No. 15-1248

In the Supreme Court of the United States

MCLANE COMPANY, INC., PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE RESPONDENT

NOEL J. FRANCISCO
Acting Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Constitution, statutes and rules:

Statutes and rules—Continued: Page

Miscellaneous:

Miscellaneous—Continued: Page

In the Supreme Court of the United States

No. 15-1248

MCLANE COMPANY, INC., PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE RESPONDENT

In *Pierce* v. *Underwood*, 487 U.S. 552 (1988), this Court described the proper framework for determining whether abuse-of-discretion review applies to a particular district court ruling. As the briefs of the government and petitioner demonstrate, that method calls for abuse-of-discretion review of administrative-subpoena enforcement decisions.

The amicus ignores the framework of *Pierce*. Instead, he offers an array of alternative approaches, suggesting that the Court should borrow the standard of review from *Ornelas* v. *United States*, 517 U.S. 690 (1996); derive a standard of review from the Administrative Procedure Act (APA), 5 U.S.C. 555; or adopt an analytical framework that diverges from *Pierce.* These approaches depart from this Court's teachings and would yield unsound results. This Court should apply *Pierce* and conclude, consistent with a long history of appellate practice, that administrative-

subpoena enforcement decisions are reviewed for abuse of discretion.

A. This Court's Cases Demonstrate That Abuse-Of-Discretion Review Is Appropriate

Nowhere mentioned in the amicus's brief is this Court's direction on the steps for determining whether a particular trial-court decision is subject to abuse-of-discretion or de novo review. *Pierce*, however, was clear about those steps, explaining that "[f]or some few trial court determinations, the question of what is the standard of appellate review is answered by relatively explicit statutory command"; that "[f]or most others, the answer is provided by a long history of appellate practice"; and that where "neither a clear statutory prescription nor a historical tradition" exists, a court should consider whether "as a matter of the sound administration of justice," a trial or appellate court is "better positioned * * * to decide the issue in question." 487 U.S. at 558-560 (citation and internal quotation marks omitted). Since then, this Court has repeatedly determined standards of review using the *Pierce* framework. *Highmark Inc.* v. *Allcare Health Mgmt. Sys., Inc.*, 134 S. Ct. 1744, 1748-1749 (2014); *Koon* v. *United States*, 518 U.S. 81, 97-100 (1996); *Cooter & Gell* v. *Hartmarx Corp.*, 496 U.S. 384, 403-405 (1990). That framework supports abuse-of-discretion review here.

1. a. As the government's opening brief explains (Br. 20-26), a long history of appellate practice supports abuse-of-discretion review of district courts' decisions regarding enforcement of administrative subpoenas. The amicus does not dispute that, with the exception of recent, unreasoned decisions of the Ninth Circuit, courts of appeals have uniformly concluded

that abuse-of-discretion review applies to decisions whether to enforce administrative subpoenas. That type of practice ordinarily deserves significant weight. *Pierce*, 487 U.S. at 558; see, *e.g.*, *Teva Pharm. USA, Inc.* v. *Sandoz, Inc.*, 135 S. Ct. 831, 838 (2015).

The amicus nevertheless argues (Br. 29-31) that this history should be disregarded because the courts of appeals reaching these decisions failed to recognize a de novo standard implicit in this Court's decisions on administrative subpoenas. The amicus is mistaken. None of the cases that the amicus invokes discussed standard of review, involved briefing on standard of review, or indicated that standard of review affected the disposition.

The amicus reads (Br. 13) the 1894 decision in *Interstate Commerce Commission* v. *Brimson*, 154 U.S. 447, to establish that administrative-subpoena enforcement decisions should be reviewed de novo as pure questions of law. That contention is mistaken. The Court in *Brimson* did not consider standards of review, but instead addressed a litigant's claim that he had a right to a jury trial concerning his duty to comply with an administrative subpoena. *Id.* at 488. At the time of the decision, this Court had sometimes "spoken of the line" between jury and non-jury issues "as one between issues of fact and law." *Markman* v. *Westview Instruments, Inc.*, 517 U.S. 370, 378 (1996). *Brimson* used that terminology to reject the litigant's jury-trial argument, concluding that the dispute concerning his duty to comply with a subpoena presented a question not "of fact, but of law exclusively," because the issue closely resembles matters that would be decided by judges rather than juries. 154 U.S. at 488 (discussing mandamus and contempt). That Sev-

enth Amendment holding has never been understood to control the level of appellate scrutiny for district court determinations underlying subpoena enforcement. Indeed, the Court has cautioned that "[t]he characterization of a mixed question of law and fact for one purpose does not govern its characterization for all purposes." *United States* v. *Gaudin*, 515 U.S. 506, 522 (1995).

Additional decisions involving enforcement of administrative subpoenas or orders that the amicus invokes (Br. 30-31) similarly did not address standards of review. *Endicott Johnson Corp.* v. *Perkins*, 317 U.S. 501 (1943), *Oklahoma Press Publ'g Co.* v. *Walling*, 327 U.S. 186 (1946), and *United States* v. *Morton Salt Co.*, 338 U.S. 632 (1950), each rejected legal arguments concerning the scope of agency authority under governing statutes or the Constitution—arguments that would be reviewed de novo even if a judge's ultimate subpoena-enforcement decision is reviewed for abuse of discretion. See *Koon*, 518 U.S. at 100.

In particular, *Endicott Johnson* held that an agency could enforce a subpoena to investigate compliance with the Walsh-Healey Public Contracts Act, 41 U.S.C. 6501 *et seq.*, without first establishing that an entity's activities are covered by that statute. While the amicus suggests (Br. 29-30) that *Endicott Johnson* must reflect an understanding that de novo review applies in administrative-subpoena enforcement cases because the Court did not remand the case for further proceedings after addressing the scope of the statute, the petitioner had raised only a single (legal) challenge. Affirmance was the appropriate course after the only asserted ground for reversal was rejected.

Moreover, even when an appellate court cannot simply affirm an underlying enforcement decision against the challenge presented, a decision to order enforcement rather than a remand does not necessarily reflect a reviewing court's application of a de novo standard. Courts engaged in abuse-of-discretion review commonly order that a subpoena be enforced after finding legal error in the district court's analysis, since no remand is necessary when only one resolution of the enforcement question would be within a court's discretion. See Gov't Br. 33; cf. *Endicott Johnson*, 317 U.S. at 510 (describing "[t]he subpoena power * * * as here exercised" as "so clearly within the limits of Congressional authority that it is not necessary to discuss the constitutional questions urged by the petitioner").

Oklahoma Press likewise rejected broad constitutional and statutory challenges to an administrative-subpoena scheme without ruling on standards of review. It rejected claims that the First Amendment, Fourth Amendment, or other statutory and constitutional limits barred the Secretary of Labor from subpoenaing a newspaper's records under the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. 201 *et seq.*, either as a general matter or without showing probable cause. 327 U.S. at 192-218. The decision's lone reference to standards of review acknowledged, without criticism, that the court of appeals had ordered enforcement of a subpoena while applying abuse-of-discretion scrutiny—explaining that the court of appeals had "directed that the district court's discretion be exercised" in favor of enforcement. *Id.* at 191. And the Court made plain that it agreed that the validity of the subpoenas could not seriously be questioned. *Id.*

at 209 ("When these principles are applied to the facts of the present cases, it is impossible to conceive how a violation of petitioners' rights could have been involved."). That decision does not contravene the abuse-of-discretion approach.

Morton Salt is similar. It held that the Federal Trade Commission Act, 15 U.S.C. 41 *et seq.*, permitted the Federal Trade Commission to require "special reports of corporations * * * of the manner in which [the companies] are complying with decrees enforcing" cease-and-desist orders. 338 U.S. at 651. The Court rejected arguments that requiring such reports violated the APA, Fourth Amendment, and Fifth Amendment. *Ibid.* The Court indicated that the orders before it were obviously within the bounds of the provision authorizing special reports. *Id.* at 649 (stating that the statute "would appear to grant ample power to order the reports here in question" and rejecting extratextual limitations); *id.* at 650 ("If the report asked here is not a special report, we would be hard put to define one."). The Court also noted that the respondents had not preserved any case-specific challenges to the reasonableness of the orders, *id.* at 653, and were instead challenging only whether the Commission had power to require special reports, *ibid.* ("Their position was that the Commission had no more authority to issue a reasonable order than an unreasonable one."). That decision does not contradict the approach taken by appellate courts to standards of review.

Finally, *McPhaul* v. *United States*, 364 U.S. 372 (1960), is even further afield. That case likewise did not involve discussion of (or briefing on) standards of review. But it also did not even involve a district

court's subpoena-enforcement decision. Instead, it involved a challenge to a criminal conviction for failure to obey a subpoena that had been *issued by Congress* and therefore was not subject to any district court subpoena-enforcement proceeding. These cases, which simply do not address standards of review, do not call into question the longstanding appellate tradition of deferential review for decisions on administrative-subpoena enforcement.

b. As the government's opening brief explains (Br. 23-26), the history with respect to administrative subpoenas is bolstered by equally uniform practice with regard to similar determinations, such as decisions regarding enforcement of pretrial subpoenas *duces tecum*, decisions regarding enforcement of grand jury subpoenas, and (as bearing on the relevance determination here) assessments of relevance under the Federal Rules of Evidence. The amicus does not dispute that history. And he offers no good reason why administrative subpoenas should be reviewed under a different standard than similar district court decisions, including decisions on grand jury subpoenas that are closely related to administrative subpoenas. *Oklahoma Press Publ'g Co.*, 327 U.S. at 216-217.

The amicus suggests that abuse-of-discretion review for grand jury subpoenas could be reconciled with de novo review for administrative subpoenas because the grand jury is best regarded as "an appendage of the Court." Amicus Br. 53 (quoting *United States* v. *Williams*, 504 U.S. 36, 66 (1992) (Stevens, J., dissenting)). But the opinion on which the amicus relies describes the grand jury as "an appendage of the court" only insofar as the grand jury requires a

court's aid to compel the testimony of witnesses—just as administrative agencies do. *Williams*, 504 U.S. at 66 (Stevens, J., dissenting) (describing the grand jury as an appendage because it is "powerless to perform its investigative function without the court's aid") (citation omitted). Beyond this, as the Court in *Williams* explained, grand juries are "functional[ly] independen[t]" of the judiciary. *Id.* at 48. Longstanding practice concerning grand jury subpoenas and similar compulsory process bolsters the appellate practice concerning administrative subpoenas.

c. As the government's opening brief notes (Br. 25-26), Congress ratified this longstanding practice in the context of Title VII, by incorporating subpoena-enforcement procedures of the National Labor Relations Act (NLRA), 29 U.S.C. 151 *et seq.*, that had been uniformly construed to trigger abuse-of-discretion review.

The amicus argues (Br. 54) that ratification principles are inapplicable because the NLRA does not explicitly address appellate review, "and thus there is nothing that could be ratified by incorporation." That contention is inconsistent with *Lorillard* v. *Pons*, 434 U.S. 575 (1978), which held that a statute incorporated a jury-trial right when it incorporated the procedures set out in specified provisions of the FLSA. The Court explained that, although the FLSA did not mention a jury-trial right, "every court to consider the issue had * * * held" at the time of the incorporation that "there was a right to a jury trial in private actions pursuant to the FLSA." *Id.* at 580. Similarly here, courts had uniformly construed the NLRA subpoena-enforcement procedures to call for deferential appellate review, and Congress then incorporated the

NLRA's subpoena-enforcement procedures for Title VII subpoena enforcement. See 42 U.S.C. 2000e-9.

The amicus alternatively invokes the principle that "the *Lorillard* canon applies only 'when judicial interpretations have settled the meaning of an existing statutory provision.'" Amicus Br. 54 (citation omitted). That requirement is satisfied here, however, because every court to address the standard of review for NLRA subpoena-enforcement decisions had adopted an abuse-of-discretion standard. Indeed, the consensus is more robust than the consensus in *Lorillard.* Compare Gov't Br. 26 (noting uniform consensus among four courts of appeals) with *Lorillard*, 434 U.S. at 580 n.7 (relying on two cases from a single court of appeals and a district court decision).[1]

2. As the government's opening brief explains (Br. 26-33), abuse-of-discretion review is further supported by consideration of whether a trial or appellate court "is better positioned * * * to decide the issue in question." *Pierce*, 487 U.S. at 560 (citation omitted). The amicus offers no persuasive rejoinder.

---

[1] Contrary to the amicus's assertion (Br. 54), *D.G. Bland Lumber Co.* v. *NLRB*, 177 F.2d 555 (5th Cir. 1949) and *NLRB* v. *Anchor Rome Mills, Inc.*, 197 F.2d 447 (5th Cir. 1952), do not suggest that the Fifth Circuit understood the APA to require de novo review of subpoena-enforcement decisions. Neither decision addressed—or had cause to address—standards of review. *D.G. Bland* simply remarked that the litigant's claims (which were contrary to decisions of this Court issued before the APA was enacted) gained no vitality after the APA's enactment, because the APA was "intended to leave the scope of judicial inquiry unchanged upon an application for the enforcement of a subpoena." 177 F.2d at 558. And *Anchor Rome* merely rejected a litigant's claim that the APA required the NLRB to promulgate regulations before enforcing a subpoena. 197 F.2d at 449-450.

a. Functional considerations support abuse-of-discretion review because administrative-subpoena enforcement turns on "multifarious, fleeting, special, narrow facts that utterly resist generalization." *Pierce*, 487 U.S. at 561-562; see Gov't Br. 27-29. The amicus does not meaningfully dispute that determinations of relevance, burden, motive, and specificity turn on such facts. Instead, he principally contends (Br. 43-45) that de novo review is appropriate because the case-specific determinations involved in subpoena enforcement rarely turn on observation of witnesses or credibility judgments, and instead generally turn on review of documents that can be placed before an appellate court.

This argument is flawed in two respects. First, district courts are better situated to decide questions that turn on multifarious and fleeting facts not only when credibility determinations and witness observation are involved, but also when district courts are simply more experienced in making the kind of determination at hand. This Court made that point in *Buford* v. *United States*, 532 U.S. 59 (2001), when it rejected the argument that determinations of whether past cases were appropriately treated as consolidated for sentencing should be reviewed de novo because the determinations typically turn on documentary records, so that "the underlying facts are not in dispute" and "witness credibility is not important." *Id.* at 64. This Court explained that "a district judge sees many more 'consolidations' than does an appellate judge," and that a district court's greater "[e]xperience with trials, sentencing, and consolidations" makes it better positioned to determine "whether a particular set of

individual circumstances demonstrates 'functional consolidation.'" *Ibid.*

That analysis is fully applicable here, because the questions resolved in administrative-subpoena enforcement are routinely resolved de novo by trial courts, but are assessed by appellate courts less frequently and only under an abuse-of-discretion standard. For instance, district courts routinely decide questions of relevance in the contexts of subpoena enforcement and trial rulings under the Federal Rules of Evidence, and they must consider whether compliance would pose an unreasonable or oppressive burden in addressing enforcement of a variety of subpoenas. See Fed. R. Crim. P. 17(c)(2); Sara Sun Beale et al., *Grand Jury Law and Practice* § 6:23 (2d ed. 2016). Courts of appeals see these questions far more rarely, and when they do see such questions, they consider only whether the trial court abused its discretion. Trial courts' substantially greater experience resolving de novo the fact-intensive questions that underlie subpoena-enforcement decisions favors deferential appellate review.

Deferential review of determinations that turn on "multifarious, fleeting, special, narrow facts that utterly resist generalization," *Pierce*, 487 U.S. at 561-562, also helps to prevent inefficient expenditures of agency and judicial resources. When appellate courts review decisions that are highly case-specific, that "investment of appellate energy" is unlikely to produce substantial "law-clarifying benefits" for future cases. *Id.* at 561; accord *Highmark*, 134 S. Ct. at 1749; *Buford*, 532 U.S. at 66. Applying a deferential standard of review to case-specific determinations discourages appeals that consume substantial resources

but produce only modest benefits. See Gov't Br. 27-28.

b. Abuse-of-discretion review is also counseled by the objectives of administrative-subpoena schemes generally and of Title VII in particular. The amicus does not dispute that subpoena-enforcement proceedings are designed to be quick, summary actions, ensuring swift enforcement and minimal consumption of resources on the part of litigants and courts. Frequent appeals undermine those objectives by consuming resources and slowing enforcement. See Gov't Br. 29-32.

The amicus responds (Br. 57) that litigants are no more likely to appeal under a de novo standard of review than under a deferential one. But a standard of review that increases the losing party's chance of success self-evidently increases its incentives to appeal, and this Court has recognized that a deferential standard of appellate review will "discourage litigants from pursuing marginal appeals." *Cooter & Gell*, 496 U.S. at 404. The amicus alternatively suggests (Br. 56) that, even if de novo review increases the frequency of appeals, it would not necessarily impede investigations because subpoena enforcement is not automatically stayed during appellate litigation. This argument also misses the mark. Increasing the number of appeals increases the number of stays because a litigant can generally delay enforcement only by filing an appeal. And because whether a stay is issued depends in part on likelihood of success on the merits, see, *e.g.*, *Hilton* v. *Braunskill*, 481 U.S. 770, 776-777 (1987), a de novo standard of review substantially improves a litigant's prospects of receiving a stay pending appeal, since an appellant's likelihood of success is greater

when the decision being challenged will be reviewed without deference.

The prospect that a de novo standard would generate additional satellite litigation also undermines Title VII and other investigative frameworks because such collateral litigation diverts resources from the agency's core investigative functions. The amicus seeks to minimize this concern (Br. 57) by asserting that the number of actions that the EEOC files to enforce subpoenas is small compared to the total number of discrimination charges that the EEOC receives. But subpoena-enforcement actions already represent a quarter of the suits filed by the agency. See EEOC, *Performance and Accountability Report, Fiscal Year 2016*, at 36, https://www.eeoc.gov/eeoc/plan/upload/2016par.pdf. A change in the standard of review that generated additional subpoena-enforcement litigation would divert resources from investigating and resolving the tens of thousands of charges that the agency receives each year.

c. The amicus contends that the benefits of abuse-of-discretion review are outweighed by consideration of "unify[ing] precedent" and promoting "consisten[cy]" in guidance and enforcement. Amicus Br. 24 (citation omitted). But this Court's decisions reflect a recognition that searching appellate review of case-specific questions is likely to have only modest law-clarifying value. *Cooter & Gell*, 496 U.S. at 405 ("Fact-bound resolutions cannot be made uniform through appellate review, de novo or otherwise.") (citation omitted); see *Pierce*, 487 U.S. at 559-563. Thus, when a determination is fact-intensive and other aspects of the statutory scheme favor discretion, this Court has not found that unifying precedent and pro-

moting consistency justify de novo review. See, *e.g.*, *Pierce*, 487 U.S. at 563; *Cooter & Gell*, 496 U.S. at 405; *Koon*, 518 U.S. at 99-100. Indeed, the interests in unifying precedent and giving guidance have never been understood to justify de novo review of case-specific determinations like those at issue here, such as decisions concerning grand jury subpoenas, pretrial subpoenas *duces tecum*, and discovery orders.

B. The Amicus's Contrary Arguments Lack Merit

Eschewing the *Pierce* framework, the amicus argues that the standard of review should be decided based on analogies to other legal inquiries. Each of his approaches lacks merit.

1. Decisions involving Fourth Amendment intrusions reinforce the Pierce *analysis*

The amicus argues (Br. 16-29) that de novo review should apply to administrative-subpoena enforcement decisions because some of the restraints on administrative subpoenas are derived from the Fourth Amendment, and (in the amicus's view) all trial-court determinations relevant to Fourth Amendment reasonableness should be reviewed de novo. The amicus's reliance on this Court's Fourth Amendment precedents is misplaced.

Consideration of the standard of review applied to trial-court rulings about alleged Fourth Amendment intrusions actually reinforces the longstanding approach of the courts of appeals to administrative-subpoena enforcement. To be sure, *Ornelas*, *supra*, held that de novo review applies to a trial-court determination about whether an officer's warrantless search or seizure was supported by probable cause or reasonable suspicion. See Amicus Br. 22-26. But the

standard of review that applies to rulings about mere constructive intrusions on Fourth Amendment interests, such as those involved in enforcement of subpoenas, has always been deferential. See *Oklahoma Press Publ'g Co.*, 327 U.S. at 202 (explaining that no "actual" search occurs when documents are obtained pursuant to "authorized judicial orders," but instead only a "'figurative' or 'constructive' search").[2] In particular, while grand jury subpoenas, pretrial subpoenas, and discovery orders involve intrusions upon Fourth Amendment interests comparable to the intrusion of an administrative subpoena, district court decisions ordering such intrusions are reviewed only for abuse of discretion. See Gov't Br. 29.

The question presented in *Ornelas*, moreover, concerned the standard of review that applies to a district court's after-the-fact determination that an officer's warrantless search or seizure was supported by reasonable suspicion or probable cause. By contrast, more deferential review applies to determinations by a magistrate in advance of a search—the type of determination more closely resembling those that are made when a district court enforces a subpoena. When a magistrate has found that probable cause exists, this Court has "repeatedly said that after-the-fact scrutiny by courts of the sufficiency of an affidavit should not take the form of *de novo* review," and that

---

[2] *Ornelas* also makes clear that de novo review is not categorically required for every trial-court ruling that implicates constitutional interests. The *Ornelas* Court identified the appropriate standard of review for the questions before it based on historical and functional considerations, rather than on any blanket constitutional rule. 517 U.S. at 697-700; see also *Miller* v. *Fenton*, 474 U.S. 104, 113-118 (1984).

the magistrate's determination of probable cause "should be paid great deference by reviewing courts." *Illinois* v. *Gates*, 462 U.S. 213, 236 (1983); see *United States* v. *Ventresca*, 380 U.S. 102 (1965). Those decisions support deferential review of subpoena-enforcement decisions, which are made before enforcement of the subpoena occurs.[3]

Nor is there any conflict between the reasoning of *Ornelas* and the abuse-of-discretion approach. While both actual and constructive searches under the Fourth Amendment involve case-specific determinations, there are crucial differences with respect to other aspects of the functional inquiry. *Pierce* establishes that one important consideration is whether the "consequences" of a decision are so "substantial" that "one might expect [the decision] to be reviewed more intensively." 487 U.S. at 563. The stakes are different for actual and constructive searches, because constructive searches implicate more modest Fourth Amendment interests. *Oklahoma Press Publ'g Co.*, 327 U.S. at 213 (noting that the constitutional interests at stake in actual and constructive searches "are not identical * * * nor are the threatened abuses the same"); see *See* v. *City of Seattle*, 387 U.S. 541, 545

---

[3] Decisions concerning probable cause also demonstrate that, contrary to the amicus's suggestion (Br. 41-42), there is nothing anomalous about requiring that a magistrate give weight to agency expertise in assessing whether the standards for issuance of a subpoena are satisfied, while also providing that magistrates' determinations are reviewed deferentially on appeal. See *Ornelas*, 517 U.S. at 698 (noting that courts should give "due weight to inferences by" a law enforcement officer who "views the facts through the lens of his police experience and expertise," while also noting that "'great deference' [is] paid when reviewing a decision to issue a warrant").

(1967) (explaining that the Fourth Amendment imposes only "rather minimal limitations" on administrative subpoenas). The lesser stakes support the deferential review that has uniformly applied to court orders compelling disclosure of information.

Moreover, the costs and benefits of de novo review differ significantly between subpoena-based intrusions and warrantless searches by officers. While de novo review of subpoena-enforcement decisions would encourage investigation-hindering delay, see *supra* pp. 12-13, that risk is not present when courts review the warrantless searches addressed in *Ornelas*, because such searches have already occurred. And while *Ornelas* gave substantial weight to the benefit of generating clearer guidance for officers performing warrantless searches in the field, 517 U.S. at 697-698, that interest is less substantial in the subpoena-enforcement context because enforcement occurs only after an opportunity for judicial review. In sum, intrusions on Fourth Amendment interests similar to those at issue here are uniformly reviewed deferentially—and with good reason.

2. The Administrative Procedure Act does not render the* Pierce *framework inapplicable here

The amicus also invokes (Br. 31-35) the APA provisions that address administrative subpoenas. But those provisions do not identify a standard of review. Section 555(c) of Title 5 simply makes clear that an agency may not issue a subpoena unless it is legally authorized to do so. ("Process, requirement of a report, inspection, or other investigative at or demand may not be issued, made, or enforced except as authorized by law."). And Section 555(d) gives a party in an administrative proceeding access to subpoenas on

the same terms as the agency, by stating that an "[a]gency subpoena[] authorized by law shall be issued to a party on request" and "sustain[ed] * * * to the extent that it is found to be in accordance with law." 5 U.S.C. 555(d); see U.S. Dep't of Justice, *Attorney General's Manual on the Administrative Procedure Act* 67 (1947) (*Attorney General's Manual*) ("The purpose of this provision is to make agency subpenas available to private parties to the same extent as to agency representatives."); see also 7 West's Fed. Admin. Prac. § 7784 (2d ed. 2016) (explaining that Section 555(d) "does no more than provide a private party with the same ability to gain information as that available to the agency").

The amicus does not contend that these provisions actually address the standard of review. He argues (Br. 32), however, that they effectively require de novo review because they indicate that a district court must enforce an administrative subpoena when certain substantive requirements are met. That argument is misguided.

The government agrees that, when the substantive requirements for an EEOC subpoena are satisfied, the district court must enforce the subpoena. See Gov't Br. 5 (citing *University of Pa.* v. *EEOC*, 493 U.S. 182, 192 (1990)). But many decisions that are governed by rules a district court must follow are reviewed on appeal only for abuse of discretion because of historical or functional considerations. These include rule-bound determinations on pretrial subpoena enforcement, grand jury subpoena enforcement, and relevance under the Federal Rules of Evidence. See Fed. R. Crim. P. 17 (rule governing subpoenas in the criminal context); *United States* v. *Nixon*, 418

U.S. 683, 699-700 (1974) (setting out test for enforcement of pretrial subpoenas *duces tecum*); *United States* v. *R. Enters., Inc.*, 498 U.S. 292, 301 (1991) (setting out test for enforcement of grand jury subpoenas); Fed. R. Evid. 401 (setting out test for relevance under Federal Rules of Evidence). In other words, some decisions receive abuse-of-discretion review because of "primary" discretion, meaning there is "no formulary rule governing the situation or the issue," but other decisions receive abuse-of-discretion review because of "secondary" or "review-limiting discretion," under which appellate review is limited even though a rule of decision exists. Maurice Rosenberg, *Appellate Review of Trial Court Discretion*, 79 F.R.D. 173, 174-175 (1978); see 2 Stephen Alan Childress & Martha S. Davis, *Federal Standards of Review* § 7.06 (4th ed. 2010).

The *Attorney General's Manual*, which receives "some weight" in interpreting the APA, *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 302 n.31 (1979), confirms that the provisions the amicus invokes have no bearing on the standard of review. The manual explains that Section 555(d)'s reference to subpoenas "found to be in accordance with law" is simply "a reference to and an adoption of the existing law with respect to subpenas." *Attorney General's Manual* 68. It further explains that Section 555(d) "leaves unchanged existing law as to" both "the scope of judicial inquiry where enforcement of a subpena is sought" and "the reasonableness and the scope of subpenas." *Id.* at 69.

The APA thus does not alter or even address the standard of review for administrative-subpoena enforcement, and the amicus identifies no decision that treats the APA as setting that standard. The cases

that the amicus invokes (Br. 35) involve neither Section 555 nor subpoena enforcement more generally. Instead, they apply de novo review to a different type of decision under a different statutory provision—the decision to set aside an agency action as arbitrary, capricious, or contrary to law under 5 U.S.C. 706(2)(A). District courts' decisions on such matters do not involve the historical or functional considerations that favor abuse-of-discretion review of subpoena-enforcement decisions, and courts have not treated de novo review under Section 706(2)(A) as necessitating de novo review of subpoena-enforcement decisions.

3. The amicus's other proposed approaches are unworkable and contrary to precedent

The amicus proposes several alternative approaches for deciding the standard of review. Those approaches are incompatible with this Court's teachings and would produce unworkable results.

a. The amicus contends that the Court should apply de novo review because each of the questions in the subpoena-enforcement determination is inherently a "legal question" and must therefore be reviewed de novo. Amicus Br. 8; see *id.* at 36-40.

That approach is mistaken. The inquiries that a district court undertakes in deciding whether to enforce a subpoena—including the relevance inquiry at issue here—are mixed questions of law and fact. "[M]ixed questions of law and fact" are questions as to which "the historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the statutory standard, or to put it another way, whether the rule of law as applied to the established facts is or is not violated." *Pullman-*

Standard v. *Swint*, 456 U.S. 273, 289 n.19 (1982); see *Gaudin*, 515 U.S. at 512; accord *Ornelas*, 517 U.S. at 696. Determinations of whether particular information is relevant because it "might cast light on" the charge at hand, *EEOC* v. *Shell Oil Co.*, 466 U.S. 54, 69 (1984); whether a request is "too indefinite or has been made for an illegitimate purpose," *id.* at 72 n.26; and whether compliance "would be unduly burdensome," Pet. App. 8, each involve applications of law to fact.

In deciding the standard of review to be applied to issues that "fall[] somewhere between a pristine legal standard and a simple historical fact," this Court has analyzed whether "as a matter of the sound administration of justice, one judicial actor is better positioned than another to decide the issue in question." *Miller* v. *Fenton*, 474 U.S. 104, 114 (1985); accord *Pierce*, 487 U.S. at 559; see Harry T. Edwards et al., *Federal Standards of Review: Review of District Court Decisions and Agency Actions* 8 (2d ed. 2013). That approach reflects the Court's recognition that any other "methodology for distinguishing questions of fact from questions of law has been, to say the least, elusive." *Miller*, 474 U.S. at 113; see *Pullman-Standard*, 456 U.S. at 288 (noting "the vexing nature of the distinction between questions of fact and questions of law"). As explained above, functional considerations support abuse-of-discretion review here. See *supra* pp. 10-14.

The amicus appears to contend that mixed questions of law and fact that a court resolves during a subpoena-enforcement proceeding, such as the question whether materials are relevant to an investigation, are questions of law subject to de novo review

because they bear upon whether the EEOC is acting within its statutory authority. Amicus Br. 36 ("Determining whether the Commission has confined itself to the subpoena authority granted by Congress is a legal task, and the court of appeals properly reviews that question de novo."); *id.* at 40 (arguing that relevance is a legal determination because "[t]he congressionally established and judicially enforced boundaries placed on the EEOC's investigatory authority * * * are legal boundaries"). But whenever a court applies law to facts in order to decide whether an action was permitted, it determines whether the action fell within "legal boundaries." *Ibid.* Yet deferential review often applies to such decisions, as when a district court applies law to fact in making grand-jury subpoena enforcement decisions, trial-subpoena enforcement decisions, and determinations under the Federal Rules of Evidence.

b. The amicus alternatively contends (Br. 45) that, absent an express statutory command, abuse-of-discretion review is inappropriate unless "the district court's discretion is inherent." But a test that focuses on whether discretion is "inherent"—for which the amicus cites no precedent—would depart from this Court's decisions. For instance, in *Pierce*, while the Court observed in a footnote that it was "especially common" for matters of "supervision of litigation" to receive abuse-of-discretion treatment, 487 U.S. at 558 n.1, the Court explained that whether abuse-of-discretion review applied was to be determined based on text, history, and functional considerations, *id.* at 558-560; see *Cooter & Gell*, 496 U.S. at 399-405 (deciding standard of review for determinations underlying Rule 11 sanctions based on *Pierce* considerations,

rather than because sanctions involve "inherent" discretion).

Contrary to the amicus's suggestion (Br. 50), *Nixon*, *supra*, does not support an inherent-authority approach. *Nixon* did not mention an inherent-powers rationale in finding that decisions whether to enforce certain subpoenas under Federal Rule of Criminal Procedure 17(c) should be reviewed for abuse of discretion. Instead, the Court relied on the fact-intensive nature of the decisions—one of the considerations bearing on whether "one judicial actor is better positioned than another to decide the issue in question." *Pierce*, 487 U.S. at 560 (citation omitted); see *Cooter*, 496 U.S. at 403.

A test that turned on whether discretion was "inherent" (Br. 45) would also be unworkable. "[M]any decisions pertaining to a range of issues" are reviewed for abuse of discretion, including not simply decisions involving control over court proceedings but "also matters of a more substantive nature." Edwards 73 (offering as example determinations of whether state jury awards are consistent with state punitive damages statutes). As the amicus describes (Br. 48-49), these include determinations of "procedure, sanctions, remedy, sentencing, and fees and costs," as well as "matters of 'case management, discovery, and trial practice.'" These diverse decisions cannot be separated from others by characterizing them as "inherently" discretionary.

This case illustrates the unworkability of such a test, because the amicus offers little more than ipse dixit to explain why so many issues of procedure, remedies, and evidence are discretionary, but use of court processes to compel production of evidence under an

administrative subpoena—alone among uses of court process to compel production of evidence—is not. Rather, *Pierce* provides the appropriate framework to determine the standard of review. Under that approach, a district court's decision concerning whether to enforce an administrative subpoena should be reviewed for abuse of discretion.

* * * * *

For the reasons stated in respondent's opening brief, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

NOEL J. FRANCISCO
Acting Solicitor General

FEBRUARY 2017