NO. 23-_____

In the Supreme Court of the United States

JENNY SCHIEBER, ET AL.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the D.C. Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This petition presents two crucial and as yet unresolved questions regarding the availability of judicial review under the Administrative Procedure Act ("APA") of agency adjudication rendered pursuant to international executive agreements. In the decision from which certiorari review is sought, the D.C. Circuit held in a case of first impression that final agency decisions issued under an executive agreement are immune from judicial review in the absence of congressional legislation setting forth substantive evaluative criteria, because they are deemed *ipso facto* to have been "committed to agency discretion by law." 5 U.S.C. § 701(a)(2). This is what Petitioners have dubbed the "substantive statute" test.

The lower court also held, alternatively, that judicial review of adjudicative action under an international executive agreement containing a government-to-government dispute resolution clause is precluded on the grounds that such an agreement is a "statute" that "preclude[s] judicial review." 5 U.S.C. § 701(a)(1). The questions presented by this petition therefore are:

1. Whether agency adjudication rendered pursuant to an international executive agreement is subject to judicial review under the APA where: (a) Congress has granted the agency general authority to act; (b) the authorizing statute lacks substantive criteria by which to measure agency action; (c) the executive agreement sets forth such criteria; and (d) the agency has adopted detailed procedures for adjudicating claims by individuals, incorporating such evaluative criteria.

2. Whether a government-to-government dispute resolution clause in an international executive agreement bars judicial challenges to agency action under the APA brought by individual claimants?

PARTIES TO THE PROCEEDINGS

Petitioners and Plaintiffs-Appellants below:

- Jenny Schieber
- Solange Faktor
- Esther Gutrejman
- Louis Schneider
- Regina English
- Simon Bywalski

Respondent and Defendant-Appellee below:

- United States of America

LIST OF PROCEEDINGS

U.S. Court of Appeals,
District of Columbia Circuit

No. 22-5068

Jenny Schieber et al., *Plaintiffs/Appellants* v.
United States, *Defendant/Appellee*

Final Opinion: July 18, 2023

U.S. District Court, District of Columbia

No. 21-cv-1371

Jenny Schieber, *Plaintiff* v. United States, *Defendant*

Final Opinion: January 26, 2022

No. 20-cv-263

Solange Faktor, *Plaintiff* v. United States, *Defendant*

Final Opinion: March 10, 2022

No. 20-cv-266

Esther Gutrejman, *Plaintiff* v. United States, *Defendant*

Final Opinion: March 22, 2022

No. 20-cv-260

Louis Schneider, et al., *Plaintiff* v.
United States, *Defendant*

Final Opinion: April 22, 2022

No. 20-cv-265

Simon Bywalski, *Plaintiff* v. United States, *Defendant*

Final Opinion: May 13, 2022

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OPINIONS BELOW

The decision of the U.S. Court of Appeals for the D.C. Circuit, affirming the decisions of the district court on other grounds, appears at *Schieber v. United States*, 77 F.4th 806 (D.C. Cir. 2023). [App.1a-17a]

The decisions of the U.S. District Court for the District of Columbia, granting the government's motions to dismiss, are reported at:

(1) *Schieber v. United States*, 2022 WL 227082 (D.D.C. Jan. 26, 2022) [App.18a-38a] (*Schieber*);

(2) *Faktor v. United States*, 590 F. Supp. 3d 287 (D.D.C. 2022) [App.110a-126a] (*Faktor*);

(3) *Gutrejman v. United States*, 596 F. Supp. 3d 1 (D.D.C. 2022) [App.69a-93a] (*Gutrejman*);

(4) *Schneider v. United States*, 2022 WL 1202427 (D.D.C. Apr. 22, 2022) [App.54a-68a] (*Schneider*);

(5) *Bywalski v. United States*, 2022 WL 1521781 (D.D.C. May 13, 2022) [App.39a-53a] (*Bywalski*).[1]

[1] On appeal, the five cases were consolidated.

JURISDICTION

The judgment of the Court of Appeals issued on July 18, 2023. [App.1a-17a]. The Chief Justice granted an application which extended the time to file until November 15, 2023. (Sup. Ct. No. 23A306). This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

22 U.S.C. § 2668a—Disposition of trust funds received from foreign governments for citizens of United States

> All moneys received by the Secretary of State from foreign governments and other sources, in trust for citizens of the United States or others, shall be deposited and covered into the Treasury.
>
> The Secretary of State shall determine the amounts due claimants, respectively, from each of such trust funds, and certify the same to the Secretary of the Treasury, who shall, upon the presentation of the certificates of the Secretary of State, pay the amounts so found to be due.
>
> Each of the trust funds covered into the Treasury as aforesaid is appropriated for the payment to the ascertained beneficiaries thereof of the certificates provided for in this section.

INTRODUCTION

The "administrative state wields vast power and touches almost every aspect of daily life." *City of Arlington, Tex. v. F.C.C.*, 569 U.S. 290, 312 (2013), Roberts, C.J. *dissenting*. This phenomenon "continues to grow." *Id*. The exponential growth of the administrative state is also reflected in the increasing use of international executive agreements to regulate domestic matters. Oona A. Hathaway *et. al.*, *The Failed Transparency Regime for Executive Agreements: An Empirical and Normative Analysis*, 134 HARV. L. REV. 629, 684 (2020) ["*Hathaway*"] (documenting thousands of executive agreements currently in force).

This petition concerns the proper scope of judicial review of administrative action taken pursuant to executive agreements. Given the massive number of currently operative executive agreements, the decision of the D.C. Circuit to insulate allegedly illegal action from judicial review will, if let stand, create a gaping lacuna in the congressionally mandated mechanism for remedying administrative abuse embodied in the APA, as applied by this Court. Review by certiorari is, therefore, clearly warranted. Kathleen Claussen, *The Improvised Implementation of Executive Agreements*, 89 U. CHI. L. REV. 1655, 1656 (2022) ["*Claussen*"] (noting that courts have yet to examine "legal implementation" by federal agencies of executive agreements.).

In the proceeding below, the D.C. Circuit ruled that the "*Agreement Between the Government of the United States of America and the Government of the French Republic on Compensation for Certain Victims*

of Holocaust-Related Deportation from France Who Are Not Covered by French Programs", Dec. 8, 2014, T.I.A.S. No. 15-1101 (entered into force on Nov. 1, 2015) (the "Agreement)[2] is ***un***enforceable in U.S. courts absent congressional legislation containing specific evaluative criteria. In so doing, the appellate court affirmed the dismissals of five lawsuits brought under the APA, alleging that the State Department erred in denying claims for compensation under the Agreement.[3]

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[2] For a brief discussion of the historical, political, legislative and judicial background of the Agreement, *see* Ronald Bettauer, *A Measure of Justice for Uncompensated French Railroad Deportees, during the Holocaust*, 20 ASIL INSIGHTS, No. 5 (Mar. 1, 2016), https://www.asil.org/insights/volume/20/issue/5/measure-justice-uncompensated-french-railroad-deportees-during-holocaust (last visited last on November 15, 2023).

For related litigation s*ee also Freund v. Republic of France*, 592 F. Supp. 2d 540 (S.D.N.Y. 2008), *aff'd*, 391 Fed. Appx. 939 (2d Cir. 2010), *cert. denied*, 565 U.S. 816 (2011); *Abrams v. Société Nationale des Chemins de Fer Français*, 175 F. Supp. 2d 423 (E.D.N.Y. 2001), *aff'd*, 389 F.3d 61 (2d Cir. 2002), *vacated,* 542 U.S. 901 (2004), *aff'g d. ct. on remand,* 389 F.3d 61 (2d Cir.), *cert. denied*, 544 U.S. 975 (2005); *Scalin v. Societe Nationale des Chemins de Fer Francais*, 2018 WL 1469015 (N.D. Ill. Mar. 26, 2018), *aff'd on other grounds sub nom., Scalin v. Societe Nationale SNCF SA*, 8 F.4th 509 (7th Cir. 2021).

For proposed congressional responses *see* H.R. 1193, 112th Cong. (2011); S. 634, 112th Cong. (2011); H.R. 1505, 113th Cong. (2013); S. 1393, 113th Cong. (2013). A hearing on the 2011 bill was held before the Senate Judiciary Committee on June 20, 2012. *See* Holocaust-Era Claims in the 21st Century: Hearing on H.R. 1193 Before the S. Comm. on the Judiciary, 112th Cong. (2011), available at www.judiciary.senate.gov/meetings/location-change_holocaust-era-claims-in-the-21st-century.

[3] For example, in *Schneider*, the Department of State concluded that the region from which the Plaintiffs were deported—Haute Savoie—was not France, but rather Italy. [App.58a]. The State

Taking its cue from this Court's decision in *Medellín v. Texas*, 552 U.S. 491 (2008), the D.C. Circuit disregarded the State Department's discrete administrative actions—including the establishment of a detailed claims process after notice and comment—to implement the Agreement. Ignoring 22 U.S.C. § 2668a and the substantive criteria set forth in the Agreement, the D.C. Circuit held that there was no statute that contained substantive evaluative criteria sufficient to allow judicial enforcement of Petitioners' claims which are therefore barred under APA § 701(a)(2). [App.15a-16a]. Essentially, the D.C. Circuit concluded that Congress—and only Congress—can implement international executive agreements (thereby allowing judicial review) by way of specific, substantive, legislation. As discussed in greater detail below, the D.C. Circuit's reading of *Medellín* is incorrect: Congress is not the exclusive constitutional institution empowered to render international executive agreements enforceable in domestic United States law.

This Court's intervention is warranted to correct the decision of the D.C. Circuit and to restore the proper role of the executive branch in domestically implementing international executive agreements and

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Department's historical and legal conclusion concerning the status of the Haute Savoie region at the time of deportation is wrong historically and legally. The region was part of France prior to World War II having been annexed by France from the Kingdom of Piedmont-Sardinia in 1860. It was merely occupied by Italy temporarily from November 1942 to September 1943 after which the *Schneider* plaintiffs were deported by the German SS under the auspices of the Vichy French government to death camps in central and eastern Europe.

the task of the judiciary in reviewing such implementation.

Finally, certiorari is necessary to correct the alternate holding of the D.C. Circuit below: that the intergovernmental dispute resolution provision of the Agreement operates like a "statute" to preclude judicial review under APA, § 701(a)(1). That conclusion, reached without careful analysis, is utterly disconsonant with the plain language of the Agreement and this Court's jurisprudence and international law concerning the interpretation of treaties and international agreements.

STATEMENT OF THE CASE

I. Factual Background

A. The United States and France Enter into the Agreement.

On December 8, 2014, the United States and the French Republic signed the Agreement. [App.143a-160a]. Under the Agreement, France agreed to pay $60 million to the United States to establish a fund to be deposited in an interest-bearing account "in accordance with the applicable domestic procedures of the United States [. . .]" Art. 4(4) [App.152a].

In exchange, the United States agreed to "secure, with the assistance of the Government of the French Republic if need be, at the earliest possible date, the termination of any pending suits or future suits that may be filed in any court at any level of the United States legal system against France concerning any

Holocaust deportation claim." Art. 5(2) [App.153a]. The Agreement entered into force on November 1, 2015.

One of the Agreement's stated objectives was to provide "an exclusive mechanism for compensating" individuals (1) who "survived deportation from France, their surviving spouses, or their assigns" and (2) who are "not able to gain access to the pension program established by the French Republic for French nationals, or by international agreements concluded by the French Republic to address Holocaust deportation claims." Art. 2(1). [App.150a].

Under the Agreement, the United States is required to distribute the fund "according to criteria which it shall determine unilaterally, in its sole discretion." Art. 6(1) [App.154a]; *see also* 22 U.S.C. § 2668a, discussed below. The Agreement mandates that, in making eligibility determinations, the United States "shall rely" on (1) an applicant's "sworn statement of nationality appearing in [. . .] the Annex to this Agreement" [App.155a]; (2) her "sworn representation" regarding whether she has received (or is eligible to receive) funding from other programs that provide compensation for Holocaust deportation; and (3) "any relevant information obtained" pursuant to information sharing between the United States and France. Art. 6(2)(c) [App.155a].

The Agreement also includes an intergovernmental dispute resolution provision, Article 8: "Any dispute arising out of the interpretation or performance of this Agreement shall be settled exclusively by way of consultation between the parties." [App.157a].

B. The Department of State Implements the Agreement.

The authority of the Executive Branch to enter into sole executive agreements to settle claims against foreign nations on behalf of individuals stems from Art. II of the Constitution and the President's role as "Commander-in-Chief and as the Nation's organ in foreign affairs." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610-611 (1952) (Frankfurter, J., *concurring*); *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 414 (2003).[4] *See also* 11 FAM 723.2-2(C).

The disposition of funds received from foreign governments pursuant to a sole executive agreement is governed by 22 U.S.C. § 2668a. That statute is an explicit grant of congressional authority to the Secretary of State to receive and hold in trust funds received from foreign governments for the benefit of individuals. It provides in its entirety:

> All moneys received by the Secretary of State from foreign governments and other sources, in trust for citizens of the United States or others, shall be deposited and covered into the Treasury. The Secretary of State shall

[4] There are three types of international instruments: (1) treaties; (2) executive agreements; and (3) non-binding instruments. *See* Congressional Research Service, *International Agreements (Part I): Overview and Agreement-Making Process*, (September, 29, 2023), available at https://crsreports.congress. gov/product/pdf/LSB/LSB11048. There are three types of executive agreements: (1) Congressional-executive agreements (authorized by legislation); (2) treaty-based executive agreements (based on authority derived from Senate-approved treaties); and (3) sole executive agreements (based on the President's constitutional powers). The Agreement here is a sole executive agreement.

> determine the amounts due claimants, respectively, from each of such trust funds, and certify the same to the Secretary of the Treasury, who shall, upon the presentation of the certificates of the Secretary of State, pay the amounts so found to be due. Each of the trust funds covered into the Treasury as aforesaid is appropriated for the payment to the ascertained beneficiaries thereof of the certificates provided for in this section.

In the present case, acting under the President's Art. II authority and the general authorization pursuant to § 2668a, the Department of State developed a detailed claims procedure. The government issued two notices of request for public comment under the Paperwork Reduction Act to assist it in developing this claims procedure. *See* 80 Fed. Reg. 22604-01, 2015 WL 1802386 (April 22, 2015); 80 Fed. Reg. 37352-02, 2015 WL 3943095 (June 30, 2015).

Ultimately, the government developed and published Form DS-7713 entitled "*Statement of Claim Related to Deportation from France During the Holocaust*"[5] as well as additional online explanatory material for the general public. The form was readily downloadable. All claimants were required to complete and submit Form DS-7713 for agency adjudication. Claimants were also instructed to submit additional evidence to support their DS-7713s.

Form DS-7713 instructs claimants to "provide all available identifying information and documentation regarding the relevant individual's deportation from

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[5] https://2009-2017.state.gov/documents/organization/249134.pdf (last accessed on November 15, 2023).

France during the Second World War, including if possible the date, convoy, and place of departure and arrival of such deportation." [DS-7713, Sec. 4]. In addition, the Form includes a "*Release and Penalties*" section. [DS-7713, Sec. 5]. The Form must be signed by the claimant who must certify that "the statements set forth in this Statement of Claim, including any papers attached to or filed with this Statement of Claim, are true and accurate, and that all material facts have been set forth in this Statement of Claim."

After completing the DS-7713, claimants must submit it to the State Department via post, e-mail (DeportationClaims@state.gov) or facsimile. After receiving the Statement of Claim and accompanying documentation, the State Department sends an acknowledgment letter confirming receipt. The State Department also contacts the claimant in the event it needs additional information or documentation. According to the State Department, each "claims form and accompanying evidence will be considered on a case-by-case basis. Claimants are contacted by the Department regarding any follow-up questions and with a determination as to the eligibility of the claim."[6]

C. Plaintiffs' Applications for Compensation and the Denial Thereof.

Plaintiffs (or their predecessors-in-interest) were neither French nationals entitled to compensation under French Holocaust compensation programs; nor were they entitled to compensation as nationals of other countries for Holocaust deportation under any agreement concluded by France addressing Holocaust

[6] https://2009-2017.state.gov/p/eur/rt/hlcst/deportationclaims/248921.htm (last accessed on November 15, 2023).

deportation. Art. 3(2). [App.151a]. Moreover, none of the Plaintiffs (or their predecessors-in-interest) received compensation under another nation's program or that of an institution providing compensation specifically for Holocaust deportation. Art. 3(4). [App.151a]. That Plaintiffs met these eligibility requirements is undisputed. Accordingly, Plaintiffs were eligible to receive compensation under the Agreement.

The Department of State nonetheless denied Plaintiffs' claims in their entirety. *See*, for example, App.161a (denial of Bywalski claim); App.163a (denial of Gutrejman claim); App.166a (denial of Schieber claim). Although the grounds for the denials varied, the majority of applications were denied due to the government's refusal to accept the truth of the sworn statements of Plaintiffs—as they appeared in the DS-7713 and supplemental declarations—and the rejection of the proffered evidence in support of the statements.[7]

D. Plaintiffs File Suit Seeking Judicial Review of the Denial of Their Claims.

After receiving notice of the denial of their DS-7713 applications, Plaintiffs filed lawsuits pursuant to the APA, alleging that the State Department's decisions were arbitrary and capricious under 5 U.S.C. § 706(2). They alleged that the State Department's findings were unsupported by the record and did not fall within the bounds of reasonable decision-making. Plaintiffs sought a judicial declaration that the denial of their claims should be overturned under the APA.

The government moved to dismiss all the complaints for want of subject matter jurisdiction under

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[7] *See also, supra*, fn. 2.

Rule 12(b)(1) of the Federal Rules of Civil Procedure ("FRCP") and for failure to state a claim under FRCP Rule 12(b)(6). The government argued that federal jurisdiction in each of the cases was lacking under the political question doctrine. The government also argued that the complaints should be dismissed because the Agreement precludes judicial review under APA, 5 U.S.C. § 701(a).[8] The various district judges granted the government's motions to dismiss in every case. However, the decisions were not unanimous on the grounds for dismissal. The following chart briefly describes the outcomes in the various cases:

Dismissal under Rule 12(b)(6) (Agreement does not create private right of action)	*Schieber* *Bywalski* *Schneider* *Faktor* *Gutrejman*
Dismissal under 5 U.S.C. § 701(a)(1) (Agreement precludes judicial review)[9]	*Schieber* *Faktor*
Dismissal under Rule 12(b)(1) (nonjusticiable political question)	*Bywalski* *Schneider* *Gutrejman*[10]

[8] 5 U.S.C. § 701(a) provides:

> This chapter applies, according to the provisions thereof, except to the extent that—
>
> (1) statutes preclude judicial review; or
>
> (2) agency action is committed to agency discretion by law.

[9] No court below made any conclusions regarding the government's APA § 701(a)(2) arguments.

[10] Although Judge Randolph Moss in *Gutrejman* concluded that the Agreement does not bestow a right of action on individual

Plaintiffs timely filed appeals to the United States Court of Appeals for the District of Columbia Circuit which were subsequently consolidated. Oral argument was held on January 10, 2023.

On July 18, 2023, the court of appeals issued its opinion. The court found that the district courts in *Schieber* and *Faktor* correctly concluded that the plaintiffs failed to state a claim, while the district courts in *Gutrejman*, *Schneider*, and *Bywalski* erred in dismissing the claims based on jurisdictional grounds. However, the court of appeals affirmed those decisions on the alternative ground and held that the claims are barred under 5 U.S.C. § 701(a)(2). [App.16a].

The court of appeals held that Plaintiffs' claims are unreviewable under § 701(a)(2) because the general authorizing statute, § 2668a, "neither requires the Secretary of State to apply the substantive standards of the Agreement nor itself provides any substantive standards." [App.16a].

The court of appeals also held that even if § 2668a did domesticate[11] the Agreement for purposes of the APA, the claims would be barred under 5 U.S.C. § 701 (a)(1) because the Agreement contains a government-to-government dispute resolution clause "which requires interpretive and enforcement disputes to be settled

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applicants, he addressed the issue in the context of his political question analysis under Rule 12(b)(1) rather than 12(b)(6)

[11] By "domestication" we mean that the terms of a non-self-executing executive agreement have domestic legal force insofar as individuals may bring claims under the APA challenging executive adjudication pursuant to the agreement and the government's implementation procedures.

exclusively by way of consultation between the parties." [App.17a].

REASONS FOR GRANTING THE PETITION

This petition should be granted to overrule what we refer to here as the D.C. Circuit's "substantive statute" test. The appellate court's novel analysis must be rejected and the judgment below reversed for the following reasons: (1) the "substantive statute" test is inconsistent with decisions of other Circuits that have addressed the same question in the context of executive orders; (2) the test conflicts with both the purpose and structure of the APA; (3) the test is at odds with this Court's well-established APA jurisprudence; and (4), the "substantive statute" test ignores this Court's holdings that the President's authority to settle foreign claims of private persons (including non-U.S. citizens) by way of executive agreement is a "long standing" practice backed by congressional acquiescence.

The D.C. Circuit's alternative holding—that the dispute resolution provision in the Agreement bars judicial review—is equally deserving of review by this Court. This holding was fundamentally erroneous and unsupported by any statutory, judicial or scholarly authority. Considering the wide use of similar dispute resolution clauses in bilateral and multilateral executive agreements, review by this Court of the D.C. Circuit's conclusion regarding Article 8 is essential to prevent further misapplication of the proper interpretation of such provisions and adverse impact on

thousands of claimants under existing and future executive agreements.

I. SUPREME COURT REVIEW IS NECESSARY TO CORRECT THE D.C. CIRCUIT'S "SUBSTANTIVE STATUTE" TEST.

A. The "Substantive Statute" Test Is Inconsistent with the Decisions of Other Circuits That Have Addressed the Issue in an Analogous Context.

By requiring the authorizing statute to include substantive judicially manageable standards, the D.C. Circuit deviated from the analysis adopted by at least three other circuit courts of appeal, addressing whether an executive order (as opposed to an executive agreement) had been sufficiently "domesticated" so as to provide a court with the "law to apply" for purposes of APA judicial review under § 701(a)(2). *Heckler v. Chaney*, 470 U.S. 821, 834 (1985).

In *City of Carmel-By-The-Sea v. U.S. Dep't of Transp.*, 123 F.3d 1142, 1166 (9th Cir. 1997), the Ninth Circuit held that otherwise nonreviewable executive orders, will come within the purview of the APA if there is "specific statutory foundation." *Id.*, *relying on Chrysler Corp. v. Brown*, 441 U.S. 281, 317-319 (1979). *City of Carmel* discussed Executive Order 11988, 42 Fed. Reg. 26951, 1977 WL 201900 (May 24, 1977), a generally applicable order concerning agency floodplain management. The Ninth Circuit held that the agency action taken pursuant to the order was reviewable under the APA, notwithstanding the fact that the authorizing statute did not include the substantive provisions of the order.

The Tenth and Eleventh Circuits have taken a similar approach. *See City of Albuquerque v. U.S. Dep't of Interior*, 379 F.3d 901, 913 (10th Cir. 2004); *Nat'l Mining Ass'n v. United Steel Workers*, 985 F.3d 1309, 1327 (11th Cir. 2021) (citing *City of Albuquerque* and *City of Carmel*.).

Under the approach of the 9th, 10th and 11th Circuits (which we will refer to as the "general authorization" test) the proper test for the domestication of executive agreements should be whether there is some anchor or "foundation" in federal law authorizing the executive action in the first instance, whether the action is by executive order or agreement. The form of the executive action is irrelevant. The authorizing statute does not itself need to include substantive standards as a precondition to trigger APA judicial review, so long as the substantive standards—or, the "law to apply"—are found in the subject executive agreement or executive order.

Had the D.C. Circuit adhered to the approach followed by its sister circuits, it would have found that the Agreement, a sole executive agreement, was authorized under the President's constitutional authority. Moreover, the State Department was granted general authority by Congress to receive, manage and distribute funds transferred by the French Republic to the United States pursuant to the Agreement in accordance with § 2668a. Under the rationale of *City of Carmel* and its progeny, the combination of the President's constitutional authority and the general authorization statute, coupled with the subsequent detailed procedures adopted by the government, provides the legal substrate sufficient to domesticate and judicialize the Agreement for purposes of APA, § 701(a)(2).

B. The "General Authorization" Test Best Comports with the Purpose and Structure of the APA.

The APA establishes a federal cause of action for one who is adversely affected or aggrieved by agency action provided that (1) no statute precludes judicial review [5 U.S.C. § 701(a)(1)]; (2) the action in question is not one committed by law to agency discretion [5 U.S.C. § 701(a)(2)]; and (3) there is no other adequate remedy in a court [5 U.S.C. § 704]; *Heckler*, 470 U.S. at 828.

The D.C. Circuit's "substantive statute" test misunderstands the respective roles of Congress and the Executive in the modern administrative state and the critical importance of the APA's judicial review remedies as a check against error and abuse by federal administrative agencies. Joseph F. Weis, Jr., *A Judicial Perspective on Deference to Administrative Agencies: Some Grenades From the Trenches*, 2 ADMIN. L.J. 301 (1988) (APA "reflects congressional disapproval of agency activity which seemed to be exempt from checks, balances, and controls [. . .]" and was enacted to "reorder comprehensively the administrative scheme and to clarify the roles of the legislative, executive, and judicial entities.").

When Congress enacted the APA in 1946, it recognized that the transfer of quasi-legislative authority to executive agencies created enhanced risk of erroneous agency action in implementing and enforcement of the delegated powers that could severely impact the life, liberty and economic interests of private persons. To this end, Congress turned to the judicial branch to provide a check and balance against improper agency action, especially in adjudicative cases where

the authorizing statute neither set out substantive criteria for judicial review nor even expressly provided for judicial review at all. Judicial review would be precluded *a priori* under this legislative framework only in the narrow range of cases described in APA § 701(a). *Heckler*, 470 U.S. at 838 (701(a)(2) creates a "narrow" exception to the general presumption of judicial review).

The "general authorization" test adopted in the 9th, 10th and 11th Circuits is consistent with both the structure and purpose of the APA. This test simply asks whether an individual has been adversely affected by agency action and whether a plaintiff is within the "zone of interests protected by the statute, executive order, or regulation which the agency is alleged to have violated." *City of Albuquerque*, 379 F.3d at 913. Additionally, under this approach, a court is asked to determine whether there is legislation that authorizes the agency action pursuant to an executive agreement /order so as to enable the court to verify that such action is "within the scope of authority delegated by Congress" [*Id.*]; and, hence, whether the action can be said to have domestic legal force.

The D.C. Circuit's "substantive statute" test, on the other hand, misses the point of the purpose and need of an authorizing statute: to delegate authority to the executive. The purpose of the statute is <u>not</u> to provide the court with "judicially manageable standards" for purposes of APA, § 701(a)(2). Those standards stem from the Agreement's eligibility criteria and the State Department's elaborate procedural regime. As the court of appeals acknowledged, these sources provide more than an adequate basis for evaluating the propriety of the government's handling of the Plaintiffs'

claims. [App.9a, acknowledging, when discussing the applicability of the political question doctrine, that "[t]here are also judicially manageable standards for resolving the claims."]; *see also Padula v. Webster*, 822 F.2d 97, 100 (D.C. Cir. 1987) (holding that even "formal and informal policy statements and regulations" can provide requisite predicate for judicial review); *Steenholdt v. F.A.A.*, 314 F.3d 633, 638 (D.C. Cir. 2003) (same); *Keats v. Becerra*, 2021 WL 6102200, at *1 (D.C. Cir. Dec. 3, 2021) (same).

Thousands of executive agreements—similar to the U.S.-France Agreement at issue here—are domestically implemented by federal agencies with almost no congressional oversight. *Hathaway*, *supra*, 684 (documenting thousands of executive agreements currently in force); Oona A. Hathaway, *Treaties' End: The Past, Present, and Future of International Lawmaking in the United States*, 117 YALE L.J. 1236, 1260 (2008) (cataloging more than 2,700 executive agreements implemented by federal agencies); *Claussen*, *supra*, at 1657 (documenting an additional 1,000 executive agreements in the field of trade alone). Agency implementation of executive agreements can and does have immediate effects on thousands of individuals, yet it evades congressional supervision (and, as the D.C. Circuit would have it, judicial review); *Claussen*, *supra*, at 1715 (noting that the "rise of executive-agreement implementation" requires us to "consider questions of agreement enforceability as falling along a spectrum."). *Cf.* Jean Galbraith & David Zaring, *Soft Law As Foreign Relations Law*, 99 CORNELL L. REV. 735, 745-748 (2014) ["*Galbraith & Zaring*"] (describing the rise of agency domestic implementation of international soft law); *see also* Jean Galbraith, *Making*

Treaty Implementation More Like Statutory Implementation, 115 MICH. L. REV. 1309, 1362 (2017) ["*Galbraith*"] (discussing the development of the executive implementation of non-self-executing treaties). Jacob Katz Cogan, *The Regulatory Turn in International Law*, 52 HARV. INT'L. L. J. 321, 344-45, 349-352 (2011) (describing this trend and observing that "[u]nlike previous practice, seemingly now the default position in international negotiations [. . .] is the regulation of individual behavior.").

The consensus among legal commentators and scholars is that agency action taken pursuant to executive agreements is not—and should not be—insulated from judicial review. *Galbraith*, *supra*, at 1361 (noting that many of the APA "provisions would be relevant for treaty delegations to agencies" and that § 706(2)(a) "does not require that the agency action be pursuant to a statute as opposed to a treaty"); *Galbraith & Zaring*, *supra*, at 742; Richard B. Stewart, *The Global Regulatory Challenge to U.S. Administrative Law*, 37 N.Y.U. J. INT'L L. & POL. 695, 723 (2005) ["*Stewart*"] ("[. . .] nothing in the APA indicates that domestic agency decisions in implementing global norms are exempt from APA requirements or subject to a lesser standard of judicial review than comparable purely domestic decisions."); Richard B. Stewart, *U.S. Administrative Law: A Model for Global Administrative Law?*, 68 LAW & CONTEMP. PROBS. 63, 78 (2005) (discussing agency implementation of international agreements and judicial review); Elspeth Faiman Hans, *The Montreal Protocol in U.S. Domestic Law: A "Bottom Up" Approach to the Development of Global Administrative Law*, 45 N.Y.U. J. INT'L L. & POL. 827, 833 (2013) (discussing judicial review of "domestic

agency implementation of an international norm, standard, or policy."); *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 111 cmt. h (1987) ("the intention of the United States determines whether an agreement is to be self-executing in the United States or should await implementation by legislation or appropriate executive or administrative action.) [emphasis added].

Supreme Court review is necessary to restore the proper role of the APA in protecting individuals from adverse agency action, even action taken pursuant to executive agreements.

C. The D.C. Circuit's "Substantive Statute" Test Is at Odds with This Court's Well-Established APA Jurisprudence.

This Court's prior decisions addressing the general applicability of the APA also support the position that agency action taken pursuant to executive agreements should not be categorically insulated from judicial review unless authorized by a substantive and comprehensive federal statute. In *Bennett v. Spear*, 520 U.S. 154, 175 (1997), this Court held that 5 U.S.C. § 704 provides a cause of action for all "final agency action for which there is no other adequate remedy in a court." The APA creates a right of action for persons aggrieved by arbitrary and capricious agency conduct and other agency misconduct even in the absence of a federal statute (or international agreement) creating a cause of action. 5 U.S.C. § 704; *Chrysler Corp.*, 441 U.S. at 317-319.

Nothing in the APA or this Court's precedent precludes judicial review for agency action pursuant to executive agreements. Indeed, as this Court has

recognized, there is a strong presumption in favor of judicial review of agency action under the APA, unless a statute's language or structure precludes it. *Hosp. Ass'n v. Becerra*, 142 S.Ct. 1896, 1902 (June 15, 2022).

This Court's APA jurisprudence has correctly led lower courts to conclude that an APA claim can be maintained even when the underlying statute does not provide litigants with a private cause of action. *See, for example, Karst Envtl. Educ. & Prot., Inc. v. Envtl. Prot. Agency*, 475 F.3d 1291, 1295 (D.C. Cir. 2007) ("Because NEPA creates no private right of action, challenges to agency compliance with the statute must be brought pursuant to the Administrative Procedure Act [. . .]"); *San Carlos Apache Tribe v. United States*, 417 F.3d 1091, 1095 (9th Cir. 2005), *citing Glacier Park Found. v. Watt*, 663 F.2d 882, 885 (9th Cir. 1981) ("[r]egardless whether a statute implies a private right of action, administrative actions thereunder may be challenged under the APA unless they fall within the limited exceptions of that Act.").

The D.C. Circuit's "substantive statute" test turns this APA jurisprudence on its head. It narrows the coverage of APA review to agency actions taken pursuant to federal statutes that incorporate substantive, comprehensive standards. That, however, is simply not the case, nor should it be, where, as here, those criteria are provided by the executive agreement and the agency's own detailed procedural framework.

There is no reason to distinguish between the availability of judicial review over agency action taken pursuant to an executive agreement and that over agency action pursuant to a federal statute that contains no private cause of action. *Cf. Sluss v. United States Dep't of Just., Int'l Prisoner Transfer Unit*, 898

F.3d 1242, 1249 (D.C. Cir. 2018) ("Non-self-executing treaties are much like federal statutes that do not supply a private cause of action. Although both are enactments that create legal obligations, plaintiffs cannot bring claims under either."). It is axiomatic that the latter type of action is subject to APA judicial review; the former type of action deserves the same treatment.

D. The D.C. Circuit's "Substantive Statute" Test Fails to Consider the Role That the Executive Has Taken in Implementing Non-Self-Executing Agreements.

In adopting the "substantive statute" test, the D.C. Circuit operated under the erroneous "[a]ssumption that Congress needs to be the intermediary between otherwise unenforceable treaty provisions and the courts [. . .]". *Galbraith*, at 1312. It was precisely due to this assumption that the D.C. Circuit required a substantive and comprehensive federal statute as a precondition for APA review. [App.15a] (citing *Medellín v. Texas*, 552 U.S. 491 (2008) for its conclusion that "because [the U.S.-France Agreement] is not self-executing, it does not function as binding federal law, and it can only be enforced domestically through implementing legislation.") (internal quotations omitted).

A correct reading of *Medellín* would have led the D.C. Circuit to eschew its "substantive statute" test. This Court in *Medellín* explicitly left open the question whether the executive can judicialize an otherwise non-self-executing treaty when there is "congressional acquiescence." *Medellín*, 552 U.S. at 1370-1371. In *Medellín,* "such acquiescence" did "not exist." *Id*. Here, in contrast, "congressional acquiescence" clearly exists. *See Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003),

citing United States v. Pink, 315 U.S. 203, 223 (1942) (stating that the "President's control of foreign relations includes the settlement of claims" and such authority "is indisputable."); *Medellín,* 552 U.S. at 531, *citing Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981) (noting that *Garamendi* and similar holdings are "are based on the view that 'a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned,' can 'raise a presumption that the [action] had been [taken] in pursuance of its consent.'").

Thus, in the context of foreign claims settlements, the D.C. Circuit's "substantive statute" test is completely out of place. The Agreement, together with its implementation and development of the claims process by the Department of State, is based on the historic practice, role and authority granted by Congress to the executive to carry out these functions. If these types of agreements are sufficient to preempt state law (as was the case in *Garamendi*), they should also be sufficient to trigger APA review on agency decisions rendered thereunder.

II. THE D.C. CIRCUIT'S INTERPRETATION AND APPLICATION OF ARTICLE 8 OF THE U.S.-FRANCE AGREEMENT WARRANTS REVIEW BY THIS COURT.

A. The D.C. Circuit's Interpretation of Article 8 Conflicts with Basic Tenets of International Treaty Interpretation.

This Court has long respected the principle that the "clear import of treaty language controls unless "application of the words of the treaty according to their obvious meaning effects a result inconsistent with the intent or expectations of its signatories."

Sumitomo Shoji Am., Inc. v. Avagliano, 457 U.S. 176, 180 (1982); *The Amiable Isabella*, 6 Wheat. (10 U.S.) 1 (1821). "The shared expectations of the contracting parties" control in the interpretation of international agreements, just as parties' collective intent governs the adjudication of private contracts. *Air France v. Saks*, 470 U.S. 392, 399 (1985); *Sullivan v. Kidd*, 254 U.S. 433, 439 (1921) (noting that "treaties [. . .] are to be executed in the most good faith, with a view to making effective the purposes of the high contracting parties" and importance of examining the circumstances and specific interests of each of contracting parties at the time of the negotiation of treaty).

This Court's instructions as to treaty interpretation are rooted in international law. Article 31(1) of the Vienna Convention on the Law of Treaties [opened for signature May 23, 1969, 1155 U.N.T.S. 331, reprinted in 8 I.L.M. 679] provides that "a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." Executive agreements are considered "treaties" and the Vienna Convention would apply equally to them. *See* RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW § 301 (2018).

Against this background, the error of the D.C. Circuit is manifest. Significantly, the appellate court did not engage in any analysis when it interpreted Article 8 to include claims brought by individuals challenging agency action under the Agreement. By its own clear and unambiguous terms, Article 8 applies exclusively to disputes between sovereigns. In adopting Article 8, the United States and France were concerned about disputes between themselves (*i.e.*, horizontal

disputes); they had no intention to include disputes amongst individual non-parties against a party for action taken under the Agreement (*i.e.*, vertical disputes).[12]

Even if there was any doubt as to the proper interpretation and scope of Article 8, that doubt should be dispelled by a familiar principle of statutory construction, namely that when a statute (or treaty) is "reasonably susceptible to divergent interpretation, we adopt the reading that accords with traditional understandings and basic principles: that executive determinations generally are subject to judicial review." *Kucana v. Holder*, 558 U.S. 233, 251 (2010), *citing Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 434 (1995).

B. The D.C. Circuit's Application of Article 8 Conflicts with Language and Purpose of APA § 701(a)(1).

Section 701(a)(1) bars an APA action only when "*statutes* preclude judicial review." [Emphasis added]. By its clear terms, § 701(a)(1)'s limitation on judicial review applies only when the restriction is mandated by a *statute*. The U.S.-France Agreement is manifestly not a statute. Thus, Article 8 cannot serve as a bar to APA judicial review under § 701(a)(1). The D.C. Circuit cited no authority to support the applicability of § 701(a)(1) to treaties or executive agreements. Nor could it. When a statute bars judicial review, it reflects

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[12] This intent is evident from the government's argument that the Agreement is not self-executing and has no domestic effect. If so, then Art. 8 could not have been intended to apply to individuals who, according to the government, cannot bring claims in the first place.

the will of Congress, which has the final say in such matters. Just as it created a right to judicial review under the APA, Congress is free to withhold the right to challenge agency action in court. This is not the case with sole executive agreements. Nothing in the APA contemplates that an agency could foreclose judicial oversight of its own conduct by international agreement. Had Congress wished to grant the Executive such authority, it could have easily so provided. It did not. *Cf. Gutrejman v. United States*, 596 F. Supp. 3d 1, 8 (D.D.C. 2022) (making similar argument).

In enacting the APA, Congress's "evident intent" was to "make agency action presumptively reviewable." *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 225 (2012), *quoting Clarke v. Securities Industry Assn.*, 479 U.S. 388, 399 (1987). The presumption can only be overcome by "clear and convincing evidence" of congressional intent to preclude judicial review. *Guerrero-Lasprilla v. Barr*, 140 S. Ct. 1062, 1069 (2020); *Reno v. Cath. Soc. Servs., Inc.*, 509 U.S. 43, 64 (1993) [clear and convincing evidence required to trigger § 701(a)(1)].

Article 8 of the Agreement does not constitute "clear and convincing evidence" of a contrary congressional intent. Article 8 is not a "statute." Moreover, it cannot dislodge Congress's intent to make agency action under an executive agreement reviewable in claims by individuals challenging the propriety of such action.

Accordingly, review of this Court is necessary to correct a clear error of statutory interpretation, the result of which is to frustrate Congress's overriding intent to allow for judicial review of adverse agency action.

CONCLUSION

This Court's intervention is warranted and a petition for a writ of certiorari should be granted.

Respectfully submitted,

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