

## CLEAR RIGHTS AND WORTHY CLAIMANTS: JUDICIAL INTERVENTION IN ADMINISTRATIVE ACTION UNDER THE ALL WRITS ACT

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*The All Writs Act, 28 U.S.C. § 1651, authorizes federal courts to “issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.” The Act has applications in a variety of contexts, including law enforcement investigations, the detention of military prisoners, and the management of complex multidistrict litigation. Another important but less studied area is the Act’s use as a mechanism to examine ongoing proceedings of federal administrative agencies. While judges generally hesitate to review nonfinal administrative action, courts have found authority under the Act to issue writs of mandamus and injunctions to agencies to compel action or suspend the enforceability of preliminary decisions while parties pursue administrative appeals. This Note examines the use of the All Writs Act to issue such relief and the doctrine governing the standards parties must meet to obtain it. After revealing significant disagreement in the case law as to the appropriate thresholds for court intervention, it advocates for balanced standards designed to preserve agency autonomy and access to judicial review alike.*

### INTRODUCTION

Under the Administrative Procedure Act (APA),<sup>1</sup> a party that disagrees with a decision or other determination of a federal agency generally may obtain review from a federal court only if the measure qualifies as a final agency action.<sup>2</sup> Parties must also typically exhaust available administrative remedies and present a dispute that qualifies as ripe.<sup>3</sup> Situations at times arise, however, in which parties seek judicial oversight of agency action before it meets the traditional criteria of completeness. While judges generally hesitate to interfere in ongoing administrative proceedings out of deference to the role and function of agencies,<sup>4</sup> courts in some instances have granted parties relief from ongoing

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1. 5 U.S.C. §§ 551–559, 701–706 (2012).

2. See *id.* § 704.

3. See *infra* section I.A.2.

4. See, e.g., *FTC v. Standard Oil Co. of Cal.*, 449 U.S. 232, 242 (1980) (explaining the risks of premature judicial review of agency action—namely, “interference with the proper functioning” of agencies); cf. *Chevron U.S.A. Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 844 (1984) (describing longstanding principles of deference to agency interpretations of statutes).

agency action under the authority of the All Writs Act.<sup>5</sup> A somewhat obscure but persistently important statute, the All Writs Act authorizes federal courts to “issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.”<sup>6</sup>

Courts have interpreted the broad language of the All Writs Act to enable a variety of actions beyond the usual scope of judicial activity.<sup>7</sup> Recent scholarship has addressed prominent applications in the law enforcement and military detention contexts.<sup>8</sup> Few inquiries, however, discuss the Act’s use as a mechanism to examine ongoing agency proceedings.<sup>9</sup> Agency cases involving All Writs Act–based relief do not frequently arise, but the limited case law that exists reveals that courts have imposed different thresholds that parties must meet to obtain relief. Most prominently, courts in some cases have required parties seeking injunctions against agencies to make heightened showings on the four traditional factors for equitable relief.<sup>10</sup> In other cases, however, courts have taken All Writs Act–based action without any mention of the traditional injunction factors.<sup>11</sup> In light of the general principle of judicial respect for ongoing agency proceedings,<sup>12</sup> lowering the threshold for regulated parties to win court intervention in nonfinal administrative action would represent a significant challenge to agency authority. At the same time, raising the standard unnecessarily risks barring relief to otherwise deserving plaintiffs.

A recent example suggests the impact of a lowered threshold for review. In July 2016, a federal district court invoked All Writs Act authority to order the Food and Drug Administration (FDA) not to approve or deny pending applications by generic drug manufacturers to sell their versions of a leading cholesterol drug.<sup>13</sup> The drug’s original manufacturer had filed suit arguing that any approvals would be based on an incorrect interpretation of the governing statutes and that it would have no opportunity to seek meaningful judicial review without immediate intervention; in response, the court ordered the FDA to announce decisions on the applications at a sealed hearing at which the court

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5. 28 U.S.C. § 1651 (2012); see also 16 Charles Alan Wright et al., *Federal Practice and Procedure* § 3942 (3d ed. 2012) (“A substantial number of cases recognize power in the courts of appeals to intervene under the All Writs Act without the pretense of characterizing agency action as final.”) (footnote omitted).

6. 28 U.S.C. § 1651.

7. See 14AA Charles Alan Wright et al., *Federal Practice and Procedure* § 3691 (4th ed. 2011) (describing the Act’s conferral of power to courts to implement orders and protect their jurisdiction through injunctions and other means); 16 Wright et al., *supra* note 5, § 3932 (reviewing numerous invocations of All Writs Act authority to review and supervise lower courts and agencies).

8. See *infra* notes 81, 91, and accompanying text.

9. See *infra* section II.A.

10. See *infra* section I.A.3.

11. See *infra* notes 13–17 and accompanying text.

12. See *supra* note 4 and accompanying text.

13. See *AstraZeneca Pharm. LP v. Burwell*, 197 F. Supp. 3d 53, 58 (D.D.C. 2016). For a more thorough discussion of this case, see *infra* section II.C.1.

would then hear the merits of the statutory challenge.<sup>14</sup> Despite its stated reluctance to “unnecessarily or unduly interfere with the usual operation of the administrative process,”<sup>15</sup> the court effectively prohibited the FDA from following its normal procedure for approving generic versions of a drug with billions of dollars in annual sales—without a clear finding of irreparable harm to the plaintiff or a similar justification.<sup>16</sup> While the court ultimately rejected the manufacturer’s statutory argument at the hearing,<sup>17</sup> such interference in an agency’s procedures, without a clear finding of a doctrinally sufficient threat to the moving party’s interests, represents a concerning development that future parties with stronger substantive arguments may attempt to exploit.

Indeed, while judicial oversight of agency action has relaxed over the past several decades as courts have generally granted greater discretion to agencies,<sup>18</sup> a well-documented scholarly and judicial campaign that questions and disputes the basic legitimacy of the administrative state is also underway.<sup>19</sup> While agencies enjoy some degree of “bureaucratic autonomy,”<sup>20</sup> a movement based in libertarian ideology and originalist judicial interpretation actively challenges the modern administrative state’s statutory and constitutional foundations and advocates restoring a “Constitution in Exile” in which national power is restricted in deference to individual economic interests.<sup>21</sup> In an article reviewing recent decisions of the D.C. Circuit Court of Appeals, Professors Cass Sunstein and Adrian Vermeule have documented one aspect of this movement, a mode of judicial decisionmaking they dubbed “libertarian administrative law.”<sup>22</sup> A clear pattern of court decisions applying the All Writs Act to restrict agency authority on such grounds has not yet emerged, and the Supreme Court has given some indication that it disapproves of the libertarian

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14. *AstraZeneca*, 197 F. Supp. 3d at 59.

15. *Id.* at 56.

16. See Andrew M. Harris et al., *AstraZeneca Fails to Keep Generic Crestor Rivals off Market*, Bloomberg (July 19, 2016), <http://www.bloomberg.com/news/articles/2016-07-19/astrazeneca-loses-bid-to-keep-crestor-generics-off-market> [<http://perma.cc/PPW6-2NJR>] (describing the outcome and the size of the market for the drug).

17. See *id.*

18. See Daniel A. Farber & Anne Joseph O’Connell, *The Lost World of Administrative Law*, 92 *Tex. L. Rev.* 1137, 1170–73 (2014) (tracing administrative law doctrine and explaining that “courts are not the dominant overseer of agencies that the APA anticipated,” though noting “they can still play a powerful role in particular circumstances”).

19. See Jeremy K. Kessler, *The Struggle for Administrative Legitimacy*, 129 *Harv. L. Rev.* 718, 720–23 (2016) (reviewing Daniel R. Ernst, *Tocqueville’s Nightmare: The Administrative State Emerges in America, 1900–1940* (2014)) (describing the growing trend of “historically grounded” challenges to administrative government).

20. Gillian E. Metzger, *The Constitutional Duty to Supervise*, 124 *Yale L.J.* 1836, 1885 (2015) (citing Daniel P. Carpenter, *The Forging of Bureaucratic Autonomy: Reputations, Networks, and Policy Innovation in Executive Agencies, 1862–1928*, at 4, 18–27, 353–54 (2001)).

21. See Kessler, *supra* note 19, at 720–22 & nn.14–15 (noting critiques by scholars including Professors Randy Barnett, Richard Epstein, and Philip Hamburger, as well as ideologically aligned 2015 Supreme Court opinions by Justices Scalia, Thomas, and Alito).

22. Cass R. Sunstein & Adrian Vermeule, *Libertarian Administrative Law*, 82 *U. Chi. L. Rev.* 393, 398–401 (2015).

approach.<sup>23</sup> Nonetheless, given the recent elevation of outspoken ideological and philosophical opponents of the administrative state to the White House<sup>24</sup> and Supreme Court,<sup>25</sup> any potential strategy of limiting and restricting agency authority and autonomy merits discussion, particularly one that has attracted little scholarly attention thus far.<sup>26</sup>

This Note examines the development and use of federal court authority under the All Writs Act to issue injunctions and other forms of relief in the context of agency action. Part I provides an overview of administrative law principles that govern agency action, standards for interim relief, and the All Writs Act. Part II explores the uneven doctrine courts have developed surrounding use of the Act in agency suits, describing the reasoning courts have applied in such cases and particularly highlighting variation in the showing required for injunctive relief. Because the doctrine courts have developed for administrative All Writs Act cases has at times drawn from holdings outside the agency context, this Part reviews those areas when relevant as well. Finally, Part III expands on the role of the All Writs Act in contemporary debates about the administrative state's legitimacy and suggests appropriate standards for All Writs Act-based action that respect both agency authority and regulated entities' right to seek relief.

#### I. STATUTORY AND COMMON LAW BACKGROUND

Several subjects merit review before turning to courts' application of the All Writs Act in administrative agency litigation. This Part discusses each in turn. Section I.A describes the statutory regime governing federal administrative action and its review by courts; the overlapping doctrines of exhaustion, finality, and ripeness that govern the timing of such review; and the traditional four-factor test for obtaining equitable relief. Section I.B provides a brief historical background on the All Writs Act, as well as the Supreme Court's core doctrine delineating its use and scope. It also discusses the forms of court action that the Act authorizes, including both the traditional writs and other forms of interim relief.

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23. See Kessler, *supra* note 19, at 720–21 & nn.13–14.

24. See Leah Litman & Ian Samuel, *The Blind Side in Trump's War on the Administrative State, Take Care* (Apr. 17, 2017), <http://takecareblog.com/blog/the-blind-side-in-trump-s-war-on-the-administrative-state> [<http://perma.cc/E79D-XWL2>] (discussing President Donald Trump's selection of leaders for executive agencies who have strongly criticized those agencies in the past).

25. See Emily Bazelon & Eric Posner, *The Government Gorsuch Wants to Undo*, N.Y. Times (Apr. 1, 2017), <http://www.nytimes.com/2017/04/01/sunday-review/the-government-gorsuch-wants-to-undo.html> (on file with the *Columbia Law Review*) (describing then-Judge Neil Gorsuch's strong criticism of the *Chevron* doctrine and general skepticism of congressional delegation of power to agencies).

26. See *infra* section III.C (expanding on the potential use of the All Writs Act as a deregulatory measure).

### A. Taking and Challenging Agency Action

1. *The Administrative Procedure Act and Judicial Review of Agency Action.* —The APA<sup>27</sup> “provides the statutory structure on which federal administrative law is built.”<sup>28</sup> Among the many innovations of the statute, the APA defines the term “agency action,” which covers all manner of agency activities, including “the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act.”<sup>29</sup> While this list of actions includes each type of agency proceeding subject to judicial review in federal court,<sup>30</sup> every agency final disposition of a matter constitutes either a “rule” or an “order,”<sup>31</sup> the processes for creating which are rulemaking and adjudication, respectively.<sup>32</sup> Both types of procedure have “formal” and “informal” variants,<sup>33</sup> although formal rulemaking is now rare.<sup>34</sup> Importantly, any type of agency action that leads to a final disposition but does not constitute informal or formal rulemaking or formal adjudication is an informal adjudication, an “enormous category” of action.<sup>35</sup>

Assuming a party meets all other hurdles and requirements,<sup>36</sup> it may seek judicial review of agency action through one of three main avenues.<sup>37</sup> “Special statutory review” is a cause of action authorized by section 703 of the APA<sup>38</sup> and the “organic statute” that delegates authority to the agency; such statutes

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27. 5 U.S.C. §§ 551–559, 701–706 (2012).

28. 1 Richard J. Pierce Jr., *Administrative Law Treatise* § 1.1, at 2 (5th ed. 2010).

29. 5 U.S.C. § 551(13).

30. See *FTC v. Standard Oil Co. of Cal.*, 449 U.S. 232, 247 (1980) (Stevens, J., concurring in the judgment) (“‘Agency action’ is a statutory term that identifies the conduct of executive and administrative agencies that Congress intended to be reviewable in federal court.”).

31. Peter L. Strauss et al., *Gellhorn & Byse’s Administrative Law* 51 (11th ed. 2011). A rule is defined as “the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency.” 5 U.S.C. § 551(4). An order is “the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing.” *Id.* § 551(6).

32. Rulemaking is the “agency process for formulating, amending, or repealing a rule.” 5 U.S.C. § 551(5). Adjudication refers to the “agency process for the formulation of an order.” *Id.* § 551(7).

33. See Strauss et al., *supra* note 31, at 51.

34. *Id.* at 114.

35. *Id.* at 376.

36. See *infra* section I.A.2 (describing the timing doctrines of exhaustion, finality, and ripeness).

37. See Strauss et al., *supra* note 31, at 1193 (describing the three methods). Section 702 of the APA provides a basic presumption of judicial review of agency action and inaction. 5 U.S.C. § 702 (“A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.”).

38. 5 U.S.C. § 703.

typically grant review jurisdiction to federal appellate courts.<sup>39</sup> “General statutory review,” provided for in section 704 of the APA,<sup>40</sup> is the means of action available when an agency’s organic statute does not otherwise provide for review.<sup>41</sup> Importantly, the APA itself does not give subject matter jurisdiction to federal courts to review agency action;<sup>42</sup> instead, the general federal question jurisdiction statute, 28 U.S.C. § 1331, places such jurisdiction in the federal district courts.<sup>43</sup> Finally, “nonstatutory review” includes “specific relief,” comprising actions for declaratory or injunctive relief and remedies related to specific writs available under the All Writs Act.<sup>44</sup> Section 703 of the APA expressly contemplates the availability of nonstatutory review when special statutory review is unavailable or inadequate.<sup>45</sup>

2. *Exhaustion, Finality, and Ripeness.* —Whichever category of action for review a party is able to pursue, it must also show that the timing of its suit is appropriate. Timing of judicial oversight of agency action is governed by the three overlapping doctrines of exhaustion, finality, and ripeness, which can be difficult to distinguish in many circumstances.<sup>46</sup> The exhaustion doctrine traditionally instructed that parties must use and complete agencies’ internal procedures for raising objections to their actions before turning to the courts,<sup>47</sup>

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39. See Strauss et al., *supra* note 31, at 1193 (drawing the connection between section 703 of the APA and agency organic statutes, which frequently contain provisions authorizing judicial review).

40. 5 U.S.C. § 704; see also Strauss et al., *supra* note 31, at 1195 (identifying section 704 as the authorization for general statutory review).

41. See Strauss et al., *supra* note 31, at 1195.

42. See *Califano v. Sanders*, 430 U.S. 99, 107 (1977) (“We thus conclude that the APA does not afford an implied grant of subject-matter jurisdiction permitting federal judicial review of agency action.”).

43. See Strauss et al., *supra* note 31, at 1195.

44. See *id.* at 1198–99 (identifying specific relief as a variety of nonstatutory review in order to “correct administrative violations of federal rights”).

45. 5 U.S.C. § 703 (“The form of proceeding for judicial review is . . . in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction.”); see also Strauss et al., *supra* note 31, at 1200 (“Section 703 of the APA expressly acknowledges the important tradition of nonstatutory review”).

46. See 2 *Pierce*, *supra* note 28, § 15.1, at 1218–19 (explaining the overlap between the three doctrines). Notably, in the well-known case *Ticor Title Insurance Co. v. FTC*, each of the three judges on a D.C. Circuit panel agreed that review of the dispute was premature, but each cited a different doctrine as the reason. 814 F.2d 731, 732 (D.C. Cir. 1987).

47. See Strauss et al., *supra* note 31, at 1347 (describing exhaustion). Common law exhaustion doctrine imposes a “flexible and pragmatic” duty for parties challenging agency action to first exhaust any available administrative remedies. 2 *Pierce*, *supra* note 28, § 15.2, at 1219. The Supreme Court described the doctrine in 1938 in *Myers v. Bethlehem Shipbuilding Corp.*, identifying a “long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted.” 303 U.S. 41, 50–51 (1938). In *Leedom v. Kyne*, the Court granted an exception to the common law duty, however, and upheld an injunction against the NLRB after determining the agency had clearly acted contrary to an explicit statutory prohibition. 358 U.S. 184, 188–89 (1958); see also 2 *Pierce*, *supra* note 28, § 15.2, at 1225 (detailing the *Leedom* holding). The D.C. Circuit has referred to the *Leedom* exception as a “Hail Mary pass” only applicable when a statute

although parties challenging action to which the APA applies need not exhaust available agency procedures before seeking judicial review unless explicitly required by statute or regulation.<sup>48</sup> Finality doctrine, in the form of the final agency action requirement imposed in common law as well as the APA and many agency organic statutes,<sup>49</sup> weighs whether the agency's action is complete or is rather part of a larger, ongoing process of decisionmaking.<sup>50</sup> Importantly, if a party has not yet exhausted mandatory administrative remedies to challenge an action or is in the process of pursuing them, the action is not final.<sup>51</sup> Finally, ripeness doctrine considers whether review of an action is appropriate at the time of the filing or whether waiting for a future event before beginning review would be preferable.<sup>52</sup> Courts use ripeness in the administrative context primarily to determine whether rules are susceptible to judicial review prior to enforcement (pre-enforcement review) and to decide whether informal statements of an agency position are reviewable.<sup>53</sup>

3. *Standards for Equitable Relief.* —In addition to the three main categories of judicial review of agency action,<sup>54</sup> the APA contemplates

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impliedly precludes review of agency action, the plaintiff has no alternative procedure for review of a statutory claim, and the agency “plainly acts ‘in excess of its delegated powers and contrary to a specific prohibition in the’ statute that is ‘clear and mandatory.’” *Nyunt v. Chairman, Broad. Bd. of Governors*, 589 F.3d 445, 449 (D.C. Cir. 2009) (quoting *Leedom*, 358 U.S. at 188).

48. *Darby v. Cisneros*, 509 U.S. 137, 154 (1993) (“[W]here the APA applies, an appeal to ‘superior agency authority’ is a prerequisite to judicial review *only* when expressly required by statute or when an agency rule requires appeal before review and the administrative action is made inoperative pending that review.”). Congress has in some organic statutes imposed such a mandatory duty to exhaust administrative remedies. See 2 *Pierce*, supra note 28, § 15.3, at 1241.

49. See 2 *Pierce*, supra note 28, § 15.11, at 1307–08.

50. See *Strauss et al.*, supra note 31, at 1347 (describing finality doctrine); see also 2 *Pierce*, supra note 28, § 15.2, at 1219 (explaining the difficulty of distinguishing finality and exhaustion and noting that most courts rejecting claims on exhaustion grounds could alternatively dispose of them under finality doctrine). While the Supreme Court has never fully distinguished finality from exhaustion, it has established a two-part test for whether an agency action is final. See 2 *Pierce*, supra note 28, § 15.11, at 1308–09 (discussing finality and exhaustion and describing the Court’s test). First, the action must “mark the ‘consummation’ of the agency’s decisionmaking process.” *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997) (quoting *Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 113 (1948)). The action must also “be one by which ‘rights or obligations have been determined,’ or from which ‘legal consequences will flow.’” *Id.* at 178 (quoting *Port of Bos. Marine Terminal Ass’n v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71 (1970)).

51. See 2 *Pierce*, supra note 28, § 15.1, at 1219.

52. See *Strauss et al.*, supra note 31, at 1347.

53. See 2 *Pierce*, supra note 28, § 15.1, at 1219 (describing the typical applications of ripeness doctrine in agency action litigation). The Supreme Court announced the prevailing two-prong doctrine of ripeness in 1967 in *Abbott Laboratories v. Gardner*, holding that courts must evaluate “both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.” 387 U.S. 136, 149 (1967). The case was the first in which the Court held that a party may seek judicial review of an agency rule before being subject to its restrictions (in other words, obtaining pre-enforcement review) as long as the two-part ripeness inquiry is satisfied. See *id.* at 148–49; see also 2 *Pierce*, supra note 28, § 15.14, at 1359 (explaining this holding’s departure from historical doctrine).

54. See supra section I.A.1.

equitable relief to suspend enforceability of agency action pending judicial review, notably mentioning “irreparable injury” as a prerequisite.<sup>55</sup> In *Virginia Petroleum Jobbers Ass’n v. Federal Power Commission*, the D.C. Circuit established a four-factor test to determine whether a party has made an adequate showing to merit a stay of administrative action pending review:

- (1) Has the petitioner made a strong showing that it is likely to prevail on the merits of its appeal? . . . (2) Has the petitioner shown that without such relief, it will be irreparably injured? . . . (3) Would the issuance of a stay substantially harm other parties interested in the proceedings? . . . (4) Where lies the public interest?<sup>56</sup>

Although first presented in a suit seeking a stay of agency action pending review, the *Virginia Petroleum Jobbers* factors have become the general test for evaluating motions for preliminary injunctions in civil litigation.<sup>57</sup> Courts have further applied the framework in considering motions for temporary restraining orders.<sup>58</sup> The Supreme Court has generally embraced the factors for stays pending review of orders by lower courts and agencies,<sup>59</sup> as well as for preliminary injunctions,<sup>60</sup> although the Court has since explained the technical

55. See 5 U.S.C. § 705 (2012) (“On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court . . . may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.”). Section 705 was a codification of the holding in *Scripps-Howard Radio, Inc. v. FCC*, 316 U.S. 4 (1942). See Ronald M. Levin, “Vacation” at Sea: Judicial Remedies and Equitable Discretion in Administrative Law, 53 *Duke L.J.* 291, 324 (2003) (identifying the source of section 705). *Scripps-Howard* is a crucial doctrinal development laying the foundation for later All Writs Act jurisprudence. See *infra* notes 108–110 and accompanying text.

56. 259 F.2d 921, 925 (D.C. Cir. 1958). The D.C. Circuit later held that the factors “also apply to motions for preliminary injunctions and motions for stays of district court orders pending appeal.” *Wash. Metro. Area Transit Comm’n v. Holiday Tours, Inc.*, 559 F.2d 841, 842 n.1 (D.C. Cir. 1977).

57. See Levin, *supra* note 55, at 325 n.142 (“With minor variations, the test remains authoritative.”).

58. See, e.g., *Morgan Stanley DW Inc. v. Rothe*, 150 F. Supp. 2d 67, 72 (D.D.C. 2001) (explaining that “the court considers the same factors in ruling on a motion for a temporary restraining order and a motion for a preliminary injunction,” citing case law and listing the four *Jobbers* factors). The factors “have been cited and applied in countless lower-court cases.” 11 Charles Alan Wright et al., *Federal Practice and Procedure* § 2904 (3d ed. 2013).

59. See *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987) (identifying the four factors). The Court had earlier noted the “established rule” that parties typically must make an adequate showing of irreparable injury in order to win a stay of an administrative action, citing *Virginia Petroleum Jobbers*, although it did not discuss the remaining three factors. See *In re Permian Basin Area Rate Cases*, 390 U.S. 747, 773 (1968) (citing *Va. Petroleum Jobbers Ass’n*, 259 F.2d at 925).

60. *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 20–22 (2008). Notably, although *Winter* was the first case in which the Court had directly named the four factors for preliminary injunctions, it had adopted and applied each in piecemeal fashion as early as the 1930s. See Thomas R. Lee, *Preliminary Injunctions and the Status Quo*, 58 *Wash. & Lee L. Rev.* 109, 114 (2001).

distinction between stays and injunctions and described the different functions of the two forms of relief.<sup>61</sup>

While each of the four traditional factors is a component of the analysis, the most important step to obtain interim relief is a showing that the movant would suffer irreparable harm without immediate court action.<sup>62</sup> Although no concise and exhaustive definition of irreparable harm exists, the D.C. Circuit in *Wisconsin Gas Co. v. FERC* presented a set of guiding principles particularly applicable in the agency litigation context.<sup>63</sup> To obtain a stay of final agency action pending judicial review, the movant's alleged injury "must be both certain and great . . . [and] must be actual and not theoretical," with an imminence that demands court intervention.<sup>64</sup> Additionally, economic loss alone does not constitute irreparable harm; monetary loss can meet the threshold only if it "threatens the very existence of the movant's business,"<sup>65</sup> while an inability to obtain "adequate compensatory or other corrective relief . . . at a later date, in the ordinary course of litigation" strengthens the movant's claim.<sup>66</sup> Finally, the movant must provide evidence that the claimed harm is likely to occur and that the harm is caused by the action the party seeks to enjoin.<sup>67</sup> Thus, merely speculative and likely recoverable economic loss cannot constitute irreparable injury sufficient to merit relief from agency action pending judicial review.<sup>68</sup>

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61. See *Nken v. Holder*, 556 U.S. 418, 428–36 (2009) (explaining that an injunction is "a means by which a court tells someone what to do or not to do," while a stay "operates upon the judicial proceeding").

62. 11A Charles Alan Wright et al., *Federal Practice and Procedure* § 2948.1 (3d ed. 2013).

63. 758 F.2d 669, 674 (1985).

64. *Id.*

65. *Id.* (citing *Wash. Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 n.2 (D.C. Cir. 1977)).

66. *Id.* (internal quotation marks omitted) (quoting *Va. Petroleum Jobbers Ass'n v. Fed. Power Comm'n*, 259 F.2d 921, 925 (D.C. Cir. 1958)). Courts have read this prong of *Wisconsin Gas* somewhat more favorably to movants in more recent decisions, holding, for example, that "financial injury" may be found irreparable when no adequate relief is available through litigation, without the requirement of an existential threat. See *Mexichem Specialty Resins, Inc. v. EPA*, 787 F.3d 544, 555 (D.C. Cir. 2015); see also *Texas v. EPA*, 829 F.3d 405, 434 (5th Cir. 2016) (reading *Wisconsin Gas* to allow a finding of irreparable harm both when the movant's existence is threatened and when subsequent adequate relief is unavailable). Other circuits, however, have long maintained a less rigorous threshold for irreparable harm, although outside the context of injunctions against agencies. See, e.g., *Freedom Holdings, Inc. v. Spitzer*, 408 F.3d 112, 114 (2d Cir. 2005) (explaining that "[a]n anticipated loss of market share growth may suffice as an irreparable harm"); *Novartis Consumer Health, Inc. v. Johnson & Johnson Merck Consumer Pharm. Co.*, 290 F.3d 578, 596 (3d Cir. 2002) (holding that anticipated loss of market share may demonstrate irreparable harm and citing similar conclusions in other circuits).

67. See *Wis. Gas Co.*, 758 F.2d at 674.

68. See *id.* at 675.

B. *The All Writs Act*

1. *Background of the All Writs Act.*—The All Writs Act is a short but potent statute.<sup>69</sup> It derives from two provisions of the Judiciary Act of 1789, which authorized the Supreme Court to issue writs to lower federal courts “in cases warranted by the principles and usages of law” and gave all federal courts the power to issue writs “which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law.”<sup>70</sup> The provisions were consolidated in their current location in the U.S. Code in 1948.<sup>71</sup> The “writs” the statute refers to are the set of special court orders developed in English common law and adopted by early American courts,<sup>72</sup> including such historic instruments as writs of scire facias and ne exeat,<sup>73</sup> among others including mandamus, prohibition, certiorari, and habeas corpus.<sup>74</sup> The writs have fallen into varying degrees of obscurity, although criminal defendants at times petition for writs of audita querela (seeking relief due to new evidence or defenses)<sup>75</sup> and coram nobis (attacking a judgment based on alleged fundamental errors),<sup>76</sup> typically with little success.<sup>77</sup>

While the scope of the historic writs is somewhat limited, the Supreme Court has established principles governing use of the All Writs Act that have expanded the statute’s reach significantly in certain contexts. Perhaps the broadest statement of All Writs Act authority came in *United States v. New York Telephone Co.*, in which the Court found that the Act gives a federal court power to “issue such commands . . . as may be necessary or appropriate to effectuate and prevent the frustration of orders it has previously issued in its

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69. 28 U.S.C. § 1651(a) (2012). The full text states that “[t]he Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.” *Id.*

70. 16 Wright et al., *supra* note 5, § 3933 (internal quotation marks omitted) (quoting Act of Sept. 24, 1789, ch. 20, §§ 13–14, 1 Stat. 73, 80–81).

71. See Daniel J. Wacker, The “Unreviewable” Court-Martial Conviction: Supervisory Relief Under the All Writs Act from the United States Court of Military Appeals, 10 Harv. C.R.-C.L. L. Rev. 33, 57 n.113 (1975) (providing a detailed history of the Act’s passage and evolution).

72. See Strauss et al., *supra* note 31, at 1199. A writ is a written court order commanding the recipient to take or refrain from taking an action. See Writ, Black’s Law Dictionary (10th ed. 2014).

73. See Fruqan Mouzon, Forgive Us Our Trespasses: The Need for Federal Expungement Legislation, 39 U. Mem. L. Rev. 1, 18 (2008) (listing historic common law writs).

74. See Joan Steinman, The Newest Frontier of Judicial Activism: Removal Under the All Writs Act, 80 B.U. L. Rev. 773, 778 & n.8 (2000) (detailing the historic and modern writs); see also Lonny Sheinkopf Hoffman, Removal Jurisdiction and the All Writs Act, 148 U. Pa. L. Rev. 401, 433–37 (1999) (providing additional historical discussion); Wacker, *supra* note 71, at 52 n.94 (detailing the writs).

75. See Audita Querela, Black’s Law Dictionary (10th ed. 2014).

76. See Coram Nobis, Black’s Law Dictionary (10th ed. 2014); see also *United States v. Morgan*, 346 U.S. 502, 506 (1954) (explaining the statutory basis of the writ).

77. See, e.g., *United States v. Lugo*, 100 F. Supp. 3d 285, 289–92 (E.D.N.Y. 2015) (defining and discussing the writs and denying petitions for each on the grounds that neither is appropriate when relief is available under the habeas corpus statute, 28 U.S.C. § 2241 (2012)).

exercise of jurisdiction otherwise obtained.”<sup>78</sup> In appropriate circumstances, such power allows courts to issue binding orders to nonparties to litigation who are “in a position to frustrate the implementation of a court order or the proper administration of justice.”<sup>79</sup> Somewhat strikingly, the Court in *New York Telephone* did not identify a common law writ providing the procedural vehicle for the order at issue in the case, a directive by a district court to a telephone provider to install surveillance devices on its lines to assist with an FBI investigation.<sup>80</sup> The holding illustrates the broad modern scope of the Act in the law enforcement context.<sup>81</sup>

The Court later provided some limiting clarifications for application of the Act. First and crucially, the Act does not provide an independent source of subject matter jurisdiction to federal courts.<sup>82</sup> The principle derives directly from the statute’s requirement that orders under the Act be “in aid of” the issuing court’s jurisdiction, which must already exist on an independent statutory basis.<sup>83</sup> Importantly, the jurisdiction to be aided may be merely prospective: An appellate court may issue writs relating to matters that would come before the court if appealed.<sup>84</sup> Second, the authority the All Writs Act

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78. 434 U.S. 159, 172 (1977).

79. *Id.* at 174.

80. See *id.* at 161–63. In a spirited dissent, Justice Stevens argued that this result transformed the All Writs Act into an “open-ended grant of authority to federal courts” by ignoring the statutory requirements that orders be in aid of the court’s jurisdiction and that the means selected be “analogous to a common law writ.” See *id.* at 187–90 (Stevens, J., dissenting in part).

81. The FBI’s attempt to force Apple to “unlock” the iPhone belonging to the perpetrators of the December 2015 mass shooting in San Bernardino, California, is a prominent contemporary example of the All Writs Act’s use in a law enforcement investigation. See Eric Lichtblau & Katie Benner, Apple Fights Order to Unlock San Bernardino Gunman’s iPhone, N.Y. Times (Feb. 17, 2016), <http://www.nytimes.com/2016/02/18/technology/apple-timothy-cook-fbi-san-bernardino.html> (on file with the *Columbia Law Review*). For a scholarly account of this use of the All Writs Act, see generally John L. Potapchuk, Note, A Second Bite at the Apple: Federal Courts’ Authority to Compel Technical Assistance to Government Agents in Accessing Encrypted Smartphone Data Under the All Writs Act, 57 B.C. L. Rev. 1403, 1428–30 (2016) (describing use of the All Writs Act to compel nonparties to assist with government investigations).

82. See *United States v. Denedo*, 556 U.S. 904, 913 (2009) (“[T]he All Writs Act and the extraordinary relief the statute authorizes are not a source of subject-matter jurisdiction.”); see also *Clinton v. Goldsmith*, 526 U.S. 529, 534–35 (1999) (reversing the U.S. Court of Appeals for the Armed Forces’ injunction of a convicted servicemember’s sentence under the All Writs Act on grounds that such action was outside that court’s jurisdiction and that the Act does not confer jurisdiction itself).

83. See *Clinton*, 526 U.S. at 534–35 (“[T]he Act does not enlarge [courts’] jurisdiction.” (citation omitted) (citing *Pa. Bureau of Corr. v. U.S. Marshals Serv.*, 474 U.S. 34, 41 (1985))).

84. *Roche v. Evaporated Milk Ass’n*, 319 U.S. 21, 24–25 (1943). In a key step, the Court in *Roche* explained that appellate court authority to issue writs under the Act extends beyond writs “in aid of a jurisdiction *already* acquired by appeal” to allow writs in cases “within [a court’s] appellate jurisdiction *although no appeal has been perfected.*” *Id.* (emphasis added). In other words, the Act allows courts to issue writs in aid of appellate jurisdiction they have not yet acquired but would if a dispute reached that level on its merits. This principle of protecting prospective or future jurisdiction derives from the All Writs Act’s purpose of ensuring that lower courts do not “defeat” appellate court jurisdiction by taking actions improperly preventing

gives to courts is residual in nature; courts may not resort to the Act if another statute specifically addresses the question of court authority at issue in the case.<sup>85</sup> While the Act gives courts power to take extraordinary measures when necessary, “it does not authorize them to issue ad hoc writs whenever compliance with statutory procedures appears inconvenient or less appropriate.”<sup>86</sup> This principle also draws from the Act’s requirement that court action be “necessary or appropriate,” a prerequisite not met if alternative remedies are available,<sup>87</sup> although a sufficient need due to “exceptional circumstances” may satisfy this threshold in some cases.<sup>88</sup>

2. *Forms of Relief Under the All Writs Act.* —Before turning to the development and application of All Writs Act authority in administrative agency cases, additional clarification is necessary on the forms of relief on which this inquiry focuses. The most basic form of relief under the All Writs Act is the set of common law writs authorized by the statute.<sup>89</sup> While several have largely disappeared from modern jurisprudence,<sup>90</sup> new doctrine related to the writ of habeas corpus appeared in the set of cases relating to detainees at the Guantanamo Bay facility.<sup>91</sup> The historical writ that remains most relevant in the administrative context is mandamus, defined as a writ from a reviewing court ordering action by a lower court or other government officer or entity,

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appeals; the writs the Act authorizes provide a means to correct such errors. See *id.* at 25; see also 16 Wright et al., *supra* note 5, § 3932 (detailing the doctrine allowing courts to issue writs “in aid of appellate jurisdiction yet to be acquired”).

85. *Pa. Bureau of Corr. v. U.S. Marshals Serv.*, 474 U.S. 34, 43 (1985). In a key decision, the Court reversed a writ directing the U.S. Marshals Service to supervise a set of state inmates called to testify at a federal trial, finding that the existing federal habeas corpus regime already provided the exclusive mechanism for transport of state prisoners. *Id.* at 35–38, 43. Importantly, the Court distinguished *New York Telephone* on grounds that in that case, the All Writs Act granted the district court jurisdiction over the *only* party that could install court-ordered surveillance devices required for an FBI investigation; here, in contrast, the existing habeas corpus statute provided an adequate solution to bring the inmates to court, and thus the All Writs Act had no application. See *id.* at 42 n.7.

86. *Id.* at 43. The Court later applied this principle to end the practice of using the All Writs Act to remove cases from state to federal court, holding that the removal statute, 28 U.S.C. § 1441, was the exclusive vehicle for removal and could not be circumvented by means of the All Writs Act. See *Syngenta Crop Prot., Inc. v. Henson*, 537 U.S. 28, 32–33 (2002) (“Petitioners may not, by resorting to the All Writs Act, avoid complying with the statutory requirements for removal.”).

87. See *Clinton*, 526 U.S. at 537 (finding All Writs Act–based relief not necessary or appropriate in light of the petitioner’s other statutory options for relief).

88. See *Pa. Bureau of Corr.*, 474 U.S. at 43 (noting that “exceptional circumstances” in which existing remedies are inadequate may render All Writs Act action “necessary and appropriate”).

89. See *supra* notes 72–74 and accompanying text (describing the writs); see also Strauss et al., *supra* note 31, at 1200 n.8 (identifying the All Writs Act as the basis for federal court authority to issue writs).

90. See *supra* text accompanying notes 72–75.

91. See generally Dimitri D. Portnoi, Note, *Resorting to Extraordinary Writs: How the All Writs Act Rises to Fill the Gaps in the Rights of Enemy Combatants*, 83 N.Y.U. L. Rev. 293, 304–15 (2008) (describing use of the All Writs Act by Guantanamo detainees).

usually to correct a prior action or failure to act.<sup>92</sup> In *Cheney v. United States District Court*, the Supreme Court, explaining that the All Writs Act codified the common law writ of mandamus, identified three requirements to obtain a writ: The petitioner must have no other adequate means to attain relief (including appeal), the petitioner must show a “clear and indisputable” right to the writ, and the issuing court must be satisfied that the writ is appropriate under the circumstances.<sup>93</sup> Use of the All Writs Act to obtain writs of mandamus to agencies is one of the two forms of relief at issue here.

Beyond the common law writs, lower courts have also derived authority under the All Writs Act to issue injunctions and other forms of equitable relief for a variety of purposes in aid of their jurisdiction.<sup>94</sup> A basic example is the authority to enjoin vexatious litigants from filing repeated and frivolous suits and appeals.<sup>95</sup> A more substantive power exists to enjoin the filing or proceeding of parallel litigation that threatens the jurisdiction of the issuing court. For example, in *In re Baldwin-United Corp.*, a multidistrict class action against a set of securities brokers, the Second Circuit upheld an All Writs Act injunction preventing states that were not parties from bringing related suits that would affect the rights of plaintiffs or class members.<sup>96</sup> Importantly, the *Baldwin-United* court drew a key distinction between the type of relief issued

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92. See Mandamus, Black’s Law Dictionary (10th ed. 2014). Key to note is that common law mandamus, which the All Writs Act authorizes in *reviewing* courts, is distinct from the writ authorized by the 1962 Mandamus and Venue Act, which gives *district* courts original jurisdiction over actions “in the nature of mandamus” to compel any federal official to perform a duty owed to a plaintiff. 28 U.S.C. § 1361 (2012); see also 14 Charles Alan Wright et al., *Federal Practice and Procedure* § 3655 (4th ed. 2015) (describing the distinction between “original mandamus” relief under 28 U.S.C. § 1361 and “appellate mandamus” under the All Writs Act).

93. 542 U.S. 367, 380–81 (2004) (internal quotation marks omitted) (quoting *Kerr v. U.S. Dist. Court*, 426 U.S. 394, 403 (1976)); see also *Kerr*, 426 U.S. at 403 (identifying loosely the three-part test formalized in *Cheney*). While the Court in *Cheney* acknowledged the high bar this sets for obtaining a writ, it explained that such a heavy burden is appropriate considering that common law mandamus is a “drastic and extraordinary” remedy “reserved for really extraordinary causes.” *Cheney*, 542 U.S. at 380 (quoting *Ex parte Fahey*, 332 U.S. 258, 259–60 (1947)). Nonetheless, the Court stated that the three hurdles, “however demanding, are not insuperable,” citing instances in which the Court issued the writ to remedy significant separation of powers or federalism issues. *Id.* at 381.

94. Some scholarship has in fact referred to the injunction as a type of writ available under the All Writs Act, although this characterization is not universal. Compare Wacker, *supra* note 71, at 52 n.94 (referring to a “writ of injunction”), and Steinman, *supra* note 74, at 778 & n.8 (same), with 16 Wright et al., *supra* note 5, § 3932.2 (describing All Writs Act–based power to issue injunctions without reference to a writ).

95. See, e.g., *Molski v. Evergreen Dynasty Corp.*, 500 F.3d 1047, 1056–61 (9th Cir. 2007) (describing and applying standards for issuing an All Writs Act injunction barring future litigation); *Green v. Warden, U.S. Penitentiary*, 699 F.2d 364, 367–68 (7th Cir. 1983) (finding authority to enjoin future litigation by a filer of hundreds of suits in the All Writs Act’s provision of authority to act in aid of the court’s jurisdiction).

96. 770 F.2d 328, 338 (2d Cir. 1985). The court held that such an injunction was necessary “to prevent third parties from thwarting the court’s ability to reach and resolve the merits of the federal suit before it.” *Id.* at 338–39. For additional analysis of *Baldwin-United*, see Joshua J. Wes, Note, *The Anti-Injunction and All Writs Acts in Complex Litigation*, 37 *Loy. L.A. L. Rev.* 1603, 1609–10, 1625–27 (2004).

in the case, an All Writs Act injunction protecting the court's jurisdiction from interference by nonparties, and All Writs Act injunctions that "preserve the status quo" among parties pending a future decision.<sup>97</sup> Courts have indeed found authority under the All Writs Act to issue such "status quo" injunctions when necessary in aid of their jurisdiction.<sup>98</sup> In addition to writs of mandamus to agencies under the All Writs Act, doctrine concerning the Act's use as a means to issue status quo injunctions and stays in the agency litigation context is the second and major focus of this inquiry.

## II. ALL WRITS ACT RELIEF IN ADMINISTRATIVE AGENCY LITIGATION

Despite the principles the Supreme Court has articulated about the uses and functions of the All Writs Act,<sup>99</sup> the Act continues to generate "considerable litigation and confusion as to its scope."<sup>100</sup> Its role as a mechanism to set aside the timing requirements for judicial oversight of nonfinal agency action is one such area of dispute. The key topic of disagreement and confusion, with important implications, is the showing a party must make to obtain a status quo injunction staying the effect of an agency's preliminary decision while the party pursues administrative appeals. The other component of agency-related All Writs Act jurisprudence, although less disputed, concerns writs of mandamus to agencies. While the number of cases involving All Writs Act-based review of nonfinal agency action is relatively low, the issue recurs sufficiently often to merit discussion, and such challenges could plausibly become more common in light of the ongoing challenge to the legitimacy of the regulatory state.<sup>101</sup> Moreover, the lack of a broadly developed jurisprudence on the issue increases the potential for harm from decisions that diverge on questionable grounds from the doctrine that does exist.

To be sure, their separate historical origins aside,<sup>102</sup> writs of mandamus and injunctions to agencies are both court directives to compel some type of action, whether it involves issuing or refraining from issuing or enforcing an order, or modifying or stopping a proceeding. Indeed, the Supreme Court in multiple cases has suggested that injunctions compelling action from agencies were equivalent to writs of mandamus.<sup>103</sup> Review of case law, however, reveals

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97. *In re Baldwin-United*, 770 F.2d at 338.

98. See 16 Wright et al., *supra* note 5, § 3932.2 (discussing the power of courts of appeals to issue injunctions under the All Writs Act).

99. See *supra* section I.B.

100. 14AA Wright et al., *supra* note 7, § 3691.

101. See *supra* notes 18–25 and accompanying text.

102. See Clark Byse & Joseph V. Fiocca, Section 1361 of the Mandamus and Venue Act of 1962 and "Nonstatutory" Judicial Review of Federal Administration Action, 81 Harv. L. Rev. 308, 318–20 (1967) (discussing the common law origin of mandamus as compared to the equitable nature of injunctions).

103. See *id.* at 331–32 (identifying two cases in which the Court made this assertion). The Court in both cases was considering "mandatory injunctions," traditionally defined as "[a]n injunction that orders an affirmative act or mandates a specified course of conduct." Injunction,

that regulated entities seek the two remedies for different purposes and at different moments in the administrative process. Parties petition for writs of mandamus to agencies to halt ongoing proceedings on the basis of some fundamental alleged issue not correctable on review of final agency action<sup>104</sup> or to compel a decision after an extraordinary delay by the agency.<sup>105</sup> In contrast, parties move for injunctive relief once the agency has made a preliminary decision and the impacted party seeks to stay its effect while it pursues administrative remedies.<sup>106</sup> While some agencies automatically stay their initial decisions when parties file for administrative review,<sup>107</sup> the All Writs Act operates as a gap-filler to compel those that do not to maintain the status quo until the time of final agency action and judicial review.

This Part provides an overview of the approaches courts have taken in assessing requests for both types of All Writs Act relief against agencies. Section II.A discusses key Supreme Court precedents that are the foundation for this area of doctrine. Section II.B explores the differing paths the U.S. Courts of Appeals for the D.C. and Eleventh Circuits have taken in this area, focusing especially on their divergence as to the showing parties must make to obtain status quo injunctions. Finally, section II.C examines three additional cases that illustrate the need for clearer standards for All Writs Act relief. Such

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Black's Law Dictionary (10th ed. 2014). A prohibitory or negative injunction, in contrast, "forbids or restrains an act." Id. Notably, the APA references the distinction as well. 5 U.S.C. § 703 (2012). Commentators have long argued, however, that the difference between the two is illusory and neither practical nor helpful to draw. See, e.g., Kenneth Culp Davis, Mandatory Relief from Administrative Action in the Federal Courts, 22 U. Chi. L. Rev. 585, 590 (1955) ("Quibbling about what is affirmative and what is negative [with regard to injunctions] is unprofitable and injurious."); Developments in the Law: Injunctions, 78 Harv. L. Rev. 994, 1062 (1965) (explaining that any rule based on the distinction between mandatory and prohibitory injunctions is "ridiculously easy to circumvent" because any mandatory injunction can be reframed in prohibitory terms). The conclusion from these observations is that a distinction between writs of mandamus and any type of injunction to agencies must come from differences in their use by litigants rather than any inherent distinguishing qualities.

104. E.g., *Pub. Util. Comm'r v. Bonneville Power Admin.*, 767 F.2d 622, 630 (9th Cir. 1985). This use is consistent with broader mandamus doctrine and the limited bases that exist for issuing writs to lower courts. See *Cheney v. U.S. Dist. Court*, 542 U.S. 367, 380–81 (2004); see also *supra* note 93 (elaborating on mandamus doctrine).

105. E.g., *George Kabeller, Inc. v. Busey*, 999 F.2d 1417, 1419–23 (11th Cir. 1993); *Telecomms. Research & Action Ctr. v. FCC (TRAC)*, 750 F.2d 70, 72 (D.C. Cir. 1984); see also *infra* section II.B.1 (discussing the *TRAC* case in detail).

106. E.g., *V.N.A. of Greater Tift Cty., Inc. v. Heckler (VNA)*, 711 F.2d 1020, 1030 (11th Cir. 1983); see also *infra* section II.B.2 (discussing *VNA*).

107. See, e.g., 29 C.F.R. § 1955.45 (2016) (mandating stays of ALJ decisions on certain Occupational Safety and Health Administration matters pending possible administrative appeal); *id.* § 4041.44(e) (explaining that requesting reconsideration of certain Pension Benefit Guaranty Corporation decisions results in an automatic stay pending a new decision); 42 C.F.R. § 1005.22 (2016) (providing for an automatic stay of certain Department of Health and Human Services ALJ decisions upon administrative appeal). In contrast, some agencies specify that issuance of a stay is at the agency's discretion. See, e.g., 34 C.F.R. § 81.20(f) (2016) (granting Department of Education ALJs discretion to decide whether to stay an initial decision when a party appeals); 49 C.F.R. § 1115.3(f) (2016) (granting the Surface Transportation Board discretion as to whether to grant an appeal of certain initial decisions and, if so, whether to stay the initial decision).

standards will ideally further two complementary values: protecting agencies from unwarranted intervention, but preserving regulated entities' fair access to review when merited.

A. *Foundational Supreme Court Case Law*

The Supreme Court established its foundational jurisprudence on the All Writs Act's role as a basis for review of nonfinal agency action between the 1940s and 1970s. This section provides an overview of these key holdings as a background to the differing lower court approaches that followed.

1. *Basis of the All Writs Act Status Quo Injunction.* —The Court's first significant statement about All Writs Act authority to provide interim relief from agency action came four years before the passage of the APA in *Scripps-Howard Radio, Inc. v. FCC*.<sup>108</sup> In finding federal court authority to stay final agency action pending judicial review, the Court noted that while “[n]o court can make time stand still,” appellate courts have always had power under the All Writs Act “to prevent irreparable injury to the parties or to the public” resulting from enforcement of an administrative action that the court might later review and reject.<sup>109</sup> The Court's notable emphasis on the Act's purpose as a mechanism to prevent irreparable injury from administrative action was a key development.<sup>110</sup> The Court reaffirmed *Scripps-Howard* two decades later in *Arrow Transportation Co. v. Southern Railway Co.*, noting that *Scripps-Howard* recognized an All Writs Act power to “preserve the court's jurisdiction or maintain the status quo by injunction pending review of an agency's action.”<sup>111</sup> Notably, while the Court found it was precluded from issuing the injunction sought against the Interstate Commerce Commission, it was not because of a failure to show irreparable injury, but rather a statutory bar to relief.<sup>112</sup>

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108. 316 U.S. 4 (1942).

109. *Id.* at 9. The Court explained that this authority is “part of [courts'] traditional equipment for the administration of justice,” citing the version of the All Writs Act in force at the time and discussing its inclusion in the first Judiciary Act in 1789. *Id.* at 9–10. The Court also noted that judicial review of improper administrative action “would be an idle ceremony if the situation were irreparably changed before the correction could be made.” *Id.* at 10; see also Strauss et al., *supra* note 31, at 1205 (describing the power to issue stays identified in *Scripps-Howard* as a provision “[i]f all else fails” in seeking to stay a final agency action pending judicial review).

110. The Court took care to note, however, that irreparable injury does not result in an automatic stay and that granting of equitable relief remains a matter of judicial discretion. See *Scripps-Howard*, 316 U.S. at 10.

111. 372 U.S. 658, 671 n.22 (1963).

112. See *id.* at 675 (Clark, J., dissenting) (identifying the lack of dispute over lower court findings that the challenged agency action would cause irreparable injury to the plaintiffs). The dissent argued that the majority's statutory conclusion was flawed because it unnecessarily abrogated the “equitable power long recognized as existing in the courts” to grant injunctive relief “in compelling circumstances to prevent an irreparable injury and to maintain the status quo pending . . . [an agency] decision.” See *id.* at 677–79. In other words, the dissent would have

2. *The Landmark Precedent of FTC v. Dean Foods.* —The Court’s 1966 holding in *FTC v. Dean Foods Co.*<sup>113</sup> is “[t]he leading definition of court of appeals power to issue an injunction” under the All Writs Act.<sup>114</sup> Building directly on *Arrow Transportation* and applying the prospective jurisdiction doctrine articulated in *Roche v. Evaporated Milk Ass’n*,<sup>115</sup> the Court found power under the All Writs Act to enjoin a merger from proceeding before the FTC could rule on its legality.<sup>116</sup> Writing for the majority, Justice Clark explained that “the traditional power” conferred by the All Writs Act, as described in *Roche*, gives appellate courts authority “to issue injunctions to preserve the *status quo* while administrative proceedings are in progress and prevent impairment of the effective exercise of appellate jurisdiction.”<sup>117</sup> Without statutory direction from Congress to the contrary, agencies “charged with protecting the public interest” may request that an appellate court use All Writs Act authority to issue status quo injunctions necessary to protect the court’s jurisdiction.<sup>118</sup>

Three components of *Dean Foods* broadened the doctrine of All Writs Act relief in the agency context. First and critically, unlike in *Scripps-Howard* and *Arrow Transportation*,<sup>119</sup> the Court found authority under the Act to grant an

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applied the *Scripps-Howard* doctrine fully, finding sufficient irreparable injury to merit a status quo injunction against the agency under the All Writs Act. See *id.* at 679–81.

113. 384 U.S. 597 (1966).

114. 16 Wright et al., *supra* note 5, § 3932.2 n.8.

115. 319 U.S. 21 (1943); see also *supra* note 84 (discussing *Roche* and reviewing courts’ power under the All Writs Act to issue injunctions to protect their prospective jurisdiction).

116. *Dean Foods*, 384 U.S. at 605 (finding “ample precedent to support jurisdiction of the Court of Appeals to issue a preliminary injunction preventing the consummation of [the] agreement”). The Commission argued that without an injunction to stop the merger, one of the defendant companies would cease to exist, leaving the Commission with no effective remedy should it find the merger illegal. See *id.* at 599–600.

117. *Id.* at 603–04; see also *id.* at 608 (“It must be remembered that the courts of appeals derive their power to grant preliminary relief here not from the Clayton Act, but from the All Writs Act and its predecessors dating back to the first Judiciary Act of 1789.”). While the Court did not itself detail how failing to grant an injunction would impair its jurisdiction, it quoted at length to this effect from the FTC’s brief, which explained that allowing the merger to proceed would remove the Commission’s authority to rule on the merger and in turn deprive the courts of their jurisdiction to review an FTC order declaring it illegal. See *id.* at 599–600. Wright & Miller’s *Federal Practice and Procedure* notes the somewhat tenuous nature of this reasoning, especially considering the possibility that review of such an order might come in a different circuit from the one issuing the All Writs Act injunction or that the FTC might simply approve the merger. 16 Wright et al., *supra* note 5, § 3942. The treatise asserts, however, that the Court’s primary underlying concern was most likely preserving the FTC’s power, rather than the jurisdiction of a reviewing court, reducing the concern posed by the Commission’s somewhat questionable claim. *Id.*

118. See *Dean Foods*, 384 U.S. at 608. The dissent strenuously opposed this holding, arguing that no precedent supports the finding that an administrative agency with statutorily defined powers can seek relief not expressly authorized by Congress. See *id.* at 612 (Fortas, J., dissenting). Notably, Congress later gave the FTC such authority to block pending mergers by filing for interim relief. See 15 U.S.C. § 53(b) (2012); see also *FTC v. Exxon Corp.*, 636 F.2d 1336, 1343 (D.C. Cir. 1980) (describing the provision’s enactment and legislative history).

119. See *supra* section II.A.1.

injunction in advance of a final agency action (while the merger review was ongoing).<sup>120</sup> Second, the Court issued an injunction requested by the agency whose action was at issue, rather than a regulated entity.<sup>121</sup> Finally, the Court did not directly acknowledge the traditional doctrinal considerations for issuing a preliminary injunction. While the Court had not yet formally embraced the D.C. Circuit's four-factor framework for preliminary injunctions,<sup>122</sup> it had applied each of the factors as early as the late 1930s.<sup>123</sup> The explanation for this omission may lie in the Court's acceptance of the Commission's argument that without an injunction, it would be unable to devise "any effective remedy" for the illegal merger, thus speaking to irreparable harm.<sup>124</sup> In addition, the Court's statement that "an agency charged with protecting the public interest" may request an All Writs Act injunction suggests that the Court also considered the injunction to meet the fourth traditional factor.<sup>125</sup> Nonetheless, the granting of relief without confronting the presumably applicable doctrine is a notable step in the development of All Writs Act jurisprudence, although the key holding of the case remains the application of the prospective jurisdiction doctrine to judicial review of nonfinal agency action.<sup>126</sup>

3. *The Complication of Sampson v. Murray.* —The Court returned to *Dean Foods* in *Sampson v. Murray*,<sup>127</sup> reaching a different but distinguishable result as to the standards for obtaining interim relief from nonfinal agency action under the All Writs Act. The case concerned a dispute between the federal General Services Administration and a probationary worker it had begun proceedings to terminate; the employee sought interim relief under the All Writs Act pending review of her termination by the federal Civil Service

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120. In *Scripps-Howard*, the plaintiff sought a stay of a final FCC order pending judicial review. 316 U.S. 4, 5 (1942). In *Arrow Transportation*, the Court apparently considered the Interstate Commerce Commission's failure to act within a seven-month statutory period for review of a proposed rate increase to be final agency action. See 372 U.S. 658, 659–60 (1963).

121. See supra note 117 (describing the multiple steps of reasoning the Court employed to find that granting an injunction to an agency was in aid of court jurisdiction).

122. See supra section I.A.3 (describing the four *Virginia Petroleum Jobbers* factors and their ultimate adoption by the Court for preliminary injunctions in *Winter v. Natural Resources Defense Council*, 555 U.S. 7, 20–22 (2008)). The four traditional factors are the likelihood of prevailing on the merits, irreparable harm, harm to other parties from issuing the injunction, and the public interest. See *id.*

123. See Lee, supra note 60, at 114.

124. *FTC v. Dean Foods Co.*, 384 U.S. 597, 600 (1966).

125. See *id.* at 608; cf. *Virginian Ry. Co. v. Sys. Fed'n No. 40*, 300 U.S. 515, 552 (1937) ("Courts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved.").

126. See Richard F. Richards, *Preliminary Relief in Employment Discrimination Cases*, 66 Ky. L.J. 39, 59 (1977) ("The principle established in *Dean Foods* is that the All Writs Act allows a federal court to issue interim relief pending the completion of administrative proceedings when such relief is necessary to preserve the court's ability to issue an effective remedy should its jurisdiction attach.").

127. 415 U.S. 61 (1974).

Commission.<sup>128</sup> In other words, the plaintiff sought a status quo injunction in the context of nonfinal agency action while she pursued administrative remedies.<sup>129</sup> In reversing the grant of injunctive relief by the lower courts, which had applied the *Virginia Petroleum Jobbers* factors,<sup>130</sup> the Supreme Court found that not only *Scripps-Howard* and *Dean Foods*<sup>131</sup> but also the longstanding body of doctrine governing federal employment disputes factored in the All Writs Act analysis.<sup>132</sup> Because the relevant doctrine strongly disfavored court intervention in federal employment disputes, the Court concluded the employee here had to make a heightened showing of irreparable injury, beyond the showing required under the *Virginia Petroleum Jobbers* factors.<sup>133</sup> Temporary loss of income due to termination, the Court held, is typically insufficient for this showing—or even for the standard showing under *Virginia Petroleum Jobbers*.<sup>134</sup>

The principle underlying the *Murray* result is that the showing of irreparable harm a party must make to win interim relief from nonfinal agency action may be context dependent; that is, if a robust body of existing doctrine governs the type of agency action at issue—here, federal employment decisions under Civil Service regulations<sup>135</sup>—it may impact the threshold for winning a status quo injunction pending administrative appeals.<sup>136</sup> The key holding by

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128. See *id.* at 62–66.

129. See *id.* at 74; see also L. Harold Levinson, Interim Relief in Administrative Procedure: Judicial Stay, Administrative Stay, and Other Interim Administrative Measures, 42 Am. J. Comp. L. (Supplement Issue) 639, 643 (1994) (describing the procedural posture in *Murray*).

130. See *supra* section I.A.3 (describing the four factors).

131. See *supra* section II.A.2.

132. 415 U.S. at 69–71. The Court specifically rejected the direct application of the *Dean Foods* principle to the case, explaining that unlike the administrative role of the FTC and the appellate jurisdiction of the courts in *Dean Foods*, “[n]either the reviewing jurisdiction of the Civil Service Commission nor that of the District Court would be similarly frustrated” by denial of a status quo injunction to suspend the plaintiff’s dismissal. *Id.* at 77–78. Instead, judicial action would interfere with the challenged agency’s processes, rather than support its mission as in *Dean Foods*. See *id.*

133. See *id.* at 84 (“[R]espondent at the very least must make a showing of irreparable injury sufficient in kind and degree to override [the] factors cutting against the general availability of preliminary injunctions in Government personnel cases.”). The Court made clear that federal employment doctrine did not completely eliminate district courts’ “customary authority to grant temporary injunctive relief” under the All Writs Act, as identified in *Scripps-Howard*, but that a standard application of the traditional four-factor test for injunctive relief was inappropriate. See *id.* at 80.

134. See *id.* at 90. In dissent, Justice Marshall argued that there was no basis to require a heightened showing for status quo injunctions in federal employment cases beyond the *Virginia Petroleum Jobbers* standard of irreparable harm and further that a temporary loss in income could meet the traditional standard. See *id.* at 100–01 (Marshall, J., dissenting).

135. See *id.* at 81–82 (majority opinion) (describing the statutory and regulatory scheme at issue).

136. The language of the Court’s conclusion reiterates the subject matter limitation of the holding. See *id.* at 91–92 (finding that even if the plaintiff had stronger evidence supporting her claim, such a showing would fall “far short of the type of irreparable injury which is a necessary predicate to the issuance of a temporary injunction *in this type of case*”) (emphasis added); see

implication, however, is that the *Virginia Petroleum Jobbers* factors are the standard test for evaluating motions for status quo injunctions under the All Writs Act pending exhaustion of administrative remedies.<sup>137</sup> The Court's conclusion as to *Dean Foods* was also substantially narrow, explaining that an injunction or stay based only on *Dean Foods* is unwarranted when the jurisdiction of neither the agency nor the reviewing court will be imperiled by failing to grant interim relief, as the Court found here.<sup>138</sup> Thus, while the case addressed both *Dean Foods* and the *Virginia Petroleum Jobbers* standard, its treatments of each are readily understood as limited to the relatively narrow statutory and procedural context of the case.<sup>139</sup>

### B. *Diverging Circuit Court Developments*

Following *Dean Foods* and *Murray*, the Supreme Court has not weighed in significantly on the use of the All Writs Act in the agency context.<sup>140</sup> The federal circuit courts, however, have produced varied rulings building from these core precedents, reaching differing results as to the showing parties must make to win status quo injunctions. This section addresses some of this case law in two of the most active circuits, showing that doctrinal evolution as to the proper threshold for All Writs Act injunctions has diverged based on conflicting interpretations of *Murray*. Also featuring in this jurisprudence, although with less disagreement across circuits, are standards for issuing writs of mandamus to agencies. While the standards for the two forms of relief are separate, close examination of the relevant doctrine is useful to illuminate the full landscape of All Writs Act agency litigation.

1. *The D.C. Circuit's Key Developments and the Wagner Approach to Status Quo Injunctions.* —Two key D.C. Circuit decisions in the 1980s built on *Dean Foods* and *Murray* to establish and refine approaches for both types of All Writs Act relief. In *Telecommunications Research & Action Center v. FCC*

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also Levin, *supra* note 55, at 324–25 (describing the *Murray* outcome as one of the “variations” on the *Virginia Petroleum Jobbers* factors that “have emerged in specific contexts”).

137. This is the logical result of the Court's holding that the D.C. Circuit erred in applying the *Virginia Petroleum Jobbers* factors to the case, which the Court refers to as the “traditional standards governing more orthodox ‘stays,’” “orthodox” presumably referring to stays of final agency action pending judicial review. See *Murray*, 415 U.S. at 83–84 (citing *Va. Petroleum Jobbers Ass'n v. Fed. Power Comm'n*, 259 F.2d 921 (D.C. Cir. 1958)). At the very least, the Court recognized the factors as authoritative, if not fully adopting them.

138. *Id.* at 77 (“Neither the reviewing jurisdiction of the Civil Service Commission nor that of the District Court would be . . . frustrated by a decision of the District Court remitting respondent to her administrative remedy.”).

139. But see *VNA*, 711 F.2d 1020, 1030 (11th Cir. 1983) (finding *Murray* requires heightened showings on all four traditional factors whenever statutes preclude judicial oversight of agency action before exhaustion of administrative remedies); *infra* notes 161–162 and accompanying text (discussing the *VNA* standard).

140. The Court in *Nken v. Holder* reiterated that appellate courts' authority to stay orders pending review derives from the All Writs Act but did not provide further new analysis. 556 U.S. 418, 426 (2009); see also *supra* note 61 and accompanying text (discussing the Court's analysis in *Nken* of the distinction between stays and injunctions).

(*TRAC*),<sup>141</sup> the court extended *Dean Foods* in two ways to explicitly derive an All Writs Act–based exception to the final agency action requirement.<sup>142</sup> First, the court affirmed that the *Dean Foods* prospective jurisdiction doctrine for intervening in nonfinal agency action applies not only when *agencies* seek relief under the All Writs Act but also in the more common case of *regulated entities* seeking relief from agency action.<sup>143</sup> Second, the court interpreted *Dean Foods* to hold that the All Writs Act authorizes not only status quo injunctions and stays to suspend nonfinal agency action pending administrative appeals but also writs of mandamus to agencies, analogous to writs issued to lower courts.<sup>144</sup> *TRAC* in fact involved a mandamus petition seeking to “compel unreasonably delayed agency action,” rather than a status quo injunction to suspend an agency decision pending appeal.<sup>145</sup> Drawing on earlier D.C. Circuit case law, the court held that petitions for mandamus to agencies should be granted only in cases of “clear right.”<sup>146</sup> Although language from *TRAC* and its predecessors suggests that the clear right standard applies to all petitions for All Writs Act intervention in nonfinal agency action,<sup>147</sup> the sole focus in these cases on mandamus as the means of intervention makes clear that the standard applies specifically when mandamus, rather than a status quo injunction, is the remedy at issue.<sup>148</sup>

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141. 750 F.2d 70 (D.C. Cir. 1984). For additional context on the historical importance of this case, see generally 3 *Pierce*, supra note 28, § 18.2, at 1688–89.

142. See supra section I.A.2 (describing the exhaustion, finality, and ripeness requirements for general review of agency action).

143. See *TRAC*, 750 F.2d at 76. For background on the prospective jurisdiction doctrine, cogently articulated in *Roche v. Evaporated Milk Ass’n*, 319 U.S. 21 (1943), see supra notes 84, 115–118 and accompanying text. The Court in *Murray* had arguably recognized by implication the ability of individuals to petition for All Writs Act review of nonfinal agency action, but *TRAC*’s articulation of the principle is express.

144. *TRAC*, 750 F.2d at 76 & n.28. *TRAC* was not the first D.C. Circuit case to make this finding, but it provided an early and clear articulation of the principle. See *Potomac Elec. Power Co. v. Interstate Commerce Comm’n*, 702 F.2d 1026, 1032 (D.C. Cir. 1983) (citing the All Writs Act as interpreted in *Dean Foods* as “empowering a federal court to issue a writ of mandamus to protect its future jurisdiction”).

145. *TRAC*, 750 F.2d at 72. The plaintiff nonprofit organization in the case sought a writ to force the FCC after a long delay to decide whether AT&T had to reimburse ratepayers for alleged overcharges. *Id.*

146. *Id.* at 79 (internal quotation marks omitted) (quoting *Ass’n of Nat’l Advertisers v. FTC*, 627 F.2d 1151, 1180 (D.C. Cir. 1979) (Leventhal, J., concurring)). *Ass’n of National Advertisers* in turn drew the standard from the exhaustion exception identified in *Leedom v. Kyne*. See *Ass’n of Nat’l Advertisers*, 627 F.2d at 1178–79 (Leventhal, J., concurring) (citing *Leedom v. Kyne*, 358 U.S. 184, 188–89 (1958)); see also supra note 47 (discussing the context of the *Leedom* exception). The standard clearly anticipated the general All Writs Act mandamus test the Supreme Court articulated in *Cheney v. United States District Court*, 542 U.S. 367, 379 (2004). See supra note 93 and accompanying text (discussing *Cheney*).

147. See, e.g., *TRAC*, 750 F.2d at 79 (“[W]e have found the threshold a litigant must pass to obtain judicial review of ongoing agency proceedings to be a high one.”).

148. Judge Harry T. Edwards, the author of the *TRAC* opinion, provided support for this reading of the case’s scope the following year. See *In re GTE Serv. Corp.*, 762 F.2d 1024, 1027 (D.C. Cir. 1985) (explaining that “the court [in *TRAC*] found that claims of unreasonable agency delay represent one narrow class of cases which are within this court’s *mandamus* jurisdiction” as

A second D.C. Circuit case expanded on *Dean Foods* and *TRAC* to identify the proper standard for status quo injunctions under the All Writs Act. In *Wagner v. Taylor*, a federal personnel dispute under Title VII, the court held that the *Dean Foods* prospective jurisdiction doctrine allows courts to grant injunctions to “worthy claimants” to “preserve the status quo pending ripening of the claim for judicial review.”<sup>149</sup> The holding made clear that *Dean Foods* allows parties aggrieved by agency action to seek not only writs of mandamus, as in *TRAC*, but also injunctions to restrict agency action pending completion of administrative appeals;<sup>150</sup> crucially, parties must meet only the traditional *Virginia Petroleum Jobbers* factors to obtain such relief.<sup>151</sup> The court did not directly address the agency’s argument that *Murray* required the plaintiff to meet an elevated standard for irreparable harm;<sup>152</sup> it did, however, clearly distinguish the “legislative and regulatory framework” of Title VII from the employment statute at issue in *Murray*, which “posit[ed] a very different relationship between administrative agencies and the courts.”<sup>153</sup> This adds support for the conclusion that *Murray*’s heightened standards for interim relief were a function of the specific doctrinal and statutory background governing the dispute in the case, rather than a rule applying to all All Writs Act status quo injunctions.<sup>154</sup>

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provided by the All Writs Act (emphasis added)). The court in *GTE* also reiterated the “well-settled principle” that mandamus is proper to disrupt agency proceedings only if the remedy prescribed by the governing statute is “clearly inadequate,” anticipating the *Cheney* formalization of the mandamus test. *Id.* (citing *TRAC*, 750 F.2d at 78); see also *supra* note 93 and accompanying text (describing the *Cheney* test).

149. 836 F.2d 566, 571–72 (D.C. Cir. 1987). The plaintiff in *Wagner*, an Interstate Commerce Commission employee who filed an administrative Title VII claim of discrimination against the agency, sought relief to prevent the Commission from taking retaliatory action against him while the EEOC reviewed his complaint. See *id.* at 567–70. Specifically, he requested a status quo injunction to temporarily prevent the enforcement of acts of retaliation and other “reprisals” against him, including a proposed order transferring him to another position, which would have constituted preliminary agency action. See *id.* at 569–71. The court found that while Title VII requires exhaustion of administrative remedies before judicial review of a discrimination claim, nothing in the statute leads to the conclusion that “Congress intended to divest the federal courts of their ancient equitable power to fashion interim injunctive relief.” *Id.* at 575.

150. The D.C. Circuit had in fact made such a finding some years earlier, although without fully clarifying the applicable standard for obtaining a status quo injunction. See *Am. Pub. Gas Ass’n v. Fed. Power Comm’n*, 543 F.2d 356, 358 (D.C. Cir. 1976) (explaining that All Writs Act relief is available to parties with “an irreparable injury sustained because an agency order has been made effective pending reconsideration, the Act being employed in aid of jurisdiction to prevent . . . immunity from judicial scrutiny of agency actions before statutory review provisions become available”).

151. *Wagner*, 836 F.2d at 575–76. The court found the plaintiff had failed to sufficiently show irreparable harm under the traditional factors and affirmed the district court’s denial of relief. See *id.*

152. See *supra* note 133 and accompanying text (describing the *Murray* holding).

153. *Wagner*, 836 F.2d at 575 n.66. Interim injunctive relief, the court explained, plays an “indispensable role . . . in achieving the goals of Title VII.” *Id.* at 574.

154. See *supra* notes 133–136 and accompanying text (advancing this reading of *Murray*).

Together, these cases reveal that in the D.C. Circuit, courts have authority under the All Writs Act to grant interim relief from nonfinal agency action in the form of status quo injunctions under *Wagner*, as well as to issue writs of mandamus under *TRAC*. Under the *Wagner* approach, parties seeking status quo injunctions to stay preliminary agency action pending administrative review must make a sufficient showing under the four traditional factors that an injunction is merited. They need not make a heightened showing under the *Murray* standard, at least outside of *Murray*'s narrow class of government personnel disputes.<sup>155</sup> For writs of mandamus in advance of any agency action, parties must make the more substantial "clear right" showing under *TRAC*.<sup>156</sup> Notably, the D.C. Circuit recently added one other detail to mandamus doctrine, holding that a petitioner seeking All Writs Act mandamus under *TRAC* must initiate a proceeding before the agency or a lower court in order to implicate the appellate court's prospective jurisdiction and thus enable relief.<sup>157</sup> Without an ongoing proceeding that can be appealed, writs from a reviewing court cannot be "in aid of" the appellate court's prospective jurisdiction under the All Writs Act.<sup>158</sup>

2. *The Eleventh Circuit and the VNA Approach to Status Quo Relief.* — The Eleventh Circuit has issued a number of rulings since the 1980s that diverge from the D.C. Circuit's approach to All Writs Act injunctions under *Dean Foods* and *Murray*.<sup>159</sup> While each of the major cases has notably cast doubt on the accuracy of the previous ruling's doctrine, each is worth reviewing. In the major case of note, *V.N.A. of Greater Tift County, Inc. v. Heckler (VNA)*, the court interpreted *Murray* to find that whenever an agency's organic statute limits judicial review of *final* agency action before exhaustion of administrative remedies,<sup>160</sup> parties seeking All Writs Act status quo

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155. See supra notes 152–154 and accompanying text (analyzing *Wagner* and noting its support for the conclusion that *Murray*'s standard is likely limited to its facts).

156. Presumably the mandamus standard would now be the three-prong test from *Cheney*, which the D.C. Circuit has applied in cases involving writs to lower courts, although not yet in an agency case. See, e.g., *In re al-Nashiri*, 791 F.3d 71, 78–82 (D.C. Cir. 2015) (citing *Cheney v. U.S. Dist. Court*, 542 U.S. 367, 380–81 (2004)).

157. See *In re Tennant*, 359 F.3d 523, 528–29 (D.C. Cir. 2004). As in *TRAC*, the petitioner in *Tennant* sought a writ of mandamus to compel agency action, rather than to suspend enforceability pending administrative appeals of an action already taken. *Id.* at 526–27.

158. See *id.* at 529 (internal quotation marks omitted) (quoting 28 U.S.C. § 1651(a) (2000)). The opinion by then-Judge John Roberts noted that precedent for the holding includes *Marbury v. Madison*, which similarly found that the Court's mandamus jurisdiction "was limited to review of 'proceedings in a cause already instituted.'" *Id.* at 530 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 175 (1803)).

159. In contrast, Eleventh Circuit case law is consistent with the D.C. Circuit with regard to the standard for All Writs Act mandamus. See, e.g., *George Kabeller, Inc. v. Busey*, 999 F.2d 1417, 1421–23 (11th Cir. 1993) (citing and applying the *TRAC* doctrine to deny a writ of mandamus against the Federal Aviation Administration).

160. See 711 F.2d 1020, 1031–33 (11th Cir. 1983). This broad reading of *Murray*, applying its holding on All Writs Act injunctions to a wide range of agency action, is the inverse of the D.C. Circuit's narrow interpretation in *Wagner v. Taylor*, 836 F.2d 566 (D.C. Cir. 1987). See supra notes 152–154 and accompanying text.

injunctions to stay *nonfinal* action must make a heightened showing on all four traditional factors for an injunction,<sup>161</sup> not only the irreparable harm prong as in *Murray*.<sup>162</sup> While recognizing the *Dean Foods* prospective-jurisdiction doctrine,<sup>163</sup> the court found that *Murray* had replaced it, at least for any case in which parties seek interim relief from agency action despite limitations on preexhaustion judicial oversight.<sup>164</sup> The proper analysis under *Murray*, the court reasoned, is a two-step determination for whether a statutory limit to preexhaustion review mandates a heightened showing on the traditional factors.<sup>165</sup> Such an inquiry must consider both whether refusal to grant the relief would defeat the court's review jurisdiction per the All Writs Act and whether Congress had intended to allow for such status quo injunctions.<sup>166</sup> Neither prong was met here, requiring the plaintiff home health provider to make a heightened showing for an injunction to maintain its normal Medicare reimbursements pending its administrative appeal of an initial decision to suspend them.<sup>167</sup> The court found that the plaintiff had not met the standard, showing that under the case's reading of *Murray*, even a plaintiff's imminent bankruptcy could not constitute sufficient harm to the court's jurisdiction to merit All Writs Act intervention.<sup>168</sup>

While *VNA* set forth a significant amount of novel All Writs Act doctrine based on this questionable expansion of *Murray*'s narrowly focused holding,<sup>169</sup>

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161. 711 F.2d at 1030. The court developed its own heightened standards for each factor (including a "virtual certainty of irreparable injury"), none of which it found the plaintiff had met. See *id.* at 1033–35.

162. See *id.* at 1029–30. The court in fact concluded that *Murray* had implicitly required a heightened showing on all four factors and merely focused on irreparable injury because it was "the essential weakness" in the plaintiff's case. *Id.* The court cited in support an opinion by *Murray*'s author, then-Associate Justice Rehnquist, identifying irreparable harm and probability of success on the merits as factors a court must consider in staying the action of an administrative agency. See *id.* at 1030 (citing *Coleman v. Paccar Inc.*, 424 U.S. 1301, 1305 (Rehnquist, Circuit Justice 1976)). Justice Rehnquist made no apparent mention of heightened standards in the case, however, merely finding that the lower court had improperly failed to sufficiently consider the traditional factors in staying a Department of Transportation ruling pending judicial review. See *Coleman*, 424 U.S. at 1308.

163. See *supra* note 117 and accompanying text (describing the doctrine).

164. *VNA*, 711 F.2d at 1029–30 & n.25 ("*Murray* neither overruled *Dean Foods* nor specifically limited *Dean Foods* to its facts, but the conclusion is inescapable that *Murray* replaces the *Dean Foods* analysis." (citation omitted)).

165. See *id.* at 1029.

166. *Id.*

167. See *id.* at 1031–35.

168. See *id.* at 1031, 1034–35. In dissent, the Chief Judge of the Eleventh Circuit agreed with the panel majority as to the two-step review under *Murray* but differed sharply as to its application of the framework. See *id.* at 1035–36 (Godbold, C.J., dissenting). The dissenting judge found that the plaintiff's likely bankruptcy without an injunction was sufficient to defeat the court's potential jurisdiction under *Dean Foods* and *Murray* and that failing to issue the injunction would also undermine Congress's intent because the plaintiff's bankruptcy would also defeat the jurisdiction of the agency reviewing the plaintiff's ongoing administrative appeal. See *id.* at 1036–37.

169. See *supra* notes 137–138 and accompanying text (discussing *Murray*'s reach).

a subsequent Eleventh Circuit case, *Klay v. United Healthgroup*,<sup>170</sup> cast *VNA*'s precedential value into doubt while establishing another new All Writs Act analysis. Although the case lacks a direct application to agency litigation, its reliance on doctrine from agency cases and impact on subsequent decisions and commentary give it relevance here. The court's innovation was what appears to be a wholly new typology for federal court injunctions. It defined three varieties and their qualities: the "traditional" injunction, an interim or permanent remedy for breaches of common law, statutory, or constitutional rights, requiring a showing under the traditional four-factor test; the "statutory injunction," available when a statute creates standards for granting an injunction; and finally, the All Writs Act injunction, predicated not on a plaintiff's cause of action but rather on a threat to the court's past orders and judgments or ongoing or prospective proceedings.<sup>171</sup>

The distinctive feature of the All Writs Act injunction, the *Klay* court held, is that the traditional four factors are irrelevant "because a court's traditional power to protect its jurisdiction, codified by the Act, is grounded in entirely separate concerns" from those animating the traditional four-factor analysis.<sup>172</sup> The court listed cases in support of this finding and in a footnote determined that it was not bound by earlier precedent to the contrary from its own circuit, including *VNA*,<sup>173</sup> which it found had improperly assumed the traditional factors applied to All Writs Act injunctions (without discussing the additional complication of the heightened standards derived and applied in the case).<sup>174</sup> On these grounds, the court reversed the lower court finding before it for its

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170. 376 F.3d 1092 (11th Cir. 2004). The case involved a group of physicians arguing that a set of national health management organizations had conspired to underpay them; the plaintiffs sought an All Writs Act injunction to prevent the defendant from compelling arbitration, which the district court granted, finding the relief necessary to protect its jurisdiction over the claims. See id. at 1095–96.

171. See id. at 1097–100. The court notably cited precedents drawing on *Dean Foods* for the finding that All Writs Act injunctions may be needed to safeguard "potential future proceedings." See id. at 1099 & n.10.

172. Id. at 1100.

173. 711 F.2d 1020 (11th Cir. 1983); see also supra notes 160–168 and accompanying text.

174. See *Klay*, 376 F.3d at 1100 n.12 (explaining that *VNA* "should be read as closely confined to its specific facts"). In the immediately subsequent footnote, however, the court stated that "a district court may not evade the traditional requirements of an injunction by purporting to issue what is, in effect, a preliminary injunction under the All Writs Act." Id. at 1101 n.13. The court pointed to a 1979 former Fifth Circuit case, *Florida Medical Ass'n v. U.S. Department of Health, Education & Welfare*, in which that court found that a district court lacked jurisdiction under the All Writs Act to enjoin the defendant department from releasing a national list of doctors participating in Medicare. See id. (citing 601 F.2d 199 (5th Cir. 1979)). The key factor apparently distinguishing the case for the *Klay* court was that the relief sought was a "textbook definition of a preliminary injunction," issued "to preserve the status quo and prevent allegedly irreparable injury until the court had the opportunity to decide whether to issue a permanent injunction." Id. Thus the *Klay* court synthesized the case's holding to be that "a court may not issue an order under the All Writs Act, circumventing the traditional requirements for an injunction, when a party is in reality seeking a 'traditional' injunction," which requires consideration of the four factors. Id. How this differed from *VNA* is unclear.

erroneous application of the traditional factors to a motion for an All Writs Act injunction.<sup>175</sup>

While *Klay* established a new framework for All Writs Act injunctions, like *VNA* before it, another in-circuit precedent has called it into question. In *Alabama v. United States Army Corps of Engineers*, one stage of a complex interstate dispute over the allocation of water in a Georgia reservoir, an Eleventh Circuit panel reviewed a preliminary injunction issued to stay implementation of a settlement agreement entered by the Corps.<sup>176</sup> In granting the injunction, the district court had considered the four traditional factors.<sup>177</sup> Weighing whether the lower court abused its discretion, the Eleventh Circuit rejected the appellees' argument that the injunction was in fact an All Writs Act injunction under *Klay* and that it was therefore unnecessary to consider the four traditional factors.<sup>178</sup> Importantly, in a footnote to this finding, the court directly questioned *Klay*'s "abrogation of the traditional injunction requirements" for All Writs Act injunctions, finding that *Klay*'s conclusion on this point was doubtful in light of the Eleventh Circuit's "deeply inconsistent" case law on this question.<sup>179</sup>

Despite the questionable continuing validity of *Klay*'s fairly significant shift in All Writs Acts doctrine after *Alabama*, the *Klay* framework has been quite influential in recent scholarship concerning the Act.<sup>180</sup> This may be a result of the neatness of its injunction-classification scheme. Regardless, it seems questionable at best to treat as settled doctrine an isolated and novel circuit court conclusion that was questioned shortly after its release by another panel of the same court. Nonetheless, courts within and outside of the Eleventh Circuit have followed the *Klay* holding for All Writs Act injunctions, perhaps most notably in the infamous case of Theresa Schiavo, the Florida woman whose family dispute over whether to maintain her artificial life support resulted in federal legislation—although that decision preceded the *Alabama* case.<sup>181</sup> Interestingly, the small number of agency-related cases that have noted

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175. See *id.* at 1112–13.

176. 424 F.3d 1117, 1124–27 (11th Cir. 2005).

177. See *id.* at 1125–26.

178. See *id.* at 1131–32.

179. See *id.* at 1131 n.20.

180. See, e.g., Michael D. Sousa, *A Casus Omissus* in Preventing Bankruptcy Fraud: Ordering a Search of a Debtor's Home, 73 Ohio St. L.J. 93, 113 (2012) (citing the questioned *Klay* finding that the traditional injunction requirements do not apply to All Writs Act injunctions); Portnoi, *supra* note 91, at 299–303 (describing a four-part set of necessary elements for application of the All Writs Act, heavily relying on *Klay*'s classification framework and definition of All Writs Act injunctions); Potapchuk, *supra* note 81, at 1419–26 (citing *Klay* for a comprehensive definition and discussion of All Writs Act–based injunctions in district courts and their distinction from "traditional" injunctions).

181. See *Schiavo ex rel. Schindler v. Schiavo*, 403 F.3d 1223, 1229 (11th Cir. 2005) (rejecting the plaintiffs' request for an All Writs Act injunction as an attempt to evade the four traditional injunction factors); see also, e.g., *United States v. Benton Cty. Sewer Dist. No. 1*, No. 13-00319-CV-W-BP, 2015 WL 10936761, at \*3 (W.D. Mo. Dec. 30, 2015) (incorporating the

the *Klay* holding seem to have nonetheless applied the traditional factors.<sup>182</sup> None of these cases, however, referenced the *Alabama* suggestion that *Klay*'s analysis was erroneous, indicating that the door remains theoretically open for a court following *Klay* to issue an All Writs Act injunction against an agency without considering the likelihood of irreparable harm to the moving party.

Despite the somewhat unsettled nature of its All Writs Act doctrine, the Eleventh Circuit's expansive interpretation of *Murray* in *VNA* sets it in opposition to the D.C. Circuit's more plaintiff-friendly approach to status quo injunctions derived in *Wagner*.<sup>183</sup> Its negative treatment in *Klay* notwithstanding, *VNA* remains productive as courts continue to apply its broad interpretation of the heightened *Murray* standards in the agency action context, both in and out of the Eleventh Circuit, at least in factually similar cases.<sup>184</sup> Further, even though *Alabama* suggested that *Klay*'s abrogation of the four traditional factors for All Writs Act injunctions was misguided,<sup>185</sup> the Eleventh Circuit and other courts have continued to cite and apply *Klay*'s reasoning.<sup>186</sup> The Eleventh Circuit's All Writs Act doctrine thus remains uncertain, although the *VNA* approach's "virtual certainty of irreparable injury"<sup>187</sup> standard for obtaining a status quo injunction pending administrative review is the prevailing rule. There also remains the possibility that a court could follow *Klay* to find that a party need not make any showing of harm at all to obtain an injunction.

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*Klay* holding that All Writs Act injunctions do not require a showing under the four traditional factors).

182. See *Huron Mountain Club v. U.S. Army Corps of Eng'rs*, No. 2:12-CV-197, 2012 WL 3060146, at \*13 (W.D. Mich. July 25, 2012) (noting but declining to apply *Klay*'s finding on All Writs Act injunctions because of the plaintiff's low likelihood of success on the merits of its claims); *Miccosukee Tribe of Indians of Fla. v. United States*, No. 04-21448-CIV, 2008 WL 2967654, at \*40-42 (S.D. Fla. July 29, 2008) (noting *Klay*'s All Writs Act finding but concluding that an injunction in an APA-based challenge was "traditional" and thus applying the four factors); *Fla. Wildlife Fed'n v. U.S. Army Corps of Eng'rs*, 404 F. Supp. 2d 1352, 1360-61 (S.D. Fla. 2005) (citing *Klay* in weighing an All Writs Act injunction but nonetheless evaluating the motion in light of the four traditional factors).

183. See supra notes 149-153 and accompanying text (discussing the *Wagner* approach).

184. See, e.g., *Faith Home Health Servs. v. Shalala*, No. 98-30549, 1998 WL 912171, at \*2 (5th Cir. Dec. 15, 1998) (adopting the *VNA* factors in a factually similar Medicare case); *D&G Holdings, LLC v. Burwell*, 156 F. Supp. 3d 798, 810-11 (W.D. La. 2016) (finding a plaintiff could not meet the *VNA* heightened standards and thus failed to merit an All Writs Act injunction); *Cameo Care Ctr., Inc. v. Dep't of Health & Human Servs.*, No. 96-C-513, 1997 WL 599421, at \*3-5 (E.D. Wis. May 31, 1997) (applying the *VNA* standards and finding that the plaintiff's claimed financial hardship from adjustment of its Medicare reimbursement schedule was not irreparable injury).

185. See supra notes 176-179 and accompanying text.

186. See, e.g., *Burr & Forman v. Blair*, 470 F.3d 1019, 1031 n.32 (11th Cir. 2006) (reiterating the *Klay* finding on the requirements for an All Writs Act injunction); see also supra note 181 and accompanying text (noting additional cases).

187. *VNA*, 711 F.2d 1020, 1034 (11th Cir. 1983); see also supra note 161 and accompanying text (describing the *VNA* standard).

C. *Varying Standards for Obtaining All Writs Act Review*

Courts across the country have drawn on the major Supreme Court holdings on the All Writs Act, the *Wagner* and *VNA* approaches to status quo injunctions, and *TRAC*'s approach to mandamus when faced with requests for All Writs Act relief against agencies. These cases have produced varying results as to the standards parties must meet to obtain relief. Some decisions have also lacked specificity as to what type of relief is sought and merited. Both of these areas of doctrinal uncertainty raise potential issues. This section highlights three key cases and describes their connection to, or divergence from, the bodies of All Writs Act doctrine discussed in sections II.A and II.B. In the process, it illustrates that clearer standards as to the thresholds for different types of relief are necessary to protect both agency authority and litigants' access to review.

1. *AstraZeneca Pharmaceuticals LP v. Burwell*. —A recent case found a troublingly low threshold for All Writs Act–based intervention in ongoing agency proceedings. In *AstraZeneca Pharmaceuticals LP v. Burwell*, major pharmaceutical manufacturer AstraZeneca moved to temporarily restrain the FDA from approving generic drug manufacturers' applications to sell versions of Crestor, one of AstraZeneca's major drugs.<sup>188</sup> The substance of its claim was that any such approval would be premised on a mistaken FDA interpretation of a statute concerning generic-drug labeling.<sup>189</sup> The FDA argued that because there was not yet an approval and thus no final agency action, the court lacked jurisdiction over the suit; it also pointed to a statutory provision suggesting preclusion of preexhaustion judicial review.<sup>190</sup> AstraZeneca, however, contended that because the generic manufacturers had already manufactured and packaged several months' worth of generic Crestor to ship immediately upon FDA approval, AstraZeneca would have no opportunity for meaningful judicial review of its statutory challenge before suffering a significant and

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188. 197 F. Supp. 3d 53, 54–55 (D.D.C. 2016).

189. See *id.* AstraZeneca argued that the FDA could not approve any generic Crestor because: (1) the FDA had granted AstraZeneca an exclusive right to sell Crestor labeled with information about using the drug to treat a rare pediatric disease; (2) FDA regulations require that generic labels include all pediatric information included on the label for the corresponding brand-name drug; and (3) the statutes that authorize the FDA to grant some exceptions to the label-matching rules did not authorize it to make an exception here. See Daniel Siegal, *AstraZeneca Loses Bid to Keep FDA OK from Generic Crestor*, Law360 (July 19, 2016), <http://www.law360.com/articles/819378/astrazeneca-loses-bid-to-keep-fda-ok-from-generic-crestor> [<http://perma.cc/JGM5-7SRE>]. Thus, AstraZeneca argued, no generic versions of Crestor could be sold at all until AstraZeneca's exclusivity on the special pediatric disease label expired. See *id.*

190. *AstraZeneca*, 197 F. Supp. 3d at 55. The statute, 21 U.S.C. § 355(q) (2012), bars judicial review of issues raised in a "citizen petition," an administrative request asking the FDA to take a particular action, before the FDA releases a response. See Michael A. Carrier & Daryl Wander, *Citizen Petitions: An Empirical Study*, 34 *Cardozo L. Rev.* 249, 251 (2012) (defining and explaining the use of citizen petitions). AstraZeneca had filed a citizen petition raising the same substantive concerns as its complaint, which remained pending when it filed suit. See *AstraZeneca*, 197 F. Supp. 3d at 55.

unrecoverable loss of market share and revenue.<sup>191</sup> In other words, as soon as there was agency action that it could challenge, AstraZeneca would suffer allegedly irreparable harm without opportunity for judicial recourse.<sup>192</sup>

Although the court in weighing AstraZeneca's petition recognized both exhaustion and ripeness concerns in addition to the finality issue,<sup>193</sup> it turned to the All Writs Act, expressing concern that AstraZeneca and similarly situated drug manufacturers lacked an avenue for challenging generic-drug approvals before suffering substantial revenue loss.<sup>194</sup> Citing *Dean Foods* and *Wagner*,<sup>195</sup> the court found that this was a proper situation in which to preserve its jurisdiction by taking action under the All Writs Act.<sup>196</sup> Based on this authority, the court ordered the FDA not to act on the generic applications or AstraZeneca's pending citizen petition.<sup>197</sup> Instead, it directed the FDA to provide the court confidential notice when it had made its decisions, after which the court would schedule a closed hearing in which the FDA would announce its action and the court would hear the merits of AstraZeneca's statutory challenge.<sup>198</sup> When the hearing took place, the FDA announced approval of the applications, and the court denied the plaintiff's motion for a temporary restraining order, allowing the generic manufacturers to enter the market.<sup>199</sup>

The *AstraZeneca* decision is noteworthy not for its ultimate holding rejecting the drug maker's challenge to the generic approvals<sup>200</sup> but rather for the court's invocation of the All Writs Act to intervene in incomplete FDA proceedings without applying either of the D.C. Circuit's frameworks for All Writs Act relief. Indeed, while the court in its order referred to the

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191. *AstraZeneca*, 197 F. Supp. 3d at 55.

192. Cf. *Teva Pharm. USA v. Sebelius*, 595 F.3d 1303, 1311 (D.C. Cir. 2010) (noting that the FDA's procedure for approving generic drug applications can put courts and parties in an "awkward bind," requiring "more or less instantaneous[]" review of the merits of a statutory challenge to approval).

193. *AstraZeneca*, 197 F. Supp. 3d at 55–56; see also *supra* section I.A.2 (discussing finality and ripeness).

194. *AstraZeneca*, 197 F. Supp. 3d at 56.

195. See *supra* section II.B.1 (discussing *Dean Foods* and *Wagner*).

196. *AstraZeneca*, 197 F. Supp. 3d at 58.

197. See *id.* at 57–59. For discussion of citizen petitions, see *Carrier & Wander*, *supra* note 190, at 251.

198. *AstraZeneca*, 197 F. Supp. 3d at 57–59.

199. See Transcript of TRO Hearing at 66, *AstraZeneca*, 197 F. Supp. 3d 53 (D.D.C. 2016) (No. 16-cv-1336); see also *Harris*, *supra* note 16 (describing the result).

200. The court's basis for denying the temporary restraining order at the hearing did apply the four traditional factors; the court concluded that AstraZeneca's irreparable harm showing was insufficient and that its likelihood of success on the merits was low. See Transcript of TRO Hearing, *supra* note 199, at 66–75. At this stage, however, the interim relief sought was unrelated to doctrine governing nonfinal agency action, as the FDA had taken final agency action in announcing its decision on the generic-drug applications and the citizen petition. AstraZeneca was thus simply seeking a standard stay of agency action pending judicial review. See *supra* notes 55–58 and accompanying text (describing the traditional standards and conditions for a stay pending review).

“irretrievable loss” and “significant injury” AstraZeneca alleged it would suffer without an opportunity to present its statutory arguments, it did not raise the other traditional factors for injunctive relief.<sup>201</sup> In addition, the relief the court granted, ordering the FDA to complete an administrative proceeding in a manner prescribed by the court and under its supervision, had little in common with a status quo injunction. AstraZeneca was not seeking to stay the enforceability of a preliminary FDA decision pending administrative appeal but rather to compel the agency to suspend its licensing procedure entirely, based on a claim of a right to judicial review and a lack of other adequate means to obtain relief.<sup>202</sup> In other words, while neither the parties nor the court raised the topic, the remedy sought and imposed in some ways resembled a writ of mandamus rather than equitable relief.<sup>203</sup> This suggests that the court might have required not only a showing of irreparable harm per *Wagner* but also the much higher mandamus standard articulated in *TRAC*, in order to invoke the All Writs Act against the FDA.

Multiple possibilities might account for this outcome. The court could have concluded that this was a case purely in the manner of *Dean Foods*, in which the Court need not consider the traditional factors in granting interim relief, although the Court there may have made such a consideration implicitly.<sup>204</sup> The fact that the court also cited *Wagner*, in which the court had imposed the traditional *Virginia Petroleum Jobbers* factors after finding it had All Writs Act authority to examine action pending exhaustion of administrative remedies,<sup>205</sup> casts some doubt on this interpretation. It is also conceivable, and perhaps most likely, that the court was prepared to reject AstraZeneca’s statutory argument and merely used the All Writs Act to create an opportunity to hear and dismiss the case on the merits rather than on procedural and jurisdictional grounds. Such an approach would be a practical solution to a complex procedural dilemma, if one not necessarily consistent with precedent.

Regardless of the underlying reasoning for the decision, the outcome raises potential concerns. While the court did ultimately reject the claim by applying the standard four factors,<sup>206</sup> the suit proceeded to that stage only because the court did not raise the factors before requiring the FDA to complete its procedure on the court’s terms. AstraZeneca’s substantive argument for interim relief was ultimately weak, but the court’s initial decision that the drug maker’s procedural claim merited invocation of the All Writs Act

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201. *AstraZeneca*, 197 F. Supp. 3d at 56, 58.

202. *Id.* at 54–55.

203. For comparison, the petitioners in *TRAC* similarly and successfully asked the court to force an agency to complete its ongoing procedure at court direction. See *TRAC*, 750 F.2d 70, 72, 81 (D.C. Cir. 1984).

204. See *supra* notes 120–125 and accompanying text. This case is of course the reverse of *Dean Foods* in that it was a regulated entity, rather than an agency, moving for interim relief in the context of nonfinal agency action.

205. See *supra* notes 149–154 and accompanying text (describing *Wagner*’s application of the four factors).

206. See *supra* note 200.

invites future parties with stronger substantive arguments to evade the timing doctrines and disrupt agency procedures without a clear showing that such extraordinary relief is justified. The prospect of court-approved party intervention into administrative procedures on the somewhat thin basis of protecting the court's prospective jurisdiction, without a showing of justification presumably required by doctrine, is a potentially troubling development. Courts should at least require parties seeking court intervention before any agency decision has been announced to make a showing of irreparable harm, if not a "clear and indisputable right" to relief under the mandamus standard,<sup>207</sup> before granting interim relief under the All Writs Act.

2. *Virginia Department of Education v. Riley*. —An earlier case combines the role of the All Writs Act as a mechanism to set aside the final agency action requirement for judicial review with its use as a vehicle to issue status quo injunctions pending administrative appeals. It also demonstrates the ambiguities that can exist in the forms of relief parties can seek and courts can impose against agencies. In *Virginia Department of Education v. Riley*, the Fourth Circuit found authority under the All Writs Act to enjoin the U.S. Department of Education (USDOE) from withholding Virginia's \$50 million federal grant for education of disabled children for the 1994 fiscal year, as well as to require the federal agency to allow an administrative appeal before also withholding the state's 1995 funds.<sup>208</sup> Virginia had sought relief after USDOE notified the state that it intended to withhold its 1994 grant unless the state changed its policy on discipline of children with disabilities; the Department refused to release any of the 1994 funds pending an administrative appeal, arguing it lacked statutory authority to do so.<sup>209</sup> In its petition for review, Virginia argued that withholding the 1994 funds without providing an administrative appeal first in fact violated the statute and left the State with the unfair choice to either change its policy or forgo the grant and suffer irreparable harm.<sup>210</sup>

Virginia in essence requested two types of relief from the court. First, it sought an injunction to suspend enforceability of the preliminary USDOE decision to withhold Virginia's grant payment pending an administrative appeal—in other words, to simply release the 1994 grant immediately.<sup>211</sup> Second, it asked the court to review the governing statute and find that the state

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207. *Cheney v. U.S. Dist. Court*, 542 U.S. 367, 380–81 (2004) (internal quotation marks omitted) (quoting *Kerr v. U.S. Dist. Court*, 426 U.S. 394, 403 (1976); see also *supra* note 93 and accompanying text (discussing the mandamus standard).

208. 23 F.3d 80, 82 (4th Cir. 1994).

209. *Id.* at 82–83. Virginia's regulations stated that school authorities could discipline disabled children identically to nondisabled children if their misconduct was not causally related to their disability; USDOE interpreted the governing federal statute to require schools not to suspend disabled students even for behavior unrelated to their disability. See *id.*

210. *Id.* at 84. The state presented testimony from state officials and school districts that denial of the 1994 funds would force imminent layoffs of teachers, aides, social workers, and other vital employees of the state's school systems and force statewide and local authorities to completely rewrite budgets they had prepared in reliance on the federal funds. See *id.* at 84–85.

211. *Id.* at 83–84.

was entitled to such an appeal before USDOE could also withhold the next and final year of grant funds.<sup>212</sup> The court found for the state in both areas. First, it concluded that the case was one of the “rare instances [in which] an appellate court may act under the authority of the All Writs Act in granting interlocutory relief to a party aggrieved by administrative actions when the court would have full appellate jurisdiction following a final agency decision.”<sup>213</sup> Notably, the court looked to neither *Dean Foods* nor the traditional injunction factors for this finding but rather to *TRAC* and other cases describing the standards for writs of mandamus requested in advance of any agency decision.<sup>214</sup> Deriving and applying a standard requiring a likelihood of irreparable harm and the absence of adequate remedies in ongoing administrative proceedings,<sup>215</sup> the court found that the circumstances merited All Writs Act–based review.<sup>216</sup> It next concluded that the USDOE procedure provided no opportunity for meaningful review of the agency’s initial decision before the state’s loss of the \$50 million grant and the resultant irreparable harm to its budget and school system.<sup>217</sup> Finally, having thus found jurisdiction to review the agency’s statutory interpretation, the court concluded that USDOE’s interpretation was indeed erroneous and that the state was entitled to an administrative appeal, and imposed an “injunction” prohibiting USDOE from withholding the 1994 funds and requiring a hearing before withholding the following year’s grant.<sup>218</sup>

*Riley* demonstrates two noteworthy features of All Writs Act jurisprudence. First, it serves as an additional example of the Act’s use as a means to issue status quo injunctions and to push agencies to limit the negative impact of their preliminary decisions while affected parties pursue

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212. See *id.* at 84. To be clear as to the procedure at issue, Virginia’s funding under the relevant statute operated on the basis of a three-year plan running from 1993 to 1995 with portions of the grant disbursed annually; USDOE had conditionally approved the plan in 1992. *Id.* at 82–83. When USDOE notified Virginia just months before the beginning of the 1994 school year that it now disapproved and thus proposed to withhold the funds going forward, Virginia requested an administrative hearing to appeal the decision. *Id.* USDOE declined, claiming it lacked statutory authority to provide one. *Id.* When Virginia then petitioned the Fourth Circuit, it sought immediate release of the 1994 funds—a stay of the suspension of the multiyear grant or, in practical terms, disbursement of the 1994 funds—and an administrative appeal of the decision before USDOE withheld the 1995 funds on the basis of its initial decision. *Id.* Thus, the petition constituted a request for an All Writs Act status quo injunction to stay the enforceability of an initial agency decision pending an administrative appeal, with the added dispute over the hearing provisions of the relevant statute.

213. *Id.* at 83–84.

214. See *id.* (citing *TRAC*, 750 F.2d 70, 75 (D.C. Cir. 1984)).

215. The irreparable harm standard here is distinct from the similar traditional injunction factor and derives in part from a 1985 decision by then-Judge Anthony Kennedy about the general threshold for All Writs Act relief from nonfinal agency action, parallel to the standard from *TRAC*. See *id.* at 84 (citing *Pub. Util. Comm’r v. Bonneville Power Admin.*, 767 F.2d 622, 630 (9th Cir. 1985)).

216. *Riley*, 23 F.3d at 84.

217. *Id.*

218. See *id.* at 85–87. For additional background on the dispute in the case and developments following the All Writs Act decision, see 2 *Pierce*, *supra* note 28, § 15.11, at 1333–34.

administrative remedies. Indeed, the case is regarded with *Dean Foods* as an example of court authority to issue injunctions under the All Writs Act.<sup>219</sup> That the court relied not on *Dean Foods* or the traditional injunction factors in its analysis, however, but rather on cases concerning All Writs Act–based mandamus<sup>220</sup> illustrates again the ambiguity that exists in All Writs Act doctrine as to the forms of relief that are available and the standards for obtaining it. Because the court found the State had amply met the mandamus-level threshold it had set,<sup>221</sup> the court’s choice to apply such a standard was likely inconsequential here. There is a concern, however, that placing the bar for a status quo *injunction* at the high *mandamus* level could risk the rejection of relief to plaintiffs seeking injunctions in the future. Greater clarity among the forms of relief available under the Act will help to alleviate this concern.

3. *Colorado v. United States*. —A final case illustrates the risks to “worthy claimants”<sup>222</sup> from applying the unnecessarily stringent *VNA* approach to status quo injunctions against agencies,<sup>223</sup> as well as from the general lack of clarity in All Writs Act doctrine. In *Colorado v. United States*, the plaintiff state filed suit against the U.S. Air Force alleging it violated a government contracting law that requires a preference for blind bidders by awarding a contract for a dining facility to a competitor of the incumbent blind vendor.<sup>224</sup> While the plaintiff pursued administrative remedies (an arbitration proceeding), it filed for status quo injunctive relief under the All Writs Act to stay the contract award, arguing that the incumbent’s business would fail without court action, constituting irreparable harm.<sup>225</sup> Rather than apply the traditional four factors under the *Wagner* approach, the court instead looked to *VNA*.<sup>226</sup> In considering *VNA*’s two-prong test to determine whether a heightened showing on the four traditional factors is necessary, the court concluded that the test applies to *all* requests for status quo injunctions to stay nonfinal agency action, not merely those cases in which statutory provisions or common law principles limit preexhaustion review as in *Murray* and *VNA*.<sup>227</sup> Applying this strict test, the court found that a heightened showing was required and that Colorado had failed to show the “virtual certainty” of irreparable harm necessary for relief under the *VNA* approach.<sup>228</sup>

The court premised its extension of the *VNA* test to *all* requests for All Writs Act status quo injunctions on a mistaken reading of a distinguishable body of Supreme Court doctrine. While the court acknowledged *Dean Foods* as

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219. See 16 Wright et al., *supra* note 5, § 3932.2 n.8.

220. See *supra* note 214 and accompanying text.

221. See *supra* notes 215–217 and accompanying text.

222. *Wagner v. Taylor*, 836 F.2d 566, 572 (D.C. Cir. 1987).

223. See *supra* notes 160–167 and accompanying text (discussing the *VNA* approach).

224. 813 F. Supp. 2d 1230, 1233 (D. Colo. 2011). The law in question was the Randolph-Sheppard Act, 20 U.S.C. §§ 107–107f (2012).

225. *Colorado v. United States*, 813 F. Supp. 2d at 1233–36.

226. *Id.* at 1234–35.

227. *Id.*

228. See *id.* at 1235–36 (citing *VNA*, 711 F.2d 1020, 1034 (11th Cir. 1983)).

the basis of its jurisdiction to grant All Writs Act relief, it concluded that the Supreme Court had since “retreated” from that case’s “expansive view” of the All Writs Act.<sup>229</sup> In *Wisconsin Right to Life, Inc. v. FEC*, the court noted, Chief Justice Rehnquist sitting as Circuit Justice had held that the All Writs Act must be used “sparingly and only in the most critical and exigent circumstances.”<sup>230</sup> The cases the Chief Justice had cited for this proposition, however, make clear that it referred only to injunctions requested from a Circuit Justice, not *any* request for an All Writs Act injunction.<sup>231</sup> Nonetheless, proceeding on this interpretation, the *Colorado* court found that it had to evaluate *all* All Writs Act injunction requests under the *VNA* test,<sup>232</sup> dramatically increasing the chances of the blind dining facility operator losing his livelihood because of an allegedly unlawful agency decision. While the administrative appeal concluded that the Air Force had in fact acted improperly,<sup>233</sup> the case illustrates the risks to worthy claimants of an unnecessarily high threshold for All Writs Act injunctive relief and the generally unclear doctrine surrounding the Act’s use.<sup>234</sup>

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229. *Id.* at 1234.

230. *Id.* at 1235 (internal quotation marks omitted) (quoting *Wis. Right to Life, Inc. v. FEC*, 542 U.S. 1305, 1306 (Rehnquist, Circuit Justice 2004)).

231. See *Wis. Right to Life*, 542 U.S. at 1306. The cases from which the strict language on the All Writs Act derives strongly support this interpretation. The Chief Justice in *Wisconsin Right to Life* was quoting *Ohio Citizens for Responsible Energy, Inc. v. Nuclear Regulatory Commission*, in which Justice Scalia as Circuit Justice declined to issue a requested injunction to stay the operation of a power plant pending judicial review of NRC action. *Id.* (citing 479 U.S. 1312, 1313 (Scalia, Circuit Justice 1986)). In addition to noting the statutory issues the petitioners faced in the case, Justice Scalia explained that the All Writs Act was the only basis for such an injunction and that it is “[t]he *Circuit Justice*’s injunctive power [that] is to be used ‘sparingly and only in the most critical and exigent circumstances.’” *Ohio Citizens for Responsible Energy*, 479 U.S. at 1313 (emphasis added) (quoting *Fishman v. Schaeffer*, 429 U.S. 1325, 1326 (Marshall, Circuit Justice 1976)). The language originally derived from an opinion by Justice Stewart as Circuit Justice that did not relate to the All Writs Act, further clarifying that the statement in *Wisconsin Right to Life* was a point of doctrine about the authority of circuit justices, not a statement applying to any All Writs Act–based injunction. See *Williams v. Rhodes*, 89 S. Ct. 1, 2 (Stewart, Circuit Justice 1968).

232. 813 F. Supp. 2d at 1235. Notably, a recent case involving a similar factual claim under the Randolph-Sheppard Act discussed *Colorado* and specifically rejected this conclusion. See *Kansas v. United States*, 192 F. Supp. 3d 1184, 1213 (D. Kan. 2016).

233. See *Colo. Dep’t of Human Servs. v. U.S. Dep’t of Defense*, No. R-S/10-06, at 15–16 (May 30, 2012) (Snider, Arb.), [http://icbv.net/wp-content/uploads/2012/08/2012-05-30-Final-Arbitration-Decision-Case-No-R-S\\_10-6.pdf](http://icbv.net/wp-content/uploads/2012/08/2012-05-30-Final-Arbitration-Decision-Case-No-R-S_10-6.pdf) [<http://perma.cc/9DUD-PR4N>].

234. The *Colorado* court did find that the plaintiff would not have merited an injunction even under the normal irreparable harm standard, based on *VNA*’s holding that bankruptcy does not meet the threshold. *Colorado v. United States*, 813 F. Supp. 2d at 1236–37 (citing *VNA*, 711 F.2d 1020, 1034 (1983)). That holding, however, is arguably based on the same questionable reading of *Murray* that led the *VNA* court to find that a heightened showing is required for all four traditional factors. See *supra* notes 161–168 and accompanying text (discussing *VNA*’s interpretation of *Murray*); cf. *Wis. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (identifying a threat to the existence of the movant’s business as irreparable harm).

## III. MAINTAINING DEFERENCE TO AGENCIES AND FAIRNESS TO LITIGANTS

Review of the differing standards parties must meet to obtain All Writs Act relief against agencies yields two sets of implications. This Part describes each and recommends that courts apply standards that promote the twin goals of appropriate deference to agencies and fairness to litigants. Section III.A advocates that courts maintain the high threshold to obtain writs of mandamus. It also recommends precision in identifying the type of relief sought and imposed in such cases to help preserve a high bar to judicial intervention before the agency has made even an initial determination. Section III.B recommends protecting fairness to litigants by rejecting the doctrine that would require parties seeking status quo injunctions pending administrative appeals to make a heightened showing on the traditional injunction factors. Finally, section III.C links these proposals with contemporary debates over the administrative state's legitimacy and role. Overall, this Part argues that parties invoking the All Writs Act to avoid harm from administrative action or inaction should present sufficient justification for relief but should not be overly burdened by unnecessarily high standards.

A. *Maintaining the High Bar for Writs of Mandamus*

Courts have long maintained that obtaining judicial review of ongoing agency proceedings, before the agency has made any decision in a matter, requires an extraordinary showing of need.<sup>235</sup> While the Supreme Court established the three-prong All Writs Act mandamus test in *Cheney*,<sup>236</sup> and lower courts have articulated the standard in varying language (including the Ninth Circuit in an opinion by then-Judge Anthony Kennedy),<sup>237</sup> all variations set a high threshold. As the Ninth Circuit has explained, intervention in ongoing agency proceedings risks the court engaging in “premature, possibly unnecessary, and piecemeal judicial review,” not to mention disruption of the administrative process and delay of the ultimate resolution of the proceedings.<sup>238</sup> Courts should thus remain cautious and err on the side of

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235. See, e.g., *TRAC*, 750 F.2d 70, 79 (D.C. Cir. 1984); *Gulf Oil Corp. v. U.S. Dep't of Energy*, 663 F.2d 296, 312 (D.C. Cir. 1981); see also supra section II.B.1 (discussing *TRAC*).

236. *Cheney v. U.S. Dist. Court*, 542 U.S. 367, 380–81 (2004); see also supra note 93 and accompanying text (discussing *Cheney*).

237. Then-Judge Kennedy held in a case seeking All Writs Act mandamus to halt an ongoing rulemaking proceeding that “circumstances that will justify [appellate court] interference with nonfinal agency action must be truly extraordinary,” requiring an irreparable injury not correctable on normal review of final action. See *Pub. Util. Comm'r v. Bonneville Power Admin.*, 767 F.2d 622, 630 (9th Cir. 1985) (noting also that use of the All Writs Act to issue writs of mandamus to agencies is even rarer than writs to review nonfinal district court orders); see also *George Kabeller, Inc. v. Busey*, 999 F.2d 1417, 1421–23 (11th Cir. 1993) (agreeing with and applying *Public Utility Commissioner* and *TRAC* to deny a writ of mandamus against the Federal Aviation Administration).

238. *Pub. Util. Comm'r*, 767 F.2d at 629–30; see also *FTC v. Standard Oil Co. of Cal.*, 449 U.S. 232, 242 (1980) (explaining the risks of premature judicial review of agency action—namely, “interference with the proper functioning” of agencies); cf. *In re Murray Energy Corp.*,

deferring to agencies while their procedures are ongoing and no decisions have been made, carefully evaluating requests for writs of mandamus to ensure that parties are not able to use premature requests for judicial review to obstruct and impede agency action that may be unfavorable to the party but within the agency's authority and public interest mission.<sup>239</sup>

Although the Supreme Court narrowed the scope of the exhaustion doctrine in *Darby v. Cisneros*,<sup>240</sup> the separation of powers principle underlying the Court's jurisprudence on the subject provides an additional, structural basis for maintaining the high threshold for court intervention before an agency has made even a preliminary decision. One of the major purposes for the traditional exhaustion requirement, the Court has explained, is "protecting administrative agency authority."<sup>241</sup> This concept is "grounded in deference to Congress' delegation of authority to coordinate branches of Government"<sup>242</sup> and recognizes that "agencies, not the courts, ought to have primary responsibility for the programs Congress has charged them to administer."<sup>243</sup> In other words, the doctrine is "an expression of executive and administrative autonomy."<sup>244</sup> When a court issues a writ of mandamus before an agency has acted on the matter at issue, it does so despite the fundamental structural concerns such judicial intervention in executive action raises. The standard for obtaining such a forceful directive should accordingly remain stringent.

Courts should also ensure that petitions that in form seek temporary equitable remedies—and the lower bar for All Writs Act intervention available for such measures—are not in substance requests for mandamus-type relief to compel more significant action from an agency. While mislabeling a court's directive may not always be consequential for the case at issue,<sup>245</sup> it does present two potential concerns. First, a lack of doctrinal clarity could allow parties actually seeking a fundamental change or disruption of agency procedure to disguise their proposed remedy as a more limited form of relief,

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788 F.3d 330, 335 (D.C. Cir. 2015) ("[T]he All Writs Act does not authorize a court to circumvent bedrock finality principles in order to review proposed agency rules.")

239. Cf. *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 66 (2004) ("The principal purpose . . . of the traditional limitations upon mandamus . . . is to protect agencies from undue judicial interference with their lawful discretion, and to avoid judicial entanglement in abstract policy disagreements which courts lack both expertise and information to resolve.")

240. 509 U.S. 137, 154 (1993); see also *supra* note 48 and accompanying text (describing *Darby's* conclusion that parties must exhaust administrative remedies before seeking judicial review under the APA only when required by statute or agency rule).

241. *McCarthy v. Madigan*, 503 U.S. 140, 145 (1992). The other major purpose is promoting judicial efficiency; the doctrine allows agencies to resolve disputes without bringing them to court and helps to build a more thorough record should judicial review become necessary. *Id.*

242. *Id.*

243. *Id.*

244. *McKart v. United States*, 395 U.S. 185, 194 (1969) (internal quotation marks omitted) (quoting Louis L. Jaffe, *Judicial Control of Administrative Action* 425 (1965)).

245. See *supra* section II.C.2 (describing ambiguity in the form of relief ordered by the Fourth Circuit Court of Appeals in *Virginia Department of Education v. Riley*, 23 F.3d 80 (4th Cir. 1994)).

which if accepted by courts could lead to unmerited intrusion into agency proceedings.<sup>246</sup> Second, general ambiguity in the form of action sought and ordered could also unnecessarily and unfairly elevate the bar for plaintiffs actually seeking the less disruptive form of relief.<sup>247</sup> When parties request multiple or vague forms of relief, courts should not hesitate to use their discretionary authority under the All Writs Act to impose the threshold that matches the relief the party is effectively seeking.<sup>248</sup> These measures would help to maintain an appropriately high threshold for access to judicial relief more sweeping than stays of decisions pending administrative appeal, as well as encourage doctrinal clarity.

### B. Ensuring Fair Access to Status Quo Injunctions

Although courts should maintain a high standard for mandamus intervention in nonfinal agency action, they should not impose more burdensome requirements for an All Writs Act status quo injunction than are required for a standard preliminary injunction.<sup>249</sup> To be sure, *Murray* established that parties invoking the Act to suspend certain federal employment decisions must make a higher showing of irreparable harm than is required for a traditional motion for interim relief.<sup>250</sup> Yet decisions that stretch this narrow, context-specific holding to each of the four injunction factors in all cases with doctrinal or statutory impediments to preexhaustion judicial review<sup>251</sup>—and even more strikingly to any motion for an All Writs Act status quo

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246. This is arguably what took place in *AstraZeneca Pharmaceuticals LP v. Burwell*, 197 F. Supp. 3d 53, 57–59 (D.D.C. 2016); see also supra section II.C.1. Without directly discussing any of the applicable standards for All Writs Act relief, the court ordered the FDA to conduct its procedure for generic-drug approval under court supervision. See *AstraZeneca*, 197 F. Supp. 3d at 57–59. This outcome would have been much less likely had the plaintiff framed its request for relief as a petition for a writ of mandamus rather than a motion for a temporary equitable remedy.

247. Cf. *Colorado v. United States*, 813 F. Supp. 2d 1230, 1234–35 (D. Colo. 2011) (illustrating the unnecessarily high barriers to relief that may result due to lack of clarity in All Writs Act doctrine); see also supra section II.C.3 (discussing the *Colorado* case).

248. See *Air Line Pilots Ass’n Int’l v. Dep’t of Transp.*, 880 F.2d 491, 503 (D.C. Cir. 1989) (declaring the petitioner’s request for an injunction to be “more accurately characterized as a writ of mandamus”); *In re GTE Serv. Corp.*, 762 F.2d 1024, 1025–27 (D.C. Cir. 1985) (explaining the court’s authority and decision to treat an ambiguous pleading for All Writs Act relief as a request for a writ of mandamus).

249. See supra section I.A.3 (describing the traditional *Virginia Petroleum Jobbers* standard for injunctive relief and its use by the Supreme Court and courts generally).

250. *Sampson v. Murray*, 415 U.S. 61, 84 (1974). This basic conclusion by the Court is deservedly subject to the criticism expressed in the dissent, but the majority opinion is not questioned for its precedential value. See supra note 134. Notably, however, the D.C. Circuit has suggested that subsequent decisions may have “in large part mooted” the question of the *Murray* standards’ applicability to other contexts by reinterpreting the statutory scheme at issue in the case. See *Taylor v. Resolution Tr. Corp.*, 56 F.3d 1497, 1505 n.1 (D.C. Cir. 1995).

251. See *VNA*, 711 F.2d 1020, 1030 (11th Cir. 1983) (concluding that *Murray* requires heightened showings on all four traditional injunction factors whenever agency statutes preclude judicial review before parties exhaust administrative remedies); see also supra notes 161–162 and accompanying text (discussing the *VNA* standard).

injunction<sup>252</sup>—are misguided on both practical and doctrinal grounds. Cases in which parties seek such relief arise relatively infrequently, but to the extent that they grow in prominence due to shifts in agency behavior or other changed circumstances, courts should take care to note key points of doctrinal development and keep in mind certain guiding principles.

First, *Murray* established by implication that the four traditional factors are appropriate for weighing All Writs Act motions for status quo injunctions.<sup>253</sup> Courts should not discard the traditional standards based on the *Murray* outcome, especially because the Supreme Court made substantially clear that the case's heightened standard applied only to the specific context of civil service personnel disputes.<sup>254</sup> The *VNA* court's elevation of the showing parties must make to obtain interim relief results from an unwarranted extension and extrapolation of this holding. Even if the *VNA* court's motivation for imposing heightened standards was deference to agencies, the result in *VNA* and cases that have relied on it has been denial of interim relief to ostensibly "worthy claimants"<sup>255</sup> whose businesses would cease to exist without court intervention, constituting definitional irreparable harm.<sup>256</sup> Given the APA's presumption of judicial review for parties aggrieved by agency action,<sup>257</sup> courts should endeavor to avoid this unfair and unwarranted departure from traditional standards of equitable relief with such serious and irreversible consequences.

The text and function of the All Writs Act itself further reveal the error of the *VNA* approach. The statute states that federal courts may issue "all writs necessary or appropriate *in aid of their respective jurisdictions*."<sup>258</sup> In *Dean Foods*, the Court explained that judicial exercise of All Writs Act power is "in the nature of appellate jurisdiction" and that a writ is "in aid of" that jurisdiction when it might otherwise be "defeated."<sup>259</sup> The Court thus found that the Act enabled it to halt a merger in order to allow the FTC to determine its legality, which in turn protected the Court's appellate jurisdiction over the

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252. See *Colorado v. United States*, 813 F. Supp. 2d 1230, 1234–35 (D. Colo. 2011); see also *supra* section II.C.3 (describing the doctrine derived in the case).

253. See *supra* note 137 and accompanying text (describing *Murray*'s implications and the traditional injunction factors).

254. See *supra* notes 133–136 (describing the Court's limitation of the *Murray* holding's scope).

255. *Wagner v. Taylor*, 836 F.2d 566, 572 (D.C. Cir. 1987).

256. *VNA*, 711 F.2d at 1031 n.26 (acknowledging the plaintiff's allegation that it will be forced to enter bankruptcy without interim relief); *Colorado v. United States*, 813 F. Supp. 2d at 1236 (same); see also *supra* note 184 (listing additional cases relying on *VNA* to withhold All Writs Act relief).

257. 5 U.S.C. § 702 (2012) ("A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.")

258. 28 U.S.C. § 1651(a) (2012) (emphasis added).

259. *FTC v. Dean Foods Co.*, 384 U.S. 597, 603 (1966) (internal quotation marks omitted) (quoting *McClellan v. Carland*, 217 U.S. 268, 280 (1910)).

eventual FTC order.<sup>260</sup> As the Court explained in *Murray*, refusing to grant the injunction would have resulted in “the practical disappearance”<sup>261</sup> of one of the merger parties. In *VNA*, however, the court concluded that the plaintiff Medicare provider’s bankruptcy during its administrative appeal would not sufficiently defeat the court’s jurisdiction to merit All Writs Act relief, a finding influenced by the court’s strict reading of *Murray*.<sup>262</sup> The dissent explained the failure of this analysis, observing that without an injunction, “review by the administrative board as well as the court will become virtually meaningless,”<sup>263</sup> and thus the court’s jurisdiction “will be effectively defeated within the meaning of *Dean Foods* and *Murray*.”<sup>264</sup> As the dissent demonstrates, a standard for status quo injunctive relief that requires harm more substantial than the practical disappearance of the regulated entity is more likely to harm courts’ jurisdiction than serve in aid of it. Such a standard is thus at odds with the core purpose of the All Writs Act.

Courts similarly should not abandon all requirements for injunctive relief by embracing the *Klay* approach to All Writs Act injunctions for the agency context,<sup>265</sup> nor should they treat *Dean Foods* as a vehicle to intervene in administrative action without requiring any showing under the traditional factors. Judicial oversight of agency action, even if only to suspend an order pending administrative appeals, is an intrusive intervention into ongoing proceedings. Indeed, “a court interferes just as much when it orders the status quo preserved as when it changes it.”<sup>266</sup> An injunction remains “an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief.”<sup>267</sup> Before imposing an injunction against an agency under the All Writs Act, courts should continue to require that parties make a compelling showing under the traditional factors that they merit temporary equitable relief.

### C. *The All Writs Act and Challenges to the Administrative State*

In an era of ongoing challenges to the legitimacy of the administrative state,<sup>268</sup> outspoken supporters of which rose to the highest levels of government

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260. *Id.* at 606–12; see also *supra* notes 117–118 and accompanying text (discussing the Court’s holding and reasoning in *Dean Foods*).

261. *Sampson v. Murray*, 415 U.S. 61, 77 (1974).

262. *VNA*, 711 F.2d 1020, 1031 (11th Cir. 1983).

263. *Id.* at 1036. (Godbold, C.J., dissenting). As the dissent noted, “A court has no power to breathe life into the corpse of a [regulated entity] that is out of business and bankrupt.” *Id.*

264. *Id.*

265. See *supra* notes 170–175 and accompanying text (describing *Klay*’s All Writs Act doctrine).

266. John Leubsdorf, *The Standard for Preliminary Injunctions*, 91 *Harv. L. Rev.* 525, 546 (1978).

267. *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 22 (2008) (citing *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (per curiam)).

268. See Kessler, *supra* note 19, at 720–23.

following the 2016 elections,<sup>269</sup> proper understanding of mechanisms that can restrict the power and authority of agencies grows increasingly important. For those who support a robust administrative state with an appropriate degree of agency autonomy,<sup>270</sup> clarifying doctrine that allows regulated entities to obtain judicial intervention in ongoing agency activity is a priority worth pursuing. While All Writs Act-based challenges to agency action remain infrequent, deregulatory attacks on the administrative state using the Act are conceivable. One potential strategy is seeking to halt agency action with repeated claims of bias against agency decisionmakers in petitions for mandamus.<sup>271</sup> While such suits are unlikely to succeed without compelling evidence, a sufficient volume of litigation could nonetheless raise significant impediments to agency activity. Another risk is that parties will attempt to expand the holding in *AstraZeneca v. Burwell* and persuade courts to force other agencies to conduct their procedures under court supervision without requiring the plaintiff to satisfy the standards for either form of All Writs Act relief.<sup>272</sup> In light of these concerns, ensuring that doctrine governing the Act's use against agencies clearly and properly reflects foundational precedents and principles of deference alike is a valuable endeavor.

At the same time, the All Writs Act serves as a tool “for the administration of justice.”<sup>273</sup> Given the “Constitution in Exile” movement’s goal to restrict and limit administrative activity,<sup>274</sup> one manifestation of this mission could be the elimination of procedural protections for the subjects of agency action, including by denying stays of adverse decisions pending administrative appeals. When agencies refuse to accommodate the interests of “worthy claimants”<sup>275</sup> while the administrative process progresses, the All Writs Act should remain a means to administer justice on an interim basis with a sufficient showing on the four traditional factors for relief. Another possible impact of the movement’s proponents gaining influence is an increased likelihood of extensive delays or withholding of agency decisions—the type of inaction that the D.C. Circuit in *TRAC* held could be challenged with a petition

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269. See *supra* notes 24–25 and accompanying text.

270. See *supra* note 20 and accompanying text (noting the concept of bureaucratic autonomy).

271. Courts have weighed writs of mandamus on the basis of such allegations in the past. See, e.g., *Pub. Util. Comm’r v. Bonneville Power Admin.*, 767 F.2d 622, 624 (9th Cir. 1985); *Ass’n of Nat’l Advertisers v. FTC*, 627 F.2d 1151, 1155–56 (D.C. Cir. 1979). Bias assertions would be consistent with rhetoric charging the so-called “Deep State,” including administrative agency officials, with prejudice against certain political views. See Rebecca Ingber, *The “Deep State” Myth and the Real Executive Branch Bureaucracy*, *Lawfare* (June 14, 2017), <http://lawfareblog.com/deep-state-myth-and-real-executive-branch-bureaucracy> [<http://perma.cc/N9W5-CPCN>] (describing the “Deep State”).

272. See *supra* section II.C.I (discussing the case and its unusual outcome in detail).

273. *Scripps-Howard Radio, Inc. v. FCC*, 316 U.S. 4, 9–10 & n.4 (1942).

274. See *supra* text accompanying note 21 (describing the movement).

275. *Wagner v. Taylor*, 836 F.2d 566, 572 (D.C. Cir. 1987); see also *supra* notes 149–153 and accompanying text.

for a writ of mandamus under the All Writs Act.<sup>276</sup> While the threshold for mandamus is and should remain high,<sup>277</sup> regulatory beneficiaries in particular may take note of All Writs Act–based avenues to encourage and compel agency action when its delay or absence is harmful to the public interest.

#### CONCLUSION

The All Writs Act allows courts to entertain requests for intervention in ongoing administrative action, both to require agencies to act at court direction with writs of mandamus and to suspend the enforceability of initial agency decisions with injunctions pending completion of administrative remedies. The APA’s presumption of judicial review dictates that parties should have access to the courts to challenge agency action when it causes them substantial hardship. The doctrine that has developed to govern All Writs Act–based review holds that courts may invoke the Act against agencies in aid of their prospective jurisdiction, a powerful vehicle to grant extraordinary relief for deserving parties. Courts should not, however, threaten agency authority by too readily using the All Writs Act to intervene in ongoing agency action. At the same time, they should not unnecessarily raise the threshold for status quo injunctive relief for parties that can make clear that they will suffer irreparable harm without it. In an era of an uncertainty for the future of the administrative state, appropriate standards for All Writs Act relief will help to both protect agencies’ authority to serve the public interest and preserve access to the courts for parties that deserve it.

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276. *TRAC*, 750 F.2d 70, 75–77 (D.C. Cir. 1984) (“Because the statutory obligation of a Court of Appeals to review on the merits may be defeated by an agency that fails to resolve disputes, a Circuit Court may resolve claims of unreasonable delay in order to protect its future jurisdiction.”); see also *supra* notes 141–146 and accompanying text.

277. See *supra* notes 235–238 and accompanying text.