

# Washington Law Review

---

Volume 95 | Number 1

---

3-2020

## The Substantial Impact Approach: Reviewing Policy Statements in Light of APA Finality

Emily Parsons

Follow this and additional works at: <https://digitalcommons.law.uw.edu/wlr>



Part of the [Administrative Law Commons](#), and the [Immigration Law Commons](#)

---

### Recommended Citation

Emily Parsons, Comment, *The Substantial Impact Approach: Reviewing Policy Statements in Light of APA Finality*, 95 Wash. L. Rev. 500 (2020).

Available at: <https://digitalcommons.law.uw.edu/wlr/vol95/iss1/14>

This Comment is brought to you for free and open access by the Law Reviews and Journals at UW Law Digital Commons. It has been accepted for inclusion in Washington Law Review by an authorized editor of UW Law Digital Commons. For more information, please contact [jafrank@uw.edu](mailto:jafrank@uw.edu).

## THE SUBSTANTIAL IMPACT APPROACH: REVIEWING POLICY STATEMENTS IN LIGHT OF APA FINALITY

Emily Parsons\*

*Abstract:* Federal agencies engage in a wide range of non-binding action, issuing guidance documents such as policy statements and interpretive rules. Although these guidance documents may have a substantial impact on industries or members of the public, courts often refuse to review their substance. The Administrative Procedure Act requires agency action to be “final” before courts can review it. The D.C. Circuit and the Ninth Circuit have taken conflicting and often messy approaches in determining whether interpretive rules and policy statements are final and thus reviewable. This Comment proposes a new approach: the substantial impact approach. Under this approach—repurposed from a rejected test for procedural sufficiency of guidance documents—courts could review a guidance document that has a substantial impact on affected parties. This Comment analyzes the 2017 Department of Homeland Security memorandum rescinding Deferred Action for Childhood Arrivals, highlighting it as an example of a subset of policy statements that should be reviewable under the proposed substantial impact approach.

---

\* J.D. Candidate, University of Washington School of Law, Class of 2020. I would like to thank Professor Kathryn A. Watts for her invaluable guidance and comments throughout the drafting process. I am also grateful to the *Washington Law Review* editors, whose attention to detail and insight contributed greatly to the piece. All errors are my own.

## INTRODUCTION

In November of 2017, the Department of Homeland Security (DHS) issued a memorandum rescinding the Deferred Action for Childhood Arrivals (DACA) program.<sup>1</sup> In response, Dulce Garcia, a San Diego lawyer who entered the country undocumented at the age of four, sued the federal government.<sup>2</sup> So did several other plaintiffs across the country.<sup>3</sup> As these claims continue to work their way through the federal court system,<sup>4</sup> an important question will likely remain unanswered because it was waived:<sup>5</sup> was the rescission of DACA “final” under the Administrative Procedure Act (APA)?<sup>6</sup> This question matters because if rescission was non-final, Garcia’s challenge of the rescission was not reviewable in court in the first place.

In 2012, U.S. Secretary of Homeland Security Janet Napolitano issued a memorandum announcing DACA.<sup>7</sup> This policy identified undocumented individuals who entered the United States as children as “low priority” for deportation when they met enumerated criteria, including a clean criminal record.<sup>8</sup> Effectively, DACA allowed these

---

1. Memorandum from Elaine C. Duke, Acting Sec’y of Homeland Sec., to James W. McCament, Acting Dir., U.S. Citizenship & Immigr. Serv., et al. (Sept. 5, 2017) [hereinafter Duke Memo], <https://www.dhs.gov/news/2017/09/05/memorandum-rescission-daca> [<https://perma.cc/PPT3-7G9F>]; Carrie Johnson, *Trump Rescinds DACA, Calls on Congress to Replace It*, NPR (Sept. 6, 2017, 4:59 AM), <https://www.npr.org/2017/09/06/548819221/trump-administration-rescinds-daca-calls-on-congress-to-replace-it> [<https://perma.cc/E4KM-Q7X5>].

2. *Regents of the Univ. of Cal. v. U.S. Dep’t of Homeland Sec.*, 908 F.3d 476, 486 (9th Cir. 2018), *cert. granted*, \_\_ U.S. \_\_, 139 S. Ct. 2779 (June 28, 2019).

3. *NAACP v. Trump*, 298 F. Supp. 3d 209, 237 (D.D.C. 2018), *adhered to on denial of reconsideration*, 315 F. Supp. 3d 457 (D.D.C. 2018); *Batalla Vidal v. Duke*, No. 16-cv-41196 (E.D.N.Y. Oct. 27, 2017); *Regents*, 908 F.3d at 514.

4. *See Status of Current DACA Litigation*, NAT’L IMMIGR. L. CTR. (June 7, 2019), <https://www.nile.org/issues/daca/status-current-daca-litigation/> [<https://perma.cc/8CDJ-4GEH>]. The Supreme Court recently granted certiorari of the Ninth Circuit’s decision, preliminarily enjoining the rescission of DACA. *See Regents of Univ. of Cal. v. U.S. Dep’t of Homeland Sec.*, 279 F. Supp. 3d 1011, 1048 (N.D. Cal. 2018), *aff’d*, 908 F.3d 476 (9th Cir. 2018), *cert. granted*, \_\_ U.S. \_\_, 139 S. Ct. 2779 (2019).

5. *See infra* Part II (discussing the D.C. Circuit’s 2016 opinion holding that finality is not a jurisdictional element and can thus be waived); *infra* notes 319–320 and accompanying text (explaining that the DOJ failed to raise finality in any of its briefing at the trial court level).

6. 5 U.S.C. § 704 (2012).

7. Memorandum from Janet Napolitano, Sec’y of Homeland Sec., to David V. Aguilar, Acting Comm’r, U.S. Customs & Border Prot., et al. (June 15, 2012) [hereinafter Napolitano Memo], <https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf> [<https://perma.cc/3WUA-V2FH>].

8. *Id.*

young people to apply for deferred action in two-year increments.<sup>9</sup>

Deferred action, a longstanding practice of prosecutorial discretion,<sup>10</sup> allows DHS to focus its attention and limited resources on removing undocumented individuals that pose a security risk by designating certain individuals as low priority for deportation.<sup>11</sup> Individuals that receive deferred action are classified as “lawfully present” in the United States, and U.S. Citizenship and Immigration Services will not initiate removal proceedings against those individuals.<sup>12</sup> Lawfully present individuals may, in some instances, qualify for federal public benefits such as social security, welfare, and health insurance<sup>13</sup> or state public benefits.<sup>14</sup> Moreover, these individuals can apply for work authorization.<sup>15</sup> Lawful presence is not an enforceable right, however,<sup>16</sup> and DHS may revoke it at any time.<sup>17</sup>

In 2017, after a change in administration, the DHS Acting Secretary Elaine C. Duke issued a memorandum rescinding DACA.<sup>18</sup> Duke relied to some extent on a letter from then-Attorney General Jeff Sessions, which explained that the original DACA program had been unlawful.<sup>19</sup> The decision triggered Garcia’s suit.<sup>20</sup>

---

9. *Id.*

10. See Memorandum from Jeh Charles Johnson, Sec’y of Homeland Sec., to León Rodríguez, Director, U.S. Citizenship & Immigration Servs., et al. (Nov. 20, 2014) [hereinafter Johnson Memo] (citing IMMIGRATION AND NATURALIZATION SERVICE, OPERATION INSTRUCTIONS § 103.1 (a)(1)(ii) (1975)) (explaining that DHS’s practice of granting deferred action can be traced at least as far back as 1975).

11. *Texas v. United States*, 809 F.3d 134, 188 (5th Cir. 2015) (King, J., dissenting), *as revised* (Nov. 25, 2015).

12. *Id.* at 148.

13. 8 U.S.C. § 1611(a)–(c) (2012) (stating that section (a) exempts unqualified aliens from federal public benefits, (b) creates an exception for “lawfully present” individuals, and (c) defines federal public benefits). A lawfully present individual must still meet the independent qualifying criteria for public benefits. See *Texas*, 809 F.3d at 148.

14. 8 U.S.C. § 1621(d) (“A State may provide that an alien who is not lawfully present in the United States is eligible for any State or local public benefit . . . only through the enactment of a State law . . . which affirmatively provides for such eligibility.”).

15. 8 C.F.R. § 274a.12(c)(14) (2019).

16. *Texas*, 809 F.3d at 188 (King, J., dissenting).

17. Zuzana Cepla, *Deferred Action Basics*, NAT’L IMMIGR. F. (Apr. 15, 2016) <https://immigrationforum.org/article/deferred-action-basics/> [<https://perma.cc/36WY-E8CY>].

18. See *supra* note 1.

19. Letter from Jeff Sessions, U.S. Att’y Gen. U.S. Dep’t of Justice, to Elaine C. Duke, Acting Sec’y, U.S. Dep’t of Homeland Sec., [https://www.dhs.gov/sites/default/files/publications/17\\_0904\\_DOJ\\_AG-letter-DACA.pdf](https://www.dhs.gov/sites/default/files/publications/17_0904_DOJ_AG-letter-DACA.pdf) [<https://perma.cc/T9RB-YH9C>] (arguing, among other things, that the program lacked statutory authority).

20. *Regents of the Univ. of Cal. v. U.S. Dep’t of Homeland Sec.*, 908 F.3d 476, 486 (9th Cir. 2018),

DHS is a federal agency, and it issued both the DACA program and its subsequent rescission as policy statements.<sup>21</sup> Policy statements—and their cousins, interpretive rules—are a useful but controversial agency tool. Agencies issue policy statements “to advise the public prospectively of the manner in which the agency proposes to exercise a *discretionary* power.”<sup>22</sup> Interpretive rules, on the other hand, “advise the public of the agency’s construction of the statutes and rules which it administers.”<sup>23</sup> Both policy statements and interpretive rules purport to be non-binding, thereby avoiding the cumbersome notice-and-comment rulemaking procedures required for binding agency action.<sup>24</sup>

In practice, however, these rules can have real-world consequences on the lives and daily business activities of private individuals like Garcia, whether binding or not.<sup>25</sup> DHS issued both DACA<sup>26</sup> and its rescission<sup>27</sup> without undergoing notice-and-comment procedures. Regardless of real-world consequences, the Ninth Circuit agreed that both DACA and its rescission constituted non-binding policy statements and acknowledged that a failure to observe these procedures was not improper.<sup>28</sup>

In addition to avoiding the APA’s procedural requirements, policy statements have frequently been held as non-final agency action.<sup>29</sup> The APA requires that agency action be final before it can be reviewed.<sup>30</sup> Thus, if the DACA rescission does not constitute final agency action, a court cannot review the substance of the policy statement until final agency

---

*cert. granted*, \_\_\_ U.S. \_\_\_, 139 S. Ct. 2779 (June 28, 2019).

21. *Id.*

22. U.S. DEP’T OF JUSTICE, ATTORNEY GENERAL’S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 30 n.3 (1947), <https://www.regulationwriters.com/downloads/AttorneyGeneralsManual.pdf> [<https://perma.cc/AJ9L-3TET>] (emphasis added).

23. *Id.*

24. Stephen Hylas, *Final Agency Action in the Administrative Procedure Act*, 92 N.Y.U. L. REV. 1644, 1651 (2017) (citing Jeff Bowen & Susan Rose-Ackerman, *Partisan Politics and Executive Accountability: Argentina in Comparative Perspective*, 10 SUP. CT. ECON. REV. 157, 196 (2003)).

25. *See infra* section I.A.

26. *Regents*, 908 F.3d at 489.

27. *Id.* at 491.

28. *See id.* at 494–503 (discussing and distinguishing 5 U.S.C. § 701(a)(2) (2012)’s bar on judicial review of “agency action . . . committed to agency discretion by law”).

29. *See infra* Part III.

30. *See* 5 U.S.C. § 704 (2012) (“[P]reliminary, procedural, or intermediate agency action or ruling *not* directly reviewable is subject to review on the review of the final agency action.”); *id.* § 551 (defining “agency action” as “the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act”); *Chamber of Commerce v. Reich*, 74 F.3d 1322, 1326 (D.C. Cir. 1996) (reviewing otherwise unreviewable presidential action once agency action implementing it became final).

action relying on it is brought.<sup>31</sup> In other words, Garcia might have to wait until deportation proceedings were brought against her before a court would even hear the merits of her claim.

To determine whether agency action is final, courts apply the *Bennett v. Spear*<sup>32</sup> test. Final agency action (1) “mark[s] the ‘consummation’ of the agency’s decisionmaking process” and (2) is action by which “‘rights or obligations have been determined,’ or from which ‘legal consequences will flow.’”<sup>33</sup> Recently, the Supreme Court has reemphasized a pragmatic approach to finality, suggesting that the practical effects of agency action play a role in the finality analysis.<sup>34</sup> However, the Supreme Court has never meaningfully reviewed the finality of a policy statement or interpretive rule.<sup>35</sup>

Without precise guidance from the Supreme Court, the lower courts have taken conflicting and often messy approaches to reviewing policy statements and interpretive rules. The D.C. Circuit applies what this Comment refers to as the “categorical approach.”<sup>36</sup> The categorical approach generally determines that both policy statements and interpretive rules are non-final because they are non-binding.<sup>37</sup> Conversely, the Ninth Circuit applies the “flexible approach,” which sometimes holds interpretive rules to be final, but seemingly refuses to hold a true policy statement as final.<sup>38</sup> In two notable 2019 opinions, both circuits appeared to shift their approaches.<sup>39</sup> The D.C. Circuit shifted toward a flexible approach, holding that non-binding agency action is not categorically non-final.<sup>40</sup> The Ninth Circuit expanded its flexible

---

31. See *supra* note 30.

32. 520 U.S. 154 (1997).

33. *Id.* at 177–78.

34. U.S. Army Corps of Eng’rs v. Hawkes Co., 578 U.S. \_\_\_, 136 S. Ct. 1807, 1815 (2016).

35. See *infra* notes 201–204 and accompanying text (explaining that the Supreme Court determined that a policy statement was final without any analysis and proceeded to dismiss it on other grounds).

36. These terms were adapted from the terms “Rigid Approach” and “Pragmatic Approach,” as used by Steven J. Lindsay. See Steven J. Lindsay, *Timing Judicial Review of Agency Interpretations in Chevron’s Shadow*, 127 YALE L.J. 2448, 2452–53 (2018). Lindsay identified three main approaches the lower courts have taken to reviewing interpretive rules. *Id.* This Comment does not discuss the third approach because it is not relevant to policy statements, the main focus of this Comment.

37. See *infra* section III.A.

38. See *infra* section III.B.

39. See generally *Gill v. U.S. Dep’t of Justice*, 913 F.3d 1179 (9th Cir. 2019); *Cal. Cmty. Against Toxics v. EPA*, 934 F.3d 627 (D.C. Cir. 2019).

40. *Cal. Cmty.*, 934 F.3d at 631.

approach, holding that a policy statement was final.<sup>41</sup>

This Comment argues that some policy statements, including the rescission of DACA, should be final and reviewable. It proposes that the substantial impact test—a test that was first used to determine whether interpretive rules and policy statements needed to undergo notice-and-comment rulemaking procedures and was later held invalid—is actually appropriate for determining whether guidance documents are final and thus reviewable in court.

This Comment proceeds in four Parts. Part I defines policy statements and interpretive rules. Part II explores finality as a bar to judicial review of agency action in courts. Part III explores the approaches that lower courts have taken to finality when reviewing interpretive rules and policy statements, particularly with respect to *Bennett*'s second prong. Part IV argues that some policy statements, including the DACA rescission, should be reviewable. It proposes that courts apply the substantial impact test in place of *Bennett*'s second prong to provide judicial review of policy statements that have a substantial impact outside of the agency.

## I. GUIDANCE DOCUMENTS AS NON-BINDING AGENCY ACTION

Federal agencies take credit for producing the vast majority of binding federal law.<sup>42</sup> Yet agencies also engage in a wide range of non-binding action.<sup>43</sup> The umbrella term “guidance document” refers to agency documents that detail non-binding action.<sup>44</sup> These documents generally seek to explain an agency’s policies or to define and interpret binding regulations.<sup>45</sup> Guidance documents are quite numerous, often

---

41. *Gill*, 913 F.3d at 1184–85 (citing *Or. Nat. Desert Ass’n v. U.S. Forest Serv.*, 465 F.3d 977, 982 (9th Cir. 2006)).

42. CLYDE WAYNE CREWS, JR., *COMPETITIVE ENTER. INST., MAPPING WASHINGTON’S LAWLESSNESS 2016: A PRELIMINARY INVENTORY OF “REGULATORY DARK MATTER”* 3 (2015), <https://cei.org/sites/default/files/Wayne%20crews%20-%20Mapping%20Washington%27s%20Lawlessness.pdf> [<https://perma.cc/QLF4-CBSN>] (“Congress passes a few dozen public laws every year, but federal agencies issue several thousand . . . regulations.”).

43. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-15-368, *REGULATORY GUIDANCE PROCESSES: SELECTED DEPARTMENTS COULD STRENGTHEN INTERNAL CONTROL AND DISSEMINATION PRACTICES 1* (2015) [hereinafter U.S. GOV’T ACCOUNTABILITY OFFICE], <https://www.gao.gov/assets/670/669688.pdf> [<https://perma.cc/UWZ3-2587>].

44. *See, e.g.*, Gwendolyn McKee, *Judicial Review of Agency Guidance Documents: Rethinking the Finality Doctrine*, 60 ADMIN. L. REV. 371, 375 (2008); U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 43, at 1.

45. U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 43, at 1 (defining “guidance document” as “an agency statement of general applicability and future effect, other than a regulatory action, that sets forth a policy on a statutory, regulatory, or technical issue or an interpretation of a statutory or

outnumbering the binding regulations and statutes for which they seek to provide guidance.<sup>46</sup> Because guidance documents avoid the rigorous notice-and-comment procedural requirements that courts have imposed for issuing binding rules, agencies may be tempted to impermissibly issue binding rules as guidance documents. Recognizing this, courts apply a variety of procedural sufficiency tests to determine whether a guidance document needed to undergo notice-and-comment rulemaking procedures.

### A. *Defining Guidance Documents*

As non-binding agency action, guidance documents are largely defined by what they are not: legislative rules. The APA exempts by name both policy statements and interpretive rules from notice-and-comment rulemaking procedures required for issuing legislative rules.<sup>47</sup> And this exemption is not insignificant.

To enact legislative rules,<sup>48</sup> the bare text of the APA requires only a “[g]eneral notice of proposed rule making,”<sup>49</sup> an opportunity for written public comment,<sup>50</sup> and “a concise general statement of . . . basis and purpose.”<sup>51</sup> However, in the 1960s and 1970s, various judicial glosses were added to the notice-and-comment rulemaking procedures.<sup>52</sup>

---

regulatory issue”).

46. *Id.* (“The number of guidance documents related to regulations issued by agencies has often been reported to outnumber the agency regulations that these documents can help explain.”).

47. 5 U.S.C. § 553(b)(A) (2012) (“[T]his subsection does not apply . . . to interpretative rules, [or] general statements of policy.”); McKee, *supra* note 44, at 375. The APA also exempts procedural rules, which are guidance documents, but are not the subject of this Comment. 5 U.S.C. § 553(b)(A).

48. The APA requires notice-and-comment for “informal rulemaking.” 5 U.S.C. § 553(b). “Formal Rulemaking” is now rarely used. See Kent Barnett, *How the Supreme Court Derailed Formal Rulemaking*, 85 GEO. WASH. L. REV. ARGUENDO 1, 1 (2017) (“In two railroad cases decided in the early 1970s, the Supreme Court allowed formal rulemaking to fall largely into desuetude with little fanfare.”).

49. 5 U.S.C. § 553(b).

50. *Id.* § 553(c).

51. *Id.*

52. Compare the textual requirements of a proposed notice of rulemaking in 5 U.S.C. § 553(b) (requiring a “[g]eneral notice of proposed rule making . . . published in the Federal Register [including] reference to the legal authority [and] the terms or substance of the proposed rule or a description of the subjects and issues involved”), with *Home Box Office, Inc. v. F.C.C.*, 567 F.2d 9, 36 (D.C. Cir. 1977) (requiring agencies to “make [their] views known to the public in a *concrete and focused* form so as to make criticism or formulation of alternatives possible”) (emphasis added), and with Lisa Marshall Manheim & Kathryn A. Watts, *Reviewing Presidential Orders*, 86 U. CHI. L. REV. 1743, 1755–56 (2019) (“These judicial glosses emerged in the 1960s and 1970s as the importance of rulemaking was surging, and they persist to this day.”).



Although these judicial glosses may have increased the quality of substantive judicial review,<sup>53</sup> the resulting procedural requirements place a heavy burden on agencies.<sup>54</sup> When issuing guidance documents, this non-legislative status affords agencies a valuable benefit. Rather than contend with the rigorous notice-and-comment requirements, “agencies often instead try to opt-out of the section 553 [notice-and-comment] process” by issuing guidance documents, such as interpretive rules and policy statements, in lieu of regulations.<sup>55</sup>

One type of guidance documents are policy statements: “statements issued by an agency to advise the public prospectively of the manner in which the agency proposes to exercise a *discretionary* power.”<sup>56</sup> Policy statements “educat[e] . . . agency members in the agency’s work.”<sup>57</sup> Policy statements may be issued at all levels of the agency, by agency headquarters or field offices,<sup>58</sup> under a variety of names—including memoranda, guidance, manuals, and staff instructions.<sup>59</sup>

Interpretive rules, on the other hand, share many characteristics with policy statements—although some courts are careful to distinguish the two.<sup>60</sup> Interpretive rules are “rules or statements issued by an agency to advise the public of the agency’s construction of the statutes and rules which it administers.”<sup>61</sup> Agency staff may issue interpretive rules at the request of regulated entities seeking to determine whether their proposed

---

53. GARY LAWSON, *FEDERAL ADMINISTRATIVE LAW* 387 (7th ed. 2007) (describing the D.C. Circuit’s “elaborate notice of proposed rulemaking” requirements as a procedural tool to allow more robust substantive review of agency decisions).

54. Hylas, *supra* note 24, at 1648–49 (“[The notice-and-comment] process can be a time-consuming headache that allows the public to both inundate the agency with comments and file potentially endless lawsuits arguing that the procedures are arbitrary and capricious.”); *id.* at 1651 (“[O]ver the last several decades, [it] has changed significantly in ways that have created so many disadvantages to use of the process that many agencies avoid it whenever possible.” (quoting RICHARD J. PIERCE, JR., *ADMINISTRATIVE LAW* 64 (2d ed. 2012))).

55. *Id.* at 1651.

56. U.S. DEP’T OF JUSTICE, *supra* note 22 (emphasis added).

57. Noel v. Chapman, 508 F.2d 1023, 1030 (2d Cir. 1975) (quoting H. FRIENDLY, *THE FEDERAL ADMINISTRATIVE AGENCIES* 145–46 (1962)).

58. Robert A. Anthony & David A. Codevilla, *Pro-Ossification: A Harder Look at Agency Policy Statements*, 31 WAKE FOREST L. REV. 667, 671 (1996).

59. *Id.*

60. See *infra* Part III. The D.C. Circuit has been inconsistent about whether policy statements and interpretive rules even warrant a separate analysis. Compare Syncor Int’l Corp. v. Shalala, 127 F.3d 90, 93–94 (D.C. Cir. 1997) (carefully distinguishing policy statements from interpretive rules), with Am. Tort Reform Ass’n v. Occupational Safety & Health Admin., 738 F.3d 387, 393 (D.C. Cir. 2013) (“Not much turns on the distinction between policy statements and interpretive rules.” (quoting EDWARDS, ELLIOT, & LEVY, *FEDERAL STANDARDS OF REVIEW* 162 (2d ed. 2013))).

61. U.S. DEP’T OF JUSTICE, *supra* note 22.

action would violate a regulation or statute.<sup>62</sup> Agency heads may also issue interpretive rules as an agency-wide interpretation of a statute or regulation.<sup>63</sup>

*B. Procedural Sufficiency: Refining the Meaning of Guidance Documents*

Although policy statements and interpretive rules purport to be non-binding, they “typically include detailed instructions for regulatory compliance”<sup>64</sup> and can be highly coercive toward regulated parties.<sup>65</sup> Indeed, agencies may be tempted to issue new binding rules as policy statements or interpretive rules, a tactic referred to as agency gamesmanship.<sup>66</sup> Litigants, in turn, may challenge a purported policy statement or interpretive rule as procedurally insufficient, arguing that the agency action is actually a legislative rule masquerading as non-binding guidance.<sup>67</sup> Courts then employ a procedural sufficiency test to determine whether the rule is legislative. Failing such a test invalidates any legislative rule that did not undergo the requisite procedures.

These procedural sufficiency tests seek to further clarify the line between binding and non-binding agency action. The resulting caselaw, however, has arguably “enshrouded” that distinction “in considerable smog.”<sup>68</sup> As this Comment will further explore in Part III, these tests appear to be serving a second purpose in the lower courts: determining whether agency action is final. Wading through this “considerable smog” is thus dually necessary. This Comment will provide an overview of four identifiable procedural sufficiency tests: (1) the legal effects test; (2) the substantial impact test; (3) the impact on agencies test; and (4) the *American Mining*<sup>69</sup> test.

---

62. See *Soundboard Ass’n v. FTC*, 888 F.3d 1261, 1264–65, 1268 (D.C. Cir. 2018) (reviewing staff opinion letter that informed a company that its use of prerecorded messages that were triggered by a live agent were not “robocalls” under the regulation).

63. See, e.g., *Oregon v. Ashcroft*, 368 F.3d 1118, 1120 (9th Cir. 2004), *aff’d sub nom. Gonzales v. Oregon*, 546 U.S. 243 (2006) (reviewing as an interpretive rule a directive issued by the attorney general “proclaim[ing] that physician assisted suicide serves no ‘legitimate medical purpose’ under 21 C.F.R. § 1306.04”).

64. McKee, *supra* note 44, at 372.

65. Lindsay, *supra* note 36, at 2452–53 (2018); see, e.g., *United States v. Acquest Transit LLC*, No. 09-CV-00055S(F), 2018 WL 3861612, at \*14 (W.D.N.Y. Aug. 14, 2018) (discussing an agency’s enforcement action “maintain[ing] [Defendant] failed to follow the Corps’ 2005 guidance”).

66. Hylas, *supra* note 24, at 1651.

67. See, e.g., *Cnty. Nutrition Inst. v. Young*, 818 F.2d 943, 949 (D.C. Cir. 1987).

68. E.g., *id.* at 947 (quoting *Noel v. Chapman*, 508 F.2d 1023, 1030 (2d Cir. 1975)).

69. *Am. Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106 (D.C. Cir. 1993).

### 1. *The Legal Effects Test*

One simple test to distinguish a legislative rule from a guidance document is the legal effects test.<sup>70</sup> The legal effects test holds that a rule that “creates a binding norm”<sup>71</sup> and “has the force of law”<sup>72</sup> is a legislative rule.<sup>73</sup> In effect, this test invalidates only rules that use binding language.<sup>74</sup> Of course, agencies may supplement non-binding language with a predictable pattern of implementation,<sup>75</sup> coercion,<sup>76</sup> and implication,<sup>77</sup> resulting in similar practical effects to binding substantive rules.<sup>78</sup> In recognition of this concern, other tests have emerged to supplement the legal effects test.

### 2. *The Substantial Impact Test*

The substantial impact test seemed to solve the problem of agency gamesmanship in one swoop. This test looked to see if an interpretive rule or a policy statement had “a substantial impact on the rights and interests of the parties . . . .”<sup>79</sup> If the court deemed there was a substantial impact, the rule was required to undergo notice-and-comment rulemaking procedures.

---

70. See LAWSON, *supra* note 53, at 420.

71. See *id.* at 421; Jessica S. Schaffer, *Air Transport Association of America v. Department of Transportation: Excess Baggage for Rules of Agency Procedure*, 42 CATH. U. L. REV. 313, 322 (1993); see, e.g., *U.S. Dep’t of Labor v. Kast Metals Corp.*, 744 F.2d 1145, 1153 (5th Cir. 1984) (applying the substantial impact test).

72. *Pac. Gas & Elec. Co. v. FPC*, 506 F.2d 33, 38 (D.C. Cir. 1974).

73. See *supra* note 71.

74. *Pac. Gas*, 506 F.2d at 38.

75. *U.S. Tel. Ass’n v. FCC*, 28 F.3d 1232, 1245 (D.C. Cir. 1994) (identifying at most three incidents out of over 100 when the agency failed to conform to the penalty schedule it had outlined in a purported policy statement).

76. LAWSON, *supra* note 53, at 422–23; see also Leslie M. MacRae & Kenneth E. Nicely, *Break the Rules and Run an Industry: Guidance Manuals More Destructive of the Rule of Law Than Bad Accounting*, 11 U. BALT. J. ENVTL. L. 1, 7–8 (2003) (describing how regulated industries and the politics of the administration in charge may affect an agency’s regulatory behavior).

77. LAWSON, *supra* note 53, at 422–23.

78. *Id.*

79. Kathleen Taylor, *The Substantial Impact Test: Victim of the Fallout from Vermont Yankee?*, 53 GEO. WASH. L. REV. 118, 138 n.157 (1984) (citing *Action on Smoking & Health v. C.A.B.*, 699 F.2d 1209, 1216 n.47 (D.C. Cir. 1983)); see, e.g., *Pickus v. U.S. Bd. of Parole*, 507 F.2d 1107 (D.C. Cir. 1974) (applying the substantial impact test to determine that agency’s rule was neither interpretive rule nor general statement of policy); *Lewis-Mota v. Sec’y of Labor*, 469 F.2d 478, 481–82 (2d Cir. 1972) (applying the substantial impact test to determine that an agency’s rule was neither an interpretive rule, a policy statement, nor a procedural rule).

The court in *Lewis-Mota v. Secretary of Labor*<sup>80</sup> applied the substantial impact test to the revocation of a policy that prioritizing certain applications for permanent residency.<sup>81</sup> The Secretary of Labor published a schedule that listed a number of occupational categories as being short in labor supply.<sup>82</sup> Applicants with the listed occupations qualified for pre-certification for permanent residency.<sup>83</sup> They did not need to show a job offer or submit a statement of their qualifications along with the application.<sup>84</sup> Without observing notice-and-comment procedures, the Secretary suspended the system.<sup>85</sup> In holding that the revocation of the schedule needed to undergo notice-and-comment rulemaking procedures, the court expressed that the schedule and its subsequent revocation had a substantial impact on employers and undocumented individuals.<sup>86</sup> Revoking the schedule made it more difficult for employers to fill job vacancies, and burdened individuals within the named occupations by requiring them to submit additional information before they could qualify for permanent residency.<sup>87</sup>

The substantial impact test raised fundamental concerns, both practical and legal. The D.C. Circuit objected in particular to the use of the substantial impact test for interpretive rules. The test, it argued, had “no limiting principles”<sup>88</sup> as “under the ‘substantial impact’ test every significant interpretative rule automatically becomes a legislative rule by virtue of its effect.”<sup>89</sup> Furthermore, legal scholars and the lower courts inferred the holding of *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*<sup>90</sup>—a 1978 Supreme Court case addressing notice-and-comment judicial glosses—as disqualifying the substantial impact test altogether.<sup>91</sup> *Vermont Yankee* prevented courts

---

80. 469 F.2d 478 (2d Cir. 1972).

81. *Id.* at 482.

82. *Id.* at 480.

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.* at 482.

87. *Id.* at 480.

88. Taylor, *supra* note 79, at 126.

89. *Energy Reserves Grp., Inc. v. Dep’t of Energy*, 589 F.2d 1082, 1094–95 (Temp. Emer. Ct. App. 1978).

90. 435 U.S. 519 (1978).

91. *See, e.g., Levesque v. Block*, 723 F.2d 175, 182 (1st Cir. 1983) (“We agree that substantial impact does not make a rule legislative, but whether a rule has a substantial impact may be relevant in construing the intent of the agency in issuing the rule.”); *Rivera v. Becerra*, 714 F.2d 887, 890–91 (9th Cir. 1983) (“Thus, in view of the express exemption

from adding judicial glosses to agencies' procedures beyond those grounded in the APA,<sup>92</sup> and the lower courts labeled the substantial impact test just such a judicial gloss:<sup>93</sup> the words "substantial impact" do not appear in the text of the APA,<sup>94</sup> and scholars argued that the test "ha[d] no plausible grounding in the . . . history of [section] 553 of the APA."<sup>95</sup>

### 3. *The Impact on Agencies Test for Policy Statements*

Although courts no longer apply the substantial impact test,<sup>96</sup> most courts apply some version of a newer test to distinguish between legislative rules and policy statements: the impact on agencies test.<sup>97</sup> Rather than focusing on the impact on private individuals or industries—as the substantial impact test did—this test focuses on the impact on the agency itself. A rule that effectively binds the discretion of the agency is a legislative rule, even if it purports to be non-binding.<sup>98</sup> More specifically, courts might infer from a pattern of enforcement<sup>99</sup> or detailed internal guidelines<sup>100</sup> that the ostensible policy statement is in fact a

---

in section 553 and the admonition of *Vermont Yankee*, we reject the substantial impact test and reverse the district court on this issue."); LAWSON, *supra* note 53, at 423 (citing *Cabais v. Egger*, 690 F.2d 234, 237 (D.C. Cir. 1982)) (arguing that, under *Cabais*, "[i]nterpretative and substantive rules may both vitally affect private interests, thus, the substantial impact test has no utility in distinguishing between the two"); Taylor, *supra* note 79, at 127 ("The [*Vermont Yankee*] Court's dicta declared that agencies should be free to fashion their own rules of procedure and that courts should not mandate rulemaking procedures that Congress has not required except in extremely rare circumstances. Thus, where the enabling statute or the APA does not require notice and comment, courts may not mandate those procedures.").

92. Taylor, *supra* note 79, at 118 (describing how the Court in *Vermont Yankee* "emphatically declared that the judiciary could not engraft its own notions of proper procedure onto the APA").

93. *Id.*

94. *Id.* at 126 ("There is nothing in the APA to warrant employment of the 'substantial impact' test to classify interpretative and legislative rules. The phrase 'substantial impact' does not appear in the APA." (quoting *Energy*, 589 F.2d at 1094–95)).

95. LAWSON, *supra* note 53, at 423.

96. *Id.* For a thorough exploration of the effect of *Vermont Yankee*'s holding and dicta on lower courts' application of the substantial impact test, see generally Taylor, *supra* note 79.

97. LAWSON, *supra* note 53, at 423. Scholars also refer to the test as the "practically binding test." *E.g.*, Cass R. Sunstein, "Practically Binding": *General Policy Statements and Notice-and-Comment Rulemaking*, 68 ADMIN. L. REV. 491, 496 (2016).

98. *Texas v. United States*, 809 F.3d 134, 171 (5th Cir. 2015); *Prof'l's & Patients for Customized Care v. Shalala*, 56 F.3d 592 (5th Cir. 1995); *U.S. Tel. Ass'n v. FCC*, 28 F.3d 1232 (D.C. Cir. 1994).

99. *Supra* note 75.

100. *See, e.g.*, *Texas v. United States*, 328 F. Supp. 3d 662, 732 (S.D. Tex. 2018) (considering evidence of "hundreds of pages of DHS manuals and procedures that instruct, in painful detail, each step a reviewer should take and what types of evidence each reviewer may consider as evidence."); *U.S. Tel. Ass'n*, 28 F.3d at 1247 (taking into account agency's highly detailed penalty schedule in determining that the agency was bound to follow a guidance document).

legislative rule in disguise, even if it uses non-binding language.

In the Ninth Circuit’s review of the memorandum rescinding DACA, it applied the impact on agencies test, determining that both the original DACA program and its rescission were a policy statement.<sup>101</sup> Regarding the original program, the court pointed to DHS’s use of discretionary language and the fact that, although DACA applicants “self-select” (given that the application requires applicants to volunteer their immigration status and thereby risk exposing themselves to deportation),<sup>102</sup> the agency still denied 17.8% of applicants.<sup>103</sup> This denial rate was not insignificant and suggested that agency officials were not automatically applying the criteria.<sup>104</sup> Instead, officials were using judgment and discretion in evaluating each applicant.<sup>105</sup> The Ninth Circuit similarly characterized the rescission of DACA as a policy statement.<sup>106</sup> While the memorandum requires agency officials to reject new applications for the DACA program, it also explicitly allows DHS to continue to grant deferred action on a case-by-case basis, leaving the background principles of prosecutorial discretion in place.<sup>107</sup>

#### 4. *The American Mining Test for Interpretive Rules*

Courts often rely on a test laid out in cases such as *American Mining* to distinguish interpretive rules from legislative rules.<sup>108</sup> The *American Mining* test focuses on whether the agency intended to have the force and effect of law.<sup>109</sup> Specifically, a rule is merely interpretive when “in the absence of the [interpretation] there would [ ] be an adequate [regulatory] basis for enforcement action.”<sup>110</sup> A rule that “repudiates or is irreconcilable with [a statute or regulation],” however, cannot be an interpretive rule because it amends rather than clarifies the law.<sup>111</sup>

Some courts carefully distinguish policy statements from interpretive

---

101. *Regents of the Univ. of Cal. v. U.S. Dep’t of Homeland Sec.*, 908 F.3d 476, 507–08 (9th Cir. 2018).

102. *Id.* at 507 (citing *Texas*, 809 F.3d at 210 (King, J., dissenting)).

103. *Id.* at 507–08.

104. *Id.*

105. *Id.*

106. *Id.* at 513.

107. *Id.*

108. *McKee*, *supra* note 44, at 389.

109. *Am. Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1109 (D.C. Cir. 1993).

110. *Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579, 588 (D.C. Cir. 1997), *abrogated* by *Perez v. Mortg. Bankers Ass’n*, 575 U.S. 92 (2015) (quoting *Am. Mining*, 995 F.2d at 1112).

111. *Am. Mining*, 995 F.2d at 1113.

rules,<sup>112</sup> reserving the impact on agencies test for policy statements<sup>113</sup> and the *American Mining* test for interpretive rules.<sup>114</sup> These courts reason that the impact on agencies test is not as effective at distinguishing interpretive rules from legislative rules.<sup>115</sup> In fact, some Ninth Circuit decisions have expressed that interpretive rules may fail the impact on agencies test and yet still not be legislative rules.<sup>116</sup> This occurs because some interpretive rules cabin agency discretion in future conduct.<sup>117</sup> Agency-wide interpretations may require agency officials to rely on the interpretive rule in future action.<sup>118</sup> Courts that accept this reasoning hold that interpretive rules nonetheless do not carry the force of law because they do not create new law; they merely interpret lawmaking that has already taken place.<sup>119</sup>

However, not all courts embrace this stark distinction between policy statements and interpretive rules.<sup>120</sup> Because interpretive rules and policy statements are both exempt from notice-and-comment procedures, courts are often “concerned only with distinguishing legislative rules from nonlegislative rules (that is, interpretive rules and policy statements).”<sup>121</sup> The D.C. Circuit has held that “[n]ot much turns on the distinction between policy statements and interpretative rules. The more important question is whether the disputed statement is merely informative or interpretative, or whether it is [legislative] and thus establishes a binding legal norm that is subject to judicial review.”<sup>122</sup>

112. *Animal Legal Def. Fund v. Veneman*, 469 F.3d 826, 839 (9th Cir. 2006), *opinion vacated on reh'g en banc*, 490 F.3d 725 (9th Cir. 2007).

113. *See supra* notes 98–101 and accompanying text (providing examples of courts applying the impact on agencies test to policy statements).

114. *See Veneman*, 469 F.3d at 840.

115. *See id.*

116. *See id.*; McKee, *supra* note 44, at 396–97. *But see Lindsay, supra* note 36, at 2468 (“Because interpretative rules cannot ‘command anyone to do anything or to refrain from doing anything,’ they do not create ‘adverse effects of a strictly legal kind,’ and therefore ‘typically cannot result in justiciable disputes.’” (quoting *Am. Tort Reform Ass’n v. Occupational Safety & Health Admin.*, 738 F.3d 387, 393, 396 (D.C. Cir. 2013))).

117. *Veneman*, 469 F.3d at 840.

118. *Id.*

119. *Syncor Int’l Corp. v. Shalala*, 127 F.3d 90, 94 (D.C. Cir. 1997) (“An interpretative rule, on the other hand, typically reflects an agency’s construction of a statute that has been entrusted to the agency to administer. The legal norm is one that Congress has devised; the agency does not purport to modify that norm, in other words, to engage in lawmaking.”).

120. McKee, *supra* note 44, at 389.

121. *Id.*

122. *Am. Tort Reform Ass’n v. Occupational Safety & Health Admin.*, 738 F.3d 387, 393 (D.C. Cir. 2013) (quoting EDWARDS, ELLIOT, & LEVY, *FEDERAL STANDARDS OF REVIEW* 162 (2d ed. 2013)). *But see Syncor Int’l Corp.*, 127 F.3d at 93–94 (“Further confusing the matter is the tendency of courts and litigants to lump interpretative rules and policy statements together in contrast to

Regardless of this theoretical dispute and the deceptively simple definitions of policy statements and interpretive rules, courts have struggled for decades to clarify the line between binding and non-binding agency action.<sup>123</sup> This distinction matters for litigants, like Garcia, wishing to challenge the procedural sufficiency of guidance documents that may substantially impact them.

## II. FINALITY AS A BAR TO JUDICIAL REVIEW OF AGENCY ACTION

Litigants challenging a policy statement or interpretive rule face another hurdle: the APA only permits review of “final agency action.”<sup>124</sup> Although agency action is presumptively reviewable,<sup>125</sup> litigants challenging agency action must overcome a daunting number of obstacles before entering the courthouse. In addition to standing and ripeness under Article III,<sup>126</sup> a challenge to agency action must meet threshold requirements such as remedy exhaustion,<sup>127</sup> issue exhaustion,<sup>128</sup> preclusion,<sup>129</sup> and finality.<sup>130</sup> Litigants must thus demonstrate that the rule is “final” or risk avoiding judicial review altogether.<sup>131</sup>

### A. *The APA’s Requirement of Finality*

Finality is a congressional mandate, which means that Congress has placed the requirement on courts through the statutes that govern agencies.<sup>132</sup> When an agency’s statute does not independently provide for

---

substantive rules, a tendency to which we have ourselves succumbed on occasion.”)

123. *E.g.*, *Cnty. Nutrition Inst. v. Young*, 818 F.2d 943, 946 (D.C. Cir. 1987); *see supra* section II.B.

124. 5 U.S.C. § 704 (2012).

125. *Regents of the Univ. of Cal. v. U.S. Dep’t of Homeland Sec.*, 908 F.3d 476, 494 (9th Cir. 2018) (“Thus, as a general matter, the Supreme Court has consistently articulated ‘a “strong presumption” favoring judicial review of administrative action.’” (quoting *Mach Mining, LLC v. E.E.O.C.*, 575 U.S. 480, 486 (2015))); 5 U.S.C. § 702 (“A person suffering legal wrong because of agency action . . . is entitled to judicial review.”).

126. U.S. CONST. art. III, § 2, cl. 1.

127. 4 CHARLES H. KOCH, JR., *ADMINISTRATIVE LAW AND PRACTICE* § 12:21 (3d ed. 2010).

128. *Id.*

129. *See generally* *Heckler v. Chaney*, 470 U.S. 821 (1985); 5 U.S.C. § 701(a)(2) (2012).

130. 5 U.S.C. § 704.

131. *Id.*

132. 2 KRISTIN E. HICKMAN & RICHARD J. PIERCE, *ADMINISTRATIVE LAW TREATISE* 1567 (6th ed.



judicial review, section 704 of the APA provides that “final agency action for which there is no other adequate remedy in a court [is] subject to judicial review.”<sup>133</sup>

In *Norton v. South Utah Wilderness Alliance*,<sup>134</sup> the Supreme Court emphasized the important role that finality and other APA bars to judicial review serve in preventing judicial overreach:

The principal purpose of [the APA] limitation[s] is to protect agencies from undue judicial interference with their lawful discretion and to avoid judicial entanglement in abstract policy disagreements which courts lack the expertise and information to resolve . . . . The APA does not contemplate such pervasive federal-court oversight.<sup>135</sup>

But finality arguably serves an “overlapping” function to other bars to judicial review.<sup>136</sup> Indeed, it can be difficult to distinguish among finality, exhaustion, and ripeness,<sup>137</sup> all of which control timing and serve the purpose of preventing “premature judicial involvement in the administrative decisionmaking process.”<sup>138</sup> In one notable case,<sup>139</sup> all three judges on a D.C. Circuit panel agreed that a challenged agency action was not reviewable, yet each rested their decision on a different

2019) (citing *Dep’t of Commerce v. U.S. House of Representatives*, 525 U.S. 316 (1999)) (explaining that Congress appears to have the power to determine whether an agency action is final); *see also* *Soundboard Ass’n v. FTC*, 888 F.3d 1261, 1274 n.6 (D.C. Cir. 2018) (“Unlike reviewability doctrines developed by courts, final agency action is a statutory requirement set by Congress.”).

133. 5 U.S.C. § 704. The APA provides default standards for judicial review of agency action, including finality. *See* *McKee*, *supra* note 44, at 389–90. In the past, courts sometimes applied a legislative/non-legislative test to determine if action under direct review clauses provided in agency statutes was a “regulation” or “final regulation.” *See id.* at 392. In *Molycorp, Inc. v. EPA*, 197 F.3d 543, 545 (D.C. Cir. 1999), the D.C. Circuit looked to whether the agency action had “binding effects” to see if it was a “regulation” under the direct review statute at issue. Today, however, courts tend to apply the same finality analysis for direct review statutes that they provide for APA finality. *KOCH*, *supra* note 127, § 12:20; *see also* *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 478 (2001) (holding that the term “final action” in the Clean Air Act, 42 U.S.C. § 7607(b)(1) (2012), which governs the EPA, is synonymous with “final agency action” in the Administrative Procedure Act (APA), 5 U.S.C. § 704).

134. 542 U.S. 55 (2004).

135. *Id.* at 55.

136. *Manheim & Watts*, *supra* note 52, at 1801; 2 *HICKMAN & PIERCE*, *supra* note 132, at 1453; *Ass’n of Flight Attendants-CWA v. Choa*, 493 F.3d 155, 160 (D.C. Cir. 2007) (“Exhaustion, ripeness, and the requirement of final agency action are related and often overlapping doctrines.”).

137. 2 *HICKMAN & PIERCE*, *supra* note 132, at 1453.

138. *Manheim & Watts*, *supra* note 52, at 1801 (quoting *RICHARD J. PIERCE*, 2 *ADMINISTRATIVE LAW TREATISE* § 15.17, at 1105 (Aspen 4th ed. 2002)).

139. *Ticor Title Ins. Co. v. FTC*, 814 F.2d 731 (D.C. Cir. 1987).

timing doctrine.<sup>140</sup> In an ironic turn, the D.C. Circuit recently stressed the importance of distinguishing the three doctrines.<sup>141</sup>

If litigants cannot point to final agency action, the action is not reviewable<sup>142</sup> for substance,<sup>143</sup> though it may be reviewed for procedural sufficiency.<sup>144</sup> Courts may still review the substance of non-final agency action in one of two ways. First, once an enforcement proceeding or other final agency action occurs, the substance of the non-final action becomes reviewable.<sup>145</sup> Second, under some courts' interpretations, litigants may waive the finality requirement by failing to raise it at the trial level.

In particular, the D.C. Circuit argued in *Trudeau v. FTC*<sup>146</sup> that APA finality can be waived because it is not a jurisdictional element.<sup>147</sup> Resolving a jurisdictional element determines whether a court even has the power to hear a case, meaning that the issue cannot be waived.<sup>148</sup> In *Trudeau*, the D.C. Circuit relied on *Arbaugh v. Y & H Corp.*,<sup>149</sup> in which the Supreme Court held that the Court will not interpret a threshold determination as jurisdictional unless Congress "clearly states that a threshold limitation on a statute's scope shall count as jurisdictional."<sup>150</sup> Because the APA does not clearly indicate that finality is jurisdictional, the D.C. Circuit reasoned that the issue can be waived.<sup>151</sup> Under this

---

140. 2 HICKMAN & PIERCE, *supra* note 132, at 1454.

141. *Soundboard Ass'n v. FTC*, 888 F.3d 1261, 1274 n.6 (D.C. Cir. 2018) ("[W]hile courts often mingle the three doctrines [of finality, ripeness, and exhaustion], they are analytically distinct.").

142. *McKee*, *supra* note 44, at 397; *see, e.g., Cal. Cmty. Against Toxics v. EPA*, 934 F.3d 627, 631 (D.C. Cir. 2019) ("For the reasons explained herein, we hold that the Wehrum Memo is not final agency action, and we dismiss the petitions for lack of subject matter jurisdiction under the Act. We express no opinion as to whether the Wehrum Memo is prudentially ripe, an interpretive rule or a legislative rule, or on the merits of its interpretation.").

143. 5 U.S.C. § 706 (2012).

144. *See supra* section I.B (describing procedural sufficiency tests for purported policy statements and interpretive rules).

145. *See* 5 U.S.C. § 704 ("[P]reliminary, procedural, or intermediate agency action or ruling *not* directly reviewable is subject to review on the review of the final agency action."); 5 U.S.C. § 551 (defining "agency action" as "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act"); *Chamber of Commerce v. Reich*, 74 F.3d 1322, 1326 (D.C. Cir. 1996) (reviewing otherwise unreviewable presidential action once agency action implementing it became final).

146. 456 F.3d 178 (2006).

147. *Trudeau v. FTC*, 456 F.3d 178, 184 (2006). For a detailed overview of the reasoning underlying this decision and its impact, *see generally* Sundee Iyer, *Jurisdictional Rules and Final Agency Action*, 125 *YALE L.J.* 785, 790 (2016).

148. Iyer, *supra* note 147, at 787.

149. 546 U.S. 500 (2006).

150. *Id.* at 515–16.

151. *Trudeau*, 456 F.3d at 184 n.7.

interpretation, if the agency fails to dispute the finality of the challenged action at the trial level, appellate courts will not be able to later revisit the issue.<sup>152</sup> As of 2014, several circuits that had originally applied finality as a jurisdictional element—including, at least, the Second Circuit, the Fourth Circuit, and the Federal Circuit—have found the D.C. Circuit’s reasoning persuasive and subsequently questioned whether finality is indeed jurisdictional.<sup>153</sup>

### B. *The Supreme Court Defines Final Agency Action*

In 1997, the Supreme Court synthesized its finality analysis into the *Bennett* test: a two-part test that focused on *legal* consequences.<sup>154</sup> In several cases before *Bennett v. Spear*,<sup>155</sup> and in one subsequent 2016 case *Army Corps of Engineers v. Hawkes Co.*,<sup>156</sup> however, the Supreme Court emphasized a “‘pragmatic’ approach” to finality, which looked to *practical* effects as well.<sup>157</sup> Notably, although *Hawkes* cited to *Bennett* as the official rule for finality, the decision in *Hawkes* could extend *Bennett*’s finality doctrine to consider not only legal consequences but also practical consequences.

#### 1. *The Bennett Test*

In *Bennett*, the Supreme Court laid out the prevailing test to determine whether agency action is indeed “final” under section 704.<sup>158</sup> Under the two-part test in *Bennett*, final agency action (1) “mark[s] the ‘consummation’ of the agency’s decisionmaking process” and (2) is action by which “‘rights or obligations have been determined,’ or from which ‘legal consequences will flow.’”<sup>159</sup>

In *Bennett*, litigants challenged an opinion letter issued by the Fish & Wildlife Service under the Endangered Species Act (ESA).<sup>160</sup> The ESA requires the Secretary to identify “threatened” and “endangered” species and their designated habitat, at which point other agencies must determine

---

152. Iyer, *supra* note 147, at 787.

153. *Id.* at 790.

154. McKee, *supra* note 44, at 374.

155. 520 U.S. 154 (1997).

156. 578 U.S. \_\_\_, 136 S. Ct. 1807 (2016).

157. *Id.* at 1815.

158. McKee, *supra* note 44, at 374.

159. *Bennett*, 520 U.S. at 177–78.

160. *Id.* at 179.

whether proposed action may affect that species or its habitat.<sup>161</sup> If an agency determines that its proposed action may affect that species, the agency must meet with the Fish and Wildlife Service, which will issue an opinion letter.<sup>162</sup> That Biological Opinion determines whether the action might jeopardize the species and what, if any, alternative actions the agency should take.<sup>163</sup> Any such actions are put in an Incidental Take Statement, which lays out the “terms and conditions . . . that *must* be complied with by the Federal agency . . . .”<sup>164</sup>

Although the government argued that the Biological Opinion did not constitute “final agency action” because it was merely advisory and created no legal obligation,<sup>165</sup> the Court unanimously held that the opinion letter was final.<sup>166</sup> The Court pointed specifically to the binding language in the Incidental Take Statement determining that the action met the second prong of the finality test.<sup>167</sup> As the Court explained, the agency was, “to put it mildly, keenly aware of the virtually determinative effect of its biological opinions.”<sup>168</sup> Indeed, the Biological Opinion “alter[ed] the legal regime to which the action agency is subject . . . .”<sup>169</sup> The Biological Opinion may not have been binding itself, but it would inevitably trigger an Incidental Take Statement, which contained binding language on its face.

## 2. *The Supreme Court’s Pragmatic Approach in Abbott Laboratories and Hawkes*

For thirty years prior to *Bennett*, *Abbott Laboratories v. Gardner*<sup>170</sup> served as the leading case on finality.<sup>171</sup> As part of its analysis of ripeness, the Court in *Abbott Laboratories* held that a drug labeling regulation was

---

161. *Id.* at 157–58. The opinion letter in *Bennett* does not qualify under the APA as either a regulation, a policy statement, or an interpretive rule. Instead, it has its own procedural requirements as outlined by statute. *See* 16 U.S.C. § 1533(b) (2012). *Bennett* thus does not directly address how the Supreme Court would approach finality in the context of a policy statement.

162. *Bennett*, 520 U.S. at 157–58.

163. *Id.*

164. *Id.* at 158 (quoting 16 U.S.C. § 1536(b)(4)) (emphasis added).

165. *Id.* at 177 (quoting 5 U.S.C. § 704 (2012)).

166. *Id.* at 179.

167. *Id.*

168. *Id.* at 170.

169. *Id.* at 178.

170. *Abbott Labs. v. Gardner*, 387 U.S. 136 (1967).

171. 4 CHARLES H. KOCH, JR., ADMINISTRATIVE LAW AND PRACTICE § 12:21 (3d ed. 2010).

final, although the agency had not brought enforcement proceedings.<sup>172</sup>

The Court in *Abbott Laboratories* applied what would later be referred to as *Bennett's* first prong. The regulation at issue “mark[ed] the ‘consummation’ of the agency’s decisionmaking process.”<sup>173</sup> As the Court explained, “[t]here [was] no hint that this regulation [was] informal . . . or only the ruling of a subordinate official, . . . or tentative.”<sup>174</sup>

However, rather than referencing “rights or obligations” or “legal consequences,” as the Court later did in announcing the second prong in *Bennett*,<sup>175</sup> the Court in *Abbott Laboratories* emphasized the “direct and immediate” impact that the regulation would have on the plaintiffs.<sup>176</sup> The Court explained that the regulation “ha[d] a direct effect on the day-to-day business” of regulated parties and put them “in a dilemma.”<sup>177</sup> Plaintiffs, the Court explained, must either “comply . . . and incur the costs . . . or they must follow their present course and risk prosecution.”<sup>178</sup>

The Court in *Abbott Laboratories* relied on several previous cases to emphasize the “pragmatic” and “flexible” approach that it had generally taken to finality.<sup>179</sup> For example, an agency’s mere statement of its intentions may constitute final agency action when “expected conformity to [the agency’s intentions] causes injury cognizable by a court of equity . . . .”<sup>180</sup> Furthermore, agency action may be final even when the action carries “no authority” except in giving notice of how to interpret a statute.<sup>181</sup>

In 2016—nearly twenty years after the Supreme Court laid out *Bennett's* two-pronged test—*U.S. Army Corps of Engineers v. Hawkes Co.*<sup>182</sup> seemed to revive the pragmatic approach described in *Abbott Laboratories*,<sup>183</sup> significantly relaxing the standard for final agency

---

172. *Abbott Labs.*, 387 U.S. at 138.

173. *Bennett*, 520 U.S. at 177–78 (quoting *Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 113 (1948)).

174. *Abbott Labs.*, 387 U.S. at 151.

175. *Bennett*, 520 U.S. at 178 (quoting *Port of Bos. Marine Terminal Ass’n v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71 (1970)).

176. *Abbott Labs.*, 387 U.S. at 152.

177. *Id.* (quoting *Abbott Labs. v. Celebrezze*, 228 F. Supp. 855, 861 (D. Del.1964)).

178. *Id.*

179. *Id.* at 149–50 (citing *Columbia Broad. Sys. v. United States*, 316 U.S. 407 (1942); *Frozen Food Express v. United States*, 351 U.S. 40 (1956)).

180. *Abbott Labs.*, 387 U.S. at 150.

181. *Id.* (citing *Frozen Food Express*, 351 U.S. at 45).

182. \_\_\_ U.S. \_\_\_, 136 S. Ct. 1807 (2016).

183. *U.S. Army Corps of Engineers v. Hawkes Co.*, 578 U.S. \_\_\_, 136 S. Ct. 1807, 1815 (2016) (explaining that the Court’s decision tracks the pragmatic approach applied in cases such as

action.<sup>184</sup> In *Hawkes*, the Court held that a jurisdictional determination that an area contained “waters of the United States” by the U.S. Army Corps of Engineers was final agency action because it resulted in “direct and appreciable legal consequences.”<sup>185</sup> A “negative” jurisdictional determination that the area did not contain “waters of the United States” would have given the party “a five-year safe harbor from [government] civil enforcement proceedings.”<sup>186</sup> Therefore, a “positive” determination that the area did contain “waters of the United States” also brought legal consequences: the missed opportunity of a five-year safe harbor.<sup>187</sup> Plaintiffs could simply have acted in contravention of the determination<sup>188</sup> and faced an enforcement proceeding,<sup>189</sup> which would have incontrovertibly constituted final agency action.<sup>190</sup> But, as the Court explained, it would unfairly put the plaintiffs at risk for a large penalty if a court ultimately sided with the agency.<sup>191</sup> This final consideration echoed the Supreme Court’s reasoning in *Abbott Laboratories*, where the Court described the “dilemma” of plaintiffs who must either “comply . . . and incur the costs . . . or . . . follow their present course and risk prosecution.”<sup>192</sup>

As part of its analysis, the majority pointed out that its conclusion “tracks the ‘pragmatic’ approach we have long taken to finality.”<sup>193</sup> The Court cited *Abbott Laboratories* and another case, *Frozen Food Express v. United States*,<sup>194</sup> in support of their longstanding pragmatic approach.<sup>195</sup> The *Hawkes* Court emphasized a particular similarity between *Frozen Food* and *Hawkes*: the threat of criminal penalties.<sup>196</sup> In both cases, the Court explained, “no administrative or criminal proceeding c[ould] be

---

*Abbott Laboratories*).

184. 2 HICKMAN & PIERCE, *supra* note 132, at 1454.

185. *Hawkes*, 136 S. Ct. at 1810 (quoting *Bennett v. Spear*, 520 U.S. 154, 178 (2016)).

186. *Id.*

187. *Id.* at 1812.

188. *Id.* at 1814.

189. *Id.*

190. *Id.* at 1815.

191. *Id.*

192. *Abbott Labs. v. Gardner*, 387 U.S. 136, 152 (1967).

193. *Hawkes*, 136 S. Ct. at 1815 (quoting *Abbott Labs.*, 387 U.S. at 149).

194. 351 U.S. 40 (1956).

195. *Hawkes*, 136 S. Ct. at 1815 (citing *Frozen Food Express v. United States*, 351 U.S. 40, 76 (1956)).

196. *Id.*

brought for failure to conform to the [challenged agency action] itself.”<sup>197</sup> However, the challenged agency action “warn[ed]” of “the risk of significant criminal and civil penalties.”<sup>198</sup> The decision in *Hawkes* functionally revived the *Abbott Laboratories* pragmatic approach, possibly extending the finality doctrine into practical consequences rather than merely legal consequences,<sup>199</sup> as had been laid out in *Bennett*.<sup>200</sup>

### III. REVIEWING POLICY STATEMENTS AND INTERPRETIVE RULES IN LIGHT OF FINALITY

The Supreme Court has not yet unambiguously held that an interpretive rule or policy statement was final. The Court came close to speaking directly on the issue in *National Park Hospitality Association v. DOI*.<sup>201</sup> That case involved a regulation that had undergone notice-and-comment rulemaking.<sup>202</sup> Because the agency sought to interpret a statute that it did not administer and had no power to enforce, the Court held that it was a general statement of policy—rather than a regulation—under section 553 of the APA.<sup>203</sup> In half a sentence devoid of any analysis, the Court indicated that the regulation was final agency action, but then proceeded to hold that the regulation was not ripe for review.<sup>204</sup>

In the absence of robust analysis from the Supreme Court, lower courts have been divided on the meaning of *Bennett*'s second prong. The D.C. Circuit generally applies a categorical approach to finality.<sup>205</sup> That approach virtually always holds that both interpretive rules and policy statements are not final. The Ninth Circuit embraces a flexible approach—drawing from cases like *Abbott Laboratories* and *Hawkes*.<sup>206</sup> Courts in the Ninth Circuit are more likely to hold that an interpretive rule is final agency action under the *Bennett* test,<sup>207</sup> but the finality of policy statements was less clear until recently. Two cases decided in 2019

---

197. *Id.*

198. *Id.*

199. 4 CHARLES H. KOCH, JR., ADMINISTRATIVE LAW AND PRACTICE § 12:21 (3d ed. 2010).

200. *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997).

201. 538 U.S. 803 (2003).

202. *Nat'l Park Hospitality Ass'n v. DOI*, 538 U.S. 803, 806 (2003).

203. *Id.* at 809.

204. *Id.* at 812. The dissent agreed that the agency action was final, explaining that it was “not tentative or likely to change.” *Id.* at 820 (Breyer, J., dissenting).

205. *See infra* section III.A.

206. Lindsay, *supra* note 36, at 2466–67.

207. *See infra* section III.B.

indicate that both circuits may be shifting toward a more flexible approach to *Bennett*'s second prong.<sup>208</sup>

A. *The D.C. Circuit's Categorical Approach*

The D.C. Circuit's categorical approach appears to "categorically preclude from pre-enforcement review all interpretative rules and policy statements."<sup>209</sup> In other words, under the categorical approach, if the guidance document at issue is a guidance document, it is not final. In effect, the categorical approach has repurposed the procedural sufficiency tests introduced in Part I, section B of this Comment.

When reviewing a policy statement, the D.C. Circuit appears to apply the impact on agencies test—the test used for the procedural sufficiency of policy statements<sup>210</sup>—in place of *Bennett*'s second prong.<sup>211</sup> In *National Association of Home Builders v. Norton*,<sup>212</sup> the D.C. Circuit held that a policy statement was not final because "there is insufficient evidence in the record to conclude that either of the Protocols *binds* the agency sufficiently to make it a substantive rule under the reasoning of [a D.C. Circuit case applying the impact on agencies test]."<sup>213</sup>

*Norton* emphasized the binding effect of the challenged rule on the agency's discretion, which is also a key factor in the impact on agencies test described in section II.B.3.<sup>214</sup> When applying the impact on agencies test, courts typically look at enforcement actions to see if they conform to a purported policy statement.<sup>215</sup> The *Norton* Court explained that "there ha[d] been no enforcement actions that indicate[d] whether the FWS

---

208. See generally *Cal. Cmty. Against Toxics v. EPA*, 934 F.3d 627 (D.C. Cir. 2019); *Gill v. U.S. Dep't of Justice*, 913 F.3d 1179 (9th Cir. 2019).

209. Lindsay, *supra* note 36, at 2466.

210. See *supra* section I.B.

211. *Nat'l Ass'n of Home Builders v. Norton*, 415 F.3d 8, 17 (D.C. Cir. 2005) (emphasis added).

212. 415 F.3d 8 (D.C. Cir. 2005).

213. *Id.* at 17 (emphasis added). In place of the impact on agencies test, the *Norton* court referenced *Community Nutrition*, a case that applied the impact on agencies test. See *Cmty. Nutrition Inst. v. Young*, 818 F.2d 943, 949 (D.C. Cir. 1987) ("We conclude that in the circumstances of this case, FDA by virtue of its own course of conduct has chosen to limit its discretion and promulgated action levels which it gives a present, binding effect.").

214. See, e.g., *U.S. Telephone Ass'n v. FCC*, 28 F.3d 1232 (D.C. Cir. 1994) (holding that a federal agency may not issue a policy that binds agency officials' discretion without first following the notice and comment procedures outlined in the Administrative Procedure Act); *Professionals and Patients for Customized Care v. Shalala*, 56 F.3d 592, 595 (5th Cir. 1995) ("[W]e follow the D.C. Circuit's analysis in determining whether [the rule] is a substantive rule under the APA, focusing primarily on whether the rule has binding effect on agency discretion or severely restricts it.").

215. See, e.g., *U.S. Telephone Ass'n*, 28 F.3d 1232; *Shalala*, 56 F.3d 592.



consider[ed] itself bound by survey results.”<sup>216</sup> Similarly, in a more recent case, *Sierra Club v. EPA*,<sup>217</sup> the D.C. Circuit applied the equivalent of the impact on agencies test to hold that a policy statement was “not binding on the agency or affected parties and therefore d[id] not constitute ‘final action.’”<sup>218</sup> The arguments of both courts boiled down to this: the policy statement was a policy statement, so it was not final.

Under the categorical approach, interpretive rules receive similar treatment. In *American Tort Reform Ass’n v. Occupational Safety & Health Administration*,<sup>219</sup> the D.C. Circuit held that a labeling requirement was not final precisely because it was an interpretive rule.<sup>220</sup> The court reasoned that “[b]ecause Paragraph (a)(2) is merely interpretive, it is not subject to notice and comment rulemaking under the APA, and it is not subject to judicial review . . . .”<sup>221</sup> Applying the procedural sufficiency test thus served a dual function: determining simultaneously that the labeling requirement was an interpretive rule and that it was non-final.<sup>222</sup>

In *Association of Flight Attendants v. Huerta*,<sup>223</sup> the D.C. Circuit further entrenched the idea that a guidance document cannot be final.<sup>224</sup> The court held that a guidance document was non-final without even determining whether it was a policy statement or an interpretive rule.<sup>225</sup> As the court explained, “[i]t really does not matter whether [the guidance document] is viewed as a policy statement.”<sup>226</sup> What mattered, was that the guidance document was “not a legislative rule carrying the ‘force and effect of law.’”<sup>227</sup> Because it was a guidance document, it was not final.<sup>228</sup>

In a 2019 case, *California Communities Against Toxics v. EPA*,<sup>229</sup> the D.C. Circuit took a sharp turn in the opposite direction.<sup>230</sup> The D.C.

---

216. *Norton*, 415 F.3d at 17.

217. 873 F.3d 946 (D.C. Cir. 2017).

218. *Id.* at 948.

219. 738 F.3d 387 (D.C. Cir. 2013).

220. *Id.* at 390.

221. *Id.*

222. *Id.*

223. *Ass’n of Flight Attendants-CWA, AFL-CIO v. Huerta*, 785 F.3d 710, 713 (D.C. Cir. 2015).

224. *Id.* at 716.

225. *Id.*

226. *Id.*

227. *Id.* (quoting *Perez v. Mortgage Bankers Ass’n*, 575 U.S. 92, 135 S. Ct. 1199, 1204 (2015)).

228. *Id.* at 713 (“The Notice is nothing more than an internal guidance document . . . . Therefore, the Notice does not reflect final agency action.”).

229. 934 F.3d 627 (D.C. Cir. 2019).

230. *Id.* at 627, 631.

Circuit reviewed a memo issued by an administrator within the EPA interpreting a section of the Clean Air Act.<sup>231</sup> The court cautioned against the reasoning in a line of cases that improperly combined “the related but separate analysis of whether an agency action is a legislative rule.”<sup>232</sup> According to the court, these cases, including *Huerta*, failed to recognize recent Supreme Court precedent indicating that “the finality analysis is distinct from the test for whether an agency action is a legislative rule.”<sup>233</sup> In other words, the approach to finality should not be quite so categorical.

### B. *The Ninth Circuit’s Flexible Approach*

In contrast to the D.C. Circuit’s precedent, the Ninth Circuit recognizes a stark difference between interpretive rules and policy statements. Although interpretive rules do not carry the force and effect of law, they may, in some cases, bind the agency’s discretion.<sup>234</sup> Such interpretive rules have legal consequences under the *Bennett* test and are considered final.<sup>235</sup> Policy statements, under the impact on agencies test, cannot bind the agency’s discretion and thus cannot be final. Effectively, the Ninth Circuit’s flexible approach applies the impact on agency test in place of *Bennett*’s second prong. Thus, the Ninth Circuit differs from the D.C. Circuit by allowing review of interpretive rules. However, this approach appeared to preclude all policy statements from judicial review until a 2019 case, *Gill v. U.S. Dep’t of Justice*,<sup>236</sup> in which the Ninth Circuit held that a policy statement was final.<sup>237</sup>

Under the flexible approach, some interpretive rules can be final agency action. Although interpretive rules do not independently carry “the force of law[,]” they may have legal consequences on the agency.<sup>238</sup> For example, in *Oregon v. Ashcroft*,<sup>239</sup> the Attorney General had issued an interpretive rule that declared that physician assisted suicide violated the

---

231. *Id.*

232. *Id.* at 634.

233. *Id.*

234. *Animal Legal Def. Fund v. Veneman*, 469 F.3d 826, 839 (9th Cir. 2006), *opinion vacated on reh’g en banc*, 490 F.3d 725 (9th Cir. 2007).

235. *Id.*

236. 913 F.3d 1179 (9th Cir. 2019).

237. *Id.* at 1184–85 (citing *Or. Nat. Desert Ass’n v. U.S. Forest Serv.*, 465 F.3d 977, 982 (9th Cir. 2006)).

238. *Oregon v. Ashcroft*, 368 F.3d 1118, 1148 (9th Cir. 2004), *aff’d sub nom. Gonzales v. Oregon*, 546 U.S. 243 (2006).

239. *Id.*

Controlled Substances Act.<sup>240</sup> The rule constituted final agency action because the “instruction created direct and immediate consequences for physicians who wish to prescribe controlled substances for assisted suicide.”<sup>241</sup> The directive “significantly and immediately alter[ed] the legal landscape for Oregon physicians.”<sup>242</sup> The dissenting opinion agreed that that the rule was final “even though it [wa]s a nonbinding, pre-enforcement, interpretive rule.”<sup>243</sup>

The Ninth Circuit’s willingness to hold policy statements as final, however, remained unclear for some time. Two opinions announced in 2006—*Animal Legal Defense Fund v. Veneman*,<sup>244</sup> and *Oregon Natural Desert Association v. U.S. Forest Service*<sup>245</sup>—indicated conflicting views on whether a true policy statement could ever be final agency action under *Bennett*.

In *Veneman*, the Ninth Circuit explicitly held that a true policy statement could not constitute final agency action. In that case, the court reviewed a disputed “Draft Policy” that was not yet issued.<sup>246</sup> The issue of finality hinged on whether the draft policy was an interpretive rule or a policy statement.<sup>247</sup> The court was careful to characterize the “Draft Policy” as an interpretive rule rather than a policy statement.<sup>248</sup> As an interpretive rule, the “Draft Policy” would have been final because the agency “would have *bound itself* to a particular interpretation of [the statute] for enforcement purposes had it adopted the Draft Policy.”<sup>249</sup>

The court’s reasoning suggested that, like the D.C. Circuit, the *Veneman* court had effectively supplanted *Bennett*’s second prong with the impact on agency test. The court explained that a “‘typical policy statement’ is ‘not reviewable at all.’”<sup>250</sup> Unlike policy statements, which by definition do not bind the agency’s discretion,<sup>251</sup> interpretive rules, may

---

240. *Id.* at 1120.

241. *Id.* at 1147–48.

242. *Id.* at 1147. The Supreme Court later affirmed the Ninth Circuit but did not speak to finality in its opinion. *Gonzales*, 546 U.S. 243.

243. *Ashcroft*, 368 F.3d at 1147.

244. 469 F.3d 826 (9th Cir. 2006), *opinion vacated on reh’g en banc*, 490 F.3d 725 (9th Cir. 2007).

245. 465 F.3d 977 (9th Cir. 2006).

246. *Id.*

247. *Id.*

248. *Id.* at 839.

249. *Id.* at 840 (emphasis added).

250. *Id.* at 839 (quoting *Tozzi v. U.S. Dep’t of Health & Human Servs.*, 271 F.3d 301, 309 (D.C. Cir. 2001) (Silberman, J., concurring)).

251. *Syncor Int’l Corp. v. Shalala*, 127 F.3d 90, 93–94 (D.C. Cir. 1997).

bind the agency, triggering legal consequences.<sup>252</sup> This repurposing of the impact on agencies test appeared to categorically preclude judicial review of a true policy statement.<sup>253</sup> Indeed, a district court in the Ninth Circuit recently followed suit, holding that a purported policy statement was final agency action precisely because it was not a true policy statement.<sup>254</sup>

In *Oregon Natural Desert*,<sup>255</sup> decided a few months after *Veneman*, the Ninth Circuit suggested a more flexible approach, one that might allow review of a policy statement. The court held as final agency action the United States Forest Service's issuance of annual operating instructions "to permittees who graze livestock on national forest land."<sup>256</sup> The court did not classify the agency action as either an interpretive rule or a policy statement.<sup>257</sup> Significantly, the court did not ask whether the permit instructions had a binding effect on the agency itself when articulating its test for finality.<sup>258</sup> Instead, the court highlighted the flexible use of the word "or" in the second prong of the *Bennett* test.<sup>259</sup> The court surmised that this disjunctive test allowed review of agency actions that "impose an obligation, deny a right, or fix *some* legal relationship as a consummation of the administrative process."<sup>260</sup> This approach allows review of agency action that "has a 'direct and immediate . . . effect on the day-to-day business'" of affected parties.<sup>261</sup> In other words, a guidance document's "practical effects and substantial impact on regulated parties can be enough to meet *Bennett*'s second prong."<sup>262</sup> This recharacterization of the test arguably opened the door for judicial review of some policy statements.

In the 2019 case *Gill v. United States Department of Justice*,<sup>263</sup> the Ninth Circuit firmly resolved the tension between *Veneman* and *Oregon Natural Desert*. Drawing on the holding in *Oregon Natural Desert*, the

---

252. *Veneman*, 469 F.3d at 840.

253. *Id.*

254. *See* *W. Watersheds Project v. Zinke*, 336 F. Supp. 3d 1204, 1227, 1232 (D. Idaho 2018) (holding that a policy statement was not a legislative rule "for reasons already articulated" in the section explaining why it was not final).

255. 465 F.3d 977 (9th Cir. 2006).

256. *Id.* at 979.

257. *Id.*

258. *See generally id.*

259. *See generally id.*

260. *Id.* at 987 (emphasis in original) (quoting *Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 113 (1948)).

261. *Id.* at 987 (quoting *FTC v. Standard Oil Co.*, 449 U.S. 232, 239 (1980)).

262. Lindsay, *supra* note 36, at 2466.

263. 913 F.3d 1179 (9th Cir. 2019).

Ninth Circuit explicitly held that a policy statement constituted final agency action.<sup>264</sup> The court determined that the Functional Standard, a standardized system of information sharing among agencies regarding terrorism activities,<sup>265</sup> was a policy statement.<sup>266</sup> The court nevertheless held that it was final because it triggered “legal and *practical* effects.”<sup>267</sup> The court analyzed the legal and practical effects of the Functional Standard. First, the court determined that the Functional Standard had legal consequences under *Oregon Natural Desert*, although participation in the national information sharing program was within the agencies’ discretion.<sup>268</sup> The court explained that once an agency decided to participate in the program, the administering agency could revoke its membership—and consequently remove the agency’s access to shared information—for failure to comply with the Functional Standard.<sup>269</sup> Second, the court determined that the Functional Standard had practical consequences.<sup>270</sup> The court explained that when an agency joined the program, “there was the immediate understanding that its analysts would conform to the Functional Standard.”<sup>271</sup> The case itself did not indicate whether practical effects alone could render an agency action final.<sup>272</sup> Significantly, however, it demonstrated that a non-binding policy statement could trigger “legal consequences” as required under the *Bennett* test and that practical effects played a role in the analysis as well.<sup>273</sup>

#### IV. THE SUBSTANTIAL IMPACT APPROACH TO FINALITY

The Supreme Court should adopt the substantial impact test in place of

---

264. *Id.* at 1185.

265. President George W. Bush, *Memorandum for the Heads of Executive Departments and Agencies*, (Dec. 16, 2005), <https://fas.org/sgp/news/2005/12/wh121605-memo.html> [<https://perma.cc/J5P2-B8SK>].

266. *Gill*, 913 F.3d at 1186–87.

267. *Id.* at 1184–85 (citing *Or. Natural Desert Ass’n v. U.S. Forest Serv.*, 465 F.3d 977, 982 (9th Cir. 2006)) (emphasis added).

268. *Id.* at 1185.

269. *Id.*

270. *Id.*

271. *Id.*

272. *See* *SurvJustice Inc. v. DeVos*, No. 18-CV-00535-JSC, 2019 BL 112847, at \*5 (N.D. Cal. Mar. 29, 2019) (“The Court is not convinced that the *Gill* court’s holding regarding finality based on the practical effects of the Functional Standard can carry that weight. The holding instead appears intertwined with the court’s holding regarding the legal consequences because both rely on the eGuardian User Agreement.”).

273. *Id.* at \*3 (“[T]he *Gill* court determined that the Functional Standard produced legal consequences despite its nonbinding nature.”) (citing *Gill*, 913 F.3d at 1184-85).

*Bennett's* second prong. First, judicial review allows courts to perform an essential check on agency action. Second, Supreme Court precedent supports a substantial impact approach to finality. Rather than focus merely on a rule's effect on the agency itself—as many lower court decisions have done—the Supreme Court's pragmatic approach seems to emphasize the effect that agency action has on parties outside of the agency. Third, the substantial impact test provides a model for reviewing a small subset of policy statements, like the DACA rescission, that have a substantial impact on private individuals but do not bind the discretion of agency officials.

#### A. *The Importance of Judicial Review for Policy Statements*

When enacting the APA, Congress warned “that the practice of creating administrative agencies . . . threatens to develop a ‘fourth branch’ of the Government for which there is no sanction in the Constitution.”<sup>274</sup> Congress likely had this concern in mind when it drafted section 553 of the APA, providing for notice-and-comment procedures.<sup>275</sup> These procedures were intended to make agencies more accountable to the public.<sup>276</sup> However, when agencies issue policy statements, they necessarily bypass these procedures<sup>277</sup> and the accountability that stems from them. Generally, the more extensive procedures an agency employs the more judicial deference its conclusions receive.<sup>278</sup> Denying judicial review of policy statements has the inverse result: agency action requiring virtually no procedures results in no judicial review at all and allows agencies complete deference.<sup>279</sup> By issuing policy statements, agencies can dodge both notice-and-comment procedures and judicial review, possibly avoiding accountability altogether.<sup>280</sup>

With increased presidential control over agencies,<sup>281</sup> opponents may

---

274. H.R. REP. NO. 1980, 79th Cong., 2d Sess. 8 at 242 (1946), *reprinted in* 1946 U.S. Code Cong. & Admin. News 1195, 1195.

275. Tracy C. Hauser, *The Administrative Procedure Act, Procedural Rule Exception to the Notice and Comment Requirement - A Survey of Cases*, 5 ADMIN. L.J. 519, 521 (1991).

276. *Id.*

277. *See* Hylas, *supra* note 24, at 1648–49.

278. *See, e.g.,* United States v. Mead Corp., 533 U.S. 218, 230–31 (2001) (recognizing that extensive procedures warrant deference and denying *Chevron* deference because agency's procedures were “far removed . . . from [the] notice-and-comment process”).

279. McKee, *supra* note 44, at 401.

280. Cal. Cmty. Against Toxics v. EPA, 934 F.3d 627, 635–36 (D.C. Cir. 2019) (citing William Funk, *Final Agency Action After Hawkes*, 11 N.Y.U. J. L. & LIBERTY 285, 304 (2017)).

281. *See* Hylas, *supra* note 24, at 1651; *see generally* Kathryn A. Watts, *Controlling Presidential*

argue that the public holds agencies accountable through the political process.<sup>282</sup> However, this explanation is unsatisfactory for two reasons. First, the mere availability of judicial review lends legitimacy to federal agencies.<sup>283</sup> Judicial review “suggests that the will of the majority is always subject to the limitations of the Constitution and that government therefore operates by consent inasmuch as all citizens have agreed to government action in accordance with the Constitution.”<sup>284</sup> Second, providing judicial review of an agency’s reasoning forces the agency to make reasoned decisions and, importantly, to own up to its decisions, two actions which are necessary for an informed public to hold agencies accountable.<sup>285</sup> This sentiment is particularly salient when the agency is implying that its administering statute prevents it from acting, thereby pushing the burden onto Congress.<sup>286</sup>

It is true that not all parties affected by non-final agency action are barred from the courthouse. After all, litigants may wait for the agency to rely on the policy statement in an enforcement proceeding,<sup>287</sup> or they may bring constitutional claims.<sup>288</sup> But “regulatory beneficiaries . . . are generally not parties to enforcement actions, and, therefore, may only be able to challenge nonlegislative rules via judicial review.”<sup>289</sup> The threat of

---

*Control*, 114 MICH. L. REV. 683 (2016) (detailing the evolution of presidential control over agencies from the Reagan Administration to the Obama Administration); *id.* at 685 (“This Article picks up where Kagan left off nearly fifteen years ago, demonstrating that presidential control has deepened during the [Bush and Obama] presidencies.”).

282. *See, e.g.,* *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 59 (1983) (“A change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency’s reappraisal of the costs and benefits of its programs and regulations.”). The view that agencies will be responsive to the will of the public also contradicts the view that agencies should “apply their expertise dispassionately,” another argument for limited review of agency action. *See* Sidney A. Shapiro, *Heightened Scrutiny of the Fourth Branch: Separation of Powers and the Requirement of Adequate Reasons for Agency Decisions*, 1987 DUKE L.J. 387, 434 n.233 (1987).

283. Shapiro, *supra* note 282, at 394–95.

284. *Id.* at 395.

285. *See Regents*, 908 F.3d 476, 498 (explaining that when an agency attempts to hide beneath its discretion while really making a legal argument, it is the job of the courts to determine if the legal argument is sound).

286. *See id.*

287. *Am. Tort Reform Ass’n v. Occupational Safety & Health Admin.* 738 F.3d 387, 390 (D.C. Cir. 2013) (Non-final agency action “is not subject to judicial review unless it is relied upon or applied to support an agency action in a particular case”).

288. *Navajo Nation v. Dep’t of the Interior*, 876 F.3d 1144, 1170 (9th Cir. 2017) (quoting 5 U.S.C. § 702 (2012)) (“Claims not grounded in the APA, like the constitutional claims in *Presbyterian Church* and *VCS I*, ‘do[ ] not depend on the cause of action found in the first sentence of § 702’ and thus § 704’s limitation does not apply to them.”).

289. *Cal. Cmty. Against Toxics v. EPA*, 934 F.3d 627, 636 (D.C. Cir. 2019) (citing Nina A.

an enforcement proceeding may be enough to coerce some parties into obeying, particularly where an enforcement proceeding would be especially costly.<sup>290</sup> Additionally, not all those harmed by a policy statement can point to a viable constitutional claim.

“At bottom, finality is about agency accountability for the decisions it makes and the consequences it unleashes.”<sup>291</sup> The decision to grant or deny review under finality determines for example “whether those who are told to close up shop and discharge their employees are entitled first to a day in court.”<sup>292</sup> If courts continue to interpret policy statements as non-final, they may preclude themselves from carrying out this essential function on an entire category of influential agency action.

*B. Supreme Court Precedent Supports a Substantial Impact Approach to Finality*

Supreme Court precedent supports shifting away from the more categorical approach and instead adopting a substantial impact approach toward finality. First, the lower courts’ approach of supplanting *Bennett*’s second prong with the impact on agencies test defies binding Supreme Court precedent. Second, cases employing the Supreme Court’s pragmatic approach, as recently emphasized in *Hawkes*, suggest that the Court also considers a rule’s impact outside of the agency in its finality analysis. A substantial impact approach, which considers the action’s practical impact outside of the agency, would thus be consistent with this precedent.

First, with the exception of the *Gill* Court, it appears that the lower courts are categorically classifying policy statements as non-final.<sup>293</sup> However, this categorical approach contradicts the Supreme Court’s precedent. The decision in *Park Hospitality Association v. DOI*<sup>294</sup>—holding that what it deemed to be a “general statement of policy” was final—suggests that policy statements are at least not categorically non-final.<sup>295</sup> Indeed, no trace of the categorical approach appears in either *Bennett* or *Hawkes*: neither court

---

Mendelson, Regulatory Beneficiaries and Informal Agency Policymaking, 92 CORNELL L. REV. 397, 420–24 (2007).

290. *Abbott Labs. v. Gardner*, 387 U.S. 136, 152 (1967).

291. *Soundboard Ass’n v. FTC*, 888 F.3d 1261, 1284 (D.C. Cir. 2018) (Millett, J., dissenting), *petition for cert. filed*.

292. *Id.* at 1285.

293. *See supra* Part III.

294. 538 U.S. 803 (2003).

295. *Id.* at 809 (quoting 5 U.S.C. § 553(b)(3)(A) (2012) (quotations omitted)).



“asked whether the action at issue had the force and effect of law”<sup>296</sup>; nor did they ask whether the agency action was binding on the agency itself.<sup>297</sup>

Supplanting *Bennett*'s second prong with the impact on agencies test may have the reverse effect intended by the Supreme Court's pragmatic approach. In *Abbott Laboratories*, the Court explained that the challenged regulation put private parties “in a dilemma” because they had to comply or risk an enforcement proceeding.<sup>298</sup> The *Norton* Court in the D.C. Circuit applied the equivalent of the impact on agencies test to determine that agency action was not final.<sup>299</sup> The court explained that “there ha[d] been no enforcement actions that indicate[d] whether the FWS consider[ed] itself bound by survey results.”<sup>300</sup> The holding effectively requires courts to wait for the agency to bring enforcement proceedings to determine if the policy statement is actually binding and therefore final.<sup>301</sup> Requiring that a purported policy statement bind the agency before labeling it final seems to undermine the holding in *Abbott Laboratories* and other Supreme Court cases that take a pragmatic approach to finality. After all, these cases emphasized the fact that agency action may be final *before* enforcement proceedings are brought.<sup>302</sup>

Second, precedent supports an approach that looks to the practical effect of a rule outside of the agency. The Court in *Frozen Food* held as final an order that “had no authority except to give notice of how the Commission interpreted . . .” the law because of practical consequences on parties outside of the agency.<sup>303</sup> Because the order warned private parties that they risked separate criminal penalties, it was final and immediately reviewable.<sup>304</sup> Furthermore, in *Abbott Laboratories*, the Court emphasized the challenged regulation's “direct effect on the day-to-day business” of regulated parties.<sup>305</sup> And in 2016, *Hawkes* reemphasized this pragmatic approach.<sup>306</sup>

Parties affected by policy statements may also face the dilemma highlighted in *Abbott Laboratories*<sup>307</sup> Individuals may reasonably fear an

---

296. Cal. Cmty. Against Toxics v. EPA, 934 F.3d 627, 635 (D.C. Cir. 2019).

297. See generally *Bennett v. Spear*, 520 U.S. 154 (1997); *U.S. Army Corps of Engineers v. Hawkes Co.*, 578 U.S. \_\_\_, 136 S. Ct. 1807 (2016).

298. *Abbott Labs. v. Gardner*, 387 U.S. 136, 152 (1967).

299. *Nat'l Ass'n of Home Builders v. Norton*, 415 F.3d 8, 17 (D.C. Cir. 2005).

300. *Id.*

301. See *id.*

302. *Abbott Labs.*, 387 U.S. at 152.

303. *Id.* (citing *Frozen Food Express v. United States*, 351 U.S. 40 (1956)).

304. *Id.*

305. *Id.*

306. See *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 578 U.S. \_\_\_, 136 S. Ct. 1807, 1815 (2016).

307. See *Abbott Labs.*, 387 U.S. at 152.

enforcement proceeding even if the agency has not officially bound itself and committed to enforcing its policy statement. The DACA rescission exemplifies this. Indeed, DHS may continue to grant deferred action on a case-by-case basis and to classify DACA recipients as low priority for deportation.<sup>308</sup> However, the agency itself warned DACA recipients to “be prepared to no longer remain here.”<sup>309</sup>

Opponents may argue that the substantial impact test has no place in the jurisprudence because *Vermont Yankee*'s<sup>310</sup> holding is widely viewed as invalidating the substantial impact test as applied to procedural sufficiency. However, *Vermont Yankee*'s holding cannot fairly be read to bar the use of the substantial impact test in all areas. Courts have generally assumed that the holding of *Vermont Yankee* invalidated the substantial impact test as it was applied to notice-and-comment procedures only.<sup>311</sup> *Vermont Yankee* emphasized the importance of giving discretion to agencies “in determining when extra procedural devices should be employed.”<sup>312</sup> It does not follow, then, that courts should give discretion to agencies in determining whether their action should be reviewable. Indeed, considering the importance of judicial review for agency accountability, such a result would be absurd.

Furthermore, the substantial impact test combined with the first prong of *Bennett* satisfies the purpose of finality as defined by the Supreme Court. Finality seeks to control timing,<sup>313</sup> yet *Bennett*'s first prong satisfies much of the timing element.<sup>314</sup> Courts must wait for action that “marks the consummation of the agency’s decisionmaking process” before they can review it.<sup>315</sup> Requiring the agency action to have a substantial impact on parties outside the agency also serves “to protect agencies from undue judicial interference with their lawful discretion . . . .”<sup>316</sup> If agency action marks the

---

308. See *Regents of the Univ. of Cal. v. U.S. Dep’t of Homeland Sec.*, 908 F.3d 476, 513 (9th Cir. 2018), *cert. granted*, 139 S. Ct. 2779 1156 (June 28, 2019) (“[T]he rescission memorandum . . . leaves in place the background principle that deferred action is available on a case-by-case basis.” (citing Duke Memo, *supra* note 18)).

309. Rebecca Shabad, *How the Decision to End DACA Affects “Dreamers”*, CBS NEWS (Sept. 5, 2017), <https://www.cbsnews.com/news/how-the-decision-to-end-daca-affects-dreamers/> [<https://perma.cc/7LUU-K2YZ>].

310. *Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519 (1978).

311. *Abbott Labs.*, 387 U.S. at 152.

312. *Vermont Yankee*, 435 U.S. at 546.

313. 2 HICKMAN & PIERCE, *supra* note 136, at 1453.

314. See also McKee, *supra* note 44, at 406–07 (arguing that *Bennett*'s first prong alone would satisfy Congress's purpose behind the finality requirement).

315. *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997).

316. *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 56 (2004).

consummation of the agency's decisionmaking process, that party has necessarily exhausted its administrative remedies. If at that point, the action has a substantial impact on a private party who has no other remedies available, judicial interference cannot fairly be said to be "undue."

C. *The DACA Rescission Would Have a Substantial Impact*

The DACA rescission typifies a policy statement that does not bind the agency yet still has a substantial impact outside of the agency. According to the Ninth Circuit, the DACA rescission survives the impact on agencies test and is a policy statement under the modern application of the law;<sup>317</sup> however, the Ninth Circuit never addressed finality, likely because the government never raised the issue.<sup>318</sup> After DACA's rescission, litigants filed suit in various jurisdictions across the country.<sup>319</sup> In response to each of these lawsuits, the DHS failed to directly dispute that the policy rescinding DACA was final agency action under APA section 704.<sup>320</sup>

---

317. *Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Sec.*, 908 F.3d 476, 486 (9th Cir. 2018).

318. *See infra* notes 320–322.

319. *Regents*, 908 F.3d at 514; *Batalla Vidal v. Duke* (No. 17-cv-5228-NGG-JO) (E.D.N.Y. Oct. 27, 2017); *NAACP v. Trump*, 298 F. Supp. 3d 209, 237 (D.D.C. 2018), *adhered to on denial of reconsideration*, 315 F. Supp. 3d 457 (D.D.C. 2018).

320. Defendants' Notice of Motion And Motion to Dismiss All N.D. Cal. DACA Cases; Memorandum In Support, *Regents*, 908 F.3d 476 (9th Cir. 2018) (No. 3:17-cv-05211-WHA) (No. 3:17-cv-05235-WHA) (No. 3:17-cv-05329-WHA) (No. 3:17-cv-05380-WHA) (No. 3:17-cv-05813-WHA) (N.D. CA 2017); Defendants' Motion to Dismiss, *NAACP v. Trump*, 298 F. Supp. 3d 209 (D.D.C. 2018) (No. 17-1907); Defendants' Motion To Dismiss Or, In The Alternative, For Summary Judgment, Trustees of Princeton v. U.S., 298 F. Supp. 3d 209 (D.D.C. 2017) (No. 17-cv-2325); Defendants' Motion To Dismiss Or, In The Alternative, For Summary Judgment, Casa De Md. v. U.S. Dept. of Homeland Sec., 284 F. Supp. 3d 758 (D. Md. 2017) (No. 17-cv-2942); Defendants' Motion To Dismiss, *Batalla Vidal v. Duke*, 295 F. Supp. 3d 127 (E.D.N.Y. 2017) (No. 16-cv-41196) (No. 16-cv-4756) (No. 17-cv-5228); Plaintiffs' Motion for Provisional Relief at 16, n.7, Nos. 17-CV-05211-WHA, 17-CV-05235-WHA, 17-CV-05329-WHA, 17-CV-05380-WHA, 17-CV-05813-WHA (Nov. 2017) ("In the motion to dismiss filed in *Batalla Vidal v. Duke*, No. 16-cv-41196 (E.D.N.Y. Oct. 27, 2017), ECF No. 95-1, defendants did not challenge finality or ripeness. If defendants take a contrary position in this case, plaintiffs will respond either in their opposition to defendants' motion to dismiss or in their reply supporting the instant motion."). The government's motions did raise several issues that were peripheral to finality. The government argued that the Plaintiffs' claim that DHS violated 5 U.S.C. § 553 (2012) failed because its requirement to publish impact on small businesses only applies to rules that have gone through notice-and-comment rulemaking. *See* Motion to Dismiss at 39, *Batalla Vidal v. Duke*, 295 F. Supp. 3d 127 (E.D.N.Y. 2017) (No. 16-cv-4756-NGG-Jo) (No. 17-cv-5228-NGG-JO) (quoting *U.S. Telecom Ass'n v. FCC*, 400 F.3d 29, 42 (D.C. Cir. 2005)), ("The RFA's requirement that an agency publish analyses of a rule's impact on small businesses applies only 'when an agency promulgates a final rule under section 553 of . . . title [5], after being required by that section or any other law to publish a general notice of proposed rulemaking.'"). The government also argued that 8 U.S.C. § 1252(g) (2012) only allows review of final removal decisions and that this was not a final removal decision. *See* Motion to Dismiss at 22, *Casa De Md.*, 284 F. Supp. 3d 758 ("[N]o court shall have jurisdiction to hear any cause or claim by

Under the D.C. Circuit’s view in *Trudeau*, discussed above,<sup>321</sup> the issue may have been waived. Although the Supreme Court may never rule on finality here, this case presents an example of a policy statement that would be final under the proposed substantial impact approach.

Under the older substantial impact test, the rescission of DACA likely would have been deemed a legislative rule, not a policy statement. Similarly, under a substantial impact approach to finality, the DACA rescission would be final agency action. *Lewis-Mota*<sup>322</sup>—discussed in Part I of this Comment as an example of the substantial impact test—provides a useful model for analyzing the substantial impact of the DACA rescission.

The DACA rescission mirrors the fact pattern in *Lewis-Mota*, a case that applied the substantial impact test to hold that the Secretary of Labor’s revocation of a policy was actually a legislative rule.<sup>323</sup> In *Lewis-Mota*, the Secretary rescinded a program that gave priority to applicants seeking permanent residence who had specified occupations.<sup>324</sup> Similarly, the case at hand involves a rescission of DACA, a program that gave deferred action priority to undocumented individuals meeting certain criteria.<sup>325</sup>

Although the agency in *Lewis-Mota*, like DHS,<sup>326</sup> could still review the applications of those individuals on a case-by-case basis, the court held that both the original program and the rescission of that program would have a substantial impact on both the undocumented individuals seeking permanent residence and employers seeking to hire those individuals.<sup>327</sup> Permanent residents would face a more burdensome application process, and employers

---

or on behalf of any alien arising from the decision or action by the [Secretary of Homeland Security] to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter.”) (quoting 8 U.S.C. § 1252(g)). The Ninth Circuit rejected this argument. *See Regents*, 908 F.3d at 503 (“The Supreme Court has explicitly held that this section ‘applies only to three discrete actions that the [Secretary] may take: her ‘decision or action’ to ‘commence proceedings, adjudicate cases, or execute removal orders.’” (quoting *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 482 (1999)) (emphasis in original)). The government also argued that there was no change to DHS’s privacy policy, so there was no APA finality and the claims regarding the privacy policy were not final agency action. *See* Defendant’s Motion to Dismiss at 34, *Trustees of Princeton*, 298 F. Supp. 3d 209 (No. 17-cv-2325); Defendant’s Motion to Dismiss at 37, *Casa De Md.* 284 F. Supp. 3d 758, 38–39 (No. 17-cv-2942).

321. *See supra* citation to section II.A.

322. *Lewis-Mota v. Sec’y of Labor*, 469 F.2d 478 (2d Cir. 1972).

323. *Id.* at 482.

324. *Id.* at 480.

325. Napolitano Memo, *supra* note 7.

326. Duke Memo, *supra* note 18; Carrie Johnson, *Trump Rescinds DACA, Calls on Congress to Replace It*, NPR (Sept. 6, 2017), <https://www.npr.org/2017/09/06/548819221/trump-administration-rescinds-daca-calls-on-congress-to-replace-it> [<https://perma.cc/9LHP-4866>].

327. *Lewis-Mota*, 469 F.2d at 482.

would struggle to fill job vacancies.<sup>328</sup>

Revoking DACA would have an even greater impact on both DACA recipients and employers. DACA recipients would be subject to deportation, lose their Employment Authorization Documents and other government benefits, and be unable to reenter the United States if they had not already obtained Advance Parole.<sup>329</sup> Employers would not be able to retain DACA recipients once their Employment Authorization Documents expired and would be forced to replace them.<sup>330</sup> Moreover, the effect on the economy is estimated to be as much as \$280 billion in lost growth<sup>331</sup> and 700,000 lost jobs.<sup>332</sup>

Because DHS still retains its discretion to grant deferred action on a case-by-case basis, the rescission of DACA does not bind the agency and thus is not a substantive rule. Under the modern impact on agency test, this means that the rescission of DACA did not need to undergo notice-and-comment procedures. If courts adopted a substantial impact approach to *Bennett*'s second prong, the rescission of DACA would be final agency action and thus reviewable whether or not the issue had been waived.

## CONCLUSION

DHS's rescission of DACA occupies a curious space in administrative law. It has the potential to substantially impact hundreds of thousands of undocumented individuals, yet in virtually all lower courts it is not reviewable because it is a policy statement. Some courts applying a flexible approach are willing to review interpretive rules, and recently, in *Gill*, the Ninth Circuit was willing to review a policy statement. This Comment argues that some policy statements, such as the rescission of DACA, should also be reviewable in courts. By applying the substantial impact test as *Bennett*'s second prong, courts could hold as final any agency action that (1) marks the end of the agency's decisionmaking process and (2) has a substantial impact outside of the agency. Applying the substantial impact test adheres to the Supreme Court's more recent precedent in cases like *Hawkes*, which emphasize a pragmatic approach. Moreover, it allows courts to hold agencies accountable when their actions have a substantial impact on private individuals.

---

328. *Id.*

329. Rebecca Shabad, *How the Decision to End DACA Affects "Dreamers"*, CBS NEWS (Sept. 5, 2017), <https://www.cbsnews.com/news/how-the-decision-to-end-daca-affects-dreamers> [https://perma.cc/7LUU-K2YZ].

330. *Id.*

331. Alana Abramson, *Here's How Much Rescinding DACA Could Cost the U.S. Economy*, FORTUNE (Sept. 6, 2017), <http://fortune.com/2017/09/05/daca-donald-trump-economic-impact/> [https://perma.cc/934F-BESM].

332. *Id.*