FINAL EXAMINATION
ADMINISTRATIVE LAW – LAW 6400 – Section 11 – Siegel
Fall 2020

INSTRUCTIONS

1. This is an open book examination. You may consult written materials during the exam. "Written" materials include materials that are handwritten, typewritten, printed, published, and the electronic equivalents thereof, including materials posted on the Internet. The materials may be written by you or by anyone else. They may include commercial materials. The materials must have been written before the exam began.

2. It is forbidden to consult any other person about the exam, directly or indirectly, during the exam. It is forbidden during the exam to discuss the exam with any other person, even in a general way, regardless of whether or not the other person is a student in the class, regardless of whether or not you and/or the other person have seen the exam, and regardless of whether or not you and/or the other person have already submitted answers. The phrase "during the exam" means the entire 24-hour period from 2 pm Eastern time on December 9, 2020 to 2 pm Eastern time on December 10, 2020.

3. **You have 3.5 hours (3 hours, 30 minutes) to complete the exam.** You may start the exam at any time from 2 pm Eastern time December 9, 2020 to 10:30 am Eastern time December 10, 2020. Once you start, you have 3.5 hours to complete your answers to both the essay and multiple choice questions and to upload your essay answers to the Records Office. For further details, consult the instructions you received from the Dean's Office.

4. There are **THREE ESSAY QUESTIONS** and **FIFTEEN MULTIPLE CHOICE QUESTIONS**. All students must answer all questions. You may complete the questions in any order.

5. You will answer the essay questions using MyLaw. You will answer the multiple choice questions on Google Forms. To get to the multiple choice questions, copy and paste this link into your browser:

   https://tinyurl.com/yy3u3wul

   You must be logged in to your @law.gwu.edu email to access the multiple choice questions. The Google Form will record your email address, but Prof. Siegel will not see it, so the anonymity of the exam will be preserved.

6. **Include your GWid at the start of your answer to the first essay question.** Input your GWid wherever the software tells you to, but also type your GWid at the start of your answer to the first essay question.

7. **<u>Word Limit on Essay Answers</u>:** Your answers to the three essay questions must be no more than 3000 words in total. You must conclude your answers to the essay questions with a certificate in the following form: "I certify that my answers to the three essay questions contain [number] words in total. [GWid]." Replace [number] with the number of words in your answer to all three essay questions in total, and replace [GWid] with your GWid, which constitutes your signature to the certificate. Do *not* put your name on the certificate.

8. The recommended time allocations for the questions are:

Essay Question One:	45 minutes
Essay Question Two:	45 minutes
Essay Question Three:	30 minutes
Multiple Choice Questions:	60 minutes (total)

The weights of the questions are proportional to the recommended time allocations. The recommended times add up to 3 hours. The 30 extra minutes are designed to permit ample time to deal with the administrative aspects of the exam.

9. Do not put your name anywhere on your answers.

10. If you are writing any answers by hand, remember to *write legibly*.

11. If, with regard to any essay question, you think additional facts are needed to answer the question, state clearly what facts you think are missing. Then make a reasonable assumption about the missing facts and answer the question based on your assumption. Do not change the given facts.

12. Using good judgment, address all the issues presented and assigned by the essay questions, even if your answers to some issues would, in real life, eliminate the need to address other issues.

13. Unless otherwise specified, assume all events occurred within the United States and answer all questions on the basis of current law.

14. Unless otherwise specified, assume that your reader wants all your answers to the essay questions to be explained and justified, but doesn't have time to read unnecessary material.

15. Good luck.

ESSAY QUESTION ONE

All meat products sold in interstate commerce in the U.S. must be inspected by the U.S. Department of Agriculture (USDA). The Federal Meat Inspection Act (FMIA or Act) requires the USDA to conduct inspections in all "establishments in which amenable species are slaughtered and the meat thereof is prepared for commerce," and it prohibits USDA from approving any meat that is "adulterated." The statutory definition of "adulterated" includes meat that "has been prepared under insanitary conditions whereby it may have been rendered injurious to health." The Act gives the Secretary of Agriculture ("the Secretary") power to prescribe rules to implement the Act. The Secretary of Agriculture is the head of USDA and serves at the pleasure of the President.

In January 2021, the President hires former Senator John Kerry to a White House job that does not require Senate approval. The President then names Kerry as his "Special Presidential Envoy for Climate (SPEC)," a position that did not previously exist. The President charges Kerry with taking all appropriate steps to mitigate the effects of global climate change. The President issues an Executive Order (EO) directed to all agency heads that serve at the pleasure of the President. Among other things, the EO states: "All agency heads subject to this order shall, to the extent permitted by law, take direction from the SPEC as though it came from me in all matters."

Thereafter, the Secretary of Agriculture publishes notice that he proposes to adopt a rule under which most beef currently produced in the U.S. would be considered "adulterated" because raising cows contributes to global warming, and global warming is "injurious to health." To avoid being considered "adulterated" under the proposed rule, beef would have to come from cows raised using specified methods that would contribute less to global warming, but which would be more expensive for cattle ranchers.

Cattle ranchers submit comments opposing the proposed rule. The comments assert that the rule is beyond the authority conferred on the Secretary by the FMIA. In addition, among other things, the comments include analyses by expert economists, which assert that the rule will make raising cows in the U.S. so expensive that it will cause most beef production to move from the U.S. to abroad (i.e., far less beef will be produced in the U.S., and far more beef will instead be produced abroad and imported into the U.S.). The analyses further assert that, because cows are raised abroad using methods that contribute even more to global warming than current U.S. methods, the effect of the rule will be to make global warming worse.

The SPEC submits a comment, which is included in the record with all the other comments, which, among other things, says: "The current U.S. methods of raising cows play a leading role in contributing to global warming. Under the authority delegated to me by the President, I have therefore directed the Secretary of Agriculture to adopt the proposed rule, provided he determines that he may lawfully do so."

The Secretary adopts a final rule that is identical to the proposed rule. The statement accompanying the final rule makes no mention of the rule's likely effect on where beef is produced.

The statement analyzes the additional costs that ranchers will be required to incur because of the rule and the health benefits that would accrue if global warming were reduced because cattle were raised using the improved methods required by the rule, and the statement concludes that the benefits justify the costs. The statement also says this: "USDA acknowledges that this rule was undertaken and completed at the instigation of the SPEC. For the reasons already described, the Secretary finds the rule to be lawful and to be an appropriate and permissible policy choice under the FMIA, but without the SPEC's directive, USDA would not have changed its current rules."

The rule is scheduled to take effect on July 1, 2022. On February 1, 2022, the Libertarian Society of America, an organization of individuals who believe in "small government," and which is dedicated to fighting all unnecessary government regulation, brings a suit in an appropriate federal court challenging the rule on such grounds as one might expect given the above facts. The Secretary raises such defenses as one might expect, including that the matter is not ripe for review. Both sides raise all appropriate arguments.

You are a law clerk to the judge considering the case. Write the judge a memo discussing the issues raised by the case and making a recommendation as to how to rule on each issue and on the case overall. Put your GWid at the start of the memo.

ESSAY QUESTION TWO

The U.S. Fish and Wildlife Service ("FWS") is an agency within the Department of Interior. The FWS is headed by a Director and the Department of Interior is headed by the Secretary of Interior. Both the Director and the Secretary are appointed by the President by and with the advice and consent of the Senate and both serve at the pleasure of the President.

Pursuant to the Endangered Species Act ("ESA" or "Act"), the FWS is authorized to promulgate regulations governing the building of structures in areas that are important to endangered species.* The Act provides that the FWS regulations "shall ensure that structures built in such areas do not threaten the continued survival of any endangered species." The Act authorizes the FWS to enforce its regulations and to penalize violators. FWS has duly promulgated numerous regulations pursuant to its authority under the ESA.

In March, 2021, Paula Penn, a resident of New York City, writes to the FWS to request that the agency take enforcement action against the Big Sky Company, which, Penn alleges, is building a fence that violates the FWS regulations. The fence is on the company's private land in Montana, but it is near a cabin that Penn rents in the summertime, and Penn has been in the habit of crossing the company's land on her way to her favorite fishing hole. The fence will block her usual path and force her to drive a long distance to go fishing.

In her letter to the FWS, Penn asks that the FWS Director, Vanessa Vandal, recuse herself from making the decision on her request. Penn notes that Vandal owns 5% of the Big Sky Company.

In May, 2021, Penn receives a letter from the FWS. The letter says, "Dear Ms. Penn: Your letter has been received. Your request that I recuse myself in this matter is denied. After careful reflection, I have determined that a fence of the kind the Big Sky Company is building is not a "structure" subject to regulation under the Endangered Species Act. Accordingly, the FWS has no jurisdiction to take the action you request. Sincerely, Vanessa Vandal."

The Endangered Species Act provides: "Any party desiring to seek judicial review of any action taken by the Fish and Wildlife Service pursuant to this Act shall first request that the Secretary of Interior review the action. Pursuant to such request, the Secretary may affirm, modify, or reverse the action. During the pendency of the Secretary's review, the action shall be fully operative."

Without seeking review by the Secretary of Interior, Penn seeks judicial review of the FWS's denial of her request. She raises such claims as might be expected on the above facts, and the government raises such defenses as might be expected.

You are the law clerk to the district judge considering the case. The judge says to you, "don't

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* Details of the Endangered Species Act have been changed for exam purposes. Please ignore any outside knowledge of the Act that you may have and accept what is stated here.

worry about the merits of the question of whether a fence is a 'structure' within the meaning of the ESA. I'll take care of that particular point myself. But there seem to be a lot of other issues swirling around here, including issues about which issues I can properly reach. Please write me a memorandum discussing these issues and making a recommendation as to how I should rule on each."

Write the memorandum.

ESSAY QUESTION THREE

Airplane pilots must be licensed by the Federal Aviation Administration ("FAA"). The Administrator of the FAA is statutorily authorized to modify or revoke a pilot's license if the Administrator determines that "safety in air commerce or air transportation and the public interest require that action." As part of its response to terrorism incidents involving airplanes, the FAA (using proper notice and comment procedures) has adopted rules governing the revocation of pilots' licenses in cases involving national security. Under the rules, the Administrator may propose to revoke the license of any pilot when the Administrator determines that the pilot poses a threat to national security. The revocation will then be considered by an Administrative Law Judge at the FAA. In the course of that proceeding, the Administrator will openly present such evidence as the Administrator can reveal without endangering national security. The Administrator may also present the ALJ with a sealed file containing evidence that cannot be revealed openly without endangering national security. The pilot, the pilot's representatives, and the public will not get to see the evidence in the sealed file. The pilot may cross-examine witnesses presented openly by the Administrator and the pilot may also present evidence on his or her own behalf.

Pursuant to these rules, the Administrator proposes to revoke the license of Ryan, a pilot for Delta Air Lines. The Administrator states that he has determined that Ryan poses a threat to national security. In the proceeding before the ALJ, the Administrator states that there is no evidence that can be presented openly. The Administrator presents the ALJ with evidence in a sealed file pursuant to the rules. Ryan and his counsel do not get to see the evidence in the sealed file. Ryan objects to this, but the ALJ overrules his objection. Ryan presents testimony from himself and other witnesses to the effect that he is an upstanding, patriotic U.S. citizen.

The ALJ rules in favor of the Administrator. The ALJ's ruling states, "the evidence in the sealed file shows very strongly that Ryan is a threat to national security and that, if allowed to retain his pilot's license, he might participate in terrorist actions involving airplanes."

Ryan seeks judicial review. He raises such challenges to the proceeding as might be expected on the above facts. The Administrator raises all appropriate arguments in reply. The Administrator does *not* present any threshold defenses (standing, ripeness, unreviewability, etc.), but defends the proceeding on the merits.

You are the law clerk to the district judge considering the case. Write a memorandum addressing the issues presented by the case and advising the judge as to how to rule.

- **End of the essay questions.**
- **Per the instructions, conclude your answers with a certificate in this form:**
  "I certify that my answers to the three essay questions contain [number] words in total. [GWid]."
- **Then go online and do the multiple choice questions.**

Administrative Law Final Exam - Fall 2020 - LAW 6400 - Section 11 - Siegel

Multiple Choice Questions Instructions:

* Enter your GWid below before answering any questions.
* For each question, choose the best answer from the answers provided.
* There are five possible answers to each question. Make sure you can see all the possible answers.
* There is no penalty for wrong answers, so answer every question.
* There are 15 question pages, plus this page, for a total of 16 pages in this Google Form.
* Do not click "Submit" until you are done with all the questions. You can only submit once.

* Required

Enter your GWid: *

Your answer

1. The Department of Labor (DOL) enforces the federal minimum wage statute, which requires employers to pay employees a minimum amount per hour of "work." However, the statute does not define what portions of a worker's day count as "work." DOL has a large number of regulations that address this issue. One long-standing regulation, promulgated through the notice-and-comment process and published in the Code of Federal Regulations, provides that in the case of workers who arrive at the employer's premises in street clothes, change into work clothes in a locker room provided by the employer, and then proceed to their work station, the period of "work" for which the minimum wage is due does not begin until the workers arrive at their work station wearing work clothes, with the result that such workers are not paid for the time necessary to change or to move from the locker room to the work station. In 2022, the DOL, without using notice and comment, adopts what it calls an "interpretative rule," which provides that, henceforth, the period of "work" for such workers will begin as soon as the workers have changed into work clothes, with the result that workers will still not be paid for changing time, but will be paid for the time needed to move from the locker room to the work station. The new rule is published in the Code of Federal Regulations. In 2023, the DOL brings an action against an employer for failing to comply with the new rule. The employer asserts that the rule is a legislative rule and that it is ineffective because of the DOL's failure to use the notice-and-comment rulemaking procedure. What is the likely outcome?

- A. The DOL's new rule is a legislative rule because it was published in the Code of Federal Regulations.
- B. The DOL's new rule is a legislative rule because, without the rule, there would be no legislative basis for the agency's enforcement action.
- C. The DOL's new rule is a legislative rule because it amends an existing legislative rule.
- D. The DOL's new rule is an interpretative rule because that is how the DOL intended it.
- E. The DOL's new rule is an interpretative rule because it explains the DOL's understanding of what the organic statute requires.

2. Harold owns some lakefront property in a secluded, forested area in Idaho. He plans to build a cabin on the property. The U.S. Environmental Protection Agency publishes notice that under the authority of the Clean Water Act, it proposes to adopt a rule that limits building on lakefront property. The rule would have the effect of making it impossible for Harold to build his planned cabin. The rule would substantially reduce the value of Harold's property. Harold submits a written comment opposing the rule and demands that the agency hold an oral, evidentiary hearing at which he can present evidence and oral argument against the rule. The agency rejects this demand, considers Harold's and other comments submitted, and adopts a final rule that is identical to the proposed rule. Harold brings a lawsuit claiming that the rule is invalid because of the agency's refusal to hold an oral, evidentiary hearing. What is the likely outcome of this suit?

- A. Harold loses, because the rule does not deprive him of life, liberty, or property.
- B. Harold loses, because his case is on the wrong side of the Londoner / Bi-Metallic distinction.
- C. Harold loses, because although his case implicates his rights under the Due Process Clause, the court, applying the Mathews v. Eldridge test, would determine that Harold received all the process that he was due.
- D. Harold wins, because the rule deprives him of life, liberty, or property, and the agency has not provided him with adequate process.
- E. Harold wins, because the Administrative Procedure Act required the agency to hold an oral, evidentiary hearing.

3. In 2019, President Trump declared a national emergency relating to security at the southern border of the country. Under existing law, this declaration authorized the President to direct that his proposed border wall between the United States and Mexico be built using money that Congress had appropriated for other purposes. Unhappy with this experience, in 2022 Congress passes the Emergency Redirection of Appropriated Funds Act ("ERAFA"). ERAFA provides that whenever the President uses an emergency authority to redirect funds appropriated by Congress, he must submit a formal "Redirection Notice" describing the redirection to the Speaker of the House and the Majority Leader of the Senate. Upon receipt of such a notice, any member of either house of Congress may propose a "Anti-Redirection Bill" prohibiting the redirection of the funds. Both houses of Congress must then vote on the Anti-Redirection Bill after only two hours of debate. If both houses of Congress pass the bill, it must immediately be presented to the President for his signature. If the President signs the bill, or if 2/3 of both houses of Congress re-pass the bill after the President disapproves it and returns it to Congress, then the President is forbidden from redirecting the funds as described in the Redirection Notice. Is the ERAFA constitutional?

- A. No, because it violates the non-aggrandizement principle derived from INS v. Chadha and Bowsher v. Synar, which prohibits Congress from interfering with executive action.
- B. No, because it violates the nondelegation doctrine.
- C. No, because it prevents the President from taking care that the laws be faithfully executed.
- D. Yes, because the process of passing the Anti-Redirection Bill satisfies the constitutional requirements for congressional action.
- E. Yes, because Congress did not have to grant the President any authority to redirect appropriated funds in the first place, and so Congress may place whatever limits it desires on such authority.

4. Any party that transports nuclear waste must have a license to do so from the Department of Energy. Using notice and comment procedures, the Department of Energy adopts a rule providing that it may immediately suspend the license of any transporter of nuclear waste if it determines that doing so is necessary for national security reasons. Following such a suspension, the suspended licensee may request a hearing before an ALJ, which will be conducted under the procedures of §§ 556 and 557 of the APA. If the ALJ finds for the agency, the suspension will become permanent; if the ALJ finds for the licensee, the suspension will be rescinded. But the suspension will remain in effect during the pendency of the ALJ hearing. After the regulation is promulgated, but before the Department has suspended any license pursuant to the regulation, the National Association of Nuclear Waste Transporters seeks judicial review of the regulation and claims that the regulation is unconstitutional under the Due Process Clause. What should the court do?

- A. Dismiss the case because the agency action is not final.
- B. Dismiss the case because the agency action is not ripe for review.
- C. Dismiss the case because the matter is committed to agency discretion by law.
- D. Dismiss the case because the plaintiff has not exhausted its administrative remedies.
- E. Hear the case and consider the merits of the plaintiff's claim.

5. The Communications Act provides that “Review of all rules and orders of the Federal Communications Commission may be sought in the United States Court of Appeals for the District of Columbia Circuit.” The Porter Broadcasting Company (“PBC”) applies for a broadcast license for a television station in Denver, Colorado. The FCC concludes that the “public interest, convenience, and necessity” would not be served by granting the license and denies the application. PBC seeks judicial review in the United States District Court for the District of Colorado. Should the district court hear the case?

- A. Yes, because a party may seek judicial review of an agency action by using any applicable form of legal action.
- B. Yes, because § 703 of the APA permits a party to use any form of action to seek judicial review unless the applicable statute states that review MUST be sought in some other way.
- C. Yes, because preclusion of review is disfavored and statutes apparently precluding review will be narrowly construed.
- D. No, because review must be sought in accordance with the special statutory proceeding specified in an agency’s organic statute, unless such proceeding is absent or inadequate.
- E. No, because PBC has not exhausted its administrative remedies.

6. The organic statute of the federal Mine Safety and Health Administration (MSHA) requires all operators of mines to operate their mines safely; it authorizes MSHA to promulgate regulations to implement this requirement; and it provides that MSHA may bring an action in federal district court against any mine operator that it alleges has failed to comply with any MSHA regulation, and that any mine operator found to have failed to comply shall be fined. In 2022, MSHA uses notice-and-comment procedures to promulgate a fire safety regulation. The organic statute provides that after MSHA promulgates a regulation, any person aggrieved by the regulation may seek judicial review of the regulation in a federal court of appeals within 60 days. No one seeks review of the new fire safety regulation within the 60-day period. Thereafter, in 2024, MSHA brings an action in federal district court against the operator of the Heartsease Mine for failing to comply with the new fire safety regulation and proposes a fine of $250,000. The mine operator wishes to assert, as a defense, that the regulation is arbitrary and capricious because it is very expensive to comply with and produces no improvement in mine safety. May the operator raise this defense?

- A. Yes, because unless there is a prior, adequate, and exclusive opportunity for judicial review, agency action may be challenged in the context of an enforcement proceeding.
- B. Yes, because it would be unconstitutional to seek a fine against the defendant but to prohibit the defendant from raising an issue that might constitute a valid defense.
- C. No, because the defendant could have challenged the rule in the 60-day period and its failure to do so means that it is now barred from raising this defense.
- D. No, because the matter is committed to agency discretion by law.
- E. No, because the defendant is not within the zone of interests of the organic statute, which was intended to help mine workers, not mine operators.

7. Amy is an employee of the Microsoft Corporation. Her position is unionized, and the collective bargaining agreement between her union and Microsoft provides that workers in her position can be fired only for good cause. Microsoft, however, fires Amy without giving any reason and without providing her with any opportunity to contest the firing. Amy claims that her firing violates her rights under the Due Process Clause of the United States Constitution. Which of the following is true?

- A. The Due Process Clause required Microsoft to give Amy a full hearing prior to her termination. At the hearing, Microsoft was required to present evidence showing good cause to fire Amy and permit her to cross-examine any witnesses.
- B. The Due Process Clause required Microsoft to give Amy a hearing prior to her termination, but the hearing could be a very brief one in which Amy is simply told the reasons for her termination and given a chance to explain her side of the story.
- C. The Due Process Clause did not require Microsoft to give Amy a hearing because she had no legitimate expectation of continued employment with the company.
- D. The Due Process Clause did not require Microsoft to give Amy a hearing because the risk of error in the firing process was very low.
- E. The Due Process Clause had no application to Amy's firing.

8. The Clean Water Act authorizes the Environmental Protection Agency to set the maximum level of arsenic that can occur in drinking water and requires the agency to choose a level that will protect human health without imposing excessive regulatory costs. The EPA conducts a notice-and-comment rulemaking proceeding to choose the level. During the proceeding, the agency compiles a record that would support choosing a level anywhere from 4 to 9 parts per billion but would make a choice outside that range arbitrary. However, the President of the United States learns of the proceeding after the close of the comment period and instructs the Administrator of the EPA (who serves at the President's pleasure) to choose a level of 12 parts per billion, because any level lower than that will, the President believes, cause the President too much political trouble with key Senators. The EPA chooses a level of 12 parts per billion and an environmental group seeks judicial review of the agency's action. What is the likely outcome?

- A. The court will uphold the agency's action provided the agency placed the communication from the President to the Administrator in the agency's rulemaking docket, because the President is allowed to give instructions to agency administrators who serve at his pleasure provided they are docketed.
- B. The court will uphold the agency's action regardless of docketing, because the President is allowed to give instructions to agency administrators who serve at his pleasure and the instructions do not have to be docketed.
- C. The court will overturn the agency's action because ex parte communications from the President are forbidden in agency rulemaking.
- D. The court will overturn the agency's action because an agency cannot receive comments, even from the President, after the close of a comment period.
- E. The court will overturn the agency's action because even the President cannot order an agency to take action that is arbitrary or capricious.

9. The organic statute creating the U.S. Department of State provides, "There shall be at the seat of government an executive department to be known as the 'Department of State', and a Secretary of State, who shall be the head thereof." The statute gives the Secretary of State numerous important powers, but it says nothing about how the Secretary is to be appointed or how the Secretary may be removed. Which of the following is true?

- A. The Secretary must be appointed by the President by and with the advice and consent of the Senate. Also, the Secretary serves at the pleasure of the President, because that is necessarily the result when a statute makes no provision for how a federal officer may be removed.
- B. The Secretary must be appointed by the President by and with the advice and consent of the Senate. Also, the Secretary serves at the pleasure of the President, because that result follows from the lack of any contrary rule in the statute combined with consideration the character of the office.
- C. The Secretary may be appointed by the President alone, without Senate approval, because the statute does not require Senate approval.
- D. The Secretary may be appointed by the President alone, without Senate approval, because the Secretary is an inferior officer.
- E. The statute is unconstitutional because it fails to specify a means for appointing the Secretary.

10. The organic statute of the federal Mine Safety and Health Administration (MSHA) requires all operators of mines to operate their mines safely and authorizes MSHA to promulgate regulations to implement this requirement. An MSHA regulation requires all mine operators to have adequate fire-fighting equipment strategically located, plainly marked, and maintained in fire-ready condition. The United Mine Workers union complains to MSHA that the Sandalow Mine in Texas (where members of the union work) is notoriously failing to comply with this requirement, and asks the agency to enforce its regulation against the mine operator. The agency writes to the union that it will not bring an enforcement action because the agency has other enforcement priorities. The union seeks judicial review. What is the likely outcome?

- A. The court will review the agency's action and order the agency to bring an enforcement action against the mine operator.
- B. The court will hold that the union lacks standing to sue because there is no Article III injury.
- C. The court will hold that the union lacks standing to sue because it is not within the zone of interests of the relevant statute.
- D. The court will hold that the agency's action is not ripe for review.
- E.The court will hold that the agency's action is committed to agency discretion by law.

11. Congress passes the Circus Animal Welfare Act. Section 1 of the Act authorizes the Secretary of Agriculture ("the Secretary") to promulgate regulations that protect the welfare of circus animals. Section 2 of the Act provides that whenever the Secretary believes that a circus is in violation of the rules promulgated under § 1, the Secretary shall issue a charge against that circus; shall afford the charged circus a hearing under §§ 556 and 557 of the APA; and, if the charge is sustained at the hearing, shall fine the circus in an amount appropriate to induce compliance with the rules. The Act says nothing about judicial review. The Secretary promulgates rules in accordance with the Act. Thereafter, the Secretary charges the Adorable Circus with violation of the rules and provides the circus with a hearing as provided in the Act, at which the charge is sustained. The Secretary fines the circus $25,000. The circus seeks judicial review in federal district court. What is the likely result?

- A. The court will dismiss the case because statutes preclude judicial review.
- B. The court will dismiss the case because the agency action is committed to agency discretion by law.
- C. The court will dismiss the case because the plaintiff has failed to exhaust its administrative remedies.
- D. The court will dismiss the case because the plaintiff did not seek review using an applicable form of legal action.
- E. The court will hear the case and address the merits of the plaintiff's claims.

12. To help the national economy recover from the COVID-19 pandemic, Congress passes a statute authorizing the Small Business Administration (SBA) to make "COVID-19" grants to small businesses. The statute instructs the agency to promulgate criteria for awarding the grants. The statute provides that "Whenever the agency denies any application for a COVID-19 grant, it shall inform the applicant of the reasons for the denial, and it shall, upon request of the applicant, provide the applicant with an oral, evidentiary hearing at which it may attempt to rebut those reasons. The agency shall then make a final decision on the application after considering the evidence presented at the hearing." The SBA uses notice-and-comment rulemaking to promulgate numerous rules specifying criteria for COVID-19 grants. Among them is a rule that states: "No COVID-19 grant shall be awarded to any business the President of which has been convicted of a felony within the last five years." Thereafter, Shady Construction, Inc. (SCI), a small business, applies to the SBA for a COVID-19 grant. On its application, SCI indicates that its President was convicted of felony fraud two years previously. The SBA denies the application. SCI requests an oral, evidentiary hearing. The SBA denies this request. SCI seeks judicial review. What is the likely result?

- A. The court will order the agency give SCI a hearing, because the organic statute requires it.
- B. The court will order the agency give SCI a hearing, because the Due Process Clause of the U.S. Constitution requires it.
- C. The court will affirm the agency's action, because agencies are allowed to adopt rules that eliminate the need for an evidentiary hearing when such a hearing is unnecessary.
- D. The court will affirm the agency's action, because SCI failed to exhaust its administrative remedies.
- E. The court will hold that the matter is committed to agency discretion by law.

13. In light of disputes about the validity of the 2020 presidential election, Congress, in 2021, passes a statute creating the "Election Integrity Review Commission." The Commission is to have 12 members, four appointed by the President, four appointed by the Speaker of the House, and four appointed by the Majority Leader of the Senate. Each appointing authority is required to name no more than two appointees from the same political party. No Senate confirmation is required for any of the appointees. The Commission is empowered and directed to receive allegations of improprieties in the 2020 presidential election, to investigate such allegations, and to issue a report concerning them no later than December 31, 2022. After it issues its report, the Commission is to go out of existence. The Commission has no other powers. Is the Commission constitutional?

- A. No, because the provision specifying who shall appoint its members violates the Appointments Clause of the Constitution.
- B. No, because the provision specifying who shall appoint its members violates the non-aggrandizement principle.
- C. No, because the restriction concerning political party membership violates the Appointments Clause of the Constitution.
- D. Yes, because the members are not officers of the United States subject to the Appointments Clause.
- E. Yes, because the members are inferior officers.

14. Martha applies for benefits under the Social Security Disability program but is rejected on the ground that she is not disabled. She appeals administratively until she reaches the stage of an ALJ hearing at the federal Department of Health and Human Services. At the hearing, where Martha is representing herself, she attempts to present a doctor's report that she believes shows her to be disabled. The ALJ rejects this report on the ground that it is not in proper form under the agency's rules. At the conclusion of the hearing, the ALJ affirms the finding that Martha is not disabled. After an unsuccessful appeal of this decision within the agency, Martha seeks judicial review. The court determines that the ALJ's rejection of the doctor's report was improper under the governing statute. What should happen?

- A. The court should receive the doctor's report, consider whether it and the other evidence in the agency record show that Martha is disabled, and rule accordingly.
- B. The court should receive the doctor's report, but should consider only whether a reasonable decisionmaker could, based on the evidence in the agency record plus the doctor's report, have determined that Martha is not disabled, and, if so, affirm.
- C. The court should remand the case to the agency with instructions to reconsider the matter with the doctor's report admitted as evidence.
- D. The court should affirm, as the admission of evidence is committed to agency discretion by law.
- E. The court should dismiss, as the matter is not ripe for review.

15. In the game of golf, a golfer must, for each hole, hit a golf ball into the hole from a teeing ground many yards away by a series of strokes made with golf clubs. The object of the game is to complete a course, usually consisting of 18 holes, using the fewest strokes. The game is played according to rules maintained by a private organization called the United States Golf Association. In 2025, Congress passes the Federal Golf Act. The Act provides: "Congress finds that golf is too hard." The Act creates the Federal Golf Commission ("Commission") and charges it with regulating golf so as to alleviate this problem. Among other things, the Act directs the Commission to issue new rules of golf that "make it possible for golfers of ordinary skill to play well, while not wholly undermining the traditional character of the game." The Act requires that any golf tournament at any golf course that operates in interstate commerce must be conducted using the Commission's rules. The Commission comes into existence and issues new rules of golf, including a rule that allows golfers to try every stroke twice and to count only whichever of the two tries came out better (as opposed to the traditional rules, which require counting every stroke). Before the new rules take effect, the Augusta National Golf Club, which hosts a prestigious annual golf tournament, seeks judicial review on the ground that the Act violates the nondelegation doctrine. Assuming that this doctrine has remained unchanged since 2020, what is the likely result?

- A. A court will likely hold that the Act violates the nondelegation doctrine, because the statute provides no guidance for the exercise of the discretion it confers.
- B. A court will likely hold that the Act violates the nondelegation doctrine, because the guidance provided by the statute is so vague that it does not provide an intelligible principle to guide the exercise of the discretion conferred.
- C. A court will likely hold that the Act violates the nondelegation doctrine, because the two criteria that the Act provides to guide the exercise of the discretion it confers contradict each other, making it impossible to know whether the will of Congress is being obeyed.
- D. A court will likely sustain the Act against a nondelegation doctrine challenge, because the court will likely determine that the Act provides an intelligible principle to guide the exercise of the discretion it confers.
- E. A court will likely sustain the Act against a nondelegation doctrine challenge, because a court will likely find that the Act provides a definite criterion and that the role of the executive is limited to finding facts that trigger the application of the congressionally-specified rule.

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