impoverished than any other group of Americans, even relative to analogous non-tribal areas.[1] Yet many tribal reservations contain enormous amounts of fossil fuels, undeveloped renewable energy sources, and other mineral resources, all of which offer tribes the potential to improve their economic circumstances.[2] In addition to the panoply of federal agencies imposing constraints on tribal use, federal law paternalistically requires the Department of the Interior ("Interior")—through its Bureau of Indian Affairs ("BIA") and Bureau of Land Management ("BLM")—to approve all tribal resource development.[3] The entire federal government has a legally binding fiduciary duty toward Native Americans, including the management of tribal resources.[4] Yet, Native tribes and individuals have asserted that the federal government has entirely failed in its fiduciary duty to the tribes in its control of tribal resource development.[5]

A direct cause of this monumental federal failure is the complex, inefficient, and time-insensitive federal permitting regimen required for resource

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[1] *See* Naomi Schaefer Riley, *One Way to Help Native Americans: Property Rights*, The Atlantic (July 30, 2016) https://www.theatlantic.com/politics/archive/2016/07/native-americans-property-rights/492941/ [https://perma.cc/7QR2-7KCN].

[2] *Tribal Energy Resources: Reducing Barriers to Opportunity: Hearing Before the Subcomm. on the Interior, Energy, and Env't of the H. Comm. on Oversight and Gov't Reform,* 115th Cong. 7 (2018) (statement of Eric Conrad Henson, Executive Vice President, Compass Lexecon).

[3] *See* U.S. Gov't Accountability Off., GAO-15-502, Indian Energy Development: Poor Management by BIA Has Hindered Energy Development on Indian Lands 4 (2015).

[4] *See id.* at 5.

[5] *See id.*

development on federally owned and managed land.[6] A deadly combination of flawed legislation and federal agency inefficiency renders the average duration of a tribal permitting application measurable in years.[7]

While the federal government holds the title for most Native American reservation land—about 56 million acres—and the associated mineral rights and natural resources through a trust relationship, the tribes retain the beneficial interest.[8] Similar to any other beneficial owner of a trust relationship, the federal government owes a binding fiduciary duty to the tribal entities.[9] This alone may provide a legal basis for challenging federal permitting practices. Regardless, the authoritative precedent of the Supreme Court of the United States ("Supreme Court") establishes that Native Americans are entitled to pursue constitutional takings claims against the federal government, despite only holding a "beneficial interest" rather than fee simple ownership of the land in their reservations.[10]

Under the Fifth Amendment's prohibition of takings without due process and compensation, a regulatory taking occurs when the government restricts the use of a land parcel and functionally annihilates all of its productive economic use.[11] Adhering to the four-part Supreme Court approach derived from *Penn Central Transportation Co. v. City of New York*[12] ("the *Penn Central* test"), such a regulatory taking provides monetary damages to a property owner.[13]

This Note argues that the current tribal resource permitting process presents considerable barriers given the federal government's maladministration. Often, a tribe must wait several years for the tribal permit application process, and this delay in the regulatory process directly contributes to the loss of financially useful activity.[14] A successful regulatory takings claim may compensate

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[6] See *id*. at 22 ("[U]ndue delays in BIA's review process can have a direct negative impact on economic development and noted that willing developers have walked away from a lease or other agreement because the process takes too long").

[7] *See id.* at 21–23.

[8] *See Native American Ownership and Governance of Natural Resources*, U.S. Dep't of the Interior, https://revenuedata.doi.gov/how-revenue-works/native-american-ownership-governance/ [https://perma.cc/R9GA-6RU3] (last accessed May 16, 2024).

[9] *See* GAO-15-502, *supra* note 3, at 5.

[10] *See* United States v. Klamath and Moadoc Tribes, 304 U.S. 119 (1938); *see* Coast Indian Cmty. v. United States, 550 F.2d 639 (Cl. Ct. 1977).

[11] *See* Penn Cent. Transp. Co. v. N.Y.C., 438 U.S. 104, 124 (1978) (states that the economic impact of a regulation is a relevant consideration when considering if there was a taking).

[12] 438 U.S. 104 (1978).

[13] *See id.* at 124.

[14] *See Tribal Energy Resources: Reducing Barriers to Opportunity: Hearing Before the Subcomm. on the Interior, Energy, and Env't of the H. Comm. on Oversight and Gov't Reform,* 115th Cong.

Native tribes for the loss of economic opportunity and could incentivize the federal government to reform its permitting process.

Part II of this Note examines the issues preventing energy development on Native American reservations and how that contributes to poverty on the reservations. Part III establishes the background of the regulatory takings doctrine and how the *Penn Central* test is used. Part IV applies that test to this context, looking at each of the prongs of the *Penn Central* test. Finally, Part V analyzes this in the context of the *Tahoe-Sierra* case, the primary authority opposing this argument.

I. Poverty and Energy Development Permitting Issues on Federal Lands

The Property and Environment Research Center reports that Native lands "hold almost 30% of the nation's coal reserves west of the Mississippi, 50% of potential uranium reserves, and 20% of known oil and natural gas reserves. These resources are estimated to be worth approximately $1.5 trillion."[15] Yet 88% of all resource-bearing Native lands—fifteen million acres' worth—remain undeveloped,[16] leaving tribes at a poverty rate nearly twice the national average.[17]

The failures of the current tribal permitting process are well documented. Although the tribes are nominally sovereign actors seeking to develop—or lease to private parties—their resources, the required federal review and approval of the project makes the final approval a major federal action subject to the National Environmental Policy Act ("NEPA").[18] NEPA requires federal agencies to examine the environmental effects of federal actions through either an Environmental Assessment or the more exhaustive Environmental

8 (2018) (statement of Eric Conrad Henson, Executive Vice President, Compass Lexecon).

[15] *Tribal Energy Resources: Reducing Barriers to Opportunity: Hearing Before the Subcomm. on the Interior, Energy, and Env't of the H. Comm. on Oversight and Gov't Reform,* 115th Cong. 6–7 (2018) (statement of Eric Conrad Henson, Executive Vice President, Compass Lexecon) (citing Shawn Regan, Unlocking the Wealth of Indian Nations: Overcoming Obstacles to Tribal Energy Development 4 (Laura E. Huggins ed., 2014)).

[16] *See id.* at 6–7.

[17] *See* Naomi Schaefer Riley, *One Way to Help Native Americans: Property Rights*, The Atlantic (July 30, 2016), https://www.theatlantic.com/politics/archive/2016/07/native-americans-property-rights/492941/ [https://perma.cc/7QR2-7KCN] (citing Facts for Features: American Indian and Alaska Native Heritage Month: November 2015, U.S. CENSUS BUREAU (Nov. 2, 2015), https://www.census.gov/content/dam/Census/newsroom/facts-for-features/2015/cb15-ff22_AIAN_month.pdf [https://perma.cc/KF24-TGQS]).

[18] *See* GAO-15-502, *supra* note 3, at 17 (explaining the numerous administrative hoops that certain development projects on Indian land must go through).

Impact Statement.[19] The process is extended only when circumstances require mandatory consultation with the U.S. Fish and Wildlife Service, the National Marine Fisheries Service, and the Environmental Protection Agency.[20]

A. The Tribal Permitting Process

Through the BIA and BLM, the Department of the Interior controls tribal energy and mineral development, with input from other federal agencies:[21] Operators, tribes, or individuals can nominate resource areas—i.e., oil or gas fields—to be leased. These nominations are reviewed by BIA, often with the assistance of BLM, which conducts competitive auctions and identifies the highest bidder, assuming there are no previously existing leases or claims upon the land.[22]

BIA must evaluate tribal permit applications using a "best interest of the Indian mineral owner" test and by considering factors including "economic considerations, such as date of lease expiration; probable financial effect on the Indian mineral owner; leasability [sic] of the land concerned; need for change in terms of the existing lease; marketability; and potential environmental, social, and cultural effects."[23] The best interest of the Native mineral owner does not include any requirement for speed or efficiency.[24] If BIA completes its bureaucratic reviews and recommends approval, BLM must issue permits for the drilling and required right-of-way approvals, as well as coordinate with state and local authorities along with the tribes.[25] The permitting process mandated for tribal development requires forty-nine separate bureaucratic steps before actual groundbreaking on the project begins.[26]

Recent examples document the endemic delays of the tribal permitting process. "In 2011, the Rosebud Sioux Tribe reported that they had been prepared to move forward with a shovel-ready wind project since 2008, but due to the BIA taking 18 months to review the necessary lease, the project had been unduly delayed and had lost its pre-arranged interconnection agreement

[19] *Id.*

[20] *Id.* at 17–18.

[21] *See id.* at 14–17.

[22] *Id.* at 14–15.

[23] 25 C.F.R. § 211.3 (2011).

[24] *See id.*

[25] GAO-15-502, *supra* note 3, at 15–16.

[26] *See* Elizabeth Ann Kronk Warner, *Tribal Renewable Energy under the Hearth Act: An Independently Rational, but Collectively Deficient, Option*, 55 Ariz. L. Rev. 1031, 1041–42 (2013).

with the local utility."[27] In 2014, the "Southern Ute reported that of 81 pipeline right-of-way agreements up for renewal, 11 had been under review by the BIA for eight years, and the rest had been under review for at least five years, resulting in approximately $95 million of lost revenue to the Tribe."[28]

B. Tribal Permitting Reform Attempts

Congress has attempted to accelerate tribal permitting on two separate occasions through the Helping Expedite and Advance Tribal Homeownership ("HEARTH") Act and the Indian Tribal Energy Development and Self-Determination Act.[29] Since 1955, the Indian Long-Term Leasing Act has required the Interior Secretary to approve leasing tribal land.[30] In 2012, Congress passed the HEARTH Act, which aimed to fast-track tribal leasing by allowing tribes to obtain preapproved leasing provisions and to lease tribal land without individual approval by the Secretary of the Interior.[31]

BIA does not have the knowledge or resources to approve leasing provisions efficiently on a one-by-one basis.[32] In fact, the federal government's involvement caused several obstacles in the energy permitting process.[33] The Secretary of the Interior's interests are not necessarily aligned with those of Native Americans, and the Interior itself tends to be risk-averse and slow-moving. Long time frames and the possibility of lease denials deprive tribes of the potential for commercial investment and disincentivize energy operators and developers from the initial investment in tribal land.[34]

While the HEARTH Act was designed to minimize these issues, it largely failed.[35] Allowing the Secretary of the Interior to preapprove a lease does allow some timeframe reduction, but HEARTH still requires the leasing process to follow NEPA.[36] Interior staff must independently review and approve the

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[27] *Tribal Energy Resources: Reducing Barriers to Opportunity: Hearing Before the Subcomm. on the Interior, Energy, and Env't of the H. Comm. on Oversight and Gov't Reform,* 115th Cong. 8 (2018) (statement of Eric Conrad Henson, Executive Vice President, Compass Lexecon).

[28] *Id.*

[29] Helping Expedite and Advance Tribal Homeownership Act of 2012, 25 U.S.C. § 415 (West 2013); Indian Tribal Energy Development and Self-Determination Act Amendments of 2017, Pub. L. No. 115–325, 132 Stat. 4445 (codified as amended in scattered sections of 25 U.S.C.).

[30] Warner, *supra* note 26, at 1045–46.

[31] *Id.* at 1031.

[32] *See id.* at 1042.

[33] *Id.* (citing Ryan D. Dreveskracht, *Alternative Energy in American Indian Country: Catering to Both Sides of the Coin*, 33 Energy L.J. 431, 441–43 (2012)).

[34] *See* Warner, *supra* note 26, at 1041–42.

[35] *See id.* at 1052, 1055.

[36] *See id.* at 1054–55.

tribal document,[37] guaranteeing tribal permits need more time for approval.[38] In the first decade of the HEARTH Act, BIA approved less than 20% of the federally recognized tribal nations under HEARTH.[39]

In 2017, Congress enacted the Indian Tribal Energy Development and Self-Determination Act, allowing tribes to enter into Tribal Energy Resource Agreements ("TERAs") designed to expedite tribal energy development.[40] According to one academic assessment, tribes have not embraced such agreements warmly due to "(1) the high costs incurred; (2) the broad waiver of federal liability; (3) the environmental provisions, which intrude upon tribal sovereignty; and (4) the uncertainty implicit in any untested statutory framework."[41] As with the HEARTH Act, TERAs require notice-and-comment for their environmental review process and every subsequent step.[42] However, this review can take years because tribal actors must meet stringent administrative and technical requirements and tightly oversee activities to ensure compliance with federal environmental law and the restrictions built into TERA.[43]

Even analysis generally in favor of TERAs recognizes that it creates "delays outside the control of the tribe" and "may trigger substantive issues . . . under the Endangered Species Act, the Federal Aviation Act, and the National Historic Preservation Act."[44] Despite TERA, the process for leasing tribal lands is long, slow, and complicated, and a project on Native lands can take years more than an analogous project elsewhere.[45]

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[37] *See id.* at 1051–52.

[38] *See* GAO-15-502, *supra* note 3, at 22.

[39] *See Indian Affairs approves HEARTH Act regulations of five Tribal Nations in California,* U.S. Dep't Interior (Apr. 19, 2022) https://www.bia.gov/news/indian-affairs-approves-hearth-act-regulations-five-tribal-nations-california [https://perma.cc/3HSW-8BA3]; *see also Federally Recognized Indian Tribes and Resources for Native Americans*, USA.Gov, https://www.usa.gov/tribes [https://perma.cc/3NDH-QSN3] (last visited May 7, 2024).

[40] *See generally* Indian Tribal Energy Development and Self-Determination Act Amendments of 2017, Pub. L. No. 115–325, 132 Stat. 4445 (codified as amended in scattered sections of 25 U.S.C.).

[41] Michael Maruca, *From Exploitation to Equity: Building Native-Owned Renewable Energy Generation in Indian Country*, 43 Wm. & Mary Envtl. L. & Pol'y Rev. 391, 428 (2019).

[42] *See id.* at 431.

[43] *See id.* at 433–34.

[44] *See id.* at 456.

[45] *See* Elizabeth Ann Kronk Warner, *Renewable Energy Depends on Tribal Sovereignty*, 69 Kansas L. Rev. 810, 841–42 (2021).

II. Regulatory Takings Doctrine and the *Penn Central* Test

The Fifth Amendment plainly states that "private property [shall not] be taken for public use, without just compensation."[46] As the reach of government and the regulatory environment's complexity grew, a simple definition of *taken* as physically possessing property soon proved inadequate.[47] In *Pennsylvania Coal Co. v. Mahon*,[48] Justice Holmes recognized that "if regulation goes too far it will be recognized as a taking."[49] He suggested that the diminution of property value may determine whether a regulation has gone too far but not to what degree such a diminution would have to be to indicate such.[50] In practice, this definition of a taking was essentially tautological: when was a regulation a taking? When it goes too far. When does it go too far? When it constitutes a taking.

Not until 1978 did the Supreme Court, in *Penn Central*, provide further guidance to determining whether a regulatory taking amounts to a constitutional violation.[51] *Penn Central* involved New York City's designation of Grand Central Terminal as a historic landmark.[52] When a property is designated as a landmark, the building owner must maintain its exterior unless the city's Landmarks Preservation Commission ("the Commission") is granted permission to make exterior alterations.[53] Here, Penn Central Transportation Company ("Penn Central") submitted a plan to construct an office building over Grand Central Terminal; however, the Commission rejected it given its landmark designation.[54] Penn Central sued, claiming that "the application of the Landmarks Preservation Law had 'taken' their property without just compensation in violation of the Fifth and Fourteenth Amendments."[55] After winning in the trial court and losing on appeal, Penn Central proceeded to the Supreme Court.[56]

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[46] U.S. Const. amend. V.

[47] John D. Echeverria, *Making Sense of Penn Central*, 39 Envtl. L. Rep. News & Analysis 10471, 10471 (2009).

[48] 260 U.S. 393, 415 (1922).

[49] *Id.* at 415.

[50] *See id.* at 413.

[51] Penn Cent. Transp. Co. v. N.Y.C., 438 U.S. 104 (1978).

[52] *Id.* at 117.

[53] *See id.* at 110-11.

[54] *See id.* at 117.

[55] *Id.* at 119.

[56] *Id.*

Penn Central identified three traditional factors—economic impact, investment-backed expectations, and character of the action—for determining whether a regulatory restriction constitutes a prohibited taking:[57]

> The *economic impact* of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct *investment-backed expectations* are, of course, relevant considerations. So, too, is the *character of the governmental action*. A "taking" may be more readily found when the interference with property can be characterized as a physical invasion by government than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.[58]

The court also noted that:

> 'Taking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court *focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole*—here the city tax block designated as the 'landmark site.'[59]

Despite not constituting one of the three traditional factors, the *parcel-as-a-whole* element should comprise a *de-facto* fourth constitutional factor.[60] *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*[61] illustrates such by recognizing that delay could lead to a regulatory taking.[62] Even when *all* economic value is destroyed by a law or government action, that may not be a taking if such action was needed to protect "the public health, safety, and welfare."[63] The economic impact is a weighing factor helping to resolve edge cases, rather than being dipositive in and of itself.[64]

Investment-backed expectations are also difficult to pin down. Justice Brennan in *Penn Central* derived this factor from *Mahon*, calling it the "leading case for the proposition that a state statute that substantially furthers important public policies may so frustrate distinct investment-backed

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[57] *See* Steven J. Eagle, *The Four-Factor Penn Central Regulatory Takings Test*, 118 Penn State L. Rev. 601, 612 (2014).

[58] Penn Cent. Transp. Co. v. N.Y.C., 438 U.S. 104, 124 (1978) (emphasis added) (citations omitted).

[59] *Id*. at 130–31 (emphasis added).

[60] Eagle, *supra* note 57, at 622.

[61] 535 U.S. 302 (2002).

[62] *See* discussion *infra* Part VI.

[63] Steven J. Eagle, *Property Rights and Takings Burdens*, 7 Brigham-Kanner Prop. Rts. Conf. J. 199, 209 (2018) (quoting Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1064 (1992)).

[64] Eagle, *supra* note 63, at 209.

expectations as to amount to a 'taking.'"[65] Brennan's reasoning in *Penn Central* relied on an article by Professor Frank Michaelman, whose definition of an investment-backed expectation would "protect an owner whose particular land uses were predicated on then-existing regulations, as opposed to a speculator who might be open to many possibilities for the land's use."[66] Justice Rehnquist modified the phrase to refer to *reasonable* investment-backed expectations, creating an objective standard based on reasonability and a subjective, individualized standard co-existing in current law.[67]

In the 2004 *Appolo Fuels v. United States*[68] decision, the United States Court of Appeals for the Federal Circuit ("Federal Circuit") similarly analyzed reasonable investment-backed expectations by dividing them into three subelements: (1) operation in a regulated industry, (2) awareness of the issue that led to the claimed regulatory taking at the time of investment, and (3) reasonable anticipation of regulation at the time of investment.[69] Some argue that the Supreme Court's conception of investment-backed expectations in a regulatory taking is that of "established, economically beneficial uses."[70] While others say that a plaintiff also needs a subjective and objective expectation of returns that the regulatory action hinders.[71] The analyzed subject in either of these standards is a specific regulation, not a general regulatory climate.[72]

The Supreme Court noted in *Penn Central* that the "character of the governmental action" was relevant.[73] "A taking may more readily be found when the interference with property can be characterized as a physical invasion of government than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good."[74] However, the Supreme Court in *Loretto v. Teleprompter Manhattan CATV Company*[75] removed literal physical takings of another's property from the realm of *Penn Central* analysis by classifying them as *per-se* takings.[76] *Penn*

[65] Penn Cent. Transp. Co, v. N.Y.C. 438 U.S. 104, 127 (1978).

[66] Eagle, *supra* note 63, at 209–10.

[67] Eagle, *supra* note 57, at 620.

[68] 381 F.3d 1338 (Fed. Cir. 2004).

[69] *See id.*; Echeverria, *supra* note 47, at 10476 (citing Appolo Fuels, Inc. v. United States, 381 F.3d 1338, 1349 (Fed. Cir. 2004)).

[70] Joseph William Singer, *Justifying Regulatory Takings*, 41 Ohio N.U. L. Rev. 601, 650 (2015).

[71] *See id.*

[72] *See supra* notes 65–71 and accompanying text.

[73] Penn Cent. Transp. Co. v. N.Y.C., 438 U.S. 104, 124 (1978).

[74] *Id.* (citations omitted).

[75] 458 U.S. 419 (1982).

[76] *Id.*; *see also* R.S. Radford & Luke A. Wake, *Deciphering and Extrapolating: Searching for Sense in Penn Central*, 38 Ecology L. W. 731, 736–37 (2011).

Central's character-of-the-regulation test only examines legally promulgated regulations that do not physically take another's property.

The final element of the *Penn Central* test concerns the definition of the "parcel as a whole," which tends to be challenging to dispense practically.[77] Justice Kennedy noted that determining the definition of the property is a critical question in a regulatory-takings test.[78] Both parties in a regulatory-takings action are incentivized to define the parcel as categorically as possible—broadly for the government and narrowly for the plaintiffs. While citing Steven Eagle's "The Four Factor Penn Central Regulatory Takings Test," Justice Kennedy stated in *Murr v. Wisconsin* that this very question may be determinative of the entire regulatory "takings" inquiry.[79] There can only be a taking if a use is denied on "the entire property held by the owner."[80] In this context, each reservation can be considered a 'parcel as a whole.'

In 1938, in *United States v. Klamath and Moadoc Tribes*,[81] the Supreme Court established that:

> [T]he United States has power to control and manage the affairs of its Indian wards in good faith for their welfare, [but] that power is subject to constitutional limitations, and does not enable the United States without paying just compensation therefor to appropriate lands of an Indian tribe to its own use or to hand them over to others.[82]

Further, in 1997's *Coast Indian Community v. United States*,[83] the United States Court of Claims expressly held that the "concept of ownership includes beneficial ownership" and that the eponymous Coast Indian Community could sue for a taking of its land.[84] In 1938, in *United States v. Mitchell*,[85] the Supreme Court confirmed that a regulatory taking of Native property by the federal government could give rise to a taking claim, holding that the Quinault tribe could sue for damages over regulatory mismanagement of tribal timber resources.[86]

Regulatory takings fall on the parcel as a single unified element. In *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*,[87] the Supreme Court held that two temporary moratoria on a parcel's use did not constitute a

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[77] Eagle, *supra* note 57, at 623.

[78] *See* Murr v. Wisconsin, 582 U.S. 383, 395 (2017).

[79] *See id.* (citing Eagle, *supra* note 57, at 631).

[80] *Id.*

[81] 304 U.S. 119 (1938).

[82] *Id.* at 123.

[83] 550 F.2d 639 (Cl. Ct. 1977).

[84] *Id.* at 650.

[85] 463 U.S. 206 (1983).

[86] *See id.*

[87] 535 U.S. 302 (2002).

per-se taking of the parcel as a whole.[88] The Supreme Court rejected a categorical rule for a regulatory delay claim stating that the "*Penn Central* framework adequately directs the inquiry to the proper considerations—only one of which is the length of the delay."[89] The Supreme Court emphasized that its ruling "do[es] not hold that the temporary nature of a land-use restriction precludes finding that it effects a taking,"[90] and affirmed that "justice and fairness require that economic injuries caused by public action be compensated by the government."[91] The Federal Circuit understood *Tahoe-Sierra* to hold that "no per se rule applies to temporary moratoria and that whether they are takings must be analyzed under *Penn Central*."[92]

Both critics and supporters of the regulatory takings theory widely criticized *Penn Central*.[93] While later cases such as *Agins v. City of Tiburon*[94] and *First English Evangelical Lutheran Church v. County of Los Angeles*[95] attempted to redefine and *clarify Penn Central*, these decisions were abandoned and scholars, judges, and litigants were left with "no guidance beyond the ad hoc, standardless, situational relativism of *Penn Central*."[96]

III. Applying the *Penn Central* Test to Federal Regulatory Mismanagement of Native Resources

This Note applies the three explicit prongs established in *Penn Central* to test the mismanagement of Native resources on Native land by the federal government to analyze economic impact, investment-backed expectations, and the character of the action.[97] Part V will address and apply the de-facto fourth prong: the *parcel-as-a-whole* element.

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[88] *See id.* at 332.

[89] *Id.* at 339 n.34.

[90] *Id.* at 337.

[91] *Id.* at 336 (quoting Penn Cent. Transp. Co. v. N.Y.C., 438 U.S. 104, 124 (1978)).

[92] Boise Cascade Corp. v. United States, 296 F.3d 1339, 1347 (Fed. Cir. 2002) (citing *Tahoe-Sierra*, 535 U.S. at 342).

[93] *See* Echeverria, *supra* note 47, at 1047; Eagle, *supra* note 57, at 603 (John Echeverria argues it "provided little guidance," while Steven Eagle asserts that it "does not have a firm grounding in property law or due process.").

[94] 447 U.S. 255 (1980).

[95] 482 U.S. 304 (1987).

[96] R.S. Radford & Luke A. Wake, *Deciphering and Extrapolating: Searching for Sense in Penn Central*, 38 Ecology L. Q. 731, 734–35 (2011).

[97] *See* discussion *infra* Part VI.A–C.

A. Economic Impact

1. What sort of impact?

Any examination of the regulatory delays in approving Native American energy development must begin with *Penn Central*'s three part test. The first prong of the *Penn Central* test consists of the "economic impact of the regulation on the claimant."[98] The Supreme Court noted that a possible justification for a regulatory taking claim would be "if [the regulation in question] has an unduly harsh impact upon the owner's use of the property."[99] Alternatively, the Supreme Court, summarizing *Mahon*, noted a regulation that "had nearly the same effect as the complete destruction of [mineral] rights" would also be a taking.[100] Even the destruction of a specific *use* of a property for a given purpose—such as no longer being able to use land as a chicken farm—would effectively serve as a taking.[101]

The question is less about the size of the economic impact and more about the fact that there is an economic impact. It does not matter how much value is lost when determining a taking; the Constitution simply protects "private property."[102] The value lost may provide a guide for compensation, but the actual state of something taken is binary: private property is taken or not.[103] As Stephen Eagle noted:

> "While the extent of the pecuniary loss occasioned by the taking of property determines the amount of just compensation, the size of the loss should not determine if there is a taking. Because landowners do not have a property right in maintaining a nuisance or other condition inimical to the public health, safety, or welfare, even a large loss resulting from termination of such activity is not compensable."[104]

While a property owner awaits legally mandated regulatory approval for the long-term use of their property, the owner cannot practically use the property for another long-term purpose. Regulatory inaction reduces the value of any long-term use, as the potential lessor must wait years to approve the proposed use.[105]

Other agreements necessary for the development project can lapse—or funding that was secured on the premise of a more reasonable timeframe may

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[98] Penn Cent. Transp. Co. v. N.Y.C., 438 U.S. 104, 124 (1978).

[99] *Id.* at 127.

[100] *Penn Cent. Transp. Co.*, 438 U.S. at 127–28 (citing Penn Coal Co. v. Mahon, 260 U.S. 393, 414–15 (1922)).

[101] *See id.* at 128 (citing United States v. Causby, 328 U.S. 256, 262–63 n.7 (1946)).

[102] U.S. Const. amend. V, cl. 4.

[103] *See* Eagle, *supra* note 57, at 617.

[104] *See* Eagle, *supra* note 57, at 617.

[105] *See* Eagle, *supra* note 57, at 641–42.

disappear—and the project itself may fall apart.[106] Investors lose patience, find alternatives, lose capital, or die.[107] Should the government deny development permission, the owner can at least put the capital toward another project.[108] In contrast, a delay merely leaves the owner in limbo.[109]

2. How long is the impact?

Although all economically productive value is eliminated, the temporary nature of such elimination means that it is not a *per-se* taking. The Supreme Court in *Tahoe-Sierra* limited the already narrow exception created by *Lucas v. South Carolina Coastal Council*.[110] In *Tahoe-Sierra*, the Supreme Court found that *Lucas*'s definition of "elimination of all beneficial use" as a *per-se* taking only applies in the "'extraordinary circumstance' of a permanent deprivation of all beneficial use."[111] As such, *Penn Central* guides the analysis of delays despite this total elimination of value.

Perhaps understandably, the Supreme Court would not go so far as to say that "*normal* delays in obtaining building permits, changes in zoning ordinances, variances and the like" are compensable as a taking.[112] But an extraordinary delay—a term not well-defined by the Supreme Court—can qualify as a taking.[113] Extraordinary delays are unnecessary when the permit is ultimately denied, regardless of how long it takes to deny.[114] Thus, denying the permit is a final government action that can be challenged.

Summarizing its holding in *Wyatt v. United States*,[115] the Federal Circuit in *Boise Cascade Corporation v. United States*[116] wrote "absent denial of the permit, only an extraordinary delay in the permitting process can give rise to a compensable taking."[117] This essentially implies that permit denial may give rise

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[106] *Tribal Energy Resources: Reducing Barriers to Opportunity: Hearing Before the Subcomm. on the Interior, Energy, and Environment of the H. Comm. On Oversight and Gov't Reform*, 115th Cong. 8 (2018) (statement of Eric Conrad Henson).

[107] *See supra* notes 28–30, 38–39, 45–46, and accompanying text.

[108] *See supra* notes 28–30, 38–39, 45–46, and accompanying text.

[109] *See supra* notes 28–30, 38–39, 45–46, and accompanying text.

[110] *See* 505 U.S. 1003 (1992).

[111] *See* Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency, 535 U.S. 302, 324 n.19 (2002) (quoting *id.* at 1017).

[112] *Id.* at 335 (emphasis added) (quoting First Eng. Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 321 (1987)).

[113] *See* Tabb Lakes Ltd v. United States, 10 F.3d 796, 801 (Fed. Cir. 1993).

[114] *See* Boise Cascade Corp. v. United States, 296 F.3d 1339, 1349 (Fed. Cir. 2002).

[115] 271 F.2d 1090 (Fed. Cir. 2002).

[116] 296 F.3d 1339 (Fed. Cir. 2002).

[117] Boise Cascade Corp. v. United States, 296 F.2d 1339, 1349 (Fed. Cir. 2002).

to a compensable taking. Without that denial, there must be a valid property interest at the time of the claimed taking for there actually to be a taking.[118]

However, the Native American tribes are already interested in legitimizing their suit for taking through the trust relationship.[119] The tribes have a beneficial interest in the land despite not having its title.[120] As a beneficial interest has been held sufficient for a physical taking claim,[121] such an interest would be enough to allow a regulatory taking claim due to the government's failure to act promptly on permitting issues.[122]

In *Boise Cascade,* a property owner filed a taking claim after the U.S. Fish and Wildlife Service prevented him from logging on his land for a year.[123] The property owner sought "just compensation for the temporary taking of merchantable timber," advancing on—among other theories—a *Penn Central* basis.[124] While the United States Court of Federal Claims ("Court of Federal Claims") ultimately dismissed the suit, it held that until a permittee applies for and is denied a permit, they do not have a so-called taken property interest.[125] The Court of Federal Claims stated:

> [T]he initial denial of a permit is still a necessary trigger for a ripe takings claim. If the government denies a permit, then the aggrieved party can seek compensation. If at some point the government reconsiders the earlier denial and grants a permit (or revokes the permitting requirement), then the aggrieved party can seek compensation for a "temporary regulatory taking."[126]

It is long established that government "hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law."[127] The regulatory taking claim in *Boise Cascade* failed because the delay denied no property interest and no "extraordinary" delay that would otherwise justify the existence of a regulatory takings claim on delay grounds.[128] However, a regulatory taking suit for delay

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[118] *See* Wyatt v. United States, 271 F.3d 1090, 1096 (Fed. Cir. 2002).

[119] *See* Coast Indian Cmty. v. United States, 550 F.2d 639, 652–53 (Cl. Ct. 1977); *see also* United States v. Klamath and Moadoc Tribes, 304 U.S. 119, 123 (1938); *see also* United States v. Mitchell, 463 U.S. 206, 225–27 (1983).

[120] *See Native American Ownership and Governance of Natural Resources*, U.S. Dep't Interior, https://revenuedata.doi.gov/how-revenue-works/native-american-ownership-governance/ [https://perma.cc/5LQJ-9TSC] (last visited Mar. 2, 2023).

[121] *See Coast Indian Cmty.*, 550 F.2d at 642.

[122] *See supra* notes 109–114 and accompanying text.

[123] *See* Boise Cascade Corp. v. United States, 296 F.3d 1339, 1342 (Fed. Cir. 2002).

[124] *Id.*

[125] *Id.* at 1347.

[126] *Id.* (footnote omitted).

[127] Penn. Coal Co. v. Mahon, 260 U.S. 393, 413 (1922).

[128] *Boise Cascade Corp.*, 296 F.3d at 1349–50.

by Native tribal entities would sidestep the issue created in *Boise Cascade*; even if the delay is not "extraordinary," property interest is still impaired.[129] Native American tribes already have property interests that are established through the trust relationship.[130] And unlike the situations in *Boise Cascade* and *Tabb Lake Ltd. v. United States*,[131] Native tribes are already attempting to exercise the "escape hatch" of the permit; they simply cannot get a timely response.[132]

B. Investment-Backed Expectations

The second prong of the *Penn Central* test involves the "extent to which the regulation has interfered with distinct investment-backed expectations."[133] Contextually, the expectation in *Penn Central* appears to be one of use.[134] This is distinguishable from the scenario proposed in this Note, in which the Native American plaintiffs would have proposed a project and sued upon inevitable delay.[135] The development of the test in *Appolo Fuels*[136] is a useful framework. If the party claiming the taking was in a regulated industry, were they aware of the issue that led to the claimed regulatory taking at the time of investment, and could they have reasonably anticipated the possibility of regulation when investing?[137]

What are the reasonable, investment-backed expectations at stake here? The regulations themselves are not at issue in the scenario that this Note proposes, but rather the extraordinary delays that those regulations create.[138] In preparing for the project, the applicant will invest time and effort; the elaborate series of regulatory steps needed to get the permit for an energy project is not free, though hard to pin down precisely.[139] However, an environmental impact statement likely costs between two and five million dollars and an

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[129] *Id.*

[130] *See* discussion *supra* Part IV; *see also* Coast Indian Cmty. v. United States, 550 F.2d 639 (Cl. Ct. 1977).

[131] 10 F.3d 796 (Fed. Cir. 1993).

[132] *Id.* at 801; *Boise Cascade Corp.*, 296 F.3d at 1348.

[133] Penn Cent. Transp. Co. v. N.Y.C., 438 U.S. 104, 124 (1978).

[134] *See id.* at 136.

[135] *See* discussion *supra* Part II.

[136] *See supra* notes 69–73 and accompanying text.

[137] *See* Echeverria, supra note 47, at 10476 (citing Appolo Fuels, Inc. v. United States, 381 F.3d 1338, 1349 (Fed. Cir. 2004)).

[138] *See supra* notes 37–46 and accompanying text.

[139] *See* Ghanashyam Neupane & Birendra Adhikari, Economic Impact of Permitting Timelines on Geothermal Power in California, Nevada, and Utah, 7, 15–16 (2022) ("[The] costs incurred to prepare, apply, and complete NEPA/CEQA review process for various activities of a project were challenging to acquire or were unavailable.").

environmental assessment between $5,000 and $200,000.[140] Certainly, any tribe requesting a federal resource development permit will expend its financial and human resources on the project over several years.[141] Following *Appolo Fuels,* a Native American tribal entity would know that they are operating in a "highly regulated industry" and would likely be aware of the issue that led to the claimed regulatory taking at the time of investment.[142] But unlike *Appolo Fuels*, the expectation in this scenario is not that there will be regulation but a time frame for the completion of the regulatory process.[143]

The present permitting system does not produce a denial or permit in a reasonable time. The government's actions demonstrate the inefficiency in the regulatory process, as it enacted laws—such as the HEARTH Act—to accelerate the process. And as the HEARTH Act has not been widely adopted, the timescale must still be so if the regulatory timeframe is unreasonable.[144]

C. Character of the Action

The third *Penn Central* prong considers the "character of the governmental action."[145] The Supreme Court relegated regulatory takings to regulations that "adjust[] the benefits and burdens of economic life to promote a common good."[146] Looking at Supreme Court precedent, Stephen Eagle suggests that "a series of ostensible separate regulatory actions that impose foreseeable harm on specific property for the single purpose of benefiting other specific property" could qualify as a regulatory taking.[147]

The circumstances suggested in this Note do not fit Eagle's definitions for a regulatory taking. The regulatory mismanagement—a delay in regulating Native land to a timeframe beyond regulating comparable non-Native

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[140] Mark C. Rutzick, *A Long and Winding Road: How the National Environmental Policy Act Has Become the Most Expensive and Least Effective Environmental Law in the History of the United States, and How to Fix It*, Regul. Transparency Project of the Federalist Soc'y 1, 14 (Oct. 16, 2018) (https://rtp.fedsoc.org/wp-content/uploads/RTP-Energy-Environment-Working-Group-Paper-National-Environmental-Policy-Act.pdf) [https://perma.cc/V2JM-CV22].

[141] *See id.* at 14–15; *see supra* notes 26–30 and accompanying text.

[142] *See* Appolo Fuels, Inc. v. United States, 381 F.3d 1338, 1349 (Fed. Cir. 2004).

[143] *See id.*; *see also* discussion *supra* Part II.

[144] Under 20% of federally recognized tribes have approved HEARTH regulations. *See Approved HEARTH Act Regulations*, Bureau of Indian Affs., https://www.bia.gov/service/HEARTH-Act/approved-regulations [https://perma.cc/LZ2F-HM4R] (last visited Apr. 1, 2024); *see also Federally Recognized Indian Tribes and Resources for Native Americans*, USA.Gov, https://www.usa.gov/tribes [https://perma.cc/3NDH-QSN3] (last visited May 7, 2024).

[145] Penn Cent. Transp. Co. v. N.Y.C., 438 U.S. 104, 124 (1978) (citing United States v. Causby, 328 U.S. 256 (1946)).

[146] Eagle, *supra* note 57, at 621 (quoting *id.*).

[147] *Id.* at 622.

land—neither "substantially advances a legitimate state interest"[148] nor creates a "reciprocity of advantage."[149]

Bass Enterprises Production Co. v. United States[150] provides a valuable case study for character-of-the-action analyses.[151] In *Bass Enterprises*, after rejecting a forty-five-month permitting delay for drilling on non-Native BLM land as not being "extraordinary,"[152] the Federal Circuit applied *Penn Central*.[153] The Federal Circuit specifically looked to "the public purposes served by the Government's regulatory actions,"[154] specifically referencing the Supreme Court's invocation of "'essentially *ad hoc*, factual inquiries' designed to permit a full examination of the relevant circumstances."[155] The Federal Circuit found that "the important and critical nature of the permitting decision" justified the timeframe, as it did not want to encourage hasty decision-making by the Government.[156]

However, the assumption in *Bass Enterprises* is that forty-five months is the optimal period for a permit application because of detailed analysis and consideration on the part of the Federal permitting authorities.[157] The aim of the action could unquestionably advance the public interest and be a "legitimate state interest," but if it is an action extraordinarily delayed, then it is not advancing anything.[158] Inefficiency does not serve any public interest. The goal of the action does not matter in this context; the way that the action is done does.

IV. *Tahoe-Sierra* and the Federal Regulatory Mismanagement of Native Energy Resources

Among the four elements—three *de jure* and one *de-facto*—of the *Penn Central* test is the "nature and extent of the interference with rights in the

[148] Agins v. City of Tiburon, 447 U.S. 255, 260 (1980).

[149] Keystone Bituminous Coal Ass'n. v. DeBenedictis, 480 U.S. 470, 488 (1987).

[150] 381 F.3d 1360 (Fed. Cir. 2004).

[151] *Id.* at 1366.

[152] *Id.* at 1361.

[153] *Id.* at 1369.

[154] *See id.*

[155] *Id.* at 1370 (quoting Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency, 535 U.S. 302, 322 (2002)).

[156] Bass Enterprises Production Co. v. United States, 381 F.3d 1360, 1367 (Fed. Cir. 2004).

[157] *See id.* (explaining upon appeal, the district court found the Government's delay proper and reasonable not in bad faith, or an extraordinary delay given the potential substantial impact and endangerment of health and safety to the surrounding community).

[158] Echeverria, *supra* note 47, at 10478.

parcel as a whole."[159] The very nature of federal regulations means that inherently, they fall upon the entirety of the parcel because the parcel in question is any given reservation land, which Congress regulates through its power to regulate trade.[160] While the specific project seeking to permit would, of course, not encompass the entirety of a reservation, the regulatory approval requirement does fall on the entirety of the reservation; *all* Native tribes have permitting requirements for energy projects laid upon them.[161]

In *Tahoe-Sierra*, the Supreme Court stated that the petitioners "fail to offer a persuasive explanation for why moratoria should be treated differently from ordinary permit delays."[162] Thus, there was no persuasive explanation for disparate treatment, so moratoria and ordinary permit delays should merit similar treatment.[163]. But what *Tahoe-Sierra* does is get a foot into the metaphorical door.

The Supreme Court in *Tahoe-Sierra* established that while not a *per-se* taking, it does not find "that the temporary nature of a land-use restriction precludes finding that it effects a taking"[164] and that it would be analyzed by "relying on the familiar *Penn Central* approach."[165] The Supreme Court rejected a categorical rule because the "*Penn Central* framework adequately directs the inquiry to the proper considerations—only one of which is the length of the delay."[166] Energy developers cannot plan around delays in the regulatory process thereof. How could a developer possibly predict the period it would take, even without third-party intervention, to conduct the steps in the regulatory process? The predictability—the limited and planned duration of the moratorium, as opposed to the chaos of the regulatory delay—distinguishes *Tahoe-Sierra* from the unpredictable permitting delay-based regulatory takings this Note suggests.

If delays can create a regulatory taking, what *sort* of delay can be a regulatory taking? Only an "extraordinary delay in governmental decisionmaking" can give rise to a taking.[167] In *Wyatt v. United States,* the Federal Circuit also has explained that:

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[159] Penn Cent. Transp. Co. v. N.Y.C., 438 U.S. 104, 130–31; *see also* discussion *supra* Part II.

[160] *See* U.S. Const., art. I § 8.

[161] *See* U.S. Gov't Accountability Off., GAO-15-502, Indian Energy Development 5 (2015).

[162] Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency, 535 U.S. 302, 337 n.31 (2002).

[163] *See id.*

[164] *Id.* at 337.

[165] *Id.* at 342.

[166] *Id.* at 338–39 n.34.

[167] Tabb Lakes, Ltd. v. United States, 10 F.3d 796, 803 (Fed. Cir. 1993).

> The length of the delay is not necessarily the primary factor to be considered when determining whether there is extraordinary government delay. Because delay is inherent in complex regulatory permitting schemes, we must examine the nature of the permitting process as well as the reasons for any delay. Moreover, it is the rare circumstance that we will find a taking based on extraordinary delay without a showing of bad faith.[168]

An extraordinary delay can be of any length, but the Federal Circuit assumes some delay inherent in the permitting process.[169] The agencies should be "afforded significant deference" in determining the level of detail required for analyzing a permit and the timeline for approval or denial thereof.[170]

However, a tribe pursuing a regulatory delay claim would have grounds to claim extraordinary delay on its permit applications: "[b]y thus recognizing [in *Agins*] that most government delay cannot effect a taking, the Supreme Court also implied that certain delay can, so long as the delay is 'extraordinary.'"[171] This Note analyzes the extraordinary delay in the context of the broader reservation permitting scheme.[172] As the BIA and Congress are trying to improve the permitting timeline separately, the government's assumption seems to be that those timelines are acceptable—hence, an extraordinary delay.[173]

Assuming that such a delay is extraordinary, "the Federal Circuit indicated that, once delay becomes extraordinary, courts must use the Penn Central test to determine whether this delay, going forward, has effected a taking."[174]

Conclusion

This Note offers a potential legal solution to a long-recognized and largely ignored problem in this country: enduring poverty on Native reservations. The Note suggests that Native American tribes should file regulatory taking suits against the federal government in the Court of Federal Claims, based on the *Penn Central* regulatory taking jurisprudence. This Note also argues the Federal Circuit should use the interpretation of the *Penn Central* test advanced above.

To be sure, no single lawsuit can eliminate tribal poverty. However, as suggested in this Note, regulatory takings' suits by Native tribal entities should contribute to improved economic conditions on Native American reservations and, just as significantly, lead to systemic regulatory relief benefiting

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[168] Wyatt v. United States, 271 F.3d 1090, 1098 (Fed. Cir. 2001).

[169] *See id.*

[170] *Id.*

[171] Resource Investments, Inc. v. United States, 85 Fed. Cl. 447, 494 (2009) (quoting Agins v. City of Tiburon, 447 U.S. 255, 263 n.9 (1980)).

[172] *See supra* notes 23–45 and accompanying text.

[173] *See* GAO-15-502, *supra* note 3; *see also supra* notes 46–53 and accompanying text.

[174] Resource Investments, Inc., 85 Fed. Cl. at 494.

tribes throughout the nation. The threat of paying damages to tribal entities could spur the government to reform its tribal resource permitting procedures to act and regulate more efficiently than at present to provide lasting economic gains long into the future.

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