THE SOLICITOR GENERAL, CONSISTENCY, AND CREDIBILITY

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This Article offers the first comprehensive look at cases in which the Solicitor General (SG) rejects a legal argument offered on behalf of the United States in prior litigation. Such reversals have received considerable attention in recent years, as shifts in presidential administrations have produced multiple high-profile "flip-flops"—as the Justices sometimes call them—by the SG. Even those observers who defend the SG, including veterans of the office, caution that inconsistency in legal argument poses a threat to the SG's credibility with the Court. Our goal is to better understand the circumstances that lead the SG to change its position on the meaning of the law, and to unpack the connections between consistency and credibility.

To assess these questions, we build an original dataset of 131 cases, dating from 1892 to the close of the Court's 2022 Term, that include such reversals. A close reading of the cases and associated briefing and oral argument transcripts confirms that changes in the government's litigating position have become more common in recent decades—but it also reveals significant blind spots in the prevailing picture, which depicts positional changes as a function of political polarization and shifts in presidential administrations. Reversals happen for a variety of (often overlapping) reasons, many of which stem from the SG's unique role in coordinating litigation across a vast

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and constantly changing federal government. Indeed, our study calls into question the idea that ideological swings associated with changes of presidential administrations can be isolated, either in theory or in practice, from other sorts of legal, social, and technological changes that shape the government's understanding of the law. It also shows that the connection between consistency and credibility, while intuitive at first blush, rests on a formalist understanding of law and an unpersuasive equation of the judiciary and the executive.

These insights are particularly important today, given the Justices' willingness to jettison their own longstanding precedents while simultaneously hamstringing administrative agencies' ability to update or modify policies. The Court's decision in Loper Bright Enterprises v. Raimondo*, overruling* Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, endorsed an understanding of the law and legal interpretation in which even the hardest questions have single "best" answers—and, once ascertained, the meaning of the law is fixed. As we show, the Justices' reactions to litigation reversals by the government rest on similar premises. Given that the SG has powerful incentives to offer arguments that appeal to the Justices, the Court's skepticism of litigation reversals risks freezing legal interpretation by the government actors who often are best situated—by virtue of democratic accountability and on-the-ground experience—to consider the tradeoffs between stability and change.*

INTRODUCTION

The Office of the Solicitor General (OSG) has drawn attention in recent years for inconsistency in the legal positions it presents to the Supreme Court on behalf of the United States.[1] OSG is by far the most frequent and most successful litigant at the Court.[2] Often referred to as the "Tenth Justice," the Solicitor General (SG) enjoys a special position of trust and respect.[3] This stems in part from an understanding that OSG is expected to seek justice rather than victory in the immediate case[4] and to advance the long-term interests of the United States as a whole rather than the goals of a particular agency—or a particular administration.[5] In recent years, however, as leadership of the Office has changed in the shifts in presidential administrations from Obama to Trump and then Trump to Biden, the government has reversed its litigating position in multiple high-profile cases.[6] As this Article goes

1 *See, e.g.*, Jessica Gresko & Mark Sherman, *Supreme Court Notebook: Flip-Flops and Summer Plans*, AP NEWS (May 24, 2018, 12:31 AM EDT), https://apnews.com/article/c90f4f299c5741139581757366693914 [https://perma.cc/B69G-32XS]; Glenn G. Lammi, *SCOTUS Shouldn't Let Federal Flip-Flop on Airline Deregulation & Preemption Fly*, FORBES (June 27, 2022, 10:09 AM EDT), https://www.forbes.com/sites/wlf/2022/06/16/scotus-shouldnt-let-federal-flip-flop-on-airline-deregulation–preemption-fly/ [https://perma.cc/QNQ4-LT8E]; Marianne Levine, *Justice Department Switches Sides in Supreme Court Case*, POLITICO (June 16, 2017, 6:30 PM EDT), https://www.politico.com/story/2017/06/16/justice-department-supreme-court-labor-relations-board-239653 [https://perma.cc/E9KE-M58W]; Adam Liptak, *Trump's Legal U-Turns May Test Supreme Court's Patience*, N.Y. TIMES (Aug. 28, 2017), https://www.nytimes.com/2017/08/28/us/politics/trump-supreme-court.html [https://perma.cc/P4GL-7HTQ]; Todd Rokita, Opinion, *Why Did the U.S. Solicitor General Flip-Flop on Climate Change?*, NEWSWEEK (Apr. 11, 2023, 11:51 AM EDT), https://www.newsweek.com/why-did-us-solicitor-general-flip-flop-climate-change-opinion-1793032 [https://perma.cc/FA3P-LRFW]; Pete Williams, *Justice Department Switches Sides, Urging Supreme Court to Uphold Obamacare*, NBC NEWS (Feb. 10, 2021, 4:40 PM EST), https://www.nbcnews.com/news/us-news/justice-department-switches-sides-urging-supreme-court-uphold-obamacare-n1257352 [https://perma.cc/H6E8-ZRSY].

2 *See infra* notes 42–48 and accompanying text.

3 *See generally* LINCOLN CAPLAN, THE TENTH JUSTICE: THE SOLICITOR GENERAL AND THE RULE OF LAW (1987).

4 *See* Simon E. Sobeloff, *Attorney for the Government: The Work of the Solicitor General's Office*, 41 A.B.A. J. 229, 229 (1955) ("My client's chief business is not to achieve victory, but to establish justice.").

5 *See, e.g.*, The American Law Institute, *Annual Meeting Reception: Elena Kagan and Paul D. Clement (2018)*, VIMEO, at 19:34 (May 31, 2018, 11:41 AM) [hereinafter Kagan Interview], https://vimeo.com/272791402 (explaining that OSG "is supposed to be . . . serving the long-term interests of the United States, not any one President").

6 This includes reversals on cases concerning affirmative action in education, discrimination on the basis of sexual orientation and gender identity, election law, freedom of association, the Affordable Care Act, environmental law, and criminal sentencing. *See infra* notes 195–211 and accompanying text.

to press in February 2025, a new wave of reversals seems all but certain as SG leadership transitions from Biden back to Trump.

In many of the relevant cases, the Justices have expressed disapproval of the Solicitor General's "flip-flop."[7] The criticism is, in one sense, intuitive. Consistency often is considered a hallmark of sound argument, both within and outside the law. "That's not what you said before!" is a familiar objection in disagreements of all sorts. Consistency suggests a basis in principle and an absence of hypocrisy—a sense that the advocate has a genuine position as opposed to making whatever argument she can in support of the current goal.[8] Depending on context, consistency also can signal that an argument has stood the test of time, a particularly important consideration given the institutional role of the SG. A majority of the Justices, moreover, are committed to a view of the law as fixed and unchanging, offering up single correct answers to even the most difficult legal questions.[9] From that perspective, changes in the legal arguments presented by the "Tenth Justice" may provoke a distinct form of discomfort, especially when the changes appear to be the result of a shift in the political winds.

Yet the Justices' disapproval is itself inconsistent, and in many cases may be more performative than real.[10] The Justices make it a point to call out changes in the government's submissions—to name the inconsistency and often to mark it with censure, even if it does not appear to have any meaningful effect on the Court's decision.[11] Especially in recent years, the Justices also have prodded the SG to

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7 *See, e.g.*, Transcript of Oral Argument at 10, Perez v. Mortg. Bankers Ass'n, 575 U.S. 92 (2015) (Nos. 13-1041 & 13-1052) (Scalia, J.). For additional examples, see *infra* notes 92–94, 223, 256–57 and accompanying text.

8 *See, e.g.*, Jon Elster, *Deliberation and Constitution Making*, *in* DELIBERATIVE DEMOCRACY 97, 104 (Jon Elster ed., 1998) (observing that "[o]nce a speaker has adopted an impartial argument" he will seem "opportunistic if he deviates from it when it ceases to serve his needs"). Elster calls this "the civilizing force of hypocrisy." Jon Elster, *Arguing and Bargaining in Two Constituent Assemblies*, 2 U. PA. J. CONST. L. 345, 413 (2000) (emphasis omitted).

9 *See* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2266 (2024) (asserting that ambiguous statutes, "no matter how impenetrable, do—in fact, must—have a single, best meaning"); Anita S. Krishnakumar, *Textualism and Statutory Precedents*, 104 VA. L. REV. 157, 204 (2018) ("Textualist judges, particularly in the post-Scalia era, tend to presume that there is a correct, definitive answer to every (or nearly every) interpretive question . . . .").

10 *See* Michael R. Dreeben, *Stare Decisis in the Office of the Solicitor General*, 130 YALE L.J.F. 541, 552–54 (2021) (noting a marked lack of comment from the Justices in response to Trump-era changes "compared to . . . Obama-era changes," *id.* at 554).

11 *Compare, e.g.*, Transcript of Oral Argument at 39–40, Bates v. Dow AgroSciences LLC, 544 U.S. 431 (2005) (No. 03-388) ("This is a new position for the Government, isn't it? . . . You used to take the opposite position. . . . How can you possibly say it's clear?" (Scalia, J.)), *with Bates*, 544 U.S. at 457 (Thomas, J., concurring in the judgment in part and dissenting in part, joined by Scalia, J.) ("The ordinary meaning of [the statute's] terms makes plain that some of petitioners' state-law causes of action may be pre-empted.").

acknowledge the political basis for a shift in legal argument,[12] even as they increasingly insist that political or policy considerations are irrelevant to the task of legal interpretation.[13]

Despite the centrality of OSG to Supreme Court litigation and the attention recent reversals have received in the popular press, the subject has received very little scholarly consideration.[14] This Article fills that gap. It is the first to look comprehensively at cases in which OSG argues that the law means something different from what government lawyers have advocated previously, either before the Supreme Court or in the lower courts.[15] Through a search of briefs, oral arguments, and opinions, we build an original dataset of 131 cases decided by the Supreme Court, dating from 1892 to the close of the 2022 Term, that include such "flips."[16] Our goal is to unpack the reasons why the SG modifies or reverses prior government positions and to assess the judicial reaction to inconsistency in the government's legal arguments.

To the limited extent flips have been considered in popular and academic literature, they typically have been characterized as a product of the hyperpartisan nature of the current political landscape.[17] As we show, that characterization is accurate to a point, but it obscures significant features of the larger picture. While changes in the government's litigating position have become much more common (and certainly more easily identifiable) in recent years, the practice is longstanding. The government reconsiders its position for many different—and often overlapping—reasons, including not only different policy preferences but also changes in the legal landscape, social or

12 *See infra* notes 223, 256–57 and accompanying text.

13 *See generally, e.g.*, Victoria Nourse, *The Paradoxes of a Unified Judicial Philosophy: An Empirical Study of the New Supreme Court: 2020–2022*, 38 CONST. COMMENT. 1 (2023) (describing "original public meaning" approach of current Court majority, which disclaims inquiry into policy consequences, *id.* at 1).

14 The most comprehensive study of the subject to date is an essay written by a long-term former deputy SG exploring litigation reversals in the Obama and Trump administrations. *See generally* Dreeben, *supra* note 10. Other scholarship has explored recent litigation reversals as part of larger inquiries into President-driven changes in government policy and legal argumentation. *See generally* Josh Blackman, *Presidential Maladministration*, 2018 U. ILL. L. REV. 397; Cristina M. Rodríguez, *The Supreme Court 2020 Term — Foreword: Regime Change*, 135 HARV. L. REV. 1 (2021). Our study builds on this work but provides a much fuller picture of flips and the circumstances that can lead to them.

15 More technically, we define a "flip" as any case in which the SG urges an interpretation of a legal rule (be it a statute, regulation, constitutional provision, or judicial precedent) that diverges from the interpretation advanced by the government in earlier litigation before the Supreme Court or the lower federal courts, in the same case or a different case.

16 We adopt the term "flip" for ease of reference only; we do not mean it as a pejorative, although Justices and opposing parties sometimes use it that way. *See infra* Part II and Appendices for a detailed description of our methodology and a full list of flip cases.

17 *See supra* note 14.

technological developments, and divisions and disagreements between distinct agencies or constituent parts of "the government."[18] Although the Justices and other parties often ignore the significance of such distinctions, we urge a more nuanced assessment of the circumstances around the reversal. And we argue that the "political" flips that tend to provoke the most criticism are often defensible on democratic grounds—but are also the most threatening, perhaps, to the self-conception of an increasingly formalist Court.[19]

Indeed, the Court's skepticism about positional changes by the SG draws into sharp relief the current majority's formalism about legal meaning, especially as it relates to statutory interpretation in the administrative state. Nowhere is this clearer than in the Court's recent decision in *Loper Bright Enterprises v. Raimondo*,[20] which overruled *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*[21] *Chevron* famously directed courts to defer to agencies' reasonable interpretations of ambiguous statutory commands.[22] Deference was premised on the view that legislation often leaves questions open and that agencies are better positioned than courts to make the policy choices required when, in Justice Kagan's words, "the law runs out."[23] Importantly, *Chevron* authorized agencies not only to set policy, but also to *change* it, within the bounds marked out by the statute.[24]

Loper Bright rejected this understanding of the nature of interpretation. The majority opinion insisted that all statutory questions have a single "best" answer that can be found by judges applying conventional tools of legal, not policy, analysis.[25] Rather than embracing[26]—

18 *See infra* Part III.

19 *See infra* Part IV.

20 Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244 (2024).

21 Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984); *see Loper Bright*, 144 S. Ct. at 2273 (holding "*Chevron* is overruled").

22 *Chevron*, 467 U.S. at 842–45.

23 Kisor v. Wilkie, 139 S. Ct. 2400, 2415 (2019).

24 *See Chevron*, 467 U.S. at 863 ("An initial agency interpretation is not instantly carved in stone."); Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 981 (2005) ("Agency inconsistency is not a basis for declining to analyze the agency's interpretation under the *Chevron* framework.").

25 *Loper Bright*, 144 S. Ct. at 2266 ("In an agency case as in any other, . . . even if some judges might (or might not) consider the statute ambiguous, there is a best reading all the same—'the reading the court would have reached' if no agency were involved. . . . [A]gencies have no special competence in resolving statutory ambiguities. Courts do." (quoting *Chevron*, 467 U.S. at 843 n.11)); *see also id.* at 2268 ("It is reasonable to assume that Congress intends to leave policymaking to political actors. But resolution of statutory ambiguities involves legal interpretation. That task does not suddenly become policymaking just because a court has an 'agency to fall back on.'" (quoting *Kisor*, 139 S. Ct. at 2415)).

26 At one point, the flexibility allowed by *Chevron* was deemed one of its key virtues. *See, e.g.*, *Chevron*, 467 U.S. at 863–64 (endorsing "flexible" agency interpretation on the

or even allowing—flexibility in executive interpretation, the Court instead recommitted to the multifactor approach set out in *Skidmore v. Swift & Co.*, which listed "consistency with earlier and later pronouncements" as one of the factors that can lend persuasive "weight" to an interpretation.[27] As consummate Supreme Court litigator (and former SG) Paul Clement put it during the oral argument in *Loper Bright*, "Flip-flopping is a huge *Skidmore* minus."[28] Yet the Court has never explained why, precisely, consistency is a plus and inconsistency a minus.[29]

Loper Bright suggests, reasonably enough, that part of the problem is that changes in agency positions can cause uncertainty for regulated parties.[30] But the Court's skepticism of change runs deeper than such practical concerns. It rests on a conception of law in which the meaning of a statutory text is fixed upon enactment[31]—which in turn suggests that shifts in interpretation are suspect, evidence either of a prior error or the influence of politics or ideological preferences rather than law. When paired with the view that legal questions have single best answers that are revealed through lawyerly skill,[32] the prognosis for flexible, policy-inflected interpretation by the executive seems dim indeed.

The Justices' hostility to regulatory reform in the *Chevron* context, as well as to the OSG flips that are our focus, is particularly striking given the current Court's willingness to jettison its own longstanding precedents. Our judicial system is built on a principle of stare decisis; courts' adherence to prior decisions promotes stability, predictability, and confidence in the integrity of the judicial process.[33] There may be

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ground that "the agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis," *id.* at 864, 863–64); *cf.* United States v. Mead Corp., 533 U.S. 218, 247–50 (2001) (Scalia, J., dissenting) (praising *Chevron* as creating a "space, so to speak, for the exercise of continuing agency discretion" and arguing that reviewing agency actions under *Skidmore*, by contrast, would lead to a problematic "ossification of large portions of our statutory law," *id.* at 247).

27 Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944); *see also Loper Bright*, 144 S. Ct. at 2263 (explaining that *Skidmore*, unlike *Chevron*, is consistent with the requirements of the Administrative Procedure Act).

28 Transcript of Oral Argument at 40, *Loper Bright*, 144 S. Ct. 2244 (No. 22-451) [hereinafter *Loper Bright* Transcript].

29 *See infra* notes 113, 296–98 and accompanying text.

30 *Loper Bright*, 144 S. Ct. at 2272 ("[I]nstability in the law[] leav[es] those attempting to plan around agency action in an eternal fog of uncertainty.").

31 *Id.* at 2266 ("[E]very statute's meaning is fixed at the time of enactment." (quoting Wis. Cent. Ltd. v. United States, 138 S. Ct. 2067, 2074 (2018) (emphasis omitted))).

32 *Id.*

33 *See, e.g.*, June Med. Servs. L.L.C. v. Russo, 140 S. Ct. 2103, 2134 (2020) (Roberts, C.J., concurring in the judgment) (arguing that stare decisis "contributes to the actual and *perceived* integrity of the judicial process" (emphasis added) (quoting Payne v. Tennessee,

good reasons (occasionally) for courts to reconsider past holdings, but we share the concerns voiced by many critics of the "sweeping changes" initiated by the new supermajority on the Supreme Court.[34] Such rapid and widespread change destabilizes the law and fuels the belief that the Justices are guided more by their own policy preferences than by neutral application of legal principles.[35]

The same is not true of reversals by OSG. Despite the "Tenth Justice" moniker, the SG is of course not a Justice. Even if one believes that legal questions have single best answers, the inputs that inform the executive branch's view of the best answer may differ, quite appropriately, from those that guide judicial analysis. That is not to say that OSG "flips" should be immune from criticism: reasonable observers (including Justices) may well deem the executive branch's legal arguments wrongheaded as a matter of law or policy. But such critiques should focus on the *substance* of the new positions, not on the fact that they seem to reflect contested value judgments associated with the new administration.

Nor do changes in the legal arguments the SG makes before the Court—arguments about what the proper interpretation of a law should be—necessarily undermine legal stability or upset reliance interests in the way overturning a judicial precedent does.[36] To be sure, when the SG and other executive branch officials are considering modifying the government's litigation position, they should weigh the extent to which the change would upset settled expectations. Judges

501 U.S. 808, 827 (1991))), *overruled on other grounds by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022); Dreeben, *supra* note 10, at 556–57 (discussing the significance of stare decisis within the judicial branch and contrasting it with the distinct role of OSG).

34 *See, e.g.*, Andrew Coan, *Too Much, Too Quickly?*, 58 U.C. DAVIS L. REV. 407, 409–10 (2024) (detailing multiple areas of law that have featured "sweeping changes in the few short years that have elapsed since Amy Coney Barrett joined the Supreme Court as the sixth member of a solidly conservative majority," *id.* at 409).

35 *See, e.g.*, Thomas Beaumont & Linley Sanders, *New Poll Shows Majority of Americans Believe Supreme Court Justices Put Ideology over Impartiality*, PBS NEWS (June 27, 2024, 10:11 AM EDT), https://www.pbs.org/newshour/nation/new-poll-shows-majority-of-americans-believe-supreme-court-justices-put-ideology-over-impartiality [https://perma.cc/GF9A-DSCT] (reporting that, as of June 2024, about 70% of Americans believe Justices are more likely to be guided by ideology than neutral application of the law and that 40% have hardly any confidence in the Court, whereas prior to the Court's overturning of *Roe*, only 25% lacked confidence in the Court); *Public's Views of Supreme Court Turned More Negative Before News of Breyer's Retirement*, PEW RSCH. CTR. (Feb. 2, 2022) https://www.pewresearch.org/politics/2022/02/02/publics-views-of-supreme-court-turned-more-negative-before-news-of-breyers-retirement/ [https://perma.cc/8VVN-R5RP] (noting favorable opinion of the Court dropped sharply in recent years and that only 16% of adults believe the Justices do an "excellent or good job in keeping their [political] views out of their decisions").

36 *See infra* notes 280–84 and accompanying text; *see also* Dreeben, *supra* note 10, 556–57 (discussing the significance of stare decisis within the judicial branch and contrasting it with the distinct role of OSG).

reviewing such a change should do the same.[37] Reliance can be faced head-on, however; it is quite different to suggest that a new legal argument is worthy of less weight simply because it differs from a position previously advanced.

OSG, meanwhile, has strong incentives to cast its arguments in a form likely to persuade rather than provoke the Justices.[38] It is therefore understandable that, particularly in recent years, the SG tends to characterize flips as the product of an earlier "mistake[]"—a misreading of text, for example.[39] But the more the SG caters to the Justices' preferences by prioritizing textualist arguments that posit statutory language has a single, clear meaning, the greater the skepticism with which future reversals will likely be met. This dynamic risks freezing legal interpretation by government actors who are often best situated—both democratically and by virtue of on-the-ground experience with the relevant legal questions—to identify a need for change.

Skepticism of flips also contributes to a view of law, and to a set of legal practices, that obscures the practical considerations and value judgments that often inform the interpretation of legal texts. Recent empirical scholarship has shown that even those Justices who insist on the irrelevance of such "policy" concerns regularly mention them in their opinions[40]—and an even larger body of work suggests that

37 *See, e.g.*, FCC v. Fox Television Stations, Inc., 556 U.S. 502, 515–16 (2009) (explaining that an agency seeking to defend a policy change under arbitrary and capricious review must "display awareness that it *is* changing position," "show that there are good reasons for the new policy," and "provide a more detailed justification" when "its prior policy has engendered serious reliance interests that must be taken into account," *id.* at 515).

38 *See, e.g.*, Aaron-Andrew P. Bruhl, *Supreme Court Litigators in the Age of Textualism*, 76 FLA. L. REV. 59, 95–96 (2024) (finding that in recent decades OSG has "increased its use of textual sources" and "decreased markedly" its "emphasis on legislative history" (emphasis omitted)). Bruhl asserts that these changes provide evidence that OSG "shapes its arguments to appeal to the Court's sensibilities" while still adhering to "norms of comprehensiveness in service to the Court." *See id.* at 96.

39 *See* Dreeben, *supra* note 10, at 547, 542 (asking when "OSG [should] alter its past positions that it now believes mistaken" and concluding that "OSG should operate with a presumption in favor of providing the Supreme Court with its current view of the law, rather than sticking to error"); *see also infra* Appendix B, Table 1, Column E (listing OSG's stated explanation for flips).

40 *See, e.g.*, Anita S. Krishnakumar, Practical Consequences in Statutory Interpretation 7 (Feb. 9, 2024) (unpublished manuscript) (on file with authors) (studying every statutory decision by the Roberts Court from January 2006 through June 2022 and finding that "all of the Justices . . . referenced practical consequences regularly in the opinions they authored"); Anita S. Krishnakumar, *Statutory Interpretation in the Roberts Court's First Era: An Empirical and Doctrinal Analysis*, 62 HASTINGS L.J. 221, 236–37 (2010) (studying early Roberts Court statutory decisions and reporting that textualist Justices frequently invoked practical consequences); Miranda McGowan, *Do as I Do, Not as I Say: An Empirical Investigation of Justice Scalia's Ordinary Meaning Method of Statutory Interpretation*, 78 MISS. L.J. 129, 175 (2008) (studying ten years' worth of dissenting opinions by Justice Scalia and finding that he made

ideological commitments can influence the Justices' decisions in less visible (and perhaps less conscious) ways, especially in the hard cases that make up the Court's docket.[41] If legal decisionmaking cannot always be separated neatly from policy and politics, then submerging the connections between changes in the government's understanding of the law and changed goals, priorities, and social understandings deprives the Justices—and the public—of valuable insight from a coordinate branch.

Our aim in this Article is to provide both a descriptive account of litigation flips and a normative argument for why (and when) the Court's skepticism of such flips is itself problematic. The balance of the Article proceeds in four parts. Part I begins by introducing OSG and its distinctive role in promoting consistency in the government's legal arguments, and it situates litigation flips in the larger body of doctrine addressing consistency and change in the administrative state. Part II offers an overview of what our search for flips revealed. We first specify the category of interest, distinguishing litigation flips from other variations in policy or argumentation, and we explain our methodology for identifying flips. We then provide a quantitative snapshot of the cases we found, noting a marked rise over the last few decades in the overall number of flips, the relative rarity of the type of reversals that tend to receive the most attention, and some suggestive differences tied to the different roles in which OSG may appear before the Court (petitioner, respondent, or amicus).

Our primary goal in building a more comprehensive database of OSG flips, however, is qualitative rather than quantitative. Part III digs more deeply into the cases to sketch out a taxonomy of flips and the forces that contribute to them. To provide a sense of the textured complexity that can lead to changes in the government's litigating

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consequentialist or purposive arguments in fifty-five percent of them); Nourse, *supra* note 13, at 56 (studying constitutional and statutory cases during the Court's 2020 and 2021 Terms and finding that textualist/originalist Justices invoke practical consequences in a "supermajority" of nonunanimous cases); Jane S. Schacter, *The Confounding Common Law Originalism in Recent Supreme Court Statutory Interpretation: Implications for the Legislative History Debate and Beyond*, 51 STAN. L. REV. 1, 21 (1998) (studying statutory interpretation decisions from the Court's 1996 Term and finding that seventy-three percent referenced "judicially-selected policy norms"); Nicholas S. Zeppos, *The Use of Authority in Statutory Interpretation: An Empirical Analysis*, 70 TEX. L. REV. 1073, 1097 (1992) (reporting the Court's frequent use of practical reasoning).

41 *See* Adam Bonica & Maya Sen, *Estimating Judicial Ideology*, 35 J. ECON. PERSPS. 97, 97 (2021) ("Today, the dominant view among social scientists is that ideology is indeed a key component predicting judicial rulings and judicial behavior."). For an overview of the literature, see BARRY FRIEDMAN, MARGARET H. LEMOS, ANDREW D. MARTIN, TOM S. CLARK, ALLISON ORR LARSEN & ANNA HARVEY, JUDICIAL DECISION-MAKING: A COURSEBOOK 95–166 (2020).

position, we offer a detailed case study regarding conflicting interpretations of how pregnancy discrimination law applies to requests for workplace accommodations. Using the case study and other examples, we then highlight several factors—beyond changes in presidential administration—that appear to be driving many of the flips we found.

Part IV turns to normative analysis, seeking to understand and critically assess the reasons why inconsistency might pose a threat to the credibility of OSG. The analysis draws into clearer view the links between distrust of litigation flips and the formalism of today's Court. It shows, moreover, that the reasons why inconsistency might call into question credibility provide no support for reflexively valorizing the government's earlier (now discarded) position. A brief conclusion follows.

I. THE SOLICITOR GENERAL AND LEGAL CONSISTENCY

The Solicitor General controls virtually all litigation on behalf of the United States before the Supreme Court.[42] As a result, OSG is the quintessential repeat player before the Court, appearing in roughly two-thirds of the cases the Justices decide on the merits each Term[43]—more than any other law firm or litigant.[44] The SG is not only the most frequent but also the most successful litigant before the Supreme Court, winning an "astonishing" percentage of cases in which the United States appears as either party[45] or amicus.[46] Scholars have

42 *See, e.g.*, Margaret H. Lemos, *The Solicitor General as Mediator Between Court and Agency*, 2009 MICH. ST. L. REV. 185, 187–88.

43 *See About the Office*, U.S. DEP'T OF JUST., OFF. OF THE SOLIC. GEN., https://www.justice.gov/osg [https://perma.cc/5WDT-FQMD]. OSG also enjoys the unique privilege of participating in oral argument when it weighs in as amicus. *See* Darcy Covert & Annie J. Wang, *The Loudest Voice at the Supreme Court: The Solicitor General's Dominance of Amicus Oral Argument*, 74 VAND. L. REV. 681, 683 (2021) (reporting that between the 2010 and 2019 Terms, the Court granted 306 amicus oral argument motions by OSG compared to fifteen by other amici).

44 *See* Lee Epstein & Eric A. Posner, *The Decline of Supreme Court Deference to the President*, 166 U. PA. L. REV. 829, 832 (2018) ("The executive branch litigates in the Supreme Court far more frequently than any other person or entity.").

45 RYAN C. BLACK & RYAN J. OWENS, THE SOLICITOR GENERAL AND THE UNITED STATES SUPREME COURT 25 (2012); *see id.* at 26 fig.2.3 (reporting success rate for United States as party in 60 to 70% of cases between 1946 and 2000); Margaret Meriwether Cordray & Richard Cordray, *The Solicitor General's Changing Role in Supreme Court Litigation*, 51 B.C. L. REV. 1323, 1334–35 (2010) (summarizing literature and reporting that SG wins 70 to 80% of cases in which the United States is petitioner, compared to 60% for other petitioners; and 50 to 60% of cases as respondent, compared to 40% for other respondents).

46 S*ee* BLACK & OWENS, *supra* note 45, at 26 fig.2.3 (using data from 1954 to 1996 and 1998 to 2010 and reporting win rates for SG as amicus ranging from roughly 70% to over 80%); Cordray & Cordray, *supra* note 45, at 1335 (summarizing the literature and reporting 70 to 80% win rate for OSG as amicus); *see also* Patrick C. Wohlfarth, *The Tenth Justice?*

identified various reasons for the SG's remarkable success rates, including careful case selection, exemplary lawyering, and a distinctive form of trust the Justices hold in the SG.[47] Those variables are related, as the SG's care in selecting strong cases—and legal arguments—to present to the Court helps build the trust the Justices afford the government's arguments.[48] The SG's ability to curate the Court's docket, in turn, stems from institutional features that form a necessary first step in our exploration of litigation flips.

A. The Solicitor General's Role in Promoting Consistency

The Office of the Solicitor General was created in 1870 in response to concerns that the volume of government litigation was too much for the Attorney General (AG) to handle alone.[49] The Judiciary Act of 1789 had created the office of the AG and charged the AG with "prosecut[ing] and conduct[ing] all suits in the Supreme Court in which the United States shall be concerned."[50] The 1789 Act also created the offices of the district attorneys, but it did not empower the AG to oversee their work.[51]

Although Attorneys General complained from the outset about inadequate resources and the lack of coordination over government litigation, the early system limped along until the latter half of the nineteenth century, when various forces combined to spur reform.[52] First, the pace of litigation in the Supreme Court increased dramatically, placing new strain on the AG's limited resources.[53] Second, the onset

Consequences of Politicization in the Solicitor General's Office, 71 J. POL. 224, 231 (2009) (using data from 1961 to 2003 and finding that the Court rules in favor of the SG's position as amicus in between 60 and 87% of the cases, and explaining the variance by reference to "politicization," measured by the percentage of all SG amicus briefs advocating the appointing President's ideological predisposition).

47 *See, e.g.*, Linda R. Cohen & Matthew L. Spitzer, *The Government Litigant Advantage: Implications for the Law*, 28 FLA. ST. U. L. REV. 391, 395 (2000) (emphasizing strategic case selection by OSG); Kevin T. McGuire, *Explaining Executive Success in the U.S. Supreme Court*, 51 POL. RSCH. Q. 505, 507 (1998) (attributing the SG's success to the expertise of OSG lawyers); Jessica A. Schoenherr & Nicholas W. Waterbury, *Confessions at the Supreme Court: Judicial Response to Solicitor General Error*, 10 J.L. & COURTS 13, 14 (2022) ("By helping the justices, the solicitor general gains trust and deference that ultimately results in unparalleled success and influence.").

48 *See* Schoenherr & Waterbury, *supra* note 47, at 16–17.

49 Act of June 22, 1870, ch. 150, § 2, 16 Stat. 162, 162.

50 Judiciary Act of 1789, ch. 20, § 35, 1 Stat. 73, 93.

51 *Id.*, 1 Stat. at 92.

52 *See* Seth P. Waxman, Solic. Gen. of the U.S., "Presenting the Case of the United States as It Should Be": The Solicitor General in Historical Context, Address to the Supreme Court Historical Society (June 1, 1998), *in* 23 J. SUP. CT. HIST., no. 2, 1998, at 3, 5.

53 BLACK & OWENS, *supra* note 45, at 12 (describing increase in number of cases involving the United States as a party after 1830); Waxman, *supra* note 52, at 5 (noting that

of the Civil War "laid bare the deficiencies of this uncoordinated legal structure."[54] In 1861, Congress gave the AG control over the U.S. district attorneys and marshals (a role he shared with the Solicitor of the Treasury[55]), but rather than increasing the AG's own resources the Act authorized him to hire private attorneys to represent the government in court.[56] The result was not only expensive but chaotic, as "[p]rivate attorneys and the government's own attorneys pursued scattershot approaches before federal courts."[57]

The volume of expenditures going to the support of outside counsel eventually captured Congress's attention, and in 1867 Congress requested the views of AG Henry Stanbery on the need for reform. Stanbery urged Congress to consolidate the then-scattered legal authority in the AG's office "so that it may be made the law department of the government, and thereby secure uniformity of decision, of superintendence, and of official responsibility."[58] Stanbery also proposed the creation of a new office of "a solicitor general" who could focus on representing the United States before the Supreme Court and obviate the need for outside counsel.[59] Congress responded in 1870 with "An Act to establish the Department of Justice," which centralized control of government litigation in the AG and the newly created Department of Justice (DOJ), and provided for "an officer learned in the law, . . . to be called the solicitor-general."[60] The first SG, Benjamin Bristow, "took little time in establishing primacy over the government's Supreme Court docket."[61]

Today, the SG is supported by four deputies and sixteen attorney assistants.[62] The SG is appointed by the President; three of the deputies and the attorney assistants are career civil servants, who may remain in the positions through multiple administrations.[63] The remaining deputy is known as the principal or "political" deputy, and—like

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the 1789 Act did not provide for a staff to assist the AG and set his salary at $1,500 "with the clear expectation that his would be a part-time job").

54 Waxman, *supra* note 52, at 8.

55 *Id.*

56 Act of Aug. 2, 1861, ch. 37, § 2, 12 Stat. 285, 285.

57 BLACK & OWENS, *supra* note 45, at 13.

58 Waxman, *supra* note 52, at 8–9 (quoting S. Exec. Doc. No. 40-13, at 2 (1867)).

59 *Id.* at 8 (quoting S. Exec. Doc. No. 40-13, at 2 (1867)).

60 Act of June 22, 1870, ch. 150, § 2, 16 Stat. 162, 162.

61 Waxman, *supra* note 52, at 11.

62 *See Employment Opportunities*, U.S. DEP'T OF JUST., OFF. OF THE SOLIC. GEN., https://www.justice.gov/osg/employment-opportunities [https://perma.cc/4ZRN-WU7P].

63 *See, e.g.*, Richard G. Wilkins, *An Officer and an Advocate: The Role of the Solicitor General*, 21 LOY. L.A. L. REV. 1167, 1170 (1988) ("[T]he bulk of the Solicitor General's staff consists of civil service employees who are not subject to removal for political or ideological reasons.").

the SG herself—typically leaves at the end of a presidential administration.[64]

With a handful of exceptions for agencies that Congress has granted independent litigating authority, OSG represents the United States in all litigation by federal government entities in the Supreme Court.[65] The SG plays a significant role in intermediate appellate litigation as well. Most government litigation at the trial and appellate levels runs through DOJ, with OSG serving as a gatekeeper as cases move up the judicial hierarchy.[66] OSG must approve any government appeal from a loss at the district court level, any government intervention in an appellate court, any request for rehearing en banc, and any amicus filings in the courts of appeals.[67] OSG also controls access to the Supreme Court: it decides whether and when to seek the Justices' review of the government's losses in the appellate courts, ultimately filing petitions for certiorari in only a tiny fraction of the possible cases.[68]

Both the evident goal and the apparent effect of DOJ's "monopoly over government litigation" in general, and OSG's control over the government's appellate advocacy in particular, are to promote consistency in the government's legal arguments.[69] As former SG Seth

64 *See* Thomas W. Merrill, *The Story of* Chevron*: The Making of an Accidental Landmark*, 66 ADMIN. L. REV. 253, 268 (2014) (tracing the role of "political" deputy to Paul Bator in 1982); Patricia A. Millett, *"We're Your Government and We're Here to Help": Obtaining Amicus Support from the Federal Government in Supreme Court Cases*, 10 J. APP. PRAC. & PROCESS 209, 210–11 (2009) (describing staffing of OSG); John A. Jenkins, *The Solicitor General's Winning Ways*, 69 A.B.A. J. 734, 737 (1983) (describing the Bator appointment).

65 *See* Neal Devins, *Unitariness and Independence: Solicitor General Control over Independent Agency Litigation*, 82 CALIF. L. REV. 255, 265, 274–78 (1994).

66 For an extended discussion of the consolidation of litigation authority in DOJ and its consequences, see, for example, Neal Devins & Michael Herz, *The Uneasy Case for Department of Justice Control of Federal Litigation*, 5 U. PA. J. CONST. L. 558 (2003).

67 28 C.F.R. § 0.20 (2023); *see* Drew S. Days, III, *No Striped Pants and Morning Coat: The Solicitor General in the State and Lower Federal Courts*, 11 GA. ST. U. L. REV. 645, 646–50 (1995) (describing OSG's role in the lower courts); *Panel of Former Solicitors General*, 2003 BYU L. REV. 153, 168, 173–75 (statements of former SGs Seth P. Waxman and Walter E. Dellinger, III, describing the consultative process OSG follows when considering appeal requests from agencies and prosecutors).

68 The number of cert petitions filed by OSG averaged roughly seventeen per year during the 2012–2022 Terms. *See Supreme Court Briefs*, U.S. DEP'T OF JUSTICE, OFF. OF THE SOLIC. GEN., https://www.justice.gov/osg/supreme-court-briefs [https://perma.cc/DZ8H-N9Z2]; *see also* Cordray & Cordray, *supra* note 45, at 1341–43 (reporting a filing rate of approximately fifteen petitions per Term and linking the small size of the contemporary Court's docket to OSG's restraint in seeking cert).

69 Michael Herz & Neal Devins, *The Consequences of DOJ Control of Litigation on Agencies' Programs*, 52 ADMIN. L. REV. 1345, 1346 (2000) (explaining that DOJ's monopoly is based on the perceived need for "the government [to] speak with one voice in the courts, a consistency that can only be achieved by centralizing litigation authority").

Waxman put it, "[I]t is the responsibility of the Solicitor General to ensure that the United States speaks in court with a single voice."[70] Indeed, commentary on OSG routinely stresses its role in—to quote former SG Kenneth Starr—"bringing greater consistency to the government's litigating positions."[71]

That is no easy task, to put it mildly. The federal government is a vast and sprawling bureaucracy. There are numerous distinct entities within the Executive Office of the President;[72] fifteen primary agencies, the head of each of which is a member of the President's cabinet,[73] with well over two hundred distinct subagencies and bureaus that often operate relatively independently within parent executive agencies;[74] about sixty independent agencies; and several dozen more boards, commissions, and quasi-official agencies.[75] The executive branch alone employs about 40,000 lawyers, accounting for more than five percent of all lawyers practicing in the United States.[76]

Given the sheer scope of the federal government, different arms of the government may adopt legal interpretations that are in tension

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70 Waxman, *supra* note 52, at 4.

71 Kenneth W. Starr, U.S. Solic. Gen., Remarks at Brown University (Feb. 17, 1990), *in* Remarks, *Perspectives on the Judiciary*, 39 AM. U. L. REV. 475, 480 (1990); *see also, e.g.*, Cordray & Cordray, *supra* note 45, at 1326 ("Consolidating all appellate litigation within the Solicitor General's office enables the federal government to coordinate and present a considered litigation strategy that looks beyond the immediate concerns of individual agencies to the longer-term interests of the federal government."); Devins, *supra* note 65, at 257–58 (describing the conventional view that OSG's capacity to "provide[] a unitary voice for the United States before the Supreme Court . . . serves both the government and the Court").

72 The Executive Office of the President (EOP) includes key presidential advisors and their staffs; the specific number and makeup of offices varies from administration to administration. *See The Executive Branch*, WHITE HOUSE, https://www.whitehouse.gov/about-the-white-house/our-government/the-executive-branch/ [https://perma.cc/6HS3-RX5X]. For example, there were eighteen divisions, including the Office of Management and Budget, the National Security Council, and the Office of Public Engagement, in the EOP during the Biden-Harris administration. *Executive Office of the President*, WHITE HOUSE, https://www.whitehouse.gov/administration/executive-office-of-the-president/ [https://perma.cc/F7GL-HF67].

73 *See The Executive Branch*, *supra* note 72.

74 *See generally* U.S. GOV'T MANUAL, https://usgovernmentmanual.gov/ [https://perma.cc/TH6P-C74Y]. This category includes prominent sub-agencies such as the Internal Revenue Service, part of the larger Department of the Treasury; the Food and Drug Administration, part of the larger Department of Health and Human Services; and the various divisions of the Department of Justice. It also includes far more specialized niche entities, such as Radio Free Asia and the Saint Lawrence Seaway Development Corporation.

75 *Id.*

76 *Occupational Employment and Wages, May 2023, 23-1011 Lawyers*, U.S. BUREAU OF LAB. STAT. (Apr. 3, 2024), https://www.bls.gov/oes/current/oes231011.htm [https://perma.cc/HG9R-RFSJ] (reporting 40,630 lawyers employed by the federal executive branch, out of a total of 731,340 lawyers).

with one another. For example, several distinct federal agencies, most prominently the Equal Employment Opportunity Commission (EEOC) and the Department of Labor, are charged with enforcing workplace laws that protect employees. At the same time, the federal government is by far the country's largest employer, with 2.8 million civilian workers and an additional 1.4 million military personnel, meaning it also looks at workplace laws from the perspective of management.[77]

Similarly, the United States owns about twenty-eight percent of the total land acres in the country.[78] This property is managed by multiple federal agencies, including the Bureau of Land Management, the Forest Service, the Fish and Wildlife Service, the National Park Service, and the Department of Defense.[79] These agencies have somewhat distinct values and charges, which may come into conflict with each other. They may also be in tension with the perspective of the Environmental Protection Agency, which is charged with enforcing environmental laws.[80]

There are many other areas of overlapping or related jurisdiction. The perspective of the Food and Drug Administration, charged with assessing the safety and effectiveness of drugs, may differ from that of the Department of Justice, charged with prosecuting illicit use.[81] The perspective of the Office of Civil Rights on prisoners' rights may differ from that of lawyers bringing criminal prosecutions.[82] And the

77 *See* CAROL WILSON, CONG. RSCH. SERV., R43590, FEDERAL WORKFORCE STATISTICS SOURCES: OPM AND OMB 6 (2023).

78 *See* CAROL HARDY VINCENT, LAURA A. HANSON & LUCAS F. BERMEJO, CONG. RSCH. SERV., R42346, FEDERAL LAND OWNERSHIP: OVERVIEW AND DATA 1 (2020).

79 *See id.* at 4–6. These five agencies collectively manage about ninety-six percent of all federal land; the remaining lands are managed by numerous distinct agencies, such as the Post Office, the Department of Energy, the Army Corps of Engineers, and the Bureau of Reclamation, which manages much of the water infrastructure in the western half of the country. *See id.* at 3 & n.3.

80 See *infra* note 226 for an example.

81 For example, the FDA has signaled some openness to considering medical uses for cannabis. *See FDA and Cannabis: Research and Drug Approval Process*, FDA, https://www.fda.gov/news-events/public-health-focus/fda-and-cannabis-research-and-drug-approval-process [https://perma.cc/RA9A-NHGU] (noting that the agency has approved one cannabis-derived drug product and recognizing "increasing interest" in use of cannabis for medical conditions). As of May 2024, however, marijuana continues to be a controlled substance under federal law subject to prosecution by DOJ. *See* LISA N. SACCO, JOANNA R. LAMPE & HASSAN Z. SHEIKH, CONG. RSCH. SERV., IF12270, THE FEDERAL STATUS OF MARIJUANA AND THE POLICY GAP WITH STATES 2 (2024) ("The Department of Justice (DOJ) has . . . reaffirmed that marijuana growth, possession, and trafficking remain crimes under federal law irrespective of states' marijuana laws.").

82 *See, e.g.*, Brief for the United States as Amicus Curiae Supporting Respondents at 1, Coleman v. Tollefson, 575 U.S. 532 (2015) (No. 13-1333) (noting that the government is both a primary enforcer of civil rights laws on behalf of prisoners and a frequent defendant

perspective of the Department of the Treasury, charged with collecting revenue on behalf of the United States, may differ from that of various agencies enforcing regulations with different objectives.[83]

Often these conflicts will remain dormant, but litigation can draw them out by forcing agencies—and the lawyers who represent them in court—to go on the record with specific positions on specific questions. Centralization of litigation authority in DOJ (and, at the Supreme Court, OSG) helps facilitate the objective that "the government" speak with one voice in court. As others have recognized, however, the goal of perfect consistency is likely unattainable. The "enormous range of activities and interests" encompassed by the federal government inevitably will produce "conflicts of goals, policies, and positions," and DOJ "cannot perfectly coordinate its own activities," let alone those of the hundreds of government clients it serves.[84]

So far we have been discussing consistency of a particular kind, concerning the arguments the government is presenting to the judiciary at any point in time. We might think of this as horizontal or lateral consistency, having to do with uniformity *across government*—a single voice rather than a cacophony. Litigation flips also implicate a second kind of consistency, longitudinal rather than lateral, concerning consistency in the government's legal arguments *over time*.

Longitudinal consistency is, if anything, even more difficult to maintain than lateral consistency: it requires not only identifying existing positions but predicting how one agency's position might come into conflict with another agency's take on an issue the second agency has not yet confronted, under circumstances that may not yet exist. The federal government is an ongoing enterprise that is simultaneously creating and responding to an ever-changing legal landscape. When statutes are enacted or amended, government lawyers need to

in civil rights suits filed by prisoners); *see also* Alexander A. Reinert, *The Influence of Government Defenders on Affirmative Civil Rights Enforcement*, 86 FORDHAM L. REV. 2181, 2182 (2018) ("At the same time that the DOJ's Civil Rights Division (CRD) is entering federal court to 'vindicat[e] rights and remedy[] inequities,' attorneys in the Civil Division (either from Main Justice or in any number of U.S. Attorney's offices) are appearing in court to prevent the same." (alterations in original) (quoting Vanita Gupta, Head, C.R. Div., U.S. Dep't of Just., Remarks at the National Legal Aid & Defender Association Annual Conference (Nov. 10, 2016), https://www.justice.gov/opa/speech/head-civil-rights-division-vanita-gupta-delivers-remarks-national-legal-aid-defender [https://perma.cc/FT8V-YCAN])).

83 *See, e.g.*, Dunn v. Commodity Futures Trading Comm'n, 519 U.S. 465, 480 (1997) (highlighting competing interpretations offered by the Treasury Department and the CFTC as to the scope of an exemption for transactions in foreign currency).

84 Devins & Herz, *supra* note 66, at 572, 576.

determine how to harmonize new rules with existing laws.[85] When courts issue definitive interpretations of constitutional and statutory provisions, government lawyers must go back and assess whether their regulations, guidance, or approaches to enforcement need to be reconsidered. The government is also, of course, charged with developing effective policy. This means policymakers must assess and reassess the efficacy and workability of interpretations, sometimes updating their approaches to better achieve the underlying objectives.

Nothing in the regulatory scheme governing the SG's Office demands consistency in the government's arguments over time. Yet longstanding practice supports the conventional wisdom that OSG both does and should seek this kind of longitudinal consistency. Former Deputy Solicitor General Michael Dreeben described this feature as "an unspoken way of doing business" during his more than thirty years in the Office: "If our Office had staked out a legal position in the Court, with rare exceptions that was the position of the United States, full stop. OSG did not ask whether to apply stare decisis to OSG positions—we just did."[86] Other veterans of the Office confirm the internal norm of stare decisis, linking it to the SG's role in defending the "long-term interests of the United States" rather than idiosyncratic goals of the inhabitant of any given government office.[87] Accounts of the internal norm also regularly draw a connection between consistency in the arguments the SG presents to the Court and the credibility of those

85 *Cf.* Morton v. Mancari, 417 U.S. 535, 551 (1974) ("[W]hen two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.").

86 Dreeben, *supra* note 10, at 542.

87 Kagan Interview, *supra* note 5, at 19:34 (discussing the high bar to a change in position); *see also* Marcia Coyle, *Clement and Katyal Offer Road Map for Biden DOJ to Dump Trump's Obamacare Stance*, NAT'L L.J. (Jan. 28, 2021, 1:24 PM) https://www.law.com/nationallawjournal/2021/01/28/clement-and-katyal-offer-roadmap-for-biden-doj-to-dump-trumps-obamacare-stance/ [https://perma.cc/8TUD-TRFS] (reporting on event featuring former SG Paul Clement and former Acting SG Neal Katyal, both of whom emphasized the importance of continuity in OSG's arguments and of the focus on the long-term views and interests of the government); *Panel of Former Solicitors General*, *supra* note 67, at 170 ("So long as the men and women who work in the Justice Department understand that what matters is the long-term institutional interest of the United States, the political leadership does not, cannot, and should not have that much sway." (statement of former SG Seth P. Waxman)); *id.* at 168 ("[T]here is a very strong stare decisis weight to be given to the positions taken by the United States . . . ." (statement of former Acting SG Walter E. Dellinger, III)); *id.* at 167 ("I went into the office thinking that it was my responsibility to maintain continuity in the law to the greatest extent possible . . . ." (statement of former SG Drew S. Days, III)).

arguments—and of OSG itself.[88] Not surprisingly, therefore, OSG does not lightly modify a position it has previously advanced to the Court.[89]

We will explore the relationship between consistency and credibility in much more detail in Part IV. For now, it suffices to note that other advocates before the Court—opposing parties and amici—often leverage OSG's internal norm of stare decisis to draw into question arguments that seem to violate it.[90] Given the SG's remarkable win rates in the Court, it stands to reason that opposing litigants will take any opportunity they can to blunt the significance of the SG's position, and contending that it differs from a position the government has taken in earlier litigation appears to many advocates a fruitful line of attack. This includes not only cases in which OSG departs from legal arguments previously advanced to the Supreme Court, but also cases in which the SG rejects arguments made previously by any of the tens of thousands of government lawyers in the lower courts.[91]

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88 *See, e.g.*, Dreeben, *supra* note 10, at 543 ("[A] change of position can jeopardize OSG's credibility with the Court . . . ."); Kagan Interview, *supra* note 5, at 19:34 (noting that "the credibility of the office in great measure depends" on courts' seeing OSG as representing long-term rather than short-term interests).

89 *See* Dreeben, *supra* note 10, at 559–61 (describing the rigorous process OSG follows before reversing a position).

90 *See, e.g.*, Brief of NAACP Legal Defense and Educational Fund, Inc. and the Leadership Conference on Civil and Human Rights as Amici Curiae in Support of Respondents at 5, Husted v. A. Philip Randolph Inst., 138 S. Ct. 1833 (2018) (No. 16-980) ("The Court should give no weight to the Department's revisionist construction . . . ."); Brief for Respondents Par/Paddock at 10, FTC v. Actavis, Inc., 570 U.S. 136 (2013) (No. 12-416) ("That the United States switched position on the reverse-payment issue since the last administration warrants special mention."); Brief for Respondent at 22, United States v. Cleveland Indians Baseball Co., 532 U.S. 200 (2001) (No. 00-203) ("Regardless of the reason for the Solicitor General's unexplained reversal of position, this Court discounts the arguments of the Government when it switches positions.").

91 *See, e.g.*, Brief for Respondent at 49, Jam v. Int'l Fin. Corp., 139 S. Ct. 759 (2019) (No. 17-1011) (arguing that OSG's repudiation of position advanced in appellate court brief in an earlier case "provides ample reason to afford the government's current views no deference"); Transcript of Oral Argument at 60, Smith v. Berryhill, 139 S. Ct. 1765 (2019) (No. 17-1606) [hereinafter *Berryhill* Transcript] ("[A]ll of a sudden, after eight decades, the Solicitor General's Office has looked at this text and decided it means something else from what it has always meant . . . ." (Deepak Gupta, Court-appointed amicus curiae)); Reply Brief for the Petitioner at 7–8, Coleman v. Tollefson, 575 U.S. 532 (2015) (No. 13-1333) (stating that "[a]stoundingly, the United States now asks this Court to hold that [the statute] *unambiguously forecloses the interpretation that it previously advocated*" in appellate court brief in earlier case); Brief for Amalgamated Bank, as Trustee for the Longview Collective Investment Fund, Change to Win, and the CtW Investment Group as *Amici Curiae* in Support of Respondents at 4, Tellabs, Inc. v. Makor Issues & Rts., Ltd., 551 U.S. 308 (2007) (No. 06-484) (arguing that "the SEC's position is particularly disappointing" given inconsistency with prior amicus submissions in lower courts); Brief Amicus Curiae of the American Hospital Association in Support of the Respondents at 26, Bowen v. Georgetown Univ. Hosp., 488 U.S. 204 (1988) (No. 87-1097) (characterizing contrary position taken in earlier lower

Most importantly for our purposes, the Justices likewise have suggested that inconsistency is a point against the government's position. In one oral argument, for example, Justice Scalia asked bluntly, "[W]hy should we listen to you rather than the solicitors general who took the opposite position . . . not only in several courts of appeals, but even up here?"[92] Justice Roberts then picked up the theme, suggesting that "whatever deference" the SG is "entitled to is compromised by the fact that your predecessors took a different position."[93] Like opposing parties, the Justices are, at least sometimes, equally skeptical when the SG advances a position that is inconsistent with a government position that has been pushed in the lower courts.[94]

As we noted in the Introduction, however, the Justices' disapproval of litigation reversals is itself inconsistent—an ambivalence that hints at just how undertheorized (in)consistency is. Indeed, given the Court's recent decision overruling *Chevron*, the areas of law in which the Court has addressed consistency and legal change most directly are now profoundly in flux—and *Chevron*'s demise means that consistency will take on added importance in agency cases. Before we turn to our findings, therefore, the next Section briefly situates litigation flips in the larger body of doctrine governing administrative change.

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court cases as "agency waffl[ing] without explanation" (alteration in original) (quoting Homemakers N. Shore, Inc. v. Bowen, 832 F.2d 408, 412 (7th Cir. 1987))).

92 Transcript of Oral Argument at 43, Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108 (2013) (No. 10-1491) [hereinafter *Kiobel* Transcript].

93 *Id.* at 44–45; *see also, e.g.*, Fribourg Navigation Co. v. Comm'r, 383 U.S. 272, 279–80 (1966) ("The Commissioner's position represents a sudden and unwarranted volte-face from a consistent administrative and judicial practice . . . . [T]he Commissioner contends that he did not 'focus' on the issue in most of these instances. This is hardly a persuasive response . . . ."); Transcript of Oral Argument at 34, Janus v. Am. Fed'n of State, Cnty. & Mun. Emps., Council 31, 138 S. Ct. 2448 (2018) (No. 16-1466) [hereinafter *Janus* Transcript] ("I don't understand what you're arguing. This is such a radical new position on your part." (Sotomayor, J.)); Transcript of Oral Argument at 28, Husted v. A. Philip Randolph Inst., 138 S. Ct. 1833 (2018) (No. 16-980) ("Seems quite unusual that your office would change its position so dramatically." (Sotomayor, J.)); Transcript of Oral Argument at 43, Levin v. United States, 568 U.S. 503 (2013) (No. 11-1351) (highlighting change from government's prior position and asking "[w]hat occurred to turn on the light for the government" (Ginsburg, J.)).

94 *See, e.g.*, Bates v. Dow AgroSciences LLC, 544 U.S. 431, 449 (2005) ("The notion that [the statute] contains a nonambiguous command . . . is particularly dubious given that just five years ago the United States advocated the interpretation that we adopt today."); *Berryhill* Transcript, *supra* note 91, at 26 ("[Y]ou portray this as a straightforward question of statutory interpretation . . . . But the government's been on the opposite side of this for a long time." (Kavanaugh, J.)); Transcript of Oral Argument at 20–21, Millbrook v. United States, 569 U.S. 50 (2013) (No. 11-10362) ("[T]he United States didn't take this position below, right? . . . This is a change of heart. . . . So [the meaning of the relevant text] couldn't be that obvious, I guess?" (Scalia, J.)); *infra* notes 153, 256–57 and accompanying text.

B. Inconsistency About Consistency? Change in the Administrative State

The Court's decision in *Loper Bright*, overturning *Chevron*, dramatically reworked the contours of judicial deference to agency interpretations of statutory language. Though not our immediate focus here, this doctrine, and its relationship to the Administrative Procedure Act (APA), forms a critical backdrop for our consideration of litigation flips, as it illustrates the circumstances in which the Court has been willing—and unwilling—to countenance change, as well as the instability of the lines the Court has drawn.

Chevron, decided in 1984, instructed courts to defer to agencies' reasonable interpretations of statutory ambiguities.[95] *Chevron* deference reflected the view that legislation often leaves questions open; as Justice Kagan recently put it, "sometimes the law runs out, and policy-laden choice is what is left over."[96] When it comes to policymaking, various functional reasons support giving primacy to agencies rather than courts: subject-matter and technical expertise, experience with implementation of the relevant statute, flexibility, and democratic accountability via their relationships with the President and Congress.[97] Thus, within the "space"[98] created by statutory gaps and ambiguities, *Chevron* held that agencies should be permitted to choose reasonable policy free from judicial second-guessing.[99]

It followed directly from that view that agencies also could change policy, so long as they remained within the lines drawn by the statute.[100] That was so even if the agency's approach contradicted an earlier judicial decision interpreting the statute. The logic was straightforward: if filling statutory gaps and resolving ambiguities does not involve identifying law so much as creating it, then "the agency's decision to construe that statute differently from a court does not say that the court's holding was legally wrong," and there is nothing anomalous about permitting the agency to "choose a different construction."[101]

Chevron governed substantive review of agency action, testing the agency's positions for consistency with the statute(s) it has been charged with administering. Agency action also may be challenged as

95 Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–45 (1984).

96 Kisor v. Wilkie, 139 S. Ct. 2400, 2415 (2019); *see* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 980 (2005) ("Filling [statutory] gaps . . . involves difficult policy choices that agencies are better equipped to make than courts.").

97 *Chevron*, 467 U.S. at 865–66.

98 *See* Peter L. Strauss, *"Deference" Is Too Confusing—Let's Call Them "*Chevron *Space" and "*Skidmore *Weight,"* 112 COLUM. L. REV. 1143, 1143 (2012).

99 *Chevron*, 467 U.S. at 842–45.

100 *Brand X*, 545 U.S. at 982–84.

101 *Id.* at 983.

"arbitrary [and] capricious" within the meaning of the APA.[102] Not surprisingly, agency changes in policy often give rise to such challenges, and the Court has recognized that abrupt and unexplained change may be suspect even if it respects the substantive boundaries of the relevant statute—for example, if the agency failed to account for reliance interests, or displayed no awareness that it was changing position.[103] At the same time, however, the Court made clear that change itself need not raise judicial eyebrows for purposes of arbitrary and capricious review.[104]

Loper Bright marks a significant shift in this story. Not only did the Court discard *Chevron*'s rule of deference, but it also staked out a position far less hospitable to change. Indeed, hostility to change was a key element in the challenges to *Chevron*, which characterized *Chevron* deference as a "reliance-destroying doctrine."[105] Chief Justice Roberts's opinion for the Court in *Loper Bright* echoed those claims, complaining that "[r]ather than safeguarding reliance interests, *Chevron* affirmatively destroys them."[106]

But *Loper Bright* rests on more than practical concerns about reliance. It also rejects *Chevron*'s foundational assumption that the resolution of statutory ambiguity entails not only legal skill but also policy judgment.[107] As Justice Gorsuch put it in an earlier opinion, "[A] basic premise of our legal order [is] that we are governed not by the shifting whims of politicians and bureaucrats, but by written laws whose meaning is fixed and ascertainable."[108] On that conception, statutory ambiguities are not invitations to policymaking but simply thorny legal puzzles to be solved, and once "ascertain[ed]," the meaning of the law is "fixed."[109] The *Loper Bright* majority embraced this view. Ambiguous

102 5 U.S.C. § 706(2)(A) (2018) (authorizing courts to "hold unlawful and set aside agency action . . . found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law").

103 *See, e.g.*, Encino Motorcars, LLC v. Navarro, 579 U.S. 211, 221–22 (2016); FCC v. Fox Television Stations, Inc., 556 U.S. 502, 514–15 (2009).

104 *Encino Motorcars*, 579 U.S. at 221 (specifying that change is permissible if the agency "provide[s] a reasoned explanation").

105 Brief for Petitioners at 16, Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244 (2024) (No. 22-451); *see also* Richard J. Pierce, Jr., *The Combination of* Chevron *and Political Polarity Has Awful Effects*, 70 DUKE L.J. ONLINE 91, 103 (2021) (arguing that *Chevron* should be abandoned, despite its benefits, due to the instability it creates when combined with political polarization).

106 *Loper Bright*, 144 S. Ct. at 2272.

107 *Id.* at 2267–68.

108 Kisor v. Wilkie, 139 S. Ct. 2400, 2442 (2019) (Gorsuch, J., concurring in the judgment).

109 *See* Krishnakumar, *supra* note 9, at 204 (arguing that the Court's textualists "treat the task of statutory interpretation like a puzzle" that can be solved in all or almost all cases);

statutes, the Court contended, "no matter how impenetrable, do—in fact, must—have a single, best meaning. That is the whole point of having written statutes; 'every statute's meaning is fixed at the time of enactment.'"[110]

Plainly, such an approach to statutory interpretation is hostile to change regardless of its source—and Justice Gorsuch's reference to bureaucratic and political whims might suggest a special hostility to changed legal arguments by the government. In the wake of *Loper Bright*, understanding that hostility takes on added urgency. *Loper Bright* recentered the rule of *Skidmore v. Swift & Co*,[111] under which the "weight" of an agency's judgment "will depend upon the thoroughness evident in its consideration, the validity of its reasoning, *its consistency with earlier and later pronouncements*, and all those factors which give it power to persuade, if lacking power to control."[112] The Court did not explain in *Skidmore* why "consistency" enhances the persuasive power of agency constructions, and later cases repeated that language—often combining or conflating it with an inquiry into whether the agency's interpretation was contemporaneous with the enactment of the statute in question—without articulating the precise value of consistency (or the problem with change).[113] *Loper Bright*, as noted, provided two very different reasons to look askance at inconsistent arguments: a practical or prudential set of worries about upsetting reliance interests or facilitating unfair surprise and a more theoretical insistence that legal meaning does not change—which in turn might suggest that shifting interpretations are not to be taken seriously as legal arguments, or (more strongly) that they are trafficking in something other than law.

Our focus in the remainder of this Article is on the latter set of ideas. That is not to deny the importance of reliance and related values associated with stability in the law. As we explain below, concerns about reliance can and should be addressed on their own terms (as

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Rodríguez, *supra* note 14, at 113 (noting that Justice Gorsuch's "conception of law . . . cannot coexist with the idea of ambiguity itself").

110 *Loper Bright*, 144 S. Ct. at 2266 (quoting Wis. Cent. Ltd. v. United States, 138 S. Ct. 2067, 2074 (2018) (emphasis omitted)).

111 Skidmore v. Swift & Co., 323 U.S. 134 (1944).

112 *Id.* at 140 (emphasis added).

113 *See* Anita S. Krishnakumar, *Longstanding Agency Interpretations*, 83 FORDHAM L. REV. 1823, 1825–26 (2015) (noting that courts and scholars "long have assumed that longevity matters a great deal in the judicial calculus of whether to uphold an agency statutory interpretation, . . . [b]ut no one has explained *why* longstanding agency interpretations should receive heightened deference").

they are under arbitrary and capricious review, for example[114])—and in any event will not be present in many cases involving litigation flips.[115] The notion that inconsistency deprives a legal argument of respect or credibility is conceptually distinct, however, and worthy of consideration in its own right. While not directly tied to formal deference regimes, the Justices' reactions to litigation reversals by the government rest on premises similar to those on display in *Loper Bright*—or so we will argue—and, as such, offer a useful lens through which to begin an exploration into the commitments and assumptions that lie behind a skepticism of government "flip-flops."[116]

II. A BIRD'S-EYE VIEW OF LITIGATION FLIPS

Our goal in this Article is to better understand the reasons why litigation flips are thought to pose a threat to the credibility of the SG's legal arguments. To begin that task, we need to develop a more systematic account of when flips happen, and why. This Part describes our methodology for identifying flips and offers an overview of what we found. Part III then delves more deeply into the various forces that contribute to reversals in the government's legal position.

A. Defining Flips

We are interested in cases in which the legal argument presented to the Justices by the government is different from the argument advanced by the government in a previous case or cases. The conflict could take several forms. In some instances, the government rejects a position it took earlier before the Supreme Court in the very same case. This kind of dramatic reversal typically occurs when the case spans presidential administrations and the new SG reaches legal conclusions that differ from those taken by the prior SG.[117] In other instances, the

114 *See, e.g.*, Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1913 (2020) (explaining that a failure to address reliance interests renders agency action arbitrary and capricious).

115 *See infra* notes 280–84 and accompanying text.

116 Concerns that *Chevron* permitted agencies to "flip-flop" cropped up on multiple occasions in the oral arguments in the cases challenging *Chevron*. *See, e.g.*, *Loper Bright* Transcript, *supra* note 28, at 5–6, 24–25, 40, 88 (alluding to the problem of agency "flip-flop[s]"); Transcript of Oral Argument at 23, 24, 63, 131, Relentless v. Dep't of Com., 144 S. Ct. 2244 (2024) (No. 22-1219) (same).

117 *See, e.g.*, Letter from Elizabeth B. Prelogar, Acting Solic. Gen., U.S. Dep't of Just., to Hon. Scott S. Harris, Clerk, U.S. Sup. Ct. (Mar. 15, 2021) (announcing, with regard to *Terry v. United States*, that OSG had "reconsidered" the position it had advanced four months prior in a cert-stage brief).

SG takes a position that differs from that previously taken by government lawyers in the lower courts in the same case.[118]

Other flips occur across cases. These flips may be roughly contemporaneous, or the first and second cases (and the divergent legal positions) may be divided by decades. The earlier—now discarded—positions also may differ in terms of where and by whom they were presented. That is, the arguments may have been presented by the SG before the Supreme Court in a different case,[119] or they may have been presented by lawyers within other parts of DOJ or by agency lawyers before the lower courts.[120]

Michael Dreeben's essay on SG litigation flips, which is the most extensive prior analysis of the topic, considers only cases in which OSG itself presents inconsistent legal positions to the Supreme Court.[121] That limitation follows naturally from Dreeben's focus; having served for twenty-four years as the Deputy Solicitor General in charge of the government's criminal docket in the Supreme Court, Dreeben is interested in the circumstances under which OSG should revise its own positions.[122] Our focus, by contrast, is on the Court's reaction to inconsistency in the government's legal arguments. As discussed in Section I.A, the Justices frequently fail to distinguish between cases in which OSG presents arguments that differ from arguments previously advanced by OSG itself and cases in which OSG presents arguments that differ from those advanced by other government lawyers in the lower courts, characterizing both as suspect reversals.[123] Thus, we intentionally adopt a broad definition of "flip" that includes any cases in which the legal position presented by "the government" to the Supreme Court by the SG conflicts with a litigating position "the

118 *See* Dreeben, *supra* note 10, at 546 ("OSG historically has shown a significant degree of openness to reversing a position that the Government took in the lower courts, even if OSG had previously approved the position. . . . After all, the stakes are greater [at the Supreme Court] since the Court will issue a final, binding decision with nationwide application.").

119 *See, e.g.*, Groff v. DeJoy, 143 S. Ct. 2279, 2293 (2023).

120 *See, e.g.*, Barton v. Barr, 140 S. Ct. 1442 (2020); *infra* text accompanying notes 268–74.

121 Dreeben, *supra* note 10, at 551 n.50. He further narrows the category to exclude changes that respond to an agency's reinterpretation of a statute it administers, changes caused by "intervening judicial decisions," "changes dictated by the Attorney General or President" and changes stemming from OSG's practice of generally defending statutes against constitutional attack. *See id.* at 546–47. Our definition of "flip" includes these kinds of cases when they result in OSG making changed arguments about legal meaning. *See infra* note 124 and accompanying text.

122 Dreeben, *supra* note 10, at 542; *see also The Term: Michael Dreeben on Arguing 106 High Court Cases*, LAW360 (Nov. 18, 2021, 7:22 PM EST), https://www.law360.com/articles/1441650 [https://perma.cc/YS3U-WZWF].

123 *See supra* note 91 and accompanying text.

government" took previously, whether in the same case or a different case, to the Supreme Court or a different court.[124] However, we code for different types of reversals to provide a more nuanced assessment of the universe of "flips" and the circumstances that can lead to them.

Because we're interested in changes in the government's arguments about legal meaning, we want to bracket cases involving shifts in how an agency seeks to implement an existing legal command—or, put differently, changes in agency *policy*.[125] Such cases do not necessarily involve "flips" as we are using that term. Suppose an agency adopts new regulations, moving policy from *A* to *B*, and the change is challenged as arbitrary and capricious.[126] If the agency argues that the relevant statute permits both policies *A* and *B*, and the agency has come to the view that *B* is preferable, the agency has not changed its interpretation of the statute.[127] The case would fit within our definition of a litigation flip only if the government defended the change by abandoning its prior legal arguments in support of policy *A* and now

124 Our definition of a flip thus excludes cases in which the government's prior (now rejected) legal position was memorialized in some way but never presented to a court. *See, e.g.*, Rodríguez, *supra* note 14, at 43 (discussing changes in prosecutorial guidance issued by the Attorney General under Presidents Trump and Biden). Perhaps in part for that reason, very few of the flip cases we found implicate the controversial question of "constitutional nondefense"—instances in which the SG refuses to defend a statute or regulation on the ground that it is unconstitutional. *See* Katherine Shaw, *Constitutional Nondefense in the States*, 114 COLUM. L. REV. 213, 218, 221–29 (2014) (emphasis omitted) (summarizing debates over nondefense by federal executive actors). Conceptually speaking, nondefense cases are within our definition of flips if DOJ or OSG had defended the law in question in earlier litigation. This was true, for example, in *United States v. Windsor*, 570 U.S. 744 (2013), regarding the constitutionality of the Defense of Marriage Act, which is included as a flip in our data. In most of the famous nondefense cases, however, no prior litigation had occurred and therefore there was no "flip," in our terms. Nondefense cases thus raise a set of thorny issues concerning departmentalism and the relationship between the executive and legislative branches that are not presented in most flip cases, while generally sidestepping the question that most interests us, concerning the relationship between credibility and consistency in the legal arguments the government presents in court. *Cf.* Daniel J. Meltzer, *Executive Defense of Congressional Acts*, 61 DUKE L.J. 1183, 1218 (2012) (discussing debates over the Obama administration's decision not to defend the Defense of Marriage Act in the litigation culminating in *Windsor*, and worrying that the "considerable credibility that [DOJ] has with the courts, because of the consistency with which it fulfills its responsibilities, might be undermined if some judges view an administration's failure to defend a statute—*especially one that was successfully defended by prior administrations*—as evidence of politicization" (emphasis added)).

125 *Accord* Dreeben, *supra* note 10, at 546 ("This Essay is concerned with a subset of positional changes: those that result from the Solicitor General's conclusion that OSG's prior position was *legally* wrong.").

126 *See supra* notes 102–04 and accompanying text (discussing arbitrary and capricious review).

127 *See* William W. Buzbee, *Agency Statutory Abnegation in the Deregulatory Playbook*, 68 DUKE L.J. 1509, 1519 (2019) (describing "standard" or "typical" agency approach).

insisting that *A* is inconsistent with the terms of the relevant statute and policy *B* is the only lawful option.[128]

Litigation flips also are conceptually distinct from confessions of error—instances in which the SG admits that a judgment in favor of the government rests on faulty legal analysis[129]—although the categories sometimes overlap. That is, in some instances confessions of error involve changes in the government's legal position, as when the government abandons a position it advanced in the lower courts. Sometimes, however, the "error" in question was committed by the lower court, giving the government a win on grounds it did not ask for and cannot defend.[130] Cases in the latter category do not count as "flips" for our purposes.

B. Methodology

To better understand flips, and to assess claims that recent high-profile flips are a product of hyperpartisanship, we sought to develop a database of litigation flips by the SG's Office over time. For reasons both practical and theoretical, we took a fire-alarm approach to identifying flips. We wanted to investigate how the Justices, who understand their role as "say[ing] what the law is,"[131] respond to changes in arguments about the law by other government actors. The cases of interest to us, then, are those in which a flip is *evident*: a change noticed by no one will provoke no response at all. Thus, as a rough (but, we think, serviceable) proxy for cases in which a flip is evident we looked for cases in which the government itself, other parties or amici, or the Justices flagged that the government had changed its legal position. In about eighty percent of our cases, the government acknowledged the change in its briefing; however, our dataset includes numerous cases

128 *See id.* at 1518 (describing instances in which, "[a]cting against a backdrop of unchanged statutory law, an agency reexamines its powers under that law" and "newly declares that it no longer has authority it previously asserted").

129 *See* David M. Rosenzweig, Note, *Confession of Error in the Supreme Court by the Solicitor General*, 82 GEO. L.J. 2079, 2080 (1994) (explaining that "[u]pon confessing error, the Solicitor General may ask the Court to reverse the judgment or may argue either that the judgment should stand despite the error or that the case does not merit review under the Court's standards for granting certiorari"); *see also* Aaron-Andrew P. Bruhl, *The Supreme Court's Controversial GVRs—and an Alternative*, 107 MICH. L. REV. 711, 731–35 (2009) (discussing confessions of error and the Court's response).

130 *See* Schoenherr & Waterbury, *supra* note 47, at 18–20 (distinguishing between confessions of "mistakes made by the solicitor general or someone else within the Department of Justice" and "mistakes made by a lower court judge," *id.* at 18).

131 Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

in which the government either did not discuss or denied the changed position.[132]

To compile our list, we began with cases identified in Michael Dreeben's recent essay exploring shifts in OSG's position under the Obama and Trump administrations,[133] as well as other scholarly works and news reports discussing litigation flips.[134] We analyzed the cases discussed in these works to generate terms used to describe such reversals, such as "chang! position," "change in administration," "further reflection," and "reconsider! the issue." Using Lexis, Westlaw, and ProQuest Supreme Court Insight, and with the help of research assistants, we then searched briefs, oral argument transcripts, and Supreme Court opinions to generate additional cases. The process was iterative, as new cases sometimes revealed new ways of describing or explaining flips, which we then added to our list of search terms.[135] We went back as far as possible in time, though our searches were limited by less comprehensive digital records for earlier cases. We ended our search with cases decided during the Court's 2022–2023 Term. We did not include cases in which the SG may have supported or opposed a petition for certiorari—and may have reversed an earlier position in so doing—but that the Court ultimately declined to take.[136]

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132 This information can be found at Column E in the list of cases included in Appendix B, Table 1. It's worth emphasizing that some flips are identified (or alleged) in briefs filed after the government's own submission (e.g., when the government files an amicus brief on behalf of the petitioner, and the flip is raised in the brief filed by the respondent or one of its amici).

133 Dreeben, *supra* note 10. Dreeben identified cases by searching OSG's filings in merits cases for keywords including "reconsider," "reevaluate," "position," "change," and "view." *Id.* at 548 n.25.

134 Useful case examples appear in Blackman, *supra* note 14; Rodríguez, *supra* note 14; and Rosenzweig, *supra* note 129.

135 For example, an opposing party might describe a flip by reference to a change in presidential administration—which would be picked up by our search for "change in administration"—and OSG's brief might use a different formulation, which we would then add to our list of search terms. Ultimately, our search terms included the following: "(change current prior previous before) /3 administration," "upon further reflection," "upon further consideration," "chang! (interpretation position)," "chang! its (interpretation position)," "reconsider! the (issue question)," "reevaluat! the (issue question)," "reexamin! the (issue question)," "once took the position," "previously took the position," "previously taken the position," "prior position," "switch! sides," "previously believed," "shift! argument," "in light of this court's grant of certiorari," and "contrary position!"

136 If the Court denies cert, the stakes in a flip are generally lower. However, there may be notable flips in that context, as well. *See, e.g.*, Brief for the United States as Amicus Curiae at 6–7, Suncor Energy (U.S.A.) Inc. v. Bd. of Cnty. Comm'rs, 141 S. Ct. 2667 (2021) (No. 21-1550) (noting that "after the change in Administration" from President Trump to President Biden and "in light" of decisions by five circuit courts rejecting the argument the United States had previously advanced, the government "has reexamined its position," *id.* at 7).

Our objective was to identify a body of cases in which OSG modified earlier government positions from which we could discern broad patterns in the reasons for government reversals and tease out some of the practical and theoretical questions posed by such changes. We believe our list meets this goal, but we do not suggest that our search methodology yields a definitive and complete list of OSG litigation flips. Rather, it is potentially overinclusive and almost certainly underinclusive.

As to the former, as noted, we searched for our terms of interest in all of the briefs submitted, as well as oral argument transcripts and opinions. Ultimately, we examined 175 cases that we deemed at least potential flips.[137] For these, we carefully reviewed the government's briefs, other briefs that referenced the supposed flip, the oral argument, and the decisions. Based on this review, we excluded cases in which an opposing party or amicus (or sometimes a Justice) accused the SG of reversing itself on a question of law, but where in our assessment (and sometimes the Court's) the government plainly had not reversed a prior position.[138] We also excluded cases in which OSG was defending an agency change in policy, or refusing to defend the lower court's judgment, when those positions did not entail a change in the government's arguments about the meaning of the law. This yielded our final list of 131 cases, analyzed below.[139]

Our methodology is also underinclusive. Cases are only included in our list if someone stated—either in a brief submitted to the Court or in oral argument—that the government had reversed a prior decision, using one of our key terms. This happened only if the government itself flagged the reversal or if another party or amicus identified that the government had changed its position *and* deemed it helpful as a matter of advocacy to highlight the shift. This is a strategic decision, and—especially before the advent of modern search technology—many advocates may not have thought it worth their while to hunt for possible inconsistencies in the government's arguments. As a

137 Some of our search terms—for example, "contrary position!"—turned up hundreds of hits that had nothing to do with litigation flips; often they were references to disagreements among courts. We screened these cases out quickly and never included them in our list of potential flips.

138 The line between a clarification and a reversal, or between distinguishing a prior position and abandoning it, can be fuzzy. For example, *Kokesh v. SEC*, 137 S. Ct. 1635, 1639 (2017), concerned whether disgorgement orders are a penalty under securities law. The SG, arguing they are *not*, suggested its earlier contention that disgorgement *was* a penalty under the bankruptcy code did not control its interpretation of the securities law. Brief for the Respondent at 30, *Kokesh*, 137 S. Ct. 1635 (No. 16-529). The opposing party argued it was an unwarranted reversal. *Id.* After our review, we agreed it was a flip.

139 Our final list of flip cases includes fifteen cases, or about 10% of the total, in which the accusation of a flip is debatable. *See infra* Appendix B, Table 1, Column H.

result, there surely are cases (perhaps especially older cases) in which the government may indeed have reversed a prior decision, but the change is not known or mentioned.[140] And there may be cases where the change in the government's litigation position was identified in terms not captured in our search.

For each of the 131 flip cases, we coded (1) the government's role in the case (petitioner, respondent, or amicus); (2) whether the government's prior, now rejected, position had been advanced to the Supreme Court in the same case, to the Supreme Court in a different case, to the lower courts in the same case, or to the lower courts in a different case; (3) whether the government (or the party supported by the government) prevailed in the Supreme Court case; and (4) the year of the decision. We also recorded the primary issue in the case and how the government explained, or failed to explain, the reason for the shift. Appendix A describes these categories in greater detail; Appendix B provides the full list of cases we analyzed, including those we analyzed but ultimately deemed to be outside our definition of litigation flips.

C. Findings

We identified 131 Supreme Court cases in which the government flipped its argument from that advanced in earlier litigation. Table 1 summarizes the different types of flips and different roles in which OSG appears in the Supreme Court. The vast majority of the flips we identified, 92 of the 131 cases, were cases in which OSG took a different

140 In other cases, a change in OSG's position may go unmentioned precisely because it is already evident to all. For example, in the half century since *Roe v. Wade*, 410 U.S. 113 (1973), was decided, OSG revised its position on the constitutionality of abortion restrictions on multiple occasions. *See, e.g.*, RICHARD L. PACELLE, JR., BETWEEN LAW & POLITICS: THE SOLICITOR GENERAL AND THE STRUCTURING OF RACE, GENDER, AND REPRODUCTIVE RIGHTS LITIGATION 242–45, 248–51, 255–58 (2003) (discussing generally hostile positions to abortion rights taken by the Reagan and George H.W. Bush SGs and generally supportive positions taken by the Clinton OSG). These cases did not appear in our "flip" list. This could suggest that no one deemed it strategically advantageous to flag the SG's changes as an inconsistency, perhaps because it was assumed (or already obvious from OSG's arguments) that the SG's position would generally reflect that of the President on the abortion issue. When the new position took the form of accepting and applying the Court's precedents, moreover, opponents likely saw little to be gained from criticizing OSG on that score. For example, in *Stenberg v. Carhart*, 530 U.S. 914 (2000), the SG argued that a state law was unconstitutional under *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), *see* Brief for the United States as Amicus Curiae Supporting Respondent at 8, *Stenberg*, 530 U.S. 914 (No. 99-830), notwithstanding the fact that OSG's brief in *Casey* had unsuccessfully urged the Court to overrule *Roe*, *see* Brief for the United States as Amicus Curiae Supporting Respondents at 4, *Casey*, 505 U.S. 833 (Nos. 91-744 & 91-902). Of course, it is also possible that our search terms missed references to OSG's consistency in these cases.

legal position than had been taken by government lawyers in the lower courts. In other words, the types of flips that tend to receive the most attention—reversals by OSG on its positions before the Supreme Court—accounted for just thirty percent of the total, and there were only thirteen cases in which the government reversed its position before the Supreme Court in the same case. Five of those cases reflected the transition from Trump to Biden, and at least one reflected the transition from Obama to Trump.

Table 1: Summary Data

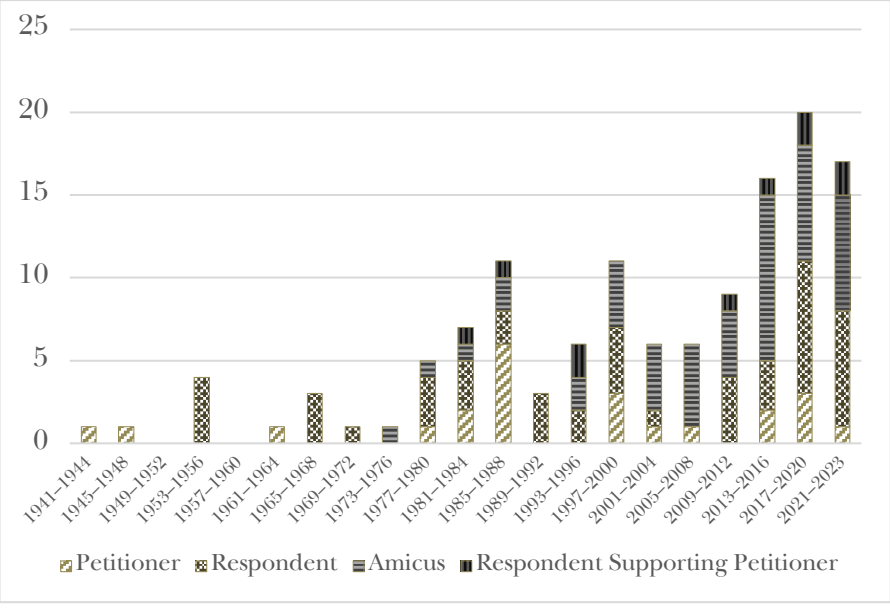
	Total Count	**Percent of Total**	**Win Percentage**
All flip cases	131	100%	59%
Government Role			
Petitioner	25	19%	54%
Respondent	48	37%	58%
Respondent, supporting petitioner/for reversal	10	8%	60%
Amicus	48	37%	63%
Type of Flip			
Change at SCOTUS (same case)	13	10%	31%
Change at SCOTUS (different case)	26	20%	58%
Change from lower court (same case)	49	37%	65%
Change from lower court (different case)	43	33%	63%

We also find that the number of flips—or, more accurately, observed flips—has increased dramatically over time. Figure A shows flips (after 1941), in four-year increments roughly matching presidential administrations.[141] We see more frequent reversals from the late 1970s onward. Since 1981, when President Reagan took office, there have been at least ten flips under every presidential administration,

141 For ease of readability, we have opted to not include in this graph the relatively few flips included on our list that were decided before 1941. Additionally, we note that some decisions issued in the first few months of a presidential administration were briefed and argued by OSG under the prior administration; for example, in four of the 2021 decisions, the relevant change in government position was made in briefs or oral argument statements by OSG under Trump. *See infra* note 148; *see also* Appendix A, subsection B.8. For purposes of Figure A, we show all cases in the year in which they were decided, but it is important to recognize that due to the delay between briefing and oral argument and the issuance of a decision, Figure A does not precisely track presidential administration.

other than that of George H.W. Bush.[142] As we explore more fully below, the increase is likely a consequence of heightened polarization. However, we suspect several other factors also play a role. For one, as time goes by, the government takes more litigating positions, and the possibility of conflict increases. The advent of modern search engines, such as Westlaw and Lexis, also has changed legal research in important ways. As search technology has improved and as historical materials have been increasingly digitized, it has become much easier for advocates, clerks, Justices, and the government itself to identify inconsistencies.[143] Additionally, *Chevron*, decided in 1984, explicitly invited agencies to update or reconsider policy choices. It is possible that the embrace of change in *Chevron* and its progeny also encouraged some of the flips we observe since the 1980s.

Figure A: Litigation Flips over Time, 1941–2023



As also shown in Figure A, the pattern of government participation has changed over time. Until the mid-1990s, the government's

142 The relatively low number of flips under the senior Bush likely reflects both that he served only a single term and that there was not a large ideological swing when he took over from President Reagan, for whom he had served as Vice President.

143 We also relied on modern search technology to locate these flips. By necessity, our searches were limited to the materials housed in these various databases. This allowed us to search relatively comprehensively back until the mid-twentieth century. Prior to that time, we were generally able to search the Supreme Court decisions but not necessarily the briefs or oral arguments. Appendix A provides greater detail.

role in flip cases was almost always a party. After that point, the government was far more likely to participate as amicus—and far less likely to appear as petitioner. This tracks (roughly, at least) overall trends for the SG's Office, which show a decreasing presence of the government as a party in Supreme Court litigation, especially as petitioner,[144] and a corresponding increase in the prevalence of amicus filings by OSG.[145]

Table 1 also offers a sense of the government's win rates in different kinds of "flip" cases, though we caution against placing great significance on the raw numbers. Overall, we find that the government, or the party supported by the government, prevailed in 59% of the "flip" cases. This is generally consistent, albeit on the low side, with studies reporting the SG's overall win rate as 60 to 70%.[146] The increased prevalence of flip cases in recent years may be an important factor here, as the success of the government in general appears to have declined in recent years.[147] Notably, our dataset includes thirteen cases in which Biden's SG and her colleagues were making arguments to a Court dominated by conservative Justices; the government prevailed in just 23% of these cases, dragging down the overall win rate.[148] If we exclude the Biden cases, the win rate is 63%.

144 *See* Epstein & Posner, *supra* note 44, at 843 (reporting decline in party status); *see also* Cordray & Cordray, *supra* note 45, at 1346 ("[D]uring the Roberts Court the federal government was the respondent in over twice as many cases as it was the petitioner, whereas this division used to be roughly equal.").

145 *See* Cordray & Cordray, *supra* note 45, at 1324 (reporting that "the Solicitor General now participates in considerably more cases as amicus than as a party (reversing the proportions of the 1980s)").

146 *See* sources cited *supra* note 45.

147 Lee Epstein and Eric Posner find that the President's win rate (a metric that largely tracks OSG's own win rate) has steadily declined in recent decades, from 77% in 1980 to just 48% by 2015. Epstein & Posner, *supra* note 44, at 839, 846–47. The authors do not purport to offer a definitive explanation for the decline but suggest it may be due to the increasing confidence and "activism" of the Court, as well as to the rise of an elite private Supreme Court bar during the same period, which has enabled opposing parties to offer advocacy that matches OSG's experience and expertise. *Id.* at 852, 852–59. Epstein and Posner note that they "lack a theory of judicial behavior that would account for the importance of lawyering in the Supreme Court," *id.* at 859—a question that dovetails in interesting ways with our inquiry into the Justices' reactions to SG flips. *See infra* Part IV for discussion.

148 To analyze the success rate of the Biden OSG, we included all 2022 and 2023 decisions in our dataset and those 2021 decisions in which the relevant "flip" in argument occurred after the beginning of Biden's presidency. However, we excluded four 2021 decisions that were briefed and/or argued in 2020 and in which the relevant change in government position was made in a filing or statement in oral argument by the Trump OSG, even though the Supreme Court decision was released during Biden's presidency. The four 2021 cases that are excluded are *Torres v. Madrid*, 141 S. Ct. 989 (2021); *Department of Justice*

If we disaggregate the overall win rate to track the government's role in the case, we can see that the government's win rate in flip cases as a petitioner is just 54%, lower than the 70 to 80% success rate that the government generally enjoys when it is a petitioner.[149] Its success as an amicus in flip cases also is lower than typical.[150] By contrast, the government's win rate as a respondent in flip cases is consistent with its win rate as respondent generally.[151] These findings are interesting. Earlier studies suggest OSG enjoys a higher win rate as petitioner and amicus because those are roles in which the government can choose its battles, appearing before the Court "only if it believes that the law is on its side."[152] With the aid of regression analysis, future empirical work could investigate whether the case-selection advantage is blunted in flip cases, where the SG is offering a new view of what "the law" is.

Finally, we note that the win rate when the government switches its position before the Supreme Court in the same case is just 31%. This could suggest that a majority of the Justices are hostile to what they perceive as purely "political" changes in position. However, only 10% of the flip cases fell into this category, and many of them are from the past few years; accordingly, the very low win rate may reflect the significant ideological divide between the Biden SG and the current Court majority, more than hostility to a last-minute flip per se.[153]

III. WHY FLIPS HAPPEN

When and why does the government change the legal position it presents to the courts? To the extent government reversals have been

v. House Committee on the Judiciary, 142 S. Ct. 46 (2021) (mem.); *Facebook, Inc. v. Duguid*, 141 S. Ct. 1163 (2021); and *Brnovich v. Democratic National Committee*, 141 S. Ct. 2321 (2021).

149 *See supra* note 45 (collecting studies on SG win rates).

150 In flip cases, we find the government's win rate as an amicus is 63%. Most general studies of the SG's success rate as an amicus report ranges from 70 to 80%. *See* BLACK & OWENS, *supra* note 45, at 26 fig.2.3.

151 In flip cases, we find the government's success as a respondent to be 58%; more general studies typically put the success rate for the government as respondent at 50 to 60%. *See* Corday & Cordray, *supra* note 45, at 1335.

152 Epstein & Posner, *supra* note 44, at 839, 838–40 (describing the government's advantage in case selection, relative to private litigants, and noting that it "explains why the president's win rate is higher when he is a petitioner choosing to bring a case to the Court than when he is a respondent forced to defend whatever case a private litigant happens to persuade the Supreme Court to hear," *id.* at 840).

153 Of course, different Justices may vote for or against the SG for different reasons. We have not coded the individual Justices' votes in flip cases. It may be the case that some Justices are more troubled by flips than other Justices, regardless of the ideological valence of the flip; it is also possible that some Justices react differently to flips depending on the administration in office. Those questions would benefit from future empirical work on this subject.

discussed in prior scholarship, most theorists have focused on the ideological shifts that can accompany a change in presidential administration.[154] White House transitions do contribute to flips—undoubtedly so—but, we argue, they should be understood in the larger litigation context in which OSG operates. As the discussion in Part I suggested, when one takes account of the full span of the government both laterally (across different departments and agencies) and longitudinally (over time), the challenge of maintaining consistency in legal argument becomes clear. And as the previous Part detailed, the majority of flip cases involve departures from the positions taken in the lower courts by DOJ or other agency lawyers. Yet this complexity can be hard to appreciate when looking through the narrow prism of a single case being argued by OSG at a single moment in time—which may help explain why flips of all types often garner derision from the Justices and other parties. To illustrate how the lateral and longitudinal aspects of consistency can interact, this Part uses a detailed case study of a flip concerning accommodations for pregnancy in the workplace—supplemented by other examples—to draw out the various dynamics that appear to drive flips.

A. A Case Study on Flips: The Story of Pregnancy Accommodations

On December 3, 2014, Solicitor General Donald B. Verrilli began his argument in support of Peggy Young, a package deliverer for United Parcel Services, Inc. (UPS), who had asked UPS to excuse her from heavy lifting while she was pregnant.[155] When Justice Ruth Bader Ginsburg, long a champion of women's rights, asked the first question, Verrilli probably expected a softball. Instead, Justice Ginsburg challenged him to explain why the SG was supporting Young when "the government" had previously defended a policy functionally equivalent to UPS's, especially since in that earlier litigation government lawyers had characterized the argument now advanced by the SG as "frivolous" and "contrived."[156] UPS's lawyer came back to the theme of inconsistency during her presentation, characterizing OSG's position as a "180-degree change from the position that the government has consistently taken."[157]

The case, *Young v. United Parcel Service, Inc.*,[158] concerned the meaning of the Pregnancy Discrimination Act's (PDA) mandate that

154 *See* sources cited *supra* note 14.

155 *See generally* Transcript of Oral Argument, Young v. United Parcel Serv., Inc., 575 U.S. 206 (2015) (No. 12-1226) [hereinafter *Young* Transcript].

156 *Id.* at 19.

157 *Id.* at 52.

158 *Young*, 575 U.S. 206.

employers treat pregnant employees "the same" as "other persons not so affected but *similar in their ability or inability to work*."[159] Although UPS refused to accommodate Young's request for relief from heavy lifting, it regularly provided light-duty positions to employees with workplace injuries, employees with disabilities recognized under federal disability law, and employees who temporarily lost their Department of Transportation certifications.[160] UPS claimed that because it had "pregnancy-blind" reasons that distinguished the other workers (e.g., they had been injured on the job), those workers were not relevantly "similar" to Young.[161] Young insisted that what mattered was not the cause but the nature of the limitation, and that many of those who received accommodations had lifting restrictions that were comparable to hers.[162]

The question in *Young* had been percolating in the lower courts for decades. In 1979, immediately after the PDA was enacted, the EEOC issued guidance specifying that the statute required employers to treat pregnant employees like other employees with temporary disabilities.[163] In an accompanying appendix, the agency explained that "[i]f other employees temporarily unable to lift are relieved of these functions, pregnant employees also unable to lift must be temporarily relieved of the function."[164] The guidance did not directly address the question raised by Young's case, however: how the PDA applied when an employer accommodated some, but not all, temporary disabilities.[165] That question arises frequently because many employers offer

159 42 U.S.C. § 2000e(k) (2012) (emphasis added).

160 *See Young*, 575 U.S. at 211–12.

161 Brief for Respondent at 50, 53, 50–52, *Young*, 575 U.S. 206 (No. 12-1226).

162 Petitioner's Brief at 32–45, *Young*, 575 U.S. 206 (No. 12-1226).

163 *See* Guidelines on Discrimination Because of Sex Under Title VII of the Civil Rights Act of 1964, As Amended, 44 Fed. Reg. 13278, 13278 (Mar. 9, 1979) (codified at 29 C.F.R. § 1604.10) ("Disabilities caused or contributed to by pregnancy . . . for all-job-related purposes, shall be treated the same as disabilities caused or contributed to by other medical conditions.").

164 *Id.* at 13280 (codified at 29 C.F.R. § 1604 app.). This general point was repeated in subsequent EEOC guidance. *See* U.S. EQUAL EMP. OPPORTUNITY COMM'N, NOTICE NO. 915.002, ENFORCEMENT GUIDANCE: UNLAWFUL DISPARATE TREATMENT OF WORKERS WITH CAREGIVING RESPONSIBILITIES (2007) ("An employer also may not treat a pregnant worker who is temporarily unable to perform some of her job duties because of pregnancy less favorably than workers whose job performance is similarly restricted because of conditions other than pregnancy."); U.S. EQUAL EMP. OPPORTUNITY COMM'N, EMPLOYER BEST PRACTICES FOR WORKERS WITH CAREGIVING RESPONSIBILITIES (Apr. 22, 2007) (listing as a prohibited practice "providing reasonable accommodations for temporary medical conditions but not for pregnancy").

165 *See Young*, 575 U.S. at 223–24 ("This post-Act guidance . . . simply tells employers to treat pregnancy-related disabilities like nonpregnancy-related disabilities, without clarifying how that instruction should be implemented when an employer does not treat all nonpregnancy-related disabilities alike."). For an argument that the plain text should have

light-duty positions to workers injured on the job, in part to reduce costs under workers' compensation laws.[166]

During the 1980s and 1990s, several postal workers sued the United States Postal Service (USPS) for failing to accommodate restrictions related to their pregnancies. After utilizing the USPS's internal complaint process, the workers proceeded through the EEOC's administrative review process for federal workers but were unsuccessful in securing relief.[167] The workers then filed claims in federal court alleging violations of the PDA. In the litigation, the USPS—represented by lawyers from the Postal Service and DOJ—argued that it was permissible for the Postal Service to reserve its less physically demanding positions for employees injured at work.[168] Some courts endorsed the government's interpretation,[169] while others reasoned that workers with on-the-job injuries were "similar" to pregnant employees under the PDA.[170]

Investigators and lawyers in the EEOC's field offices, which review charges of discrimination in the private sector, also were seeing a steady stream of such claims. The EEOC is empowered to bring litigation on behalf of individual claimants. It typically does so when it deems there will be a significant impact beyond the particular dispute

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been interpreted to require accommodations for pregnant workers in this scenario, see Deborah A. Widiss, Gilbert *Redux: The Interaction of the Pregnancy Discrimination Act and the Amended Americans with Disabilities Act*, 46 U.C. DAVIS L. REV. 961, 1025–35 (2013).

166 *See, e.g.*, Niklas Krause, Lisa K. Dasinger & Frank Neuhauser, *Modified Work and Return to Work: A Review of the Literature*, 8 J. OCCUPATIONAL REHAB. 113, 135 (1998) (concluding light-duty programs may lead to "substantial reductions" in workers' compensation costs). In the federal sector, the Federal Employees' Compensation Act (FECA) works similarly. *See generally* 5 U.S.C. § 8106 (2018); 20 C.F.R. § 10.507(b) (2024).

167 Lawyers in the EEOC's Office of Federal Operations handle appeals of federal agencies' orders on discrimination complaints. *See Overview of Federal Sector EEO Complaint Process*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/federal-sector/overview-federal-sector-eeo-complaint-process [https://perma.cc/XB5T-K6XJ]. In at least two of the USPS cases, the Commission issued decisions in favor of the USPS. *See* White v. Frank, EEOC Decision No. 01892607, 1989 WL 1007559 (Nov. 15, 1989); Ensley Gaines v. Runyon, EEOC Decision No. 01930820, 1993 WL 13119163 (June 30, 1993).

168 *See* White v. Frank, No. 92-1579, 8 F.3d 823, 1993 WL 411742, at *1–2 (4th Cir. 1993) (per curiam) (unpublished table decision); Ensley-Gaines v. Runyon, 100 F.3d 1220, 1222 (6th Cir. 1996); Guarino v. Potter, 102 F. App'x 865, 867 (5th Cir. 2004).

169 *See Guarino*, 102 F. App'x at 868 (following circuit precedent that held that a distinction between on-the-job and off-the-job injuries was permissible "as long as it is applied equally"); *see also White*, 1993 WL 411742, at *5 (reversing district court's denial of summary judgment to the Postal Service on grounds that the plaintiff had failed to provide evidence that any rural carriers received light duty).

170 *See Ensley-Gaines*, 100 F.3d at 1226 (reversing grant of summary judgment to the USPS and suggesting that workers with on-the-job injuries were potential comparators for pregnant employees under the PDA).

and especially where the law is unsettled.[171] Disputes over pregnancy accommodations fit squarely within that mandate, and the EEOC successfully litigated at least two cases on behalf of women denied accommodations for pregnancy.[172] In both cases, the evidence suggested the employers at least sometimes accommodated off-the-job injuries, so the EEOC did not need to press the claim that policies providing light duty only for workplace injuries were per se unlawful.[173] Meanwhile, a growing number of circuits held that it was permissible for employers to limit light-duty positions to workplace injuries.[174]

The stakes in determining who counted as a potential comparator under the PDA became even more pressing in 2008, when the primary federal disability law, the Americans with Disabilities Act (ADA), was amended in a way that dramatically expanded the scope of disabilities that employers needed to accommodate.[175] While a normal pregnancy still was not considered a "disability," other conditions that caused temporary limitations similar to those caused by pregnancy increasingly were qualifying disabilities.[176] If employers could point to the ADA as a "pregnancy-blind" reason for accommodating some conditions while

171 *See, e.g.*, *U.S. Equal Employment Opportunity Commission National Enforcement Plan*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/us-equal-employment-opportunity-commission-national-enforcement-plan [https://perma.cc/4EQN-CQCE].

172 *See* EEOC v. Horizon/CMS Healthcare Corp., 220 F.3d 1184, 1195–96 (10th Cir. 2000); EEOC v. Ackerman, Hood & McQueen, Inc., 956 F.2d 944, 948 (10th Cir. 1992).

173 *See Horizon/CMS Healthcare*, 220 F.3d at 1195–96; *Ackerman, Hood & McQueen*, 956 F.2d at 948. In the district court in the *Horizon/CMS Healthcare* case, the EEOC argued that the light-duty policy was direct evidence of discrimination, but it abandoned that argument before the circuit court. *See Horizon/CMS Healthcare*, 220 F.3d at 1191. This was likely a strategic choice to avoid direct conflict with other circuits' precedent by relying instead on a fact-specific argument that the employer did not consistently limit accommodations to workplace injuries. *See* Response of the Equal Employment Opportunity Commission to the Defendant-Appellee Horizon/CMS Healthcare Corporation's Petition for Rehearing En Banc, *Horizon/CMS Healthcare*, 220 F.3d 1184 (No. 98-2328) (contending that because the agency had "waived off" the argument that limiting light duty to workplace injuries was per se illegal, the panel decision did not conflict with the decisions of other circuit courts). Disclaiming this argument also had the effect of minimizing the conflict with the position the Postal Service was taking as a defendant in such cases, although it's not clear whether the EEOC lawyers involved were doing so consciously.

174 *See* Serednyj v. Beverly Healthcare, LLC, 656 F.3d 540, 548–49 (7th Cir. 2011); Reeves v. Swift Transp. Co., 446 F.3d 637, 642 (6th Cir. 2006); Spivey v. Beverly Enters., Inc., 196 F.3d 1309, 1312–13 (11th Cir. 1999); Urbano v. Cont'l Airlines, Inc., 138 F.3d 204, 206 (5th Cir. 1998), *all abrogated by* Young v. United Parcel Serv., Inc., 575 U.S. 206 (2015).

175 *See* 42 U.S.C. § 12102(4) (2018) (providing that the amended disability definition "shall be construed in favor of broad coverage" and that it can include disabilities that are episodic or in remission and without regard to the ameliorative effects of mitigating measures); *see also* 29 C.F.R. § 1630.2(j)(ix) (2023) (providing "[t]he effects of an impairment lasting or expected to last fewer than six months" can be a qualifying disability).

176 Widiss, *supra* note 165, at 1006–07 (gathering cases).

excluding those caused by pregnancy, the broadening of disability law would have the almost certainly unintended effect of weakening support for pregnant workers.[177] At a 2012 EEOC meeting, two experts raised questions about how the PDA's same-treatment language applied to such accommodations.[178] In December 2012, the EEOC released a strategic enforcement plan highlighting the issue as a priority, and subsequently it announced it would release formal guidance on the question.[179]

During this time of uncertainty, Peggy Young was pursuing her case against UPS. Young had requested an accommodation from UPS in 2006.[180] In 2008, she filed her case in court, and in 2013, after losing at the Fourth Circuit, she filed a petition for certiorari.[181] The Supreme Court asked the SG to weigh in on whether the Court should grant cert. The SG took the position that most circuit courts (including the Fourth Circuit in Young's case) had misinterpreted the PDA.[182] OSG advised the Court to deny cert, however, noting that the EEOC was working on guidance on the issue and that courts were still in the early years of assessing how the amendments to the disability law impacted the analysis.[183]

In a supplemental brief opposing the cert petition, UPS then raised a new argument: the SG's interpretation was inconsistent with the position "the government" had taken in defending suits by "*its own* employees."[184] UPS was referring to the position previously taken by government lawyers representing the U.S. Postal Service.

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177 *See id.* at 964, 1024–25, 1030–33 (discussing this issue).

178 *See Unlawful Discrimination Against Pregnant Workers and Workers with Caregiving Responsibilities: Meeting of the U.S. Equal Emp. Opportunity Comm'n* (2012) (statement of Emily Martin, Vice President and Gen. Couns., Nat'l Women's L. Ctr.), https://www.eeoc.gov/meetings/meeting-february-15-2012-unlawful-discrimination-against-pregnant-workers-and-workers/martin [https://perma.cc/TJ4C-RSK7]; *id.* (statement of Joan C. Williams, Distinguished Professor of L., UC Hastings Found. Chair, & Dir., Ctr. for WorkLife L.), https://www.eeoc.gov/meetings/meeting-february-15-2012-unlawful-discrimination-against-pregnant-workers-and-workers/williams [https://perma.cc/ZV59-7NWR].

179 *See* U.S. EQUAL EMP. OPPORTUNITY COMM'N, STRATEGIC ENFORCEMENT PLAN FY 2013–2016 (2012), https://www.eeoc.gov/us-equal-employment-opportunity-commission-strategic-enforcement-plan-fy-2013-2016 [https://perma.cc/V2U8-CDSR].

180 Young v. United Parcel Serv., Inc., 575 U.S. 206, 211–12 (2015).

181 *See* Petition for a Writ of Certiorari, *Young*, 575 U.S. 206 (No. 12-1226).

182 *See* Brief for the United States as Amicus Curiae Supporting Petitioner at 11, *Young*, 575 U.S. 206 (No. 12-1226) (arguing that evidence that UPS routinely accommodated other employees was at least sufficient to establish a prima facie case of pregnancy discrimination).

183 *See id.* at 20–22.

184 Supplemental Brief for Respondent at 3, *Young*, 575 U.S. 206 (No. 12-1226).

The Court granted cert in Young's case in July 2014.[185] Two weeks later, the EEOC issued the promised guidance. The new guidance was generally consistent with the agency's earlier interpretations of the PDA, but it explicitly answered the question at the heart of *Young* and so many prior cases. Specifically, the guidance provided that

> [a]n employer may not refuse to treat a pregnant worker the same as other employees who are similar in their ability or inability to work by relying on a policy that makes distinctions based on the source of an employee's limitations (e.g., a policy of providing light duty only to workers injured on the job).[186]

The following fall, merits briefs were due in Young's case. The SG's merits-stage amicus brief, also signed by the general counsel and other lawyers at the EEOC, took the position that a policy limiting accommodations to on-the-job injuries was direct evidence of a violation of the PDA. It argued that this interpretation was compelled by the plain text of the PDA.[187] To the extent the statute was ambiguous, OSG's brief urged the Court to defer to the EEOC's guidance under *Skidmore*, noting that the 2014 guidance was consistent with earlier EEOC guidance and with the positions the EEOC had taken in litigation.[188] The brief acknowledged that DOJ, on behalf of the Postal Service, had previously argued pregnant employees were not similar to those with on-the-job injuries, but indicated that USPS was reconsidering its policies "[i]n light of the EEOC's new guidance, the enactment of the ADA Amendments . . . , and the pendency of this case."[189]

UPS's merits brief, not surprisingly, emphasized the theme of inconsistency. The company asserted that "[w]hen its own ox was being gored," "the government" had taken the same position as UPS.[190] As noted above, the disconnect between the position advocated by the

185 Young v. United Parcel Serv., Inc., 573 U.S. 957 (2014) (mem.).

186 U.S. EQUAL EMP. OPPORTUNITY COMM'N, NOTICE NO. 915.003, ENFORCEMENT GUIDANCE: PREGNANCY DISCRIMINATION AND RELATED ISSUES (2014), https://web.archive.org/web/20141219193255/http://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm [https://perma.cc/28S6-BYNJ]. The EEOC has since updated its guidance to reflect the Court's decision in *Young*.

187 *See* Brief for the United States as Amicus Curiae Supporting Petitioner, *supra* note 182, at 13–16.

188 *See id.* at 26–29. EEOC guidance interpreting substantive provisions of Title VII does not operate with the force of law and therefore did not qualify for *Chevron* deference, even when *Chevron* was still good law. *See, e.g.*, EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 257–58 (1991).

189 Brief for the United States as Amicus Curiae Supporting Petitioner, *supra* note 182, at 16 n.2 (citation omitted).

190 Brief for Respondent, *supra* at 161, at 16.

government in *Young* and the defensive arguments it had made in the Postal Service cases was discussed during oral argument as well.[191]

Ultimately, although the Justices adopted an interpretation of the statute that was close to the reading Young and the SG had advocated, they refused to place any weight on the EEOC's guidance. The Court insisted it was not questioning the EEOC's "experience" or "informed judgment."[192] It emphasized, however, that the EEOC's position was "inconsistent with positions for which the Government has long advocated" and faulted the EEOC for failing to adequately explain the basis for this divergence from "the litigation position the Government previously took."[193] Those factors, the Court reasoned, "severely limit the EEOC's July 2014 guidance's special power to persuade."[194]

B. Unpacking Flips

Young illustrates the dynamics that can, in isolation and especially in combination, lead to litigation flips by the government. The remainder of this Part identifies four factors that appear to have driven the flip in *Young* as well as in many of the other cases we found. We begin with the obvious—changes in presidential administration—but the bulk of this Section explores forces beyond political transitions that can contribute to changes in legal argumentation.

1. Changes in Presidential Administration

In the *Young* case, the "the government's" position in 2014 likely was influenced by the Obama administration's general support for workers' and women's rights.[195] If so, *Young* is hardly an outlier. The heightened polarization of recent years and the dramatic swings between the policies endorsed by President Obama, President Trump, and then President Biden have yielded multiple high-profile cases in which the government has reversed itself on the meaning of the law. The (first) Trump administration featured reversals on the

191 *See supra* text accompanying notes 155–57.

192 Young v. United Parcel Serv., Inc., 575 U.S. 206, 225 (2015).

193 *Id.*

194 *Id.*

195 The EEOC is an independent bipartisan agency, so the President's influence is somewhat indirect. Its five commissioners are appointed by the President and confirmed by the Senate; although they serve staggered five-year terms, the chair and two other members come from the majority party and the remaining two commissioners come from the minority party. *See EEOC Office Overviews*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/eeoc-office-overviews [https://perma.cc/MMU6-4UTR].

constitutionality of union dues,[196] the interaction between arbitration and labor law,[197] the appointment of Administrative Law Judges[198] and the removal of agency heads,[199] criminal sentencing guidelines,[200] election law,[201] LGBTQ discrimination,[202] and more.[203] The Biden OSG changed the government's litigating position in cases involving affirmative action in higher education,[204] religious accommodations in employment,[205] habeas review,[206] First Amendment protections,[207] voting rights,[208] the Affordable Care Act,[209] environmental regulation,[210] and criminal sentencing.[211] As this Article goes to press shortly after the reelection of President Trump, commentators already are predicting a new wave of litigation flips.[212]

Such reversals are not a new phenomenon. Seemingly ideological flips in legal argument have regularly occurred alongside changes in party control of the presidency at least since the 1980s, with scattered examples in earlier decades. To name just a few, the Reagan[213] and

196 *See* Janus v. Am. Fed'n of State, Cnty. & Mun. Emps., Council 31, 138 S. Ct. 2448, 2486 (2018).

197 *See* Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1632 (2018).

198 *See* Lucia v. SEC, 138 S. Ct. 2044, 2049, 2056 (2018).

199 *See* Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2211 (2020).

200 *See* Koons v. United States, 138 S. Ct. 1783, 1790 (2018).

201 *See* Husted v. A. Philip Randolph Inst., 138 S. Ct. 1833, 1848 (2018).

202 *See* Bostock v. Clayton County, 140 S. Ct. 1731, 1754 (2020).

203 *See* Dreeben, *supra* note 10, at 552–54 (discussing Trump-era flips).

204 *See* Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 143 S. Ct. 2141, 2176 (2023).

205 *See* Groff v. DeJoy, 143 S. Ct. 2279, 2286, 2293 (2023).

206 *See* Jones v. Hendrix, 143 S. Ct. 1857, 1877 (2023).

207 *See* Ams. for Prosperity Found. v. Bonta, 141 S. Ct. 2373, 2389 (2021).

208 *See* Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321, 2350 (2021).

209 *See* California v. Texas, 141 S. Ct. 2104, 2120 (2021).

210 *See* HollyFrontier Cheyenne Refin., LLC v. Renewable Fuels Ass'n, 141 S. Ct. 2172, 2183 (2021).

211 *See* Terry v. United States, 141 S. Ct. 1858, 1862 (2021); *see also* Rodríguez, *supra* note 14, at 18–32 (discussing Biden-era flips).

212 *See, e.g.*, Adam Liptak, *Trump's Supreme Court Agenda Is Likely to Include Legal U-Turns*, N.Y. TIMES (Nov. 8, 2024), https://www.nytimes.com/2024/11/08/us/politics/trump-supreme-court.html [https://perma.cc/BBM6-3U8W]; John Kruzel & Andrew Chung, *Under Trump, US Government Legal Stance Poised to Shift at Supreme Court*, REUTERS (Nov. 14, 2024, 3:27 PM EST), https://www.reuters.com/legal/under-trump-us-government-legal-stance-poised-shift-supreme-court-2024-11-14/ [https://perma.cc/2CTL-67YM].

213 *See* Loc. 28 of the Sheet Metal Workers' Int'l Ass'n v. EEOC, 478 U.S. 421, 465 (1986) (changing position on race-based affirmative action); Bob Jones Univ. v. United States, 461 U.S. 574, 577, 600 (1983) (changing position on tax exemption for racially discriminatory schools); Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457, 471 (1982) (changing position on state measures to desegregate schools).

Clinton[214] administrations flipped on a variety of issues related to race, the George W. Bush administration flipped on preemption of state law,[215] and the Obama administration flipped on criminal sentencing[216]—in addition to pregnancy discrimination.[217]

Even if ideological flips can be traced back over time, commentators have suggested that inconsistency in the government's litigating positions has increased in recent years and is likely to continue to increase, due to political polarization. For example, Professor Cristina Rodríguez discusses litigation reversals associated with changes in presidential administration as part of her analysis of "regime change" and observes that "[i]n a polarized context such as ours, in which the two political parties each have reasonable prospects of controlling the presidency (and Congress for that matter), and the prospects for consensus building seem dim, political and institutional conditions are likely to produce significant swings in policy."[218] Our study provides significant support for that claim. As noted above, we find a relatively steady increase in (observed) flip cases beginning in the late 1970s and rising sharply in the past decade. While other factors—such as modern search technology—make it increasingly easy to locate such reversals, it also seems apparent that ideology is playing a role.

Political polarization might contribute to flips in a second way as well. The overwhelming majority of "flip" cases we found involve the interpretation of statutes—statutes that could, in theory, be amended or clarified by Congress. To the extent polarization contributes to gridlock in Congress, it may reduce the likelihood that Congress will step in to update statutes to account for changed circumstances or to address new challenges.[219] Congressional inaction, in turn, may place

214 *See, e.g.*, Taxman v. Bd. of. Educ., 91 F.3d 1547 (3d Cir. 1996) (changing position on race-based affirmative action); Margaret H. Lemos, *Three Models of Adjudicative Representation*, 165 U. PA. L. REV. 1743, 1756 (2017) (describing the *Taxman* litigation in the Third Circuit and Supreme Court).

215 *See* Wyeth v. Levine, 555 U.S. 555, 563 (2009); Riegel v. Medtronic, Inc., 552 U.S. 312, 326 (2008); Bates v. Dow AgroSciences LLC, 544 U.S. 431, 436–37 (2005).

216 *See* Dorsey v. United States, 567 U.S. 260, 273 (2012) (changing position on application of statutory amendment reducing sentences for crack cocaine).

217 *See supra* notes 187–89 and accompanying text; *see also* Dreeben, *supra* note 10, at 548–51 (describing Obama-era flips).

218 Rodríguez, *supra* note 14, at 53–54 (footnote omitted).

219 *See* Mathew R. Christiansen & William N. Eskridge, Jr., *Congressional Overrides of Supreme Court Statutory Interpretation Decisions, 1967–2011*, 92 TEX. L. REV. 1317, 1332 (2014) (finding dramatic decline in overrides after 1998); Richard L. Hasen, *End of the Dialogue? Political Polarization, the Supreme Court, and Congress*, 86 S. CAL. L. REV. 205, 209 (2013) (using a different methodology to identify overrides and placing the beginning of the decline in the early 1990s).

more pressure on executive actors to revise their interpretations of statutes to adjust to current conditions.[220]

The perception of increasingly "political" interpretations by OSG also may reflect changes in the way the SG has explained flips to the Justices. The SG's explanations tend to be terse, but they have changed over time. Some of the explanatory shifts seem to be merely semantic, such as whether a change is characterized as based on "further reflection" or "further consideration."[221] A more meaningful linguistic change appears to have occurred in the last decade: the explicit acknowledgement of a change in presidential administration. In several Obama-era cases, the Justices pressed the SG during oral argument on the connection between a change in administration and the change in the legal argument being offered.[222] Perhaps in response, OSG explained several Trump-era flips as reflecting reconsideration

220 *See, e.g.*, Jody Freeman & David B. Spence, *Old Statutes, New Problems*, 163 U. PA. L. REV. 1, 5 (2014) ("[T]ypical statutory obsolescence made worse by atypical congressional dysfunction puts tremendous pressure on agencies to do *something* to address new problems . . . .").

221 Josh Blackman discusses litigation flips in the Obama administration, focusing on the language "'upon further reflection'"—which, he claims, "is usually understood to mean 'upon further election.'" Blackman, *supra* note 14, at 409 (quoting Tony Mauro, *Roberts Takes SG's Office to Task over Shifting Positions*, NAT'L L.J. (Nov. 27, 2012), https://www.law.com/nationallawjournal/almID/1202579510215/ [https://perma.cc/9BSS-D2Q8]). Blackman suggests it is significant that he did not find use of the phrase in briefs submitted by the Bush, Clinton, or Bush II OSGs. *Id.* at 410. We suspect the lacuna is due to the fact that OSG seems to have shifted from "reflection" to "consideration" (or "reconsideration") during those years. *See, e.g.*, Brief for the United States at 14 n.4, Gutierrez de Martinez v. Lamagno, 515 U.S. 417 (1995) (No. 94-167) ("Upon further consideration, the United States changed its position."); *see also infra* Appendix B, Table 1, Column E (listing other briefs from that period that use "consideration").

222 *See, e.g.*, Transcript of Oral Argument at 32, US Airways, Inc. v. McCutchen, 569 U.S. 88 (2013) (No. 11-1285) [hereinafter *US Airways* Transcript]; *Kiobel* Transcript, *supra* note 92, at 43–44.

"after the change in administration."[223] OSG continued that practice under the Biden administration.[224]

In sum, change-of-administration flips not only have become more prevalent, but have become more visible. Such flips are undoubtedly important and worthy of the attention they have received. Yet, as the story of *Young* suggests and as we detail below, political developments are not the only factors that cause the government to reconsider its legal positions.

2. Two Hats

We have already highlighted one of those additional factors: the reality that the government appears in court wearing many different "hats," as it were. The Postal Service's perspective on a question of employment discrimination law was colored by its status as employer, the EEOC's by its status as enforcer on behalf of victims of discrimination. As the SG put it during oral argument in *Young*, the case forced the government to "weigh [its] interest as enforcer of the law as well as employer."[225] The potential for such intragovernmental conflicts poses challenges for lateral consistency—and even more so, as we've stressed, for longitudinal consistency.

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223 *See, e.g.*, Brief for the United States as Amicus Curiae Supporting Petitioner at 14, Husted v. A. Philip Randolph Inst., 138 S. Ct. 1833 (2018) (No. 16-980) ("After this Court's grant of review and the change in Administrations, the Department reconsidered the question."). For more examples, see *infra* Appendix B, Table 1, Column E. Note that the practice does not seem to have begun immediately following President Trump's assumption of office, nor did it extend to all cases. For example, in *Janus v. American Federation of State, County, & Municipal Employees, Council 31*, 138 S. Ct. 2448 (2018), the SG reversed its position on a significant constitutional question, rejecting the position the government had taken before the Court four years prior and urging the Justices to overrule their own precedent. Rodríguez, *supra* note 14, at 16 n.49. The SG's amicus brief stated only that "[f]ollowing the grant of certiorari in this case, the government reconsidered the question and reached the opposite conclusion." Brief for the United States as Amicus Curiae Supporting Petitioner at 11, *Janus*, 138 S. Ct. 2448 (No. 16-1466). The government's reversal prompted a lively exchange at oral argument during which Justice Sotomayor expressed confusion about the government's "radical new position" and asked the SG, "[H]ow many times this term already have you flipped positions from prior administrations?" *Janus* Transcript, *supra* note 93, at 34. (It was February 2018, and the answer was three. *Id.* at 1, 34.) The government's brief in *Janus* was filed in December 2017; compare, for example, the brief in *Husted*, *supra*—filed August 2017—which acknowledged the change in administration.

224 *See, e.g.*, Brief for the United States as Amicus Curiae Supporting Respondent at 31, Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 143 S. Ct. 2141 (2023) (No. 20-1199) ("Having reexamined the case following the court of appeals' decision and the change in Administrations, the United States has concluded that there is no sound basis to set aside the concurrent findings of both lower courts . . . .").

225 *Young* Transcript, *supra* note 155, at 21.

A sizeable share of flip cases feature a similar pattern, where the government takes a position in Case 1 involving Agency A, and then reconsiders that position when subsequent events (including litigation) put the issue squarely before Agency B. As in the postal litigation that predated *Young*, some of the cases feature the government wearing one "hat" similar to that of a private party—as employer, for example, or property owner—and another "hat" as regulator.[226] In other cases, two or more agencies each have a special regulatory expertise or perspective. Often in these cases, one agency ultimately defers to the position taken by another. For example, *Retirement Plans Committee of IBM v. Jander* concerned the scope of the fiduciary duties the Employee Retirement Income Security Act (ERISA) imposes on plan fiduciaries.[227] ERISA is enforced by the Department of Labor (DOL), but ERISA plans typically invest in securities regulated by the Securities and Exchange Commission (SEC).[228] In an amicus brief in prior litigation before a circuit court, DOL had taken the position that ERISA might sometimes impose a duty to disclose nonpublic information even when the securities laws would not require such disclosure.[229] In *Jander*, "[a]fter further reflection and consultation with the SEC," the government "reconsidered that position."[230] Similarly, *Kennedy v. Plan Administrator for DuPont Savings & Investment Plan* concerned an ERISA policy that implicated a tax regulation, and DOL reconsidered a position that conflicted with the position taken by Treasury.[231]

In at least a few instances, the relevant agencies are not able to resolve the differences. For example, *Dunn v. Commodity Futures Trading Commission* concerned whether the Commodity Futures Trading Commission (CFTC) had authority over foreign currency options, an issue in which both the CFTC, an independent agency, and the Treasury Department had a direct interest.[232] At the cert stage, the government—in a brief submitted jointly on behalf of the CFTC, Treasury, and OSG—acknowledged that "[t]he Department of the Treasury and the CFTC ha[d] expressed contrary views on the statutory issue involved here," but argued against review on the ground that the

226 *See, e.g.*, United States v. Atl. Rsch. Corp., 551 U.S. 128, 133–34 (2007) (involving a suit against the Department of Defense as property owner, seeking contribution for a share of the cost of environmental cleanup, and pitting DOD's interest as property owner against EPA's interest in strong enforcement of the Superfund program).

227 Ret. Plans Comm. of IBM v. Jander, 140 S. Ct. 592, 594 (2020).

228 *Id.* at 594–95; *see* Brief for the United States as Amicus Curiae Supporting Neither Party at 1, *Jander*, 140 S. Ct. 592 (No. 18-1165).

229 Brief for the United States, *supra* note 228, at 24 n.3.

230 *Id.*

231 *See* Brief for the United States as Amicus Curiae in Support of Neither Party at 20 n.6, Kennedy v. Plan Adm'r for DuPont Sav. & Inv. Plan, 555 U.S. 285 (2009) (No. 07-636).

232 Dunn v. Commodity Futures Trading Comm'n, 519 U.S. 465, 480 (1997).

agencies had "instituted discussions that may lead to a regulatory or legislative resolution of their differences."[233] Those discussions were apparently unsuccessful. The merits brief was submitted by CFTC and OSG, with the notable absence of Treasury.[234] This fact was highlighted by the petitioner during oral argument to bolster his claim for the interpretation that had been favored by the Treasury department,[235] and ultimately the Court adopted Treasury's approach.[236]

3. Changed Circumstances

Longitudinal consistency also can be challenging outside "two hats" scenarios. Consider *Young* again. If we focus exclusively on the EEOC, we can see that the agency's position was not static. In the postal litigation, the agency's Office of Federal Compliance (a division separate from the field offices that litigate on behalf of private employees[237]) endorsed the Postal Service's policy as permissible,[238] and the EEOC's early litigation focused on cases where the evidence showed the employer at least sometimes accommodated non-workplace-related injuries.[239] It was not until the 2014 guidance that the EEOC clearly took the position that employers could not limit accommodations to on-the-job injuries or to those with ADA-qualifying disabilities. That clarity was forged by decades of litigation on this very point, which made evident that the prior guidance was not sufficiently clear. The EEOC's 2014 guidance also reflected its assessment of the significance of the interactions between the PDA and disability law after the 2008 amendments to the latter.

Other flip cases likewise illustrate how the passage of time, experience with the relevant legal regime, and intervening changes in

233 *See* Brief in Opposition for the Commodity Futures Trading Commission and for the United States as Amicus Curiae at 8, *Dunn*, 519 U.S. 465 (No. 95-1181).

234 *See* Brief for the Commodity Futures Trading Commission, *Dunn*, 519 U.S. 465 (No. 95-1181).

235 *See* Transcript of Oral Argument at 24–25, *Dunn*, 519 U.S. 465 (No. 95-1181).

236 *See Dunn*, 519 U.S. at 469–70 ("We are not persuaded by any of the arguments advanced by the CFTC in support of a narrower reading . . . .").

237 *See Enforcement*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/enforcement [https://perma.cc/MPM5-STQ5] (describing federal sector enforcement as entirely separate from private sector enforcement); *EEOC Organizational Structure*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/eeoc-organizational-structure [https://perma.cc/W87S-FXVD] (showing the federal operations office does not share reporting lines or direction with the field offices). To the best of our knowledge, this separation was present in the 1980s and 1990s as well.

238 *See* Ensley Gaines v. Runyon, EEOC Decision No. 01930820, 1993 WL 13119163 (June 30, 1993); White v. Frank, EEOC Decision No. 01892607, 1989 WL 1007559 (Nov. 15, 1989).

239 *See supra* notes 172–73 and accompanying text.

statutes and regulations or in judicial interpretations can put pressure on longitudinal consistency. In *Shearson/American Express, Inc. v. McMahon*,[240] for example, the SG urged a position at odds with an argument presented in an amicus brief the SEC had filed ten years prior in the Third Circuit. The question in both cases was whether claims brought under Section 10(b) of the Securities Exchange Act of 1934 can be subject to compulsory arbitration based on a predispute agreement between the parties, and particularly how *Wilko v. Swan*, a 1953 Supreme Court decision interpreting a different provision of securities law to preclude mandatory arbitration, applied.[241] In 1975, the SEC filed an amicus brief in a Third Circuit case urging an extension of *Wilco* to Section 10(b) claims.[242] In *Shearson*, it disclaimed that position. OSG justified the change by citing the increased judicial acceptance of arbitration in cases post-*Wilco* as well as post-1975 statutory amendments that gave the agency the power "to ensure the adequacy of arbitration procedures employed in a case like the present one."[243] That new authority, the SEC argued, offered an answer to the central concern animating the decision in *Wilco*: that arbitration would be "inadequate to enforce the statutory duties" at issue in that case.[244]

Department of the Navy v. Egan involved a flip based on a different kind of development: experience with how a legal standard works in practice.[245] *Egan* concerned the scope of review when an employee is discharged based on the denial of a security clearance. That fate can befall both civil service employees and certain private sector employees (for example, employees of private defense contractors); the procedures for review are different for the two categories of employees, but the standards governing security clearances are the same.[246] In *Egan*, the government argued that review by the Merit Systems Protection Board should not extend to the merits of the underlying security clearance determination.[247] That position was in tension with arguments the government had made in a series of earlier D.C. Circuit cases

240 Shearson/Am. Express Inc. v. McMahon, 482 U.S. 220 (1987).

241 Wilko v. Swan, 346 U.S. 427, 438 (1953) (holding that claims brought under Section 12(2) of the Securities Act of 1933 are not subject to mandatory arbitration), *overruled by* Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477 (1989).

242 *See* Brief for the Securities and Exchange Commission as Amicus Curiae Supporting Petitioners at 18 n.13, *Shearson/Am. Express*, 482 U.S. 220 (No. 86-44) (explaining that "the Commission has reconsidered its position and no longer holds the view urged in the 1975 brief").

243 *Id.* at 14, 13–14.

244 *Id.* at 10 (interpreting the holding in *Wilco* to rest on concern about the adequacy of arbitration).

245 Dep't of the Navy v. Egan, 484 U.S. 518 (1988).

246 *See* Brief for the Petitioner at 29 n.15, *Egan*, 484 U.S. 518 (No. 86-1552).

247 *Id.* at 14–44.

concerning private sector employees, in which it had called for more searching review.[248] "[W]e believe that this was error," the SG explained in *Egan*: cases applying the more searching "rational nexus" standard had revealed that such review "leads . . . to blatant second-guessing of an agency's determination that a constellation of facts makes it impossible to make the affirmative determination necessary to grant a security clearance."[249]

Finally, consider *US Airways, Inc. v. McCutchen*.[250] The case concerned the remedies available when a health plan administrator sues under ERISA "to obtain . . . appropriate equitable relief . . . to enforce . . . the terms of the plan."[251] The SG urged the Court to apply the "longstanding equitable common-fund doctrine" to limit the administrator's recovery notwithstanding the plan's silence on the question.[252] The government's brief acknowledged that the Secretary of Labor had made a contrary argument in an amicus brief filed in the Fifth Circuit in 2003.[253] Since then, however, the Court had issued a decision confirming that ERISA preserved the core remedial powers recognized in equity.[254] In light of the discussion in that case and "[u]pon further reflection," the SG's brief explained, "the Secretary is now of the view that the common-fund doctrine is generally applicable in reimbursement suits under [ERISA]."[255]

This argument earned the government a rebuke at oral argument from Chief Justice Roberts: "[T]he position that the United States is advancing today is different from the position that the United States previously advanced."[256] The argument continued:

> Chief Justice Roberts: You say that, in prior case, the Secretary of Labor took this position. And then you say that, upon further reflection, the Secretary is now of the view—that is not the reason. It wasn't further reflection. We have a new Secretary now under a new administration, right.
>
> Mr. Palmore: We do have a new Secretary under a new administration. But that—

248 *Id.* at 29 n.15 (acknowledging that "[t]he government concurred in the application of the . . . 'sufficient proof to support a rational nexus' standard" in "several cases involving employees of defense contractors" and citing cases).

249 *Id.*

250 US Airways, Inc. v. McCutchen, 569 U.S. 88 (2013).

251 29 U.S.C. § 1132(a)(3) (2012).

252 Brief for the United States as Amicus Curiae Supporting Neither Party at 22, *US Airways*, 569 U.S. 88 (No. 11-1285).

253 *Id.* at 22 n.9.

254 *Id.*

255 *Id.*

256 *US Airways* Transcript, *supra* note 222, at 32.

> Chief Justice Roberts: . . . [I]t would be more candid for your office to tell us when there is a change in position, that it's not based on further reflection of the Secretary. It's not that the Secretary is now of the view—there has been a change. We are seeing a lot of that lately. It's perfectly fine if you want to change your position, but don't tell us it's because the Secretary has reviewed the matter further, the Secretary is now of the view. Tell us it's because there is a new Secretary.
>
> Mr. Palmore: . . . [W]ith respect, Mr. Chief Justice, the law has changed since that brief was filed nearly ten years ago . . . .[257]

This oft-quoted exchange is front and center in accounts of recent flips seemingly occasioned by a change in presidential administration[258]—and we do not doubt that the shift in party control of the White House played a role (perhaps a decisive one) in *McCutchen*. Yet the kinds of social, economic, and political changes that cause new presidential administrations to take new positions on issues like pregnancy discrimination, arbitration, and employee benefits also tend to leave their mark on other aspects of law and life. The line between ideological shifts and other forms of change, in other words, is not always so clear.

4. Zealous Advocacy

As some of the above examples suggest, part of what is going on in flips is simply *advocacy*—advocacy on behalf of a client whose interests and perspective may be different from one case to the next.[259] This dynamic is easy to see in *Young* and other "two hats" cases that expose the rich variation (and often division) within the big tent that is "the government."

Yet even when the interests the SG represents are relatively stable, it is in the nature of litigation that different cases bring different arguments to the fore. Statutory cases (which make up the overwhelming majority of flip cases[260]) illustrate the point particularly well. We've

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257 *Id.* at 32–33.

258 *See, e.g.*, Blackman, *supra* note 14, at 412–13; Mauro, *supra* note 221.

259 A considerable literature has developed around the question of who (or what) is the "client" of government lawyers in general and the SG in particular. *See, e.g.*, Geoffrey P. Miller, *Government Lawyers' Ethics in a System of Checks and Balances*, 54 U. CHI. L. REV. 1293, 1298 (1987) (arguing that government attorneys' client is the executive branch as a whole and the President in particular, not individual agencies); Drew S. Days, III, *Executive Branch Advocate v. Officer of the Court: The Solicitor General's Ethical Dilemma*, 22 NOVA L. REV. 679, 681 (1998) (arguing that OSG also represents Congress and the people). On most conceptions, OSG's client does not change—that is, it is not "the Postal Service" in one case and "the EEOC" in another. Nevertheless, it's hard to deny that the interests and goals and commitments of that client might change. We will return to this point in the next Part.

260 *See infra* Appendix B, Table 1, Columns E–F (summarizing issues and reasoning addressed in flip cases).

used the word "sprawling" to describe the U.S. government; the same term could be used to describe the U.S. Code. Different statutory provisions can interact in complicated ways, and the Court's "whole code" approach to statutory interpretation aspires to make sense of those interactions in a coherent way.[261] It follows that lawyers, too, often make arguments trading on the interaction between statutory provisions: For example, "this provision in Statute A must mean *X* because an alternate reading would render part of Statute B superfluous." Or, "this provision in Statute A must mean *X* because a similar provision in Statute B also means *X*."

This mode of argument means that lawyers focused on Statute A find themselves making arguments about Statute B—though the client's interest in the case at hand may not turn on Statute B. But suppose another case comes along that does turn on Statute B. And suppose that winning this second case for the client means adopting a reading of Statute B at odds with the reading suggested in the earlier case. This pattern would not pose a problem for most lawyers, who can avoid taking cases that will cause them to contradict earlier arguments (a point to which we return below). But one consequence of the SG's centralized control over government litigation—and, by extension, its repeat-player status before the Justices—is that representatives of the same Office will find themselves at the podium in both cases. For them, the choice is between disclaiming OSG's earlier reading of Statute B in favor of a new interpretation or forgoing an argument that will serve the client in the second case.

In *Levin v. United States*,[262] for example, OSG renounced an interpretation of the Medical Malpractice Immunity Act ("Statute B") that it had relied on in the earlier case of *United States v. Smith*.[263] *Smith* concerned the scope of the Liability Reform Act ("Statute A"), but the plaintiffs argued that the government's reading of that Act would render part of the Medical Malpractice Immunity Act superfluous.[264] In response, the SG offered an interpretation of the relevant provision of the Medical Malpractice Immunity Act that would continue to do independent work even on a broad reading of the Liability Reform Act.[265] When *Levin* brought the disputed provision of the Medical Malpractice Immunity Act to the fore, the government abandoned its

261 *See generally* Anita S. Krishnakumar, *Cracking the Whole Code Rule*, 96 N.Y.U. L. REV. 76 (2021) (detailing the Court's commitment to interpreting statutes in light of the "whole code").

262 Levin v. United States, 568 U.S. 503 (2013).

263 *Id.* at 517; United States v. Smith, 499 U.S. 160 (1991).

264 *See* Brief for the Petitioners at 33–34, *Smith*, 499 U.S. 160 (No. 89-1646) (describing the argument about superfluity or implied repeal).

265 *See id.*

earlier argument and instead advocated a more limited interpretation of the Medical Malpractice Immunity Act[266]—one the Court deemed "most unnatural."[267] Although a new presidential administration had taken office by the time *Levin* was argued, the political valence of the SG's arguments in the two cases was effectively the same: both cases saw the SG vigorously defending military doctors and the United States from tort liability. Thus, the shift from *Smith* to *Levin* seems more strategic than "political."

Barton v. Barr is a similar example.[268] This case concerned the so-called stop-time provision of federal immigration law, which comes into play when the government seeks to remove a lawful permanent resident who has committed a crime, and the lawful permanent resident seeks cancellation of the removal on the ground that he has continuously resided in the United States for at least seven years after lawful admission.[269] The stop-time provision stops the seven-year clock from running (therefore thwarting the cancellation of removal) if the lawful permanent resident commits certain kinds of offenses that render him inadmissible or removable.[270] The petitioner in *Barton* argued that the government's interpretation of the stop-time rule rendered one of the two clauses of the provision superfluous—we'll call it "Clause B."[271] Not so, the government responded, but that argument required it to renounce an argument it had made about Clause B (conceding that it has "no apparent role to play") in an earlier case in the Ninth Circuit that turned on a different aspect of the rule—call it "Clause A."[272] The earlier concession of superfluity, the SG explained in *Barton*, was based on an acceptance of the Board of Immigration Appeals' reading of Clause A, which the government was defending in the Ninth Circuit case.[273] When Clause A "is correctly construed," the SG concluded, "each part of the stop-time rule does independent work."[274] As in *Levin*, the SG's repudiation of the earlier legal argument did not entail a change of sides or suggest a meaningful shift in the political winds: the government was advocating for a broad interpretation of the stop-time provision in both cases.

266 Brief for the Respondent at 23–25, 24 n.8, *Levin*, 568 U.S. 503 (No. 11-1351).

267 *Levin*, 568 U.S. at 514.

268 Barton v. Barr, 140 S. Ct. 1442 (2020).

269 *Id.* at 1446–47.

270 *Id.*

271 Brief of Petitioner at 27–28, *Barton*, 140 S. Ct. 1442 (No. 18-725).

272 Brief for the Respondent at 35, *Barton*, 140 S. Ct. 1442 (No. 18-725) (quoting Petition for Panel Rehearing and Petition for Rehearing En Banc at 13, *Nguyen v. Sessions*, 901 F.3d 1093 (9th Cir. 2018) (No. 17-70251)).

273 *Id.*

274 *Id.* at 35–36.

IV. THE (SUPPOSED) TROUBLE WITH FLIPS

A private lawyer sometimes argues one meaning of a precedent one day and another meaning in a different case another day, but we would be outraged if the government did the same.

—Judge Patricia Wald[275]

We have sought to illuminate the range of factors that can produce changes in the legal interpretations advanced by OSG on behalf of the U.S. government. Armed with a richer understanding of flips, this Part shifts the focus to the Court's reaction. To the extent the Justices share Judge Wald's sense of "outrage[]," what precisely is problematic about the government changing its legal position—in a way that is not problematic for private litigants and lawyers?

One obvious answer has to do with the distinctive power the government wields. In some flip cases, what's at stake isn't simply a change in the government's legal *arguments* but a change in underlying government regulatory *policy*, with tangible consequences for those subject to regulation or hoping to benefit from it. In such cases, a flip might raise concerns about reliance, unfair surprise, switching costs, unequal treatment, and so on.[276] Those are all familiar—and legitimate—concerns. Similar reasons explain why courts hesitate to overturn judicial precedents,[277] why retroactivity is disfavored when Congress changes statutory rules,[278] and why administrative agencies are expected to take account of reliance interests when they change their policies.[279]

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275 Patricia M. Wald, *"For the United States": Government Lawyers in Court*, LAW & CONTEMP. PROBS., Winter 1998, at 107, 124.

276 *See, e.g.*, Transcript of Oral Argument at 27, Christopher v. SmithKline Beecham Corp., 567 U.S. 142 (2012) (No. 11-204) ("There are 90,000 of these people, and . . . the agency has not brought any action for these—lo, these many years. Ninety thousand of them. And all of a sudden, you . . . come in and say, oh, you have been in violation of the law in the past . . . . I just think that's extraordinary." (Scalia, J.)).

277 *See, e.g.*, Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 597 (1987) (linking stare decisis to "the principle of predictability" and explaining that "[t]he ability to predict what a decisionmaker will do helps us plan our lives, have some degree of repose, and avoid the paralysis of foreseeing only the unknown"); Randy J. Kozel, Stare Decisis *as Judicial Doctrine*, 67 WASH. & LEE L. REV. 411, 452–64 (2010) (emphasizing reliance considerations as basis for stare decisis); *see also* Trevor W. Morrison, *Stare Decisis in the Office of Legal Counsel*, 110 COLUM. L. REV. 1448, 1494–95 (2010) (exploring similar themes as reasons for precedent within the executive Office of Legal Counsel).

278 *See, e.g.*, Jill E. Fisch, *Retroactivity and Legal Change: An Equilibrium Approach*, 110 HARV. L. REV. 1055, 1063–67 (1997) (describing the Court's retroactivity doctrine and its grounding in concerns about fairness and notice).

279 *See, e.g.*, FCC v. Fox Television Stations, Inc., 556 U.S. 502, 515 (2009) (stating that agency must provide a "more detailed justification [for a change in policy] than what would suffice for a new policy created on a blank slate" when its "prior policy has engendered serious reliance interests"); Randy J. Kozel & Jeffrey A. Pojanowski, *Administrative Change*,

Many of the OSG flips in our study do not undermine settled interests, however. As Part II detailed, many flips—especially in recent decades—have featured OSG in the role of amicus; often, the SG is simply expressing an opinion on the constitutionality of state statutes that are enforced independently of the federal government.[280] In other cases, OSG abandons a position the government previously advanced precisely because the position has been rejected or implicitly discredited by intervening court decisions.[281] Such "flips" likely *promote* stability, predictability, and coherence in the law. And in still other cases, such as those discussed above as examples of zealous advocacy, the changed position is simply a foil for the main argument at issue in a case, rather than the actual focus of the prior litigation.[282]

Other aspects of the circumstances leading to a flip—and the fora in which the earlier government position was advanced—may likewise mitigate reliance concerns. For example, in the two-hats scenario, typically different branches of "the government" have advanced conflicting interpretations. In *Young*, for example, the EEOC differed from the Postal Service in its understanding of pregnancy discrimination law,[283] and in *Retirement Plans Committee of IBM v. Jander*, the SEC adopted a different interpretation of the relevant fiduciary duties

59 UCLA L. REV. 112, 139–41 (2011) (highlighting reliance as key consideration for assessing administrative change).

280 *See, e.g.*, Brief for the United States as Amicus Curiae, Ams. for Prosperity Found. v. Bonta, 141 S. Ct. 2373 (2021) (Nos. 19-251 & 19-255) (opining on whether a California rule violated the First Amendment); Brief for the United States as Amicus Curiae in Support of Petitioners, Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321 (2021) (Nos. 19-1257 & 19-1258) (opining on whether Arizona statute violated the Voting Rights Act); Brief for the United States as Amicus Curiae in Support of Reversal, Cedar Point Nursery v. Hassid, 141 S. Ct. 2063 (2021) (No. 20-107) (opining on whether California statute constituted a taking); *cf.* Dreeben, *supra* note 10, at 557 (arguing that "the judicial stare decisis interest in preserving the 'stability' of the law is absent when speaking from an advocate's position" (quoting Hilton v. S.C. Pub. Rys. Comm'n, 502 U.S. 197, 202 (1991))).

281 *See, e.g.*, Transcript of Oral Argument at 33, Torres v. Madrid, 141 S. Ct. 989 (2021) (No. 19-292) (asserting the SG as amicus acknowledged Court had "considered and rejected" the government's prior position); Reply Brief for the Petitioner at 7, United States v. Davis, 139 S. Ct. 2319 (2019) (No. 18-431) (stating the government "reconsidered" its longstanding interpretation of a statute after the Court deemed a similar interpretation of a different statute unconstitutionally vague); Brief for the United States Supporting Petitioners at 18–19, Dorsey v. United States, 567 U.S. 260 (2012) (Nos. 11-5683 & 11-5721) (claiming the government "revisited its position in light of differing [lower court] decisions," *id.* at 19). This is closely related to the well-established practice of admitting error, where the "flip" occurs because OSG itself recognizes a prior decision, even one that helped the government, was somehow flawed. *See, e.g.*, Brief for the United States at 6–7, Bond v. United States, 572 U.S. 844 (2014) (No. 12-158) (acknowledging the government "confessed error and filed a brief in support of petitioner's argument").

282 *See, e.g.*, Levin v. United States, 568 U.S. 503 (2013).

283 Young v. United Parcel Serv., Inc., 575 U.S. 206 (2015).

imposed on retirement plan administrators from the DOL.[284] In these kinds of scenarios, there is no single "government" position to enforce, and there may be at least some disruption of expectations, whichever side OSG chooses. If anything, an inquiry focused on reliance might cut in favor of the flip. The question would not be which interpretation happened to be promulgated first but rather which interpretation was more likely to have generated substantial reliance. On this metric, the EEOC's interpretation, put forth in its guidance for regulated entities, would likely receive more weight than the litigation position adopted by the Postal Service in a few cases. Similarly, the SEC's understanding of fiduciary duties would likely receive more weight than statements by the DOL that were limited to ERISA plan administrators.

The key point for our purposes is that concerns about reliance or arbitrary treatment can be—and should be—addressed on their own terms. Such concerns are easily distinguished from an objection that the government's legal argument is entitled to less weight, or that it carries less persuasive force, simply because it is new, or that there is something inherently suspect about the SG's willingness to reject a prior position. The positions OSG takes in flip cases might also, of course, be criticized on their own terms—as substantively flawed, or as inconsistent with the long-term interests of the United States. Such criticisms similarly can be distinguished from the argument that the new position should trigger skepticism (regardless of its substance) because it is at odds with one advanced in prior litigation. Yet, as noted in Part I, a recurring theme in commentary on the SG's internal norm of stare decisis is that flips are problematic because they threaten the SG's credibility with the Court.

We do not doubt that the SG's credibility with the Justices does in fact rest, in meaningful part, on the consistency of its legal arguments over time. Indeed, our review of the cases shows that the concern about credibility is borne out in the Justices' own complaints about flips. But we think the reasons *why* inconsistency is thought to threaten credibility are worth unpacking, and that closer inspection draws into focus something interesting about the unique role of the SG and about the distinction between law and politics in the eyes of the Court. In this Part, we explore the perceived link between credibility and consistency, identifying three different reasons why litigation flips might cause consternation for the Justices. Ultimately, we argue that judicial disapproval of flips is usually misplaced—and, somewhat counterintuitively, that the ideological flips that tend to draw the most critical attention prove to be among the easiest to justify.

284 Ret. Plans Comm. of IBM v. Jander, 140 S. Ct. 592 (2020).

A. Lack of Care

A common refrain in commentary on the unique role OSG plays before the Supreme Court is that the SG receives a special sort of "trust" from the Justices. To understand this claim, and to see its connection to consistency, it helps to distinguish decisions on certiorari from decisions on the merits. Decisions on certiorari involve a classic challenge of information asymmetry: the Justices know far less about potential cases than the parties do. The Court receives many thousands of petitions for cert each year and agrees to hear fewer than one hundred.[285] A great deal of research and commentary suggests that the Justices depend on the SG to aid in this task. In order to determine which needles to pull out of the haystack, the Justices rely on various cues—including, notably, a request for review by the SG.[286] The "trust" that is relevant here is confidence that the SG will seek cert only in cases that meet the Justices' standards—even if that means forgoing review in many cases in which the government has suffered a loss below.[287] OSG, in possession of superior information about the range of cases that might be brought to the Court, makes careful choices. And in recognition of the SG's care, the Justices grant a very high percentage of the SG's petitions.[288]

The concept of trust is harder to nail down at the merits stage. One possibility is that the Justices count on the SG to make "correct" arguments about the law—much like a particularly trusted clerk, perhaps. On this view, the SG can help the Justices find the correct meaning of the law because OSG's staff is excellent and, as a repeat player,

285 *See FAQs—General Information*, SUP. CT. OF THE U.S., https://www.supremecourt.gov/about/faq_general.aspx [https://perma.cc/YWU2-6XQQ] (choose "How many cases are appealed to the Court each year and how many cases does the Court hear?") (reporting the Court receives 7,000–8,000 petitions for certiorari each Term and grants and hears oral argument in about eighty).

286 For an overview of cue theory with references to the literature, see FRIEDMAN ET AL., *supra* note 41, at 493–95. For applications to the SG, see, for example, Michael A. Bailey, Brian Kamoie & Forrest Maltzman, *Signals from the Tenth Justice: The Political Role of the Solicitor General in Supreme Court Decision Making*, 49 AM. J. POL. SCI. 72 (2005), and Joseph Tanenhaus, Marvin Schick, Matthew Muraskin & Daniel Rosen, *The Supreme Court's Certiorari Jurisdiction: Cue Theory*, *in* JUDICIAL DECISION-MAKING 111 (Glendon Schubert ed., 1963).

287 *See* Days, *supra* note 67, at 648 ("The Supreme Court has, on several occasions, noted the importance of the Solicitor General's role in serving as a 'gate keeper' or 'traffic cop' with respect to government litigation at that level."); *see also* H.W. PERRY, JR., DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT 132 (1991) ("Every solicitor general . . . has taken this job very seriously; . . . not to get us to take things that don't require our attention relative to other things that do. They are very careful in their screening and they exercise veto over what can be brought to the board." (second omission in original) (quoting an anonymous Justice)).

288 *See* Cordray & Cordray, *supra* note 45, at 1333–34.

the Office has a strong incentive to do high-quality and careful work.[289] Flips might be troubling, then, because a change in position means that one of the two interpretations pressed by the government was "incorrect." The trusted advisor has been exposed as fallible.[290]

This possibility helps explain the Justices' displeasure with flips,[291] and it is consistent with how OSG describes the government's earlier, now-abandoned arguments: as "mistakes" or "errors."[292] Notice, though, that this view makes sense only on an understanding of the law in which there are right and wrong answers and, once "fixed," meaning does not change. Such an understanding is, to put it mildly, contestable.[293] As Part I explained, *Loper Bright* explicitly endorsed the "one correct interpretation" view—and the Court's rejection of *Chevron* brings *Skidmore* to the fore, including its cryptic reference to consistency. For Justices who do not subscribe to this theory of interpretation, it's worth making explicit the connection between distrust of flips and a distinctly formalistic way of understanding law. And for the Court's formalists, the return to pre-*Chevron* conceptions makes it all the more important to be clear about what is—and is not—problematic about litigation reversals.

We've suggested that flips might be problematic on a formalist view because they suggest a lack of care—a propensity to error—by the formerly trusted adviser. A general loss of credibility might follow. It bears emphasis, however, that the fact of inconsistency does not, on its own, provide any reason to put more weight on the earlier position than the later one. If anything, the later position—which has the benefit of further reflection—would seem more likely to be correct. To be sure, there might be other reasons to favor the earlier interpretation, including the fact that it may have been adopted contemporaneously

289 *See* Ronald Mann & Michael Fronk, *Assessing the Influence of Amici on Supreme Court Decision Making*, 18 J. EMPIRICAL LEGAL STUD. 700, 722 (2021) (studying the Court's citations to amicus briefs and finding that the Justices cite the SG for doctrine at high rates compared to other amici and also compared to citations to "contextual references" in OSG's briefs).

290 *See* Devins & Herz, *supra* note 66, at 573–74 ("Inconsistency will not only annoy judges, it will eliminate the otherwise natural tendency to defer to the government's presumably well-thought-out position.").

291 *See* Dreeben, *supra* note 10, at 551 ("At least part of the Court's reaction . . . seems to reflect an expectation that OSG will take good care in formulating its positions so that it will adhere to its own positional 'precedent' or risk undermining its credibility with the Court.").

292 *See supra* note 39 and accompanying text.

293 As Justice Scalia (hardly a freewheeling pragmatist) once observed, the notion that longstanding interpretations are more trustworthy is "an anachronism—a relic of the pre-*Chevron* days, when there was thought to be only one 'correct' interpretation of a statutory text." Barnhart v. Walton, 535 U.S. 212, 226 (2002) (Scalia, J., concurring in part and concurring in the judgment).

with the passage of the relevant statute. Although *Skidmore* does not mention contemporaneousness alongside consistency as a factor that lends weight to an agency's interpretation, other early decisions regarding administrative deference point to it as an important factor,[294] and in *Loper Bright*, the Court yoked the considerations together.[295] But they are not the same thing—and while commentators have shed light on the potential value of contemporaneousness, the value of consistency has been far less discussed.[296] Contemporaneousness is thought by some to be important for reasons linked to originalism in interpretation.[297] The mere fact of consistency, by contrast, provides no evidence of original public meaning or authorial intent.[298] Especially for older statutes, an interpretation could be adopted long after the statute's enactment, thus failing the "contemporaneousness" inquiry; if it later changes—thus failing "consistency" too—the challenge is to explain why the earlier interpretation is more worthy of trust than the new one.

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294 *See, e.g.*, Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2257 (2024) (citing decisions that reference contemporaneousness as an important factor); *id.* at 2259 (same).

295 *See, e.g.*, *id.* at 2258 ("Such respect was thought especially warranted when an Executive Branch interpretation was issued roughly contemporaneously with enactment of the statute and remained consistent over time."); *id.* at 2262 (stating that in applying the independent review the Court deems required by the APA, "interpretations issued contemporaneously with the statute at issue, and which have remained consistent over time, may be especially useful in determining the statute's meaning").

296 *See generally* Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L.J. 908, 933–37 (2017) (linking the idea that contemporaneousness is an important factor to a longstanding canon that "a contemporaneous exposition is the best and most powerful in law"). Professor Bamzai also emphasizes the role of custom and usage in historical understandings, under which established practice could liquidate the meaning of the law and create reliance and expectation interests that (all else equal) should not be disturbed. *See id.* at 937–38, 940. He associates *Skidmore*'s invocation of "consistency" with the traditional rule emphasizing long usage, *id.* at 979, which might suggest a historical basis for understanding consistency as important for reliance-related reasons.

297 *Id.* at 933–37; *see also* Watt v. Alaska, 451 U.S. 259, 272–73 (1981) ("The Department's contemporaneous construction carries persuasive weight. Such attention to contemporaneous construction is particularly appropriate in these cases, because the Department first proposed the amendment." (citation omitted)); Blackman, *supra* note 14, at 421, 407 (describing *Watt*'s reasoning as "originalist" and explaining that "[a]s time elapses, changes in the interpretation of a fixed statute are less likely to reflect the original understanding and intent of the drafters" (emphasis omitted)). Of course, some commentators and some judges dispute the extent to which originalism should be the focus of statutory interpretation. *See generally, e.g.*, William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479 (1987).

298 Professor Bamzai's discussion of a historical canon favoring contemporaneous interpretations reveals its connections to an approach to statutory interpretation that emphasizes authorial intent—quite different from today's textualism. *See* Bamzai, *supra* note 296, at 933–35.

Indeed, pressing on the notion of "trust" helps highlight reasons why Justices might welcome flips. In addition to providing a particularly careful and expert analysis of text and doctrine, the SG is also a source of important information to the Justices—information about how government programs work, for example. As David Strauss has argued, OSG is

> one of the Court's few sources of information about the effects of legal rules and decisions in the world. The Court is constantly making judgments about those effects . . . . Much of the information the Court needs to make these determinations comes from the Solicitor General, and it is difficult to see from where else the Court could possibly get such information.[299]

The "effects of legal rules and decisions in the world" will, of course, change as the world itself changes. Inconsistency, then, need not signal a lack of care or an "error," but may instead reflect attentiveness to change. The SG would not be serving the Court well if she failed to inform the Justices of new developments, and it is hard to see why the Court (not to mention the nation) would be well served by an approach that locked the government into legal positions taken on the basis of circumstances and understandings that have since transformed.[300]

Young—the pregnancy discrimination case—offers an apt illustration. The interpretation OSG urged in that case was informed by years of experience with and litigation on the issue, as well as by changes in disability law that impacted the interaction between the PDA and other statutory protections. Even if the semantic meaning of the key statutory terms—"similar in their ability or inability to work"[301]—was fixed when the PDA was enacted in 1978, the legal and policy context in which those terms operate had shifted in important ways by 2014, arguably crystallizing the "correct" way to make sense of the PDA's nondiscrimination command. The fact that government lawyers urged a contrary interpretation on behalf of the Postal Service in the 1990s (well before the statutory amendments to the ADA that sharpened the EEOC's focus on the issue) offers little—if any—basis for undercutting the considered view the government had arrived at by 2014.

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299 David A. Strauss, *The Solicitor General and the Interests of the United States*, LAW & CONTEMP. PROBS., Winter 1998, at 165, 172. For a less sanguine take on OSG's unique capacity to supply the Court with information about the operation of government programs, see generally Nancy Morawetz, *Convenient Facts:* Nken v. Holder*, the Solicitor General, and the Presentation of Internal Government Facts*, 88 N.Y.U. L. REV. 1600 (2013) (exploring instances in which it appears OSG has misled the Court).

300 *See* Dreeben, *supra* note 10, at 558 (arguing that "the Supreme Court is best served by hearing the strongest and best supported arguments from a candid advocate").

301 *See supra* note 159 and accompanying text.

B. Results-Oriented Advocacy

A different way in which consistency and credibility might be linked has to do with the nature of legal advocacy and the distinctive roles of government lawyers in general and members of OSG in particular. Private lawyers are expected to engage in zealous advocacy in service of their clients.[302] As the quote from Judge Wald suggests, if that means arguing in favor of one interpretation of the law today and another tomorrow, so be it. But the "zealous advocacy" model has never been a comfortable fit for government lawyers, who are expected to temper their advocacy in service of the larger public interest, to "seek justice."[303]

That idea applies with special force to the SG, whose client—as Attorney General Francis Biddle once wrote—is "but an abstraction."[304] A prominent illustration of the unique role served by the SG is the confession of error, in which the SG refuses to defend a win on the ground that the legal basis for its victory is, well, "error."[305] Similarly, the SG sometimes "acquiesce[s]" in cert when the government is respondent and would like to protect its victory below, but OSG acknowledges that the case is important and warrants the Court's review.[306]

These traditions help animate the famous metaphor of the SG as the "Tenth Justice."[307] In this vision, the SG is not to offer the Justices the best legal argument that advances the result the government wishes to achieve. She is to offer—as Michael Dreeben puts it—the "best arguments available."[308]

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302 MODEL RULES OF PRO. CONDUCT pmbl. para. 2 (AM. BAR. ASS'N 1983) ("As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system."); *id.* r. 1.2(a) ("[A] lawyer shall abide by a client's decisions concerning the objectives of representation . . . ."); *id.* r. 1.3 cmt. 1 ("A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf.").

303 *See generally* Bruce A. Green, *Must Government Lawyers "Seek Justice" in Civil Litigation?*, 9 WIDENER J. PUB. L. 235 (2000); *see* Berger v. United States, 295 U.S. 78, 88 (1935) ("The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.").

304 Role of the Solicitor General, 1 Op. O.L.C. 228, 230 (1977) (quoting FRANCIS BIDDLE, IN BRIEF AUTHORITY 97 (1962)).

305 *See supra* notes 129–30 and accompanying text.

306 Rosenzweig, *supra* note 129, at 2086 n.42.

307 *See* Lincoln Caplan, *The SG's Indefensible Advantage: A Comment on* The Loudest Voice at the Supreme Court, 74 VAND. L. REV. EN BANC 97, 101–02 (2021).

308 Dreeben, *supra* note 10, at 543.

Some of the cases described in the previous Part seem inconsistent with this ideal.[309] And so it might follow that flips damage the SG's credibility with the Court not because they expose a lack of care but precisely the opposite. Flips might suggest a strategic (or, more pejoratively, cynical) embrace of whatever arguments will produce a victory in the instant case. Such opportunism is familiar in one of the intuitive objections to inconsistent arguments: the person who argues for *A* today and *B* tomorrow is just *arguing*; she is not committed to any actual *principle*.

To repeat, that's exactly what we expect from private lawyers—who after all are hired to advance the arguments that will help their client win.[310] Yet it's notable that nowadays many lawyers, including the more high-profile appellate advocates, take pains to avoid arguing inconsistent positions. Ethical rules caution against attorneys taking on representation that will cause them to advocate conflicting positions in the same jurisdiction at the same time.[311] The argument against so-called "positional conflicts"[312] is grounded in a concern that the attorney's advocacy might produce a precedent in one case that will hurt the client in the second case, and that the possibility of such an outcome will cause the attorney to delay or soft-pedal the arguments she makes in favor of one or the other client.[313]

Very few recorded cases discuss positional conflicts, and the reason seems to be that private attorneys go out of their way to avoid taking on representation that would conflict with the interests of current

309 *See supra* notes 262–74 and accompanying text (describing *Levin*, *Barr*, and other cases involving flips that seem to involve changing legal arguments in service of relatively stable principles or goals).

310 *See* Helen A. Anderson, *Legal Doubletalk and the Concern with Positional Conflicts: A "Foolish Consistency"?*, 111 PENN ST. L. REV. 1, 4 (2006) (describing traditional view under which a lawyer "does not necessarily endorse the viewpoints or goals of his or her clients, but nevertheless makes the best arguments possible for them").

311 *See* MODEL RULES OF PRO. CONDUCT r. 1.7 cmt. 24 (AM. BAR ASS'N 2002) ("A conflict of interest exists . . . if there is a significant risk that a lawyer's action on behalf of one client will materially limit the lawyer's effectiveness in representing another client in a different case; for example, when a decision favoring one client will create a precedent likely to seriously weaken the position taken on behalf of the other client."); *see generally* Anderson, *supra* note 310, at 6–30 (describing approaches to positional conflicts taken by the ABA, courts, and state ethics authorities).

312 The term "issue conflicts" sometimes is used to describe the same phenomena. *See* Anderson, *supra* note 310, at 6, 25 (quoting Me. Bd. of Overseers of the Bar, Pro. Ethics Comm'n, Op. 155 (1997)).

313 *See* ABA Comm. on Ethics & Pro. Resp., Formal Op. 93-377, at 2 (1993) [hereinafter ABA Opinion]; *see generally* John S. Dzienkowski, *Positional Conflicts of Interest*, 71 TEX. L. REV. 457, 463–83 (1993) (detailing problems with positional conflicts).

clients—even if it wouldn't violate any ethical rules.[314] For example, a firm that specializes in representing employers may refuse to take on pro bono work on behalf of employees.[315] The worry is that the firm's credibility with both clients and courts might be undermined if it argues both sides of the same issue.[316]

This concern with inconsistent positions is a distinctly modern one, tied up with other changes in the legal system.[317] Legal practice today is far more competitive and specialized than it once was, and with greater specialization comes a tendency to practice on only one side of a given area.[318] Equally significant are changes in how participants in the legal system think about the law and about the role of both the attorney and the judge. In a postrealist world in which the law is understood as indeterminate, it follows not only that judges play a meaningful role in shaping legal rules, but also that *attorneys* are active participants in the process of law development.[319] It is perhaps unsurprising, therefore, that empirical work shows that attorneys—especially at the Supreme Court level—tend to identify ideologically with the claims and causes they represent.[320] Gone is the day in which a

314 *See* Anderson, *supra* note 310, at 3, 11 (noting paucity of cases and arguing that, "while lawyers often feel the pressure of potential positional conflicts, they frequently resolve the problem by refusing the second representation—in other words, the positional conflict never materializes," *id.* at 11); Norman W. Spaulding, Note, *The Prophet and the Bureaucrat: Positional Conflicts in Service Pro Bono Publico*, 50 STAN. L. REV. 1395, 1408–09 (1998) ("Firms have direct incentives to avoid even the appearance of disloyalty. As one lawyer from a large Los Angeles firm put it, 'We know what side our bread is buttered on, and we stay there.'").

315 *See* Spaulding, *supra* note 314, at 1399 (reporting interviews with law firm pro bono coordinators).

316 Anderson, *supra* note 310, at 5 (noting concerns about credibility and reasoning that "[a] lawyer who argues on both sides of an issue may have difficulty establishing a persuasive character or ethos"); Spaulding, *supra* note 314, at 1415 (noting concerns about diminished credibility or "speaking out both sides of our mouth before the same court"); ABA Opinion, *supra* note 313, at 3 ("[A]lthough judges well understand that lawyers, at various stages of their careers, can find themselves arguing different sides of the same issue, the persuasiveness and credibility of the lawyer's arguments in at least one of the two pending matters would quite possibly be lessened, consciously or subconsciously, in the mind of the judge.").

317 Positional conflicts were not a subject of ethical concern prior to the 1980s. Anderson, *supra* note 310, at 11–12.

318 *Id.* at 13–14 (describing this phenomenon); Spaulding, *supra* note 314, at 1415 ("[G]rowth in specialization tends to calcify the positional identities of small to midsized firms and practice groups within large firms.").

319 *See* Spaulding, *supra* note 314, at 1400–01 (discussing the link between legal realism and concern about positional conflicts).

320 *See* Adam Bonica & Maya Sen, *A Common-Space Scaling of the American Judiciary and Legal Profession*, 25 POL. ANALYSIS 114, 117–18 (2017) (finding "a robust relationship" between attorney ideology and the ideological valence of claims advanced before the Supreme Court, *id.* at 118).

prominent lawyer could be seen advancing contradictory interpretations of the same constitutional provision in Supreme Court cases argued weeks apart—as Senator Matthew Hale Carpenter did in 1872.[321] Not only might such dual representation violate contemporary ethical strictures,[322] but it is jarring (at best) to imagine a repeat-player private advocate playing both sides of a significant issue today.[323]

While private counsel can (and evidently do) decline representation that could lead to inconsistent arguments before the Court, it's a great deal more difficult for OSG to avoid such scenarios. As we've discussed, in some respects the SG has enormous discretion over case selection: OSG chooses which of the government's many cases to bring to the Justices in a bid for cert.[324] The same is true of the government more broadly. When deciding which cases to pursue via civil enforcement or criminal prosecution, government entities enjoy considerable (and virtually unreviewable) freedom to pick and choose.[325] But the tables are turned when the government is in a defensive position—or when the Court grants cert notwithstanding the SG's arguments in opposition. "Find a different lawyer" is generally not a viable option.[326]

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321 *See* Anderson, *supra* note 310, at 2–3 (describing Carpenter's arguments and noting that "Carpenter's contradictory legal positions before the same court were not seen as an ethical problem at the time; in fact, the cases brought him fame and a thriving Supreme Court practice," *id.* at 3).

322 *Id.* at 3 ("[U]nder the ethics rules in most American jurisdictions today, Carpenter's dual representations would be seen as a conflict of interest, and therefore, an ethical violation.").

323 That said, it is relatively common for lawyers from OSG to move to elite appellate practices where they argue against positions they defended as a government lawyer, including former SG Paul Clement, who was the lead counsel in one of the cases seeking to overturn *Chevron*. *See* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2253 (2024).

324 *See supra* notes 68, 287 and accompanying text.

325 *See* Heckler v. Chaney, 470 U.S. 821, 831–32 (1985) (holding that enforcement decisions generally are not subject to judicial review); Margaret H. Lemos, *Democratic Enforcement? Accountability and Independence for the Litigation State*, 102 CORNELL L. REV. 929, 946–49 (2017) (emphasizing the discretion inherent in the government's enforcement decisions).

326 On rare occasions, the SG has refused to defend a particular agency position before the Court but permitted the agency to rely on its own lawyers to advance its preferred argument. *See* Devins, *supra* note 65, at 277 (providing examples). It seems fair to characterize such cases as the exceptions that prove the rule, and it bears emphasis that agency advocacy before the Supreme Court is even rarer today than it once was. *See* Eric Schnapper, *Becket at the Bar—The Conflicting Obligations of the Solicitor General*, 21 LOY. L.A. L. REV. 1187, 1266–69 (1988) (tracing the evolution of the SG's policy with respect to agencies with which he or she disagrees, including a move in the 1970s and 1980s away from permitting agencies to air conflicting views to the Court); *see also* Lemos, *supra* note 42, at 201–04, 201 n.60 (studying agency cases decided by the Supreme Court between 1983 and 2005 and finding briefs filed by agencies separately from the SG in only three percent); *cf.* Jenkins, *supra* note 64, at 738 (quoting former SG Rex Lee as saying that "the startling consequence of [the SG] making a decision [in favor of one agency's position and against another's] is that the

Instead, as we've explained, centralization of litigation authority is designed to enable DOJ and OSG to manage conflicts in a different way: not by avoiding them, as private lawyers do, but by resolving them.[327] In this sense, DOJ and OSG play a quasi-judicial role, deciding which of the various arguments advanced by different arms of the government should prevail as the position of "the United States."[328] We've already alluded to some of the challenges, but it's worth underscoring just how Herculean a task this is. The government routinely participates in well over 100,000 cases each year in the lower federal courts, as prosecutor for any federal criminal cases[329] and as both defendant and plaintiff in civil cases.[330] As former SG Drew Days once put it, that translates into an "immense volume of appellate matters that require the Solicitor General's review and decision."[331]

In reality, moreover, perspective matters. Legal issues come to courts in the trappings of concrete cases, with real live parties and tangible stakes. Reasonable minds may differ on whether this aspect of judicial decisionmaking is a feature or a bug, but few would dispute that judges' understanding of a legal issue can be shaped in

side that [he] rule[s] against doesn't get represented at all"). Somewhat more frequently, including in several of our flips, the SG as respondent actually supports the petitioner, typically meaning the Court appoints an amicus to argue the position the government refuses to defend. *See, e.g.*, Brief of Court-Appointed *Amicus Curiae* in Support of the Judgment Below at 3, Millbrook v. United States, 569 U.S. 50 (2013) (No. 11-10362) ("After the government informed the Court that it would not defend the judgment below with respect to the granted question, the Court appointed *amicus* to brief and argue the case in support of the judgment below.").

327 *See supra* notes 69–84 and accompanying text.

328 *See* Reinert, *supra* note 82, at 2188–89 (describing how DOJ's Civil Rights Division avoided challenging state prison policies and conditions in ways that would create conflict with the Federal Bureau of Prison's own policies).

329 *See Federal Judicial Caseload Statistics 2023*, U.S. CTS., https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2023 [https://perma.cc/ARF8-V82P] (reporting more than 68,000 criminal filings in the U.S. district courts).

330 *See id.* (reporting more than 40,000 civil cases filed against the United States as a defendant and approximately 3,000 civil cases brought by the United States as a plaintiff).

331 Days, *supra* note 67, at 648 (reporting that he had acted on roughly three recommendations related to the government's appearance in the appellate courts per day, including weekends and holidays, for the twenty months he had been SG). In fact, it is precisely because of the sheer number of cases and issues the government litigates, and the myriad factors that go into determining which adverse rulings should be appealed, that claims of nonmutual collateral estoppel cannot be advanced against the government. *See* United States v. Mendoza, 464 U.S. 154, 159–62 (1984); *id.* at 161 ("[T]he panoply of important public issues raised in governmental litigation may quite properly lead successive administrations . . . to take differing positions with respect to the resolution of a particular issue.").

meaningful ways by the packaging in which the question is presented.[332] So, too, for advocates. Legal questions tend to be presented to litigators in DOJ and OSG, not in the abstract, but in the context of an action some arm of the government very much wants to take or already has taken. When an issue is viewed through that particular lens—from the perspective of the Postal Service as a large employer, for example—it can be difficult for decisionmakers in DOJ and OSG to avoid the pull of the frame.[333]

This may be particularly true when the issue comes to light in a case in which a governmental unit is in a defensive position. As Professor Alexander Reinert has noted, "As opposed to affirmative enforcers who can choose which cases to take and which legal theories to push or not, defensive bureaus take what they are given and make the arguments they can."[334] DOJ rarely refuses to defend agencies whose actions have been challenged,[335] and some evidence suggests that lawyers engaged in defensive work "hav[e] a stronger sense of [the agency] as a *client*" than those focused on the more discretionary affirmative enforcement actions.[336] The Court has alluded to this possibility as one reason to withhold deference from legal positions taken on behalf of agencies in the course of litigation: the "momentum generated by initial [action]" can create a form of lock-in, focusing energy on defending the action rather than carefully interrogating it.[337] The felt imperatives of defense also are reflected in the fact that OSG is responsible for signing off on government appeals when the government is in the role of appellant, but not when the government is in a defensive position on appeal.[338] The absence of direct SG oversight in such cases, in turn, counsels hesitation before treating "the government's" position as set in stone.[339]

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332 *See generally* Frederick Schauer, *Do Cases Make Bad Law?*, 73 U. CHI. L. REV. 883 (2006) (exploring how the facts, circumstances, equities, and timing of each case can affect the judicial resolution).

333 *Cf. id.* at 894–99 (discussing framing effects in the context of judicial decisionmaking).

334 Reinert, *supra* note 82, at 2187.

335 Devins & Herz, *supra* note 66, at 567 ("In theory, DOJ could refuse to defend an agency action; but in practice, such defense is all but automatic.").

336 *Id.* (relaying the impressions of lawyers at EPA).

337 Inv. Co. Inst. v. Camp, 401 U.S. 617, 628 (1971).

338 28 C.F.R. § 0.20(b) (2023) (describing OSG's function as "[d]etermining whether, and to what extent, appeals will be *taken by the Government* to all appellate courts" (emphasis added)); *see also* Transcript of Oral Argument at 21, Cooper Indus., Inc. v. Aviall Servs., Inc., 543 U.S. 157 (2004) (No. 02-1192) [hereinafter *Cooper Indus.* Transcript].

339 *See Cooper Indus.* Transcript, *supra* note 338, at 21 (noting, in response to questioning from Justices about flip, that earlier position was taken in "a case that was filed as an appellee, so of course, the Solicitor General did not review the brief").

All of this suggests the need for some realism about the clarity of the line between the "best" understanding of the law and a plausible understanding that supports the desired result. In the heat of the battle, and perhaps particularly from a defensive perspective, the two may—in good faith—look awfully similar. Thus, while the Justices' displeasure with the resulting flips is understandable, the institutional features that make consistency so challenging to maintain suggest a need for caution—especially before penalizing OSG for departing from positions taken by DOJ in the lower courts.

Consider the *Young* case study in this regard. When lawyers from DOJ argued on behalf of the Postal Service that the PDA did not bar employers from reserving light duty for workers who were injured on the job, they were defending the Postal Service's policy based on a plausible reading of an ambiguous statutory provision. Perhaps DOJ could and should have done more to ensure a lack of conflict with the EEOC, but the matter is not so simple. As noted, the EEOC's guidance was ambiguous on the question at the time of the first Postal Service cases. In the 1990s, the EEOC had begun litigating cases on behalf of pregnant employees and in those cases advanced arguments in some tension with the Postal Service cases. The EEOC is one of the relatively few agencies that has independent litigating authority in the lower courts—meaning that its cases do not run through DOJ. Still, strategic choices by both USPS and the EEOC mitigated the extent to which their legal positions were at odds.[340] By the time the differing interpretations were hardening into a true conflict, there was a growing body of circuit precedent supporting the Postal Service's position. At that point, at least in those circuits, it arguably was DOJ's duty as an advocate to put forward those (likely winning) arguments on behalf of its client.[341]

Perhaps most importantly (and reprising a point we made in the prior Section), this line of reasoning provides no basis for the Justices to favor the *earlier* interpretation over the later one. To return to *Young*, it's hard to see why the happenstance of timing—the fact that the Postal Service, in a defensive position, was the first arm of the government to litigate cases under the PDA regarding the legality of policies limiting light duty to workplace injuries—should foreclose the EEOC from making a different argument about an ambiguous law. If anything, the later interpretation has the benefit of a broader

340 *See supra* notes 182–89 and accompanying text.

341 *See* Brief for John E. Potter, Postmaster General, United States Postal Service at 11, Guarino v. Potter, 102 F. App'x 865 (5th Cir. 2004) (No. 03-31139) (noting that circuit precedent in *Urbano v. Continental Airlines, Inc.*, 138 F.3d 204 (5th Cir. 1998), was "on all fours" with Guarino's case and therefore "control[s] the outcome"); *Guarino*, 102 F. App'x at 868 ("*Urbano* forecloses Guarino's argument.").

perspective: multiple frames instead of just one. And if, as other commentators have argued, defensive positions tend to be more stable across time and presidential administrations than affirmative enforcement priorities, an insistence on consistency will—on balance—likely have the effect of privileging expansive understandings of government power and restrictive positions on access to justice for those on the other side.[342]

C. Credibility and Politics

Government reversals that appear to be occasioned by a change in presidential administration may pose a distinctive challenge for the credibility of the SG. As Professor Rodríguez has observed, change-of-administration flips are unsettling in part because they "lay[] bare that legal interpretation is, in fact, often a function of politics."[343] As such, they may seem inconsistent with a vision of OSG as a source of expert and neutral legal reasoning, thereby threatening the credibility—even the legitimacy—of the SG's Office in the eyes of the Court.[344]

Consistent with this view, Michael Dreeben closes his essay with a caution. Although he argues that "OSG should approach its task with a much greater openness to abandoning a prior position than a court would have, if the Solicitor General concludes that the position was legally incorrect,"[345] he warns that OSG must not be "seen as a political actor."[346] Other commentators—including veterans of the SG's Office—link the risk of "jeopardiz[ing] OSG's 'reservoir of credibility' with the Court"[347] with particular concerns about politics and partisanship.[348]

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342 *Cf.* Dreeben, *supra* note 10, at 549 (discussing case in which observers expected Obama administration to flip on question regarding DNA testing and exoneration of factually innocent criminal defendants, but where "the institutional interests of the United States in avoiding new constitutional obligations won out"); Reinert, *supra* note 82, at 2184 ("Although affirmative enforcement priorities may shift from one administration to another, . . . defensive litigating positions are far less likely to do the same.").

343 Rodríguez, *supra* note 14, at 7.

344 *See* Caplan, *supra* note 307, at 106 (noting that the SG can "resist giving in to pressure from political appointees in the Justice Department by saying that, if the SG's office took a politically motivated position those appointees pressed, the Court would criticize the office and undermine its credibility").

345 Dreeben, *supra* note 10, at 558.

346 *Id.* at 560.

347 *Id.* at 559 (quoting Rex E. Lee, *Lawyering for the Government: Politics, Polemics & Principle*, 47 OHIO ST. L.J. 595, 601 (1986)).

348 Drew S. Days, *The Interests of the United States, the Solicitor General and Individual Rights*, 41 ST. LOUIS U. L.J. 1, 5 (1996) ("Of course, both the electorate and the judiciary expect that some changes will occur after a presidential election where there is a switch in the party in power. But there is also a value to the law and society at large in not allowing

Concerns about the role of politics in the SG's work, and its connection to the credibility of the Office, are by no means new. To take one prominent example, critics of the Reagan administration often complained of "politicization" of the SG's Office, particularly under Reagan's second SG, Charles Fried.[349] Justices and law clerks lamented in interviews that politicization of the Office shook their confidence in the SG's submissions.[350] (Perhaps not entirely coincidentally, Fried's tenure corresponded with the Court's decision in *Bowen v. Georgetown University Hospital*, a flip case that has become the standard citation for the proposition—noted above—that "an agency's convenient litigating position" is not entitled to judicial deference.[351])

Despite its volume, the commentary on politicization of the SG's Office is surprisingly vague on what it means, precisely, for the SG's Office to be "political." Different critics no doubt mean different things, but we think the charge often rests on an intuition about results-oriented advocacy.[352] The critique of Fried, for example, seems to be that he was willing to make whatever legal arguments were necessary to advance the conservative agenda of the administration.[353] To put it differently, we might say Fried engaged in the kind of zealous

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government legal positions to appear purely the consequence of political philosophy readily adjusted to the prevailing views of the moment."); Kagan Interview, *supra* note 5, at 19:34 (explaining that OSG "is supposed to be . . . serving the long-term interests of the United States, not any one President," and that "the credibility of the office in great measure depends" on courts perceiving it that way); Schoenherr & Waterbury, *supra* note 47, at 17 ("While the solicitor general's office is always dealing with political questions and solicitors general do use their influence over the justices to make political gains, its inhabitants must keep the office from looking political in order to retain the greatest amount of influence with the justices." (citations omitted)).

349 CAPLAN, *supra* note 3, at 255, 255–77 (arguing that Fried and the Reagan administration had improperly politicized OSG, sacrificing the reputation previous incumbents had so carefully cultivated with the Court); *Testimony of Professor Burt Neuborne New York University Law School Before the Subcommittee on Oversight of the House Judiciary Committee March 19, 1987*, 21 LOY. L.A. L. REV. 1099, 1102 (1988) ("I sense that in the past several years, the tone and content of the Solicitor General's work has shifted far more toward an ideological stance that views the Solicitor General's office as a vehicle for advancing a particular set of political and ideological positions.").

350 CAPLAN, *supra* note 3, at 264–67.

351 Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 213, 212–13 (1988); *see also, e.g.*, Christopher v. SmithKline Beecham Corp., 567 U.S. 142, 155 (2012) (citing *Bowen* and distinguishing between a "convenient litigating position" or "*post hoc* rationalizatio[n]" and "the agency's fair and considered judgment on the matter in question" (alteration in original) (first quoting *Bowen*, 488 U.S. at 213; and then quoting Auer v. Robbins, 519 U.S. 452, 462 (1997))).

352 *Cf.* Wohlfarth, *supra* note 46, at 226 ("[A] solicitor general who politicizes the office acts as a forceful advocate for executive policy at the expense of assisting the Court.").

353 *See* CAPLAN, *supra* note 3, at 260–83.

advocacy in service of the client that we normally expect of private lawyers—but not from the so-called "Tenth Justice."

Yet the concern about politicization captures something distinct from the more general concerns explored above regarding opportunistic or results-oriented lawyering—something that may be particularly threatening to the Justices' conception of their own work. Indeed, if one takes the "Tenth Justice" metaphor at face value, the linked concern about credibility and politics makes easy sense. Credibility is a key consideration in the judicial doctrine of stare decisis, associated with the aspiration of a government of law and not of men. If the Court's pronouncements about "what the law is" shift as presidential administrations—and, thus, Justices—change, then the Court's claim to be doing something that can be called "law" and distinguished from politics is harder to sustain. This possibility is far from hypothetical for the current Justices, who have engaged in some high-profile "flips" of their own—and have criticized each other for subordinating the rule of law to political preference.[354]

To state the obvious, however, the SG is not actually a Justice, and the executive branch is not the Court. Any case that makes it to the Supreme Court (and thus becomes a subject of SG argument) will involve some ambiguity, some indeterminacy. Even if one believes that the government is obligated to present its "best view" of the law to the Court, one might nevertheless conclude that the government's best view on hard questions of law will—naturally and appropriately—be infused with values and norms and policy goals that shift from one administration to the next. To deny that reality, we think, is to insist not only on an unpersuasively formalist understanding of law, but also on an unpersuasive equation of the executive and the judiciary.[355] That

354 *See, e.g.*, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2349 (2022) (Breyer, Sotomayor & Kagan, JJ., dissenting) ("Neither law nor facts nor attitudes have provided any new reasons to reach a different result than *Roe* and *Casey* did. All that has changed is this Court."); *see also* Coan, *supra* note 34, at 409–37.

355 Other scholars have made similar points about agency statutory interpretation specifically. *See* Jerry L. Mashaw, *Norms, Practices, and the Paradox of Deference: A Preliminary Inquiry into Agency Statutory Interpretation*, 57 ADMIN. L. REV. 501, 504 (2005) ("There are persuasive grounds for believing that legitimate techniques and standards for agency statutory interpretation diverge sharply from the legitimate techniques and standards for judicial statutory interpretation."); Kevin M. Stack, *Purposivism in the Executive Branch: How Agencies Interpret Statutes*, 109 NW. U. L. REV. 871, 880 (2015) (arguing that the nature of regulatory statutes requires agencies to follow a purposive approach to interpretation and that standard textualist critiques of purposivism in judicial interpretation "do not have the same force with regard to agency statutory interpretation"). Professor Mashaw argued that the fact that "[f]ully legitimate judicial interpretation will conflict with fully legitimate agency interpretation" poses a challenge—or, in Mashaw's terms, a "paradox"—for any system of deference. Mashaw, *supra*, at 504. One can recognize the challenge, however, without accepting that the "judicial conversation about meaning" necessarily must "ignore[], if not

is, even if the Justices themselves should aspire to formalism, the reasons for that commitment—many of them grounded in considerations of comparative institutional competence and democratic legitimacy[356]—do not translate neatly to the political branches.

Somewhat counterintuitively, then, while "ideological" or change-in-administration flips tend to attract the most criticism, on closer inspection such reversals ought to be easier to understand and defend than those that seem to stem merely from an effort to win the case at hand. The latter, described in the previous Sections, might plausibly be described as correcting "mistakes." But that characterization seems inapt when the government's legal position shifts based on contested questions of value of the sort we hold elections to resolve.

We noted in Part II, for example, that the position OSG took in the *Young* case likely was influenced by the Obama administration's general pro-worker and pro-women positions.[357] By the time the Court called for the SG's views in *Young*, it was becoming increasingly evident that the public approved of ensuring pregnant workers could receive accommodations. In the years immediately preceding the Court's decision in *Young*, states had begun to enact legislation affirmatively requiring such support.[358] In the wake of the decision, confusion regarding the standard the Court adopted spurred further advocacy; ultimately, in the space of ten years, twenty-five states enacted legislation on point, often passing with unanimous support in both "blue" and "red" states.[359] This in turn paved the way for changes to federal law. In an unusual move, the Chamber of Commerce joined forces with liberal advocacy organizations such as the ACLU to urge Congress

falsif[y], the grounds upon which much [executive] interpretive activity is appropriately and responsibly premised." *Id.* at 538 (questioning how *Skidmore* deference could "make sense as deference at all" given the tendency of judicial interpretation to reject inputs that are central to agency interpretation); *see also* Stack, *supra*, at 924 (proposing a reconciliation between judicial textualism and agency purposivism under which even textualist judges should "review the agency's compliance with its statutory duties—duties to implement and interpret the statute in a purposive manner").

356 *See generally, e.g.*, Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989). Thus, even if OSG has "'a dual responsibility'—to advocate for the interests of the president and the Executive Branch and, in addition, to be a counselor to the Court, advocating for the best interests of the law," Caplan, *supra* note 307, at 102 (quoting Letter from Lewis F. Powell Jr., Assoc. J. of the Sup. Ct. of the U.S., to Lincoln Caplan (July 2, 1986)), it does not follow that OSG discharges the latter role by approaching the task of legal interpretation in the same way a Justice would.

357 *See supra* text accompanying note 195.

358 *See generally* Deborah A. Widiss, *Pregnant Workers Fairness Acts: Advancing a Progressive Policy in Both Red and Blue America*, 22 NEV. L.J. 1131, 1144 (2022) (noting in 2013 and 2014, Delaware, Maryland, Minnesota, New Jersey, and West Virginia enacted laws requiring accommodations for pregnancy).

359 *See id.*

to enact a new law clarifying the duties employers owed pregnant workers.[360] In December 2022, Congress complied, enacting the Pregnant Workers Fairness Act—a major new civil rights law that goes even further in requiring accommodations for pregnant workers than the interpretation the SG urged in *Young*[361]—which passed with broad bipartisan margins even in these highly polarized times.[362] Rather than being castigated by the Justices, then, the government's position in *Young* might be characterized as appropriately in line with popular sentiment as expressed through democratic institutions.

For another recent example, consider the litigation leading to the Court's decision in *Bostock v. Clayton County*, concerning the application of Title VII to discrimination based on sexual orientation or gender identity.[363] The Obama administration had argued that discrimination against LGBTQ employees constitutes discrimination "because of . . . sex"[364] within the meaning of the statute, while the Trump administration pressed the contrary argument.[365] Both positions were legally plausible—as were the warring positions reflected in the majority and dissents, and in the conflicting decisions reached by the lower courts before *Bostock* was decided.[366] The judges and Justices who

360 *See* Letter from A Better Balance et al. to Hon. Bobby Scott & Hon. Virginia Foxx (Jan. 13, 2020), https://www.abetterbalance.org/resources/u-s-chamber-of-commerce-womens-groups-support-the-pregnant-workers-fairness-act/ [https://perma.cc/Y3TS-GXF9] (noting "considerable confusion about what employers are required to do to accommodate pregnant workers").

361 *See* Pregnant Workers Fairness Act, Pub. L. No. 117-328, div. II, 136 Stat. 6084 (2022) (codified at 42 U.S.C. §§ 2000gg–2000gg-6 (Supp. IV 2023)).

362 *See* Widiss, *supra* note 358, at 1155–56 (noting the Pregnant Workers Fairness Act (PWFA) passed the House 315–101, with support from almost half of the House Republicans, and passed the Senate as part of an omnibus spending bill). In the months since PWFA passed, and particularly after the EEOC interpreted the statute to potentially require accommodations for abortion, the law has become more politicized. Since the EEOC's regulations were finalized in April 2024, a number of red-leaning states and some prominent religious employers filed lawsuits challenging this aspect of the regulations, and Texas has separately alleged that the use of proxy voting to pass the law was unconstitutional. *See, e.g.*, Appellants' Opening Brief, Tennessee v. EEOC, No. 24-2249 (8th Cir. July 19, 2024); Louisiana v. EEOC, Nos. 24-cv-00629 & 24-cv-00691, 2024 WL 4016381 (W.D. La. Aug. 13, 2024); Brief for Appellants, Texas v. Garland, No. 24-10386 (5th Cir. Aug. 9, 2024); Cath. Benefits Ass'n v. Burrows, 732 F. Supp. 3d 1014, 1020–21 (D.N.D. 2024).

363 Bostock v. Clayton County, 140 S. Ct. 1731 (2020).

364 *See* Brief for the Federal Respondent Supporting Reversal at 2, 7–8, R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC, 140 S. Ct. 1731 (2020) (No. 18-107) (quoting 42 U.S.C. § 2000e-2(a)(1) (1964)).

365 *See id.* at 7–8 (describing the change of position).

366 *Compare Bostock*, 140 S. Ct. at 1754 (holding that "[a]n employer who fires an individual merely for being gay or transgender defies the law"), *with id.* at 1754–84 (Alito, J., dissenting) (rejecting majority's reading), *and id.* at 1822–37 (Kavanaugh, J., dissenting) (same); *compare, e.g.*, Zarda v. Altitude Express, Inc., 883 F.3d 100 (2d Cir. 2018) (en banc)

confronted the question divided largely along "political" lines. Whatever factors (conscious or unconscious) led those judges and Justices to adopt one position or the other, we think it was entirely fitting that the position of the executive branch reflected the values championed by the President—who, after all, was the only character in this story who could claim a democratic mandate.

To defend political flips on these terms is not to jettison the rule of law—nor is it an invitation for OSG to abandon its efforts to maintain continuity in the arguments the government presents to the courts. Professors Randy Kozel and Jeffrey Pojanowski have argued, for example, that courts should not defer to agency interpretations that represent changed positions on statutory meaning.[367] Although their argument is focused on the distinct issue of deference to agencies, it rests on rule-of-law concerns that might apply to litigation flips as well. Kozel and Pojanowski write that "[o]ne pillar of the rule of law is the ideal that governmental pronouncements about the intrinsic meaning of legal texts should aspire to be impersonal and principled rather than results-oriented and political."[368]

We agree—halfway. We share Kozel and Pojanowski's view that "[t]he petty official who reads a rule narrowly for the favored and broadly for others" exemplifies a system "in which the rule of law is lacking."[369] (Recall Justice Gorsuch's similar warnings, described above, of a system "governed . . . by the shifting whims of politicians and bureaucrats."[370]) "Political" is not the same as "[un]principled," however, nor are ideological disagreements necessarily devoid of principle. Rule-of-law concerns seem most pressing if one imagines the government flitting arbitrarily from one position to the next, with no evident principle at work other than the goal of winning the immediate case.[371] But that image is a straw man: no one suggests the government should, or does, behave that way. As we have explained, there are many reasons to favor legal continuity that have nothing to do with credibility—or aspirations to apolitical law—but instead sound in reliance, fair

(ruling in favor of claimants), *and* Hively v. Ivy Tech Cmty. Coll., 853 F.3d 339 (7th Cir. 2017) (en banc) (same), *with* Wittmer v. Phillips 66 Co., 915 F.3d 328 (5th Cir. 2019) (ruling against claimants), *and* Evans v. Ga. Reg'l Hosp., 850 F.3d 1248 (11th Cir. 2017) (same).

367 Kozel & Pojanowski, *supra* note 279, at 115 ("[F]undamental rule-of-law interests . . . should limit the agency's discretion to announce that the same document means X today, Y tomorrow, and Z the day after.").

368 *Id.* at 148.

369 *Id.* at 149.

370 Kisor v. Wilkie, 139 S. Ct. 2400, 2442 (2019) (Gorsuch, J., concurring in the judgment).

371 Judge Wald's "outrage[]," with which we began this Part, was directed at the possibility that "the agency is not evenly applying its policies across the board." Wald, *supra* note 275, at 124.

notice, equal treatment of like cases, and so on. Those reasons are more than adequate to resolve the case of the petty official—or the politicians and bureaucrats who wish to rule by "shifting whim[]." Change-of-administration flips are different. They are driven, not by an *absence* of principle, but by a *change* in principle.

A different objection to change-in-administration flips is grounded in transparency or lack thereof.[372] In several recent cases, the Justices have chided representatives of OSG for failing to own up to the true reasons behind what appeared to be change-of-administration flips.[373] Again we agree with the critique—halfway. It is fair for the Justices to expect candor from the SG, and claims that a change of position is based on, say, a reexamination of statutory text may call to mind the intuitive connection between inconsistency and hypocrisy.[374]

Yet the Justices themselves are at least partially to blame if the SG tends to deny, or submerge, the policy- or values-grounded inputs to legal interpretation. OSG has powerful incentives to pitch its arguments in a tenor most likely to appeal to the Justices. For today's Court, that may mean prioritizing textual arguments that posit legal language has a single, clear meaning—and in flip cases, characterizing earlier interpretations as "errors" or "mistakes."[375] That tendency, while understandable, feeds into a view of law in which questions of legal meaning can be separated neatly from questions of "policy." The Court's formalists often insist on such a view, under which policy considerations are separate from and irrelevant to the resolution of questions of law: the meaning of the law can be found on the page and remains fixed even as its subjects and objects shift and evolve.

The difficulty—and it is a serious one—is that the Court's rhetoric does not match its practice. As multiple studies have shown, even the Court's formalists make frequent resort to considerations of practical consequences and policy considerations, especially in cases where the ordinary meaning of the statute is not clear.[376] If consequentialist considerations are entering into the interpretive equation, the government's view—whether or not it is new—ought to be an important input.

372 *Cf.* Kozel & Pojanowski, *supra* note 279, at 149 ("In a system governed by the rule of law, the necessary corollary of faithful interpretation is candid reason-giving.").

373 *See supra* notes 223, 256–57 and accompanying text.

374 *See supra* note 8 and accompanying text.

375 *See supra* note 39 and accompanying text.

376 *See supra* note 40 and accompanying text.

CONCLUSION

The Supreme Court today is facing a much-remarked crisis of legitimacy marked by historically low approval ratings and fueled by a growing sense of the Court as a political institution that is nevertheless out of step with, and unresponsive to, the people.[377] The response of the Court's majority has been to insist on the law's determinacy—its separation from politics and its capacity to yield right or "best" answers to even the hardest legal questions. OSG, with its well-earned reputation for legal excellence, can play an important role in that vision. OSG's members are among the country's most talented lawyers, and the SG and her deputies and assistants can aid the Justices with careful and sophisticated analyses of precedent, text, history, and tradition.

But the SG, as representative of the U.S. government, also can inform the Court's decisionmaking by supplying an additional set of inputs, informed by on-the-ground experience with the law's operation, specialized expertise, and—yes—politics. By "politics" we don't mean whim or fiat, of course, but rather an articulation of goals and values that cannot realistically be divorced from a background set of ideological commitments that, in today's polarized world, will tend to track party lines. Even Justices who seem most committed to the view that legal questions have single best answers that can (indeed, must) be found by judges seem prepared to acknowledge that at least some of that latter set of inputs can inform the Court's search for the best legal answer. That is so only if the government's understanding of the law is consistent, however. If the government's legal position changes, and especially if the change seems to be occasioned by turnover in the White House, respect gives way to skepticism.

The Court has never explained why, exactly, consistency is so critical, beyond the obvious values of stability and reliance. That question is important in its own right, and it has taken on new significance with the Court's rejection of *Chevron*. We've sought to shine light on the question by exploring the forces that contribute to a particular kind of change: reversals in the government's litigating positions. Our investigation of litigation flips calls into question the idea that changes of presidential administrations can be isolated, either in theory or in practice, from other sorts of legal, social, and technological changes that might properly shape the government's understanding of the law. It also shows that the connection between consistency and credibility,

377 *See, e.g.*, Megan Brenan, *Views of Supreme Court Remain Near Record Lows*, GALLUP (Sept. 29, 2023), https://news.gallup.com/poll/511820/views-supreme-court-remain-near-record-lows.aspx [https://perma.cc/DXV9-Y9FD] (reporting approval for the Supreme Court and trust in the judicial branch near record lows and a near record high in the share of the public that feels the Court is "too conservative").

while intuitive at first blush, proves to be more complicated on closer inspection. A change in legal argument need not be taken as evidence of lack of care or cynical advocacy. On the contrary, litigation reversals by the SG can—and in our view, often do—reflect a principled effort to understand the law in light of current norms and needs by an institutional actor that is well positioned, by virtue of on-the-ground experience as well as democratic mandate, to consider the tradeoffs between stability and change.

APPENDIX A—SEARCH AND CODING METHODOLOGY IN DETAIL

Our objective in this Article is to better understand the justifications for litigation "flips" by the Office of the Solicitor General (OSG) and to critically assess the skepticism often advanced by the Supreme Court Justices in response to such flips. To do so, we sought to identify a body of cases in which OSG advances legal arguments that differ from those advanced by government lawyers in previous cases. As described in Section II.B of the Article, we identified cases of interest by searching briefs, oral arguments, and decisions for words frequently used to describe reversals. We then coded the cases that we located for many different attributes. This Appendix explains our methodology in greater detail.

A. Databases Searched and Coverage

As discussed in the Article, we used an iterative method to develop a list of search terms often found in flip cases. The final list of search terms was "(change current prior previous before) /3 administration," "upon further reflection," "upon further consideration," "chang! (interpretation position)," "chang! its (interpretation position)," "reconsider! the (issue question)," "reevaluat! the (issue question)," "reexamin! the (issue question)," "once took the position," "previously took the position," "previously taken the position," "prior position," "switch! sides," "previously believed," "shift! argument," "in light of this court's grant of certiorari," and "contrary position!"

The search was conducted primarily in Westlaw's database of "Federal materials," which allows search of cases, briefs, petitions, joint appendices, and oral arguments in the Supreme Court. Westlaw allows full-text searching of Supreme Court opinions going back to 1790.[1] For briefs, petitions, and appendices, coverage is inconsistent, with "[s]elected coverage" for briefs beginning in 1930, petitions beginning in 1985, and joint appendices beginning in 1982.[2] For oral arguments, coverage begins with the 1990–91 Term.[3] Because coverage on Westlaw is incomplete for older cases, we supplemented our search by running similar search terms in the ProQuest Supreme Court Insight database.

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1 *See U.S. Supreme Court Cases*, WESTLAW, https://1.next.westlaw.com/Browse/Home/Cases/USSupremeCourtCases [https://perma.cc/5K9C-LHAM].

2 *See U.S. Supreme Court Briefs, Petitions & Joint Appendices*, WESTLAW, https://1.next.westlaw.com/Browse/Home/Briefs/USSupremeCourtBriefsPetitionsJointAppendices [https://perma.cc/F6XC-VY9L].

3 *See U.S. Supreme Court Oral Arguments*, WESTLAW, https://1.next.westlaw.com/Browse/Home/TrialTranscriptsOralArguments/USSupremeCourtOralArguments [https://perma.cc/46GS-JSRW].

Once we had identified cases as potential flips, we conducted detailed research to determine whether the alleged flip fit within our definition. Depending on the nature of the putative flip, we often sought to review the government's briefs in the lower court in the case, in prior Supreme Court litigation, and in prior lower court cases. We also would sometimes seek to review decisions issued in the lower courts in the case of interest or earlier cases. Because coverage of lower court litigation and early Supreme Court litigation is inconsistent, if Westlaw did not have the relevant materials, we would look for them on Lexis, ProQuest Supreme Court Insight, and the Supreme Court's own website.

In some cases, we were not able to access relevant materials to make a definitive assessment of precisely what the government had argued previously. In those cases, we made inferences as we deemed appropriate based on the characterizations (which sometimes included direct quotations) of earlier material we found in briefs or decisions that we could review.

B. Coding Methodology

This Section explains in greater detail the categories found in the spreadsheet of cases provided in Appendix B and the groupings that we used for the statistical summary provided in Section II.C of the Article.

1. Citation

Where available, we provide a citation to the *United States Reports*, the official publication of Supreme Court decisions. Historically, there has been a delay, often of several years, after a decision is issued before it is published in the *U.S. Reports*. Accordingly, we provide *Supreme Court Reporter* cites for cases from OT 2017 to OT 2022 and official *U.S. Reports* cites for cases decided in OT 2016 and earlier.

2. Government Role

For each case, we coded the government role in the case: petitioner, respondent, or amicus. In a total of ten cases, the government was the respondent, but it was formally supporting the petitioner, or it was arguing for reversal without necessarily supporting the petitioner. These are indicated separately—"R (supporting P)" or "R for reversal"—in the spreadsheet in Appendix B but grouped together (as "R supporting P") for the quantitative analysis in the Article. Similarly, if the government was an amicus, we noted how it described its role on its brief in the spreadsheet. Typically, this was as an amicus in

support of petitioner or amicus in support of respondent, but there were also cases in which it participated but did not formally support either party (which included some cases in which it supported reversal or vacatur, but not on the grounds that the petitioner was arguing). For the quantitative analysis reported in the text of the Article, we collapsed these distinctions into simply "amicus." This was partly for simplicity's sake and partly because other empirical studies of the Solicitor General (SG) have found that its win rates as amicus are relatively consistent, regardless of which party it supports.[4] We also coded if we were able to ascertain that the government had been specifically invited by the Court to participate as an amicus. We note this in the spreadsheet, but since there were relatively few cases in which this was the case, we decided that the numbers were too small to be meaningful to report in our quantitative findings.

3. Type of Flip

We simplified the "type of flip" to four categories: change from the position originally advanced at the Supreme Court in the same case; change at the Court from a position in a different case; change from a position advanced in the lower court in the same case; and change from a position advanced in a lower court in a different case. In some instances, it was clear that the government had advanced the previous—now rejected—legal position both in a prior Supreme Court case *and* in lower courts. In those cases, we coded the case as a change from the position argued to the Supreme Court. This is because, as discussed in the Article, the expectation of consistency—and thus the potential harm to credibility associated with a flip—is stronger for prior SG positions than for positions advanced only in the lower courts. We did not distinguish whether the position had been advanced in multiple lower courts or just one, or in multiple Supreme Court cases or just one.

4. Stated Reason

As noted in the Article, in about eighty percent of the cases on our flip list, the government acknowledged its changed position.

4 *See, e.g.*, RYAN C. BLACK & RYAN J. OWENS, THE SOLICITOR GENERAL AND THE UNITED STATES SUPREME COURT 26 fig.2.3 (2012) (using data from 1954 to 1996 and from 1998 to 2010 and reporting overall win rates for SG as amicus ranging from roughly seventy percent to over eighty percent); Margaret Meriwether Cordray & Richard Cordray, *The Solicitor General's Changing Role in Supreme Court Litigation*, 51 B.C. L. REV. 1323, 1335 (2010) (summarizing the literature and reporting that "[o]verall, when the Solicitor General steps in as amicus, the office wins 70–80% of the cases, regardless of which side it supports").

Where possible, we recorded in the spreadsheet in Appendix B the wording or general rationale offered by the government to explain this shift (which may or may not be the "actual" reason for a shift). In most instances, quoted language comes from the government's briefs, but in some instances it comes from oral argument.

5. Issue

For each case, we summarized the main legal issue in the case, or at least the issue upon which the government was advancing a position.

6. Government "Win"

This column records whether the government as a party, or a party it supported as amicus, prevailed at the Supreme Court. In some cases, the Court did not reach the specific legal question on which the government had reversed its legal position. Nonetheless, such cases were recorded as a "win" so long as the government (or the party it supported) prevailed at the Court. Cases where the government as respondent supported petitioner or reversal are recorded as a "win" if the petitioner prevailed or the case was vacated and remanded. For cases where the government participated as an amicus supporting neither party, a government win was recorded if the position advanced by the government prevailed.

In some cases, it was difficult to assign a binary "Y" or "N" to the question of whether the government prevailed. For example, there were several cases where the government prevailed on a procedural issue rather than on the substance of a claim, and the Court then simply vacated and remanded the case back to the lower courts. Such cases are generally flagged with an asterisk (*) in our chart. For purposes of statistical analysis, however, we simplified these cases to "Y" or "N."

In three cases, we did not assign a "Y" or "N" at all; two were dismissed without a decision, and one yielded splintered majorities where the government prevailed on one argument and lost on a different argument. These cases are identified in Appendix B. For the purpose of calculating the "win percentage" reported in Table 1 and elsewhere in the Article where we discuss win rates, we excluded these cases entirely. In other words, we did not count them as wins and we did not include them in the total number of relevant cases to which we were comparing the "wins". If we had excluded them from the numerator but not the denominator of these calculations and then calculated the percentage of "wins," that would have functionally counted these cases as "losses."

7. Debatable as to Whether a Flip

As described in Section II.B of our Article, in most of the cases we considered, we felt it was relatively clear whether or not the government had reversed a prior legal position, such that it fit within our definition of a flip. Based on our definition, we excluded forty-eight cases that were initially included on our list but that we deemed to not fit within our category of interest. These are listed separately in Appendix B.

We note, however, that even for the cases we retained, in some instances it was debatable whether the government really reversed a prior position, and/or we were not able to access government briefing to determine precisely what the government had previously argued. Ultimately, we included fifteen cases that we deemed "questionable" as to whether a flip had occurred. We flag these cases in the chart in Appendix B. Other readers might feel there are additional cases that should be denoted as questionable or excluded from the flip list entirely. Conversely, some might argue that some of the cases we excluded as "not flips" should have been considered flips. Notably, the reason we were analyzing them at all was that a party, an amicus, or a Justice had accused the government of having flipped its position.

In several cases, the question centered around whether a prior position could be fairly distinguished from the (different) position being advanced by the government in the later case, or whether it amounted to a reversal.[5] There were also cases in our list where the government "confessed error" and was no longer defending the decision below, but where we could not determine whether the position, now abandoned, had been urged by the government in the lower court below (or simply reached by the lower court on its own). Often, this was in cases where the government's briefs in the lower courts were not available on Westlaw or Lexis, so we had to infer the government's position from the way the judicial opinions characterized its arguments.[6] There were also a few cases where it was clear that the government reversed a prior position, but it was debatable whether it fit within our definition of a *litigation* flip.[7]

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5 An example of this is *Kokesh v. SEC*, 137 S. Ct. 1635 (2017), discussed in the Article at footnote 138.

6 An example of this phenomenon is *Petty v. United States*, 481 U.S. 1034 (1987) (mem.).

7 For example, *Securities Industry Ass'n v. Board of Governors of the Federal Reserve System*, 468 U.S. 137 (1984), concerned whether commercial paper is a "security" under the Glass-Steagall Act. In the Supreme Court, the Board took a position that was different from the one it had taken in an adjudicative role in the lower courts, but it was difficult to discern whether the Board had also advanced the now-reversed position in litigation.

Ultimately, we provide the list of cases that we analyzed but deemed "not flips" and the list of cases that we included but felt were questionable to be as transparent as possible about our research process and to allow future research to further probe these questions. As we have noted in the Article, we believe our methodology effectively identifies a body of caselaw of litigation flips, and we do not believe our findings about the factors that tend to drive flips would be different if these questionable cases were included.

8. Year of Decision and Its Relationship to Presidential Administration

Figure A in the Article shows the numerical frequency of cases in four-year segments, beginning in 1941. Cases are grouped according to the year the decision was published. This generally means that these four-year segments will match presidential administrations, which typically begin in January of the year following an election year, and we use these four-year segments as rough proxies for presidential administrations. However, some cases decided early in the span (e.g., in April 1981) may have been briefed and argued by the Solicitor General of the prior administration (e.g., in October 1980). As discussed in the Article, in four of the cases included in our dataset that were decided in 2021, the relevant change in government position was made by the Trump OSG rather than the Biden OSG.[8] There were other 2021 cases that were briefed and argued by the Trump OSG where the change in government position was indicated in a letter from the Biden OSG to the Clerk of the Supreme Court, subsequent to the briefing and argument but prior to the decision.[9] In the Article where we discuss the win rate of the Biden OSG, we include only the 2021 cases in which the relevant change in position was in fact made by the Biden OSG.

8 These cases are identified and discussed in the Article at footnote 148.

9 An example of this is *California v. Texas*, 141 S. Ct. 2104 (2021). *See id.* at 2121 (Thomas, J., concurring).

APPENDIX B

Table 1: Flip Cases

Notes

Coding conventions are described in Appendix A.

Government role abbreviations:

P	Petitioner
R	Respondent
A	Amicus
A for P	Amicus in support of Petitioner
A for R	Amicus in support of Respondent
Invited	The government was invited by the Court to submit an amicus brief

Stated reason citation abbreviations:

BP	Opening Brief of Government as Petitioner
RBP	Reply Brief of Government as Petitioner
BR	Brief of Government as Respondent
BA	Brief of Government as Amicus
BR in Opp.	Brief of Government as Respondent in Opposition to Petition for Certiorari
OA	Oral Argument

Type of flip abbreviations:

LC/sc	lower court, same case
LC/dc	lower court, different case
SC/sc	SCOTUS, same case
SC/dc	SCOTUS, different case

	A: Case Name	*B: Citation*	*C: Gov't Role*	*D: Type of Flip*	*E: Stated Reason*	*F: Issue*	*G: Gov't Win?*
1	Groff v. DeJoy	143 S. Ct. 2279 (2023)	R	SC/dc	"Following the Court's grant of certiorari in this case, the government reexamined the issue and determined that the [earlier] brief gave insufficient weight to statutory *stare decisis* and failed to recognize the extent to which [the relevant precedent] can be (and often has been) applied to provide meaningful protection for religious observance, in accordance with the EEOC's guidelines." BR at 15 n.2.	What kind of showing of hardship employer must make in order to deny religious accommodation under Title VII	Y*
2	Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.	143 S. Ct. 2141 (2023)	A for R; invited	LC/sc	"Having reexamined the case following the court of appeals' decision and the change in Administrations, the United States has concluded that" the lower courts' decisions were correct. BA at 31–32.	Whether race-based affirmative action in higher education is unconstitutional	N
3	Jones v. Hendrix	143 S. Ct. 1857 (2023)	R	LC/sc	"In light of its varying positions on this important and difficult question, the government reexamined the issue anew after this Court granted certiorari in this case. Based on fresh consideration of the statutory text, context, and history, the government has determined that neither of its prior positions reflects the best interpretation of Section 2255." BR at 11.	Whether federal inmate who did not challenge conviction because circuit precedent barred challenge can bring habeas claim when SCOTUS reverses circuit precedent so prisoner is legally innocent	N
4	West Virginia v. EPA	142 S. Ct. 2587 (2022)	R	LC/sc	"After the change in Administration [and a new EPA rulemaking], EPA has reconsidered its position" that the Clean Air Act "unambiguously" forbade EPA from adopting the Clean Power Plan. BR at 14.	Whether the EPA's Clean Power Plan was a valid action under the Clean Air Act	N

5	Carson *ex rel.* O.C. v. Makin	142 S. Ct. 1987 (2022)	A for R	LC/sc	"After the change in Administration and . . . intervening developments [including the specific question on which the Court granted cert.], the United States reexamined this case." BA at 11.	Whether Maine's "nonsectarian" requirement for tuition assistance program for private secondary schools violates the First Amendment	N
6	Boechler, P.C. v. Comm'r	142 S. Ct. 1493 (2022)	R	LC/dc	"Upon further consideration, . . . the government has determined that the characterization in its [earlier brief] overstated the extent of the disagreement between the Ninth and D.C. Circuits." BR in Opp. at 24.	Whether time limit for petitions challenging a tax collection due process determination is jurisdictional, and, if not, whether it is subject to equitable tolling	N
7	Unicolors, Inc. v. H&M Hennes & Mauritz, L.P.	142 S. Ct. 941 (2022)	A for P	LC/dc	The government does not respond to claim of inconsistency (made by respondent after the government filed its brief).	Meaning of "knowledge" in Copyright Act's safe harbor provision	Y
8	Nat'l Fed'n of Indep. Bus. v. Dep't of Lab.	142 S. Ct. 661 (2022)	R	LC/dc	The government does not acknowledge or explain flip.	Whether OSHA has authority to impose vaccine mandate or test rule on large employers	N
9	Dep't of Just. v. House Comm. on the Judiciary	142 S. Ct. 46 (2021) (mem.)	P	LC/dc	"The government has reconsidered its position on the question . . . in light of the text and context of [the relevant rule] as well as the serious separation-of-powers concerns implicated by the court of appeals' contrary interpretation." BP at 29 n.5.	Whether impeachment counts as judicial proceeding for purposes of disclosure of grand jury information	Y*
10	Ams. for Prosperity Found. v. Bonta	141 S. Ct. 2373 (2021)	A for vacatur/ remand; invited	SC/sc	"After . . . the change in Administration, the government reconsidered the issues presented in these cases and has concluded that its prior position misstated the exacting-scrutiny standard and gave insufficient weight to the nonpublic nature of the disclosure that California requires." BA at 13.	Whether California rule requiring disclosure of donors violated the First Amendment	N

11	Brnovich v. Democratic Nat'l Comm.	141 S. Ct. 2321 (2021)	A for P	SC/sc	"Although the government has previously filed briefs in lower courts, and in this Court at the certiorari stage, . . . this brief represents this Office's first comprehensive consideration of the question at the merits stage in this Court." BA at 14 n.2.	Whether Arizona standard for reviewing vote-denial claims violates the Voting Rights Act	N
12	HollyFrontier Cheyenne Refin., LLC v. Renewable Fuels Ass'n	141 S. Ct. 2172 (2021)	R	SC/sc	Following grant of cert and change in Administration, EPA conducted "detailed review" of its position and concluded that the lower court's reasoning (invalidating EPA's approach) "better reflects the statutory text and structure, as well as Congress's intent in establishing the [relevant] program." BR at 13.	Whether EPA can grant an "extension" of an exemption to a small refinery that hasn't ever received an extension before	N
13	California v. Texas	141 S. Ct. 2104 (2021)	R	SC/sc	"Following the change in Administration, the Department of Justice has reconsidered the government's position in this cases." Letter from Edwin S. Kneedler, Deputy Solic. Gen., U.S. Dep't of Just., to Hon. Scott S. Harris, Clerk, Sup. Ct. of the U.S. 1 (Feb. 10, 2021).	Whether minimum coverage provision in the Affordable Care Act is severable if it is unconstitutional	Y*
14	Cedar Point Nursery v. Hassid	141 S. Ct. 2063 (2021)	A	SC/sc	"Following the change in Administration, the [DOJ] has reconsidered the government's position in this case, and . . . [the new] position accords with the United States' longstanding view [on the issue]." Letter from Elizabeth B. Prelogar, Acting Solic. Gen., U.S. Dep't of Just., to Scott S. Harris, Clerk, Sup. Ct. of the U.S. 1–2 (Feb. 12, 2021).	Whether California statute entitling labor organization to access agricultural employer's property in order to advocate for unionization constitutes a taking	N
15	Terry v. United States	141 S. Ct. 1858 (2021)	R (supporting P)	SC/sc	"Following the change in Administration, the Department of Justice began a process of reviewing the government's interpretation of [the relevant statute]" and "[a]s a result of that review" concluded that petitioner was indeed entitled to seek a reduced sentence. Letter from Elizabeth B. Prelogar, Acting Solic. Gen., U.S. Dep't of Just., to Scott S. Harris, Clerk, Sup. Ct. of the U.S. 1 (Mar. 15, 2021).	Whether conviction for crack cocaine possession is a "covered offense" under the Fair Sentencing Act, First Step Act	N

16	Facebook, Inc. v. Duguid	141 S. Ct. 1163 (2021)	R (supporting P)	LC/dc	"The FCC's prior interpretations of [the relevant statute] provide no sound reason for rejecting the most natural reading of the statutory text." BR at 12.	Whether Facebook's security alert constituted an "automatic telephone dialing system" under the Telephone Consumer Protection Act	Y
17	Torres v. Madrid	141 S. Ct. 989 (2021)	A for vacatur/remand	SC/dc	The government acquiesced to precedent: "If . . . you read the decision in Hodari D., it's quite clear that this Court considered and rejected the government's position, both the bottom line and the reasoning and the inferences that we drew from common law." OA at 33–34 (government attorney).	Whether physical control is required to constitute a "seizure" under the Fourth Amendment	Y
18	Trump v. New York	141 S. Ct. 530 (2020)	P	LC/dc	The government claims "past practice of including illegal aliens in the apportionment shows at most that the Executive may include this population, not that it must do so." RBP at 11.	Whether undocumented noncitizens can be excluded from the census count for purposes of congressional apportionment, as well as procedural questions regarding standing and ripeness	Y*
19	Seila L. LLC v. Consumer Fin. Prot. Bureau	140 S. Ct. 2183 (2020)	R	LC/sc	CFPB has independent litigating authority in the lower courts and defended the removal restriction there. "Since the court of appeals issued its decision, however, the Director has reconsidered that position and now agrees that the removal restriction is unconstitutional." BR on Petition for Cert. at 20.	Whether provision permitting removal of Consumer Financial Protection Board director only for "good cause" is unconstitutional	Y
20	Dep't of Homeland Sec. v. Regents of the Univ. of Cal.	140 S. Ct. 1891 (2020)	P	SC/dc	Following judicial decisions holding DACA likely unlawful, "the Department of Homeland Security reasonably determined that it no longer wished to retain the DACA policy." OA at 4 (SG).	Whether the Department of Homeland Security's termination of the DACA policy violated the APA	N

21	R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC, *consolidated with* Bostock v. Clayton County	140 S. Ct. 1731 (2020)	R for reversal	LC/sc	"[W]hile the EEOC's appeal was pending, Attorney General Sessions issued a memorandum . . . stating that 'Title VII's prohibition on sex discrimination . . . does not encompass discrimination based on gender identity'" and "withdr[awing]" a memorandum issued by President Obama's AG that "had taken a contrary position." BR at 8.	Whether Title VII bars discrimination based on gender identity	N
22	Barton v. Barr	140 S. Ct. 1442 (2020)	R	LC/dc	Earlier interpretation of one clause rested on assumption that BIA's interpretation of related clause was correct, but the "government now believes that the Board's interpretation . . . is contrary to the plain text of the statute." BR at 35.	Whether petitioner had committed an offense that functioned to end the period of continuous residence required to be eligible for cancellation of removal	Y
23	Rodriguez v. Fed. Deposit Ins. Corp.	140 S. Ct. 713 (2020)	R	LC/sc	The government denies inconsistency. BR at 22–23; OA at 39–41.	Whether state law or federal common law determines whether parent or subsidiary company receives tax refund	N
24	Ret. Plans Comm. of IBM v. Jander	140 S. Ct. 592 (2020)	A for neither	LC/dc	"After further reflection and consultation with the SEC, the United States has reconsidered" a position taken by the Department of Labor in earlier case. BA at 24 n.3.	Whether ERISA imposes disclosure requirements on fiduciaries different from what is required by securities laws	N
25	United States v. Davis	139 S. Ct. 2319 (2019)	P	SC/dc	The government "reconsidered" its longstanding interpretation of statute after Court deemed a similar interpretation of a different statute unconstitutionally vague. RBP at 7.	Whether 924(c) residual clause is unconstitutionally vague	N
26	Smith v. Berryhill	139 S. Ct. 1765 (2019)	R for reversal	LC/sc	The government "reexamined the question and concluded that its prior position was incorrect" after recent court of appeals decision deepened a circuit split. BR at 15. The government "became convinced that the statutory text is plain and dictates the result." OA at 26.	Whether certain dismissal orders entered by an administrative law judge are subject to judicial review	Y

27	Obduskey v. McCarthy & Holthus LLP	139 S. Ct. 1029 (2019)	A for R	LC/dc	In a 1992 opinion letter, FTC staff stated that foreclosure did not constitute debt collection under the statute, while in a 1997 Ninth Circuit amicus brief, the CFPB argued it did. "The [CFPB] has reconsidered that position . . . ." BA at 22 n.6.	Whether, under the Fair Debt Collection Practices Act, the enforcement of a security interest in real property through foreclosure counts as debt collection	Y
28	Jam v. Int'l Fin. Corp.	139 S. Ct. 759 (2019)	A for reversal	LC/dc	"The government's brief [in a prior Second Circuit case] did not contain any independent analysis of [the relevant statutory provision] or the Executive Branch's historical practice under the [statute], and does not reflect the United States' longstanding interpretation of the provision." BA at 29 n.8.	Immunity under the International Organizations Immunity Act, and specifically whether later laws like FSIA are incorporated into the IPIA	Y
29	Garza v. Idaho	139 S. Ct. 738 (2019)	A for R	LC/dc	No explanation.	Whether prejudice should be presumed when defense counsel fails to file appeal in light of defendant's clear requests, notwithstanding appeal waiver in plea agreement	N
30	Janus v. Am. Fed'n of State, Cnty. & Mun. Emps., Council 31	138 S. Ct. 2448 (2018)	A for P	SC/dc	Although the government had twice within the prior five years argued that a 1971 precedent on point was "correct and should be reaffirmed," "[f]ollowing the grant of certiorari in this case, the government reconsidered the question and reached the opposite conclusion." BA at 11.	Whether requiring public employees to contribute to a union, even if not members, violates the First Amendment	Y
31	Lucia v. SEC	138 S. Ct. 2044 (2018)	R	LC/sc	"Upon further consideration, and in light of the implications for the exercise of executive power under Article II, the government is now of the view that [SEC's] ALJs are officers . . . ." BR at 9–10.	Whether administrative law judges for the SEC are employees or "officers"	Y

32	Husted v. A. Philip Randolph Inst.	138 S. Ct. 1833 (2018)	A for P	LC/sc	"After . . . the change in Administrations, the Department reconsidered the question. . . . [The new position] is supported by the [statute's] text, context, and history." BA at 14.	Whether Ohio's method for purging voter rolls violated federal law	Y
33	Koons v. United States	138 S. Ct. 1783 (2018)	R	LC/sc	"As noted at the certiorari stage of this case, the government has reconsidered its position and now agrees with the court of appeals' decision in this case and with the Tenth Circuit's similar holding in [another case]." BR at 16 (citation omitted).	Whether defendants are eligible for sentencing reductions because the Sentencing Commission later reduced the ranges for the crimes they had committed	Y
34	Epic Sys. Corp. v. Lewis	138 S. Ct. 1612 (2018)	A for P	SC/sc	"After the change in administration, the Office reconsidered the issue and has reached the opposite conclusion." BA at 13.	Whether NLRA's authorization for employees to pursue collective action in court trumps FAA's mandate that courts enforce agreements to arbitrate	Y
35	Perry v. Merit Sys. Prot. Bd.	137 S. Ct. 1975 (2017)	R	SC/dc	"The Court's . . . decision in *Kloeckner* . . . demonstrates that [the legal] assertion [the government had previously advanced in *Kloeckner*] was incorrect." BR at 40–41.	Whether an exception to exclusive Federal Circuit review of MSPB decisions applies to a case determining that the action is not appealable to the Board	N
36	Kokesh v. SEC	581 U.S. 455 (2017)	R	LC/dc	Denies inconsistency, claiming that the earlier cases involved the Bankruptcy Code and therefore had "no application here." BR at 30.	Whether disgorgement under securities law is a civil fine, penalty, or forfeiture	N
37	Beckles v. United States	580 U.S. 256 (2017)	R	LC/dc	"The government has since reconsidered that [prior] position and believes that such an approach is inconsistent with this Court's precedents . . . ." BR at 29 n.2.	Whether Sentencing Guidelines errors are substantive or procedural for retroactivity purposes	Y

38	Cuozzo Speed Techs., LLC v. Lee	579 U.S. 261 (2016)	R	LC/dc	"As petitioner notes, the government advanced a different construction [of the relevant statute] in one district-court proceeding. . . . On appeal [in that earlier case], . . . the government concluded that its initial reading had been wrong . . . ." BR at 46 n.11 (citation omitted).	Whether PTO has authority to grant *inter partes* review and whether those decisions are subject to judicial review	Y
39	Puerto Rico v. Sanchez Valle	579 U.S. 59 (2016)	A for R	SC/dc	"In briefs filed two decades ago, the Department of Justice argued [the opposite position]. Those briefs do not reflect the considered view of the Executive Branch" reached after extensive consideration by the Office of Legal Counsel and presidential task forces. BA at 32 n.2 (citation omitted), 31–33.	Whether Puerto Rico is a separate sovereign for purposes of double jeopardy	Y
40	CRST Van Expedited, Inc. v. EEOC	578 U.S. 419 (2016)	R	SC/sc	Noting that both parties litigated the case below in conformity with an (anomalous) Eighth Circuit precedent, the government contends "we have a . . . right to refine our arguments once we're free from the constraints of circuit [precedent]." OA at 58.	Whether defendant can recover attorney's fees when it wins based on the EEOC's failure to satisfy presuit obligations	Y*
41	Campbell-Ewald Co. v. Gomez	577 U.S. 153 (2016)	A for R	SC/dc	The government changed argument because the Court had rejected the government's claims of derivative sovereign immunity in earlier cases. BA at 26.	Whether government contractors are entitled to derivative sovereign immunity	Y
42	Obergefell v. Hodges	576 U.S. 644 (2015)	A for P	LC/dc	Doesn't discuss as a "flip" but relies heavily on arguments advanced in *United States v. Windsor*, 570 U.S. 744 (2013), where the government did explicitly flip. BA at 31–35.	Whether bans on same-sex marriage are unconstitutional	Y
43	Coleman v. Tollefson	575 U.S. 532 (2015)	A for R	LC/dc	The government's earlier discussion of the issue in a prior brief "was perfunctory and did not contain any textual analysis." BA at 14 n.2.	Whether a dismissed case still pending on appeal counts as a "strike" under a statute barring IFP status for prisoners with three prior dismissals	Y

44	Young v. United Parcel Serv., Inc.	575 U.S. 206 (2015)	A for P; invited	LC/dc	The position taken twenty years earlier by the "Department of Justice, on behalf of United States Postal Service," "is no longer the position of the United States," and the USPS was reconsidering its policy "[i]n light of the EEOC's new guidance," statutory changes, and this case. BA at 16 n.2.	Whether the Pregnancy Discrimination Act permits employers to treat pregnant employees differently from others with similar limitations pursuant to a "pregnancy-blind" rationale	Y
45	United States v. Windsor	570 U.S. 744 (2013)	P	LC/dc	The President and the AG had determined that classifications based on sexual orientation "warrant[] . . . heightened scrutiny" and that "Section 3 fails that standard and is therefore unconstitutional." BP at 5.	Whether DOMA is constitutional	Y
46	Mut. Pharm. Co. v. Bartlett	570 U.S. 472 (2013)	A for P	SC/dc	The government doesn't respond to charge of inconsistency (challenge included in brief filed after government filed its brief).	Whether FDCA preempts state law failure to warn claims for generic drug manufacturers	Y
47	FTC v. Actavis, Inc.	570 U.S. 136 (2013)	P	SC/dc	The government acknowledges but does not explain its flip. BP at 41 n.9.	Whether reverse patent agreement where generic maker agrees to wait to bring to market is immune from antitrust litigation	Y
48	Kiobel v. Royal Dutch Petroleum Co.	569 U.S. 108 (2013)	A for P	SC/dc	"On further reflection, and after examining the primary documents, the United States acknowledges that [the 1795 AG opinion at issue] is amenable to different interpretations." BA at 8 n.1.	Whether claim under the Alien Tort Statute can reach conduct that occurred in a foreign jurisdiction	N
49	US Airways, Inc. v. McCutchen	569 U.S. 88 (2013)	A for neither	LC/dc	"Upon further reflection, and in light of [an intervening SCOTUS decision interpreting statute], the Secretary is now of the view that the common-fund doctrine is generally applicable . . . ." BA at 22 n.9.	Whether equitable defenses are available under an ERISA provision allowing an insurer to recover funds paid to insured by third party	N

50	Millbrook v. United States	569 U.S. 50 (2013)	R for reversal	LC/sc	"The Solicitor General has now concluded after review of the matter that [the now-discarded position, which had been argued only in the lower courts,] is incorrect and does not reflect a permissible reading of the statutory text." RBP at 20 n.9.	Whether a waiver of sovereign immunity under the FTCA for intentional torts of law enforcement officers applies to prison guard	Y
51	Decker v. Nw. Envt'l Def. Ctr.	568 U.S. 597 (2013)	A for P; invited	LC/sc	"On further reflection, however, the timing question [which had been part of the basis for the government's argument as amicus below] is irrelevant to the resolution of this case." BA at 30 n.12.	Whether water runoff from drainage ditches falls within CWA and requires permit	Y
52	Kirtsaeng v. John Wiley & Sons, Inc.	568 U.S. 519 (2013)	A for R	SC/dc	The government reconsidered its position in light of dictum in earlier SCOTUS opinion. OA at 42–43.	Whether "first sale" doctrine in copyright law (permitting subsequent resale) applies to books lawfully produced outside the United States but sold in the United States	N
53	Levin v. United States	568 U.S. 503 (2013)	R	SC/dc	Earlier case didn't directly implicate relevant statutory question; government's brief ignored strict construction rule for waivers of sovereign immunity.	Whether Medical Malpractice Immunity Act (Gonzalez Act) overrides FTCA exception for intentional torts, and thus whether the United States can be sued for injury at naval hospital	N
54	Nat'l Fed'n of Indep. Bus. v. Sebelius	567 U.S. 519 (2012)	R	LC/sc	"Following the district court's decision in this case and decisions rendered in other Affordable Care Act litigation, the government reexamined its position on the [Anti-Injunction Act] and concluded that it does not foreclose the exercise of jurisdiction to consider the constitutionality of the minimum coverage provision." BP at 5 n.4.	Whether the ACA's individual mandate is constitutional and whether the Anti-Injunction Act bars the challenge	Y*

55	Dorsey v. United States	567 U.S. 260 (2012)	R (supporting P)	LC/sc	During the pendency of the case, the "United States revisited its position in light of differing [lower court] judicial decisions" and issued memo to all federal prosecutors advising of the change. BR at 19.	Whether law making sentences for crack cocaine more lenient applied to cases where the offense occurred prior to the Act but the sentencing occurred after the Act	Y
56	Christopher v. SmithKline Beecham Corp.	567 U.S. 142 (2012)	A for P	LC/sc	The government denies flip.	Whether pharmaceutical salespeople count as "outside salesmen" exempt from overtime under FLSA	N
57	Magner v. Gallagher	565 U.S. 1187 (2012) (mem.)	A for neither	LC/dc	The government doesn't respond to charge of inconsistency (challenge included in brief filed after government filed its brief).	Whether Fair Housing Act permits disparate impact claims	Voluntarily dismissed
58	Bond v. United States	564 U.S. 211 (2011)	R	LC/sc	"The government confessed error and filed a brief in support of petitioner's argument . . . ." BR at 6–7.	Whether petitioner had standing to bring a Tenth Amendment challenge to a conviction for possessing and using a criminal weapon	Y
59	Gen. Dynamics Corp. v. United States	563 U.S. 478 (2011)	R	LC/sc	"Upon further reflection and consultation with senior Government officials . . . ." Joint Appendix at 774 (government's Response to the Court's Order to Show Cause).	Whether government could litigate superior knowledge defense while resisting discovery	N
60	Citizens United v. Fed. Election Comm'n	558 U.S. 310 (2010)	R	SC/sc	Reconsidered various arguments in light of questions raised in initial oral argument. Flip happened on reargument. OA at 38–46, 64–65.	Whether government may limit corporate independent campaign expenditures	N

61	Wyeth v. Levine	555 U.S. 555 (2009)	A for P; invited	LC/dc	The earlier filing "is one of several amicus filings in which the government addressed FDCA preemption issues on a more fact–specific basis, without articulating a more general rule of decision." BA at 28.	Whether FDCA preempts state law failure-to-warn claims related to labeling	N
62	Kennedy v. Plan Adm'r for Dupont Sav. & Inv. Plan	555 U.S. 285 (2009)	A for neither	LC/dc	Acknowledged prior interagency disagreement, but explained that the "Secretary of Labor has reconsidered" its position and "now agrees with the Secretary of Treasury." BA at 20 n.6.	Whether a waiver, outside the context of a QDRO, was enforceable under ERISA	Y
63	District of Columbia v. Heller	554 U.S. 570 (2008)	A for neither	SC/dc	In 2001, the Attorney General "adopted the position that the Second Amendment protects an individual right" but that it is subject to "reasonable restrictions." BA at 3.	Whether Second Amendment protects individual right to bear arms	Y
64	Riegel v. Medtronic, Inc.	552 U.S. 312 (2008)	A for R; invited	SC/dc	Earlier argument was based on "proposed regulations that FDA has since withdrawn" and was "inconsistent with . . . the risk-management principles" that the FDA currently follows. BA at 24.	Whether FDA preempts state law tort where premarket approval has been given	Y
65	Tellabs, Inc. v. Makor Issues & Rts., Ltd.	551 U.S. 308 (2007)	A for P	LC/dc	The government doesn't respond to charge of inconsistency (challenge included in brief filed after government filed its brief).	What the heightened pleading standard for fraud under the PSLRA requires	Y
66	United States v. Atl. Rsch. Corp.	551 U.S. 128 (2007)	P	LC/dc	"Once [a SCOTUS decision] clarified" that suggestions in a prior decision were dictum, the government "reexamined the statutory text." RBP at 5 n.2.	Whether a potentially responsible party can sue other PRPs under CERCLA to share costs of cleanup undertaken voluntarily	N
67	Bates v. Dow AgroSciences LLC	544 U.S. 431 (2005)	A for R; invited	LC/dc	The government "reexamined its position in light" of contrary court rulings. BA at 20.	Whether FIFRA (pesticide law) preempts state law actions	N

68	City of Sherrill v. Oneida Indian Nation of N.Y.	544 U.S. 197 (2005)	A for R; invited	SC/dc	The government changed its view "[u]pon further consideration of the historical record." BA at 17 n.4.	Whether Oneida land had been fully sold to New York in late 1700s	N
69	Cooper Indus., Inc. v. Aviall Servs., Inc.	543 U.S. 157 (2004)	A for P; invited	LC/dc	Denies that it is really a different position, but acknowledges "errant language in some government briefs may have nurtured" an assumption of a different interpretation. BA at 26.	Whether a landowner can collect under CERCLA Section 113 contributions for voluntary cleanup	Y
70	Alaska Dep't of Envt'l Conservation v. EPA	540 U.S. 461 (2004)	R	LC/sc	"[F]urther consideration of this Court's more recent precedents . . . ." OA at 43.	Whether appellate court had jurisdiction to review a challenge over an EPA order	Y
71	Breuer v. Jim's Concrete of Brevard, Inc.	538 U.S. 691 (2003)	A for R	LC/dc	Flip was due to "further consideration" based on subsequent amendment of general removal statute. BA at 6 n.1.	Whether FLSA claims are removable	Y
72	Barnes v. Gorman	536 U.S. 181 (2002)	A for P	LC/dc	The government doesn't respond to charge of inconsistency (challenge included in brief filed after government filed its brief).	Whether Title II of ADA and Rehab Act permit punitive damages	Y
73	United States v. Cleveland Indians Baseball Co.	532 U.S. 200 (2001)	P	SC/dc	The government claims it's a slightly different issue, but acknowledges interagency disagreement. OA at 4–5, 24–25.	Whether FICA and FUTA taxes on back wages are assessed according to tax in year received or year they should have been received	Y
74	Egelhoff v. Egelhoff *ex rel.* Breiner	532 U.S. 141 (2001)	A for P	LC/sc	"On further reflection . . . ." BA at 20 n.9.	Whether ERISA preempts a state law saying a spouse's designation as beneficiary automatically gets erased upon divorce	Y

75	Dickerson v. United States	530 U.S. 428 (2000)	R	SC/dc	Claims earlier positions were not "official Justice Department policy." BR at 19.	Whether 18 U.S.C. § 3501 (replacing *Miranda* warnings with totality of the circumstances test) was unconstitutional	Y
76	Arizona v. California	530 U.S. 392 (2000)	R	LC/sc	The government changed opinion regarding whether 1893 agreement was valid. Brief for United States in Support of Exception at 13–14.	Whether Tribe's claim to additional water rights was precluded by earlier litigation	Y
77	Geier v. Am. Honda Motor Co.	529 U.S. 861 (2000)	A for R	LC/dc	The government contends its position is consistent with earlier positions. OA at 36–38.	Whether provision in Safety Act (regarding cars) preempts state tort claims	Y
78	Norfolk S. Ry. Co. v. Shanklin	529 U.S. 344 (2000)	A for R	SC/dc	The government claims its earlier brief addressed a slightly different portion of the regulations and statute. BA at 23 n.29.	Whether federal regulations regarding warnings at railroad crossings installed with federal funding preempt state tort claims	N
79	Reno v. Bossier Par. Sch. Bd.	528 U.S. 320 (2000)	P	LC/dc	"While the Department previously believed" the statute put the burden of proof on the government, the Court's intervening decisions "make clear that Section 5 places the burden of proving the absence of discriminatory intent on the covered jurisdiction." RBP at 12 n.12.	Whether VRA prohibits preclearance of redistricting plan enacted with discriminatory but nonretrogressive purpose	N
80	Dep't of Com. v. U.S. House of Representatives	525 U.S. 316 (1999)	P	LC/dc	The government expressed greater confidence based on scientific experts' opinions that sampling methods could yield a higher level of accuracy than when not using sampling methods. OA at 19–20.	Whether census can use sampling to determine apportionment of representatives	N
81	Piscataway Twp. Bd. of Educ. v. Taxman	522 U.S. 1010 (1997) (mem.)	A for affirmance; invited	LC/sc	"In light of the extensive analysis contained in the OLC Memorandum [analyzing a newly issued SCOTUS decision on a related legal question], we have arrived at a different conclusion on the correct disposition of this case from that stated in the Third Circuit brief." BA at 18 n.1.	Whether race-based affirmative action may be considered in layoffs	Neither

82	Blessing v. Freestone	520 U.S. 329 (1997)	A for R	LC/dc	"The Secretary has reconsidered" its position in light of statutory amendments and lower court decisions interpreting that language. BA at 17 n.18.	Whether § 1983 provides a private right of action to sue for violations of Title IV-D of SSA	N
83	United States v. Wells	519 U.S. 482 (1997)	P	LC/sc	Court of appeals decided the legal issue, even though the government had not pressed it below, and "invited error" doctrine is inapplicable. RBP at 6–8, 10–11.	Whether materiality of falsehood is an element of the crime of knowingly making a false statement to a federal insured bank	Y
84	Dunn v. Commodity Futures Trading Comm'n	519 U.S. 465 (1997)	R	LC/dc	"Heeding Justice Frankfurter's observation that newly acquired wisdom should not be rejected merely because it arrives late, the United States has modified its position on the basis of a more detailed analysis of the Act." BR at 47 (citation omitted).	Whether "Treasury Amendment" exempting "transactions in foreign currency" from regulation by the CFTC includes an exemption of off-exchange trading of foreign currency options	N
85	Ingalls Shipbuilding, Inc. v. Dir., Off. of Workers' Comp. Programs, Dep't of Lab.	519 U.S. 248 (1997)	R	LC/dc	"[T]he Director reconsidered his position and changed his interpretation to conform to the statutory construction adopted by this Court" in an earlier decision stating two provisions of a statute should be interpreted consistently. BR at 34 n.16.	Whether an employee's spouse who may be eligible for benefits after employee's death needs employer's approval when entering into a settlement with third party	Y
86	Stutson v. United States	516 U.S. 193 (1996)	R for reversal	LC/sc	"Given the unanimity of the other courts' of appeals interpretation of [the standard following a SCOTUS decision], we believe it would be appropriate to vacate the decision below and remand this case for reconsideration . . . ." BR in support of GVR at 6–7.	Whether a 1993 Supreme Court decision adopting a liberal interpretation of "excusable neglect" applies to criminal appeals	Y
87	Gutierrez de Martinez v. Lamagno	515 U.S. 417 (1995)	R for reversal	LC/dc	"Upon further consideration," reflecting that majority of circuit courts interpreted a new statute differently from how the United States originally had interpreted it. BR at 14, n.4.	Whether AG certification that federal employee was acting in scope of employment is reviewable	Y

88	N.Y. State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.	514 U.S. 645 (1995)	A for P; invited	LC/sc	Although in the court of appeals the "Secretary of Labor, appearing as amicus curiae, expressed" a different interpretation, "[t]he position stated in text is now the position of the Secretary." BA at 14 n.4.	Whether surcharges on hospital costs are preempted by ERISA	Y
89	Turner Broad. Sys., Inc. v. FCC	512 U.S. 622 (1994)	R	LC/sc	The government does not address change.	Whether the "must carry" provisions of the Cable Television Consumer Protection and Competition Act of 1992 violate the First Amendment	Y
90	J.E.B. v. Alabama *ex rel.* T.B.	511 U.S. 127 (1994)	A for P	LC/dc	The government does not address change.	Whether the Constitution prohibits the use of peremptory challenges to exclude jurors based on sex	Y
91	Polsby v. Shalala	507 U.S. 1048 (1993) (mem.)	R	LC/sc	Confession of error. The government's position was described in the Brief of the National Organization for Women Foundation, Inc. et al. at 8–9.	Whether Title VII applies to postemployment retaliation claims	Y
92	Pauley v. Beth-Energy Mines, Inc.	501 U.S. 680 (1991)	R	LC/sc	The government does not address change.	Whether the Department of Labor's interim regulations regarding claimants for black lung benefits are more restrictive than the Department of Health's interim regulations	Y
93	Rust v. Sullivan	500 U.S. 173 (1991)	R	LC/dc	Agency is "entitled to change its policies" and did so here based on "relevant data" suggesting allowing counseling and referrals had the effect of "promoting or encouraging abortion." BR at 40–42.	Whether regulations prohibiting abortion counseling and referral in Title X funded programs violate the Constitution	Y

94	Mich. Citizens for an Indep. Press v. Thornburgh	493 U.S. 38 (1989) (mem.)	R	LC/sc	The government states that "on consideration," *Chevron* is not applicable to the agency action in question. BR at 42.	Whether Attorney General's decision, under Newspaper Preservation Act, to approve a joint operating agreement between two Detroit newspapers was permissible and whether *Chevron* requires deference to the agency's decision	Y*
95	Bowen v. Georgetown Univ. Hosp.	488 U.S. 204 (1988)	P	LC/dc	The government does not address change.	Whether Secretary of HHS can make retroactive rule exempting certain costs from reimbursement	N
96	K Mart Corp. v. Cartier, Inc.	486 U.S. 281 (1988)	P	LC/dc	"[W]ithout Treasury's knowledge or approval, the Customs Service signed an amicus curiae brief that took a position partially inconsistent with the Treasury Department's regulations." RBP at 17 n.17.	Whether a Treasury regulation permitting importation of certain gray-market goods is a reasonable interpretation of the Tariff Act of 1930	Y and N
97	Dep't of the Navy v. Egan	484 U.S. 518 (1988)	P	LC/dc	We now "believe [prior position] was error" based on experience under the earlier interpretation. BP at 29 n.15.	Whether Merit Systems Protection Board reviewing removal of an employee is authorized to review underlying denial or revocation of security clearance	Y
98	Comm'r v. Fink	483 U.S. 89 (1987)	P	LC/dc	The government does not address change.	Whether a shareholder who surrenders shares to the corporation, but maintains control, may immediately deduct basis in shares from income	Y

99	Shearson/Am. Express Inc. v. McMahon	482 U.S. 220 (1987)	A for P	LC/dc	"[T]he Commission has reconsidered its position and no longer holds the view urged in the 1975 brief." BA at 18 n.13.	Whether courts can enforce contractual arbitration clauses when adjudicating 10(b) claims under Securities and Exchange Act	Y
100	Petty v. United States	481 U.S. 1034 (1987) (mem.)	R	LC/sc	Confession of error by SG in standard applied by circuit court below (as referenced in the circuit court decision on remand). 828 F.2d 2, 3 (1987).	Whether separate criminal convictions arising out of a single criminal episode count as distinct offenses requiring sentencing enhancement	Y
101	Burke v. Barnes	479 U.S. 361 (1987)	P	LC/sc	"In light of Judge Bork's dissenting opinion and upon further reflection . . . ." RPB at 11 n.8.	Whether bill setting conditions for continuance of aid to El Salvador had been pocket vetoed	Y
102	Local 28 of the Sheet Metal Workers' Int'l Ass'n v. EEOC	478 U.S. 421 (1986)	R (supporting P)	LC/sc	Doesn't explain directly, but states that it is filing at time petitioners' brief is due to "give the other respondents the opportunity to respond to our arguments regarding race-restricted relief." BR at 10 n.7.	Whether court-ordered remedial affirmative action plan including nonwhite membership "goal" is permissible under Title VII	N
103	Int'l Union, United Auto. Workers of Am. v. Brock	477 U.S. 274 (1986)	R	LC/sc	"Upon further reflection . . . ." BR at 47 n.46.	Whether state or federal law controls a joinder issue	N
104	Evans v. Jeff D.	475 U.S. 717 (1986)	A for reversal	SC/dc	"Upon further reflection and with the benefit of nearly four years of experience under the [relevant statute], we have concluded that our earlier suggestion was impractical . . . ." BA at 16 n.5.	Whether negotiations regarding merits and attorney's fees can happen at the same time	Y

105	United States v. Mechanik	475 U.S. 66 (1986)	P	SC/dc	"[W]e believe upon further consideration that the analysis followed in [an earlier case] is incorrect and that the decision should be overruled," but in any event it does not "control the question in this case." BP at 37 n.48.	Whether procedural irregularity in grand jury requires reversal of a subsequent conviction	Y
106	Garcia v. United States	469 U.S. 70 (1984)	R	SC/dc	"Particularly in view of the Court's recent and repeated pronouncements that . . . the unambiguous language of a statute conclusively establishes its scope, we believe that the concession [made in an earlier case] was unwarranted . . . ." BR at 10	Whether conviction under a certain statute has to have a connection to the USPS	Y
107	Sec. Indus. Ass'n v. Bd. of Governors of the Fed. Rsrv. Sys.	468 U.S. 137 (1984)	R	LC/sc	The government doesn't explain the change directly.	Whether commercial paper is a "security" under the Glass-Steagall Act	N
108	Immigr. & Naturalization Serv. v. Chadha	462 U.S. 919 (1983)	P	LC/sc	INS chose to "enforce the statute, in order to ensure a judicial resolution of the controversy, but to refuse to defend [it]." RBP at 14.	Whether one-house veto is constitutional	N
109	Bob Jones Univ. v. United States	461 U.S. 574 (1983)	R (supporting P)	SC/sc	"[I]n the absence of such a legislative mandate, the result desired—no matter how much desired—cannot constitutionally be accomplished by either judicial or administrative action." BR at 2.	Whether IRS position denying tax-exempt status to discriminatory schools is valid	N
110	Burlington N. Inc. v. United States	459 U.S. 131 (1982)	R	LC/sc	Commission "changed its position" in light of intervening Supreme Court decision in different case. OA at 19.	What the allocation of authority should be between the federal courts and the ICC to set and review railroad rates	Y
111	Washington v. Seattle Sch. Dist. No. 1	458 U.S. 457 (1982)	P	LC/sc	"Reconsidered that position since the decision of the court of appeals." Memorandum for the United States at 9–10.	Whether state initiative functionally barring school districts from voluntarily taking steps to racially desegregate was constitutional	N

112	Nw. Airlines, Inc. v. Transp. Workers Union of Am.	451 U.S. 77 (1981)	A; invited	LC/sc	"In the court of appeals, the EEOC as an *amicus curiae* took" one position, but after the grant of certiorari, "the Commission . . . reconsidered its position and, by formal vote, concluded" the opposite interpretation is correct. BA at 15 n.14.	Whether employer can assert a right of contribution against a union under Title VII and Equal Pay Act	Y
113	Washington v. Confederated Tribes of the Colville Indian Rsrv.	447 U.S. 134 (1980)	R	LC/sc	Noted change in position with "embarrassment," but argued its prior position was inconsistent with an intervening SCOTUS decision. U.S. Motion to Dismiss, at 10 n.3.	Whether a three-judge court was required to adjudicate a particular issue of tribal power, which turned on application of a statute	N
114	GTE Sylvania, Inc. v. Consumers Union of the U.S., Inc.	445 U.S. 375 (1980)	R	LC/sc	"Although we originally argued to the contrary, on further reflection we have become persuaded . . . that the court of appeals is correct on this point." BR at 21 n.10.	Whether an action under FOIA may be used to obtain information when the agency holding the information has been enjoined from disclosing it by a different federal court	Y
115	Thompson v. United States	444 U.S. 248 (1980)	R	LC/sc	SG acknowledges its mistake below (as summarized in the Court's decision). 444 U.S. at 249–51.	Whether where SG acknowledges that a DOJ policy was violated but had claimed below that it was not violated, the Court should vacate and remand to the district court to dismiss the indictment	N
116	Washington v. Confederated Bands & Tribes of the Yakima Indian Nation	439 U.S. 463 (1979)	A	SC/dc	The government acknowledges change, and states that therefore "we owe it to the Court, and to the parties, to explain in some detail the reasons that have impelled us to this change in position." BA at 2. Says it's appropriate given plain language of the statute and legislative history. BA at 8–11.	Whether the State of Washington could assert partial jurisdiction over Indian country	N

117	EPA v. Brown	431 U.S. 99 (1977)	P	LC/sc	Administrator "concedes" regulations must be modified but denies some aspects of changed position. BP at 20 n.14.	Whether EPA had authority under the Clean Air Act regulations to compel states to take various implementation and enforcement actions, including requiring enacting legislation or regulations to implement program	N
118	Windward Shipping (London) Ltd. v. Am. Radio Ass'n	415 U.S. 104 (1974)	A; invited	SC/sc	"[F]urther consideration" after soliciting views of other agencies, particularly Department of State. Supplemental Memorandum for the United States as Amicus Curiae at 2.	Whether picketing a ship for substandard wages is protected under NLRA and therefore within exclusive jurisdiction of NLRB	Y
119	Combs v. United States	408 U.S. 224 (1972)	R	SC/sc	The government had an "opportunity to reconsider fully the question of standing in relation to the Fourth Amendment" after its filing of an opposition to the petition for certiorari. BR at 9.	Whether defendant has standing to challenge search and seizure of stolen property seized on another's premises	N
120	Marchetti v. United States	390 U.S. 39 (1968)	R	SC/sc	"On further reflection," the government reached a different conclusion from what it had argued in its brief "last Term." Brief for the United States on Reargument at 40, 39.	Whether wagering tax statutes violate the Fifth Amendment right against self-incrimination	N
121	Cascade Nat. Gas Corp. v. El Paso Nat. Gas Co.	386 U.S. 129 (1967)	R	LC/sc	The government settled the case and claimed that in the negotiation process it decided divestiture was not necessary to achieve the Clayton Act's objectives. BR at 9–10.	Whether parties can intervene to push for divestiture under Clayton Act when United States has settled a case without requiring divestiture	N

122	Fribourg Navigation Co. v. Comm'r	383 U.S. 272 (1966)	R	SC/dc	Commissioner failed to "focus" on the issue in prior case. BR at 35.	Whether depreciation deduction is allowed in year of sale of an asset in excess of the adjusted basis for the asset	N
123	Interstate Com. Comm'n v. N.Y., New Haven & Hartford R.R. Co.	372 U.S. 744 (1963)	P	LC/sc	"Upon further consideration, we no longer adhere to that position" because the relevant Act provides relief. BP at 21 n.8.	Whether ICC order terminating rate reductions was valid	Y
124	Frozen Food Express v. United States	351 U.S. 40 (1956)	R	LC/sc	DOJ contends ICC's earlier rulings on the issue have had "no consistency in reasoning." BR at 8.	Whether certain commodities are within an "agricultural" exemption to ICC permitting rules	Y
125	Avondale Marine Ways, Inc. v. Henderson	346 U.S. 366 (1953) (mem.)	R	SC/dc	While DOJ "once expressed" one view, "this was 20 years ago," and since that time it has "reconsidered the question, and now believes that its earlier position was unsound." BR at 13–14.	Whether Longshoreman's Act applies to marine railways	Y
126	Dalehite v. United States	346 U.S. 15 (1953)	R	LC/sc	The government does not address change.	Whether the government is responsible under the FTCA for harms caused by explosions of fertilizer	Y
127	Orloff v. Willoughby	345 U.S. 83 (1953)	R	LC/sc	"Despite the position taken by the attorneys for respondent below, the Government now concedes that doctors inducted under [the law] must be utilized in their professional capacity." BR at 16–17.	Whether induction into the Army under statute applicable to medical personnel requires the Army to assign the person to a medical position	Y

128	United States v. Evans	333 U.S. 483 (1948)	P	SC/dc	Suggests its earlier statement suggesting a different interpretation was "correct on other grounds," even if one aspect of it no longer controls. BP at 12 n.6.	Whether immigration statute imposed penalty for harboring aliens not lawfully granted entry to the US	N
129	United States v. Ragen	314 U.S. 513 (1942)	P	LC/sc	Denies inconsistency and suggests that, "even assuming that a variance existed, it was immaterial." BP at 33.	Whether defendant's conduct constituted tax evasion and whether certain questions should be left to jury	Y
130	United States v. Candelaria	271 U.S. 432 (1926)	P	LC/sc	"Upon further consideration" believed earlier argument was incorrect. BP at 23.	Whether prior suits between a tribe and private landowners barred this suit brought by the United States on behalf of the tribe	Y
131	United States v. Ala. Great S. R.R. Co.	142 U.S. 615 (1892)	P	LC/dc	The government brief is not available.	How statute providing discounted rate for mail over rails constructed by federal support applied to route where only some sections received aid	N

Table 2: Non-Flip Cases

1	Mayorkas v. Innovation L. Lab	141 S. Ct. 2842 (2021) (mem.)
2	Am. Med. Ass'n v. Becerra	141 S. Ct. 2170 (2021) (mem.)
3	FCC v. Prometheus Radio Project	141 S. Ct. 1150 (2021)
4	Gray v. Wilkie	139 S. Ct. 2764 (2019) (mem.)
5	Dep't of Com. v. New York	139 S. Ct. 2551 (2019)
6	Republic of Sudan v. Harrison	139 S. Ct. 1048 (2019)
7	Gloucester Cnty. Sch. Bd. v. G.G. *ex rel.* Grimm	580 U.S. 1168 (2017) (mem.)
8	Green v. Brennan	578 U.S. 547 (2016)
9	Welch v. United States	578 U.S. 120 (2016)
10	Sturgeon v. Frost	577 U.S. 424 (2016)
11	Fed. Energy Regul. Comm'n v. Elec. Power Supply Ass'n	577 U.S. 260 (2016)
12	Perez v. Mortg. Bankers Ass'n	575 U.S. 92 (2015)
13	Marvin M. Brandt Revocable Tr. v. United States	572 U.S. 93 (2014)
14	Lawson v. FMR LLC	571 U.S. 429 (2014)
15	Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.	570 U.S. 205 (2013)
16	Judulang v. Holder	565 U.S. 42 (2011)
17	Mayo Found. for Med. Educ. & Rsch. v. United States	562 U.S. 44 (2011)
18	Dep't of Health & Hum. Servs. v. Alley	556 U.S. 1149 (2009) (mem.)
19	Envt'l Def. v. Duke Energy Corp.	549 U.S. 561 (2007)
20	Rumsfeld v. F. for Acad. & Institutional Rts., Inc.	547 U.S. 47 (2006)
21	Gonzales v. Oregon	546 U.S. 243 (2006)
22	Johnson v. United States	544 U.S. 295 (2005)
23	Leocal v. Ashcroft	543 U.S. 1 (2004)
24	Nev. Dep't of Hum. Res. v. Hibbs	538 U.S. 721 (2003)
25	Raygor v. Regents of the Univ. of Minn.	534 U.S. 533 (2002)
26	Pub. Lands Council v. Babbitt	529 U.S. 728 (2000)
27	FDA v. Brown & Williamson Tobacco Corp.	529 U.S. 120 (2000)
28	Reno v. Koray	515 U.S. 50 (1995)
29	Dir., Off. of Workers' Comp. Programs, Dep't of Lab. v. Newport News Shipbuilding & Dry Dock Co.	514 U.S. 122 (1995)
30	City of Chicago v. Envt'l Def. Fund	511 U.S. 328 (1994)
31	Knox v. United States	510 U.S. 939 (1993) (mem.)

32	Lujan v. Defs. of Wildlife	504 U.S. 555 (1992)
33	Bd. of Governors of the Fed. Rsrv. Sys. v. Dimension Fin. Corp.	474 U.S. 361 (1986)
34	Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.	463 U.S. 29 (1983)
35	Watt v. Alaska	451 U.S. 259 (1981)
36	Kleppe v. Sierra Club	427 U.S. 390 (1976)
37	Inv. Co. Inst. v. Camp	401 U.S. 617 (1971)
38	Md. & Va. Milk Producers Ass'n, Inc. v. United States	362 U.S. 458 (1960)
39	Universal Camera Corp. v. NLRB	340 U.S. 474 (1951)
40	United States v. Lovett	328 U.S. 303 (1946)
41	Hirabayashi v. United States	320 U.S. 81 (1943)
42	United States v. Shoshone Tribe of Indians	304 U.S. 111 (1938)
43	United States v. Elgin, Joliet & E. Ry. Co.	298 U.S. 492 (1936)
44	Humphrey's Ex'r v. United States	295 U.S. 602 (1935)