STATES, PERSONS, AND THE ADMINISTRATIVE PROCEDURE ACT

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When the Federal Government adopts a policy that States oppose, a lawsuit usually isn't far behind. In filing suit, States often invoke the Administrative Procedure Act's (APA) omnibus cause of action. But only a "person," as defined by the APA, can do so. And the statutory definition does not mention States. Nor, under a well-established rule of interpretation, do we presume a "person" includes a sovereign, like a State of the Union. Just the opposite. So, is a State eligible to file suit under the APA? In nearly 80 years of APA litigation, only a few courts ever spotted the issue. Rather than approach the question methodically and deploy the usual interpretive tools, these courts instead relied on assumptions to deem a State a "person." And these assumptions have been accepted without question. However, a rigorous search for the APA's original, public meaning reveals the faults in that approach. The interpretive signs indicate that a "person" did not include a sovereign State and, by extension, any arm of a State. That means, absent a statutory amendment, States would lose their usual means of challenging federal agency action in court. The disappearance of such litigation would likely have significant ramifications on Federal-State relations.

CONTENTS

INTRODUCTION 306

I. AN UNTESTED ASSUMPTION 308

II. IS A STATE ACTUALLY A "PERSON" UNDER THE APA? 310

A. "Person" does not generally imply a State.....311

B. "Public organization" does not include a State 312

III. AN ARM OF THE STATE IS NOT A "PERSON" EITHER 317

IV. CONCLUSION 318

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INTRODUCTION

Who is a "person" for purposes of the Administrative Procedure Act (APA)? The question seems trivial, but for States, much hinges on the answer.

Those seeking judicial review of the Federal Government's conduct frequently rely on the APA's "omnibus" cause of action to unlock the courthouse doors.[2] That includes States.[3] In recent years alone, States from across the political spectrum have used APA litigation to challenge all sorts of federal policies: immigration enforcement,[4] student loan debt relief,[5] the Department of Government Efficiency,[6] retirement plan management,[7] agency funding levels,[8] medication-assisted abortion,[9] and the list goes on.

Fierce fights often arise in these suits over preliminary issues of justiciability: Has the State established Article III standing?[10] Does it challenge final agency action?[11] Much ink has been spilled over these questions.[12] Meanwhile, another threshold issue that could prove just as fatal to that State's lawsuit passes unnoticed.

An APA plaintiff must fall within "the class of litigants that may, as a matter of law, appropriately invoke the power of the court."[13] This class is fixed by the statute itself: "A *person* suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."[14] The

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[2] Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118, 130 (2014).
[3] *See, e.g.*, William Baude & Samuel L. Bray, *Proper Parties, Proper Relief*, 137 HARV. L. REV. 153, 154 (2023) ("States . . . file suits challenging any important action taken by the executive branch.").
[4] Arizona v. Biden, 593 F. Supp. 3d 676, 699–700 (S.D. Ohio), *rev'd and remanded,* 40 F.4th 375 (6th Cir. 2022); Texas v. United States, 606 F. Supp. 3d 437, 468 (S.D. Tex. 2022), *rev'd*, 599 U.S. 670 (2023).
[5] Nebraska v. Biden, 636 F. Supp. 3d 991, 995 (E.D. Mo. 2022), *rev'd and remanded,* 600 U.S. 477 (2023).
[6] New York v. Trump, 767 F. Supp. 3d 44, 70–71 (S.D.N.Y. 2025).
[7] Utah v. Walsh, No. 2:23-CV-016-Z, 2023 WL 6205926, at *2–3 (N.D. Tex. 2023), *vacated and remanded sub nom.* Utah v. Su, 109 F.4th 313 (5th Cir. 2024).
[8] Rhode Island v. Trump, 781 F. Supp. 3d 25, 42–43 (D.R.I. 2025).
[9] Washington v. U.S. Food & Drug Admin., 668 F. Supp. 3d 1125, 1136 (E.D. Wash. 2023), *vacated*, No. 1:23-CV-3026-TOR, 2025 WL 1888794 (E.D. Wash. 2025); Texas v. U.S. Dep't of Health & Hum. Servs., 681 F. Supp. 3d 665, 680–81 (W.D. Tex. 2023).
[10] *See, e.g.*, Biden v. Nebraska, 600 U.S. 477, 489–94, 524–33 (2023); United States v. Texas, 599 U.S. 670, 675–86, 709–31 (2023); Arizona v. Biden, 40 F.4th 375, 383–87 (6th Cir. 2022).
[11] *See, e.g.*, *Arizona*, 40 F.4th at 387–89; *Rhode Island*, 781 F. Supp. 3d at 43–45.
[12] *See, e.g.*, Baude & Bray, *supra* note 3, at 165–74; Seth Davis, *The New Public Standing*, 71 STAN. L. REV. 1229 (2019); William Funk, *Final Agency Action After Hawkes*, 11 N.Y.U. J.L. & LIBERTY 285 (2017); Tara L. Grove, *When Can a State Sue the United States?*, 101 CORNELL L. REV. 851 (2016); Tomas Rios, Note, *The New Frontier of Guidance Reviewability*, 123 MICH. L. REV. 563 (2024).
[13] Davis v. Passman, 442 U.S. 228, 239 n.18 (1979).
[14] 5 U.S.C. § 702 (emphasis added).

APA specifically defines the term "person" but makes no mention of States.[15] And we cannot simply assume a State fits the bill. The "longstanding interpretive presumption" is "that 'person' does not include the sovereign,"[16] such as a State.[17] So, is a State actually a "person" under the APA?

One might pause here and wonder whether this issue is not a bit picayune. But sometimes "a lot" can "turn[] on a small word" like *a* or *person*.[18] If a State does not fall within the APA's definition of a "person," it is not a "member of the class of litigants" who may sue under the statute.[19] Losing the ability to challenge federal agency actions would significantly alter the way States engage with the Federal Government.[20]

It is also not unusual for a basic question of APA meaning to arise decades after the statute was enacted. Between 1946 and 1993, "[o]nly a handful of opinions in the Courts of Appeals ha[d] considered" the relationship between final agency action and exhaustion of administrative remedies, so it took "over 45 years" for the Supreme Court "definitively to address this question"—something even the justices found "surprising."[21] Another example is the emergent, "thoughtful debate" about "whether the APA authorizes vacatur," a remedy that courts long presumed was proper.[22] The debate about vacatur reflects the recent rise in scholarship that brings "a more originalist approach to interpreting the APA."[23]

In that spirit, Part I begins by surveying the few cases to even spot the issue of a State's personhood under the APA. Each court merely assumed that a State met the statutory definition, without doing the work necessary to confirm its belief.[24] Part II then takes up that task. We deploy the "traditional tools of statutory interpretation," as the Supreme Court instructs, to ascertain the scope of this "legislatively conferred cause of action."[25] As we will see, the interpretive signs—text, context, and history—indicate "the best reading" of the statute is that a State is not a "person."[26]

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[15] 5 U.S.C. § 551(2) (defining "person").
[16] Vt. Agency of Nat. Res. v. U.S. *ex rel.* Stevens, 529 U.S. 765, 780 (2000); *see, e.g.*, Will v. Mich. Dep't of State Police, 491 U.S. 58, 64 (1989) (citations omitted); ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 273–76 (Thomson/West 2012) (discussing artificial-person canon under which "[t]he word *person* includes corporations and other entities, but not the sovereign").
[17] *See* Fed. Maritime Comm'n v. S.C. State Ports Auth., 535 U.S. 743, 760 (2002).
[18] Niz-Chavez v. Garland, 593 U.S. 155, 161 (2021).
[19] Davis v. Passman, 442 U.S. 228, 239 n.18 (1979).
[20] *See supra* notes 4–9 and accompanying text.
[21] Darby v. Cisneros, 509 U.S. 137, 145 (1993).
[22] Corner Post, Inc. v. Bd. of Governors of Fed. Rsrv. Sys., 603 U.S. 799, 809 n.2 (2024).
[23] Christopher J. Walker & Scott T. MacGuidwin, *Interpreting the Administrative Procedure Act: A Literature Review*, 98 NOTRE DAME L. REV. 1963, 1982 (2023).
[24] *See* discussion *infra* Part I.
[25] Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118, 127 (2014).
[26] Loper Bright Enters. v. Raimondo, 603 U.S. 369, 395 (2024).

Part III explores the implications of this conclusion. Most immediately, a State cannot file an APA suit in its own name; it is not a "person" entitled to judicial review under 5 U.S.C. § 702.[27] Neither, it turns out, can the arms and alter egos of a State because they are legally indistinct from the State itself.[28] Part IV concludes by encouraging courts to fulfill their "solemn duty" to interpret acts of Congress and, at long last, consider who is a "person" under the APA.[29]

I. AN UNTESTED ASSUMPTION

It took about 40 years for a court to first acknowledge the issue. In 1985, a Maryland state agency raised an APA challenge to a determination that it had misspent federal grant funds.[30] During the appeal in *Maryland Department of Human Resources v. Department of Health and Human Services*, the D.C. Circuit observed (correctly) that "the APA cause of action cannot apply here unless a state or a state agency is a 'person' within the meaning of the APA, which defines that term as 'includ[ing] an individual, partnership, corporation, association, or public or private organization other than an agency.'"[31] The court then quickly declared: "Certainly, a state or a state agency could be considered a 'public . . . organization.'"[32] How so? Because "[t]he Supreme Court manifestly assumed as much . . . in dictum."[33]

The dictum came from *Bell v. New Jersey*,[34] another dispute about misused federal grant money. At the Supreme Court, "[t]he threshold question" was whether the court of appeals "properly took [original] jurisdiction of the case."[35] Yes, the Court answered, citing a special statutory review provision.[36] Dropping a footnote, the justices mused that if no special review scheme existed, "the district courts would have had jurisdiction" under the combination of 28 U.S.C. § 1331 and the "presumption that [APA] review is available."[37] This cursory counterfactual is what the D.C. Circuit seized upon in *Maryland Department of Human Resources*.

To the D.C. Circuit, *Bell* "manifestly assumed . . . a state is a person within the meaning of the APA."[38] But for Supreme Court dictum to "be treated as

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[27] *See* discussion *infra* Part II.
[28] *Id.*
[29] *Loper Bright*, 603 U.S. at 385 (quoting United States v. Dickson, 40 U.S. 141, 162 (1841)).
[30] Md. Dep't of Hum. Res. v. Dep't of Health & Hum. Servs., 763 F.2d 1441, 1443 (D.C. Cir. 1985).
[31] *Id.* at 1445 n.1 (quoting 5 U.S.C. § 551(2) (1982 ed.)).
[32] *Id.* (quoting 5 U.S.C. § 551(2)).
[33] *Id.* (citing Bell v. New Jersey, 461 U.S. 773, 777 n.3 (1983)).
[34] Bell, 461 U.S. at 775.
[35] *Id.* at 777, 780.
[36] *Id.* at 777–78.
[37] *Id.* at 777 n.3 (citing 5 U.S.C. §§ 701(a), 702, 704).
[38] *Md. Dep't of Hum. Res.*, 763 F.2d at 1445 n.1.

authoritative," the language must be "carefully considered."[39] The *Bell* footnote hardly qualifies. It nowhere cites, much less analyzes, the APA's definition of a "person."[40] Nor does it actually apply this definition to a State. *Bell* contains nothing more than a "bare assumption" about a hypothetical scenario, which "is not the type of" Supreme Court dictum that the D.C. Circuit ordinarily "considers authoritative."[41]

Rather than recognize *Bell*'s limitations, the D.C. Circuit doubled down, claiming the "little case law that bears on this question supports" the dictum's "underlying assumption."[42] There were only two relevant cases.[43] In the first, the District Court for the District of Columbia baldly asserted that a "foreign government or an instrumentality thereof would appear to be a 'public or private organization' within the terms of" 5 U.S.C. § 551(2).[44] No reasoning or explanation backed that up. In the second case, the Fifth Circuit held that the definition of "person" was not limited to "American individuals and 'public or private' organization[s]" but included foreign entities too.[45] However, the Fifth Circuit never considered the interplay between sovereignty—as distinct from nationality—and the statutory meaning of "person."

The D.C. Circuit did not parse the statutory text either in *Maryland Department of Human Resources*. The court simply analogized that "[i]f a foreign government and its agencies are persons within the meaning of the APA, it seems clear that a state and its agencies also are."[46] At no point did the D.C. Circuit engage in the "[c]areful study and reflection" required for this novel question.[47] Bluntly, the proposition that a State is a "person" under the APA rests on nothing more than *ipse dixit*.[48]

The D.C. Circuit then compounded the problem by neglecting the "longstanding interpretive presumption that 'person' does not include the sovereign."[49] Since before the APA, "statutes employing the phrase [were]

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[39] Nat. Res. Def. Council, Inc. v. Nuclear Reg. Comm'n, 216 F.3d 1180, 1189 (D.C. Cir. 2000) (citing United States v. Oakar, 111 F.3d 146, 153 (D.C. Cir. 1997)).
[40] *See Bell*, 461 U.S. at 777 n.3.
[41] Seed v. Env't Prot. Agency, 100 F.4th 257, 266 (D.C. Cir. 2024) (citations omitted).
[42] *Md. Dep't of Hum. Res.*, 763 F.2d at 1445 n.1.
[43] Neal-Cooper Grain Co. v. Kissinger, 385 F. Supp. 769, 776 (D.D.C. 1974); Stone v. Export-Import Bank of U.S., 552 F.2d 132, 136 (5th Cir. 1977). Both arose under the Freedom of Information Act, which "is actually a part of the" APA and thus shares the definition of "person." U.S. Dep't of Just. v. Reps. Comm. For Freedom of Press, 489 U.S. 749, 754 (1989).
[44] *Neal-Cooper Grain*, 385 F. Supp. at 776.
[45] *Stone*, 552 F.2d at 136 (emphasis added).
[46] *Md. Dep't of Hum. Res.*, 763 F.2d at 1445 n.1.
[47] Cent. Va. Cmty. Coll. v. Katz, 546 U.S. 356, 363 (2006).
[48] Morrison v. Olson, 487 U.S. 654, 726 (1988) (Scalia, J., dissenting).
[49] Vt. Agency of Nat. Res. v. U.S. *ex rel.* Stevens, 529 U.S. 765, 780 (2000) (citing United States v. Cooper Corp., 312 U.S. 600, 604 (1941)).

ordinarily construed to exclude" a sovereign, like a State.[50] And this canon "may be disregarded" only upon an "affirmative showing of statutory intent to the contrary," which the D.C. Circuit never found.[51]

Despite these analytical shortcomings, *Maryland Department of Human Resources* has proved both the first and the last word on the matter. The D.C. Circuit did subsequently concede that a State could be a "person" under the APA "by implication only," but it quickly professed "little doubt that a State qualifies as a 'person,'" citing *Maryland Department of Human Resources*.[52] The rest of the federal judiciary has not picked up the slack. Only a couple of courts have acknowledged the issue, and they unhesitatingly followed the D.C. Circuit.[53]

So, as yet, no court has tackled this "interpretive problem[]" as the Supreme Court instructs—that is, "methodically, using traditional tools of statutory interpretation"—"in order to confirm [its] assumptions about" the statutory meaning.[54] Part II now does so.

II. IS A STATE ACTUALLY A "PERSON" UNDER THE APA?

We start, of course, with the text. The APA provides: "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."[55] The APA also supplies the governing definition of a "person."[56] That term "includes an individual, partnership, corporation, association, or public or private organization other than an agency."[57]

The plain text alone tells us a few things. Most obviously, the definition does not mention a State. Other statutes, though, explicitly say that a State is

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[50] United States v. Cooper Corp., 312 U.S. 600, 604 (1941), *superseded by statute*, Sherman Anti-Trust Act of 1890, Pub. L. No. 51-647, 26 Stat. 209, *as recognized in* U.S. Postal Ser. v. Flamingo Indus. (USA) Ltd., 540 U.S. 736 (2004); *see* Peck v. U.S. Dep't of Lab., Admin. Rev. Bd., 996 F.3d 224, 231 (4th Cir. 2021) ("This is no sapling of an interpretive rule—rather, it is a storied redwood of nineteenth-century origin.").

[51] Return Mail, Inc. v. U.S. Postal Serv., 587 U.S. 618, 627 (2019) (quoting *Stevens*, 529 U.S. at 781).

[52] Gov't of Manitoba v. Bernhardt, 923 F.3d 173, 181 (D.C. Cir. 2019).

[53] *See* Kentucky v. Biden, 23 F.4th 585, 602 (6th Cir. 2022) (citing *Bernhardt*); *see also* Washington v. U.S. Food & Drug Admin., 668 F. Supp. 3d 1125, 1136 (E.D. Wash. 2023) (citing *Maryland Department of Human Resources*), *vacated*, No. 1:23-CV-3026-TOR, 2025 WL 1888794 (E.D. Wash. July 8, 2025).

[54] Facebook, Inc. v. Duguid, 592 U.S. 395, 404 n.5 (2021).

[55] 5 U.S.C. § 702.

[56] *See* Digital Realty Tr., Inc. v. Somers, 583 U.S. 149, 160 (2018) ("When a statute includes an explicit definition, we must follow that definition[.]") (quoting Burgess v. United States, 553 U.S. 124, 130 (2008)).

[57] 5 U.S.C. § 551(2).

a person.[58] That triggers our caution against reading words into a statute that Congress knew how to adopt but did not.[59]

On the other hand, the APA defines "person" by what it "includes" rather than what it "means."[60] That signals the six definitional "examples enumerated in the text are intended to be illustrative, not exhaustive."[61] So, it is not textually impossible for a State to be a "person."

As for those definitional categories, five of the six—individual, partnership, corporation, association, and private organization—cannot conceivably encompass a State.[62] But the scope of the sixth—public organization—is not self-evident. The APA says that a public organization excludes "an agency" that is an "authority of the Government of the United States."[63] That does not answer whether a public organization includes a State.

Thus, the statutory text leaves two lines of inquiry. One is that "person" implicitly includes a State. The other is that the term "public organization" encompasses a State.[64] Let us take each in turn.

A. "Person" does not generally imply a State

Helpfully, the Supreme Court addressed the relationship between sovereigns and statutory persons in decisions bracketing the APA's enactment.[65] In 1941, the Court noted: "Since, in common usage, the term 'person' does not include the sovereign, statutes employing the phrase are ordinarily construed to exclude it."[66] The term instead referred to "what are usually known as natural and artificial persons, that is, individuals and

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[58] *See, e.g.*, U.S. Dep't of Energy v. Ohio, 503 U.S. 607, 613 n.5 (1992) (observing that "States may sue the United States under the citizen-suit sections" of the Clean Water Act and Resource Conservation and Recovery Act of 1976 because those statutes define a "person" to include a State).
[59] *See* Lackey v. Stinnie, 604 U.S. 192, 205 (2025) (quoting Rotkiske v. Klemm, 589 U.S. 8, 14 (2019)).
[60] *Compare* 5 U.S.C. § 551(1) ("'Agency' means . . . ."), *with id.* § 551(2) ("'Person' includes . . . .").
[61] *See id.* § 551(2); Christopher v. SmithKline Beecham Corp., 567 U.S. 142, 162 (2012).
[62] *See* New York v. Meta Platforms, Inc., 66 F.4th 288, 297 (D.C. Cir. 2023).
[63] 5 U.S.C. § 551(1), (2).
[64] *See* Md. Dep't of Hum. Res. v. Dep't of Health & Hum. Servs., 763 F.2d 1441, 1445 n.1 (D.C. Cir. 1985) (quoting 5 U.S.C. § 551(2)).
[65] *See* Bostock v. Clayton Cnty., 590 U.S. 644, 674 (2020) ("[T]he law's ordinary meaning at the time of enactment usually governs . . . ."). The original 1946 definition provided that "'[p]erson' includes individuals, partnerships, corporations, associations, or public or private organizations of any character other than agencies." Administrative Procedure Act, Pub. L. No. 79-404, § 2(b), 60 Stat. 237, 237 (1946). Twenty years later, when the APA was codified as positive law, "the words 'of any character' [were] omitted as surplusage." 5 U.S.C. § 551(2) Legis. Rep. note; *see* Act to Enact Title 5, United States Code, Government Organizations and Employees, Pub. L. No. 89-554, § 551(2), 80 Stat. 378, 382 (1966). Therefore, today's definition is materially unchanged from the 1946 original.
[66] United States v. Cooper Corp., 312 U.S. 600, 604 (1941), *superseded by statute*, Sherman Anti-Trust Act of 1890, Pub. L. No. 51-647, 26 Stat. 209, *as recognized in* U.S. Postal Ser. v. Flamingo Indus. (USA) Ltd., 540 U.S. 736 (2004).

corporations."[67] Usage patterns had not changed by 1947, when the Court maintained that a person "does not include the sovereign, and statutes employing it will ordinarily not be construed to do so."[68] Congress presumably was "aware of" these precedents when crafting the APA, yet signaled no intent to deviate from them.[69]

Indeed, legislation from that era reflects the Court's understanding. The Dictionary Act, for example, extended "the word 'person' . . . to partnerships and corporations" but not to States.[70] (It still doesn't.[71]) Other statutes from the 1930s and 1940s defined States separately from persons,[72] including those providing for judicial review of agency action.[73]

Accordingly, the "presumption that 'person' does not include the sovereign" fully applies to the APA unless there is "some affirmative showing of statutory intent to the contrary."[74] And there is only one place left to look for such intent. The D.C. Circuit actually had flagged it in *Maryland Department of Human Resources*: whether "a state or a state agency could be considered a 'public . . . organization.'"[75]

B. "Public organization" does not include a State

Again, the APA does not shed light on the meaning of a "public organization" beyond saying the term excludes federal agencies.[76] Looking up "public" and "organization" in the dictionary, we see that a public organization literally might include anything "which is organized" and

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[67] *Cooper Corp.*, 312 U.S. at 606; *see Person*, BLACK'S LAW DICTIONARY (3d ed. 1933) (noting that "as a rule, corporations will be considered persons within the statutes," but "a sovereign is not" usually "a person in the legal sense").
[68] United States v. United Mine Workers of Am., 330 U.S. 258, 275 (1947).
[69] Ysleta Del Sur Pueblo v. Texas, 596 U.S. 685, 700 (2022).
[70] 1 U.S.C. § 1 (1947).
[71] 1 U.S.C. § 1 (2012); *see* New York v. Meta Platforms, Inc., 66 F.4th 288, 297 n.7 (D.C. Cir. 2023); *see also* Peck v. U.S. Dep't of Lab., 996 F.3d 224, 232 (4th Cir. 2021) ("Notably absent" from 1 U.S.C. § 1 "is any mention of sovereigns.").
[72] Interstate Commerce Act, ch. 380, sec. 4, §402, 56 Stat. 284, 284 (1942) ("The term 'person' includes an individual, firm, partnership, corporation, company, association, or joint-stock association, and includes a trustee, receiver, assignee, or personal representative thereof. . . . The term 'State' means a State of the United States or the District of Columbia."); Natural Gas Act, Pub. L. No. 75-688, §§ 2(1), (4), 52 Stat. 821, 821–22 (1938) ("'Person' includes an individual or a corporation. . . . 'State' means a State admitted to the Union, the District of Columbia, and any organized Territory of the United States.").
[73] 16 U.S.C. § 825l (a)–(b) (1940) (authorizing judicial review of Federal Power Commission orders by "[a]ny person, State, municipality, or State commission aggrieved by an order issued by the Commission"); 15 U.S.C. § 717r (1940).
[74] Return Mail, Inc. v. U.S. Postal Serv., 587 U.S. 618, 626–27 (2019) (quoting Vt. Agency of Nat. Res. v. U.S. *ex rel.* Stevens, 529 U.S. 765, 781 (2000)).
[75] Md. Dep't of Hum. Res. v. Dep't of Health & Hum. Servs., 763 F.2d 1441, 1445 n.1 (D.C. Cir. 1985) (quoting 5 U.S.C. § 551(2)).
[76] *See supra* note 57 and accompanying text.

relates to "a nation, state, or community at large."[77] As a "political community organized under a distinct government,"[78] a State might fit. But just because "a definition is broad enough to encompass one sense of a word does not establish that the word is ordinarily understood in that sense."[79] "Public organization" is not a natural synonym for a State. In everyday conversation, people do not grumble about dealings in their organization's capital.[80]

Furthermore, if "public organization" is read most expansively, the term casts off "any limiting principle."[81] For instance, as governmental entities with a modicum of structure, Congress and every federal judicial body would qualify as public organizations and therefore persons eligible to bring APA claims.[82] Yet Congress has forsworn "authority to file suit under the myriad of general laws," like the APA, "authorizing aggrieved persons to challenge agency action."[83] An interpretation that invites a contradictory (and seemingly absurd) result should be avoided if a sounder alternative is available.[84]

Indeed, numerous sources support a narrower construction of "public organization." Dictionaries and members of Congress used the term to refer to a public business or corporation,[85] such as a municipally owned airport or utility.[86] Treatises too characterized entities "clothed with governmental authority, and charged with the performance of public duties" as public organizations.[87] Examples included "road district[s] and drainage district[s],"

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[77] *Organization*, WEBSTER'S NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 1719 (2d ed. 1942); *Organization*, FUNK & WAGNALLS NEW STANDARD DICTIONARY OF THE ENGLISH LANGUAGE 1742 (1946 ed.).

[78] *State,* BLACK'S LAW DICTIONARY 1652 (3d ed. 1933).

[79] Taniguchi v. Kan Pac. Saipan, Ltd., 566 U.S. 560, 568 (2012).

[80] *See* Henson v. Santander Consumer USA Inc., 582 U.S. 79, 84 (2017) (examining "ordinary meaning" through an imaginary conversation with "a friend").

[81] Wos v. E.M.A. *ex rel.* Johnson, 568 U.S. 627, 637 (2013).

[82] 5 U.S.C. § 551(2) provides that a "public organization" is "other than an agency." But an agency "does not include," among other entities, "the Congress" and "the courts of the United States." *Id.* § 551(1). So, Congress and the courts are not textually excluded from the definition of "public organization."

[83] Brief for the U.S. House of Representatives as Amici Curiae Supporting Appellee, U.S. Dep't of Com. v. U.S. House of Representatives, 525 U.S. 316 (1982) (No. 98-404), 1998 WL 767637, at *22.

[84] Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 575 (1982).

[85] WEBSTER'S NEW INTERNATIONAL DICTIONARY, *supra* note 77, at 1719, 2005; FUNK & WAGNALLS NEW STANDARD DICTIONARY OF THE ENGLISH LANGUAGE, *supra* note 77, at 1742, 2003; 91 CONG. REC. 9746 (1945).

[86] *See, e.g.*, 91 CONG. REC. 9746 (1945) (noting "that a public or quasi-public organization such as an irrigation district, the Port of New York Authority, the Port of San Francisco Authority," as well as "municipalities," might operate an airport).

[87] ROGER W. COOLEY, HANDBOOK OF THE LAW OF MUNICIPAL CORPORATIONS 569–70 (1914); *see also* HENRY H. INGERSOLL, HANDBOOK OF THE LAW OF PUBLIC CORPORATIONS 93 (1904) (including "all public organizations of officers clothed with governmental authority, and charged with the performance of public duties" as a subset of "the class of public quasi corporations").

"boards of education, [and] of public works."[88] Also, towns, villages, cities, and counties.[89] Other publications employed the term similarly or, at least, certainly not to indicate a State.[90]

State court opinions are in accord.[91] These decisions—written by those perhaps best placed to properly employ the term—referred to counties,[92] cities,[93] boards of education,[94] irrigation districts,[95] farm bureaus,[96] and the like[97] as public organizations.

Neither scholars nor state courts appear to have referred to the State itself as a "public organization." Instead, the term was a catchall for local and municipal entities, as well as enterprises affiliated with those governments.

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[88] COOLEY, *supra* note 87, at 569–70; INGERSOLL, *supra* note 87, at 93; *see also* 1 JAMES M. KERR, MINING AND WATER CASES ANNOTATED 111 (1912) (describing a "reclamation district" as "a public organization formed to perform certain work which the policy of the state requires or permits to be done, and is not either a public or private corporation").

[89] 3 WILLIAM HERBERT PAGE, THE LAW OF CONTRACTS, § 1884, at 3224 (2d ed. 1920); AM. INSTITUTE OF BANKING, CORPORATION FINANCE (INVESTMENTS I) 31 (1941) ("Public corporations include municipalities–cities, villages, townships, and the like–and public organizations owned or controlled by governmental bodies."); 2 HOWARD S. ABBOTT, A TREATISE ON THE LAW OF MUNICIPAL CORPORATIONS 1067 (1905-06) (labeling "an incorporated city or village" and "a township or county organization" as examples of "public organizations").

[90] *See* John Bauer, *Can Government Leadership Cut the Valuation Tangle?*, 23 Nat'l Mun. Rev. 562, 604 (1934) ("We appeal to state commissions, municipal officials, public organizations, consumer groups, and public-spirited citizens."); Roswell Magil, *Federal Regulation of Family Settlements*, 15 U. Chi. L. Rev. 265, 222 (1937) ("Congress has also subsidized gifts inter vivos to charities, educational and religious institutions, and certain public organizations, by allowing a deduction for income-tax purposes as well as for gift-tax purposes."); 2 A. WALTER SOCOLOW, THE LAW OF RADIO BROADCASTING 687 (1939) ("The producer of a radio broadcast program may be an independent contractor, the broadcast station itself, the advertising agency, the advertiser, or any other commercial or public organization which arranges and presents broadcast programs."); Louise Stitt, *State Fair Labor Standards Legislation*, 6 LAW & CONTEMP. PROBS. 454, 460 (1939) ("In some states joint committees representing labor, employer, and public organizations carefully scrutinized the proposed [wage-and-hour] bills in light of their local conditions . . . ."); MONTGOMERY H. THROOP, A TREATISE ON THE LAW RELATING TO PUBLIC OFFICERS AND SURETIES IN OFFICIAL BONDS 523 (1892) (describing "the body for which [a public officer] acts" as "the state, a municipal corporation, or other public organization").

[91] *See* New Prime Inc. v. Oliveira, 586 U.S. 105, 115 (2019) (looking to state courts' usage of term to discern statutory meaning).

[92] In re Short, 27 P. 1005, 1006 (Kan. 1891); *see also* Brooks Cnty. v. Elwell, 11 S.E.2d 82, 87–88 (Ga. App. 1940) (referencing "cities, counties, and all other public organizations"); First German Reformed Church v. Comm'rs of Summit Cnty., 1902 WL 853, at *6 (Ohio Cir. Ct. 1902) (referring to "a municipal corporation or board of county commissioners" as a "public organization").

[93] *Brooks Cnty.*, 11 S.E.2d at 87–88.

[94] Smith v. Green Tp. Bd. of Educ., 1929 WL 2286, at *1 (Ohio Ct. App. 4th Dist. 1929); *see also* Sch. Dist. No. 38 v. Rural High Sch. Dist. No. 6, 225 P. 732, 733 (Kan. 1924) (describing a "school district" as a "public organization").

[95] Eldridge v. Black Canyon Irr. Dist., 43 P.2d 1052, 1054 (Idaho 1935).

[96] Cloud Cnty. Farm Bureau v. Bd. of Comm'rs of Cloud Cnty., 268 P. 91, 92 (Kan. 1928).

[97] *See Brooks Cnty.*, 11 S.E.2d at 87–88 (referencing "cities, counties, and all other public organizations"); *Eldridge*, 43 P.2d at 1054 (acknowledging "public organizations other than cities, which exercise governmental powers"); *Cloud Cnty. Farm Bureau*, 268 P. at 92 (describing county farm bureau as "a public organization, somewhat similar to a school district or other municipality"); *see also* Petition of Bd. of Dirs. of Tillamook People's Util. Dist., 86 P.2d 460, 463 (Or. 1939) (discussing whether "specifi[c] public corporation" was "a permanent public organization" or would "be dissolved upon the performance of the special functions for which it was organized").

Although these units perform "legitimate function[s] of the State,"[98] they "never were and never have been considered as sovereign entities."[99]

This interpretation gains purchase in the statutory structure. The phrase "public or private organizations" forms a "residual clause" in 5 U.S.C. § 551(2).[100] In residual clauses, "the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words."[101] None of the categories that precede "public or private organizations" in 5 U.S.C. § 551(2)—*i.e.*, individuals, partnerships, corporations, and associations—are akin to sovereign governments. So, if these categories exercise even a modicum of control over the meaning of "public organization," the term would not encompass a sovereign State.[102]

Shifting to the historical context, several events strongly suggest that Congress did not use "public organization" to mean a State.[103] In 1940, the House of Representatives debated an administrative procedure bill that defined a person to "include[] individuals, corporations, partnerships, or other organizations."[104] The question arose if States fit the definition. Every representative in the debate agreed that the bill's bare reference to a "person" did not imply a State, *and* that "the phrase 'other organizations'" did not "admit of the construction that it included a State."[105]

Next up is the Emergency Price Control Act of 1942,[106] which "made it unlawful for 'any person' to violate . . . maximum price regulations" during the Second World War.[107] The State of Washington claimed to be exempt from the regulations because, as a State, it was not a person under the Act.[108] The Supreme Court disagreed, holding "that Congress meant to include states and their political subdivisions when it expressly made the Act applicable to the United States 'or any other government, or any of its political subdivisions, or any agency of any of the foregoing.'"[109] The Emergency

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[98] City of Trenton v. State of New Jersey, 262 U.S. 182, 186 (1923).
[99] Ysursa v. Pocatello Educ. Ass'n, 555 U.S. 353, 362 (2009) (quoting Reynolds v. Sims, 377 U.S. 533, 575 (1964)).
[100] *See* Cir. City Stores, Inc. v. Adams, 532 U.S. 105, 114–15 (2001) (quoting 2A N. SINGER, SUTHERLAND ON STATUTES AND STATUTORY CONSTRUCTION § 47.17 (1991)) (residual clause occurs when "general words follow specific words in a statutory enumeration").
[101] *Id.*
[102] Sw. Airlines Co. v. Saxon, 596 U.S. 450, 462 (2022) (declining to apply the *ejusdem generis* canon when none of a "list's preceding specific terms" "necessarily share[s] the attribute that [petitioner] would like us to read into the catchall provision"); *see Cir. City Stores*, 532 U.S. at 115.
[103] Bostock v. Clayton Cnty., 590 U.S. 644, 674–75 (2020) (recognizing that "historical sources can be useful for" identifying "distinctions between literal and ordinary meaning").
[104] 86 CONG. REC. 4650, 4658–59 (1940).
[105] *Id.* at 4653, 4658–59.
[106] Emergency Price Control Act of 1942, Pub. L. No. 77-421, 56 Stat. 23 (1942).
[107] Case v. Bowles, 327 U.S. 92, 98 (1946).
[108] *Id.* at 98–99.
[109] *Id.* at 99 (quoting Pub. L. No. 77-421, § 302(h), 56 Stat. 23, 44 (1942)).

Price Control Act thus shows that, when Congress wanted the statutory term "person" to include States, "it knew how to say so."[110] It just did not in the APA.

The omission was not for lack of opportunity. A predecessor bill to the APA actually defined "'[p]ersons'" to "mean[] individuals or organized groups of any character, including . . . Federal, State, or local agencies, subdivisions, municipal corporations, or officers."[111] But this bill, along with its express definition of a State as a person, died in committee.[112] As for the APA itself, the House and Senate committee reports neither discuss the meaning of "public organization" nor reflect any desire to depart from the usual meaning of "person."[113] The legislative history, in other words, contains no "affirmative showing of statutory intent" that "person" included a sovereign State.[114]

Perhaps the strongest reason to construe a State as a "public organization" is policy. States, like individuals or corporations, may be aggrieved by an agency action, so why shouldn't they be able to sue under the APA, too? The Supreme Court did once treat a State as a person for fear of holding otherwise.[115] Since then, though, the Court has come to view "appeal[s] to public policy" as "the usual redoubt of failing statutory interpretation arguments."[116] It is now beyond cavil that "policy concerns cannot trump the best interpretation of the statutory text."[117]

In 5 U.S.C. § 551(2), Congress fixed the class of APA claimants by defining a "person." Courts cannot "engraft" onto that definition "additions which [they] think the legislature logically might or should have made."[118] Any argument why States should be able to file APA suits is "properly addressed to Congress, not [the courts]."[119]

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[110] Rubin v. Islamic Republic of Iran, 583 U.S. 202, 216 (2018).
[111] Administrative Procedure Act: Legislative History, S. DOC. NO. 79-248, at 52, 162, 250 (1946).
[112] *Id.* at 250.
[113] H.R. REP. NO. 79-1980 (1946); S. REP. NO. 79-752 (1945).
[114] Return Mail, Inc. v. U.S. Postal Serv., 587 U.S. 618, 627 (2019) (quoting Vt. Agency of Nat. Res. v. U.S. *ex rel.* Stevens, 529 U.S. 765, 781 (2000)). If anything, Congress signaled the contrary by eschewing the bill that defined a State as a person. *See* Chickasaw Nation v. United States, 534 U.S. 84, 93 (2001) (declining to adopt a statutory "interpretation [that] would read back into the Act the very word . . . that the Senate committee deleted" because "[w]e ordinarily will not assume that Congress intended 'to enact statutory language that it has earlier discarded in favor of other language'" (quoting I.N.S. v. Cardoza-Fonseca, 480 U.S. 421, 443 (1987)).
[115] *See* Georgia v. Evans, 316 U.S. 159, 162–63 (1942) (regarding a State as a person because the alternative "would deny all redress to a State, when mulcted by a violator of the Sherman [Antitrust] Law, merely because it is a State").
[116] Ysleta Del Sur Pueblo v. Tex., 596 U.S. 685, 706 (2022).
[117] Patel v. Garland, 596 U.S. 328, 346 (2022).
[118] United States v. Cooper Corp., 312 U.S. 600, 605 (1941) (declining to "engraft" additions onto Congress's definition of "person," a rule of interpretation later left undisturbed despite statutory amendment), *superseded by statute*, Sherman Anti-Trust Act of 1890, Pub. L. No. 51-647, 26 Stat. 209, *as recognized in* U.S. Postal Ser. v. Flamingo Indus. (USA) Ltd., 540 U.S. 736 (2004).
[119] SAS Inst., Inc. v. Iancu, 584 U.S. 357, 368 (2018).

After deploying all the tools of statutory construction, nothing "in the text or context of the" APA "affirmatively shows" that in 5 U.S.C. § 551(2) "Congress intended to include" States as persons.[120] We therefore presume it did not.[121] As a result, the "best reading" of the APA is that State is not a "person."[122]

III. AN ARM OF THE STATE IS NOT A "PERSON" EITHER

If a State is not a "person" under the APA, what exactly does that mean? The first consequence is the most obvious: A State is not a "member of the class of litigants that may, as a matter of law, appropriately" invoke the APA's cause of action.[123] Gone are the APA suits captioned *State of X v. United States Department of Y*. And that is not all, because a sovereign effectively may be the litigant even when not "named as a party."[124]

"Noninclusion of the sovereign means noninclusion of agencies of the sovereign as well."[125] This reflects how sovereignty is "vested in the state governments."[126] These governments have constituted themselves through various "arm[s] or alter ego[s]"[127]—the sundry boards, commissions, and departments through which States exercise their "sovereign powers."[128] Legally constituent of "one of the United States,"[129] "an arm of the State" enjoys the same sovereign status as the State itself.[130] So too for state employees, whose actions merely vivify "the official's office."[131] As a result, the exclusion of a State from the meaning of a "person" extends as well to

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[120] Return Mail, Inc. v. U.S. Postal Serv., 587 U.S. 618, 628–29 (2019).
[121] *See id.*
[122] Loper Bright Enters. v. Raimondo, 603 U.S. 369, 373 (2024).
[123] Davis v. Passman, 442 U.S. 228, 239 n.18 (1979).
[124] Larson v. Domestic & Foreign Com. Corp., 337 U.S. 682, 687 (1949) (recognizing that a suit may be against the sovereign in substance even when not formally named).
[125] SCALIA & GARNER, *supra* note 16, at 274.
[126] Martin v. Hunter's Lessee, 14 U.S. 304, 325 (1816).
[127] State Highway Comm'n of Wyo. v. Utah Const. Co., 278 U.S. 194, 199 (1929); *see* Moor v. Alameda Cnty., 411 U.S. 693, 717 (1973).
[128] *Martin*, 14 U.S. at 325.
[129] Regents of the Univ. of Cal. v. Doe, 519 U.S. 425, 430 n.5 (1997) (internal quotation marks omitted).
[130] Alden v. Maine, 527 U.S. 706, 756 (1999); *see* N. Ins. Co. of N.Y. v. Chatham Cnty., 547 U.S. 189, 193 (2006) (observing that States' "preratification sovereignty" still applies to "States and arms of the State"); *see also* Fed. Mar. Comm'n v. S.C. State Ports Auth., 535 U.S. 743, 751 (2002) (holding that the state port authority was an arm of the State); *State Highway Comm'n*, 278 U.S. at 199 (holding that the state highway commission was an arm of the State); Mikel v. Quin, 58 F.4th 252, 257 (6th Cir. 2023) (noting that the Tennessee Department of Children's Services was "a state agency" and protected by Tennessee's sovereign immunity); Mahdi v. Salt Lake Police Dep't, 54 F.4th 1232, 1240 (10th Cir. 2022) (remarking that the Utah Highway Patrol "enjoys sovereign immunity as a state agency").
[131] Will v. Mich. Dep't of State Police, 491 U.S. 58, 71 (1989); *see In re* State of New York, 256 U.S. 490, 502 (1921) (stating that suits against the state superintendent of public works were "in their nature and effect . . . brought . . . against the state of New York").

state agencies and officers of those agencies acting in their official capacity.[132]

This result might seem startling, even absurd. However, it actually dovetails with our understanding that a "public organization" is a unit of, or an entity affiliated with, local or municipal government. Public organizations are "territorially a part of the state"[133] and may "exercise a 'slice of state power,'"[134] but they are not "equivalents of the States themselves."[135] Nor are these "lesser entities" regarded as "arm[s] of the State."[136] Accordingly, there is no disharmony between recognizing a local or municipal entity as a "public organization"—and thus a "person" under the APA—but not the State within which that entity resides.

IV. CONCLUSION

For more than 75 years, it was universally assumed that a State is a "person" under the APA.[137] It is time for courts to actually test this assumption. The issue has not been rendered moot by the mere passage of time.[138] It is reborn each time a State (or a State agency) files an APA suit.

Courts need only engage in the familiar process of statutory interpretation. Those outside the D.C. Circuit can construe the meaning of 5 U.S.C. § 551(2) largely unconstrained by binding precedent. Within the D.C. Circuit, an en banc court is necessary to revisit *Maryland Department of Human Resources* and *Government of Manitoba*.[139] But as we have seen, neither decision engaged with the APA's text, context, or history. So, there are substantial

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[132] To determine "whether a particular state agency" is "an arm of the State," one must "consider[] the provisions of state law that define the agency's character." *Regents of the Univ. of Cal.*, 519 U.S. at 430 n.5.

[133] Lincoln Cnty. v. Luning, 133 U.S. 529, 530 (1890).

[134] *N. Ins. Co. of N.Y.*, 547 U.S. at 194 (quoting Lake Country Ests., Inc. v. Tahoe Reg'l Plan. Agency, 440 U.S. 391, 401 (1979)); *see* Metro. R.R. Co. v. D.C., 132 U.S. 1, 9 (1889) ("The subordinate legislative powers of a municipal character, which have been or may be lodged in the city corporations, or in the District corporation, do not make those bodies sovereign.").

[135] City of Lafayette v. La. Power & Light Co., 435 U.S. 389, 412 (1978) (explaining that municipalities are not sovereign equivalents of states for antitrust purposes, subject to later clarification of state-action immunity in *Hallie v. Eau Claire*, 471 U.S. 34, 38–39, 45–47 (1985)), *superseded by statute*, Local Government Antitrust Act of 1984, Pub. L. No. 98–544, 98 Stat. 2750, *as recognized in* Sakamoto v. Duty Free Shoppers, Ltd., 764 F.2d 1285, 1288 (9th Cir. 1985).

[136] *Alden*, 527 U.S. at 756; *see N. Ins. Co. of N.Y.*, 547 U.S. at 193 (stating that counties are not sovereign); Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 280 (1977) (holding that "a local school board . . . is more like a county or city than it is like an arm of the State").

[137] *See* Md. Dep't of Hum. Res. v. Dep't of Health & Hum. Servs., 763 F.2d 1441, 1445 n.1 (D.C. Cir. 1985) (quoting 5 U.S.C. § 551(2)); *see also supra* discussion Part I.

[138] *See* Zuber v. Allen, 396 U.S. 168, 185 n.21 (1969) ("The verdict of quiescent years cannot be invoked to baptize a statutory gloss that is otherwise impermissible.").

[139] *See supra* discussion Part I; *see also* LaShawn A. v. Barry, 87 F.3d 1389, 1395 (D.C. Cir. 1996) (en banc) ("One three-judge panel . . . does not have the authority to overrule another three-judge panel of the court.").

arguments—at the least—that both decisions were "fundamentally flawed" on "an important question of law."[140] For a court that "has long dominated and played a major role in shaping" administrative law, the D.C. Circuit should put its own assumption about the APA to the test.[141] As Justice Frankfurter admonished, "[w]isdom too often never comes, and so one ought not to reject it merely because it comes late."[142]

Of course, Congress may intercede at any time and clarify the definition of "person" in 5 U.S.C. § 551(2). "If Congress enacted into law something different from what it intended," it may simply "amend the statute to conform it to its intent."[143] Until that happens though, courts must apply the text of the APA as enacted.

For decades, States have pressed APA claims based on nothing more than a judge's bald say-so. But as Justice Scalia warned, "he who lives by the *ipse dixit* dies by the *ipse dixit*."[144] No APA suits of States should proceed until courts finally engage in a fulsome process of statutory interpretation and actually determine that a State is a "person."

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[140] Chambers v. District of Columbia, 35 F.4th 870, 879 (D.C. Cir. 2022).
[141] Richard J. Pierce, Jr., *The Special Contributions of the D.C. Circuit to Administrative Law*, 90 GEO. L. J. 779, 779 (2002); *see, e.g.*, Judge J. Michelle Childs, *A Distinctive Court: A Glimpse Into the History & Significance of the D.C. Circuit*, 93 FORDHAM L. REV. 1937, 1940–42 (2025) (discussing the D.C. Circuit's "prominent role in reviewing agency decisions").
[142] Henslee v. Union Planters Nat. Bank & Tr. Co., 335 U.S. 595, 600 (1949) (Frankfurter, J., dissenting).
[143] Lamie v. U.S. Trustee, 540 U.S. 526, 542 (2004).
[144] Morrison v. Olson, 487 U.S. 654, 726 (1988) (Scalia, J., dissenting).