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NAVIGATING REGULATORY DISPUTES: ADMINISTRATIVE
CHALLENGES AND JUDICIAL REVIEW**

**Daniel J. Oates
Miller Nash, LLP
Seattle, Washington**

and

**Kyle Thomas Orne
DLA Piper LLP (US)
Phoenix, Arizona**

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NAVIGATING REGULATORY DISPUTES: ADMINISTRATIVE CHALLENGES AND JUDICIAL REVIEW

I. INTRODUCTION

To truly understand franchise law, a skilled practitioner must also understand administrative law.¹ Indeed, as some have noted, “franchise law is just contract law and other elements of common law interacting with statutory and administrative law.”² From the FTC Franchise Rule,³ to the North American Securities Administrators Association,⁴ to individual state regulation of registration, disclosure, and post-sale relationship conduct,⁵ governmental oversight permeates virtually every aspect of the contractual franchise relationship. As one scholar aptly put it, “Despite its reputation as technical and boring, administrative law is ultimately about power—who has it and how it is used.”⁶

Most regulatory issues that arise in franchising are resolved through amicable negotiation and compromise with government regulators. When negotiations fail, however, franchisors are left with two options: capitulate or litigate. All too often, the answer is capitulation, but in some cases, litigation is a necessary tool to curtail regulatory overreach. This paper addresses the procedures and legal issues that come with regulatory litigation, and subsequent judicial review of agency action.

II. APPLICABLE LAW: THE ADMINISTRATIVE PROCEDURE ACT

The cornerstone of all litigation with regulatory bodies is the Administrative Procedure Act. Which version of the statute applies (the federal version, or various state alternatives) depends on what rule or agency action is being challenged. In addition, depending on which law applies, there are varying degrees of judicial gloss to accompany the law as written, not all of which is

¹ David Gurnick & Peter Lagarias, *Nuts, Bolts, and Outline for Teaching Franchise Law; Would Socrates Approve?*, 40 FRANCHISE L.J. 449, 452 (2021).

² Jeffrey S. Haff & Nancy L. Lochner, *Thinking Outside the “Franchise Law” Box: Is Our Area of Law Special? Should It Be?*, 20 FRANCHISE L.J. 132, 133 (2001).

³ 16 C.F.R. § 436 *et seq.*

⁴ The North American Securities Administrators Association (“NASAA”) does not directly supervise or administer franchising in any meaningful capacity, but “its recommendations and policy initiatives have traditionally been given great weight by the states that regulate franchises.” Caroline B. Fichter & Frank J. Sciremammano, *The North American Securities Administrators Association’s Statement of Policy Regarding the Use of Franchise Questionnaires and Acknowledgements*, 42 FRANCHISE L.J. 351, 355 (2023).

⁵ There are fifteen states that impose either registration or disclosure (or both) of franchise offerings before sale, and an additional twenty states and two U.S. territories that regulate post-sale conduct by franchisors with their franchisees. David J. Kaufmann, *An Overview of Business and Law of Franchising*, ASPATORE, 2013 WL 3773409 (June 2013).

⁶ Glen Staszewski, *Four Ways to Deconstruct Regulation and Undermine Democracy in the States*, 66 WM. & MARY L. REV. 1215, 1218 (2025).

applied consistently.⁷ As such, as in most cases, before considering the best approach to take in resolving a dispute with an administrative agency, the first question that a practitioner must ask is what law applies to the dispute in question.

A. The Federal Administrative Procedure Act

The federal administrative procedure act (the “Federal APA”) was passed by Congress, unanimously, in 1946,⁸ and intended to set out “the general procedural principles which are to govern administrative exercises of rule-making and adjudicatory authority.”⁹ Thus, the Federal APA does not provide express directives on how to resolve disputes over agency action, but rather creates a general framework for evaluating such action. Unsurprisingly, this general approach has resulted substantial litigation.¹⁰

The Federal APA requires agencies to publish information in the Federal Register describing the process for federal rulemaking and adjudications, and disclosing all rules of procedure, processes, and substantive rules of general applicability, including information obtained and relied upon in adopting new rules pursuant to the agency’s legislative enabling act.¹¹ The statute also sets out the specific process that agencies must follow in adopting rules, regulations, and interpretive guidance.¹² And in cases of agency adjudications, which are required in many challenges to agency rules and conduct, the act proscribes the processes that such adjudications must adhere to, and the procedure for appeal.¹³

In the context of franchising, the Federal APA has limited application. In general, the Federal APA likely only applies to actions taken by the Federal Trade Commission (“FTC”) under section 5 of the Federal Trade Commission Act (“FTCA”).¹⁴ The FTC relied upon section 5 of the

⁷ For example, the United States Supreme Court recently changed the standard of review for agency action, eliminating a degree of deference that previously had been accorded to decisions within the agency’s special knowledge and expertise. *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 388–89 (2024). The *Loper Bright* decision overturned an earlier decision, *Chevron U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 839 (1984). The changes to review of federal agency action that have been wrought by *Loper Bright* are beyond the scope of this article, but when looking at the standards that apply in the review of state agency actions under state administrative procedures acts, the reality is, some expressly precluded application of the *Chevron* standard in the first place. Martha Kinsella & Benjamin Lerude, *Judicial Deference to Agency Expertise in the States*, State Ct. Rpt. (June 28, 2024), <https://statecourtreport.org/our-work/analysis-opinion/judicial-deference-agency-expertise-states> (noting that Arizona, Florida, Kansas, Mississippi, and Tennessee have abolished judicial deference to agency action through court decision or constitutional amendment). Other states apply a *Loper Bright*-like standard of “due weight” to agency interpretations, while others continue to apply a robust *Chevron*-like standard. See *id.* And some continue to apply a robust *Chevron*-like deference. So even on the narrow question of whether or not an agency is to be afforded any deference in its analysis of legal issues, there remains a wide array of different rules in different jurisdictions.

⁸ 5 U.S.C. § 551–59, *et seq.*

⁹ Bernard Schwartz, *The Model State Administrative Procedure Act*, 33 WASH. L. REV. 1, 2 (1958).

¹⁰ As of the time of the drafting of this paper, a cursory Westlaw search reveals that there are 116,589 citing references to section 553 of the Federal APA, which pertains to federal administrative rules, and 14,880 citing references to section 554, which pertains to federal administrative adjudications.

¹¹ See 5 U.S.C. § 552.

¹² See *id.* at § 553.

¹³ See *id.* at § 554.

¹⁴ 15 U.S.C. § 45.

FTCA when it adopted the original Franchise Rule.¹⁵ Recent FTC actions in the context of franchising include the a 2024 policy statement advising franchisors not to use franchise agreements to prevent franchisees from communicating with government officials about legal violations,¹⁶ and a staff guidance indicating that it is the FTC's position that the failure to disclose fees to franchisees in a franchise disclosure document violates Section 5 of the FTCA.¹⁷ As neither of these actions are actual agency rules, but rather merely interpretations and guidance, they likely do not arise to the level of actionable agency conduct under the Federal APA.¹⁸ But in the event the FTC pursues an enforcement action for violation of the Franchise Rule or Section 5 of the FTCA, the Federal APA and its procedures will control review of such action.

B. The Model Administrative Procedure Act and Adopted State Administrative Procedure Acts

In 1946, the National Conference of Commissioners on Uniform State Laws adopted the Model State Administrative Procedure Act.¹⁹ In the succeeding decades, the model statute has gone through several iterations,²⁰ and most states have adopted a version of the law.²¹ Much like the Federal APA, the model state APA and the various versions adopted in different jurisdictions proscribe procedures for administrative rulemaking, agency adjudications, and challenges to administrative actions.²²

In addition, unlike the FTC which rarely takes enforcement actions under the Franchise

¹⁵ FTC Franchise Rule, Statement of Basis and Purpose, 43 Fed. Reg. 59614 (Dec. 21, 1978) ("In connection with the advertising, offering, licensing, contracting, sale, or other promotion in or affecting commerce, as 'commerce' is defined in the Federal Trade Commission Act, of any franchise, or any relationship which is represented either orally or in writing to be a franchise, it is an unfair or deceptive act or practice within the meaning of Section 5 of that Act for any franchisor or franchise broker . . .").

¹⁶ See FTC, Policy Statement of the Federal Trade Commission on Franchisor's Use of Contract Provisions, Including Non-Disparagement, Goodwill, and Confidentiality Clauses (July 12, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/policy-statement-of-the-federal-trade-commission-on-franchisors-use-of-contract-provisions-including-non-disparagement-goodwill-and-confidentiality-clauses_0.pdf.

¹⁷ FTC, Staff Guidance on the Unlawfulness of Undisclosed Fees Imposed on Franchisees, at 1 (July 12, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/Franchise-Staff-Guidance.pdf.

¹⁸ Only a "final agency action" is reviewable. 5 U.S.C. § 704. "An agency action is final only if it is both 'the consummation of the agency's decisionmaking process' and a decision by which 'rights or obligations have been determined' or from which 'legal consequences will flow.'" Nat'l Min. Ass'n v. McCarthy, 758 F.3d 243, 250 (D.C. Cir. 2014). In most cases, a mere guidance document is not a final action. *Id.*; but see Barrick Goldstrike Mines Inc. v. Browner, 215 F.3d 45, 48 (D.C. Cir. 2000) (holding that a guidance document was a final agency action where the agency had made clear that it would refuse to provide an exception to the guidance to the challenging plaintiff).

¹⁹ Elizabeth Ayres Whiteside, *Administrative Adjudications: An Overview of the Existing Models and Their Failure to Achieve Uniformity and A Proposal for A Uniform Adjudicatory Framework*, 46 OHIO ST. L.J. 355, 356 (1985).

²⁰ REVISED MODEL STATE ADMINISTRATIVE PROCEDURE ACT (1961); MODEL STATE ADMINISTRATIVE PROCEDURE ACT prefatory note (1981); MODEL STATE ADMINISTRATIVE PROCEDURE ACT, REVISED (2010).

²¹ Michael N. Widener, *Chasing the Atticus Code - Preserving Adjudication Integrity in Local Administrative Hearings*, 31 J. NAT'L ASS'N ADMIN. L. JUDICIARY 443, 474 (2011).

²² See, e.g., CAL. GOV. CODE § 11340 *et seq.*; WASH. REV. CODE § 34.05 *et seq.*

Rule,²³ states are much more likely to pursue enforcement and rulemaking activities in the context of franchising.²⁴ State enforcement actions are triggered for all manner of reasons: franchisee complaints, franchisor filings, competitor complaints, electronic media and advertising, self-reporting, and franchise trade shows.²⁵ Similarly, although the FTC has not revised the Franchise Rule since 2007,²⁶ states are the laboratory of democracy,²⁷ with a constantly evolving set of rules and regulations. This slow burn of government action provides ample opportunities for franchisors, brokers, and other franchise-related businesses to raise administrative challenges. The next section addresses litigation challenges in these state-created venues.

III. LITIGATING CLAIMS IN ADMINISTRATIVE TRIBUNALS

Sometimes a spade is just a spade. And sometimes litigation, whether it is in court, an arbitration, or an administrative tribunal, is still just litigation. In other words, many of the qualities that serve a litigator well translate, regardless of the venue. Nonetheless, a prudent and prepared litigator should know that there are key differences in administrative litigation; differences that may be the key to success or failure. This section will address the idiosyncrasies of litigating regulatory claims in state administrative tribunals.

A. Types of Administrative Challenges in Franchising

The most common areas that may require challenges to agency action fall into three categories: (1) rulemaking;²⁸ (2) adjudicative proceedings;²⁹ and (3) other agency actions outside the course of an adjudicative proceeding.³⁰ Each of these areas are frequently implicated in the context of franchising. For example, with respect to rulemaking, in 2023, the State of Washington's Department of Financial Institutions adopted a new rule that codifies the NASAA Statement of Policy on the use of questionnaires and acknowledgments by franchisors.³¹ In adjudicative proceedings, franchise regulators have the power to issue stop orders for the sale of

²³ For example, the FTC took no major actions against any franchisors between 2013 and 2022. See Byron McLain, *The FTC Initiates Rare Enforcement Action in Case Against Franchisor Burgerim* (Feb. 25, 2022), <https://www.jdsupra.com/legalnews/the-ftc-initiates-rare-enforcement-8547054/>. During this time, it was focused almost exclusively business opportunities. Martin Cordell, Theresa Leets & Warren Lee Lewis, *Responding to Franchise Enforcement Actions*, ABA 43RD ANNUAL FORUM ON FRANCHISING W-12 at 9 (2020). During the 1990s, the FTC pursued only a few dozen cases. *Id.* In short, given the dearth of rulemaking and adjudication activity by the FTC, it is highly unlikely that a party will need to pursue administrative relief against the FTC under the Federal APA.

²⁴ Cordell, Leets & Lewis, *supra* note 23, at 10 ("The states regularly initiate enforcement actions for violations of state disclosure laws.").

²⁵ Cordell, Leets & Lewis, *supra* note 23, at 11.

²⁶ FTC Statement of Basis and Purpose, 72 Fed. Reg. 15444–15492 (2007).

²⁷ *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311(1932) (Brandeis, J., dissenting).

²⁸ See, e.g., WASH. REV. CODE § 34.05.570(2) (governing judicial review of agency rules).

²⁹ *Id.* at § 34.05.570(3) (governing judicial review of agency orders in adjudicative proceedings).

³⁰ *Id.* at § 34.05.570(4) (governing judicial review of other agency actions).

³¹ WASH. ADMIN. CODE § 460-80-325.

franchises to prevent violations of state law.³² And generally, franchise regulators take other regulatory actions that are also subject to challenge, such as their recent enhanced scrutiny of undisclosed fees,³³ pushback on disclosed timelines for buildouts and franchise performance in accordance with recent NASAA guidance on the subject,³⁴ and a plethora of other issues that come up during the registration renewal process, such as disputes over franchise agreement language on disclaimers and noncompetes, and scrutiny of audited financials. Each of these areas are ripe for potential administrative challenges.

1. Rulemaking Challenges

Challenges to franchise rules and rulemaking proceedings at the state level are rare. This is in part because many of the statutes that regulate franchising are long and detailed, leaving less room for regulators to add gloss through rulemaking.³⁵ The statutes also generally provide for robust rulemaking authority by state regulators, that inhibit later attacks on rule validity.³⁶

Slightly less rare are challenges to administrative rules involving industry specific dealership laws, like agencies created to adjudicate and resolve disputes in the automobile dealership space. For example, the State of California set up rules for adjudicating disputes under the California Franchise Automobile Act for resolving dealer protests of franchise terminations, modifications, and new dealerships.³⁷ The United States Supreme Court has upheld this regulatory framework as permissible under both the statute and the U.S. Constitution,³⁸ but the cases litigating these issues represent an example of the type of challenge to an administrative

³² CAL. CORP. CODE § 31115; HAW. REV. STAT. § 482E-8; 815 ILL. COMP. STAT. 705/22; IND. CODE § 23-2-2.5-14; MD. CODE ANN., BUS. REG. § 14-221; MICH. ADMIN. CODE r. 445.704; MINN. STAT. § 80C.12; N.Y. GEN. BUS. LAW § 683(7); N.D. CENT. CODE § 51-19-09; R.I. GEN. LAWS § 19-28.1-18; S.D. CODIFIED LAWS § 37-5B-41; VA. CODE ANN. § 13.1-562; WASH. REV. CODE § 19.100.120; WIS. STAT. § 553.28.

³³ See Eleanor Vaida Gerhards, *Franchise Regulatory Update: What Franchisors Need to Know*, FOX ROTHSCHILD (Oct. 29, 2025), <https://www.foxrothschild.com/publications/franchise-regulatory-update-what-franchisors-need-to-know-now>.

³⁴ See *id.* (citing N. Am. Secs. Admr's Ass'n, Bus. & Opp. Project Grp., *Impact of Shifting Market and Economic Factors on Franchise Disclosures* (Aug. 6, 2025), <https://www.nasaa.org/wp-content/uploads/2025/08/Impact-of-Shifting-Market-and-Economic-Factors-on-Franchise-Disclosures-8-6-25.pdf>).

³⁵ For example, Washington's Franchise Investment Protection Act creates a comprehensive regulatory scheme that includes a host of detailed provisions that extend to registration, disclosure, post-sale relationship activities, and administrative enforcement, contained in 39 sections and comprising more than 11,000 words. WASH. REV. CODE §§ 19.100.010–940. Conversely, there are only 26 administrative rules that have been promulgated under the statute, each of which are individually relatively narrow in scope, comprising just over 4,000 words. WASH. ADMIN. CODE §§ 460-80-050–540. In short, many of the issues that arise under Washington law pertain to the statute, rather than rules promulgated by the Department of Financial Institutions.

³⁶ See, e.g., *People v. Carter*, 97 Ill.2d 133, 139 (1982) (noting that rules promulgated by the Illinois Attorney General pursuant to the Illinois Franchise Disclosure Act provided for a robust process for securing an order of exemption, including a notice and comment period, and the statutory authority for adopting the rule, none of which suggested that the rules granted the attorney general “unrestricted criminal exemption power”).

³⁷ See *BMW of N. Am., Inc. v. New Motor Vehicle Bd.*, 162 Cal. App. 3d. 980, 985 (1984).

³⁸ *New Motor Vehicle Bd. of Cal. v. Orrin W. Cox, Co.*, 439 U.S. 96 (1978) (holding that the California Automobile Franchise Act's protest-and-stay mechanism does not violate due process, does not constitute an impermissible delegation of state power to private citizens, and does not conflict with the Sherman Act).

rule that, if successful, could radically modify compliance obligations in a relevant state.³⁹

2. Adjudicative Proceedings

Challenges to agency orders in adjudicative proceedings are much more common than rule challenges in franchise disputes. In particular, a franchisor that is subject to an agency order is typically facing the imposition of a penalty—sometimes a harsh penalty—in which case the franchisor has little choice but to fight or capitulate and accept the agency’s proposed sanction. For example, agencies frequently issue orders in the context of “(1) unregistered franchise sales; (2) fraud or false or misleading registration applications; (3) incomplete registration applications; (4) undisclosed criminal convictions or judgments; or (5) severely deteriorated franchisor financial condition,” to name a few common types of disputes.⁴⁰

Adjudicative proceedings are usually commenced when the agency issues an administrative complaint,⁴¹ a summary order,⁴² or a statement of charges against a franchisor or franchise broker.⁴³ These documents will set out the factual allegations of the dispute, much in the same manner as a complaint in a civil action.⁴⁴ They will also explain how those factual allegations purport to violate state law,⁴⁵ and describe the proposed penalty that the agency seeks

³⁹ See, e.g., *Florida Automobile Dealer’s Ass’n v. Florida Dep’t of Highway Safety & Motor Vehicles*, 2017 WL 5998853 (Fla. Div. Admin. Hrgs. 2017) (finding that state of Florida exceeded its statutory authority by enacting a rule that required certain fee disclosures because enabling statute did not authorize the agency to require such disclosures); *but see Volvo Trucks N. Am., Inc. v. State*, 886 So.2d 556, 561 (La. 5th Ct. App. 2004) (holding that agency did not create unwritten rule in violation of Louisiana APA based on comments by regulator at hearing).

⁴⁰ See Daniel J. Oates, *Franchising’s Death Penalty: The Dreaded Stop Order*, 44 FRANCHISE L.J. 91, 95–96 nn.33–36 (2026) (collecting cases).

⁴¹ See, e.g., *In re Mac and Cheese Franchise Operations, LLC*, In. Secs. Div. Cause No. 23-0008 CD (May 24, 2023), https://www.aafd.org/wp-content/uploads/2023/08/Mac_And_Cheese_Franchise_Operations_LLC_Cease_and_Desist_1690565110-1.pdf (“Petitioner, the Office of the Indiana Secretary of State, Securities Division . . . files this Petition for Cease and Desist Order . . . in the matter of Mac and Cheese Franchise Operations, LLC. . . for alleged violations of Indiana Franchise Law.”); *In re Gaming Goat, Inc.*, 2019 WL 4454339 (Minn. Dept. Comm. May 30, 2019).

⁴² See, e.g., *In re Xtreme Clean of the Fox Cities, Inc.*, 2022 WL 22937724 (Wis. Fin. Inst. Jan. 18, 2022).

⁴³ See, e.g., *In re The Franchise Collective, LLC*, Wash. Dep’t of Fin. Inst., Secs. Div., Cause No. S-25-4085-25-SC01, at 1 (Oct. 8, 2025), <https://dfi.wa.gov/sites/default/files/documents/securities-orders/S-25-4085-25-SC01.pdf> (“STATEMENT OF CHARGES. Please take notice that the Securities Administrator of the State of Washington has reason to believe that Respondent The Franchise Collective, LLC filed an incomplete franchise broker application and was granted registration as a franchise broker in the state of Washington.”).

⁴⁴ *Id.*

⁴⁵ *Id.* at 3 (“At the time the Respondent’s application was filed with the Securities Division, it was incomplete in a material respect because it failed to include payment of the fee required under RCW 19.100.240 for franchise broker registration. . .”).

to impose⁴⁶ (or in the context of a summary order, has already imposed).⁴⁷ Similar to other types of civil infractions (such as traffic citations), the party receiving an administrative complaint or statement of charges can consent to entry of an order, or can challenge the matter,⁴⁸ which will commence the formal dispute resolution process.

3. Other Agency Actions

In addition to rulemaking and administrative adjudications, agencies also take other actions that are subject to challenge. For example, an agency may simply fail to act, such as by refusing to allow a franchise registration without the franchisor conceding to changes in its filings. An agency also may issue interpretive opinions or provide other guidance that affects how the agency acts.⁴⁹ These types of actions may have concrete consequences for businesses that disagree with the agency's position, or refuse to acquiesce to demands by the agency for changes to filings as a condition to registration or renewal.⁵⁰ As a result, these actions are also often subject to administrative challenges.⁵¹

⁴⁶ *Id.* ("Pursuant to RCW 19.100.252 and based on the above Tentative Findings of Fact and Conclusions of Law, the Securities Administrator intends to order that franchise broker registration of The Franchise Collective, LLC be revoked.").

⁴⁷ An agency will often issue a summary order if it concludes that immediate relief is in the public interest. See, e.g., HAW. REV. STAT. § 482E-8 ("The director may issue a stop order prohibiting the sale of a franchise if the director finds that the order is in the public interest . . ."). This quasi-emergency power is most commonly used with stop orders, which preclude franchisors from selling franchises until the order is resolved. See generally Oates, *supra* note 40, at 95 ("Once issued, stop orders go into effect immediately, last indefinitely, and require the franchisor to pause all sales and offers."). Because constitutional due process requires that parties affected by government action receive notice and opportunity to be heard, these immediately effective orders are typically appealable and heard on an expedited basis. See CAL. CORP. CODE § 31117 (requiring hearing be set within fifteen days); HAW. REV. STAT. § 482E-8(b) (requiring hearing be set within fifteen days); 815 ILL. COMP. STAT. 705/23 (requiring hearing be set within ten days); MD. CODE ANN., BUS. REG. § 14-222 (requiring hearing be set within fifteen days); MINN. STAT. § 80C.12 (requiring hearing be set within twenty days); N.D. CENT. CODE § 51-19-09 (requiring hearing be set within fifteen days); S.D. CODIFIED LAWS § 37-5B-44 (requiring hearing be set within twenty days); VA. CODE ANN. § 13.1-562(B) (requiring that hearing be set as soon as practicable); WASH. REV. CODE § 19.100.130 (requiring hearing be set within fifteen days); WIS. STAT. § 553.56 (requiring that hearing be held within sixty days).

⁴⁸ *In re The Franchise Collective, LLC*, Wash. Dep't of Fin. Inst., Secs. Div., Cause No. S-25-4085-25-SC01, at 3 ("The Franchise Collective, LLC may make a written request for hearing as set forth in the Notice of Opportunity to Defend and Opportunity for Hearing accompanying this Order."); see also 5 ILL. COMP. STAT. 100/10-25(a) ("In a contested case, all parties shall be afforded an opportunity for a hearing after reasonable notice.").

⁴⁹ See, e.g., Md. Off. of the Att'y Gen., Sec. Div., Interpretive Opinion/No Action Position Adopting NASAA Statement of Policy Regarding the Use for Franchise Questionnaires and Acknowledgments (Jan. 23, 2023), https://www.marylandattorneygeneral.gov/Securities%20Documents/Franchise%20_SOP_Revised_022323.pdf; SEC. DIV., WASH. DEP'T OF FIN. INSTS., RE: SUBFRANCHISOR REGISTRATION REQUIREMENTS, 1 FRANCHISE ACT INTERPRETIVE STATEMENT FIS-01 (Jan. 1, 1991), <https://dfi.wa.gov/industry/franchise-act-interpretive-statements/franchise-act-interpretive-statement-fis-01>; *In re Comm'r's Interpretive Opinion/No Action Position Allowing Franchisor Financial Statements to be Current Within 120 Days of a Franchise Application*, Order No. 2023-1 (Apr. 19, 2023), <https://cca.hawaii.gov/wp-content/uploads/2026/04/120-day-Interpretive-Order.pdf>;

⁵⁰ It is often difficult to bring challenges to agency action outside rulemaking or adjudicative proceedings precisely because the complainant must show that the agency's conduct caused some kind of injury or deprivation of the complainant's rights resulting from a final agency determination. See discussion and sources cited *supra* note 18.

⁵¹ See, e.g., WASH. REV. CODE § 34.05.570(4).

B. Procedure in Administrative Hearings

1. Administrative Law Judges

In most jurisdictions, initial review of administrative decisions is performed by administrative law judges (“ALJ”).⁵² ALJs are appointed by the agency, or a state-created office of administrative hearings.⁵³ As a result, they are typically employed either by the agency that is bringing the adjudication, or by another state agency that handles all state-level administrative adjudications.⁵⁴ This creates an inherent tension, as ALJs ultimately report to the chief executive, and are not members of the judiciary. At the federal level, there is a growing discourse that this connection to the executive branch undermines the independence of the judiciary, and the separation of powers, leading to questions about whether ALJs are in fact constitutionally permissible.⁵⁵ These arguments likely have substantially less force in the states however, because unlike the federal government which has only delegated certain powers, and which has a strict separation of powers mandate, states have historically been viewed as exercising plenary legislative power. That means they are not bound by the same restrictions on separation of powers that limit the federal government, and state legislatures are more free to delegate their power to different branches of government.⁵⁶ That presumably includes granting the state executive branch the authority to adjudicate certain disputes. Moreover, as discussed in more detail later, essentially all state administrative procedure acts include a process for judicial review of agency action, so the ultimate arbiter is the judiciary, not the executive agency.⁵⁷

2. Scope.

Administrative hearings are usually limited to underlying substantive and procedural questions under the applicable administrative procedure act, not broader challenges. For

⁵² See, e.g., MINN. STAT. § 14.50 (“All hearings of state agencies required to be conducted under this chapter shall be conducted by an administrative law judge. . .”); see also CAL. GOV. CODE § 11370.3; IND. CODE § 4-21.5-3-9; WASH. REV. CODE § 34.05.425(1)(c).

⁵³ See generally, ILL. ADMIN. CODE tit. 14, § 200.410(a); MINN. RULE 1400.2020; N.Y. COMP. CODES R. & REGS. tit.19, § 400.2(a); WASH. ADMIN CODE § 10-08-001(1). Indeed, while some states keep administrative adjudications within the purview of the agency adjudicating the dispute, at least twenty-seven state governments have created centralized offices of administrative hearings to independently adjudicate disputes for other state agencies. See Cynthia A. Baker, *Introduction: Evaluating State Government Designs of Executive Branch Adjudication*, 38 IND. L. REV. 385, 387 (2005).

⁵⁴ See generally sources cited *supra* note 53.

⁵⁵ Stone Washington, *Regulatory Advantages of the Administrative Law Court System*, Regulatory Studies Ctr., George Washington Univ. (Apr. 17, 2024), https://regulatorystudies.columbian.gwu.edu/sites/g/files/zaxdzs4751/files/2024-04/commentary_admin_law_courts_swashington_final.pdf; see also Statement of Justice Dep’t Chief of Staff Chad Mizelle (Feb. 20, 2025) (“Today the Department of Justice determined that multiple layers of removal restrictions shielding administrative law judges (ALJs) are unconstitutional. Unelected and constitutionally unaccountable ALJs have exercised immense power for far too long. In accordance with Supreme Court precedent, the Department is restoring constitutional accountability so that Executive Branch officials answer to the President and to the people.”); Thaya Brook Knight, Ilya Shapiro, Devin Watkins & Ari Blask, *Ending the Reign of the Administrative Law Judge*, Cato Inst. (Mar. 10, 2017), <https://www.cato.org/blog/ending-reign-administrative-law-judge>.

⁵⁶ G. Alan Tarr, *Interpreting the Separation of Powers in State Constitutions*, 59 N.Y.U. ANNUAL SURVEY OF AM. L. 328, 329 (2003), https://www.law.nyu.edu/sites/default/files/ecm_pro_065016.pdf.

⁵⁷ See discussion *infra* section IV.

example, in many jurisdictions, ALJs lack the authority to adjudicate constitutional questions.⁵⁸ Instead, proceedings are typically limited to whether the agency acted within the scope of its statutory authority, followed proper procedure, and/or acted in an arbitrary or capricious manner.⁵⁹ Constitutional issues and statutory interpretation questions are often left unresolved until the conclusion of administrative proceedings when the matter is brought up on judicial review before the courts.⁶⁰

3. Prehearing Conference

Following commencement of adjudicative proceedings when the agency issues the administrative complaint, summary order, or a statement of charges, the agency or the office of administrative hearings will assign an ALJ. Once the ALJ is assigned, he or she will usually schedule a prehearing conference.⁶¹ This conference is akin to a Fed. R. Civ. P. 16 conference, that is devoted to simplifying issues the hearing, and addressing issues like discovery (if allowed), evidence presentation, hearing procedures, and scheduling.⁶² After the conference, the ALJ will typically issue a scheduling order that sets out all of the deadlines for the case, often including things such as initial exchange of witnesses and documents, discovery cutoff, dispositive motion deadlines, final witness and exhibit lists, prehearing briefing, and the hearing itself.

4. Discovery Issues.

Whether, and the extent to which, discovery is available prior to an administrative hearing on the merits depends on the jurisdiction in question. For example, Minnesota provides for the same degree of discovery in administrative matters as civil proceedings in court.⁶³ In other jurisdictions, such as California, Illinois, and Washington, the applicable rules do not expressly

⁵⁸ X-Gen Pharms., Inc. v. Dep't of Fin. & Pro. Regul., 224 N.E.3d 825, 828 (Ill. Ct. App. 2022) (noting that agencies lack the authority to adjudicate constitutional issues); Neeland v. Clearwater Mem'l Hosp., 257 N.W.2d 366, 368 (Minn. 1977) ("[T]he constitutional issue was not and could not have been presented to or passed upon by the administrative bodies below.").

⁵⁹ See sources cited *supra* section III.B.

⁶⁰ See, e.g., WASH. REV. CODE § 34.05.570(3)(a); *id.* at § 34.05.570(4)(c)(i).

⁶¹ 1 CAL. CODE REGS. § 1026; MINN. R. 1400.6500, Subp. 2; HAW. CODE R. § 16-201-21; MD. CODE REGS. 28.02.01.17(A); WASH. ADMIN. CODE § 10-08-130; WIS. ADMIN. CODE § HA 1.11(1).

⁶² MINN. R. 1400.6500, Subp. 1 ("The purpose of the prehearing conference is to simplify the issues to be determined, to consider amendment of the agency's order if necessary, to obtain stipulations in regard to foundation for testimony or exhibits, to obtain stipulations of agreement on nondisputed facts or the application of particular laws, to consider the proposed witnesses for each party, to consider how the hearing will be recorded and whether a transcript will be prepared, to consider whether an interpreter or other accommodation is needed, to identify and exchange documentary evidence intended to be introduced at the hearing, to determine deadlines for the completion of any discovery, to consider a reasonable limit on the time allowed for presenting evidence, to establish hearing dates and locations if not previously set, to determine whether the issues in the case are susceptible to mediation, to consider such other matters that may be necessary or advisable and, if possible, to reach a settlement without the necessity for further hearing."); WASH. ADMIN. CODE § 10-08-130.

⁶³ MINN. R. 1400.6700, Subp. 2.

provide for any discovery,⁶⁴ and in other jurisdictions it is either limited in scope,⁶⁵ or expressly left up to the discretion of the ALJ.⁶⁶ In the authors' experience, parties should request whatever discovery they think they will need at the initial prehearing conference when the case schedule is set. In order to effectively do that, counsel should go to the conference prepared to articulate what discovery is needed, and why, and be able to justify their request with targeted discovery proposals wherever possible. At a minimum, this will create a record for a later judicial appeal if the ALJ denies a request to conduct discovery.

5. Dispositive Motions.

Dispositive motions may or may not be available in administrative hearings.⁶⁷ More often than not, the availability of a dispositive motion will depend on the proclivities of the assigned ALJ. In the authors' experience, like many arbitrators, ALJs frequently view dispositive motions as an unnecessary waste of time, preferring the efficiency of proceeding straight to hearing. Other judges are more open to the prospect, and will often agree to include a briefing and hearing schedule as part of the initial case scheduling conference order if requested by one or more of the parties. If a motion is permitted, it is usually limited to summary judgment only, after the close of discovery, and follows many of the same rules that apply under Fed. R. Civ. P. 56.⁶⁸ The ALJ will typically only rule on legal issues, or if there are no genuine issues of material fact for hearing, such as where the underlying factual issues are not in dispute. In many cases, these motions are decided without oral argument on an expedited schedule, so as to create as minimal impact as possible on the scheduled final hearing date. Where the agency is aggressively seeking dismissal of challenges, this may mean that the dispositive motion phase of the process might be the only opportunity that the franchisor has to create a factual record in the event of a subsequent judicial appeal. Accordingly, counsel should be prepared to present a robust evidentiary record via affidavits, and where allowed, deposition testimony and exhibits. Failure to do so will likely preclude the admission of favorable evidence on a subsequent judicial appeal.

6. Final Hearings.

In most cases, final hearings in administrative matters are similar to an arbitration. The ALJ will set the ground rules for the hearing: the location,⁶⁹ whether witnesses can appear telephonically or virtually,⁷⁰ deadlines for submissions of witness and exhibit lists,⁷¹ the availability

⁶⁴ See 1 CAL. CODE REGS. § 1030; ILL. ADMIN. CODE tit. 14, § 200.409 (identifying record of hearing, but not including procedure for conducting discovery); WASH. ADMIN. CODE § 10-08 *et. seq.*

⁶⁵ MD. CODE REGS. 28.02.01.13(A) (limiting discovery to document productions absent an agreement of the parties).

⁶⁶ 41 IND. ADMIN. CODE 2-2-9(a) (granting the ALJ the authority to apply the Indiana Rules of Trial Procedure to an administrative proceeding).

⁶⁷ 1 CAL. CODE REGS. § 1022 (providing for the filing of motions in administrative hearings); MINN. R. 1400.6600; 19 N.Y. COMP. CODES R. & REGS. tit.19, § 400.6(a) (permitting a filing of a dispositive motion only at the conclusion of the petitioner's case in chief at the evidentiary hearing).

⁶⁸ See MD. CODE REGS. 28.02.01.12(D); WIS. ADMIN. CODE § HA 1.10(2).

⁶⁹ 41 IND. ADMIN. CODE 2-2-8(a); MD. CODE REGS. 28.02.01.21(B).

⁷⁰ See, e.g., 1 CAL. CODE REGS. § 1030(b).

⁷¹ See, e.g., MINN. R. 1400.6950, Subp. 1.

of testimony by declaration, and other procedural issues. In many cases, the rules of evidence are also relaxed.⁷² In other jurisdictions, the rules of evidence may be applied at the discretion of the ALJ.⁷³ As a practical matter, this means that hearings will be relatively informal in nature. Some jurisdictions provide for opening and closing statements,⁷⁴ while in others, it will be in the discretion of the ALJ.⁷⁵

Following the hearing, the ALJ will have the opportunity to render a ruling, usually in the form of findings of fact and conclusions of law.⁷⁶ As previously noted, in some cases, this ruling is a binding final order,⁷⁷ and in others, it is merely a recommendation that must be approved by the agency to constitute a final order.⁷⁸

C. Standards of Review

The standard of review in an administrative proceeding may depend on whether it is a rule challenge, an agency adjudication, or a challenge to other agency action. Generally speaking, a rule can be invalidated if it is unconstitutional, it exceeds the statutory authority of an agency, it was adopted without complying with the statutory rulemaking process, or the rule is arbitrary and capricious.⁷⁹ Each of these reasons are also generally grounds for overturning agency orders in administrative adjudications, but ALJs are also empowered to make factual findings and decline to adopt agency decisions that are unsupported by the evidence, or where the order that is presented is inconsistent with the law or the agency's own rules.⁸⁰

Whether an issue or action is within the agency's statutory authority, or whether the agency complied with its own rules, is generally a question of law for determination by the ALJ. On substantive evidentiary issues, the applicable standard is generally whether a party has met

⁷² See HAW. CODE R. § 16-201-21 ("The admissibility of evidence at the hearing shall not be governed by the laws of evidence and all relevant oral or documentary evidence shall be admitted if it is the sort of evidence on which reasonable persons are accustomed to rely in the conduct of serious affairs."); ILL. ADMIN. CODE tit. 14, § 200.407; MD. CODE REGS. 28.02.01.21; N.Y. COMP. CODES R. & REGS. tit. 19, § 400.8; WIS. STAT. § 227.45(1).

⁷³ See 5 ILL. COMP. STAT. 100/40; 41 IND. ADMIN. CODE 2-2-9(a); MINN. R. 1400.7300, Subp. 1; WASH. REV. CODE § 34.05.452.

⁷⁴ See HAW. CODE R. § 16-201-37; MD. CODE REGS. 28.02.01.20; MINN. R. 1400.7800(D), (H).

⁷⁵ See, e.g., WASH. ADMIN. CODE § 10-08-200(17) (granting ALJ authority to waive any rule unless a party shows that it would be prejudiced by the waiver).

⁷⁶ See ILL. ADMIN. CODE tit. 14, § 200.410; MINN. STAT. § 14.62, Subp. 1; WIS. STAT. § 227.47(1) ("Every proposed or final decision of an agency or hearing examiner following a hearing and every final decision of an agency shall be in writing accompanied by findings of fact and conclusions of law.").

⁷⁷ See MD. CODE REGS. 28.02.01.25(B).

⁷⁸ See ILL. ADMIN. CODE tit. 14, § 200.411(a) ("A final administrative decision shall be issued by the Administrator in writing within one month of receipt of the Hearing Officer's recommendation."); MINN. R. 1400.8200.

⁷⁹ See, e.g., WASH. REV. CODE § 34.05.570(2)(c). As discussed in more detail later, however, in many cases only a reviewing court can assess the constitutionality of the rule in the first instance, meaning that an administrative law judge may only overturn the rule on one of the other enumerated grounds. See, e.g., sources cited *infra* note 58.

⁸⁰ See, e.g., *id.* §§ 34.05.570(3)(d)–(e), (h).

its burden by a preponderance of the evidence.⁸¹ These standards do not materially differ from standard civil proceedings. The primary issue that is different is the ALJ's assessment of whether or not the agency's action, rule, or order is arbitrary and capricious. An action, rule, or order is "arbitrary and capricious" "where it 'lacks any rational explanation that reasonable persons might support'"⁸² or if it is a "willful and unreasoning action, taken without regard to or consideration of the facts and circumstances surrounding the action."⁸³ Generally, that requires that the agency have a rational basis for its decision or action.⁸⁴ The scope of this review is narrow, as an ALJ cannot substitute its own judgment for that of the agency.⁸⁵ But it does open many lines of inquiry into why the agency is taking the action that is the subject of the challenge, and what it has relied upon to reach its conclusions. This means that the agency must have at least some basis for taking action beyond a mere conclusory assertion of its statutory grant of authority.

D. Remedies in Administrative Hearings

In most administrative hearings, the remedy sought by the agency is the same remedy set out in the administrative complaint or statement of charges. Thus, for example, in a franchise dispute, the agency may be seeking approval of its proposed order to revoke a franchise registration, or to direct a franchisor to cease and desist from alleged violations of the state's franchise statute.⁸⁶ Conversely, the franchisor or target entity of the state's action typically seeks a declaratory order that the agency's proposed findings of fact or conclusions of law are not supported by the record or are legally incorrect. This is usually the limit of available relief. In rare cases, the ALJ has the authority to award other relief, such as costs, to the prevailing party.⁸⁷

E. Appeal from Administrative Decisions.

Following the issuance of a final decision by an ALJ, the losing party always has the right to appeal. In many jurisdictions, the agency head in question is the first layer of review following a decision by an administrative law judge.⁸⁸ Alternatively, the party that has lost can sometimes petition for judicial review by a court (either before or after an initial appeal to the agency head).⁸⁹ In either case, the standard of review is governed by the applicable APA, which requires affirmance of the appeal on factual questions if the ALJ's decision is supported by substantial

⁸¹ See, e.g., 5 ILL. COMP. STAT. 100/10-15.

⁸² See *Bd. of Health of Northbridge v. Couture*, 95 Mass. App. Ct. 296, 302, 125 N.E.3d 98, 103 (2019).

⁸³ *Brighton v. Washington State Dep't of Transp.*, 109 Wash. App. 855, 863, 38 P.3d 344, 349 (2001).

⁸⁴ *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971).

⁸⁵ See *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

⁸⁶ See, e.g., *In re The Franchise Collective, LLC*, Wash. Dep't of Fin. Inst., Secs. Div., Cause No. S-25-4085-25-SC01, at 1 (Oct. 8, 2025), <https://dfi.wa.gov/sites/default/files/documents/securities-orders/S-25-4085-25-SC01.pdf>.

⁸⁷ See, e.g., WIS. STAT. § 227.485 (noting that prevailing parties that meet the same or substantially similar requirements of the Federal Equal Access to Justice Act may be entitled to an award of costs).

⁸⁸ This is not always the case. For example, in Minnesota, ALJs merely make recommended findings of fact and conclusions of law, and the final decision is left to the agency head in the first instance. Caleb Wooten, *Watching the Waters: Constitutional Rulings of Administrative Law Judges in Minnesota*, MITCHELL HAMLINE L.J. OF PUB. POL'Y & PRAC. (Oct. 9, 2024), https://mitchellhamline.edu/law-journal/2024/10/09/watching-the-waters-constitutional-rulings-of-administrative-law-judges-in-minnesota/#_ftnref1.

⁸⁹ See, e.g., WASH. REV. CODE § 34.05.570.

evidence.⁹⁰ The substantial evidence standard is “minimal” and “less than a preponderance of the evidence.”⁹¹ “Where substantial evidence exists to support a decision being reviewed by the courts, the determination must be sustained, ‘irrespective of whether a similar quantum of evidence is available to support other varying conclusions.’”⁹² There is typically no additional fact finding on appeal, so this is a rigorous standard. Conversely, the legal determinations of the ALJ will be reviewed de novo,⁹³ including determinations as to whether the agency’s actions exceeded statutory authority,⁹⁴ or were arbitrary and capricious.⁹⁵

The next section will address the pitfalls and issues associated with an appeal for judicial review of final agency determinations.

IV. LITIGATING ADMINISTRATIVE CLAIMS IN COURT

When a dispute with an administrative agency cannot be resolved through administrative hearings alone, or when a party wants to challenge the final determination of an administrative law judge or agency head, the next avenue for relief is in the courts. Unlike the administrative proceedings discussed in the preceding section, judicial review of agency action involves a different set of procedural and substantive rules that apply in a court of law, independent of the agency. This section addresses the key issues, procedures, and standards that apply to judicial review of administrative action, including challenges to federal and state franchise regulatory determinations. Although most regulatory challenges in franchising are at the state level, for consistency this section is directed mostly to standards set out in the Federal APA, as most state-level APAs contain similar standards.⁹⁶

A. Procedural Restrictions on Litigating with Administrative Agencies in Court

Courts reviewing administrative agency determinations operate within a structured procedural framework established by law. At the federal level, these rules are largely codified in the Federal APA, while state courts rely on their own administrative procedure acts, which often parallel but diverge from the federal model in some respects, as discussed above. This procedural framework is generally meant to serve important purposes: prevent premature judicial interference with agency processes, allow agencies to correct their own errors, ensure an adequate record for review, and preserve judicial resources. In the franchise context, where

⁹⁰ See, e.g., *Haug v. State Univ. of New York at Potsdam*, 32 N.Y.3d 1044, 1045, 112 N.E.3d 323, 325 (2018) (“[T]he courts have no right to review the facts generally as to weight of evidence, beyond seeing to it that there is substantial evidence.”).

⁹¹ *Id.*

⁹² *Id.* at 1046.

⁹³ *State-Off. of Governor v. Pub. Emp. Rels. Comm’n*, 183 Wash. App. 758, 763, 334 P.3d 1177, 1180 (2014).

⁹⁴ *In re Elec. Lightwave, Inc.*, 123 Wash.2d 530, 540, 869 P.2d 1045, 1051 (1994), as amended on denial of reconsideration (Apr. 28, 1994) (“[A]lthough we generally accord substantial deference to agency decisions, we do not defer to an agency the power to determine the scope of its own authority.”) (internal citations omitted).

⁹⁵ *Nw. Alloys, Inc. v. Dep’t of Nat. Res.*, 10 Wash. App. 2d 169, 186, 447 P.3d 620, 630 (2019) (“We apply a de novo review of the agency record to determine if DNR’s decision to deny consent to sublease was arbitrary and capricious.”).

⁹⁶ Practitioners should carefully consult the applicable state APA, however, to determine if there are any significant departures from practice under the Federal APA.

disputes may involve registration denials, stop orders, or enforcement actions, these procedural hurdles can be significant obstacles for franchisors seeking judicial relief. The three primary procedural restrictions—exhaustion, the record rule, and deference—apply with varying degrees of rigor depending on the jurisdiction and the nature of the challenge.

1. Finality and Administrative Exhaustion

The exhaustion and finality doctrines require a party to pursue all available administrative remedies before seeking judicial review of a final agency decision. At the federal level, the APA addresses exhaustion and finality requirements in 5 U.S.C. § 704, which requires a “final agency action for which there is no other adequate remedy in a court” prior to court action.⁹⁷ The purposes underlying the finality and exhaustion doctrines include preventing premature interference with agency processes, allowing the agency to correct its own errors, building an adequate record, and preserving judicial resources.⁹⁸

Under the two-part *Bennett v. Spear* test, agency action is final when it marks the consummation of the agency’s decision-making process and determines rights or obligations from which legal consequences flow.⁹⁹ However, agency action is still not final for APA purposes until “an aggrieved party has exhausted all administrative remedies expressly prescribed by statute or agency rule.”¹⁰⁰

The statute’s third sentence further specifies when exhaustion of administrative remedies is required: “Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.”¹⁰¹

The Supreme Court clarified in *Darby v. Cisneros* that where 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.¹⁰² Courts cannot judicially impose exhaustion requirements beyond what statute or rule demands once an action has become final.¹⁰³

Several exceptions to the exhaustion requirement are recognized. Courts may excuse exhaustion when the administrative remedy is inadequate or futile, when the agency clearly lacks

⁹⁷ 5 U.S.C. § 704.

⁹⁸ *In re S.E.C. ex rel. Glotzer*, 374 F.3d 184 (2d Cir. 2004).

⁹⁹ *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997).

¹⁰⁰ *Osage Producers Ass’n v. Jewell*, 191 F. Supp. 3d 1243, 1252 (N.D. Okla. 2016).

¹⁰¹ *Id.*

¹⁰² *Darby v. Cisneros*, 509 U.S. 137 (1993).

¹⁰³ *Metro. Transportation Auth. v. Duffy*, 784 F. Supp. 3d 624 (S.D.N.Y. 2025).

authority to grant the relief sought, or when pursuit of administrative remedies would cause irreparable harm.¹⁰⁴ Additionally, the Supreme Court held in *Carr v. Saul* that it was inappropriate to judicially impose an issue-exhaustion requirement on claimants raising Appointments Clause challenges to administrative law judges, given the non-adversarial nature of those proceedings and the ALJs' inability to grant relief on such claims.¹⁰⁵

State exhaustion requirements closely mirror this federal framework. Most state administrative procedure acts mandate exhaustion prior to judicial review, with courts strictly enforcing these requirements and narrowly interpreting exceptions.

For example, Utah courts construe the futility exception narrowly, holding that futility “exists in situations where the entire administrative appeals process is inoperative or unavailable.”¹⁰⁶ Similarly, Connecticut requires “demonstrable futility” before excusing exhaustion even in the face of colorable constitutional claims.¹⁰⁷

In the franchise context, this means that a franchisor challenging a stop order or enforcement action must typically exhaust all administrative remedies—including appeal to the agency head where required—before filing a petition for judicial review. As the Washington APA provides, “[a] person may file a petition for judicial review under this chapter only after exhausting all administrative remedies available within the agency whose action is being challenged.”¹⁰⁸ To avoid the exhaustion requirement, franchisors would need to fall within one of the established exemptions. Franchisors subject to immediately effective stop orders or registration revocations have a particularly strong basis to invoke the irreparable harm exception and seek immediate judicial intervention.¹⁰⁹ Stop orders go into effect immediately, last indefinitely, and require the franchisor to pause all sales and offers, consequences that cannot be undone by a later favorable administrative ruling.

2. Record on Review

When a party seeks judicial review under the APA, the court's examination is confined to the administrative record compiled by the agency. The Supreme Court established this record rule in *Florida Power & Light Co. v. Lorion*, holding that “the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation” when the record does not support the agency's action, rather than allowing de novo fact-finding in court.¹¹⁰ This principle prevents the reviewing court from conducting a de novo trial and substituting its

¹⁰⁴ *Shearson v. Holder*, 725 F.3d 588 (6th Cir. 2013) (exhaustion not required when “administrative remedies are inadequate or not efficacious” or “where pursuit of administrative remedies would be a futile gesture”).

¹⁰⁵ *Carr v. Saul*, 593 U.S. 83 (2021).

¹⁰⁶ *Maxfield v. Utah Dep't of Alcoholic Beverage Control*, 665 F. Supp. 3d 1300 (D. Utah 2023).

¹⁰⁷ *Conn. Light & Power Co. v. State of Conn. Pub. Utilities Regul. Auth.*, 2025 WL 2837971 (Conn. Super. Ct. 2025).

¹⁰⁸ WASH. REV. CODE § 34.05.534.

¹⁰⁹ See, e.g. *Campbell Sixty-Six Exp., Inc. v. J. & G. Exp., Inc.*, 141 So.2d 720, 726 (Miss. 1962) (finding the exhaustion doctrine inapplicable where the extent of injury “may well be large and difficult of measurement”).

¹¹⁰ *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985).

judgment for that of the agency. Reliance on extra-record evidence is “the exception, not the rule.”¹¹¹

Courts have recognized several situations that warrant extra-record review: (1) when the agency failed to examine all relevant factors; (2) when the agency failed to adequately explain its reasoning; (3) when the agency acted in bad faith; or (4) when the agency engaged in improper behavior. However, these exceptions are narrowly construed.¹¹² The burden falls on the party seeking supplementation to demonstrate that a recognized exception applies.¹¹³

State courts similarly limit review to the agency record. For example, in Indiana, a petitioner seeking judicial review must file the agency record with the trial court as defined under the state’s administrative procedure act, and failure to do so within the prescribed period requires mandatory dismissal.¹¹⁴ In Washington, judicial review is based on the factual record developed before the agency, and the agency’s decision is not typically stayed pending judicial review.¹¹⁵

The practical consequence of this rule is that developing a full record during the administrative proceeding is critical to preserving a complete right of review on appeal. Evidence or arguments not presented to the agency will generally be unavailable to the reviewing court. A franchisor that fails to introduce favorable evidence, raise all legal arguments, or develop factual findings during the administrative phase will be precluded from supplementing the record on judicial review.

3. Deference.

For decades, federal courts applied the *Chevron* framework, which directed courts to defer to an agency’s reasonable interpretation of an ambiguous statute that the agency administers.¹¹⁶ However, the Supreme Court’s 2024 decision in *Loper Bright Enterprises v. Raimondo* overruled *Chevron* entirely.¹¹⁷ In that decision, the Supreme Court held that the APA requires courts to exercise their independent judgment in deciding whether an agency has acted within its statutory authority.¹¹⁸ What survives *Loper Bright* is the weaker *Skidmore* persuasive deference framework, under which an agency’s statutory interpretations carry weight depending on “the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors that give it power to persuade, if lacking power to control.”¹¹⁹ *Loper Bright* also preserved the principle that statutory text may itself delegate

¹¹¹ *Silver State Land, LLC v. Beaudreau*, 59 F. Supp. 3d 158, 169 (D.D.C. 2014).

¹¹² *IMS, P.C. v. Alvarez*, 129 F.3d 618, 624 (D.C. Cir. 1997).

¹¹³ *Cascade Forest Conservancy v. United States Forest Serv.*, 577 F. Supp. 3d 1163 (W.D. Wash. 2021).

¹¹⁴ *Teaching Our Posterity Success, Inc. v. Ind. Dep’t of Educ.*, 20 N.E.3d 149 (Ind. 2014).

¹¹⁵ WASH. REV. CODE §§ 34.05.558, 34.05.562.

¹¹⁶ *Chevron U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 839 (1984).

¹¹⁷ *Loper Bright Enters. v. Raimondo*, 603 U.S. 369 (2024).

¹¹⁸ *Id.*

¹¹⁹ *Logan v. Dep’t of Homeland Sec.*, 2025 WL 831412 (M.S.P.B., 2025); *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

discretion to an agency, such that when Congress has clearly conferred interpretive authority on an agency, courts respect that congressional choice.¹²⁰

At the state level, as discussed above, the deference landscape is more varied. Some states expressly precluded application of the *Chevron* standard even *before Loper Bright*, while others apply a “due weight” standard to agency interpretations, and still others continue to apply a more robust deference framework.¹²¹ In states that retain some form of deference, reviewing courts may still accord meaningful weight to agency interpretations of franchise regulatory statutes, particularly on technical or specialized questions within the agency’s expertise.¹²² But in states that have adopted a *Loper Bright*-like standard, the shift away from deference may make it easier for franchisors to challenge agency interpretations of registration and disclosure requirements that the franchisor believes exceed the agency’s statutory authority.¹²³

B. Standards of Review

As noted in the preceding section on administrative hearings, the standard of review on judicial appeal of agency action depends on whether the court is reviewing a question of fact, a question of law, or a discretionary agency determination. The applicable standards are codified in the APA’s scope of review provision, 5 U.S.C. § 706, at the federal level and in analogous provisions in state administrative procedure acts at the state level.¹²⁴

In general, the APA directs the reviewing court to hold unlawful and set aside agency action found to be: (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations; (4) without observance of required procedure; (5) unsupported by substantial evidence in cases subject to formal adjudication or rulemaking; or (6) unwarranted by the facts in a case subject to de novo review.¹²⁵ In addition to these specific grounds, the court must also compel agency action unlawfully withheld or unreasonably delayed.¹²⁶

Most states have enacted administrative procedure acts that provide standards of review substantially similar to the federal APA, though specific language and scope varies. The standards described below apply both at the federal level (as indicated) and in analogous form in state courts.

The following subsections address each of the most common standards that courts apply in the franchise regulatory context.

¹²⁰ *Loper Bright*, 603 U.S. at 394–95.

¹²¹ See sources cited, *supra* note 7.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ See 5 U.S.C. § 706.

¹²⁵ *Id.*

¹²⁶ *Id.*

1. Arbitrary and Capricious Agency Actions or Decisions.

The arbitrary and capricious standard is the primary standard for overturning informal agency rulemaking and other discretionary agency decisions.¹²⁷ The Supreme Court articulated this standard in *Motor Vehicle Manufacturers Association of the United States, Inc. v. State Farm Mutual Automobile Insurance Co.*, holding that a reviewing court must consider “whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.”¹²⁸ An agency acts arbitrarily when it fails to consider relevant factors, relies on factors Congress did not intend for it to consider, offers an explanation that runs counter to the evidence before it, or is so implausible that it cannot be attributed to a difference in view or the product of agency expertise.¹²⁹ Critically, the court is “not empowered to substitute its judgment for that of the agency.”¹³⁰ Rather, the court’s inquiry is limited to whether the agency (1) considered all relevant factors; (2) gave actual, good-faith consideration to those factors; and (3) used reason rather than whim in progressing from consideration to final decision. In state court review of state administrative actions, the arbitrary and capricious standard may be broader than the federal standard, sometimes encompassing a finding that agency action is not supported by substantial evidence.¹³¹

State courts apply similar formulations. For example, Wyoming courts apply the substantial evidence test when both parties present evidence but switch to the arbitrary and capricious standard when only the party bearing the burden of proof presents evidence and does not prevail.¹³² Notably, in state court review of state administrative actions, the arbitrary and capricious standard may be broader than the federal standard, sometimes encompassing a finding that agency action is not supported by substantial evidence.¹³³

2. Unconstitutional Agency Action.

Courts also set aside agency action “contrary to constitutional right, power, privilege, or immunity.”¹³⁴ This ground encompasses due process challenges, separation of powers arguments, Appointments Clause challenges, and limitations on the President’s removal power.

Often, constitutionality issues concern the authority and status of ALJs. For example, the Supreme Court held in that SEC ALJs are “Officers of the United States” subject to the Appointments Clause, and that their improper appointment required a new hearing before a

¹²⁷ *Id.* at § 706(2)(A).

¹²⁸ *Motor Vehicle Mfrs. Ass’n of the United States, Inc. v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29 (1983).

¹²⁹ *Id.*

¹³⁰ *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971); *Arent v. Shalala*, 70 F.3d 610 (D.C. Cir. 1995).

¹³¹ *Alliance for Rational Ground Water Rules v. Dep’t of Env’tl. Regulation*, 1988 WL 616888 (Fla. Div. of Admin. Hearings Apr. 18, 1988).

¹³² *Newman v. State ex rel. Wy. Workers’ Safety & Comp. Div.*, 49 P.3d 163 (Wyo. 2002).

¹³³ *George Wash. Univ. v. D.C. Board of Adjustment*, 831 A.2d 921 (D.C. 2003).

¹³⁴ 5 U.S.C. § 706(2)(B).

properly appointed official.¹³⁵ Subsequent courts have extended this reasoning: both Department of Labor and Department of Agriculture ALJs have been found to be inferior officers requiring appointment by the President, a court of law, or a department head.¹³⁶ At the state level, ALJ authority is also circumscribed by their general inability to declare a statute unconstitutional.¹³⁷

3. Agency Exceeding Statutory Authority.

Courts hold unlawful agency action that is “in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.”¹³⁸

A threshold application is the ultra vires doctrine, under which courts set aside agency action that is without any authority whatsoever or is made without any colorable basis for authority.¹³⁹ When an agency regulation is wholly unauthorized by the enabling statute, it is invalid as an ultra vires exercise of authority.¹⁴⁰ An agency is also bound by its own regulations and cannot disregard them while they remain in effect.¹⁴¹

In the franchise context, this standard is particularly relevant where a state regulator attempts to impose requirements on franchisors that are not clearly supported by the enabling franchise statute. For example, where a state franchise regulator conditions registration on compliance with requirements derived from NASAA model policies or interpretive opinions rather than from the express terms of the enabling statute, the franchisor can argue that the agency is acting without colorable statutory authority.

Closely related is the major questions doctrine, crystallized in *West Virginia v. Environmental Protection Agency*, under which when an agency claims authority to resolve questions of “vast economic and political significance,” courts require a “clear congressional authorization” for such action and will not presume that broad or unusual authority was delegated silently.¹⁴² This doctrine, however, is unlikely to be relevant to a franchise action given that franchise regulatory actions are unlikely to involve questions of “vast economic and political significance.”

¹³⁵ *Lucia v. SEC*, 585 U.S. 237 (2018).

¹³⁶ *K & R Contractors, LLC v. Keene*, 86 F.4th 135 (4th Cir. 2023); *Fleming v. United States Dep’t of Agric.*, 987 F.3d 1093 (D.C. Cir. 2021).

¹³⁷ As a Minnesota administrative law judge observed, citing *Neeland v. Clearwater Memorial Hospital*, 257 N.W.2d 366 (Minn. 1977), an ALJ “cannot find a statute or rule unconstitutional” in the facial attack sense, though an ALJ can “apply constitutional standards to the facts of the matter” upon which the ALJ is making a recommendation. *Whitney’s Market, WIC Vendor No. W7001*, 1997 WL 816772 (Minn. Office of Admin. Hearings 1997).

¹³⁸ 5 U.S.C. § 706(2)(C).

¹³⁹ *Louisiana v. U.S. Env’tl. Prot. Agency*, 712 F. Supp. 3d 820 (W.D. La. 2024).

¹⁴⁰ *Nw. Env’tl. Advocates v. U.S. Env’tl. Prot. Agency*, 537 F.3d 1006 (9th Cir. 2008).

¹⁴¹ *Changji Esquel Textile Co. v. Raimondo*, 573 F. Supp. 3d 104 (D.D.C. 2021).

¹⁴² *West Virginia v. Env’tl. Prot. Agency*, 597 U.S. 697 (2022).

4. Without Observance of Procedure

Review of an agency's compliance with procedure is an exacting one.¹⁴³ The court reviews only to determine whether "statutorily prescribed procedures have been followed" by the agency.¹⁴⁴ This includes if the agency fails to follow its own procedural rules.¹⁴⁵ Therefore, decisions here typically turn on the court's review of the applicable statute or procedural rule and determining whether the agency complied.¹⁴⁶

5. Unsupported by Substantial Evidence.

The substantial evidence standard applies specifically to agency action in cases subject to formal rulemaking and formal, on-the-record adjudications, and to other proceedings "reviewed on the record of an agency hearing provided by statute."¹⁴⁷ The substantial evidence standard does not apply to informal notice-and-comment rulemaking.¹⁴⁸

Substantial evidence is defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."¹⁴⁹ It requires less than a preponderance of the evidence but more than a mere scintilla.¹⁵⁰ The standard precludes the reviewing court from substituting its own judgment for that of the agency.¹⁵¹ It obliges the court to determine only whether, in light of all the relevant and credible evidence, a reasonable person could agree with the agency's decision, even though other reasonable persons might disagree.¹⁵²

This is largely consistent with the "substantial evidence" standard discussed in the context of administrative hearings above. Where a reviewing court is assessing an agency's factual findings from an adjudicative proceeding involving a franchise regulatory dispute, this deferential standard means that the facts as found by the ALJ will not be disturbed absent a strong showing that no reasonable factfinder could have reached the same conclusion. This reinforces the critical importance of developing a full factual record during administrative proceedings.

6. Unwarranted by the Facts

De novo review to determine if agency action was unwarranted by the facts is authorized

¹⁴³ Nat. Res. Def. Council, Inc. v. Sec. & Exch. Comm'n, 606 F.2d 1031, 1048 (D.C. Cir. 1979).

¹⁴⁴ *Id.*

¹⁴⁵ Nat'l Automobile Dealers Assoc. v. F.T.C., 127 F.4th 549, 555–56 (5th Cir. 2025).

¹⁴⁶ *Id.*

¹⁴⁷ 5 U.S.C. § 706(2)(E).

¹⁴⁸ Select Specialty Hospital-Akron, LLC v. Sebelius, 820 F. Supp. 2d 13, 27 (D.D.C. 2011).

¹⁴⁹ Alliance for Rational Ground Water Rules. v. Dep't of Env'tl. Regulation, 1988 WL 616888 (Fla. Div. of Admin. Hearings Apr. 18, 1988).

¹⁵⁰ *Id.*

¹⁵¹ Parker v. Defense Logistics Agency, 1 M.S.P.B. 489 (1980).

¹⁵² *Id.*

only in two circumstances. First, it is authorized when the action is adjudicatory in nature and the agency fact-finding procedures are inadequate.¹⁵³ Second, when issues that were not before the agency are raised in a proceeding to enforce nonadjudicatory agency action.¹⁵⁴ Otherwise, judicial review of agency action is confined to the administrative record, and review of the facts is not proper.¹⁵⁵

When the fact-finding procedure is inadequate, a court may “obtain from the agency, either through affidavits or testimony, such additional explanations of the reasons for the agency decision as may prove necessary.”¹⁵⁶ The new materials should be merely explanatory of the original record and should contain no new rationalizations.¹⁵⁷

C. Remedies

When a court concludes that agency action violates one of the grounds set forth in 5 U.S.C. § 706(2), the presumptively appropriate remedy is vacatur—holding the agency action unlawful and setting it aside—coupled with a remand to the agency for further proceedings consistent with the court’s decision.¹⁵⁸ Vacatur empowers courts to formally nullify and revoke an unlawful agency action; it “operates on the status of agency action in the abstract” rather than coercing government conduct.¹⁵⁹ This distinguishes vacatur from an injunction, which operates in personam and prohibits conduct.

Courts also possess equitable discretion to remand without vacatur—leaving the challenged agency action in place while the agency corrects the identified deficiency.¹⁶⁰ Factors informing whether to remand without vacatur include the seriousness of the agency’s procedural defects and the disruptive consequences of vacatur.¹⁶¹ Beyond vacatur and remand, courts may also compel agency action that has been “unlawfully withheld or unreasonably delayed” under 5 U.S.C. § 706(1), seek declaratory relief under 28 U.S.C. § 2201, or in the appropriate case pursue mandamus under 28 U.S.C. § 1361 to compel a ministerial duty owed by an agency.

State courts possess analogous remedial authority to annul or vacate agency decisions, remand to the agency, and issue injunctive relief pending review. A critical distinction exists between federal and state court authority: federal courts cannot vacate the actions of state

¹⁵³ *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971), *abrogated on other grounds by* *Califano v. Sanders*, 430 U.S. 99 (1977).

¹⁵⁴ *Id.*

¹⁵⁵ *Env’tl. Defense Fund, Inc. v. Costle*, 657 F.2d 275, 284-85 (D.D.C. 1981).

¹⁵⁶ *Camp v. Pitts*, 411 U.S. 138, 142–43 (1973).

¹⁵⁷ *Env’tl. Defense Fund*, 657 F.2d at 285.

¹⁵⁸ *Sierra Club v. Van Antwerp*, 719 F. Supp. 2d 77 (D.D.C. 2010).

¹⁵⁹ *Purl v. United States Dep’t of Health & Human Servs.*, 787 F. Supp. 3d 284 (N.D. Tex. 2025).

¹⁶⁰ *Migrant Clinicians Network v. U.S. Env’tl. Prot. Agency*, 88 F.4th 830 (9th Cir. 2023).

¹⁶¹ *New Mexico Health Connections v. United States Dep’t of Health & Human Servs.*, 340 F. Supp. 3d 1112 (D.N.M. 2018).

agencies—that power belongs to state courts or the agency itself.¹⁶² In the franchise context, this means that challenges to state franchise regulatory actions must generally be pursued in state court, even where the franchisor also has federal constitutional claims. In practice, obtaining a stay of agency enforcement pending judicial review can be challenging, as discussed in the context of stop orders. In Washington, for example, the licensee must establish that it is likely to prevail on the merits, that it will suffer irreparable injury without relief, that the relief will not substantially harm other parties, and that the threat to the public health, safety, or welfare is not sufficiently serious to justify the agency action in the circumstances.¹⁶³ The ability to obtain interim relief during the pendency of judicial review is often critical in franchise regulatory disputes, where the continued enforcement of a stop order or license revocation can effectively destroy the franchisor's ability to conduct business.

V. CONCLUSION

Franchise law is inextricably intertwined with administrative law. From the initial registration of a franchise offering to post-sale regulatory enforcement, franchisors operate within a web of federal and state regulatory oversight that touches virtually every aspect of the franchise relationship. When disputes with regulators cannot be resolved through negotiation, franchisors must be prepared to navigate the complex procedural and substantive requirements of administrative litigation—first before administrative tribunals, and then in the courts.

As this paper has discussed, the procedural landscape for these disputes is varied and jurisdiction-specific. The Administrative Procedure Act—whether the federal version or its state counterparts—provides the framework for challenging agency action, but the specific rules, standards, and procedures vary significantly from state to state. Practitioners must be familiar with the applicable exhaustion requirements, the scope of the administrative record, the degree of deference (if any) that a reviewing court will afford to agency interpretations, and the remedies available at each stage of the process. The recent decision in *Loper Bright Enterprises v. Raimondo* has added another layer of complexity to this landscape, eliminating *Chevron* deference at the federal level and potentially influencing the trajectory of state administrative law as well.

Several practical lessons emerge from this analysis. First, developing a complete factual record during administrative proceedings is essential, because judicial review is typically confined to the record before the agency. Second, counsel should be prepared to raise all available arguments—including constitutional challenges—at the earliest possible stage, or risk waiver on appeal. Third, the procedural requirements for seeking judicial review are strict and often jurisdictional; missing a filing deadline or failing to properly transmit the record can be fatal to an otherwise meritorious claim. Fourth, in disputes involving stop orders or other immediately effective agency actions, obtaining interim relief is critical, as the practical consequences of enforcement during the pendency of litigation can render any eventual victory pyrrhic. And finally, the legal landscape continues to evolve. The ongoing rebalancing of power between agencies and courts in the post-*Loper Bright* era, combined with growing constitutional challenges to ALJ authority and the expanding scope of franchise regulation at the state level, ensures that administrative law will remain a critical area of practice for franchise lawyers for years to come.

¹⁶² *Driftless Area Land Conservancy v. Valcq*, 16 F.4th 508 (7th Cir. 2021).

¹⁶³ RCW 34.05.550(3).

BIOGRAPHIES

Daniel J. Oates is a partner in the Seattle office of Miller Nash, LLP. Dan's practice is focused on franchising and distribution litigation, and other heavily regulated industries. Dan's franchise litigation experience includes disputes ranging from pre-sale disclosure violations and fraud to breach of contract claims, to post-sale relationship disputes (arising under contract or by statute). Dan is an at-large member of the ABA Forum on Franchising Governing Committee and previously served as Editor-in-Chief of the ABA's Franchise Law Journal from 2018-2021. He earned his J.D. (summa cum laude) from Seattle University School of Law in 2007. Dan is admitted to practice in Washington and Oregon, all of the federal district courts in these states, and the United States Court of Appeals for the Ninth Circuit. Dan is a former judicial clerk to the Honorable Thomas S. Zilly, United States District Court Judge for the Western District of Washington.

Kyle Thomas Orne is Of Counsel in the Phoenix office of DLA Piper LLP (US). Kyle Orne is a commercial litigator whose practice focuses on resolving complex commercial disputes for franchise brands. Kyle's franchise litigation experience includes representing franchisors in disputes across the country with their franchisees and regulators, and counseling franchisors to avoid, deal with, and resolve systemwide issues. Kyle graduated *magna cum laude* from Arizona State University Sandra Day O'Connor College of Law in 2015. Kyle is admitted to practice in Arizona, the federal district courts in Arizona, Colorado, and Utah, and the United States Courts of Appeals for the Ninth Circuit and the Sixth Circuit.