GOVERNING FOR IMPACT

Challenging Non-Enforcement

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Issue Brief

TABLE OF CONTENTS

I. INTRODUCTION

President Trump has begun his second term by trying to dismantle the administrative state.[1] Now it appears that he intends to direct agencies to cease enforcing vital statutory and regulatory requirements.[2] On February 19, he issued Executive Order 14219, which directs agencies to review "all" of their regulations for potential rescission — and, in the interim, "de-prioritiz[e] actions to enforce regulations that are based on anything other than the best reading of a statute" or "that go beyond the powers vested in the Federal Government by the Constitution."[3] The order appears to implement a proposal by Elon Musk and Vivek Ramaswamy, announced in a November 2024 op-ed, that President Trump "immediately pause the enforcement of those regulations and initiate the process for review and rescission."[4] Indeed, the administration has already announced that it intends to pause or reduce enforcement of certain requirements under the Foreign Corrupt Practices Act[5] and the Corporate Transparency Act.[6]

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[1] *See* Jacob Gardenswartz, *President Trump's First 30 Days: Rapid Government Changes and Controversial Actions*, Scripps News (Feb. 21, 2025), https://www.scrippsnews.com/politics/president-trumps-first-100-days/president-trumps-first-30-days-rapid-government-changes-and-controversial-actions.

[2] *See, e.g.*, Rick Claypool, *Corporate Clemency: How Trump Is Halting Enforcement Against Corporate Lawbreakers*, Public Citizen (Mar. 4, 2025), https://www.citizen.org/article/corporate-clemency-trump-enforcement-report/.

[3] *Ensuring Lawful Governance and Implementing the President's "Department of Government Efficiency" Deregulatory Initiative*, Exec. Order 14219 §§ 2(a), 3(a), 90 Fed. Reg. 10583 (Feb. 19, 2025), https://www.federalregister.gov/documents/2025/02/25/2025-03138/ensuring-lawful-governance-and-implementing-the-presidents-department-of-government-efficiency.

[4] Elon Musk & Vivek Ramaswamy, *The DOGE Plan to Reform Government*, Wall St. J. (Nov. 20, 2024), https://www.wsj.com/opinion/musk-and-ramaswamy-the-doge-plan-to-reform-government-supreme-court-guidance-end-executive-power-grab-fa51c020.

[5] *See* Kristen Edgreen Kaufman, *What a Foreign Corrupt Practices Act Pause Means for Companies*, Forbes (Mar. 3, 2025), https://www.forbes.com/sites/kristenkaufman/2025/03/03/trump-paused-the-foreign-corrupt-practices-act-what-does-it-mean-for-companies/.

[6] *See US Treasury Department Says It Will Not Enforce Anti-Money Laundering Law*, Reuters (Mar. 2, 2025), https://www.reuters.com/world/us/us-treasury-department-says-it-will-not-enforce-anti-money-laundering-law-2025-03-03/.

Non-enforcement is likely to be a central part of the Trump administration's second-term agenda for several reasons. The administration is sure to face pressure to scale back enforcement actions from business interests and from the conservative movement. And having drastically reduced agency capacity by terminating experienced civil servants, it will be all the more difficult for the administration to enact, revise, or repeal regulations through the procedures required by the Administrative Procedure Act (APA) — leaving non-enforcement as a potentially appealing option in the interim.

However, refusing to enforce valid federal laws and regulations wholesale is unlawful. To be sure, agencies have long been understood to possess discretion to decide how to discharge their enforcement responsibilities — to decide which violations merit action based on the agency's statutory charge, priorities, and resources. But neither the Constitution nor the APA permits the administration to nullify valid statutes and regulations by refusing to enforce them based on policy disagreements. To repeal a statute requires bicameralism and presentment;[7] to repeal a legislative rule, an agency must generally comply with the APA's notice-and-comment requirements and supply a reasoned explanation.[8] Agencies cannot sidestep these requirements by declaring a law or a regulation to be a dead letter.

This Issue Brief outlines how litigants might challenge the Trump administration's potential non-enforcement efforts. It first explains why two cases often thought to make non-enforcement challenges more difficult — *Heckler v. Chaney* and *United States v. Texas* — in fact leave substantial room to challenge categorical non-enforcement directives. It then walks through how litigants might frame such challenges, focusing on how litigants might identify a challengeable action, how they might demonstrate standing, what legal claims they might assert, and which remedies they might be able to seek. Finally, it identifies how litigants might challenge other types of decisions related to non-enforcement, including efforts to delay federal rules, refusals to engage in rulemaking, and failures to take statutorily required actions.

[7] *See* U.S. Const. art. I, § 7, cl. 2.

[8] *See* 5 U.S.C. §§ 553, 706(2); *see also id.* § 551(5) (defining "rule making" to include "formulating, amending, or repealing a rule").

II. PERCEIVED BARRIERS TO NON-ENFORCEMENT CHALLENGES

In challenging non-enforcement decisions, litigants might need to surmount two barriers, articulated most prominently in two seminal non-enforcement cases: (1) the APA's exception from judicial review for action "committed to agency discretion by law," found in 5 U.S.C. § 701(a)(2) and addressed by *Heckler v. Chaney*, 470 U.S. 821 (1985); and (2) Article III standing, addressed by *United States v. Texas*, 599 U.S. 670 (2023).

Heckler v. Chaney. In *Heckler*, several prisoners challenged the Food & Drug Administration's refusal to take enforcement action regarding the drugs to be used in their executions.[9] The Court held that the FDA's decision whether to take enforcement action was committed to the agency's discretion, and so the prisoners' challenge was barred by § 701(a)(2).[10]

At the outset, the Court reasoned that an agency's decision not to engage in enforcement action has generally been regarded as "unsuitab[le] for judicial review" because it "involves a complicated balancing of a number of factors which are peculiarly within [the agency's] expertise."[11] Those factors include "whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all."[12] The Court also noted that an agency's decision not to act typically does not involve the exercise of "coercive power" over an individual's rights, and resembles a prosecutor's decision whether to indict, "a decision which has long been regarded as the special province of the Executive Branch."[13]

[9] 470 U.S. at 823.

[10] *Id.* at 831-32.

[11] *Id.* at 831.

[12] *Id.*

[13] *Id.* at 832 (emphasis omitted).

Given those concerns, the Court determined that "an agency's decision not to take enforcement action should be presumed immune from judicial review under § 701(a)(2)."[14] The Court emphasized that such decisions are "only presumptively unreviewable; the presumption may be rebutted where the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers."[15] Specifically, "Congress may limit an agency's exercise of enforcement power if it wishes, either by setting substantive priorities, or by otherwise circumscribing an agency's power to discriminate among issues or cases it will pursue."[16] However, in reviewing the language of the Federal Food, Drug, and Cosmetic Act, the Court found no basis for limiting the FDA's discretion.[17] The Court therefore concluded that the presumption of unreviewability had not been overcome, although it emphasized that § 701(a)(2)'s exception to the reviewability of agency action "remains a narrow one."[18]

Heckler also acknowledged several potential exceptions to its presumption of unreviewability. For example, the Court noted that it did not confront "a refusal by the agency to institute proceedings solely on the belief that it lacks jurisdiction," or a situation where " the agency has 'consciously and expressly adopted a general policy' that is so extreme as to amount to an abdication of its statutory responsibilities."[19] The Court also noted that "[n]o colorable claim" had been made "that the agency's refusal to institute proceedings violated any constitutional rights of respondents."[20] Justice Brennan, concurring, also suggested that review might lie where "an agency has refused to enforce a regulation lawfully promulgated and still in effect" or where an agency declines to enforce "for entirely illegitimate reasons," like receiving a bribe.[21]

In the years since *Heckler*, federal courts have further cabined *Heckler*'s presumption of unreviewability to decisions not to engage in enforcement in *individual* cases. The Fifth

[14] *Id.*

[15] *Id.* at 832-33.

[16] *Id.* at 833.

[17] *Id.* at 835-37.

[18] *Id.* at 838.

[19] *Id.* at 833 n.4 (quoting *Adams v. Richardson*, 480 F.2d 1159, 1162 (D.C. Cir. 1973) (en banc)).

[20] *Id.* at 838.

[21] *Id.* at 839 (Brennan, J., concurring).

Circuit has held that *Heckler* does not apply at all to agency rules providing for nonenforcement.[22] Similarly, the D.C. Circuit, in *OSG Bulk Ships, Inc. v. United States* and *Crowley Caribbean Transport, Inc. v. Pena*, "distinguished between 'an agency's statement of a *general enforcement policy*' and a '*single-shot* nonenforcement decision,' the former being reviewable even though the latter may not be."[23] General statements "are more likely to be direct interpretations of the commands of the substantive statute rather than the sort of mingled assessments of fact, policy, and law that drive an individual enforcement decision and that are, as [*Heckler*] recognizes, peculiarly within the agency's expertise and discretion"; they "pose[] special risks" that the agency has abdicated its enforcement responsibilities; and they "will generally present a clearer (and more easily reviewable) statement of [the agency's] reasons for acting."[24] However, some courts have held that the *Crowley* exception to *Heckler* applies "*only* when an agency's general nonenforcement policy is based on a legal interpretation of the substantive statute."[25]

United States v. Texas. The Supreme Court's recent decision in *Texas* may make non-enforcement challenges even more difficult to bring. In *Texas*, the Court held that states lacked Article III standing to challenge a set of guidelines that prioritized the arrest of certain immigrants.[26] The Court concluded that the states had not shown a cognizable injury-in-fact, even though the states' theory of injury — monetary costs — was, in some sense, both factually[27] and legally[28] well-established.

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[22] *Texas v. Biden*, 20 F.4th 928, 976-88 (5th Cir. 2021), *as revised* (Dec. 21, 2021), *rev'd and remanded on other grounds*, 597 U.S. 785 (2022).

[23] *OSG Bulk Ships, Inc. v. United States*, 132 F.3d 808, 812 (D.C. Cir. 1998) (quoting *Crowley Caribbean Transp., Inc. v. Pena,* 37 F.3d 671, 676 (D.C. Cir. 1994)); *accord Casa De Maryland v. DHS*, 924 F.3d 684, 699 (4th Cir. 2019) ("Accordingly, as courts have recognized, an agency's expression of a broad or general enforcement policy based on the agency's legal interpretation is subject to review.").

[24] *Crowley*, 37 F.3d at 677.

[25] *E.g., United States v. Simmons*, 2022 WL 1302888, at *13-14 (D.D.C. May 2, 2022) (emphasis added) (collecting cases).

[26] 599 U.S. at 673.

[27] *See id.* at 676 ("The District Court found that the States would incur additional costs because the Federal Government is not arresting more noncitizens.").

[28] *See id.* ("Monetary costs are of course an injury."); *Czyzewski v. Jevic Holding Corp.*, 580 U.S. 451, 464 (2017) ("For standing purposes, a loss of even a small amount of money is ordinarily an 'injury.'").

The critical defect in the states' case, the Court reasoned, was their failure to show that their alleged injuries were "'legally and judicially cognizable'" — that they would have "traditionally" been deemed "redressable in federal court."[29] The Court explained the states had "not cited any precedent, history, or tradition of courts ordering the Executive Branch to change its arrest or prosecution policies so that the Executive Branch makes more arrests or initiates more prosecutions."[30] "On the contrary, th[e] Court has previously ruled that a plaintiff lacks standing to bring such a suit," holding in *Linda R.S. v. Richard D.*, a 1973 decision about child support, that a party "'lacks a judicially cognizable interest in the prosecution … of another.'"[31] Although the plaintiff in *Linda R.S.* sought to compel a criminal prosecution, the Court noted that another case, *Sure-Tan Inc. v. NLRB*, had applied *Linda R.S.*'s reasoning in the context of immigration enforcement as well.[32]

The Court also relied upon many of the same constitutional and policy concerns as it did in *Heckler*, over the objections of multiple justices that *Heckler* had nothing to do with Article III standing.[33] The Court reiterated that a decision "*not* to arrest or prosecute … does not exercise coercive power over an individual's liberty or property"; that lawsuits challenging the Executive Branch's prosecution decisions "run up against the Executive's Article II authority to enforce federal law"; and that "courts generally lack meaningful standards for assessing the propriety of enforcement choices in this area."[34] The Court worried that, if it "green-lighted" the states' suit, it "could anticipate complaints in future years about alleged Executive Branch under-enforcement of any similarly worded laws — whether they be drug laws, gun laws, obstruction of justice laws, or the like."[35]

And yet the Court also recognized five exceptions to its holding, some of which resemble exceptions in *Heckler.* Those exceptions include (1) constitutional claims relating to selective prosecution; (2) circumstances where Congress has "elevate[d] *de facto* injuries to

[29] *Texas*, 599 U.S. at 676 (quoting *Raines v. Byrd*, 521 U.S. 811, 819 (1997)).

[30] *Id.*

[31] *Id.* at 677 (quoting *Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973)).

[32] *Id.* (citing *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 897 (1984)).

[33] *Cf. id.* at 708 (Barrett, J., concurring in the judgment) ("Whatever *Heckler*'s relevance to cases like this one, it does not establish a principle of Article III standing."); *id.* at 726 (Alito, J., dissenting) ("*Heckler* is not about standing and only states a presumptive rule.").

[34] *Id.* at 678-79 (majority opinion).

[35] *Id.* at 681.

the status of legally cognizable injuries redressable by a federal court"; (3) "*Heckler*-style 'abdication' argument[s]"; (4) policies involving "the Executive Branch's provision of legal benefits or legal status; and (5) "policies governing the continued detention of noncitizens."[36] The Court did not address the other potential exception identified in *Heckler* (non-enforcement based on perceived lack of jurisdiction), nor did it engage with the questions posed by Justice Brennan's concurrence in *Heckler* about refusing to enforce on the basis of illegitimate motives.

Moreover, it remains unclear whether *Texas* applies to non-enforcement challenges in the civil context at all. The Court emphasized that it confronted a "highly unusual lawsuit," and so its decision "[wa]s narrow and simply maintain[ed] the longstanding jurisprudential status quo."[37] In focusing on "the Executive Branch's exercise of enforcement discretion over whether to *arrest or prosecute*,"[38] the Court seemed to contemplate criminal or quasi-criminal matters, like immigration.[39] Indeed, the principal case upon which it relied, *Linda R.S.*, emphasized "the special status of *criminal* prosecutions in our system."[40] As Justice Marshall explained in his concurrence in *Heckler*, however, "[a] request that a nuclear plant be operated safely or that protection be provided against unsafe drugs is quite different from a request that an individual be put in jail or his property confiscated as punishment for past violations of the criminal law."[41] But most of the cases to follow *Texas* have also

[36] *Id.* at 681-83 (quotation omitted). In dissent, Justice Alito criticized the majority's list of exceptions, noting that "the Court is unwilling to say that cases in four of these five categories are actually exempted from its general rule, and the one remaining category" — the first — "is exceedingly small." *Id.* at 727.

[37] *Id.* at 684-86 (majority opinion); *see also Texas v. DHS*, 2024 WL 4711951, at *27 (E.D. Tex. Nov. 7, 2024) (explaining that *Texas* "is not best read as giving district courts license to reexamine standing precedent across the board").

[38] *Texas*, 599 U.S. at 677 (emphasis added).

[39] *See Padilla v. Kentucky*, 559 U.S. 356, 365 (2010) ("Although removal proceedings are civil in nature, deportation is nevertheless intimately related to the criminal process." (quotation omitted)); Peter L. Markowitz, *Deportation Is Different*, 13 U. Pa. J. Const. L. 1299 (2011) (describing deportation as "a unique legal animal that lives in the crease between the civil and criminal labels").

[40] 410 U.S. at 619.

[41] 470 U.S. at 847-48 (Marshall, J., concurring in the judgment). *But see In re Aiken Cnty.*, 725 F.3d 255, 264 n.9 (D.C. Cir. 2013) (Kavanaugh, J.) (noting that "civil enforcement decisions" are "to some extent analogous to criminal prosecution decisions and stem from similar Article II roots").

involved immigration enforcement and so courts have not had an opportunity to consider the full scope of *Texas*'s reasoning.

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In sum, the leading precedents concerning challenges to non-enforcement decisions — *Heckler* and *Texas* — identify a number of the problems litigants might face in asserting such challenges but also indicate potential paths litigants might pursue.

III. CHALLENGING NON-ENFORCEMENT DIRECTIVES

To have the best chance of avoiding jurisdictional tripwires, litigants might focus on challenging categorical non-enforcement directives, by which agencies indicate that they will not enforce statutory or regulatory requirements in all or some cases. Such directives might be challenged by those who benefit from robust enforcement, including affected organizations and individuals, state and local governments, or competitors to under-regulated firms. And litigants might have a wide array of potential claims, including under the Administrative Procedure Act and the Take Care Clause of the Constitution. If such claims were to prevail, the appropriate remedy would likely be vacatur of the agency's non-enforcement directive, although litigants might consider seeking injunctive relief if the agency does not appear to be resuming enforcement activity.

A. Identifying a Challengeable Directive

To start, litigants might have the most success challenging generalized, categorical directives regarding how agencies intend to fulfill their enforcement responsibilities.[42] That category might encompass everything from notice-and-comment rules, to enforcement manuals and guidance documents, to public pronouncements by agency officials. And it

[42] Such statements are considered "rules" under the APA, which encompasses "agency statement[s] of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy." 5 U.S.C. § 551.

might encompass everything from statements that an agency intends to refrain from enforcing requirements in whole or in part to statements about what sorts of cases the agency will prioritize.

To be challengeable under the APA, an agency's "action" must also be "final,"[43] which requires two showings. First, the agency's action "must mark the consummation of the agency's decisionmaking process … —it must not be of a merely tentative or interlocutory nature."[44] Although that requirement generally will not pose an issue where the agency has announced its considered position on how it intends to exercise its enforcement authorities, it might rule out, for example, situations where the agency takes no immediate action but instead purports only to be reviewing its priorities and existing actions.[45] Second, "the action must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'"[46] Non-enforcement directives might do so in a number of ways, including where they provide a "safe harbor" to private actors[47] or limit the discretion of agency officials to make enforcement decisions.[48]

Among the various types of generalized non-enforcement directives, four categories might be particularly vulnerable to challenge: directives by which the agency abdicates its statutory or regulatory duties, directives by which the agency not only refrains from enforcing a given requirement but also confers benefits or legal status, directives that an agency will refrain from enforcement based on an interpretation of the underlying statute or regulation, and directives that are tantamount to the repeal of an existing regulation. Although other types of non-enforcement decisions might also be reviewable, challenges to these categories might be on safer ground to the extent they sidestep the principal concern expressed by courts reviewing non-enforcement decisions: an unwillingness to

[43] *Id.* § 704.

[44] *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (quotation omitted).

[45] *See, e.g.*, *In re Bluewater Network*, 234 F.3d 1305, 1313 (D.C. Cir. 2000) ("[A]n agency's pronouncement of its intent to defer or to engage in future rulemaking generally does not constitute final agency action reviewable by this court.").

[46] *Bennett*, 520 U.S. at 178.

[47] *See, e.g.*, *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 578 U.S. 590, 598 (2016).

[48] *See, e.g.*, *Texas v. EEOC*, 933 F.3d 433, 442 (5th Cir. 2019) ("[W]here agency action withdraws an entity's previously-held discretion, that action alters the legal regime, binds the entity, and thus qualifies as final agency action." (quotation omitted)).

review the Executive Branch's policy choices regarding who or what to pursue.[49] Moreover, given that the scope of *Heckler* and *Texas* is somewhat unsettled, these categories may overlap, and there might be different ways to characterize a given directive.

Directives Amounting to Abdication. As *Texas* emphasized, following *Heckler*, an agency non-enforcement directive "'so extreme as to amount to an abdication of [the agency's] statutory responsibilities'" might "exceed the bounds of enforcement discretion and support Article III standing."[50] The same is true where an agency fails to fulfill "duties imposed by promulgated regulations."[51] Courts have repeatedly found that non-enforcement policies amount to abdication.[52] Courts have found abdication even where agencies appear to be engaging in severe under-enforcement, rather than non-enforcement, or where the evidence of abdication is limited to just a few examples.[53]

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[49] *See, e.g.*, *Heckler*, 470 U.S. at 831-32.

[50] *Texas*, 599 U.S. at 682-83 (quoting *Heckler*, 470 U.S. at 833 n.4).

[51] *Xirum v. ICE*, 2024 WL 3718145, at *10-11 (S.D. Ind. Aug. 8, 2024); *see also Pub. Citizen Health Rsch. Grp. v. Acosta*, 363 F. Supp. 3d 1, 18 (D.D.C. 2018) (challenge reviewable where agency action amounted to "wholesale suspension" of a rule (emphasis omitted)).

[52] *See, e.g.*, *NAACP v. Sec'y of HUD*, 817 F.2d 149, 158-59 (1st Cir. 1987) (suggesting that HUD's pattern of failure "affirmatively … to further" Title VII's fair housing policy was reviewable as an "abdication of [HUD's] statutory responsibilities"); *N. Indiana Pub. Serv. Co. v. FERC*, 782 F.2d 730, 745 (7th Cir. 1986) (holding that FERC could not "abandon its regulatory function of ensuring just, reasonable, and preferential rates … under the guise of unreviewable agency inaction"); *Adams v. Richardson*, 480 F.2d 1159, 1163-64 (D.C. Cir. 1973) (failure to enforce desegregation requirements amounted to abdication); *Texas v. United States*, 691 F. Supp. 3d 763, 780 (S.D. Tex. 2023) (concluding that challengers to DACA had sufficiently pleaded abdication theory), *aff'd in part, modified in part*, 126 F.4th 392 (5th Cir. 2025); *Brnovich v. Biden*, 630 F. Supp. 3d 1157, 1169-71 (D. Ariz. 2022) (finding that mass parole policy constituted abdication); *Maddonna v. HHS*, 567 F. Supp. 3d 688, 722 (D.S.C. 2020) (finding abdication where agency "essentially created a mechanism through which individual states could circumvent constitutional protections"); *CREW v. FEC*, 316 F. Supp. 3d 349, 422 (D.D.C. 2018) (failure to enforce disclosure requirements), *aff'd*, 971 F.3d 340 (D.C. Cir. 2020).

[53] *See Irish 4 Reprod. Health v. HHS*, 434 F. Supp. 3d 683, 697-99 (N.D. Ind. 2020) (concluding that settlement agreement with Notre Dame and affiliates amounted to abdication); Jentry Lanza, Note, *Agency Underenforcement as Reviewable Abdication*, 112 Nw. U. L. Rev. 1171, 1194-98 (2018) (collecting cases). *But see Mathews on behalf of D.W. v. Illinois*, 690 F. Supp. 3d 808, 826-27 (N.D. Ill. 2023) (finding that purported abdication claim was "in substance an underenforcement claim" because defendants had engaged in some enforcement activities).

However, courts have rejected abdication claims where the agency simply appears to be "contemplat[ing]" its enforcement options.[54]

Directives Affecting Benefits or Status. Non-enforcement directives might also be reviewable if they go beyond refraining from enforcement and also relate to the conferral of benefits or status upon regulated parties.[55] In rejecting the first Trump administration's attempt to unwind DACA, the Supreme Court held that *Heckler* did not apply where an agency policy not only reflects a "refusal to take requested enforcement action," but also provides "access … to benefits" that "courts often are called upon to protect."[56] Even in the immigration context where *Texas* most clearly applies, courts have not hesitated to find APA claims reviewable on this basis.[57]

Litigants might also consider challenging directives that suspend enforcement of statutory and regulatory requirements associated with the receipt of federal funding, such that an entity could continue receiving federal funding despite noncompliance. Indeed, the original "abdication" case, *Adams v. Richardson*, dealt with the federal government's failure to enforce desegregation requirements against schools receiving federal funds.[58] As the D.C. Circuit explained, "[i]t is one thing to say the Justice Department lacks the resources necessary to locate and prosecute every civil rights violator; it is quite another to say [the former Department of Health, Education, and Welfare] may affirmatively continue to channel federal funds to defaulting schools."[59]

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[54] *Am. Hosp. Ass'n v. HHS*, 2021 WL 616323, at *8 (N.D. Cal. Feb. 17, 2021).

[55] *Texas*, 599 U.S. at 683.

[56] *Dep't of Homeland Security v. Regents of the Univ. of Cal.*, 591 U.S. 1, 18-19 (2020) (quotation omitted).

[57] *See, e.g.*, *Texas v. United States*, 126 F.4th 392, 411 (5th Cir. 2025) (holding that such policies are reviewable); *Barrios Garcia v. DHS*, 25 F.4th 430, 449 (6th Cir. 2022) (U-visa policy); *Florida v. United States*, 717 F. Supp. 3d 1196, 1198-200 (N.D. Fla. 2024) (detention and parole policy); *Texas v. DHS*, 2024 WL 4711951, at *24-25 (E.D. Tex. Nov. 7, 2024) (parole policy); *Gen. Land Off. v. Biden*, 722 F. Supp. 3d 710, 723-24 (S.D. Tex. 2024) (wall funding); *E. Bay Sanctuary Covenant v. Biden*, 683 F. Supp. 3d 1025, 1037 (N.D. Cal. 2023) (asylum eligibility); *New York v. ICE*, 431 F. Supp. 3d 377, 385-86 (S.D.N.Y. 2019) (policy regarding where to conduct arrests).

[58] *See* 480 F.2d at 1162-64.

[59] *Id.* at 1162; *see also Xirum*, 2024 WL 3718145, at *13 (S.D. Ind. Aug. 8, 2024) (challenge to ICE's refusal to verify appropriate use of federal funds was reviewable).

Directives Based on Legal Interpretations. Courts are especially willing to review non-enforcement directives that are grounded in an agency's interpretation of the relevant law, rather than the agency's discretionary policy choices.[60] As *Heckler* noted, an agency's refusal "to institute proceedings solely on the belief that it lacks jurisdiction" would present a different question than the circumstances in *Heckler*.[61] Courts have even been willing to review so-called "single shot" enforcement decisions predicated on legal reasoning.[62] This category of directives might be particularly relevant given Executive Order 14219's direction that agencies "de-prioritiz[e] actions to enforce regulations that are based on anything other than the best reading of a statute" or "that go beyond the powers vested in the Federal Government by the Constitution."[63] To the extent an agency predicates a non-enforcement directive on the basis of a perceived conflict with a statute or the Constitution, that legal determination might be apt for review.

Directives Tantamount to Repeal of Legislative Rules. As Justice Brennan's concurrence in *Heckler* noted, the Court's decision recognized the possibility of review where "an agency has refused to enforce a regulation lawfully promulgated and still in effect."[64] *Heckler* therefore might not pose a bar where an agency's non-enforcement directive effectively repeals or amends an existing legislative rule. That might particularly be the case where the agency failed to comply with any applicable procedural requirements, like the APA's notice-and-comment provisions.[65] Whatever discretion agencies may have to set substantive enforcement priorities, "[n]o such discretion exists when it comes to the Government's obligation to comply with procedural rules in exercising that enforcement

[60] *See, e.g.*, *Crowley*, 37 F.3d at 676-77.

[61] *Heckler*, 470 U.S. at 833 n.4.

[62] *See, e.g.*, *Rollerson v. Brazos River Harbor Navigation Dist. of Brazoria Cnty. Texas*, 6 F.4th 633, 645-46 (5th Cir. 2021) (noting that the agency "did not invoke reasoning that is intertwined with a policy decision (such as limited resources)," but instead "justified its decision solely on the basis that it lacked jurisdiction"); *CREW v. FEC*, 993 F.3d 880, 888-89 (D.C. Cir. 2021) (barring review where agency also justified action in terms of its enforcement discretion); *Am. Acad. of Pediatrics v. FDA*, 379 F. Supp. 3d 461, 481 (D. Md. 2019) (concluding that review is appropriate where "the agency's decision is a statement of statutory interpretation").

[63] Exec. Order 14219 §§ 2(a), 3(a).

[64] *Heckler*, 470 U.S. at 839 (Brennan, J., concurring).

[65] *See* 5 U.S.C. § 553, 706(2)(D); *infra* page 21 (notice and comment claims).

discretion."[66] Litigants might also analogize to agency actions to postpone the effective dates of legislative rules (addressed below) that courts have held are subject to notice-and-comment requirements without addressing *Heckler*.[67] The mere fact that an agency frames its repeal of a rule in terms of enforcement discretion should not pose a bar to review.

* * *

In identifying these four categories, this Issue Brief does not mean to foreclose challenges to other categories of general non-enforcement directives. For example, litigants might also find luck in challenging directives that impinge upon constitutional rights,[68] or directives that are particularly unreasonable and thus exceed the bounds of the agency's legitimate discretion.

Of course, one challenge in identifying a "directive" may be that enforcement regimes are sometimes documented in internal agency memoranda. There are multiple reasons why agencies announce their enforcement decisions openly: they often want to give regulated parties peace of mind and/or claim political credit for alleviating regulatory burdens. But if an agency fails to do so, litigants might still be able to assert a challenge to any hidden directives that the agency may have promulgated. If a litigant is able to adequately allege the existence of such a directive based on public reporting or other sources, a court might be willing to permit discovery "'to ascertain the contours of the precise policy at issue.'"[69]

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[66] *Massachusetts Coal. for Immigr. Reform v. U.S. Dep't of Homeland Sec.,* 698 F. Supp. 3d 10, 38 (D.D.C. 2023) (holding that agency failed to comply with NEPA); *see also DeSuze v. Carson*, 442 F. Supp. 3d 528, 540 (E.D.N.Y. 2020) ("Here, unlike in *Heckler*, the issue is not whether HUD refused enforcement, but whether HUD followed its own procedural requirements."), *aff'd sub nom. DeSuze v. Ammon*, 990 F.3d 264 (2d Cir. 2021).

[67] *See, e.g.*, *Nat. Res. Def. Council v. Nat'l Highway Traffic Safety Admin.*, 894 F.3d 95, 113 (2d Cir. 2018) (surveying cases, including *Clean Air Council v. Pruitt*, 862 F.3d 1, 6 (D.C. Cir. 2017) and *Nat. Res. Def. Council v. Envt'l Prot. Agency*, 683 F.2d 752, 761 (3d Cir. 1982)); *California v. U.S. Bureau of Land Mgmt.*, 277 F. Supp. 3d 1106, 1120 (N.D. Cal. 2017) (same, also including *Envt'l Def. Fund, Inc. v. Gorsuch*, 713 F.2d 802, 817 (D.C. Cir. 1983)); *S.C. Coastal Conservation League v. Pruitt*, 318 F. Supp. 3d 959, 965-66 & n.2 (D.S.C. 2018) (collecting cases).

[68] *See, e.g.*, *Maddonna*, 567 F. Supp. 3d at 722; *see also Heckler*, 470 U.S. at 838 (noting that "[n]o colorable claim" had been made "that the agency's refusal to institute proceedings violated any constitutional rights of respondents"); *Texas*, 599 U.S. at 681 (explaining that "selective-prosecution claims under the Equal Protection Clause" are reviewable).

[69] *Hisp. Affs. Project v. Acosta*, 901 F.3d 378, 388 (D.C. Cir. 2018) (quoting *Venetian Casino Resort, LLC v. EEOC*, 409 F.3d 359, 367 (D.C. Cir. 2008)); *see, e.g.*, *Florida v. United States*, 2022 WL 2431442, at

However, to the extent a challenge rests solely on an apparent pattern or practice of non-enforcement by the agency, untethered from any express directive or pronouncement, litigation might be more difficult.[70]

B. Article III Standing

In challenging a non-enforcement directive, prospective litigants would likely need to invoke standing as the beneficiaries of enforcement of regulatory schemes. "[W]hen the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily 'substantially more difficult' to establish."[71] Among other things, "it becomes the burden of the plaintiff to adduce facts showing that" regulated parties will respond to under-regulation "in such manner as to produce causation or permit redressability."[72] Litigants might need to show, for example, that in response to a lack of enforcement, regulated parties will increasingly engage in harmful activity. At least three categories of beneficiaries might make such a showing.

Entities Harmed by Non-Enforcement. As the Supreme Court recently reiterated in *FDA v. Alliance for Hippocratic Medicine*, "when the government regulates (*or under-regulates*) a business, the regulation (or lack thereof) may cause downstream or upstream economic injuries to others in the chain, such as certain manufacturers, retailers, suppliers, competitors, or customers."[73] "When the government regulates parks, national forests, or

*2 (N.D. Fla. June 6, 2022) ("[B]ecause Defendants deny the existence of the non-detention policy, Florida cannot be constrained by an administrative record as to that alleged policy."); *Doe 1 v. Nielsen*, 2018 WL 4266870, at *2 (N.D. Cal. Sept. 7, 2018) (permitting "jurisdictional discovery" into the "nature of the agency action"); *Aracely, R. v. Nielsen*, 319 F. Supp. 3d 110, 149 (D.D.C. 2018) (finding that plaintiffs had sufficiently alleged existence of policy, although "[d]iscovery may show otherwise"); *cf. United Student Aid Funds, Inc. v. Devos*, 237 F. Supp. 3d 1, 5 (D.D.C. 2017) (permitting admission of extra-record evidence regarding whether agency document announced a "new rule").

[70] *See Seife v. HHS*, 440 F. Supp. 3d 254, 282-83 (S.D.N.Y. 2020) (requiring an express policy of abdication); *PETA v. U.S. Dep't of Agric.*, 7 F. Supp. 3d 1, 12-13 (D.D.C. 2013) (rejecting non-enforcement challenge for failing to identify an "official pronouncement" from the agency), *aff'd on other grounds*, 797 F.3d 1087 (D.C. Cir. 2015).

[71] *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 562 (1992).

[72] *Id.*

[73] 602 U.S. 367, 384-85 (2024) (emphasis added).

bodies of water, for example, the regulation may cause harm to individual users."[74] In such cases, plaintiffs must show "a predictable chain of events leading from the government action to the asserted injury" (a burden that the plaintiffs in *Alliance* failed to carry).[75]

Although identifying the proper plaintiff will depend on the substance of the directive at issue, potential litigants might include individuals or organizations who can show that the government's failure to enforce causes them harm. Litigants might take care to plead specific facts demonstrating that the under-regulation of a given set of entities is likely to produce harm, and adduce studies or expert opinions to corroborate that increased risk. Where applicable, litigants might also look at Congress's findings in enacting the underlying statute at issue, or the preamble for the underlying agency rule, which will often lay out Congress's or the agency's policy case for the statute or rule and identify specific harms to third parties that Congress or the agency sought to avert. To the extent regulated parties have made statements indicating how they plan to respond to an agency's decision not to enforce (e.g., by increasing their unlawful and harmful behavior), those might also help to demonstrate the requisite causal connection.

State and local governments that expect to bear increased costs from non-enforcement might be able to make a particularly compelling case. During the prior administration, states repeatedly challenged the Executive Branch's immigration enforcement policies on the ground that increased immigration would raise costs for state programs.[76] States and local governments opposed to the Trump administration's policies might be able to make similar arguments. Indeed, it might be easier for governments to assert standing from non-enforcement, because the effect of non-enforcement on any one person or organization might be harder to establish than the effects of non-enforcement on a jurisdiction writ large.[77]

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[74] *Id.* at 385.

[75] *Id.*; *see also Washington v. FDA*, 108 F.4th 1163, 1175-76 (9th Cir. 2024) (concluding that Idaho had failed to establish standing to defend mifepristone regulations).

[76] *See, e.g.*, *Texas*, 126 F.4th at 411 (holding that *Texas* did not establish a "broad new rule" against indirect standing); *Florida*, 717 F. Supp. 3d at 1198 (same); *Texas v. Mayorkas*, 2024 WL 455337, at *2-3 (N.D. Tex. Feb. 6, 2024) (same).

[77] States might also consider asserting a sovereign injury theory of standing, to the extent the federal government has declined to enforce a statute that preempts the states from regulating in their own right. *Cf. Maine v. Taylor*, 477 U.S. 131, 137 (1986) ("A State clearly has a legitimate interest in the continued enforceability of its own statutes.").

Entities that Have to Compensate for Non-Enforcement. If an agency's decision not to enforce the law harms the public, other entities — including organizations and state and local governments — might need to step up their own efforts in response. For example, if an agency were to stop enforcing consumer protection laws, states and local governments might need to increase their own enforcement activity, and consumer-focused organizations might need to divert additional resources to protecting consumers from unfair practices.

Such theories might draw from the Supreme Court's decision in *Havens Realty Corp. v. Coleman*, which held that "concrete and demonstrable injury to [an] organization's activities — with the consequent drain on the organization's resources" can provide a basis for Article III standing.[78] However, the Court in *Alliance for Hippocratic Medicine* pared back on "diversion of resources" theories, noting that an organization "cannot spend its way into standing simply by expending money to gather information and advocate against the defendant's action."[79] Litigants might therefore go beyond mere advocacy expenditures and identify ways in which the direct services they provide will be affected — either because they will have to provide more of them, or (better yet) because the agency's decision will make it more difficult or costly to provide those services. For state and local governments, it might also be advantageous to point out, where applicable, that providing such services is obligatory, either under a government's general duty to care for its citizens or under specific state or local laws.

Competitors to Under-Regulated Entities. The D.C. Circuit has "repeatedly … held that parties suffer constitutional injury in fact when agencies lift regulatory restrictions on their competitors or otherwise allow increased competition."[80] By the same token, an agency's decision not to enforce existing requirements against certain entities might also result in harm to competitors.[81] Competitors may have to adjust their operations, or expend time or resources, to comply with regulatory regimes that those entities do not. Competitors may even wish to comply with certain requirements, but fear the increased costs or strategic disadvantages associated with doing so. For example, the Trump administration's decision

[78] 455 U.S. 363, 379 (1982).

[79] *See All. for Hippocratic Medicine*, 602 U.S. at 394.

[80] *Louisiana Energy & Power Auth. v. FERC*, 141 F.3d 364, 367 (D.C. Cir. 1998) (collecting cases).

[81] *See All. for Hippocratic Medicine*, 602 U.S. at 384 (noting "downstream or upstream economic injuries to … competitors" from "under-regulat[ion]").

to scale back enforcement of the Foreign Corrupt Practices Act may make it more difficult for businesses that do not wish to pay bribes to foreign officials to compete.[82]

Again, by identifying these three categories of potential plaintiffs, this Issue Brief does not mean to foreclose other potential theories of standing. In all cases, the important thing will be to demonstrate how the government's failure to enforce discrete requirements is likely to cause a concrete injury-in-fact to the plaintiff.

C. Potential Claims

The claims that litigants might assert will often depend upon the specific statutory and regulatory scheme at issue, and may overlap with the reasons for why an agency's directive is reviewable in the first place. However, there are four broad categories of claims that litigants might consider.

APA – Contrary to Law. The APA bars agency action that is "not in accordance with law."[83] An agency non-enforcement directive might be contrary to law in several ways. To start, certain statutes use mandatory language in directing the agency to bring enforcement actions. As *Heckler* noted, "Congress may limit an agency's exercise of enforcement power if it wishes, either by setting substantive priorities, or by otherwise circumscribing an agency's power to discriminate among issues or cases it will pursue."[84] For example, some statutes direct that an agency "shall" initiate enforcement proceedings or take some other action in certain circumstances, which may indicate that the statute imposes mandatory obligations on the agency.[85] Other statutes direct agencies to take affirmative action to further some statutory goal.[86] Because an agency is generally required to comply with its

[82] *See Trump Freezes U.S. Law Banning Bribery of Foreign Officials*, CBS News (Feb. 12, 2025), https://www.cbsnews.com/news/trump-fcpa-anti-bribery-law-executive-order/.

[83] 5 U.S.C. § 706(2)(A).

[84] 470 U.S. at 833.

[85] *See, e.g.*, *Florida v. United States*, 660 F. Supp. 3d 1239, 1273 (N.D. Fla. 2023) ("The Court rejects DHS's argument and concludes that § 1225(b)'s 'shall be detained' means what it says and that is a *mandatory* requirement."). Note, however, that "shall" does not always mean "must," *see De Martinez v. Lamagno*, 515 U.S. 417, 434 n.9 (1995), and that determining whether a statute in fact imposes mandatory obligations requires a review of the statute's "text, context, statutory history, and precedent." *Texas v. United States*, 524 F. Supp. 3d 598, 648 (S.D. Tex. 2021).

[86] *See, e.g.*, *NAACP*, 817 F.2d at 154 ("[A] statute that instructs an agency 'affirmatively to further' a national policy of nondiscrimination would seem to impose an obligation to do more than simply not

own regulations,[87] regulatory requirements that are couched in comparably mandatory terms may also compel the agency to engage in enforcement.[88]

Even in the absence of mandatory language, an agency non-enforcement directive — particularly one abdicating responsibility for enforcement, in whole or in part — might be deemed as an attempt to nullify or repeal a valid statute or regulation. "Of course, a new administration may not choose not to enforce laws of which it does not approve, or to ignore statutory standards in carrying out its regulatory functions."[89] Courts must therefore ensure that the rules an agency adopts "are consistent with [its] duties and not a negation of them."[90]

Finally, an agency non-enforcement directive premised on an error of law might also be deemed contrary to law. For example, an agency that acts on the erroneous belief that a statute or rule is unconstitutional, or that a rule is inconsistent with an underlying statute, has in some sense acted "contrary" to law. However, these claims seem better categorized as arbitrary-and-capricious claims, as discussed in the next section.

APA – Arbitrary and Capricious. The APA bars agency action that is "arbitrary" or "capricious."[91] An agency's action fails this test "if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of

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discriminate itself."); *Irish 4 Reprod. Health*, 434 F. Supp. 3d at 705 (finding that Settlement Agreement was "directly contrary to the obvious intent of the Women's Health Amendment: to ensure access to contraceptive care").

[87] *See, e.g.*, *Nat'l Family Planning & Reprod. Health Ass'n, Inc. v. Sullivan*, 979 F.2d 227, 234 (D.C. Cir. 1992) ("[A]n agency issuing a legislative rule is itself bound by the rule until that rule is amended or revoked."); *Montilla v. INS*, 926 F.2d 162, 166 (2d Cir. 1991) ("[T]he rules promulgated by a federal agency, which regulate the rights and interests of others, are controlling upon the agency.").

[88] *See, e.g.*, *Xirum*, 2024 WL 3718145, at *14 (complaint plausibly alleged that ICE had failed to 'manage and administer' payments in a manner that 'ensure[s]' the funding is expended and the associated programs are implemented '*in full accordance with* … Federal Law[ ] and public policy requirements'") (quoting 2 C.F.R. 200.300(a)).

[89] *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 59 (1983) (Rehnquist, J., dissenting).

[90] *Adams*, 480 F.2d at 1164; *see also Brnovich*, 630 F. Supp. 3d at 1176 (finding that plaintiff plausibly alleged that agency's abdication of its duties was contrary to law); *cf. Texas v. United States*, 126 F.4th 392, 418 (5th Cir. 2025) (reiterating view that DACA is contrary to INA's "comprehensive federal statutory scheme for regulation of immigration and naturalization").

[91] 5 U.S.C. § 706(2)(A).

the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.[92] An agency that changes a longstanding policy must also provide a "more detailed justification" if "its new policy rests upon factual findings that contradict those which underlay its prior policy[] or when its prior policy has engendered serious reliance interests that must be taken into account."[93] These principles apply to agency non-enforcement rules as well.[94]

To the extent an agency bases its non-enforcement decision on policy considerations, there are several possible errors the agency might make. The agency might not have considered the benefits of robust enforcement — including to parties that have relied on agency enforcement to protect their interests — or might have elevated purported compliance costs to industry over those benefits.[95] The agency might have ignored unfavorable evidence or its past factual findings about the effects of non-enforcement or neglected to provide any evidence to support its decision at all.[96] Or the agency might have invoked policy considerations as a pretext — e.g., to distract from its desire to favor political

[92] *State Farm*, 463 U.S. at 43.

[93] *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

[94] *See, e.g.*, *N. Indiana Pub. Serv. Co.*, 782 F.2d at 746 ("It is well-settled that an agency must provide a sound, well-reasoned justification based upon evidence in the record for its action."); *Florida*, 660 F. Supp. 3d at 1281 (finding that agency failed to consider evidence of policy's harms).

[95] *See, e.g.*, *Michigan v. EPA*, 576 U.S. 743, 753 (2015) ("[R]easonable regulation ordinarily requires paying attention to the advantages *and* the disadvantages of agency decisions."); *Mexican Gulf Fishing Co. v. U.S. Dep't of Com.*, 60 F.4th 956, 973 (5th Cir. 2023) (explaining that complying with *State Farm* requires "considering the costs and benefits associated with the regulation"); *FEC v. Rose*, 806 F.2d 1081, 1088 (D.C. Cir. 1986) ("A determination that an agency made a decision without considering a relevant factor leads to condemning the decision as 'arbitrary and capricious.'").

[96] *See, e.g.*, *Friends of Back Bay v. U.S. Army Corps of Eng'rs*, 681 F.3d 581, 588 (4th Cir. 2012) ("An unjustified leap of logic or unwarranted assumption … can erode any pillar underpinning an agency action, whether constructed from the what-is or the what-may-be."); *United Techs. Corp. v. U.S. Dep't of Def.*, 601 F.3d 557, 562 (D.C. Cir. 2010) (quoting *McDonnell Douglas Corp. v. Dep't of the Air Force*, 375 F.3d 1182, 1187 (D.C. Cir. 2004)) (explaining that, in reviewing agency action, the court cannot "defer to the agency's conclusory or unsupported suppositions"); *Nat'l Treasury Emps. Union v. Horner*, 854 F.2d 490, 499 (D.C. Cir. 1988) (explaining that an agency's appeal to its "expert judgment" is unavailing if it does not "point … to any data of the sort it would have considered if it had considered [the issue] in any meaningful way").

supporters or allies.[97] Where an agency declines to enforce a statute or rule in a subset of cases, it might also have failed to provide reasons for treating those cases differently from others.[98]

To the extent an agency bases its non-enforcement decision on an erroneous legal conclusion (e.g., that the underlying statute or regulation is unlawful), that decision might be arbitrary and capricious as well. "An agency decision cannot be sustained … where it is based not on the agency's own judgment but on an erroneous view of the law."[99] In *Regents*, for example, the Supreme Court held that DHS's attempt to rescind DACA was arbitrary and capricious because, in simply relying on the Attorney General's conclusion that DACA's immigration benefits were unlawful, DHS failed to consider whether it could nonetheless continue to defer removal proceedings.[100] Given that the Trump administration appears to be planning not to enforce laws on the basis of a number of potentially erroneous legal conclusions — e.g., that certain regulations are not based upon "the best reading of a statute" or "go beyond the powers vested in the Federal Government by the Constitution"[101] — those decisions might be particularly vulnerable to challenge.[102]

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[97] *See Dep't of Commerce v. New York*, 588 U.S. 752, 782, 784 (2019); *see also Challenging Agency Action Based on Pretextual Reasons*, Governing for Impact (Mar. 2025), https://governingforimpact.org/wp-content/uploads/2025/03/Challenging-Agency-Pretext.pdf.

[98] *Indep. Petroleum Ass'n of Am. v. Babbitt*, 92 F.3d 1248, 1258 (D.C. Cir. 1996) ("An agency must treat similar cases in a similar manner unless it can provide a legitimate reason for failing to do so.").

[99] *Prill v. NLRB*, 755 F.2d 941, 947 (D.C. Cir. 1985). Indeed, both *Heckler* and its progeny recognized that agency non-enforcement decisions premised on erroneous legal interpretations might be invalid. *See, e.g.*, *Heckler*, 470 U.S. at 833 n.4; *United States v. Simmons*, 2022 WL 1302888, at *13-14 (collecting cases).

[100] 591 U.S. at 26-28.

[101] Exec. Order 14219 §§ 2(a), 3(a).

[102] The agency might also try to reframe its concerns about legality in terms of concerns about litigation risk — e.g., that if it attempts to enforce dubious statutes or regulations in court, it will lose and thereby waste its time and resources. However, both the district courts and the Supreme Court in the DACA case rejected similar arguments about litigation risk. *See, e.g.*, *Regents*, 591 U.S. at 24 n.4 ("[G]iven the Attorney General's conclusion that the policy was unlawful … it is difficult to see how the risk of litigation carried any independent weight."); *NAACP v. Trump*, 298 F. Supp. 3d 209, 234-35 (D.D.C. 2018) ("[T]his concern does not withstand review under the familiar arbitrary and capricious standard.").

APA – Notice and Comment. The APA bars agency action taken "without observance of procedure required by law."[103] In particular, the APA generally requires agencies to provide advance notice and an opportunity for comment before issuing "legislative rules,"[104] which refer to rules that "purport[] to impose legally binding obligations or prohibitions on regulated parties," as opposed to mere policy statements — "and that would be the basis for an enforcement action for violations of those obligations or requirements."[105] Agencies must "use the same procedures when they amend or repeal a rule as they used to issue the rule in the first instance."[106] Because "an agency issuing a legislative rule is itself bound by the rule until that rule is amended or revoked," it "may not alter [such a rule] without notice and comment."[107] If an agency wishes to stay or amend a rule's effective date, it must likewise do so through notice and comment.[108]

An agency's non-enforcement directive might be construed as either itself a legislative rule or as the effective repeal of an earlier legislative rule. To the extent it vests rights in regulated parties and binds the agency's discretion, the agency's directive might itself be considered as legislative in nature, rather than as a mere policy statement.[109] Alternatively, declining to enforce a legislative rule might, as explained above, be viewed as "tantamount to amending or revoking [the] rule."[110] After all, "[i]f a second rule repudiates or is irreconcilable with [a prior legislative rule], the second rule must be an amendment of the first; and, of course, an amendment to a legislative rule must itself be legislative."[111] Thus, a non-enforcement directive that has the effect of abrogating a legislative rule might be subject to challenge if the agency failed to undergo notice and comment.[112]

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[103] 5 U.S.C. § 706(2)(D).

[104] *Id.* § 553.

[105] *Nat'l Min. Ass'n v. McCarthy*, 758 F.3d 243, 251 (D.C. Cir. 2014).

[106] *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 101 (2015).

[107] *Nat'l Family Planning & Reproductive Health Ass'n*, 979 F.2d at 234.

[108] *See Clean Air Council*, 862 F.3d at 9.

[109] *See Texas v. United States*, 809 F.3d 134, 170-76 (5th Cir. 2015) (holding that Deferred Action for Parents of Arrivals program constituted a legislative rule).

[110] *Clean Air Council*, 862 F.3d at 6.

[111] *Nat'l Fam. Plan. & Reprod. Health Ass'n*, 979 F.2d at 235.

[112] *See, e.g.*, *Am. Acad. of Pediatrics v. FDA*, 379 F. Supp. 3d 461, 497 (D. Md. 2019).

Take Care Clause. Aside from the APA, litigants might consider asserting that an agency's decision not to enforce a valid statute violates the Constitution's Take Care Clause and related separation-of-powers principles. Although such a claim is relatively novel, it might find substantial support among originalist scholars and jurists.

Under the Take Care Clause, the President "shall take Care that the Laws be faithfully executed."[113] At the time of the founding, the phrase "'take care' was a directive from a superior to an agent, directing that special attention be paid to ensure that a command or duty was carried out."[114] As Justice Story put it, the Take Care Clause requires the President "to use all such means as the Constitution and laws have placed at his disposal, to enforce the due execution of the laws."[115]

That duty extends to and binds the President's subordinates as well. As "indicated by the Clause's use of the passive voice and the sheer practical impossibility of any other result, … the actual execution of the laws will be done by others."[116] Indeed, the Supreme Court has "repeatedly affirmed" that while "[t]he vesting of the executive power in the President [is] essentially a grant of the power to execute the laws," the President cannot do so "alone and unaided" and rather "must execute them by the assistance of subordinates."[117] In short, "[t]he Constitution does not leave to speculation who is to administer the laws enacted by Congress; the President, it says, 'shall take Care that the Laws be faithfully executed,' … personally and through officers whom he appoints."[118]

[113] U.S. Const. art. II, § 3.

[114] Andrew Kent et al., *Faithful Execution and Article II*, 132 Harv. L. Rev. 2111, 2134 (2019).

[115] Joseph Story, *A Familiar Exposition of the Constitution of the United States* § 292, at 177-78 (1840).

[116] Gillian E. Metzger, *The Constitutional Duty to Supervise*, 124 Yale L.J. 1836, 1876 (2015).

[117] *Myers v. United States*, 272 U.S. 52, 117 (1926); *see, e.g.*, *Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302, 327 (2014) (the President "act[s] at times through agencies" to "faithfully execute[] [the laws]"); *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 484 (2010) ("The President cannot 'take Care that the Laws be faithfully executed' if he cannot oversee the faithfulness of the officers who execute them."); *al-Marri v. Pucciarelli*, 534 F.3d 213, 288 (4th Cir. 2008) (an executive officer is "the President's agent in implementing the Take Care Clause"), *vacated & remanded sub nom. al-Marri v. Spagone*, 555 U.S. 1220 (2009).

[118] *Printz v. United States*, 521 U.S. 898, 922 (1997) (emphasis added) (quoting U.S. Const. art. II, § 3).

Neither the President nor agencies may "ignore statutory mandates or prohibitions merely because of policy disagreement with Congress."[119] As the Supreme Court emphasized in *Texas*, its opinion should "in no way be read to suggest or imply that the Executive possesses some freestanding or general constitutional authority to disregard statutes requiring or prohibiting executive action."[120] "To contend that the obligation imposed on the President to see the laws faithfully executed, implies a power to forbid their execution, is a novel construction of the constitution, and entirely inadmissible."[121] Such authority would be the equivalent of the "suspending" and "dispensing" prerogatives wielded at times by English monarchs and decisively rejected by the founders.[122] Thus, the Executive Branch "cannot suspend [a statute's] operation, dispense with its application, or prevent its effect."[123] For these reasons, an agency directive declining to enforce a statute might run afoul of the Take Care Clause.[124]

D. Remedies

Litigants might also think carefully about which remedies to seek in the event they prevail. The typical remedy in APA litigation is vacatur, under which a court will "hold unlawful and set aside agency action."[125] "[W]hen a court vacates an agency's rules, the vacatur restores

[119] *In re Aiken Cnty.*, 725 F.3d at 260-61.

[120] 599 U.S. at 684.

[121] *Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524, 612-13 (1838).

[122] *See Texas v. Biden*, 20 F.4th 928, 976-88 (5th Cir. 2021), *as revised* (Dec. 21, 2021), *rev'd and remanded on other grounds*, 597 U.S. 785 (2022).

[123] *United States v. Smith*, 27 F. Cas. 1192, 1203 (C.C.D.N.Y. 1806).

[124] It might also be possible to assert that the Executive Branch's failure to enforce a valid regulation violates the Take Care Clause, which applies generally to "Laws." *Cf. City of New York v. FCC*, 486 U.S. 57, 63 (1988) (explaining, in the context of the Supremacy Clause, that "[t]he phrase 'Laws of the United States' encompasses both federal statutes themselves and federal regulations that are properly adopted in accordance with statutory authorization").

[125] 5 U.S.C. § 706(2); *see Bhd. of Locomotive Eng'rs & Trainmen v. Fed. R.R. Admin.*, 972 F.3d 83, 117 (D.C. Cir. 2020) ("Vacatur 'is the normal remedy' when we are faced with unsustainable agency action."). However, the Department of Justice has frequently taken the position that vacatur is not an available remedy, and that courts should instead enter targeted injunctive relief barring the application of the challenged agency action to the plaintiffs. It is difficult to imagine what such relief would look like in non-enforcement cases, given that a plaintiff's injury would typically not arise from the direct application of the agency action to the plaintiffs, but rather the downstream implications of a lack of enforcement as to regulated parties.

the status quo before the invalid rule took effect."[126] In other words, vacatur does not, by its own force, compel the agency to do anything — in the context of a non-enforcement challenge, it simply returns to the pre-directive status quo. In theory, then, the agency should resume bringing enforcement actions to the same extent it would have before the relevant non-enforcement directive was promulgated. Such relief might be more appealing to a court than injunctive relief, which could be seen directing the Executive Branch to "make more arrests or bring more prosecutions," a dynamic that concerned the Supreme Court in *Texas*.[127]

In practice, however, an agency might continue to refrain from bringing enforcement actions, even if the non-enforcement directive upon which it based its refusal is no longer in effect. In that event, litigants might, *Texas* notwithstanding, need to seek the additional relief of an injunction compelling the agency to resume enforcement action, which would require a showing that "a less drastic remedy (such as partial or complete vacatur …)" is insufficient to redress their injuries.[128] To ameliorate the concerns in *Texas*, litigants might wait until an agency appears to not be complying with a vacatur order — e.g., by continuing to refrain from enforcement, as though the challenged directive were still in effect — before seeking injunctive relief.[129] Doing so might help to build the record for the necessity of an injunction and make the court more amenable to such a remedy. Alternatively, litigants might seek to frame injunctive relief in terms that "preserv[e] for the agency its discretionary options" by, for example, requiring an agency to report on its enforcement plans and priorities without compelling the agency to initiate any particular enforcement actions.[130]

[126] *Env't Def. v. Leavitt*, 329 F. Supp. 2d 55, 64 (D.D.C. 2004).

[127] 599 U.S. at 680.

[128] *Monsanto Co. v. Geertson Seed Farms,* 561 U.S. 139, 165-66 (2010).

[129] *Cf. Texas v. Cardona*, 743 F. Supp. 3d 824, 897 (N.D. Tex. 2024) ("Given that the Department has enacted similar guidance in the past and may attempt to do so again as an end-run to the Court's relief, a broader injunction is necessary to provide complete relief.").

[130] *NAACP*, 817 F.2d at 160.

IV. CHALLENGING OTHER TYPES OF NON-ENFORCEMENT

It will generally be most advantageous for litigants to frame their non-enforcement challenges as directed at unlawful agency directives. But three other types of agency non-enforcement decisions might also warrant challenge: (A) delaying or pausing existing rules, (B) declining to engage in rulemaking, and (C) failing to take statutorily mandated action.

A. Delaying or Pausing Existing Rules

Rather than declining to enforce a previously enacted rule, the Trump administration might attempt to delay or pause the effective date of the rule itself. The administration might view that approach as particularly attractive where a rule is amenable to private enforcement; in that situation, the federal government's decision to refrain from enforcement would not necessarily bar lawsuits by private enforcers. Regulated parties might also fear future enforcement of present legal violations, in the event the administration's priorities (or the administration itself) were to change. However, all of the administration's options for staying the effective date of a rule might be vulnerable to challenge.

One option would be for the administration to stay the rule's effective date under 5 U.S.C. § 705, which permits an agency, "[w]hen [it] finds that justice so requires," to "postpone the effective date of action taken by it, pending judicial review." That provision has two important threshold limitations: it applies only to rules that have not yet gone into effect,[131] and it applies only "pending judicial review," meaning that the stay "must be tied to the underlying pending litigation."[132] Even where those conditions are met, the agency must find that "justice so requires" the postponement of the rule's effective date. Courts have held that that criterion requires the agency to consider essentially the same equitable factors as the four-part test for injunctive relief, and that determination is subject to

[131] *See, e.g.*, *Ctr. for Biological Diversity v. Regan*, 691 F. Supp. 3d 1, 9 (D.D.C. 2023) ("[A]n agency's authority to 'postpone the effective date' of a rule ends when the rule takes legal effect.).

[132] *Sierra Club v. Jackson*, 833 F. Supp. 2d 11, 33 (D.D.C. 2012).

arbitrary-and-capricious review.[133] For these reasons, it might be difficult for an agency to use § 705 to stay a rule issued by the prior administration, particularly given that many of those rules have likely taken effect by now.

Another option would be to formally amend the rule's effective date. As explained above, if an agency wishes to amend a *legislative* rule's effective date, it must generally do so through notice and comment.[134] Indeed, in the first Trump administration, some agencies attempted to indefinitely delay the effective dates of rules and thereby "effectively repeal" them, which requires going through notice-and-comment.[135]

To attempt to head off a procedural challenge to the lack of notice and comment, the agency would likely rely upon the APA's good cause exception, which applies where an agency "for good cause finds … that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest."[136] However, that exception is "narrowly construed and only reluctantly countenanced."[137] Generally, the APA only "excuses notice and comment in emergency situations, or where delay could result in serious harm."[138] It will be difficult for the agency to demonstrate that the immediate extension of a rule's effective date is needed to avert harm of such magnitude.

Even where the initial rule was promulgated *without* notice and comment, an agency's decision to amend a rule's effective date might also be vulnerable to an arbitrary-and-capricious challenge. For example, the agency may have provided an inadequate explanation for its decision or failed to consider the reliance interests of beneficiaries of the rule.[139] The initial rule itself might have made certain findings about the ease of

[133] *See, e.g.*, *Bauer v. DeVos*, 325 F. Supp. 3d 74, 106 (D.D.C. 2018) ("[E]ven though an agency need not apply the same canonical four-factor test that courts do, it must — given the statute's 'equitable' mandate — weigh the same equities.").

[134] *See Clean Air Council*, 862 F.3d at 9; *see also Env't Def. Fund, Inc. v. EPA*, 716 F.2d 915, 920 (D.C. Cir. 1983) ("The suspension or delayed implementation of a final regulation normally constitutes substantive rulemaking under APA § 553.").

[135] *See, e.g.*, *Becerra v. Dep't of Interior*, 276 F. Supp. 3d 953, 966 (N.D. Cal. 2017); *California*, 277 F. Supp. 3d at 1121.

[136] 5 U.S.C. § 553(b)(B).

[137] *Methodist Hosp. of Sacramento v. Shalala*, 38 F.3d 1225, 1236 (D.C. Cir. 1994).

[138] *Jifry v. FAA*, 370 F.3d 1174, 1179 (D.C. Cir. 2004) (citations omitted).

[139] *See, e.g.*, *State Farm*, 463 U.S. at 43; *Fox Television Stations*, 556 U.S. at 515.

compliance, the potential harm to third parties, and any other considerations that may have informed the agency's decision of when to set the effective date. Those findings might provide ample fodder for litigation.

B. Declining to Engage in Rulemaking

The Trump administration might also elect to nullify statutory requirements by declining to promulgate implementing regulations. In such cases, parties might wish to petition the appropriate agency to engage in rulemaking. The APA requires that "[e]ach agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule."[140] An agency is required to address such a petition "[w]ith due regard for the convenience and necessity of the parties or their representatives and within a reasonable time,"[141] and must provide a "brief statement of the grounds for denial" if the agency chooses to reject it.[142] Of course, parties should be aware that petitioning the Trump administration might simply prompt it to issue rules that they might not like. Parties might therefore think strategically about which issues to press agencies to address.

If an agency denies a petition for rulemaking, "extremely limited" judicial review is available.[143] Courts typically consider "an agency's refusal to institute rulemaking proceedings [to be] at the high end of the range of levels of deference we give to agency action under … arbitrary and capricious review,"[144] and will "overturn an agency's decision not to initiate a rulemaking only for compelling cause, such as plain error of law or a fundamental change in the factual premises previously considered by the agency."[145] "This is not to say," however, that courts "will rubber stamp an agency's order."[146] "[T]he record

[140] 5 U.S.C. § 553(e); *see* Cong. Rsch. Serv., *Petitions for Rulemaking: An Overview*, R46190 (Jan. 23, 2020), https://sgp.fas.org/crs/misc/R46190.pdf.

[141] 5 U.S.C. § 555(b)

[142] *Id.* § 555(e).

[143] *WildEarth Guardians v. EPA*, 751 F.3d 649, 651 (D.C. Cir. 2014).

[144] *Defenders of Wildlife v. Gutierrez*, 532 F.3d 913, 919 (D.C. Cir. 2008) (quotation omitted).

[145] *Nat'l Customs Brokers & Forwarders Ass'n of Am., Inc. v. United States*, 883 F.2d 93, 96-97 (D.C. Cir. 1989).

[146] *Coinbase, Inc. v. SEC*, 126 F.4th 175, 187 (3d Cir. 2025) (SEC failed to explain why it rejected workability concerns, prioritized other issues, and preferred to proceed incrementally in rejecting petition concerning cryptocurrency regulations).

can be slim, but it cannot be vacuous."[147] Moreover, "[w]hen an agency … is confronted with evidence that its current regulations are inadequate or the factual premises underlying its prior judgment have eroded, it must offer more to justify its decision to retain its regulations than mere conclusory statements."[148] Litigants might therefore be able to convince a court to remand to the agency to obtain a fuller explanation of the agency's rationale for rejecting their petition.[149]

C. Failing to Take Statutorily Mandated Action

In addition to requiring courts to "set aside" unlawful agency actions under § 706(2), the APA requires courts to "compel agency action unlawfully withheld or unreasonably delayed" under § 706(1). "[A] claim under § 706(1) can proceed only where a plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required to take.*"[150] Even where a plaintiff can identify such an action, "[r]esolution of a claim of unreasonable delay is ordinarily a complicated and nuanced task requiring consideration of the particular facts and circumstances before the court."[151] Most circuits, including the D.C., First, Second, Fourth, and Ninth, consider the six factors enumerated in *TRAC v. FCC*:

> (1) the time agencies take to make decisions must be governed by a rule of reason;
>
> (2) where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason;

[147] *Flyers Rts. Educ. Fund, Inc. v. FAA*, 864 F.3d 738, 747 (D.C. Cir. 2017) (FAA failed to provide evidence to support rejection of safety concerns with smaller airline seats).

[148] *Env't Health Tr. v. FCC*, 9 F.4th 893, 903 (D.C. Cir. 2021) (FCC failed to respond to evidence that radiation exposure below current limits may cause negative health effects).

[149] Courts are reluctant to direct agencies to promulgate rules: "[i]t is only in the rarest and most compelling of circumstances that courts have acted to overturn an agency judgment not to institute rulemaking." *Coinbase*, 126 F.4th at 203 (quotation omitted).

[150] *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 64 (2004)

[151] *Mashpee Wampanoag Tribal Council, Inc. v. Norton*, 336 F.3d 1094, 1100 (D.C. Cir. 2003).

> (3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake;
>
> (4) the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority;
>
> (5) the court should also take into account the nature and extent of the interests prejudiced by delay; and
>
> (6) the court need not find any impropriety lurking behind agency lassitude in order to hold that agency action is unreasonably delayed.[152]

Ultimately, the court must determine "whether the agency's delay is so egregious as to warrant mandamus."[153]

Section 706(1) might permit a challenge where an agency has explicably failed to take statutorily mandated action within a reasonable timeframe. However, *TRAC* claims are notoriously difficult to win.[154] If at all possible, litigants might consider reframing their claims in terms of a challenge to agency "action" rather than agency "inaction." Under the APA, "'agency action' includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act."[155] An agency's delay might be reframed as an implicit rejection — if, for example, the agency's statements or conduct suggest that it has in fact rejected the litigant's claim. Doing so might enable the litigant to obtain review under the more favorable standards of § 706(2), rather than the *TRAC* factors.

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[152] 750 F.2d 70, 80 (D.C. Cir. 1984) (cleaned up); *see, e.g.*, *Wellesley v. FERC*, 829 F.2d 275, 277 (1st Cir. 1987); *NRDC v. FDA*, 710 F.3d 71, 84 (2d Cir. 2013); *Gonzalez v. Cuccinelli*, 985 F.3d 357, 375 (4th Cir. 2021); *Vaz v. Neal*, 33 F.4th 1131, 1137 (9th Cir. 2022).

[153] *TRAC*, 750 F.2d at 79.

[154] *Cf., e.g.*, *In re Core Commc'ns, Inc.*, 531 F.3d 849, 856 (D.C. Cir. 2008) (issuing writ of mandamus where agency failed to respond to court-ordered remand for six years).

[155] 5 U.S.C. § 551(13).

V. CONCLUSION

Non-enforcement is likely to play a pivotal role in the Trump administration's efforts to dismantle the administrative state and undermine vital statutory and regulatory requirements. Many of our nation's proudest legislative accomplishments — everything from environmental standards to public health safeguards to consumer protections — depend on robust federal enforcement. President Trump should not be allowed to nullify these laws simply by ignoring them.