

# COMMENTS

## THE LIMITS ON AGENCY DISCRETION: EVALUATING THE DOJ'S DECISION TO CUT LEGAL AID FUNDING FOR VICTIMS OF HUMAN TRAFFICKING

ANDREA M. BELANGER\*

INTRODUCTION .....	478
I. PROCEDURAL DEFICIENCIES.....	481
A. <i>Notice-and-Comment Rulemaking</i> .....	481
B. <i>Statement of Basis and Purpose</i> .....	486
II. JUDICIAL REVIEW .....	489
A. <i>Standing</i> .....	489
B. <i>Finality</i> .....	491
C. <i>Ripeness</i> .....	493
D. <i>Committed to Agency Discretion by Law</i> .....	494
III. JUDICIAL DEFERENCE.....	496
A. <i>Taking a Hard Look</i> .....	497
IV. HOW TO GUARANTEE FEDERAL FUNDING FOR VACATUR AND EXPUNGEMENT, AND PROTECT SURVIVORS .....	499
A. <i>The DOJ Should Not Be Permitted to Avoid APA Procedures and         Evade Judicial Scrutiny</i> .....	499

---

\* J.D. Candidate, American University Washington College of Law (2021); B.A., Political Science and Journalism, University of Connecticut (2017). This Comment is dedicated to my family for their unconditional love, support, and encouragement as I pursue my dream of becoming a lawyer. This endeavor would not have been possible without the guidance and mentorship from Professor Andrew F. Popper and Professor Heather E. Ridenour. Thank you to the entire *Administrative Law Review* staff, especially Elysia Glasscock and Matti Vagnoni, for their invaluable feedback throughout the process. Special thanks to Amanda and Michael for their inspiration, enthusiasm, and willingness to read my many drafts.

B. <i>An Alternative Approach: Revising the TVPA</i> .....	503
CONCLUSION .....	505

## INTRODUCTION

The U.S. Department of Justice (DOJ or Agency) claims that protecting human trafficking victims is a top priority.<sup>1</sup> The DOJ is involved in numerous anti-trafficking efforts, including investigations, prosecutions, victim services, and grant programs.<sup>2</sup> While the DOJ's Office for Victims of Crime (OVC) asserts that it is committed to assisting all human trafficking survivors,<sup>3</sup> a recent change in the Agency's use of federal funding under the Trafficking Victims Protection Act (TVPA) shows otherwise.<sup>4</sup>

The DOJ derives authority to use federal funds to strengthen services for victims of human trafficking from the TVPA.<sup>5</sup> Congress passed the TVPA in 2000 to prevent human trafficking, ensure effective punishment of traffickers, and protect victims.<sup>6</sup> The Act appropriates funds to the Attorney General to provide grants to states, tribal governments, local governments, and nonprofit, nongovernmental victim service organizations “to develop, expand, or strengthen victim service programs.”<sup>7</sup>

1. See *What DOJ Is Doing*, U.S. DEP'T OF JUST., <https://www.justice.gov/humantrafficking/what-doj-doing> (last updated Jan. 6, 2017) (“Bringing human traffickers to justice and assisting trafficking victims are top priorities of [the Agency].”).

2. *Id.*; see also *Department of Justice Components*, U.S. DEP'T OF JUST. [hereinafter *Department of Justice Components*], <https://www.justice.gov/humantrafficking/departments-justice-components> (last updated Jan. 6, 2017) (explaining that the Department of Justice's (DOJ's or Agency's) Office for Victims of Crime (OVC) allocates grant funding to organizations dedicated to providing services for human trafficking victims).

3. See U.S. DEP'T OF JUST., OVC-2018-14302, OVC FISCAL YEAR 2018 ENHANCING ACCESS TO SERVICES PROGRAM 4 (May 30, 2018), <https://www.ovc.gov/grants/pdffxt/FY18-VS21-EnhancingAccessToServices-508.pdf> (stating that the OVC aims to bolster support services for all victims to help them “heal in the aftermath of crime victimization”).

4. See RJ Vogt, *DOJ Pressed to Explain Legal Aid Cut for Trafficking Victims*, LAW360 (Aug. 11, 2019, 9:43 PM), <https://www.law360.com/articles/1186806/doj-pressed-to-explain-legal-aid-cut-for-trafficking-victims> (noting that survivors, advocates, and service providers are concerned that funding cuts will “prevent access to legal services for people who need it most”).

5. Trafficking Victims Protection Act (TVPA), 22 U.S.C. § 7105(b)(2).

6. Pub. L. No. 106-386, § 102, 144 Stat. 1464, 1466 (to be codified at 22 U.S.C. § 7101(a)). At least 700,000 persons—primarily women and children—are victims of trafficking every year. 22 U.S.C. § 7101(b)(1).

7. *Id.* § 7105(b)(2)(A). With this grant funding, organizations—such as Freedom Network U.S.A. and Futures Without Violence—have worked to improve housing and employment

The DOJ directs the OVC to award grant funding to organizations that provide comprehensive and specialized services for victims of human trafficking.<sup>8</sup> Before 2018, the DOJ explicitly authorized the use of funds for vacatur<sup>9</sup> and expungement<sup>10</sup> programs.<sup>11</sup> However, in June 2018, the agency quietly barred the use of funds for vacatur and expungement services by removing the express provision for such funds and inserting a line in the 2018 grant application that reads “[d]irect representation on vacatur or expungement matters . . . is not an allowable cost.”<sup>12</sup> The explicit authorization for vacatur and expungement funding is again absent from the DOJ’s most recent grant application.<sup>13</sup> Although the 2020 grant application omitted the line prohibiting funds for such services, the DOJ’s failure to reinstate the express provision and use of vague language suggests

---

opportunities for human trafficking survivors, and Equal Justice Works (EJW) has connected attorneys with victims to help them enforce their rights. Press Release, Off. of Pub. Affs., U.S. Dep’t of Just., Justice Department Invests More than \$47 Million to Combat Human Trafficking and Assist Victims (Sept. 29, 2017), <https://www.justice.gov/opa/pr/justice-department-invests-more-47-million-combat-human-trafficking-and-assist-victims>.

8. *Department of Justice Components*, *supra* note 2.

9. Vacatur is a “rule or order by which a proceeding is vacated.” *Vacatur*, BLACK’S LAW DICTIONARY (11th ed. 2019).

10. Expungement is the “removal of a conviction . . . from a person’s criminal record.” *Expungement of Record*, BLACK’S LAW DICTIONARY (11th ed. 2019).

11. See U.S. DEP’T OF JUST., OVC-2017-11578, OVC FISCAL YEAR 2017 SPECIALIZED SERVICES FOR VICTIMS OF HUMAN TRAFFICKING 5 (2017) [hereinafter OVC FISCAL YEAR 2017], <https://www.ovc.gov/grants/pdfxt/FY-2017-Specialized-Services-for-Victims-of-Human-Trafficking-Solicitation-508.pdf> (“Examples of allowable services include . . . assistance pursuing efforts to vacate a victim’s criminal conviction [and] expunge a victim’s criminal record[]”); see also Press Release, Off. of Pub. Affs., *supra* note 7 (announcing that in 2017, the DOJ awarded EJW \$5 million to provide legal services to human trafficking victims).

12. U.S. DEP’T OF JUSTICE, OVC FISCAL YEAR 2018 COMPREHENSIVE SERVICES FOR VICTIMS OF ALL FORMS OF HUMAN TRAFFICKING 8 (2018) [hereinafter OVC FISCAL YEAR 2018], <https://www.ovc.gov/grants/pdfxt/FY-2018-Comprehensive-Services-for-Victims-of-All-Forms-of-Human-Trafficking-Solicitation-508.pdf> (emphasis omitted). The agency added the same line in the grant application for the 2019 fiscal year. U.S. DEP’T OF JUST., OVC-2019-15589, OVC FISCAL YEAR 2019 DIRECT SERVICES TO SUPPORT VICTIMS OF HUMAN TRAFFICKING 10 (2019) [hereinafter OVC FISCAL YEAR 2019], <https://www.ovc.gov/grants/pdfxt/FY19-Direct-Services-Human-Trafficking-Solicitation.pdf>.

13. See U.S. DEP’T OF JUST., OVC-2020-18332, OVC FY 2020 SERVICES FOR VICTIMS OF HUMAN TRAFFICKING (2020) [hereinafter OVC FISCAL YEAR 2020], <https://www.ovc.gov/grants/pdfxt/fy-2020-services-for-victims-of-human-trafficking.pdf>.

that the agency will continue to bar funds for vacatur and expungement.<sup>14</sup> Additionally, the 2020 grant application describes the federal government's opposition to "prostitution and related activities," signaling that the DOJ is unlikely to grant funding to organizations seeking to help human trafficking victims clear prostitution arrests.<sup>15</sup>

Although the OVC claims that the purpose of the grant program is to "enhance the quality and quantity of services available to victims of human trafficking," the decision to remove the provision expressly authorizing funds for vacatur and expungement services undermines that goal.<sup>16</sup> The decision leaves a wide deficit in federally funded victim services.<sup>17</sup> This funding is critical because human trafficking victims often accumulate arrests in the course of their victimization.<sup>18</sup>

---

14. See *id.* at 21. While the application authorizes funds for "legal services" and "criminal justice system-based advocacy," it is unclear what this entails. See *id.*; see also OVC FISCAL YEAR 2017, *supra* note 11 (explaining that legal services encompass assistance relating to immigration, family law, protective orders, and employment law); KIMBERLY A. LONSWAY, ET AL., END VIOLENCE AGAINST WOMEN INT'L, BREAKING BARRIERS: THE ROLE OF COMMUNITY-BASED AND SYSTEM-BASED VICTIM ADVOCATES 24 (updated ed. 2019), <https://www.evawintl.org/Library/DocumentLibraryHandler.ashx?id=31> (defining a criminal justice system-based advocate as one who provides emotional support, not legal aid). The recently introduced Trafficking Survivors Relief Act of 2020 (Relief Act) demonstrates Congress's concern that the DOJ will continue to abuse its discretion when awarding grant funding despite the absence of the express restriction in the grant application. See Trafficking Survivors Relief Act of 2020, S. 3240, 116th Cong. § 4 (2020) (proposing legislation that bars the Agency from restricting the use of legal representation funds for post-conviction aid).

15. See OVC FISCAL YEAR 2020, *supra* note 13, at 6 ("[Grantees] cannot use U.S. Government funds to promote, support, or advocate the legalization or practice of prostitution . . ."); see also Sarah N. Lynch, *Exclusive: Justice Department Anti-Human Trafficking Grants Prompt Whistleblower Complaint*, REUTERS (Feb. 10, 2020, 1:07 PM), <https://www.reuters.com/article/us-usa-justice-grants-exclusive/exclusive-justice-department-anti-human-trafficking-grants-prompt-whistleblower-complaint-idUSKBN20425G> (reporting that the DOJ awarded \$530,190 over three years to Hookers for Jesus, an organization that advocates against decriminalizing prostitution).

16. OVC FISCAL YEAR 2019, *supra* note 12, at 5.

17. See Letter from Thomas S. Susman, Dir. of the Governmental Affs. Off., Am. Bar Ass'n, to Alan Hanson, Acting Assistant Att'y Gen., U.S. Dep't of Just., & Darlene Hutchinson Biehl, Dir. of the Off. for Victims of Crime, U.S. Dep't of Just. (June 4, 2018) [hereinafter Letter from Susman] (on file with the *Administrative Law Review*) (asserting that the decision to cut funding will "create dangerous and troubling gaps in services").

18. See Tom Jackman, *Trump Administration Cuts Legal Funding for Victims of Human Trafficking*, WASH. POST (Aug. 2, 2019, 5:32 PM), <https://www.washingtonpost.com/crime-law/2019/08/02/trump-administration-cuts-funding-victims-human-trafficking/>

Human trafficking victims with criminal records are often denied access to housing, employment, and education.<sup>19</sup> The DOJ's decision prevents human trafficking victims from moving forward by taking away funding from an essential component to their recovery.<sup>20</sup> Without funding for vacatur and expungement, survivors are forced to live in the shadow of their criminal records, and face a constant reminder of their exploitation and abuse.<sup>21</sup>

The DOJ must ensure that service organizations have access to crucial funding for vacatur and expungement services to give human trafficking survivors the tools to take their lives back. Part I of this Comment discusses the procedural deficiencies of the DOJ's decision to cut funding vacatur and expungement legal aid. Part II evaluates the reviewability concerns and concludes that the Agency's action is judicially reviewable. Part III argues that a reviewing court should not afford the Agency deference and should set aside the action under an arbitrary and capricious standard of review. Part IV asserts that the DOJ should not be permitted to institute a significant policy change while avoiding procedures mandated by the Administrative Procedure Act (APA)<sup>22</sup> and judicial scrutiny, and then recommends revising the TVPA to better protect survivors.

## I. PROCEDURAL DEFICIENCIES

### A. Notice-and-Comment Rulemaking

The APA requires agencies to engage in notice-and-comment procedures when issuing substantive rules.<sup>23</sup> An agency may evade notice-and-comment procedures when promulgating substantive rules only in limited

---

(referencing a study by the National Survivor Network in which more than 90% of human trafficking survivors reported being arrested); *see also The Importance of Criminal Record Relief for Human Trafficking Survivors*, POLARIS PROJECT: BLOG (Mar. 20, 2019), [polarisproject.org/blog/2019/03/the-importance-of-criminal-record-relief-for-human-trafficking-survivors/](https://polarisproject.org/blog/2019/03/the-importance-of-criminal-record-relief-for-human-trafficking-survivors/) (explaining that human trafficking victims accrue arrests when they are forced into commercial sex, drug sales, or other offenses by their traffickers).

19. Jackman, *supra* note 18.

20. *See* Letter from Jerrold Nadler, et al., Comm. on the Judiciary, House of Representatives, to William P. Barr, Att'y Gen., U.S. Dep't of Just. 1 (July 30, 2019) [hereinafter Letter from Nadler], [https://judiciary.house.gov/sites/democrats.judiciary.house.gov/files/documents/expungement%20legal%20aid%20letter%20final%202%20\(002\).pdf](https://judiciary.house.gov/sites/democrats.judiciary.house.gov/files/documents/expungement%20legal%20aid%20letter%20final%202%20(002).pdf) (explaining that vacatur and expungement services provide victims with a "fresh start").

21. *See* Jackman, *supra* note 18 (describing a child sex trafficking victim who could not rent an apartment in her name or have her name on the mailbox because a background check would reveal her criminal record).

22. 5 U.S.C. §§ 551–559, 561–570(a), 701–706.

23. *Id.* § 553(b).

circumstances.<sup>24</sup> Congress intended exemptions to the APA's notice-and-comment requirement to be narrow.<sup>25</sup> Only "interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice" are always exempt from the APA's notice-and-comment requirement.<sup>26</sup> Interpretive rules merely clarify existing law or policy; substantive rules are "those that effect a change in existing law or policy" or "affect individual rights and obligations."<sup>27</sup> Additionally, substantive rules typically convey the agency's final legal position or policy on a particular issue, apply generally, and have a prospective effect.<sup>28</sup>

Although the DOJ instituted a major policy change by cutting funds for vacatur and expungement legal aid, the agency did not engage in notice-and-comment.<sup>29</sup> The DOJ excluded interested parties, including human trafficking victims who are negatively impacted, from the decision.<sup>30</sup> Instead of employing notice-and-comment procedures, the Agency denied any meaningful public participation when it quietly defunded services by

---

24. See *id.* § 553(d)(1) (specifying that notice is not required for "a substantive rule which grants or recognizes an exemption or relieves a restriction"); see also *id.* § 553(b)(3)(B) (providing that an agency may avoid notice-and-comment when it finds that such procedures are "impracticable, unnecessary, or contrary to the public interest"). The DOJ's action does not relieve a restriction; it imposes one on funding. Additionally, the DOJ has not put forth any reason why notice-and-comment would be contrary to public interest.

25. See *Am. Hosp. Ass'n v. Bowen*, 834 F.2d 1037, 1044 (D.C. Cir. 1987) (citing *Batterton v. Marshall*, 648 F.2d 694, 703 (D.C. Cir. 1980)) (elaborating that notice-and-comment increases public participation and fairness, and provides the agency with necessary information and potential solutions).

26. 5 U.S.C. § 553(b).

27. See *Nat'l Org. of Veterans' Advocs. v. Sec'y of Veterans Affs.*, 260 F.3d 1365, 1375 (Fed. Cir. 2001) (citing *Paralyzed Veterans of Am. v. West*, 138 F.3d 1434, 1436 (Fed. Cir. 1998)) (explaining that substantive rules assign new rights or duties, whereas interpretive rules do not); see also *Pac. Gas & Elec. Co. v. Fed. Power Comm'n*, 506 F.2d 33, 38 (D.C. Cir. 1974) (describing substantive rules as those that create rights or responsibilities, or set forth standards of conduct).

28. See *Tripoli Rocketry Ass'n v. U.S. Bureau of Alcohol, Tobacco & Firearms*, No. 00CV0273, 2002 WL 33253171, at \*10 (D.D.C. June 24, 2002).

29. See *Jackman*, *supra* note 18 (reporting that the DOJ announced its decision to defund services in the grant application).

30. See *id.* (noting that interested parties, such as Congress, the American Bar Association (ABA), survivors of trafficking, victim service organizations, and prosecutors, raised protests in the wake of the DOJ's action); see also Victor B. Flatt, *Notice and Comment for Nonprofit Organizations*, 55 RUTGERS L. REV. 65, 73 (2002) (discussing how the Administrative Procedure Act's (APA's) notice-and-comment requirements protect individuals from potentially adverse government action by allowing them to participate in decisions).

removing the express provision for vacatur and expungement funding.<sup>31</sup> The DOJ's decision to quietly defund vacatur and expungement services by burying the announcement in a grant application contradicts the Agency's internal policy against issuing guidance documents that bind parties or establish rights or obligations.<sup>32</sup> Despite the DOJ's apparent attempt to disguise a significant change as a mere announcement, the substance of its decision indicates that it is a rule requiring notice-and-comment.<sup>33</sup>

Courts often hold agencies accountable for issuing substantive rules without using notice-and-comment.<sup>34</sup> When an agency's action is challenged for failure to comply with notice-and-comment requirements, an agency may argue that the action is exempt from such procedures because it does not amount to substantive rulemaking.<sup>35</sup> Agencies often try to avoid procedures

---

31. See OVC FISCAL YEAR 2018, *supra* note 11 (disallowing funds for vacatur and expungement efforts). Previously, the DOJ explicitly authorized human trafficking service organizations to use funds to support vacatur and expungement efforts, which helped victims clear their criminal records. See OVC FISCAL YEAR 2017, *supra* note 11; see also Press Release, Off. of Pub. Affs., *supra* note 7 (stating that the DOJ awarded grant funding to EJW for vacatur and expungement efforts in 2017).

32. Memorandum from Jeff Sessions, Att'y Gen., Dep't of Just., Prohibition on Improper Guidance Documents 1 (Nov. 16, 2017), <https://www.justice.gov/opa/press-release/file/1012271/download> (“[G]uidance may not be used as a substitute for rulemaking and may not be used to impose new requirements . . .”).

33. Courts consider the character of an agency's action to determine whether it is a substantive rule, regardless of how the agency presents it. See *Sugar Cane Growers Coop. v. Veneman*, 289 F.3d 89, 96 (D.C. Cir. 2002) (deeming an announcement made in a press release a substantive rule); see also *Tripoli*, 2002 WL 33253171, at \*10 (explaining that “[w]hether an agency characterizes its own actions as rulemaking is not determinative,” and courts should look to the substance of the action to determine whether notice-and-comment is required). *But see Pac. Gas & Elec. Co. v. Fed. Power Comm'n*, 506 F.2d 33, 39 (D.C. Cir. 1974) (“Often the agency's own characterization of a particular order provides some indication of the nature of the announcement.”).

34. See *Sugar Cane*, 289 F.3d at 92, 96 (holding that the USDA violated the APA when it announced its decision to implement a payment-in-kind program for the 2001 sugar crop through a press release and without engaging in notice-and-comment procedures); see also *Tripoli*, 2002 WL 33253171, at \*10 (asserting that pronouncements made in an exchange of letters between the Bureau of Alcohol, Tobacco and Firearms and a chemical manufacturer amounted to substantive rulemaking).

35. See, e.g., *Sugar Cane*, 289 F.3d at 95–96 (arguing that implementation of a new program was an informal adjudication); *Pac. Gas*, 506 F.2d at 37 (contending that an order was a general statement of policy); *Tripoli*, 2002 WL 33253171, at \*3 (claiming that a chemical classification was a clarification of existing policy).

by disguising substantive rules as general statements of policy.<sup>36</sup> In *Sugar Cane Growers Cooperative v. Veneman*,<sup>37</sup> the U.S. Department of Agriculture argued that its decision to institute a payment-in-kind program for the 2001 sugar crop was merely an announcement contained in a press release, not a substantive rule.<sup>38</sup> The District of Columbia Circuit Court of Appeals disagreed, holding that the program's implementation amounted to substantive rulemaking because it mandated procedures for applicants to follow and established payment limitations.<sup>39</sup>

Additionally, in *Tripoli Rocketry Ass'n v. U.S. Bureau of Alcohol, Tobacco & Firearms*,<sup>40</sup> the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) argued that its pronouncements classifying a chemical as an explosive in letters to a chemical manufacturer did not amount to substantive rulemaking.<sup>41</sup> The District Court for the District of Columbia held that the ATF erred in failing to use notice-and-comment procedures because the ATF's statements were more than a mere clarification; they were designed to convey the agency's final pronouncement of its legal position or policy.<sup>42</sup> Moreover, the agency's decision to classify the chemical as an explosive amounted to substantive rulemaking because it was generalized and prospective—the classification would apply to all regulation of the chemical going forward.<sup>43</sup>

The DOJ's decision to cut funding for vacatur and expungement legal aid is more than simply an announcement or general policy statement. Unlike

---

36. Although courts look to the character of a rule to determine whether it is substantive, courts occasionally accept an agency's own labeling of an announcement. *See Pac. Gas*, 506 F.2d at 40 (refusing to classify the Federal Power Commission's (FPC's) order setting the priority schedule for restricting supplies of natural gas to some customers as a substantive rule because the FPC described the order as a policy statement). However, the DOJ intended the announcement in the grant application to have an immediate effect on all prospective grantees, not as a policy to implement in the future. OVC FISCAL YEAR 2018, *supra* note 12.

37. 289 F.3d 89 (D.C. Cir. 2002).

38. *Id.* at 95–96.

39. Unlike an informal adjudication, the announcement of the program prescribed a firm standard for all future applicants to follow. *See id.* at 96; *see also Sprint Corp. v. FCC*, 315 F.3d 369, 373 (D.C. Cir. 2003) (asserting that rules are different from informal adjudications because rules establish standards of conduct and have future effect on parties).

40. No. 00CV0273, 2002 WL 33253171, at \*1 (D.D.C. June 24, 2002).

41. *Id.* at \*3.

42. *See id.* at \*10. *But see Pac. Gas & Elec. Co. v. Fed. Power Comm'n*, 506 F.2d 33, 38 (D.C. Cir. 1974) (asserting that general statements of policy are exempt from notice-and-comment because they do not establish binding norms, assign rights or responsibilities, or carry the force of law).

43. *See Tripoli*, 2002 WL 33253171, at \*10 (noting that substantive rules prescribe law or policy intended to have future effect).

a policy statement that has little practical effect, the DOJ's decision to cut legal aid funding establishes a binding precedent and significantly affects the rights and responsibilities of interested parties, including the victims who rely on grant funding and organizations that seek funds to strengthen services.<sup>44</sup> Although the DOJ may claim that the statement disallowing funds for vacatur and expungement services—and the removal of the express provision for such funding—did not amount to substantive rulemaking, the DOJ set forth procedures for grant applicants to follow and outlined limitations in funding.<sup>45</sup>

Additionally, the decision to cut legal aid funding for vacatur and expungement effected a change in existing policy. This new policy marks a substantial departure from its previous policy, and places a significant limitation on how future grantees can use funds to serve human trafficking victims and help them rebuild their lives.<sup>46</sup> In turn, the cut in federal funding negatively impacts human trafficking victims seeking help from these organizations to clear their criminal records.<sup>47</sup> Therefore, the DOJ's action amounts to substantive rulemaking because it changes existing policy and substantially affects human trafficking survivors and organizations seeking to use grant funding to strengthen victim services.<sup>48</sup>

Furthermore, like the ATF's pronouncements in *Tripoli*, the DOJ's action is not merely a clarification of existing law; it is a substantive rule because it established the DOJ's final policy on grant funding for vacatur and expungement services, and the agency intended it to be generalized

---

44. See *Pac. Gas*, 506 F.2d at 38 (positing that the major distinction between a substantive rule and a general statement of policy is the practical effect: substantive rules carry the force of law and establish a “binding norm” whereas general statements of policy do not).

45. See OVC FISCAL YEAR 2018, *supra* note 12, at 5–8, 10. This change imposes new obligations on applicants and grantees by dictating how victim service organizations seeking to strengthen legal aid programs can use allotted funds. See *id.* Agency programs that require applicants to follow specific procedures amount to substantive rulemaking. See *Sugar Cane Growers Coop. v. Veneman*, 289 F.3d 89, 97 (D.C. Cir. 2002).

46. See Jackman, *supra* note 18 (opining that the Agency seems to have “switched its view on clearing up victims’ records”).

47. See Letter from Nadler, *supra* note 20 (stressing the dangers of cutting funding for vacatur and expungement services, including increased barriers to housing, employment, and education for human trafficking victims with criminal records).

48. See *CropLife Am. v. EPA*, 329 F.3d 876, 884 (D.C. Cir. 2003) (declaring that a directive contained in an agency's press release amounted to substantive rulemaking because it marked a “dramatic change in the agency's established regulatory regime”).

and prospective.<sup>49</sup> The DOJ's decision to cut funding for vacatur and expungement efforts signifies a final policy that support for these services is no longer a permissible use of funds.<sup>50</sup> The decision applies generally and prospectively to all applicants seeking funding to help victims clear their records.<sup>51</sup> Since the DOJ disguised a substantive rule as a mere announcement, bypassed notice-and-comment procedures, and denied public participation, the agency's action is procedurally deficient.

### B. *Statement of Basis and Purpose*

The APA requires agencies to provide a "concise general statement . . . of basis and purpose" when issuing a substantive rule.<sup>52</sup> An agency's action is procedurally deficient when the agency fails to disclose its reasoning when pertinent research is available.<sup>53</sup> An adequate statement of basis and purpose explains the agency's action, and describes the factual, legal, and policy foundations for the decision.<sup>54</sup>

In addition to failing to engage in notice-and-comment, the DOJ has not provided a detailed basis or justification for its decision to remove the express provision for funding vacatur and expungement aid and deny future funding for these services.<sup>55</sup> The Agency claimed to have cut funding for legal aid services "to preserve resources for the many other critical services provided

---

49. See *Tripoli Rocketry Ass'n v. U.S. Bureau of Alcohol, Tobacco & Firearms*, No. 00CV0273, 2002 WL 33253171, at \*10 (D.D.C. June 24, 2002) (defining substantive rules as those that set forth the agency's final legal position or policy, apply generally, and have a future effect).

50. Although the most recent grant application does not expressly prohibit funding for vacatur and expungement, based on the DOJ's attitude toward prostitution arrests, it will likely maintain the policy set forth in 2018 and continue to withhold funds for these services. See *Lynch*, *supra* note 15 (noting that in 2019, the DOJ denied funding to two well-established nonprofits and instead allocated funding to Hookers for Jesus, a religious organization that lobbies against the removal of criminal penalties for sex workers).

51. For the requirements and procedures set forth for all prospective grantees, see OVC FISCAL YEAR 2020, *supra* note 13; OVC FISCAL YEAR 2019, *supra* note 12; OVC FISCAL YEAR 2018, *supra* note 12.

52. APA, 5 U.S.C. § 553(c).

53. See *United States v. N.S. Food Prods. Corp.*, 568 F.2d 240, 251 (2d Cir. 1977) (determining that an agency should not withhold the scientific data relied upon in issuing a rule if the research is readily available and the agency lacks expertise).

54. See *Cal. Hotel & Motel Ass'n v. Indus. Welfare Comm'n*, 599 P.2d 31, 39–41 (Cal. 1979) (holding that a statement of basis must demonstrate that the agency's information supports the action).

55. See Letter from Nadler, *supra* note 20 (demanding that the DOJ explain its reason for the decision).

under these grants.”<sup>56</sup> Because of the DOJ's vague explanation, some opponents believe the decision was politically motivated rather than based on sound reasoning.<sup>57</sup> The DOJ must articulate its rationale for instituting a change that negatively impacts human trafficking survivors.

A reviewing court is likely to invalidate a rule when the agency fails to articulate a concise general statement of basis and purpose when issuing it.<sup>58</sup> In *United States v. Nova Scotia Food Products Corp.*,<sup>59</sup> the Second Circuit Court of Appeals held that a Food and Drug Administration (FDA) regulation concerning the processing of hot-smoked whitefish was procedurally deficient.<sup>60</sup> Though the FDA explained that the regulation would serve public health interests, the statement of basis and purpose failed to disclose the scientific data it relied on or address vital questions raised during the comment period.<sup>61</sup> In the absence of an adequate record explaining the reasoning for the regulation, the procedures followed were arbitrary.<sup>62</sup>

Like the FDA in *Nova Scotia Food Products*, the DOJ failed to give a reasoned explanation for its decision to cut legal aid funding for vacatur and expungement. Just as the FDA's decision had significant implications, the DOJ's decision to cut funding for vacatur and expungement services negatively affects human trafficking survivors.<sup>63</sup> Neither the FDA nor the DOJ provided any data to support such a major decision with far-reaching effects.<sup>64</sup> The FDA's bare assertion that it decided to regulate hot-smoked whitefish to serve public health interests did not survive judicial

---

56. Jackman, *supra* note 18.

57. *See id.* (reporting that the executive director for Freedom Network U.S.A. did not believe the decision was based on a recommendation from OVC staff, but instead came “from the top, from the political side”).

58. *See, e.g.,* *United Mine Workers of Am., Int'l Union v. Dole*, 870 F.2d 662, 673 (D.C. Cir. 1989) (vacating labor regulations for mine workers); *N.S. Food Prods.*, 568 F.2d at 252 (setting aside a food safety regulation); *Cal. Hotel*, 599 P.2d at 40–41 (rendering an order regarding fixed wages invalid).

59. 568 F.2d 240 (2d Cir. 1977).

60. *Id.* at 253.

61. *See id.* at 244, 253 (elaborating that the agency's record was insufficient because it did not address concerns about commercial infeasibility).

62. *Id.* at 253.

63. *See id.*; Letter from Nadler, *supra* note 20 (explaining the necessity of vacatur and expungement efforts to providing human trafficking victims with the chance to reintegrate into society).

64. Instead of providing data or a detailed explanation, the DOJ announced its decision by removing the explicit authorization for vacatur and expungement funds, and adding a line in the 2018 grant application disallowing such funds. Jackman, *supra* note 18.

scrutiny.<sup>65</sup> Similarly, the DOJ's decision to bar the use of funds for vacatur and expungement, without further explanation, is insufficient to withstand scrutiny.

Moreover, like the FDA's failure to address salient comments, the DOJ did not address important concerns raised by Congress, the American Bar Association (ABA), human trafficking victims, and victim service organizations.<sup>66</sup> The DOJ's only response to interested parties was that it cut funds to preserve funding for other services.<sup>67</sup> Legal aid for vacatur and expungement is an essential component of recovery—it gives human trafficking victims the chance to clear their criminal records and rebuild their lives.<sup>68</sup> While the DOJ asserts that protecting and strengthening victim services is a priority for the Agency, cutting funds for such a vital service undermines that claim.<sup>69</sup> The DOJ must respond to the negative impact the funding cut will have on survivors and explain its rationale. As the court in *Nova Scotia Food Products* placed the burden on the FDA to explain its decision, a reviewing court must require the DOJ to explain its reasoning for taking away vital funding for victim services.<sup>70</sup>

Although the Agency still disburses funds for other programs, victims with criminal records are unlikely to benefit from these services without access to vacatur and expungement.<sup>71</sup> Grantees cannot refer victims with criminal

---

65. See *N.S. Food Prods.*, 568 F.2d at 253 (finding that the regulation regarding hot-smoked whitefish was arbitrary).

66. See Jackman, *supra* note 18 (noting that Congress, the ABA, and victim advocacy groups expressed concern that the cut in funding would prevent victims with criminal records from obtaining affordable housing, employment in their desired careers, or higher education).

67. *Id.*

68. See Letter from Susman, *supra* note 17 (“Trafficking survivors are often further victimized by criminal histories resulting from the force, fraud, and coercion perpetrated by their traffickers.”).

69. See Letter from Nadler, *supra* note 20 (declaring that the choice to discontinue federal funds for vacatur and expungement efforts will adversely affect human trafficking victims and that the DOJ's recent change “[f]l[ies] in the face of the spirit of the plain language” of the TVPA).

70. See *N.S. Food Prods.*, 568 F.2d at 252 (stating that the Food and Drug Administration (FDA) had an obligation to disclose the scientific data it relied on and address concerns raised by interested parties); see also *United Mine Workers of Am., Int'l Union v. Dole*, 870 F.2d 662, 673 (D.C. Cir. 1989) (holding that the Secretary of Labor's statement of basis and purpose regarding new mining regulations was inadequate because it failed to discuss how the new regulations maintained or improved protections for mineworkers).

71. See Jackman, *supra* note 18 (explaining that victims with criminal records are often denied housing, employment, and education); see also Whitney J. Drasin, Comment, *New York's Law Allowing Trafficked Persons to Bring Motions to Vacate Prostitution Convictions: Bridging the Gap or*

records to federally-funded housing, employment, and education programs.<sup>72</sup> Therefore, funding for these services means nothing for victims who cannot access them due to their criminal records.<sup>73</sup> The DOJ's vague explanation, that it chose to cut funding for vacatur and expungement to augment the amount of available funding for other resources, does not address the concern that funding for other services is useless for victims with criminal records.<sup>74</sup> As the DOJ failed to provide a reasoned explanation or address important concerns, the decision to cut funding for vacatur and expungement is procedurally deficient.

## II. JUDICIAL REVIEW

The DOJ's decision to cut funding for vacatur and expungement services is an abuse of discretion. A reviewing court must hold the DOJ accountable for cutting funds without using notice-and-comment procedures or providing a statement of basis and purpose. If a reviewing court were to find the DOJ's action outside the scope of judicial review, it would empower the Agency to engage in arbitrary decisionmaking.

### A. Standing

The APA provides that a person harmed by agency action is entitled to judicial review.<sup>75</sup> A party challenging a regulation must meet three requirements for a court to confer standing.<sup>76</sup> The plaintiff must have suffered an "injury in fact," there must be a causal connection between the injury and the harm, and it must be likely that the harm will be "redressed by a favorable decision."<sup>77</sup>

---

*Just Covering it Up?*, 28 TOURO L. REV. 489, 490 (2012) (elaborating that criminal records create barriers for human trafficking victims because of the stigma associated with having a record).

72. See Vogt, *supra* note 4 (discussing how grantees are unable to refer victims to certain programs due to their convictions).

73. If funding were available for vacatur and expungement efforts, victims would have less difficulty gaining access to housing, employment, and education; therefore, those services would require less funding. See *id.* (positing that when the government invests in legal aid for vacatur and expungement, the need to fund housing and employment services lessens).

74. See Letter from Susman, *supra* note 17 (explaining that survivors are unable to obtain stability and independence, and cannot access employment and housing due to their criminal records); see also Drasin, *supra* note 71, at 517 (opining that legislation that addresses the problem of human trafficking is essentially useless when victims are treated as criminals).

75. APA, 5 U.S.C. § 702.

76. Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992).

77. *Id.* at 560–61.

Human trafficking victims who were previously entitled to funding for direct legal representation for vacatur and expungement efforts have suffered an actual injury that satisfies the first standing requirement. Under *Lujan v. Defenders of Wildlife*,<sup>78</sup> an “injury in fact” is the “invasion of a legally protected interest” that is “concrete and particularized” and “actual or imminent.”<sup>79</sup> Federal funding for victim services is an interest that is legally protected by the TVPA.<sup>80</sup> The TVPA ensures that funding will be used in part “to develop, expand, or strengthen victim service programs for victims of trafficking.”<sup>81</sup> However, taking away funding for vacatur and expungement legal aid instead weakens victim service programs.

Human trafficking victims’ interest in the withheld funding is concrete and particularized because they will suffer directly from the funding cuts.<sup>82</sup> When human trafficking victims are unable to clear their criminal records, it makes it even more difficult for them to reenter society.<sup>83</sup> The injury is immediate—not conjectural or hypothetical—because taking away this critical funding has led to a sudden gap in victim services and has left victims without necessary resources to rebuild their lives.<sup>84</sup> Human trafficking victims with criminal records are often unable to obtain affordable housing or sign leases in their names, establish careers, or access higher education.<sup>85</sup> The gap in services caused by funding cuts is not a “some day” hypothetical injury.<sup>86</sup> Thus, human trafficking victims with criminal records have suffered injury in fact sufficient to obtain judicial review of the DOJ’s action.

---

78. 504 U.S. 555 (1992).

79. *Id.* at 560.

80. TVPA, 22 U.S.C. § 7105(b)(2)(A).

81. *Id.*

82. *See Lujan*, 504 U.S. at 581 (Kennedy, J., concurring in part and concurring in the judgment) (noting that a plaintiff must show that the challenged action injures him in a “concrete and personal way” and that he has a “stake in the outcome”).

83. *See Jackman*, *supra* note 18 (asserting that victims with criminal records are unable to flourish in their communities or access opportunities because they constantly have to explain and discuss the crimes they committed in the course of their victimization).

84. *See Letter from Susman*, *supra* note 17 (“The final shackles of their trafficking victimization would remain tightly bound were vacatur and expungement not provided through critical legal services.”). Victims trying to clear their criminal records will likely face additional barriers due to the funding cuts. *But see Lujan*, 504 U.S. at 564 (asserting that “‘some day’ intentions—without any description of concrete plans, or . . . any specification of *when* the some day will be—do not support a finding of the ‘actual or imminent’ injury”) (emphasis in original).

85. *Vogt*, *supra* note 4.

86. *See Lujan*, 504 U.S. at 564 (holding that individuals with future plans to visit national forests did not have an actual or imminent injury to challenge a regulation that threatened endangered species in those areas).

The causal connection between the funding cuts and the injury to human trafficking victims is enough to satisfy the second standing requirement.<sup>87</sup> Victim service organizations previously used federal funds for vacatur and expungement efforts.<sup>88</sup> Had the DOJ not barred the use of federal funds for legal aid for vacatur and expungement, states and organizations would be free to use grant money to support these efforts. Victim service organizations have expressed their disagreement with the DOJ's action.<sup>89</sup> Therefore, these organizations would likely continue to apply for and receive grants for vacatur and expungement services if the DOJ restored funding. Thus, the injury is fairly traceable to the DOJ's action.

There is a "substantial likelihood" that a successful challenge to the DOJ's action would redress the harm from withholding legal aid for vacatur and expungement.<sup>90</sup> Although not guaranteed, it is likely that organizations that previously received grant funding for vacatur and expungement services would continue to receive and utilize such funding. If a reviewing court were to set aside the Agency's action, funds would be available again for vacatur and expungement efforts. Thus, victims of human trafficking seeking to clear their criminal records have standing to challenge the DOJ's decision.

### B. Finality

An agency's action must be final before a court can review it.<sup>91</sup> In *Bennett v. Spear*,<sup>92</sup> the Court established a two-part test to determine whether an agency action is sufficiently final for judicial review.<sup>93</sup> First, the action must be the "consummation" of the agency's decisionmaking process.<sup>94</sup> Second,

---

87. See *Duke Power Co. v. Carolina Envtl. Study Grp., Inc.*, 438 U.S. 59, 74–75 (1978) (explaining that there is a sufficient causal link between the claimed injury and the challenged conduct when a favorable decision is substantially likely to redress the harm).

88. The DOJ allocated \$5 million for vacatur and expungement services in 2017. Press Release, Off. of Pub. Affs., *supra* note 7.

89. Jackman, *supra* note 18.

90. See *Simon v. E. Ky. Welfare Rts. Org.*, 426 U.S. 26, 45–46 (1976) (declaring that the redressability prong of standing is only satisfied when there is a "substantial likelihood" that victory in a suit would cure the injury).

91. APA, 5 U.S.C. § 704.

92. 520 U.S. 154 (1997).

93. *Id.* at 177–78.

94. See *id.* (describing the consummation of agency decisionmaking as actions that are not of a "merely tentative or interlocutory nature").

the “action must be one by which ‘rights or obligations have been determined,’ or from which ‘legal consequences will flow.’”<sup>95</sup>

The DOJ’s decision to cut legal aid funding constitutes final agency action and is thus judicially reviewable.<sup>96</sup> This decision to cut legal aid funding marked the consummation of agency action because it was a definitive statement of the Agency’s position on the allowable use of funds and was effective upon publication.<sup>97</sup> States and nonprofit organizations are no longer allowed to apply for or receive funding for vacatur and expungement efforts following the DOJ’s decision.<sup>98</sup>

The DOJ’s decision to cut funds determines a legal right and sets forth legal consequences, thus satisfying the second prong of the finality inquiry. Pursuant to the TVPA, human trafficking victims with criminal records have a legal right to funding for victim services.<sup>99</sup> Taking away critical funding undermines this legal right by weakening programs dedicated to serving victims who have accrued criminal records in the course of their victimization.<sup>100</sup> Therefore, the DOJ’s action “determine[s]” a legal right to which human trafficking survivors are entitled to by limiting the allowable use of funds under this right.<sup>101</sup> The decision to cut funding will also make it more difficult for victims to clear their criminal records, resulting in legal consequences associated with continued involvement in

---

95. *Id.* at 178 (citing *Port of Bos. Marine Terminal Ass’n v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71 (1970)).

96. See Stephen Hylas, Note, *Final Agency Action in the Administrative Procedure Act*, 92 N.Y.U. L. REV. 1644, 1645 (2017) (arguing that “final definitive determinations that cause hardship to private parties should be subject to judicial review”).

97. See *Abbott Laboratories v. Gardner*, 387 U.S. 136, 152 (1967) (holding that the FDA Commissioner’s order was final because it was made effective upon publication, immediate compliance was expected, and it had a “direct and immediate” effect on complaining parties).

98. OVC FISCAL YEAR 2018, *supra* note 12 (“Direct representation on vacatur or expungement matters . . . is [not] an allowable cost.”). Although the express prohibition is absent from the 2020 grant application, the DOJ’s recent awards under the grant program suggest that it will continue to bar the use of funds to help victims clear their criminal records. See Lynch, *supra* note 15 (asserting that the DOJ’s grant awards favor Hookers for Jesus, an organization run by a trafficking survivor who has fought against decriminalizing prostitution).

99. TVPA, 22 U.S.C. § 7105(b)(2)(A) (stating that grants should bolster programs that serve victims of human trafficking, including those involved in the criminal justice system).

100. See Letter from Susman, *supra* note 17 (asserting that legal representation for vacatur and expungement is an essential service).

101. See *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997) (citing *Port of Bos. Marine Terminal Ass’n v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71 (1970)) (declaring that agency action is final when it “determine[s]” rights or obligations).

the criminal justice system.<sup>102</sup> Additionally, legal consequences flow from this action because it outlines procedures grantees must follow and places limitations on the use of funds.<sup>103</sup> Thus, the DOJ's action is sufficiently final for judicial review.

### C. Ripeness

Agency action must also be “ripe” for judicial review.<sup>104</sup> In *Abbott Laboratories v. Gardner*,<sup>105</sup> the Court established a two-part test to evaluate whether agency action is sufficiently ripe.<sup>106</sup> First, the issues must be fit for judicial decision.<sup>107</sup> Second, there must be a “hardship to the parties of withholding court consideration.”<sup>108</sup> The plaintiffs in *Abbott Laboratories* challenged the FDA Commissioner's authority to promulgate a rule under the Food, Drug, and Cosmetic Act (FDCA) “requiring labels, advertisements, and other printed matter relating to prescription drugs to designate the established name of the particular drug involved every time its trade name is used . . . .”<sup>109</sup> The rule was enforceable immediately, and drug companies were subject to criminal and civil penalties if they failed to comply.<sup>110</sup> The Court held that the issues were fit for judicial review and that delaying review would result in hardship to the complaining parties.<sup>111</sup>

The DOJ's decision to cut funding for legal aid for vacatur and expungement is fit for judicial review.<sup>112</sup> In *Abbott Laboratories*, the Court held

---

102. See Letter from Susman, *supra* note 17 (explaining that “survivors live in fear of their criminal records’ coming to light because of the severe negative consequences”); see also Drasin, *supra* note 71, at 508 (describing how, when victims are arrested, they are fingerprinted, documented in the legal system, and often branded as criminals by their families and communities).

103. See *Bennett*, 530 U.S. at 178–79 (holding that a Biological Opinion issued by the Fish and Wildlife Service had “direct and appreciable legal consequences” because it altered the legal procedure that the Bureau of Reclamation needed to follow and required compliance with advised conditions in implementing an irrigation project).

104. See *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148 (1967) (stating that courts will not review an agency's action unless the controversy is “ripe” for judicial review).

105. 387 U.S. 136 (1967).

106. *Id.* at 149.

107. See *id.* (explaining that issues are appropriate for judicial review when they are purely legal and arise out of final agency action).

108. *Id.*

109. *Id.* at 139.

110. *Id.* at 152–53.

111. See *id.* at 149, 152–53.

112. However, if a court deems the DOJ's action to be an interpretive rule, it is unlikely to find the action is ripe. See *Tenn. Gas Pipeline Co. v. FERC*, 736 F.2d 747, 751 (D.C. Cir. 1984)

that whether the Commissioner exceeded his authority under the FDCA was a purely legal question.<sup>113</sup> Like the issue in *Abbott Laboratories*, the issue here is purely legal: whether, under the TVPA, the agency has the authority to cut funding for vacatur and expungement efforts without providing any basis for the decision. Additionally, the issue arises out of final agency action, thus rendering the agency action fit for judicial review.<sup>114</sup>

The Agency's action will also have a direct and immediate effect on human trafficking victims, causing hardship to these victims if a reviewing court were to withhold judicial review.<sup>115</sup> In *Abbott Laboratories*, the Court concluded that the Commissioner's order had a "direct effect on . . . all prescription drug companies."<sup>116</sup> Similarly, the decision to cut funding for vacatur and expungement legal aid is directed at human trafficking victims—delaying judicial review will result in hardship to survivors seeking to clear their criminal records.<sup>117</sup> Therefore, the DOJ's decision to cut funds is sufficiently ripe.<sup>118</sup>

#### D. Committed to Agency Discretion by Law

The DOJ's action is not committed to agency discretion by law within the meaning of the APA and, therefore, not barred from judicial review. Under the APA, agency action is not reviewable to the extent that it is "committed to agency discretion by law."<sup>119</sup> The committed to agency discretion exception is a narrow exception that applies only if the governing statute provides "'no law to apply."<sup>120</sup> On the rare occasion when this exception applies, an agency "enjoys virtually unlimited discretion."<sup>121</sup> An agency has

---

(asserting that courts should not consider anticipatory challenges to interpretive rules when parties are not facing imminent injury).

113. *Abbott Laboratories*, 387 U.S. at 149.

114. See *supra* Part II.B (discussing the test for determining finality).

115. See Vogt, *supra* note 4 (noting the obstacles victims with criminal records face).

116. *Abbott Laboratories*, 387 U.S. at 152.

117. See Vogt, *supra* note 4 (describing how the lack of accessible legal services creates additional barriers for human trafficking victims).

118. Closely related to ripeness is the mootness doctrine. Courts will not consider claims that are "moot," in which the parties no longer have any meaningful stake. See *DeFunis v. Odegaard*, 416 U.S. 312, 317 (1974). However, this controversy is unlikely to be resolved before suit unless the DOJ explicitly restores funding for vacatur and expungement services because victims will remain without critical federal funding under the grant program.

119. APA, 5 U.S.C. § 701(a)(2).

120. See *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971).

121. Ameer B. Bergin, Comment, *Does Application of the APA's "Committed to Agency Discretion" Exception Violate the Nondelegation Doctrine?*, 28 B.C. ENVTL. AFFS. L. REV. 363, 365 (2001); see also *Webster v. Doe*, 486 U.S. 592, 595, 600 (1988) (holding that an agency Director's discharge of

a more persuasive argument that its action is committed to agency discretion when Congress uses vague statutory language to grant authority.<sup>122</sup> Although the provision of the TVPA that authorizes funds for grant programs does not impose specific restrictions or requirements on the Agency in allocating funds, there is a clear statutory directive that the Agency use funds to “develop, expand, or strengthen victim service programs.”<sup>123</sup> Given this clear legislative directive from Congress, the Agency should not have free rein to make decisions that adversely affect human trafficking victims.

In *Citizens to Preserve Overton Park, Inc. v. Volpe*,<sup>124</sup> the Court established the “no law to apply” test to determine whether an agency’s action falls within the “committed to agency discretion by law” exception to judicial review.<sup>125</sup> An agency will not be afforded unlimited discretion where there is a clear statutory directive.<sup>126</sup> The TVPA contains a clear statutory directive that funding “expand or strengthen” victim services.<sup>127</sup>

Although rare, the Court will find that an agency’s action is committed to its discretion when there is no clear legislative mandate and the agency continues to meet its statutory responsibilities.<sup>128</sup> In *Lincoln v. Vigil*,<sup>129</sup> the Indian Health Service received appropriations from Congress to provide healthcare services for Native American and Alaska Native people.<sup>130</sup> While the Service previously allocated funds to the Indian Children’s Program, which provided healthcare services to children with disabilities, it announced plans to stop funding the program and reallocate funds to establish a nationwide program.<sup>131</sup> The Court held that the agency’s decision to discontinue funding for the program was unfit for judicial review under the

---

a security officer due to his sexual orientation was committed to agency discretion because the statute allowed the Director to terminate employment whenever he deemed necessary).

122. Bergin, *supra* note 121, at 386.

123. TVPA, 22 U.S.C. § 7105(b)(2)(A).

124. 401 U.S. 402 (1971).

125. *Id.* at 410.

126. *See id.* at 411 (holding that the Secretary of Transportation’s decision to build a highway through a park did not fall within the committed to agency discretion exception because the governing statute contained clear language regarding the use of public parks).

127. 22 U.S.C. § 7105(b)(2)(A).

128. *See Lincoln v. Vigil*, 508 U.S. 182, 193–94 (1993) (upholding an agency’s decision to discontinue funding for a children’s health services program when the enabling statute spoke only in general terms and the agency’s reallocation of funds to nationwide health services fulfilled its statutory obligations).

129. 508 U.S. 182 (1993).

130. *Id.* at 185.

131. *Id.* at 184, 188.

APA because it was “committed to agency discretion by law.”<sup>132</sup> Because the Service fulfilled its statutory mandate to provide funds for healthcare services, the decision to reallocate funds was not judicially reviewable.<sup>133</sup>

However, unlike the Service’s reallocation of funds, the DOJ’s decision to deny funding for direct legal services for vacatur and expungement prevents the Agency from meeting its statutory responsibilities under the TVPA.<sup>134</sup> While the Service reallocated funds to expand healthcare services, the DOJ’s abrupt decision to take away funding for crucial services leaves a wide gap in the resources available for victims. Therefore, the DOJ’s decision to cut funding is not committed to agency discretion by law.

### III. JUDICIAL DEFERENCE

A reviewing court should not apply a deferential standard of review to the DOJ’s decision to cut legal aid funding for vacatur and expungement. The DOJ is not entitled to deference under the *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*<sup>135</sup> two-step framework.<sup>136</sup> Agency decisions made without public participation are not afforded *Chevron* deference; therefore, *Chevron* deference does not apply to the DOJ’s action because the agency did not use notice-and-comment procedures.<sup>137</sup>

Nor is the DOJ’s decision eligible for respect under *Skidmore v. Swift & Co.*<sup>138</sup> The DOJ did not engage in thoughtful consideration because it did not explain the basis for its decision or address vital concerns from the public.

---

132. *See id.* at 184, 192 (reasoning that the allocation of funds is generally a decision committed to agency discretion because appropriations “give an agency the capacity to adapt to changing circumstances and meet its statutory responsibilities in what it sees as the most effective or desirable way”).

133. *Id.* at 193.

134. While the DOJ claims the reallocation of funds will strengthen housing, education, and employment services, this means little to human trafficking victims with criminal records who are ineligible for these programs. *See supra* Part I.B.

135. 467 U.S. 837 (1984).

136. *See id.* at 842–43 (establishing that an agency is entitled to deference when the enabling statute is ambiguous, and the agency’s interpretation is a permissible construction).

137. *See Christensen v. Harris County.*, 529 U.S. 576, 587 (2000) (asserting that agency decisions that are not made through any rulemaking processes are not eligible for *Chevron* deference); *see also* Kathryn A. Watts, *Adapting to Administrative Law’s Erie Doctrine*, 101 NW. U. L. REV. 997, 1006 (2007) (explaining that *Chevron* deference is limited to notice-and-comment rulemaking and formal adjudication).

138. 323 U.S. 134 (1944). When determining whether an action qualifies for *Skidmore* respect, courts consider the thoroughness of the agency’s decisionmaking process, the validity of its justification, and its consistency with prior policies. *Id.* at 140.

Thus, the DOJ's decision lacks thoroughness.<sup>139</sup> The Agency has also been evasive and failed to present any factual findings or evidence to support its decision that would show validity.<sup>140</sup> Additionally, the Agency's decision is inconsistent with its prior policies and marks an abrupt change, as it previously allowed the use of federal funds for vacatur and expungement efforts.<sup>141</sup> Therefore, the DOJ is not entitled to *Skidmore* respect for its decision to cut funding for vacatur and expungement.

### A. *Taking a Hard Look*

The APA requires a reviewing court to set aside agency action found to be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”<sup>142</sup> In *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.*,<sup>143</sup> the Court established the “hard look” doctrine of judicial review, which requires a more demanding review of informal agency action.<sup>144</sup> To survive arbitrary and capricious scrutiny, the agency must have examined the relevant data, demonstrated a “rational connection between the facts found and the choice made,” based the decision on all relevant factors, and exhibited no error in judgment.<sup>145</sup> The

---

139. See *De La Mota v. U.S. Dep't of Educ.*, 412 F.3d 71, 80 (2d Cir. 2005) (positing that decisions that lack “the indicia of expertise, regularity, rigorous consideration, and public scrutiny” fail to satisfy the thoroughness prong under *Skidmore*); see also *Shikles v. Sprint/United Mgmt. Co.*, 426 F.3d 1304, 1316 (10th Cir. 2005) (holding that an agency's decision lacked thoroughness because it was not subject to public scrutiny). But see *Cline v. Hawke*, 51 F. App'x 392, 397 (4th Cir. 2002) (opining that an agency's consideration was thorough because the agency received public comments and conferred with interested parties).

140. See *De La Mota*, 412 F.3d at 80 (asserting that an agency's action must be “well-reasoned, substantiated, and logical” to demonstrate validity).

141. See *Gonzales v. Oregon*, 546 U.S. 243, 267–69 (2006) (holding that an interpretive rule declaring assisted suicide an illegitimate medical practice was not entitled to *Skidmore* respect because it was unpersuasive and inconsistent with prior policies).

142. APA, 5 U.S.C. § 706(2)(A).

143. 463 U.S. 29 (1983).

144. See *id.* at 43 (stating the agency must examine the relevant data and articulate a satisfactory explanation for its action); see also Cass R. Sunstein, *Deregulation and the Hard-Look Doctrine*, 1983 SUP. CT. REV. 177, 181 (1983) (explaining that the purpose of the hard look doctrine is to “facilitate review of the reasonableness of the exercise of discretion”).

145. *State Farm*, 463 U.S. at 43, 46–48 (invalidating the rescission of a regulation requiring automatic seatbelts and airbags in new automobiles because the agency failed to consider the safety benefits of automatic seatbelts or the possibility of requiring only airbag technology).

requirements set forth in *State Farm* are intended to ensure agency decisions are thoroughly considered, rather than arbitrary or politically motivated.<sup>146</sup>

As the DOJ has not explained its decision to cut funding for vacatur and expungement aid other than claiming a desire to preserve funding for other services, it is unlikely that the Agency can produce pertinent data.<sup>147</sup> The Agency's explanation indicates that it neglected to consider the negative impact the cuts would have on human trafficking victims with criminal records, whom Congress intended the TVPA to protect.<sup>148</sup> Most opponents of the decision are struggling to understand why the Agency cut funds considering that the OVC's budget for grant funding has increased in recent years.<sup>149</sup> As the DOJ has failed to put forth any findings that support its decision, it is unlikely that the Agency will be able to demonstrate a rational connection between the facts found and the choice made.<sup>150</sup> Further, it is unlikely that the Agency considered all relevant factors, like the impact the decision would have on survivors.<sup>151</sup> The Agency's abrupt decision to cut essential funding appears to be an error in judgment. Therefore, a court should set the DOJ's decision aside under an arbitrary and capricious standard of review.<sup>152</sup> Applying a

---

146. See Sunstein, *supra* note 144, at 182 (“All of these developments can be understood as an effort to ensure that the agency’s decision was a ‘reasoned’ exercise of discretion and not merely a response to political pressures.”).

147. Jackman, *supra* note 18. Even if the DOJ were able to produce data supporting its decision, it still failed to engage in notice-and-comment procedures and address salient concerns of interested parties. See *supra* Part I (discussing the procedural deficiencies of the DOJ’s decision to cut funding for vacatur and expungement legal aid).

148. See Sunstein, *supra* note 144, at 182 (“The explanations must show that agencies have given ‘adequate consideration’ to all factors made relevant by the controlling statute.”).

149. See Vogt, *supra* note 4 (noting that the decision made little sense because the OVC’s available grant funding increased from \$16.2 million in 2017 to \$31.2 million in 2018). In 2019, the OVC awarded \$53 million to seventy-seven organizations under the grant program. Press Release, Off. of Pub. Affs., U.S. Dep’t of Just., Department of Justice Invests More than \$100 Million to Combat Human Trafficking and Assist Victims (Nov. 12, 2019), <https://www.justice.gov/opa/pr/departement-justice-awards-more-100-million-combat-human-trafficking-and-assist-victims>.

150. The Agency did not articulate a statement of basis and purpose. See Jackman, *supra* note 18 (noting that the DOJ announced the decision by putting a line in its grant application).

151. See *id.* (describing the difficulty human trafficking survivors with criminal records face in obtaining housing, education, and employment).

152. When an agency fails to set forth an adequate statement of basis and purpose for an action, a court is likely to deem the action arbitrary and capricious. See *United Mine Workers of Am., Int’l Union v. Dole*, 870 F.2d 662, 673 (D.C. Cir. 1989) (clarifying that an absence of sufficient explanation and justification for agency actions is inadequate); *United States v. N.S. Food Prods. Corp.*, 568 F.2d 240, 252 (2d Cir. 1977) (explaining that agencies must provide adequate rationales when addressing significant policy issues).

deferential standard of review to this type of action would promote arbitrary and politically motivated decisions, and diminish rulemaking consistency.<sup>153</sup>

#### IV. HOW TO GUARANTEE FEDERAL FUNDING FOR VACATUR AND EXPUNGEMENT, AND PROTECT SURVIVORS

Legal aid for vacatur and expungement services is a vital component to recovery for human trafficking survivors who have accrued criminal records in the course of their victimization.<sup>154</sup> The loss of federal funding for these services creates “troubling gaps” in the available resources for victims.<sup>155</sup> A reviewing court must hold the DOJ accountable for making a policy change that hurts human trafficking victims without engaging in APA procedures. Alternatively, Congress should revise the TVPA to limit the Agency’s discretion and ensure funding for crucial resources is preserved. Since a suit has not been brought against the DOJ, Congress should address the issue through the legislative process. Furthermore, even if a court invalidates the Agency’s decision due to procedural deficiencies, the DOJ may be able to cut funding again through a properly issued rule.<sup>156</sup> Therefore, revising the TVPA is the best way to limit the DOJ’s discretion in cutting funds for vacatur and expungement, create consistency, and protect human trafficking victims who need this funding to rebuild their lives.

##### *A. The DOJ Should Not Be Permitted to Avoid APA Procedures and Evade Judicial Scrutiny*

The DOJ should not be permitted to institute a significant policy change that negatively affects human trafficking victims without engaging in procedures mandated by the APA and while evading judicial review. A

---

153. See Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 *YALE L.J.* 2, 22 (2009) (arguing that passive judicial review of agency action “seems to make it easier for agencies to change their policies due to changes in the political landscape”); see also Anne Joseph O’Connell, *Agency Rulemaking and Political Transitions*, 105 *NW. U. L. REV.* 471, 473–74 (2011) (discussing the influence political transitions have on shaping regulatory policy).

154. Letter from Nadler, *supra* note 20.

155. Letter from Susman, *supra* note 17.

156. However, even if an agency complies with procedural requirements, a reviewing court will not accept a contrived explanation for a rule. See *Dep’t of Com. v. New York*, 139 *S. Ct.* 2551, 2574 (2019) (holding that the Department of Commerce’s statement, that it reinstated the citizenship question on the census to help enforce the Voting Rights Act (VRA), was insufficient because there were other motivating factors and enforcement of the VRA was not significant in the decisionmaking process). Therefore, the DOJ would likely be unsuccessful in cutting funds, even if it complies with the APA, if there is evidence that other factors motivated the decision rather than the desire to preserve funds for other programs.

reviewing court should take a hard look and apply an arbitrary and capricious standard of review to set aside the Agency's action. If the Agency's action is set aside by a reviewing court, organizations will again be able to obtain funding for vacatur and expungement services.

Compliance with the APA's rulemaking procedures serves several essential functions.<sup>157</sup> The failure to engage in public processes, use notice-and-comment procedures, or provide a statement of basis and purpose has serious implications: it decreases transparency, expands discretion, and encourages arbitrary decisionmaking.<sup>158</sup> In the absence of public process, as exemplified by the DOJ's recent action, "the potential for arbitrariness, authoritarianism, and abuse of executive power increases."<sup>159</sup> A reviewing court must hold the DOJ accountable for cutting critical funding without employing any rulemaking procedures, and require the agency to engage in notice-and-comment and provide a statement of basis and purpose.<sup>160</sup> If the DOJ is not held accountable for making a decision with far-reaching effects without engaging in adequate procedures, the APA's safeguards against arbitrary decisionmaking are meaningless.<sup>161</sup> Permitting the agency to make a decision that negatively affects survivors of human trafficking without participating in any rulemaking process would give the agency unbridled discretion to make arbitrary decisions as it pleases.<sup>162</sup>

---

157. See *Am. Hosp. Ass'n v. Bowen*, 834 F.2d 1037, 1044 (D.C. Cir. 1987) (explaining that the purpose of notice-and-comment is to encourage public participation, increase fairness, and ensure that the agency has adequate facts to make an informed decision); see also *Cal. Hotel & Motel Ass'n v. Indus. Welfare Comm'n*, 599 P.2d 31, 37–38 (Cal. 1979) (explaining that an adequate statement of basis fosters effective judicial review, subjects the agency to informed public scrutiny, safeguards against arbitrary agency action, enables the public to comply, and increases public confidence).

158. ANDREW F. POPPER ET AL., *ADMINISTRATIVE LAW: A CONTEMPORARY APPROACH* 277 (3d ed. 2016).

159. *Id.*

160. See *Bowen*, 834 F.2d at 1044 (noting that exceptions to notice-and-comment are narrow).

161. See *United States v. N.S. Food Prods. Corp.*, 568 F.2d 240, 253 (2d Cir. 1977) (asserting that allowing an agency to issue regulations without providing a basis for its decision would render the APA's concise general statement requirement an inadequate safeguard against arbitrary decisionmaking); see also *Sugar Cane Growers Coop. v. Veneman*, 289 F.3d 89, 96 (D.C. Cir. 2002) (declaring that allowing an agency to issue a rule without engaging in notice-and-comment procedures would "eviscerate[]" the APA's requirements).

162. The DOJ claims that eliminating funding for vacatur and expungement services protects survivors by reallocating funds to other critical services. Jackman, *supra* note 18. The notion that agencies are in the best position to determine how to use their resources lends

Although the DOJ may argue that it is in the best position to decide how to allocate funding based on its expertise, its failure to engage in any public process has serious fairness implications. The choice to cut funding through an announcement in a grant application directly violates a memorandum issued by Attorney General Jeff Sessions prohibiting the DOJ from publishing guidance documents that create rights or obligations.<sup>163</sup> The importance of public process cannot be overlooked—it generates the most beneficial rules, increases fairness, and discourages arbitrary decisionmaking.<sup>164</sup> Had the agency included the public—especially directly-impacted persons—in its decision, it might have addressed the inability of human trafficking victims with criminal records to benefit from housing, employment, and education services.<sup>165</sup> Thus, the DOJ's decision to cut legal aid funding for vacatur and expungement efforts should be set aside for failing to engage in notice-and-comment or provide a statement of basis and purpose.<sup>166</sup>

Furthermore, the DOJ should not be permitted to circumvent rulemaking procedures while evading judicial scrutiny. Congress, the ABA, and human trafficking victim services providers have voiced their disagreement with the DOJ's decision to cut funding for vacatur and expungement services.<sup>167</sup> Congress and the ABA are unlikely to have standing to challenge the DOJ's action, but victim service organizations may have standing to file suit on behalf of human trafficking victims

---

support to the DOJ's justification. *See Heckler v. Chaney*, 470 U.S. 821, 831–32 (1985) (positing that agencies are the best equipped to decide how to spend their resources).

163. Memorandum from Jeff Sessions, *supra* note 32.

164. *See id.* (“[N]otice-and-comment rulemaking . . . has the benefit of availing agencies of more complete information about a proposed rule's effects than the agency could ascertain on its own, and therefore results in better decisionmaking by regulators.”).

165. Vogt, *supra* note 4. Previously, the OVC expressed the importance of including human trafficking survivors in agency decisions relating to improving victim services. *See* Press Release, Joye E. Frost, Dir., Off. for Victims of Crime, Dep't of Just., Improving Services for Victims of Human Trafficking (Jan. 16 2014), <https://www.justice.gov/archive/s/opa/blog/improving-services-victims-human-trafficking> (“The [Federal Strategic Action Plan on Services for Victims of Human Trafficking in the United States] could not have been developed without the insights of human trafficking survivors and advocates who lent their voices and expertise through public comments.”).

166. *Compare* *CropLife Am. v. EPA*, 329 F.3d 876, 885 (D.C. Cir. 2003) (vacating an agency's directive for failure to engage in notice-and-comment procedures), *with* *United Mine Workers of Am., Int'l Union v. Dole*, 870 F.2d 662, 673 (D.C. Cir. 1989) (invalidating an agency's regulation for failure to supply an adequate statement of basis and purpose).

167. Jackman, *supra* note 18.

aggrieved by the funding cuts.<sup>168</sup> However, human trafficking victims with criminal records are in the best position to obtain judicial review of the agency's decision to cut funding for legal aid for vacatur and expungement since they are directly affected.<sup>169</sup>

If a court were to deem the Agency's action outside the scope of judicial review, it would signal to the Agency that it could continue to make arbitrary decisions and abuse its discretion. Additionally, the Agency is not entitled to *Chevron* deference or *Skidmore* respect.<sup>170</sup> The DOJ's decision to cut funds is inconsistent with the TVPA's statutory directives and has far-reaching consequences for human trafficking survivors who rely on funding derived from the statute.<sup>171</sup> Rather than helping to break down barriers that prevent human trafficking victims from rebuilding their lives, the decision further hinders victims in their recovery.

Moreover, the DOJ's action appears to be arbitrary. Given the lack of rulemaking procedures and the likelihood that the decision was politically motivated and not grounded in any factual findings, the action should be set aside as arbitrary and capricious.<sup>172</sup> If a reviewing court were to apply a less demanding standard of review and uphold the DOJ's action, it would leave human trafficking victims without an avenue to challenge the DOJ's action.

---

168. See *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977) (positing that even if a group does not itself demonstrate injury in fact, it may have standing to bring suit on behalf of its members when “the interests it seeks to protect are germane to the organization’s purpose”); see also *Sierra Club v. FERC*, 867 F.3d 1357, 1366 (D.C. Cir. 2017) (holding that an environmental organization had standing to bring suit on behalf of its members when several members submitted affidavits alleging concrete injury from an agency’s order certifying a pipeline project).

169. See *supra* Part II.A.

170. See *supra* Part III. The DOJ would likely argue that the action should receive *Chevron* deference and that the Agency should not be unduly constrained in exercising its authority to appropriate funding under the TVPA. See *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 862 (1984) (asserting that agencies should have “broad discretion” in implementing policies with regulations that are consistent with the statute). However, the DOJ's decision to cut funds is inconsistent with the purpose of the TVPA. See *supra* Part II.D.

171. See *supra* Part II. Committed to Agency Discretion by Law (discussing the TVPA's statutory mandate that the DOJ use funds to strengthen victim services).

172. See Jackman, *supra* note 18 (expressing that the decision was likely politically motivated); Vogt, *supra* note 4 (claiming that the Trump Administration is responsible for the decision to block federal funds for vacatur and expungement efforts); Jenavieve Hatch, *The Trump Administration Quietly Defunded Legal Services for Trafficking Victims*, HUFFPOST (July 6, 2018, 4:20 PM), [https://www.huffpost.com/entry/trump-defunded-legal-services-trafficking\\_n\\_5b3fbeade4b07b827cc0517c](https://www.huffpost.com/entry/trump-defunded-legal-services-trafficking_n_5b3fbeade4b07b827cc0517c) (reporting that victim service organizations urged the Trump Administration to restore funding for legal aid for vacatur and expungement).

Further, a reviewing court's decision on this action will have profound effects and dictate the level of discretion afforded to agencies. It would be a mistake to uphold the DOJ's decision and send a message to agencies that arbitrary decisions will not be disturbed.

*B. An Alternative Approach: Revising the TVPA*

If impacted parties choose not to challenge the DOJ's funding cuts, Congress must pursue a different course of action to protect human trafficking victims under the TVPA. Human trafficking victims will have greater difficulty clearing their criminal records and continue to face repercussions if Congress does not require the DOJ to reserve funding for vacatur and expungement.<sup>173</sup> Congress must work to ensure that the goal of the TVPA—to protect human trafficking victims rather than brand them as criminals—is realized.<sup>174</sup> To prevent the DOJ from exercising unlimited discretion in its allocation of funds, Congress should revise the TVPA to mandate procedures for funding for vacatur and expungement.<sup>175</sup>

Many states have laws that allow human trafficking victims who have committed crimes in the course of their victimization to clear their criminal records,<sup>176</sup> but victims often do not have the resources to seek legal counsel and must navigate complicated legal processes on their own.<sup>177</sup> While states have made efforts to protect human trafficking survivors through vacatur

---

173. See Letter from Susman, *supra* note 17 (noting that funding for effective legal representation and training for advocates is essential to helping victims clear their records).

174. See TVPA, 22 U.S.C. § 7101(b)(24) (recognizing that justice is achieved when human trafficking victims are protected rather than punished).

175. Congress amended the TVPA for the ninth time in January 2019. KRISTEN WELLS, POLARIS PROJECT, THE 2019 TRAFFICKING VICTIMS PROTECTION REAUTHORIZATION: A TOPICAL SUMMARY AND ANALYSIS OF FOUR BILLS 3 (2019), <https://polarisproject.org/wp-content/uploads/2020/01/Polaris-TVPRA-2019-Analysis.pdf>. Since Congress successfully amended the TVPA as recently as 2019, Congress would likely consider revising the TVPA again to bolster services for human trafficking survivors. Additionally, Congress has introduced similar legislation that shows a desire to strengthen protections for victims. See, e.g., Put Trafficking Victims First Act of 2019, H.R. 507, 116th Cong. (2019) (setting forth provisions to improve support for human trafficking victims and service organizations).

176. See, e.g., N.Y. CRIM. PROC. LAW § 440.10(1)(i) (Consol. 2019) (allowing human trafficking victims to vacate prostitution convictions).

177. See Letter from Susman, *supra* note 17 (describing how most survivors are unaware of laws that allow them to petition to clear their records).

and expungement laws, organizations dedicated to victim advocacy need federal funding to help victims pursue these actions.<sup>178</sup>

As written now, the TVPA gives the DOJ too much discretion in allocating funds to strengthen victim services. The Agency has abused its broad authority under the TVPA and continually exhibited a pattern of inconsistency in its use of funds under the grant program.<sup>179</sup> Choice of procedure is generally within an agency's discretion, which often makes it difficult for aggrieved parties to challenge agency action.<sup>180</sup> Because the TVPA does not explicitly state how the DOJ must allocate funds, the Agency has taken advantage of this absence of procedure to abuse its discretion and cut funding for vacatur and expungement.<sup>181</sup>

Although the TVPA provides that human trafficking victims "should not be inappropriately incarcerated, fined, or otherwise penalized solely for unlawful acts committed as a direct result of being trafficked," it does not specifically include anything about allocating funds for vacatur or expungement.<sup>182</sup> By failing to address funding for these crucial legal services, the TVPA does not adequately protect survivors who are no longer incarcerated but still struggling with the stigma of their criminal records. Congress must revise the TVPA to mandate that the DOJ reserve a percentage of available funds for vacatur and expungement services, rather than giving it unrestrained discretion.<sup>183</sup>

---

178. See Jackman, *supra* note 18 (noting that, while many states have vacatur and expungement laws, victims need a lawyer "to successfully navigate the paperwork, hearings, and assorted legal hurdles"). Federal funding provides consistency in resources to all survivors nationwide who seek to vacate or expunge prior convictions. See Letter from Susman, *supra* note 17 (detailing the limited ability of state legal aid providers to offer services on a large-scale).

179. Compare OVC FISCAL YEAR 2020, *supra* note 13, at 5, 21 (outlining new restrictions on funding for holding beds and prevention programs, and using vague language regarding permitted legal services), with OVC FISCAL YEAR 2018, *supra* note 12 (explicitly barring the use of funds for vacatur and expungement efforts), and OVC FISCAL YEAR 2017, *supra* note 11 (expressly authorizing funds for vacatur and expungement services, immigration services, and family law related matters).

180. See *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 543 (1978) (explaining that agencies are allowed to set their own rules of procedure). *But see* *Morton v. Ruiz*, 415 U.S. 199, 237 (1974) (holding that although choice of process is generally within the agency's discretion, an agency cannot violate a statute that prescribes procedure).

181. See TVPA, 22 U.S.C. § 7105(b)(2)(A) (stating that funds may be used to strengthen victim services without indicating specific services funds must be allocated to).

182. *Id.* § 7101(b)(19).

183. Although the newly introduced Relief Act states that, when awarding a grant for legal representation, the Agency "may not prohibit a recipient from using the grant . . . for

Because the TVPA, as currently written, does not adequately protect survivors, revising the law is the most feasible option.<sup>184</sup> If Congress were to revise the TVPA to include guidelines requiring the DOJ to designate a portion of funds for vacatur and expungement services, the DOJ would finally live up to its responsibility to protect human trafficking survivors.<sup>185</sup>

## CONCLUSION

The DOJ must guarantee grant funding for vacatur and expungement aid to ensure that human trafficking survivors with criminal records have the tools and resources to rebuild their lives. While the Agency continues to provide funding for other services, such as housing, education, and employment, strengthening these services is useless for victims who still have criminal records.<sup>186</sup> Additionally, labeling human trafficking survivors as criminals prevents recovery from their victimization.<sup>187</sup> If the DOJ's priority

---

post-conviction relief," it does not mandate that the Agency reserve funds for legal aid for vacatur and expungement. See Trafficking Survivors Relief Act of 2020, S. 3240, 116th Cong. § 4 (2020). Thus, this legislation does not adequately protect survivors because it will not prevent the DOJ from abusing its discretion to allocate funds for other services instead of legal aid.

184. An entirely new law addressing funding for vacatur and expungement services for human trafficking victims is unlikely to gain bipartisan support. As such, Congress is unlikely to pass the Relief Act. See Sarah D. Wire, *Divided New Congress is Getting Little Accomplished*, L.A. TIMES (April 15, 2019, 8:00 AM), <https://www.latimes.com/politics/la-na-pol-congress-divided-house-senate-passing-few-laws-20190415-story.html> (discussing how Congress has been unsuccessful in passing new laws); see also Shannon Gage, *Why the Trafficking Survivors Relief Act of 2020 Matters*, DRESSEMBER (Apr. 6, 2020), <https://www.dressember.org/blog/reliefact> (positing that the Relief Act "is likely to face some hurdles in its path to becoming law"). Congress is more likely to be successful in amending the TVPA. See Policy & Legislation, POLARIS PROJECT, <https://polarisproject.org/policy-and-legislation/> (last visited Aug. 13, 2020) (stating that the TVPA has previously been reauthorized and updated with strong bipartisan support).

185. See *Morton*, 415 U.S. at 237 (holding that an agency cannot violate procedures required by an enabling statute). Since the grant program's budget grew significantly before the funding cuts, increasing the budget would not ensure funds be reserved for vacatur and expungement. See Vogt, *supra* note 4 (explaining that the available grant funds rose from \$16.2 million in fiscal year 2017 to \$31.2 million in fiscal year 2018). Thus, the DOJ is unlikely to reserve funding for vacatur and expungement absent a court order or a statutory mandate.

186. See Cassandra P. Lawrenson, Note, *The Injustice of Convicting Sex Trafficking Victims: A Model Vacating Convictions Law*, 36 T. JEFFERSON L. REV. 343, 371 (2014) (arguing that human trafficking survivors who accrue arrests are "[f]urther victimized by their criminal record when they search for housing, employment, [or] education").

187. See Drasin, *supra* note 71, at 500 (describing the importance of victim recognition).

is to protect human trafficking victims and faithfully implement the TVPA, it must explicitly reinstate funding for such an essential service, and Congress must limit the Agency's discretion to arbitrarily cut funds for vital services in the future. Failure to do so would leave human trafficking survivors with criminal records without the critical services they need to take their lives back and thrive in society.