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AGENCY UNDERENFORCEMENT AS REVIEWABLE ABDICATION

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ABSTRACT—The Supreme Court held in 1985 that agency refusals to enforce are presumptively unreviewable under the Administrative Procedure Act. In doing so, the Court created an exception for when an agency has "consciously and expressly adopted a general policy that is so extreme as to amount to an abdication of its statutory responsibilities." Courts and scholars have mostly interpreted this abdication exception as capturing only total nonenforcement, which is when an agency completely stops enforcing its statutory responsibilities. On the other hand, the D.C. Circuit allows review of all general enforcement policies, regardless of whether they implicate abdication—but rarely do agencies create such official policies. Both these approaches, however, fail to allow review when the agency is underenforcing its responsibilities so severely that it achieves substantially the same effect as total nonenforcement.

This type of "severe underenforcement" poses concerning problems. It can potentially undermine complex statutory schemes and implicates constitutional separation of powers concerns. This Note argues that courts and scholars have misread the abdication exception to include only total nonenforcement. Because severe underenforcement poses the same types of concerns that compelled the Court to establish the abdication exception, courts should also allow review under the Administrative Procedure Act when there is severe underenforcement. Adopting a severe underenforcement approach to the abdication exception would help alleviate the concerns it poses and check agency overreach via underenforcement.

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INTRODUCTION

Sixty-seven: the number of endangered Mexican wolves that had been killed illegally from their reintroduction into the American Southwest in 1998 through 2015.[1] Fourteen: the number of Mexican wolves that were killed in 2016 alone—the highest number in a single year.[2] Two: the total number of killings that have been prosecuted.[3] This high number of killings, many of which are classified as potentially illegal,[4] presents an opportunity for the Department of Justice (DOJ) to investigate and prosecute suspected individuals under the Endangered Species Act (ESA). But the DOJ has underenforced the ESA by requiring prosecutors to request jury instructions that set the mens rea as specific intent; to satisfy that, prosecutors must show

[1] U.S. FISH & WILDLIFE SERV., MEXICAN WOLF RECOVERY PROGRAM: PROGRESS REPORT #18, at 33 (2015). There were fourteen new deaths in 2016, all of which were still under investigation, but some were believed to be illegal killings. Susan Montoya Bryan, *Feds: 14 Endangered Mexican Wolves Found Dead in 2016*, AZCENTRAL (published Jan. 4, 2017, 12:16 PM, updated Jan. 4, 2017, 2:42 PM), https://www.azcentral.com/story/news/local/arizona-science/2017/01/04/feds-14-endangered-mexican-wolves-found-dead-2016/96161412 [https://perma.cc/2MLF-3UK2]. This is out of a current population of around 113. *See* News Release, U.S. Fish & Wildlife Serv., 2016 Mexican Wolf Population Survey Reveals Gains for Experimental Population 1 (Feb. 17, 2017), https://www.fws.gov/southwest/es/mexicanwolf/pdf/NR_2016_Mexican_Wolf_Annual_Count.pdf [https://perma.cc/DW8R-5HQW]. Over half of Mexican wolf killings are thus estimated to have been illegal mortalities. Larisa E. Harding et al., *Genetic Management and Setting Recovery Goals for Mexican Wolves* (Canis Lupus Baileyi) *in the Wild*, 203 BIOLOGICAL CONSERVATION 151, 157 (2016).

[2] Bryan, *supra* note 1.

[3] *See* Complaint for Declaratory and Injunctive Relief at ¶ 67, WildEarth Guardians v. U.S. Dep't of Justice, 181 F. Supp. 3d 651 (D. Ariz. 2015) (No. 4:13-cv-00392).

[4] *See* U.S. FISH & WILDLIFE SERV., *supra* note 1.

that the defendant knew he was shooting an endangered animal.[5] Because the eventual mens rea prosecutors must prove at trial impacts which cases to investigate and prosecute, the difficulty of proving this mens rea beyond a reasonable doubt at trial has resulted in fewer prosecutions.[6] As the policy only rarely results in enforcement, it undermines the deterrent effect of the ESA's criminal prohibition on the killing of endangered species.[7] Yet this prohibition is one of the statute's main ways of protecting endangered species, and the DOJ's adoption of this policy cannot easily be squared with Congress's intent in enacting the ESA.[8]

Beyond this policy, executive underenforcement has proliferated in the last few decades, including under Presidents Ronald Reagan,[9] George H.W. Bush,[10] and George W. Bush.[11] More recently, President Barack Obama used underenforcement as a tool to achieve policy directives when faced with a recalcitrant Congress. For instance, the DOJ deprioritized prosecution of certain federal marijuana offenses,[12] the Department of Health and Human

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[5] *See* Ed Newcomer et al., *The Endangered Species Act v. the United States Department of Justice: How the Department of Justice Derailed Criminal Prosecutions Under the Endangered Species Act*, 17 ANIMAL L. 251, 266–67 (2011).

[6] *See id.* at 270 (describing DOJ prosecutors as "hobbled" by the higher mens rea requirement).

[7] *See* 16 U.S.C. § 1538(a)(1)(B) (2012) (prohibition on taking); *see also* Newcomer et al., *supra* note 5, at 269–70 (arguing that charges under the ESA were "appropriate" for a hunter accused of killing an endangered bird, but noting that the hunter escaped penalties due to the mens rea requirement).

[8] *Cf.* Tenn. Valley Auth. v. Hill, 437 U.S. 153, 174 (1978) ("[E]xamination of the language, history, and structure of the [ESA] indicates beyond doubt that Congress intended endangered species to be afforded the highest of priorities.").

[9] *See* Zachary S. Price, *Politics of Nonenforcement*, 65 CASE W. RES. L. REV. 1119, 1125–30 (2015) [hereinafter Price, *Politics*]. For example, from 1980 to 1982, penalties assessed by the Occupational Safety and Health Administration fell 27%, while prosecutions under a key environmental statute fell from forty-three to three prosecutions. BARRY D. FRIEDMAN, REGULATION IN THE REAGAN–BUSH ERA 84 (1995).

[10] *See* Price, *Politics*, *supra* note 9, at 1130; Mary M. Cheh, *When Congress Commands a Thing to be Done: An Essay on* Marbury v. Madison, *Executive Inaction, and the Duty of the Courts to Enforce the Law*, 72 GEO. WASH. L. REV. 253, 266–67 (2003).

[11] *See* Price, *supra* note 9 at 1130–33.

[12] *See* Memorandum from James M. Cole, Deputy Attorney Gen., U.S. Dep't of Justice, to All U.S. Attorneys, Guidance Regarding Marijuana Related Financial Crimes 2–3 (Feb. 14, 2014), http://www.dfi.wa.gov/documents/banks/dept-of-justice-memo.pdf [https://perma.cc/J7Y7-VJP8]; Memorandum from James M. Cole, Deputy Attorney Gen., U.S. Dep't of Justice, to All U.S. Attorneys, Guidance Regarding Marijuana Enforcement 2–3 (Aug. 29, 2013), http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf [https://perma.cc/2VKB-8QQG]; Memorandum from James M. Cole, Deputy Attorney Gen., U.S. Dep't of Justice, to U.S. Attorneys, Guidance Regarding the Ogden Memo in Jurisdictions Seeking to Authorize Marijuana for Medical Use 1–2 (June 29, 2011), http://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/dag-guidance-2011-for-medical-marijuana-use.pdf [https://perma.cc/26FK-WN9X]; Memorandum from David W. Ogden, Deputy Attorney Gen., U.S. Dep't of Justice, to Selected U.S. Attorneys, Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana 1–2 (Oct. 19, 2009), http://www.justice.gov/sites/default/files/opa/legacy/2009/10/19/medical-marijuana.pdf [https://perma.cc/B2ZY-7ELL].

Services postponed deadlines for key provisions of the Affordable Care Act,[13] and the Department of Homeland Security implemented deferred action programs that relied upon underenforcement of existing immigration laws.[14]

Legal challenges to agency initiatives have had mixed success.[15] This is partially due to the Supreme Court's interpretation of the federal courts' power to review certain aspects of agency decisionmaking. The Administrative Procedure Act (APA),[16] which establishes the general scope of judicial review for administrative agency action, allows for review of final agency action or inaction.[17] In *Heckler v. Chaney*, however, the Court interpreted the APA to give an agency's decision not to enforce a potential civil or criminal violation a presumption of unreviewability.[18] The Court also provided ways to rebut that presumption of unreviewability, one of which requires showing that 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]

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[13] *See* Shared Responsibility for Employers Regarding Health Coverage, 79 Fed. Reg. 8544, 8569–76 (Feb. 12, 2014); I.R.S. Notice 2013-45, 2013-31 I.R.B. 116; Letter from Gary Cohen, Dir., Ctr. for Consumer Info. & Ins. Oversight, to State Ins. Comm'rs (Nov. 14, 2013), http://www.cms.gov/CCIIO/Resources/Letters/Downloads/commissioner-letter-11-14-2013.pdf [https://perma.cc/RKQ3-9WJN]; Bulletin from Gary Cohen, Dir., Ctr. for Consumer Info. & Ins. Oversight, Extension of Transitional Policy Through October 1, 2016 (Mar. 5, 2014), http://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/transition-to-compliant-policies-03-06-2015.pdf [https://perma.cc/UZ94-8K78].

[14] *See* Memorandum from Janet Napolitano, Sec'y, U.S. Dep't of Homeland Sec., for David Aguilar, Acting Comm'r, U.S. Customs & Border Prot., et al., Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children (June 15, 2012), http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf [https://perma.cc/4KYJ-J485] (Deferred Action for Childhood Arrivals (DACA)); *see also* Memorandum from Jeh Charles Johnson, Sec'y, U.S. Dep't of Homeland Sec., for León Rodriguez, Dir., U.S. Citizenship & Immigration Servs., et al., Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Who Are the Parents of U.S. Citizens or Permanent Residents (Nov. 20, 2014), https://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf [https://perma.cc/8JPZ-JJLN] (extending this policy to undocumented immigrants who are legal residents or parents of U.S. citizens).

[15] *Compare* Texas v. United States, 86 F. Supp. 3d 591, 677 (S.D. Tex. 2015), *aff'd*, 809 F.3d 134, 146 (5th Cir. 2015), *aff'd by an equally divided court*, 136 S. Ct. 2271 (2016), *reh'g denied*, 137 S. Ct. 285 (2016) (reviewing and enjoining deferred action immigration programs), *with* West v. Holder, 60 F. Supp. 3d 197, 203–04 (D.D.C. 2015) (refusing to review and enjoin marijuana deprioritization policy because it fell under the President's enforcement discretion).

[16] 5 U.S.C. §§ 551–59, 701–06, 1305, 3105, 3344, 4301, 5335, 5372, 7521 (2012).

[17] *Id.* §§ 702, 706. The Supreme Court has interpreted this provision narrowly. *See* Norton v. S. Utah Wilderness All., 542 U.S. 55, 64 (2004) ("Thus, 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*.").

[18] 470 U.S. 821, 827–35 (1985).

[19] *Id.* at 833 n.4 (internal quotation marks omitted).

This Note explores both how courts and scholars have interpreted and should interpret this exception for agency abdication. There are two main ways of construing the *Chaney* abdication exception's scope: (1) the abdication exception applies only when there is complete or total nonenforcement or (2) the abdication exception applies if there is either complete nonenforcement or severe underenforcement. This Note defines severe underenforcement as underenforcement so severe that it reaches the same practical result as total nonenforcement, such as when a provision is enforced only twice per year when many more opportunities to enforce it existed.[20] There is also a third approach to all agency enforcement taken by the D.C. Circuit, which, instead of focusing on the abdication language, allows review when an agency has adopted a general enforcement policy.

To understand these three approaches, consider three examples. First, suppose that the Department of Homeland Security did not investigate or deport any illegal aliens for a year. The total nonenforcement and severe underenforcement approaches would likely allow judicial review in this situation. But under the general policy approach, the agency's choice not to enforce would likely not be reviewable unless the agency adopted a general enforcement policy.

Second, suppose that the Department of Homeland Security went from deporting tens of thousands of illegal aliens in one year to deporting fifty the next year without any change in the substantive law. Under the total nonenforcement approach, a court would likely refuse to review the agency's choice not to enforce because the agency is still minimally enforcing the statute. Under the severe underenforcement approach, challengers could probably rebut *Chaney*'s presumption of unreviewability. A court using the general policy approach would find the presumption intact unless the agency adopted a general policy.

Third, suppose that the Department of Homeland Security adopted a policy that it was categorically not going to deport illegal aliens who fit certain criteria. If the agency consequently did not deport those illegal aliens but deported others, a court following the total nonenforcement approach still might not review the policy. But if the deportation numbers were sufficiently low, the severe underenforcement approach may allow review of the agency's decisions not to enforce. In either case, a court could review the policy under the general policy approach.

Ultimately, the best interpretation of abdication for the purposes of rebutting the presumption of unreviewability is the severe underenforcement

[20] This definition introduces some discretion, which poses the question of whether courts can—or should—easily make this threshold determination of whether there is severe underenforcement. *But see infra* Section IV.C (addressing this concern).

approach, which allows review of both total nonenforcement and severe underenforcement. The Court established the abdication exception to ensure that agencies could not refuse to enforce statutory prohibitions. Because severe underenforcement can achieve substantially the same effect, courts should interpret abdication to include severe underenforcement and thus allow judicial review under those circumstances.

This Note proceeds in four parts. Part I describes *Heckler v. Chaney* and the establishment of the abdication exception. Then Part II outlines the total nonenforcement approach that most courts and scholars have taken. It also explains how they have misinterpreted *Chaney* to dictate that abdication only includes nonenforcement. Next, Part III explains and analyzes the general policy approach that some courts, primarily the D.C. Circuit, have adopted. Lastly, Part IV discusses how a few courts have used the severe underenforcement approach to find *Chaney*'s presumption rebutted. It then delineates how the phenomenon of severe underenforcement poses pressing problems in two different contexts. First, it examines environmental law as an example of how severe underenforcement harms complex statutory schemes in which civil and criminal penalties are overlapping and in which there is heavy dependence on federal enforcement. Second, it describes the constitutional concerns that severe underenforcement introduces, including potential violations of the Presentment Clause and the Take Care Clause. Part IV concludes by arguing that courts should interpret abdication more broadly to encompass severe underenforcement and explores how to do so in a principled way.

I. *HECKLER V. CHANEY* AND REVIEWABLE ABDICATION

The Supreme Court has interpreted the APA to establish a presumption of unreviewability for agency decisions not to enforce. The APA allows a person who suffered from an agency's legal wrong or who is aggrieved by agency action to judicially challenge that agency's final action or inaction.[21] The language of § 706 suggests that the reviewing court has broad authority to "compel agency action unlawfully withheld or unreasonably delayed"[22] or to set aside agency actions that are "arbitrary, capricious, [or] an abuse of discretion."[23] This originally led to a general presumption of reviewability

[21] *See* 5 U.S.C. §§ 702, 704 (2012) (action); *id.* § 551(13) (inaction); *see also* Ashutosh Bhagwat, *Three-Branch Monte*, 72 NOTRE DAME L. REV. 157, 160–61 (1996) (explaining judicial review under the APA before and after *Chaney*).

[22] 5 U.S.C. § 706(1) (2012).

[23] *Id.* § 706(1)(A).

under the APA.[24] Section 701(a)(2), however, creates an exception to this presumption to the extent that the "agency action is committed to agency discretion by law."[25]

The Court's most recent interpretation of § 701(a)(2) came in the 1985 case of *Heckler v. Chaney*.[26] In *Chaney*, death row inmates petitioned the Food and Drug Administration (FDA) to take enforcement action under the Federal Food, Drug, and Cosmetic Act, alleging that states' use of lethal injection violated that statute.[27] The FDA denied the petition and the inmates challenged that denial.[28] On appeal, the Court held that agency decisions to refuse enforcement were presumptively unreviewable based on three rationales.[29] First, agency decisions not to enforce involve balancing numerous factors within the agency's expertise, and the agency—rather than courts—should decide how to best allocate resources.[30] Second, "when an agency refuses to act it generally does not exercise its *coercive* power over an individual's liberty or property rights."[31] Lastly, the Court noted the similarities between prosecutorial discretion and agency discretion, stating that agencies, like prosecutors, should be free to decide when not to pursue enforcement actions.[32]

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[24] *See, e.g.*, Mach Mining, LLC v. EEOC, 135 S. Ct. 1645, 1651 (2015) ("[T]his Court applies a strong presumption favoring judicial review of administrative action." (internal quotation marks omitted)).

[25] 5 U.S.C. § 701(a)(2) (2012). The Supreme Court's first full discussion of § 701(a)(2) came in *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971). The Court found that § 701(a)(2) presented a narrow exception to the general presumption of unreviewability when there was "no law to apply," meaning when a reviewing court had no meaningful standards against which to measure agency action. *See id.* at 410 (quoting S. REP. NO. 79-752, at 26). This decision only muddied the waters: how to determine when there was "no law to apply" was unclear. *See* Ronald M. Levin, *Understanding Unreviewability in Administrative Law*, 74 MINN. L. REV. 689, 707–10 (1990); Cass R. Sunstein, *Reviewing Agency Inaction After* Heckler v. Chaney, 52 U. CHI. L. REV. 653, 659 (1985). Courts consequently split over how to determine whether there was law to apply. *See* Levin, *supra*, at 710–11. For instance, some courts applied the *Overton Park* test to foreclose judicial review when the statute gave no substantive guidance, even if it may have been an abuse of discretion under the APA, while other courts reverted to pre-*Overton Park* tests. *See id.* at 710.

[26] 470 U.S. 821 (1985).

[27] *Id.* at 823.

[28] *Id.*

[29] *Id.* at 831–32.

[30] *Id.*

[31] *Id.* at 832.

[32] *Id.* (noting that both are left to the discretion of the President via his power under the Take Care Clause); *see also* Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671, 748 (2014) [hereinafter Price, *Enforcement Discretion*] (discussing the connections between administrative discretion and prosecutorial discretion). As hinted at by the Court, prosecutors have extensive prosecutorial discretion. *See, e.g.*, Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978) ("[S]o long as the prosecutor has probable cause . . . , the decision whether or not to prosecute . . . generally rests entirely in his discretion.").

According to the *Chaney* Court, challengers can potentially rebut this presumption of unreviewability by showing that "the agency has 'consciously and expressly adopted a general policy' that is so extreme as to amount to an abdication of its statutory responsibilities,"[33] which this Note refers to as the "abdication exception." *Chaney* was not one of those situations,[34] but the Court cited favorably to a D.C. Circuit case, *Adams v. Richardson*.[35] In *Adams*, the challengers alleged that the Department of Health, Education, and Welfare (HEW) failed to enforce Title VI of the Civil Rights Act by continuing to fund segregated institutions rather than following the relevant enforcement methods laid out in the statute.[36] HEW argued that nonenforcement decisions were committed to agency discretion and therefore were not judicially reviewable.[37] The D.C. Circuit, however, refused to apply § 701(a)(2)'s narrow exception to the APA's presumption of reviewability.[38] Instead, the court distinguished the case on the basis that HEW had "consciously and expressly adopted a general policy which [wa]s in effect an abdication of its statutory duty"[39]—language later quoted in *Chaney*.[40]

Other than this footnote reference to *Adams*, the *Chaney* Court offered no guidance on what the abdication exception entails or how courts can determine whether abdication is occurring.[41] Consequently, courts have

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[33] *Chaney*, 470 U.S. at 833 n.4 (quoting Adams v. Richardson, 480 F.2d 1159, 1162 (D.C. Cir. 1973) (en banc) (per curiam)). The Court also provided other ways of rebutting the presumption of unreviewability that are not the subject of this Note. *Id.* at 832–33; *see also* Sunstein, *supra* note 25, at 675–83 (discussing six potential arguments to rebut the presumption of unreviewability). For example, challengers can overcome the presumption of unreviewability by pointing to judicially manageable standards against which the agency nonenforcement can be judged. *See, e.g.*, Chong v. Dir., U.S. Info. Agency, 821 F.2d 171, 175–76 (3d Cir. 1987); Giacobbi v. Biermann, 780 F. Supp. 33, 36–38 (D.D.C. 1992).

[34] 470 U.S. at 833 n.4.

[35] 480 F.2d 1159.

[36] *Id.* at 1161–63.

[37] *Id.* at 1161.

[38] *Id.* at 1161–62.

[39] *Id.* at 1162; *see also id.* at 1163 ("A consistent failure to [enforce Title VI by one of the two statutory means] is a dereliction of duty reviewable in the courts.").

[40] Heckler v. Chaney, 470 U.S. 821, 833 n.4 (1985).

[41] The Court recently missed an opportunity to clarify the doctrine in *Texas v. United States*, in which Texas and other states challenged the Department of Homeland Security's nonenforcement of immigration directives under the Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) program. The state used the concept of abdication in two ways: (1) to bolster its argument that it had standing ("abdication standing") and (2) to argue that the agency's refusal to enforce was reviewable. *See* Texas v. United States, 86 F. Supp. 3d 591, 636–43, 662–63 (S.D. Tex. 2015). The district court held both that Texas had standing and that DAPA constituted complete abdication warranting judicial review of the agency's nonenforcement. *See id.* at 643. The Fifth Circuit affirmed. Texas v. United States, 809 F.3d 134, 146 (5th Cir. 2015). *But see id.* at 200–01 (King, J., dissenting)

differed in how they interpret what amounts to reviewable abdication. As Part II describes, most courts and scholars have interpreted abdication to indicate only complete nonenforcement. A few courts, including the D.C. Circuit, require a general enforcement policy before reviewing an agency's nonenforcement decision, as discussed in Part III. Lastly, Part IV details how a handful of courts have used a severe underenforcement approach.

II. NONENFORCEMENT AS ABDICATION

In an attempt to rebut *Chaney*'s presumption of unreviewability of refusals to enforce, litigants have argued that agencies have abdicated their statutory responsibilities. In response, most courts have adopted a total nonenforcement approach to abdication and rejected these arguments using three interrelated rationales. Moreover, scholars have similarly interpreted the abdication exception as capturing only total nonenforcement. Both the courts and scholars, however, have misread *Chaney*.

A. In the Courts

Generally, courts have legitimized the abdication exception's potential to rebut *Chaney*'s presumption of unreviewability[42] but have refused to find it applicable in most cases.[43] Their reasoning in doing so falls into three overlapping and interrelated categories: (1) the agency is still at least minimally enforcing the statute, (2) the agency has not announced a general policy of nonenforcement, and (3) the agency has complete discretion because there are no relevant statutory guidelines. Courts often use a mix of the above rationales. Each rationale demonstrates that most courts have

(arguing that it was not clear that the agency was doing *nothing* to enforce the federal immigration laws). The Supreme Court affirmed by an equally divided vote and denied rehearing. United States v. Texas, 136 S. Ct. 2271 (2016), *reh'g denied*, 137 S. Ct. 285 (2016) (mem.).

[42] *See, e.g.*, Mont. Air Chapter No. 29, Ass'n of Civilian Technicians, v. FLRA, 898 F.2d 753, 756 (9th Cir. 1990). But in two cases, courts have focused on the specific language of *Chaney*, as the Court stated that it "express[ed] no opinion on whether such [abdication] decisions would be unreviewable," 470 U.S. at 833 n.4, in rejecting the abdication exception. *See* Hi-Tech Bed Sys. Corp. v. U.S. Gen. Servs. Admin., No. 11-CV-293-S, 2012 WL 12871622, at *6 (D. Wyo. Mar. 8, 2012); Am. Disabled for Attendant Programs Today v. HUD, No. CIV. A. 96-5881, 1998 WL 113802, at *3 n.10 (E.D. Pa. Mar. 12, 1998), *aff'd*, 170 F.3d 381 (3d Cir. 1999).

[43] *See, e.g.*, California v. United States, 104 F.3d 1086, 1094 (9th Cir. 1997). A few courts have ultimately found that agency nonenforcement is reviewable under similar reasoning as the total nonenforcement approach but have failed to cite the abdication exception. *See, e.g.*, N. Ind. Pub. Serv. Co. v. FERC, 782 F.2d 730, 745 (7th Cir. 1986) ("[T]he Commission can[not] essentially abandon its regulatory function of ensuring just, reasonable, and preferential rates to Natural under the guise of unreviewable agency inaction."); Jones v. Comptroller of the Currency, 983 F. Supp. 197, 203 (D.D.C. 1997) ("Judicial review is available under the APA, however, with respect to plaintiff's allegation that the OCC has failed generally and programmatically to fulfill the mandate of [the statute]."), *aff'd*, No. 97-5341, 1998 WL 315581 (D.C. Cir. May 12, 1998) (per curiam).

interpreted the abdication exception to implicate only nonenforcement and not severe underenforcement.

For instance, in *Riverkeeper, Inc. v. Collins*,[44] the Second Circuit relied on the first rationale. Riverkeeper requested that the Nuclear Regulatory Commission (NRC) take certain actions regarding two nuclear power plants, fearing potential terrorist attacks.[45] The agency refused to take action.[46] Subsequently, the court rejected Riverkeeper's contention that the abdication exception applied.[47] The court reasoned that, although the agency refused Riverkeeper's specific requests,[48] the NRC had otherwise acted to fulfill its general statutory duty of adequately protecting public health and safety.[49] Moreover, the court incorporated aspects of the second rationale in its reasoning because it was not willing to find an express "NRC policy not to consider potential terrorist attacks by airborne vehicles" based on pre-September 11 documents.[50] Because that did not amount to a policy, the Second Circuit found that there was no "NRC policy expressly abdicating any relevant statutory responsibility."[51]

As in *Riverkeeper,* courts have commonly employed the second rationale to find that the agency has not adopted a general policy of nonenforcement, and it thus did not completely abdicate its duties. Courts usually refuse to read a general nonenforcement policy into a few occurrences of nonenforcement or unofficial agency representations, including documents.[52] This is especially true when the agency itself disclaims having a general nonenforcement policy. In *People for the Ethical*

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[44] 359 F.3d 156 (2d Cir. 2004).

[45] *Id.* at 158.

[46] *Id.* at 163.

[47] *Id.* at 166–71.

[48] *Id.* at 169.

[49] *Id.* at 168. The court further noted that finding abdication every time the agency "decline[d] to order demanded action" would undermine *Chaney*. *See id.* at 169 ("[I]n thus shutting the front door to federal courts, [the Court] did not mean to open a back door . . . . Such an exception to the rule that failure to institute an enforcement action is generally not reviewable would threaten to devour the rule.").

For examples of other courts using this first rationale, see, e.g., *Block v. SEC*, 50 F.3d 1078, 1084 (D.C. Cir. 1995); *Sierra Club v. Yeutter*, 911 F.2d 1405, 1412 (10th Cir. 1990); *Mass. Pub. Interest Research Grp., Inc. v. NRC*, 852 F.2d 9, 19 (1st Cir. 1988); *Gillis v. U.S. Dep't of Health & Human Servs.*, 759 F.2d 565, 578–79 (6th Cir. 1985).

[50] *Riverkeeper*, 359 F.3d at 166 (internal quotation marks omitted).

[51] *Id.* at 166.

[52] Unofficial agency documents are perhaps those that do not have the force of law and do not receive *Chevron* deference, *see* United States v. Mead Corp., 533 U.S. 218, 234 (2001) (finding that classification rulings, along with "interpretations contained in policy statements, agency manuals, and enforcement guidelines," are "beyond the *Chevron* pale") (internal quotation marks omitted), although the courts are imprecise in describing what makes a document unofficial in this context.

Treatment of Animals v. U.S. Department of Agriculture,[53] for example, the District Court for the District of Columbia refused to infer a general policy of nonenforcement from the agency officials' decade-long repeated assertions that avian abuse did not fall within their jurisdiction under the Animal Welfare Act (AWA).[54] The court instead looked to the agency's promulgated rules and regulations, which it found evinced intent to enforce the AWA as to birds.[55] Similarly, in *NAACP v. Secretary of Housing and Urban Development*,[56] the First Circuit found that several individual grant denials did not rise to the level of a general policy or practice.[57] Like in *Riverkeeper*, courts sometimes treat the first rationale of partial enforcement as a subset of the second: by even infrequently enforcing the statutory or regulatory duties, the agency demonstrated that it had not adopted a general nonenforcement policy.[58]

Moreover, as a vague catchall, courts in several different circumstances have found that the agency maintains complete discretion and, thus, any efforts at enforcement not precluded by the statute foreclose the use of the abdication exception.[59] For some courts, this third rationale is especially conclusory.[60] Other courts reason that if there are no specific duties in the statute that can be used to judge the action, there are no statutory responsibilities to abdicate.[61] In doing so, courts have consistently noted the

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[53] 7 F. Supp. 3d 1 (D.D.C. 2013) (mem.).

[54] *Id.* at 12.

[55] *Id.* D.C. Circuit cases have sometimes used this rationale when specifically addressing the abdication exception, rather than just using the general enforcement policy approach detailed in Part III. *See, e.g.*, Ass'n of Civilian Technicians, v. FLRA, 283 F.3d 339, 344 (D.C. Cir. 2002) (holding that the agency's two rulings about responsibilities were not enough to show a policy of nonenforcement severe enough to trigger the abdication exception).

[56] 817 F.2d 149 (1st Cir. 1987).

[57] *See id.* at 159.

[58] *See, e.g.*, Riverkeeper, Inc. v. Collins, 359 F.3d 156, 168–69 (2d Cir. 2004) (noting that the court could find abdication "only if [the NRC] has established a policy not to protect . . . public health and safety," and foreclosing such a finding by listing the various measures the NRC took to that end).

[59] *See, e.g.*, Garcia v. McCarthy, 649 F. App'x 589, 592 (9th Cir. 2016) (finding that the abdication exception did not apply to EPA's delay in implementing regulation but instead that "this case centers . . . around EPA's interpretation of its own enforcement duties under Title VI, a matter committed to its discretion by law"); Connecticut v. Spellings, 453 F. Supp. 2d 459, 500–01 (D. Conn. 2006) ("[This] policy disagreement can hardly be labeled an abdication of the Secretary's responsibilities.").

[60] *See, e.g.*, California v. United States, 104 F.3d 1086, 1094 (9th Cir. 1997) ("[T]he allegations asserted in the instant Complaint do not rise to a level that would indicate such an abdication.").

[61] *See* Va. Beach Policemen's Benevolent Ass'n v. Reich, 881 F. Supp. 1059, 1072 (E.D. Va. 1995); Chiles v. United States, 874 F. Supp. 1334, 1340–41 (S.D. Fla. 1994), *aff'd*, 69 F.3d 1094 (11th Cir. 1995). Some courts have gotten around this by applying the abdication exception to regulatory or other responsibilities. *See infra* notes 150, 168 and accompanying text.

sentiment that "[r]eal or perceived inadequate enforcement of . . . laws does not constitute a reviewable abdication of duty."[62]

Each of these three rationales stem from these courts' conceptualization of the abdication exception as encompassing only total agency nonenforcement. In other words, reasoning that any enforcement action disqualifies challengers from using the abdication exception because there is minimal enforcement signifies that courts view the abdication exception as only applying when there is no enforcement at all. For this large majority of courts, underenforcement—no matter how severe—does not fall within the reach of the abdication exception.

Likewise, as in *People for the Ethical Treatment of Animals*, courts' practice of refusing to infer adoption of a general policy from repeated agency representations or refusals to enforce effectively requires agencies to completely stop enforcing the relevant provisions to satisfy the abdication exception. Only then can a court easily discern a general policy amounting to abdication. This might include absolutely no enforcement of the statutory provisions or the adoption of a general nonenforcement policy. Neither possibility captures severe underenforcement.

Lastly, the widespread adoption of the complete nonenforcement approach is reflected by decisions that suggest the agency retains enforcement discretion when there are no clear responsibilities. As with weak enforcement, if the agency exercises that discretion, a court cannot review its refusals to enforce. Requiring specific statutory responsibilities that the agency is ignoring or bypassing is more likely to capture total nonenforcement than severe underenforcement. These courts do not even examine whether there is underenforcement more generally. Therefore, no matter the rationale, most courts have been interpreting abdication to mean only complete nonenforcement.

B. In the Literature

In addition to courts, scholars have interpreted *Chaney*'s abdication exception as implicating only total nonenforcement. For instance, Daniel Deacon described the abdication exception as the *Chaney* exception "with perhaps the most limited reach."[63] Deacon noted that "the exception has remained quite limited" because the exception seems to require that agencies "abandon[] enforcement in an *entire* area," which they will rarely do.[64]

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[62] Texas v. United States, 106 F.3d 661, 667 (5th Cir. 1997).

[63] Daniel T. Deacon, Note, *Deregulation Through Nonenforcement*, 85 N.Y.U. L. REV. 795, 804 (2010).

[64] *Id.* (emphasis added).

Essentially, Deacon describes the abdication exception as requiring an agency to stop enforcing statutory provisions completely.

Deacon is not alone. For instance, Professor Cass Sunstein, writing not long after the Court decided *Chaney*, found that an agency announcing that it will no longer enforce a statute satisfies the abdication exception because that agency action is "contrary to the will of the legislature that enacted the statute."[65] But Sunstein argued that an agency's "isolated failure[s] to act" do not lead to the same conclusion.[66] Moreover, according to Sunstein, refusal to act in a large number of cases may not be enough to form the pattern of nonenforcement contemplated by the abdication exception.[67] While Sunstein seemed to consider that courts could perhaps infer a pattern of nonenforcement by comparing the number of cases in which the agency refused to enforce against the total statutory jurisdiction of the agency,[68] he concluded that it was ultimately too difficult to tell "whether a particular case falls in the category of 'abdication' or of isolated refusal to act."[69] In a later work, Sunstein and Professor Adrian Vermeule examined the abdication exception in the context of a temporary moratorium on enforcing discretionary duties and found that a temporary abandonment of those duties did not satisfy the abdication exception—more was needed.[70] In other words, complete nonenforcement was needed.

Two other scholars went so far as to locate the total nonenforcement requirement in the Court's reasoning in *Chaney*. Donald Levy and Debra Duncan noted that inherent in *Chaney*'s reasoning was the assertion that an

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[65] Sunstein, *supra* note 25, at 678.

[66] *Id.* at 678–79.

[67] *Id.* at 679. Other scholars have made similar observations. *See, e.g.*, Bradley E. Markano, *Enabling State Deregulation of Marijuana Through Executive Branch Nonenforcement*, 90 N.Y.U. L. REV. 289, 305–06 (2015) (finding that the abdication exception does not apply when there is a "simple and nonmandatory shift in the priorities of federal prosecutors").

[68] Sunstein, *supra* note 25, at 679.

[69] *Id.*

[70] Cass R. Sunstein & Adrian Vermeule, *The Law of "Not Now": When Agencies Defer Decisions*, 103 GEO. L.J. 157, 193 (2014); *cf.* Josh Blackman, *The Constitutionality of DAPA Part II: Faithfully Executing the Law*, 19 TEX. REV. L. & POL. 213, 235–36 (2015) ("[T]he decision to defer deportations by itself is not enough to amount to an abdication of its statutory responsibilities." (internal quotation marks omitted)). Sunstein and Vermeule ultimately argued for an anti-abdication principle, like that established in *Chaney*, that applies to all agency action, not just enforcement. *See* Sunstein & Vermeule, *supra*, at 185–89. According to them, agency inaction poses serious separation of powers concerns. *See id.* at 186 ("Suppose that a statute gives the agency discretion to make decisions whether to decide, and that the agency offers *valid* reasons—related to resource allocation and priority setting—for deferring the relevant decisions. Suppose also, however, that the agency repeatedly gives those same reasons, constantly moving the decision to the back of the queue. Over time, the consequence will be that the statutory scheme is effectively nullified, in practice if not openly."); *see also infra* Section IV.B.2 (discussing similar concerns).

agency's decision not to enforce "*cannot* be arbitrary or capricious unless it amounts to a complete abdication of the agency's statutory obligations."[71] While they viewed abdication as encompassing total nonenforcement, they ultimately disagreed with the Court's reasoning and decision to establish the presumption of unreviewability in the first place.[72] Daniel Stepanicich similarly noted that enforcement actions that fall short of a policy of ignoring a statutory mandate but are more than a one-shot decision do not qualify for the abdication exception.[73] Based on this understanding that the abdication exception requires total nonenforcement, several scholars have determined that it will rarely be effective in rebutting *Chaney*'s presumption of unreviewability.[74]

Professor Zachary Price engaged in a more nuanced analysis of what the abdication exception entails.[75] Price identified the essential problem with abdication as one of "unmanageable line-drawing."[76] He argued that nonenforcement falls along a spectrum and it is unclear how much abdication *Chaney* prohibits.[77] Furthermore, he accepted that agencies will never be able to enforce every statute fully due to lack of resources and natural prioritization, such as prioritizing more serious crimes.[78] Price ultimately rejected the utility of the abdication exception and argued instead for a political question approach to issues of nonenforcement and underenforcement.[79] In doing so, Price ultimately accepted the complete

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[71] Donald M. Levy, Jr., & Debra Jean Duncan, *Judicial Review of Administrative Rulemaking and Enforcement Discretion: The Effect of a Presumption of Unreviewability*, 55 GEO. WASH. L. REV. 596, 627 n.214 (1987).

[72] *See id.* (noting that an agency's rescission of one of its regulations is reviewable even though this does not amount to abdication and suggesting that a similar standard should govern nonenforcement).

[73] Daniel Stepanicich, Comment, *Presidential Inaction and the Constitutional Basis for Executive Nonenforcement Discretion*, 18 U. PA. J. CONST. L. 1507, 1534 (2016).

[74] *See, e.g.*, Deacon, *supra* note 63, at 804 ("[P]laintiffs alleging a pattern of agency inaction will have a hard time proving that the pattern amounts to a conscious and express abdication of an agency's statutory responsibility.").

[75] *See* Zachary S. Price, *Law Enforcement as Political Question*, 91 NOTRE DAME L. REV. 1571, 1615–16 (2016) [hereinafter Price, *Law Enforcement*].

[76] *Id.* at 1616. This is similar to the position that Sunstein and Vermeule took when they stated that the abdication exception is "admittedly vague and not easily subject to judicial administration." Sunstein & Vermeule, *supra* note 70, at 162.

[77] Price, *Law Enforcement*, *supra* note 75, at 1616.

[78] *Id.*

[79] *Id.* at 1617 ("[*Chaney*]'s abdication principle will rarely provide a principled way out of the problem of judicial unmanageability with respect to nonenforcement."). The political question doctrine recognizes "that some legal obligations defy judicial enforcement," and in those situations the issue is essentially nonjusticiable. *Id.* at 1587. The Supreme Court has outlined a six-factor test that governs the identification of political questions. *See* Baker v. Carr, 369 U.S. 186, 217 (1962).

nonenforcement interpretation of abdication as correct and rejected the severe underenforcement interpretation.[80]

These pieces reflect the general sentiment in the literature that the abdication exception contemplates only total nonenforcement and not severe underenforcement, even as scholars have recognized that extreme underenforcement may present the same concerns.[81]

C. Misreading Chaney

Courts and scholars have been misreading *Chaney* to apply the abdication exception only in cases of total nonenforcement. The Court in *Chaney* did not, however, mean to preclude review when there is severe underenforcement. Reading the case otherwise ignores both the text establishing the exception and the Court's intent, as demonstrated by its reference to *Adams*.

First, the text in which the abdication exception has its roots discusses "a situation where it could justifiably be found that the agency has consciously and expressly adopted a general policy that is so extreme as to amount to an abdication of its statutory responsibilities."[82] This language does not limit the interpretation to include only complete nonenforcement. The phrase "a general policy that is so extreme" could include any extreme policy, whether total nonenforcement or severe underenforcement. Additionally, the adverbs "consciously" and "expressly" seem to signal that the agency's intention and method in adopting this policy are important. This principle also applies to severe underenforcement because agencies can consciously and expressly choose to dramatically underenforce statutes. Additionally, the word "abdication" is defined as "to relinquish" or "to cast off" something, such as a responsibility.[83] Under these definitions, severe underenforcement can amount to abdication. The text establishing the abdication exception thus does not explicitly require total enforcement.

Second, the *Chaney* Court cited to *Adams*, which demonstrated its underlying intent.[84] In *Adams*, the D.C. Circuit specifically noted that the suit was not challenging nonenforcement in a few school districts but rather

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[80] Price, *Law Enforcement*, *supra* note 75, at 1617.

[81] *See, e.g.*, Leigh Osofsky, *The Case for Categorical Nonenforcement*, 69 TAX L. REV. 73, 110 (2015) (noting that deprioritizing certain enforcement actions "can have a very similar effect to categorical nonenforcement").

[82] Heckler v. Chaney, 470 U.S. 821, 833 n.4 (1985) (internal quotation marks omitted).

[83] *Abdicate*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/abdicate [https://perma.cc/B3C8-6X6Z].

[84] *Chaney*, 470 U.S. at 833 n.4 (citing Adams v. Richardson, 480 F.2d 1159 (D.C. Cir. 1973) (en banc) (per curiam)).

challenging essentially complete nonenforcement.[85] In that way, *Adams* seems to suggest that the abdication exception should at least extend to total nonenforcement. At the same time, the court distinguished the situation in *Adams* from one in which there is a "generally effective enforcement program."[86] An enforcement program with severe underenforcement is unlikely to be generally effective because the statute is not being consistently enforced. The reference to *Adams* therefore also supports the proposition that the Court did not necessarily intend the abdication exception to include only total nonenforcement.

Analyzing *Chaney* demonstrates that the abdication exception can plausibly include more than total nonenforcement. The Court appeared worried about agencies purposefully undermining statutes, which severe underenforcement also does. In addition, the *Chaney* Court was concerned about abdication in situations where there is no generally effective enforcement program. Purposeful, severe underenforcement is the opposite of that. Thus, courts and scholars have been misunderstanding *Chaney*'s abdication exception to preclude severe underenforcement when reviewing severe underenforcement might best address the Court's concerns.

III. GENERAL ENFORCEMENT POLICIES

In addition to taking a total nonenforcement approach to the abdication exception,[87] the D.C. Circuit has its own approach that exempts all general enforcement policies from *Chaney*'s presumption of unreviewability. Under this approach, courts can review general, official enforcement policies, just not single nonenforcement decisions.[88] Ultimately, this approach might be too formalistic and strict. It creates perverse incentives for agencies to not

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[85] *See Adams*, 480 F.2d at 1162. In fact, based on the statute at issue in the case, some have argued that *Chaney*'s footnote reference to *Adams* is unilluminating because *Adams* is a pre-*Chaney* decision with potentially dubious precedential value. *See* Price, *Law Enforcement*, *supra* note 75, at 1616–17 (discussing *Adams* and arguing it may have been the perfect, but anomalous, case for the abdication exception); *see also* People for the Ethical Treatment of Animals v. U.S. Dep't of Agric., 60 F. Supp. 3d 14, 18 (D.D.C. 2014) (finding that Adams "ha[d] limited relevance for understanding the scope of" *Chaney*).

[86] *Adams*, 480 F.2d at 1162.

[87] *See, e.g.*, Ass'n of Irritated Residents v. EPA, 494 F.3d 1027, 1035–36 (D.C. Cir. 2007) (rejecting the argument that the EPA's nonenforcement decision fell within the abdication exception because the EPA was enforcing the statute in other ways).

[88] *See, e.g.*, Edison Elec. Inst. v. EPA, 996 F.2d 326, 333 (D.C. Cir. 1993); *cf.* Nat'l Wildlife Fed'n v. EPA, 980 F.2d 765, 773 (D.C. Cir. 1992) (finding that the presumption of unreviewability was "inapplicable or at least rebutted" in part because the National Wildlife Federation was challenging an interpretation of the statute rather than a "particular enforcement decision"); Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. Brock, 783 F.2d 237, 246 (D.C. Cir. 1986) ("Even if a statutory interpretation is announced in the course of a nonenforcement decision, that does not mean that it escapes review altogether.").

adopt any enforcement policies and therefore creates potential for total nonenforcement and severe underenforcement.

A. In the D.C. Circuit

The D.C. Circuit addresses the abdication exception when it arises,[89] but it has a separate approach to agency enforcement policies more generally. Essentially, it has found that, while *Chaney* established that individual nonenforcement decisions are presumptively unreviewable, general and official enforcement policies are reviewable, regardless of whether they indicate potential abdication.

In *Crowley Caribbean Transport, Inc. v. Peña*,[90] the D.C. Circuit explained its rationale. In *Crowley*, the Maritime Administrator indicated in correspondence with Lykes Brothers Steamship Company that it did not need a waiver to operate foreign-flag ships to certain ports.[91] Crowley, a competitor, contested that Lykes did need a waiver but to no avail—the Administrator again refused to require a waiver for Lykes.[92] Crowley sued[93] and, on appeal, the D.C. Circuit found that the Administrator's decision was an unreviewable "single-shot non-enforcement decision."[94] Only general policies were reviewable, and the unofficial correspondence between the Administrator and Lykes was neither a general policy nor indicative of one.[95]

The *Crowley* court distinguished general enforcement policies from individual decisions. First, it noted that individual enforcement proceedings involve "mingled assessments of fact, policy, and law . . . that are . . . peculiarly within the agency's expertise and discretion."[96] General enforcement policies also present clearer statements of agency reasons for nonenforcement, whereas individual nonenforcement decisions "tend to be cursory, ad hoc, or post hoc."[97] Moreover, an agency's announcement of a general nonenforcement policy implicates the potential applicability of the abdication exception because broad policies can more easily demonstrate

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[89] *See, e.g.*, People for the Ethical Treatment of Animals v. U.S. Dep't of Agric., 7 F. Supp. 3d 1, 10–13 (D.D.C. 2013).

[90] 37 F.3d 671 (D.C. Cir. 1994).

[91] *Id.* at 672–73.

[92] *Id.* at 673.

[93] *Id.*

[94] *Id.* at 676 (emphasis omitted). In fact, it was unclear whether the Administrator's determination was a nonenforcement decision or an advisory opinion. The court analyzed both possibilities. *See id.* at 673–74.

[95] *Id.* at 676–77.

[96] *Id.* at 677.

[97] *Id.*

abdication.[98] Lastly, the opinion noted that courts should shy away from "teasing meaning out of agencies' side comments, form letters, litigation documents, and informal communications."[99]

This last comment from the D.C. Circuit illustrates the fine line it has drawn. Consolidated and promulgated general enforcement policies are reviewable, such as when the policy is part of a formal regulation that underwent the rulemaking process[100] or that articulates a universal policy statement.[101] But documents produced for individual enforcement decisions are unreviewable[102]—even when, taken together, they might amount to a general policy. The exception to this approach is when a document in an individual nonenforcement decision "would actually lay out a general policy delineating the boundary between enforcement and non-enforcement and purport to speak to a broad class of parties."[103] No case yet has presented this situation.

B. In Other Courts

A few courts outside of the D.C. Circuit have noted its approach favorably.[104] The most recent case discussing both *Crowley* and the abdication exception is *WildEarth Guardians v. Department of Justice*,[105] a

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[98] *Id.* Despite this comment, the D.C. Circuit has never explicitly used the abdication exception to find a general enforcement policy reviewable, although it used similar reasoning (that is, searching for a general pattern) in *Jones v. Comptroller of the Currency* to review the total nonenforcement there. 983 F. Supp. 197, 203–04 (D.D.C. 1997), *aff'd*, 1998 WL 315581 (D.C. Cir. May 12, 1998) (per curiam) (concluding that the court has jurisdiction to review the plaintiff's claim that the OCC had "failed generally and programmatically" to administer the Fair Housing Act because the statute imposed an affirmative mandate on the OCC).

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

[100] For example, in *National Wildlife Federation v. EPA*, the EPA argued that *Chaney* foreclosed NWF's challenge to an EPA regulation that gave the EPA discretion whether to initiate certain proceedings (rather than those proceedings being automatically triggered by a certain finding). 980 F.2d 765, 772–73 (D.C. Cir. 1992). The court rejected this argument in part because the NWF challenged a particular interpretation of the statute embodied in a regulation, rather than challenging particular decisions not to enforce the statute. *Id.* at 773.

[101] *See, e.g.*, Edison Elec. Inst. v. EPA, 996 F.2d 326, 333 (D.C. Cir. 1993).

[102] This was the situation in *Crowley*. *See* 37 F.3d at 676.

[103] *See id.* at 677. Parties have also unsuccessfully invoked the *Crowley* exception in other cases. *See, e.g.*, People for the Ethical Treatment of Animals v. U.S. Dep't of Agric., 60 F. Supp. 3d 14, 16–19 (D.D.C. 2014) (mem.); K-V Pharm. Co. v. U.S. Dep't of Agric., 889 F. Supp. 2d 119, 135–40 (D.D.C. 2012) (mem.), *vacated on other grounds*, No. 12-5349, 2014 WL 68499 (D.C. Cir. Jan. 7, 2014) (per curiam).

[104] So far, a total of four courts outside the D.C. Circuit have explicitly adopted *Crowley*'s approach. *See, e.g.*, Riverkeeper v. Collins, 359 F.3d 156, 167 (2d Cir. 2004); WildEarth Guardians v. Dep't of Justice, 181 F. Supp. 3d 651, 665–68 (D. Ariz. 2015); Nat. Res. Def. Council, Inc. v. FDA, 872 F. Supp. 2d 318, 334 n.20 (S.D.N.Y. 2012), *rev'd on other grounds*, 760 F.3d 151 (2d Cir. 2014); Ringo v. Lombardi, 706 F. Supp. 2d 952, 959–60 (W.D. Mo. 2010).

[105] 181 F. Supp. 3d at 664–68.

case in the District of Arizona in which WildEarth Guardians (WEG) challenged the underenforcement of the ESA's provisions—including the underenforcement of the taking prohibition discussed in this Note's Introduction.

The ESA allows for the listing of endangered and threatened animal species by the Fish and Wildlife Service (FWS).[106] Once a species is listed, the statute prohibits taking, possessing, and selling that endangered species.[107] The potential penalties are steep: civil penalties range from $500 for strict liability offenses to $12,000 for violations requiring a mens rea of "knowingly."[108] Criminal penalties, which all require a mens rea of knowingly, range from $25,000 to $50,000 and from six months to one year of incarceration.[109] The ESA further allows for citizen suits to enjoin any person alleged to be in violation of the statute.[110]

WildEarth Guardians stems from the consequences of an earlier case concerning the mens rea requirements of the ESA. In *United States v. McKittrick*,[111] Chad McKittrick was convicted of unlawfully taking, possessing, and transporting an endangered Mexican wolf.[112] He argued on appeal that the requisite mens rea of knowingly required specific intent—that the government must prove that he knew the biological identity of the animal that he was shooting and that it was protected.[113] The Ninth Circuit rejected this interpretation and found that knowingly required only general

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[106] *See* 16 U.S.C. §§ 1531–44 (2012) (codification of Endangered Species Act of 1973 (ESA)); *see also* Ashley Crooks et al., *Environmental Crimes*, 51 AM. CRIM. L. REV. 1051, 1143 (2014) (discussing the purposes behind ESA).

[107] *See* 16 U.S.C. § 1538(a)(1)(B), (D)–(F) (2012). Taking is defined broadly as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect" a species. *Id.* § 1532(19) (2012). Both "harm" and "harass" have further been defined broadly, expanding the prohibition's reach. *See* 50 C.F.R. § 17.3 (2017). Considering the taking prohibition's broad scope, severe penalties, and low mens rea threshold, prosecutorial discretion in enforcing the statute ensures that its provisions are not overprosecuted. *See* Jonathan Wood, *Overcriminalization and the Endangered Species Act:* Mens Rea *and Criminal Convictions for Take*, 46 ENVTL. L. REP. 10496 (2016). Laypeople are unlikely to be familiar with the approximately 1,500 listed species, and overcriminalization might constitute, for instance, prosecuting cases in which people stepped on insects without realizing they were protected. *See id.* at 10506.

[108] *See* 16 U.S.C. § 1540(a) (2012).

[109] *See id.* § 1540(b).

[110] *See id.* § 1540(g)(1)(A). The ESA thus presents the issue that citizen suits may not be able to reach past violations, whereas government criminal prosecutions can. *See infra* notes 193–94 and accompanying text.

[111] 142 F.3d 1170 (9th Cir. 1998).

[112] *Id.* at 1172–73.

[113] *Id.* at 1173.

intent based on the statute's legislative history; he needed only to know that he was shooting an animal that turned out to be protected.[114]

McKittrick subsequently appealed to the Supreme Court, which denied certiorari.[115] The government's brief, however, backtracked from its previous position and indicated that the DOJ, in future taking provision cases, would request jury instructions defining knowingly as requiring specific intent.[116] Soon after, the DOJ circulated a memorandum directing federal prosecutors to do just that.[117] This policy, called the McKittrick Policy, applied to violations of the takings prohibition for all endangered species.[118]

In *WildEarth Guardians*, WEG argued that the DOJ's decisions not to enforce the ESA were reviewable in part because they reflected a general policy amounting to an abdication of statutory responsibilities.[119] In response, the DOJ moved to dismiss, arguing that the policy was unreviewable and that *Chaney*'s presumption of unreviewability applied even more strongly in the criminal context.[120] The court denied the DOJ's

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[114] *Id.* at 1177. The Fifth Circuit came to the same conclusion. *See* United States v. Ivey, 949 F.2d 759, 766 (5th Cir. 1991); United States v. Nguyen, 916 F.2d 1016, 1017 (5th Cir. 1990). In addition, the Eleventh Circuit had expressed its agreement with those cases' reasoning. *See* United States v. Grigsby, 111 F.3d 806, 817 (11th Cir. 1997); *see also* Newcomer et al., *supra* note 5, at 262–66 (discussing *McKittrick* and pre-*McKittrick* case law on the knowingly mens rea under the ESA).

[115] *See* McKittrick v. United States, 525 U.S. 1072 (1999).

[116] *See* Newcomer et al., *supra* note 5, at 266–67 (discussing this "strange and unexplained" change in the government's position).

[117] *See id.* at 267.

[118] *See id.* at 269–70 (relating that due to the McKittrick policy, the shooter of a California Condor escaped the ESA's harsher penalties because he would not admit that he knew he was shooting a California Condor during interviews, and the U.S. Attorney's Office instead prosecuted under the Migratory Bird Treaty Act).

[119] *See* WildEarth Guardians v. Dep't of Justice, 181 F. Supp. 3d 651, 665–68 (D. Ariz. 2015). Substantively, WEG alleged that the McKittrick Policy violated the APA because it was "arbitrary, irrational, and an express policy that completely abdicates DOJ's responsibility to enforce the criminal penalties provision of the ESA." *Id.* at 658. It is unclear clear whether ultimately proving the applicability of the abdication exception per se demonstrates that the policy is arbitrary and capricious under the APA, although this may be the case. *See* Levy & Duncan, *supra* note 71, at 627 (noting that *Chaney*'s abdication exception relies on the reasoning that abdications are per se arbitrary and capricious).

Of note is that while the district court in *WildEarth Guardians* seemed to be adopting *Crowley*'s general policy approach, it also did a statutory analysis that better reflects the rationale that enforcement is not totally committed to agency discretion. *See, e.g.*, *WildEarth Guardians*, 181 F. Supp. 3d at 666 ("Either way, the Court looks to the statute to determine whether the presumption of non-reviewability has been rebutted."). Still, the court facially relied upon the general policy exception, *see id.* at 668 ("The DOJ admittedly authorizes and carries out enforcement actions pursuant to the McKittrick policy . . . ."), even if the analysis was at times muddled, *see id.* at 667 ("The Court finds that DOJ's actions, including the adoption of a formal discretionary non-enforcement policy, are subject to ESA guidelines.").

[120] *Id.* at 658, 664. Another ground on which the DOJ moved to dismiss was that WEG lacked standing. *Id.* at 659–60. The plaintiffs here also used the "abdication standing" argument from *Texas v. United States*. *See supra* note 41. The premise of abdication standing is when an agency has abdicated its duty, the plaintiff has standing to challenge whether the agency has exceeded its statutory power. *See*

motion and held that the suit was not barred by *Chaney*, finding that prosecutorial discretion "does not include the power to disregard statutory obligations that apply to the Executive Branch."[121]

According to the court, WEG's allegations rebutted *Chaney*'s presumption of unreviewability.[122] The DOJ's actions and the McKittrick Policy qualified for the abdication exception because the DOJ ignored its obligations under the ESA.[123] The Final Rule for implementing the listing of the Mexican wolf envisioned vigorous enforcement as "the cornerstone to preventing illegal killings [which were] the single biggest threat to the Mexican gray wolf reintroduction program."[124] The McKittrick Policy and the DOJ's low number of prosecutions did not align with the Final Rule and underlying public welfare statutory scheme.[125] Together, these demonstrated potential abdication, and the court further indicated that the McKittrick Policy might be a general enforcement policy reviewable under *Crowley*.[126]

The DOJ later moved for summary judgment, and the district court again found that the agency action was reviewable because the McKittrick Policy "[wa]s outside the range of prosecutorial authority set out in ESA's comprehensive conservation scheme."[127] In fact, the court found that the McKittrick Policy incorrectly interpreted the ESA and that by adopting it, the DOJ had abdicated its statutory responsibility.[128] Thus, without even

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WildEarth Guardians, 181 F. Supp. 3d at 662–63 (citing Heckler v. Chaney, 470 U.S. 821, 832 (1985)). It was unclear what role this played in the *WildEarth Guardians* court's holding that the plaintiffs had standing because the court still conducted a full standing analysis. *See id.* at 659–63. Still, considering how standing requirements preclude citizen suits, *see infra* notes 196–99 and accompanying text, this may be a developing avenue to satisfy standing in these situations.

121 *WildEarth Guardians*, 181 F. Supp. 3d at 665. According to the court, prosecutorial discretion "only encompasses the Executive Branch's power to decide whether to initiate charges for legal wrongdoing and to seek punishment, penalties, or sanctions." *Id.*

122 *Id.* at 667–68.

123 *Id.*

124 *Id.* at 661.

125 *Id.*

126 *See id.* at 665 ("Plaintiffs' challenge fits within the door left open in [*Chaney*] because Plaintiffs allege the DOJ has formally expressed a general policy of non-enforcement: the McKittrick policy." (citation omitted)). But whether the district court ultimately found that the McKittrick Policy is a general enforcement policy is somewhat unclear. For more on the court's confusing mix of rationales, see *supra* note 119.

127 WildEarth Guardians v. Dep't of Justice, No. CV-13-00392, 2017 WL 4708022, at *7 (D. Ariz. June 21, 2017).

128 *See id.* at *24 ("[T]he DOJ has abdicated its statutory responsibility by adopting the McKittrick policy which precludes, without discretion, prosecutions for mistakenly and/or carelessly taking, i.e., shooting, a wolf.").

relying on *Crowley*'s approach, the district court thus granted summary judgment for WEG on that count.[129]

There are two takeaways from *WildEarth Guardians*. The first is that courts outside the D.C. Circuit have sometimes adopted *Crowley*'s rule and reasoning that general enforcement policies are per se reviewable. Second, the approach that the court used for the abdication exception analysis was not total enforcement but severe underenforcement. Even though the DOJ did not totally stop enforcing the takings prohibition, did not adopt a policy of total nonenforcement, and inherently had high levels of prosecutorial discretion in the criminal context, the court still held that the abdication exception applied.

C. Downsides of Requiring a General Policy

At first, the D.C. Circuit's approach seems to capture more situations than the total nonenforcement and severe underenforcement approaches. Under it, courts can review all general enforcement policies, regardless of whether they evince any nonenforcement or underenforcement. This approach poses three distinct issues, however.

First, this approach does not greatly expand what courts can review under the APA. Agencies rarely promulgate official general enforcement policies in the way that the *Crowley* court contemplated. Additionally, the approach dictates that unofficial agency communications, such as those connected with individual enforcement decisions, generally cannot establish such policies, further decreasing the chances of there being a reviewable policy.[130] As long as an agency does not officially adopt a policy through rulemaking or other means, its enforcement policies will generally remain unreviewable. But courts can use both the *Crowley* approach and a severe underenforcement approach, like the *WildEarth Guardians* court did,[131] which might ameliorate this concern.

This approach is further limited because when there is a general enforcement policy, review is seemingly limited to whether the agency has properly construed the relevant statute.[132] For example, in *OSG Bulk Ships, Inc. v. United States*, the D.C. Circuit found that the Maritime

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[129] *See id.* at *1. In doing so, the district court seemed to assume that an abdication of statutory responsibility was per se arbitrary and capricious. *See also supra* note 119.

[130] *See supra* notes 102–03 and accompanying text; *see also* K-V Pharm. Co. v. U.S. Dep't of Agric., 889 F. Supp. 2d 119, 136–37 (D.D.C. 2012) (holding that a letter connected to an individual enforcement decision did not indicate a general enforcement policy).

[131] *See supra* Section III.B.

[132] *See, e.g.*, OSG Bulk Ships, Inc. v. United States, 132 F.3d 808, 812 (D.C. Cir. 1998); Edison Elec. Inst. v. EPA, 996 F.2d 326, 333 (D.C. Cir. 1993); Roane v. Holder, 607 F. Supp. 2d 216, 226–27 (D.D.C. 2009); Alliance for Bio-Integrity v. Shalala, 116 F. Supp. 2d 166, 171–72 (D.D.C. 2000).

Administration's longstanding interpretation of a statute was a general enforcement policy.[133] In reviewing the policy, however, the court conducted a deferential *Chevron* analysis.[134] Under *Chevron* deference, with which courts examine the reasonableness of an agency's statutory interpretation,[135] a general enforcement policy that amounts to total nonenforcement or severe underenforcement may still be reasonable due to the high amount of deference, and thus this approach does not guard against them.

Second, this approach creates a perverse incentive for agencies not to adopt general enforcement policies, which can be beneficial in guiding both the agency and industries. Because courts using the general policy approach will review *all* enforcement policies—regardless of whether they constitute total nonenforcement, severe underenforcement, or neither—under this approach, agencies suddenly have an incentive not to adopt any enforcement policies at all. This may lead to a lack of uniformity and clarity in enforcement policies because even internal directives like the McKittrick Policy may qualify as reviewable general enforcement policies.

Third, the D.C. Circuit's approach seems inconsistent with the Court's concerns in *Chaney*. True, the Court used the phrase "general policy."[136] But it did so only in the context of a general policy amounting to abdication.[137] The Court also did not specify that such a policy had to come from official agency documents. In fact, there were no such documents in *Adams v. Richardson*, to which the Court cited. That policy was unannounced.[138] So while general policies may be reviewable for other reasons, the Court demonstrated that, in *Chaney*, it was distinctly concerned with agencies effectively halting enforcement efforts.[139] So, although the general enforcement policy approach potentially reaches new activity and might vindicate other important policies, it is not a viable substitute for a severe underenforcement or even a total nonenforcement approach.

IV. UNDERENFORCEMENT AS ABDICATION

While most courts have taken the approach that abdication includes only total nonenforcement, a few have interpreted abdication more expansively. These courts found that severe underenforcement also qualifies

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[133] *See* 132 F.3d at 812. The agency consistently referenced the policy in its letters and other representations to various parties. *Id.* at 811.

[134] *See id.* at 812.

[135] *See* Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 845 (1984).

[136] *See* 470 U.S. 821, 833 n.4 (1985).

[137] *See id.*

[138] *See* Adams v. Richardson, 480 F.2d 1159, 1161 (D.C. Cir. 1973) (en banc) (per curiam).

[139] *See supra* Section II.C.

as abdication. To explore this, Section IV.A first describes these cases and explains how they reflect the severe underenforcement approach. Next, Section IV.B details how severe underenforcement poses just as many pressing concerns as total nonenforcement. Section IV.B.1 examines how severe underenforcement harms certain complex statutory schemes, whereas Section IV.B.2 discusses the pressing constitutional and balance-of-powers concerns implicated by severe underenforcement. Lastly, Section IV.C argues that courts should interpret abdication to include severe underenforcement and explores how they might do so.

A. In the Courts

In interpreting what amounts to abdication, a few courts have looked beyond whether there is total nonenforcement to see whether an agency is engaging in severe underenforcement. These courts have been more willing to infer a general policy amounting to abdication from patterns of agencies' nonenforcement decisions, even if those decisions are relatively rare.

An example is *Roman v. Korson*,[140] in which migrant farm workers sued the United States Department of Agriculture (USDA), alleging that the USDA had failed to enforce labor housing regulations with notice-and-comment and rollback provisions.[141] The farm workers argued that the USDA's consistent failure to enforce these provisions amounted to abdication,[142] and the USDA argued that there was no abdication because it had enforced some provisions.[143] The agency, however, had enforced the rollback provisions just once in eight years[144] and seemingly never enforced the notice-and-comment requirements for borrowers.[145] Furthermore, there were no ongoing attempts at enforcement.[146] Thus, the court found that the USDA's policies appeared "to be to *not enforce* the rebate and rollback provisions for fear that they will cause economic hardships on borrowers."[147] The court therefore rejected the USDA's arguments and held that, because the USDA "failed in a systematic way to enforce its mandatory regulations,"[148] the agency's nonenforcement decisions were reviewable.[149]

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[140] 918 F. Supp. 1108 (W.D. Mich. 1995).

[141] *Id.* at 1110.

[142] *Id.*

[143] *Id.* at 1110–11.

[144] *Id.* at 1113.

[145] *Id.*

[146] *Id.*

[147] *Id.* (emphasis added).

[148] *Id.* at 1114.

[149] *Id.* at 1112–13. The court extended the abdication theory to duties established by regulation in addition to those established by statute. *See id.* at 1112 (citing to decisions from the First, Third, Sixth,

Roman contrasts with cases handled under the total nonenforcement approach. For a court using the complete nonenforcement approach, enforcing the statute just once may have been enough to disqualify challengers from accessing the abdication exception, even if there were no ongoing attempts at enforcement. The *Roman* court emphasized, however, that enforcing the statute at least once is not enough to escape the applicability of the abdication exception.[150] The court went beyond the total nonenforcement approach to find that the agency had abdicated its duties because it had severely underenforced its regulatory responsibilities.

Another example is *Nez Perce Tribe v. U.S. Forest Service*.[151] There, the Forest Service was required to review and authorize the transportation of "mega-loads" on a highway crossing Nez Perce Tribe reservation lands,[152] which included consultation with the Tribe.[153] When a company informed the Forest Service that it intended to transport a load before any review was completed, however, the Forest Service did nothing,[154] even though it knew the planned date for the shipment and received a phone call from the Nez Perce Tribal Chairman about enforcement.[155] The load passed unimpeded.[156] The Nez Perce Tribe sued, arguing that the agency action was reviewable because the Forest Service clearly abdicated their statutory responsibility in failing to stop the load before it could consult the Tribe.[157] The court found that this was a reviewable abdication of the Forest Service's statutory duties.[158]

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and D.C. Circuits recognizing that "regulations can serve as a basis for judicial review of agency enforcement decisions").

[150] *Id.* at 1113.

[151] No. 3:13-CV-348-BLW, 2013 WL 5212317 (D. Idaho Sept. 12, 2013) [hereinafter *Nez Perce Tribe I*).

[152] *Id.* at *2–3.

[153] *Id.* at *3.

[154] *Id.*

[155] *Id.*

[156] *Id.* at *4.

[157] *Id.*

[158] *Id.* at *6. Interestingly, the parties did not even raise the abdication exception in their pleadings. *See* First Amended Complaint for Declaratory and Injunctive Relief, Nez Perce Tribe *I*, 2013 WL 5213340 (D. Idaho Sept. 6, 2013); United States Forest Service's Answer to First Amended Complaint, *Nez Perce Tribe I*, 2013 WL 5985245 (D. Idaho Oct. 31, 2013). On a motion for reconsideration by intervenor Resources Conservation Company International (RCCI), RCCI raised the issue of the abdication exception to argue that it did not apply. *See* Memorandum in Support of Defendant–Intervenor RCCI's Expedited Motion for Reconsideration or, Alternatively, to Stay Injunction Pending Appeal at 9–11, *Nez Perce Tribe*, 2013 WL 5442226 (D. Idaho Sept. 20, 2013). The court, however, denied reconsideration. *See* Nez Perce Tribe v. U.S. Forest Service, No. 3:13-CV-348-BLW, 2013 WL 5592765 (D. Idaho Oct. 10, 2013) [hereinafter *Nez Perce Tribe II*) (failing to address RCCI's argument about *Chaney*). RCCI later stipulated to dismissal, *see* Stipulation of Dismissal, *Nez Perce Tribe*, 2013 WL 6778549 (D. Idaho Dec. 17, 2013), and so these issues were never reviewed on appeal.

The court's comments in *Nez Perce Tribe* demonstrate how the court used a severe underenforcement approach. Rather than challenging a seemingly consistent failure to enforce a statute, the plaintiffs challenged the agency's singular failure to halt Omega–Morgan's shipment.[159] Moreover, the Forest Service was attempting to complete a corridor study and consult with the Tribe, so it had partially enforced the statute.[160] The *Nez Perce Tribe* court, however, dismissed these reasons for why the abdication exception should not apply. Under a total nonenforcement approach, this would likely have disqualified the Tribe from accessing the abdication exception. But the Tribe was not disqualified, demonstrating that the court interpreted abdication as severe underenforcement.

Whitaker v. Clementon Housing Authority[161] is another case in which the reviewing court found that an agency refusing to enforce in one situation was sufficient abdication.[162] Whitaker sued the U.S. Department of Housing and Urban Development (HUD), alleging that HUD failed to enforce certain rules it promulgated in a handbook, which resulted in Whitaker being evicted and disqualified from Section 8 subsidization.[163] In response, HUD argued that its decision not to enforce those regulations was unreviewable under *Chaney*.[164] The court rejected that argument, holding instead that HUD's nonenforcement decisions were reviewable.[165] Not only did HUD fail to take enforcement action, but it also "discouraged plaintiff from seeking enforcement of her rights elsewhere."[166] That reflected a general policy amounting to a reviewable abdication of HUD's responsibilities.[167]

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[159] *See Nez Perce Tribe I,* 2013 WL 5212317, at *2–4.

[160] *See id.* at *4.

[161] 788 F. Supp. 226 (D.N.J. 1992).

[162] *See id.* at 231–32. While the court ultimately seemed to find a judicially manageable standard by which to judge HUD's actions, *see id.* at 232 (finding a directive in the HUD handbook to be a "clear[] constraint on agency discretion"), it first found that "[t]o the extent that [HUD's actions] reflect[ed] a general policy 'consciously and expressly adopted,'" constituting an abdication of HUD's statutory responsibilities, then "HUD's decision in this matter is of a type that was specifically excluded from the scope of the *Chaney* holding by the Supreme Court," *id.* at 231. While the ultimate holding—HUD's actions are reviewable—is clear, it is unclear whether the court viewed these as alternate (and independent) or dependent holdings.

[163] *Id.* at 228.

[164] *Id.* at 228–29.

[165] *Id.* at 231–32 (noting that "the Third Circuit appears to generally view the barrier to reviewability erected by *Chaney* as minimal").

[166] *Id.* at 231.

[167] *Id.* The court's willingness to interpret abdication more broadly is also seen in the fact that it used an unofficial handbook as a standard against which to measure the agency action. *Id.* at 229–30. This was based on the reasoning that some courts had held that HUD handbooks can be binding on the agency in certain circumstances and because the handbook reflected statutory principles. *Id.* at 229 (citing Burroughs v. Hills, 564 F. Supp. 1007, 1015 (N.D. Ill. 1983)).

The court in *Whitaker* also adopted a type of severe underenforcement approach. It was willing to infer a general policy from just one incident of nonenforcement that it considered severe. The court did not even discuss whether the agency had enforced its duties more generally. Its reasoning was based on how the plaintiff made multiple requests of HUD and how HUD failed to enforce each time.[168] That sufficed to demonstrate a general policy amounting to abdication. Under a total nonenforcement approach, though, not enforcing its duties as to just one person would not suffice.

These three cases are incompatible with the complete nonenforcement approach. Instead, they better reflect the severe underenforcement approach. These courts' approaches allowed review of more nonenforcement decisions than is permitted under the approaches of most courts. For instance, under this approach, a case like *PETA* may have qualified for the abdication exception because the agency had refused to enforce the statute in question multiple times.[169] The three courts here went beyond examining whether the agency had totally halted enforcement of a statute and examined whether it had severely underenforced the statute to achieve substantially the same effect.

It is unclear why these courts, as well as the courts in *Adams* and *WildEarth Guardians*, chose to adopt the severe underenforcement approach. One theory might be that the plaintiffs were all seemingly vulnerable and sympathetic. In *Adams*, which occurred against the backdrop of a highly charged period of racial tension, the nonenforcement involved funding segregated schools.[170] *WildEarth Guardians* involved endangered Mexican grey wolves that cannot politically or legally defend themselves.[171] In *Roman*, the challengers were migrant farm workers, a group that historically has had little legal or political power.[172] As for *Nez Perce Tribe*, the Native American tribes have occupied an uneasy ground between

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[168] *Id.* at 228.

[169] People for the Ethical Treatment of Animas v. U.S. Dep't of Agric., 7 F. Supp. 3d 1, 5–6 (D.D.C. 2013); *see also supra* notes 53–55 and accompanying text.

[170] *See* Adams v. Richards, 480 F.2d 1159, 1164–65 (D.C. Cir. 1973); *see also supra* notes 36–40 and accompanying text.

[171] *See supra* Section III.B for a discussion of the *WildEarth Guardians* case. Admittedly, the *WildEarth Guardians* case does not fit as well into this analysis as the other cases because the other cases involve human plaintiffs who were potentially harmed by the agency decision not to enforce.

[172] *See supra* notes 141–51 and accompanying text. For more information on the political and legal issues surrounding migrant farm workers, see generally Michael A. Celone, Comment, *Undocumented and Unprotected: Solutions for Protecting the Health of America's Undocumented Mexican Migrant Workers*, 29 J. CONTEMP. HEALTH L. & POL'Y 117 (2012); Jane Younglove Lapp, Comment, *The Migrant and Seasonal Agricultural Worker Protection Act: "Rumors of My Death Have Been Greatly Exaggerated,"* 3 SAN JOAQUIN AGRIC. L. REV. 173 (1993); Viviana Patino, *Migrant Farm Worker Advocacy: Empowering the Invisible Laborer*, 22 HARV. C.R.-C.L. L. REV. 43 (1987).

sovereigns and subjects, resulting in difficulty in protecting their lands and resources.[173] Lastly, *Whitaker* featured a woman with a young son who was evicted three years prior and still could not afford an apartment without Section 8 subsidization.[174] Perhaps seeing the tangible impact of underenforcement highlighted to these courts that severe underenforcement poses many of the same dangers as total nonenforcement.

B. Severe Underenforcement's Consequences

First, like total nonenforcement, an agency's severe underenforcement of a statute implicates the *Chaney* Court's concerns: it can sap the strength of statutes that agencies are congressionally mandated to enforce.[175] The consequences of severe underenforcement are especially dire when agencies underenforce complex statutory schemes with overlapping civil and criminal penalties, and that are dependent on the federal government for full enforcement. Thus, Section IV.B.1 discusses those characteristics in the context of environmental law as an example. Section IV.B.2 then explores the potential constitutional separation of powers and pragmatic balance of powers concerns that severe underenforcement poses.

1. Harms to Complex Statutory Schemes

Severe underenforcement can cripple complex statutory schemes, especially those with two common characteristics. The first is complex and overlapping provisions—underenforcing one provision can impair the others and their deterrent effect. This is especially the case in statutes that provide both civil and criminal penalties. The second characteristic is heavy dependence upon federal enforcement, such as when the federal scheme preempts state law or when citizen-suit provisions are nonexistent or ineffective. In these cases, there are few other measures to rectify federal underenforcement.

Environmental statutes frequently feature both characteristics and serve as a useful illustration. First, many environmental statutes, like the Clean Water Act (CWA) and Resource Conservation and Recovery Act (RCRA),

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[173] *See supra* notes 152–59 and accompanying text. For more information on the legal status of Native American tribes, see CHRISTINE A. KLEIN ET AL., NATURAL RESOURCES LAW 577–79 (2d ed. 2009). In fact, in *Nez Perce Tribe*, the court emphasized the unique trustee relationship between the federal government and Native American tribes. Nez Perce Tribe v. U.S. Forest Service, No. 3:13-CV-348-BLW, 2013 WL 5212317, at *5–6 (D. Idaho Sept. 12, 2013).

[174] Whitaker v. Clemington Hous. Auth., 788 F. Supp. 226, 227–28 (D.N.J. 1992); *see also supra* notes 162–69 and accompanying text.

[175] *See supra* Section II.C.

provide for overlapping civil and criminal penalties.[176] Severely underenforcing a single provision can diminish the deterrent effects of entire statutory schemes. The effectiveness of these statutes depends, in part, on robust enforcement of the statutes' penalties to deter parties from violating them. This is especially true for criminal violations.

Criminal prosecutions generally require prosecutorial discretion: prosecutors must consider complex factors in determining how to best allocate limited resources.[177] For example, the DOJ considers several factors when deciding whether to prosecute under criminal provisions of environmental statutes.[178] Because that kind of judgment involves inherent prosecutorial discretion, courts are loath to question their decisions.[179] Only in rare circumstances will courts interfere with them.[180] Moreover, questioning prosecutorial decisions may inappropriately reveal enforcement patterns, facilitating the ability of actors to escape enforcement.[181]

But in the context of environmental statutes, too much discretion can undercut entire statutory schemes. Criminal penalties under most

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[176] *See* 33 U.S.C. § 1319(b)–(c), (g) (2012) (CWA allowing the Administrator to commence civil actions and providing criminal penalties for knowing violations); 42 U.S.C. § 6928(d), (g) (2012) (RCRA providing criminal penalties for knowing violations and allowing the Administrator to further seek civil penalties); *see also* Crooks et al., *supra* note 106, at 1054 & n.12 (discussing overlapping penalties in environmental statutes).

[177] *See* Price, *Enforcement Discretion*, *supra* note 32, at 681–82. This is especially true considering the increasingly overlapping nature of federal crimes with each other and with state crimes. *See id.*

[178] *See* Crooks et al., *supra* note 106, at 1056–57. This includes (a) voluntary disclosure, (b) cooperation, (c) preventative measures and compliance programs, (d) pervasiveness of noncompliance, (e) internal disciplinary action, and (f) subsequent compliance efforts. *See* U.S. DEP'T OF JUSTICE, FACTORS IN DECISIONS ON CRIMINAL PROSECUTIONS FOR ENVIRONMENTAL VIOLATIONS IN THE CONTEXT OF SIGNIFICANT VOLUNTARY COMPLIANCE OR DISCLOSURE EFFORTS BY THE VIOLATOR (1991), https://www.justice.gov/enrd/selected-publications/factors-decisions-criminal-prosecutions [https://perma.cc/22ZF-7KRQ].

[179] *See, e.g.*, United States v. Nixon, 418 U.S. 683, 693 (1974) ("[T]he Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case . . . ."); Smith v. United States, 375 F.2d 243, 247 (5th Cir. 1967) ("The discretion of the Attorney General in choosing whether to prosecute or not to prosecute, or to abandon a prosecution already started, is absolute.").

[180] *See, e.g.*, United States v. Welch, 572 F.2d 1359, 1360 (9th Cir. 1978) (per curiam) ("We will not interfere with the Attorney General's prosecutorial discretion unless it is abused to such an extent as to be arbitrary and capricious and violative of due process."); *see also* Price, *Enforcement Discretion*, *supra* note 32, at 683–84 (describing how courts "have disclaimed virtually any authority to review executive charging decisions").

[181] For these reasons, an exemption to the Freedom of Information Act protects agency documents, the production of which "would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law." 5 U.S.C. § 552(b)(7) (2012); *see also* Mayer Brown LLP v. IRS, 562 F.3d 1190, 1192–93 (D.C. Cir. 2009) (noting that the exception's broadness is due to "the importance of deterrence" in ensuring enforcement of the laws).

environmental statutes exceed the corresponding civil penalties.[182] Under the ESA, for instance, criminal penalties are much higher and thus a much stronger deterrent.[183] A hunter might find that "taking" an endangered grizzly bear is worth up to $12,000 if he knows he will not face criminal enforcement, including incarceration.[184] The same is true of industry actors, who may find that the low civil violation costs of "harming" a population of endangered Gila trout does not exceed the monetary benefits of constructing a business complex.

Lack of criminal enforcement further diminishes complex statutory schemes for crimes that are solely federal. In other areas of the law, federal offenses overlap with each other and with state substantive offenses.[185] But this is rarely true for environmental statutes. The state may lack equivalent environmental legislation,[186] the federal statute may preempt state law,[187] or the federal scheme may preempt federal common law.[188] Federal enforcement is thus pivotal to maintaining the vitality of these provisions, especially the criminal provisions, so as not to cripple an entire scheme hinging upon enforcement and deterrence. Severely underenforcing those provisions saps the schemes of their strength.

Environmental laws often have this second characteristic—they rely on federal enforcement. There are two potential exceptions. First, some statutes established cooperative federalism schemes that allow the states to enforce certain provisions.[189] Not all states have taken advantage of this, however,

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[182] *See generally* Crooks et al., *supra* note 106 (discussing criminal and civil penalties under environmental statutes).

[183] *See supra* notes 108–109 and accompanying text (discussing penalties under the ESA).

[184] "Taking" includes killing. *See* 16 U.S.C.§ 1532(19) (2012).

[185] *See* William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 518–19 (2001) (discussing, for example, the federal criminal code's general false statement statute along with its "seemingly endless" statutes prohibiting false statements in specific settings).

[186] For instance, some states have their own versions of the ESA, *see, e.g.*, CAL. FISH & GAME CODE §§ 2051–2115.5 (West 1984), but even the most robust of these statutes lack the federal ESA's punch, *see, e.g.*, Lynn E. Dwyer & Dennis D. Murphy, *Fulfilling the Promise: Reconsidering and Reforming the California Endangered Species Act*, 35 NAT. RESOURCES J. 735, 742–44 (1995) (describing how—despite similar statutory language—California's ESA is weaker than the federal ESA "in interpretation and practice").

[187] *See, e.g.*, Rollins Envtl. Servs. (FS), Inc. v. Parish of St. James, 775 F.2d 627, 637 (5th Cir. 1985) (finding that the federal Toxic Substances Control Act (TOSCA) preempted an ordinance banning polychlorinated biphenyls (PCBs)).

[188] *See, e.g.*, Milwaukee v. Illinois, 451 U.S. 304, 332 (1981) (finding that CWA preempted a federal common law nuisance suit).

[189] *See* Jeffrey G. Miller, *Theme and Variations in Statutory Preclusions Against Successive Environmental Enforcement Actions by EPA and Citizens: Part One: Statutory Bars in Citizen Suit Provisions*, 28 HARV. ENVTL. L. REV. 401, 408 (2004); *see also* John C. Chambers, Jr., & Peter L. Gray, *EPA and State Roles in RCRA and CERCLA*, 4 NAT. RESOURCES & ENV'T 7, 7–8 (1989) (describing RCRA's and CERCLA's schemes for delegating power to state agencies).

and in some cases the federal government retains enforcement authority over certain actions.[190] Federal enforcement thus retains importance even under those schemes.

The second potential exception is citizen suits, which most environmental statutes feature. Citizen-suit provisions allow members of the interested public to act as private attorneys general and bring enforcement suits.[191] This seemingly lessens reliance on federal enforcement, which alleviates concerns about federal underenforcement. However, citizen suits lack the same reach and effectiveness as federal enforcement in four ways. First, citizen suits do not extend to criminal prohibitions. Criminal suits must, by their nature, be brought by the government. Thus, the prohibitions with the heaviest penalties rely exclusively on government enforcement.

Second, citizen suits often cannot reach as much activity as government enforcement actions can. For example, under RCRA, the citizen-suit provision provides for suits against persons "alleged *to be* in violation," meaning *presently* in violation of RCRA's requirements.[192] Government enforcement actions, on the other hand, encompass both ongoing and past violations.[193] Under RCRA, the EPA could choose to rarely enforce past violations. Citizen suits cannot rectify this. And if that underenforcement pattern became apparent, potential violators could time their violations to occur for short time periods to escape enforcement—thus lessening the statute's deterrent effect.[194]

Third, citizen suits face the hurdle of Article III standing requirements. Parties must demonstrate that they have suffered an actual and imminent injury in fact that is traceable to the challenged action and redressable by a favorable decision.[195] Meeting these requirements, especially those of injury in fact and redressability, can be especially difficult in environmental suits.[196] Ameliorating this is the fact that states receive "special solicitude" when

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[190] *See* Chambers & Gray, *supra* note 189, at 7–8.

[191] *See, e.g.*, 33 U.S.C. § 1365 (2012) (CWA's citizen-suit provision). States can also sue under citizen-suit provisions. *See* Massachusetts v. EPA, 549 U.S. 497, 520–21 (2007).

[192] 42 U.S.C. § 6972 (2012) (emphasis added).

[193] *Id.* § 6973. This is true for other statutes as well. *See, e.g.*, 16 U.S.C. § 1540(g)(1)(A) (2012) (ESA's citizen-suit provision for present violations); 33 U.S.C. § 1365(a) (CWA's citizen-suit provision for present violations). This was once the case under the Clean Air Act (CAA), *see* Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc., 484 U.S. 49, 58–59 (1987), but Congress subsequently amended the CAA to allow citizen suits to reach past violations, *see* 42 U.S.C. § 7604(a)(1) (2012).

[194] *Cf. Gwaltney*, 484 U.S. at 69 (Scalia, J., concurring in part and concurring in the judgment) (noting concern that violators could take advantage of a good day to claim they are no longer in violation of the statute).

[195] *See, e.g.*, Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61 (1992).

[196] *See, e.g.*, *id.* at 562–64, 568–71 (finding that parties did not meet the injury-in-fact and redressability elements).

suing under citizen-suit provisions because states may try to fill a federal underenforcement gap.[197] But still, this doctrine is unclear and depends on states wanting to sue, and these requirements still hinder citizen suits.[198]

Lastly, citizen suits cannot counteract underenforcement when the government does enforce the statute but does so with more difficult-to-meet requirements than used in citizen suits. An example of the agency requiring a higher standard is the McKittrick Policy, which requires prosecutors to be able to demonstrate the standard of specific intent to initiate ESA prosecutions.[199] Citizen-suit provisions require that notice be tendered to the violator and administering agency and that there be a delay between notice and bringing suit.[200] This is meant to give the agency time to bring an enforcement action on its own. If the federal or state government brings an enforcement action, a citizen suit is thus precluded.[201] So if an agency required higher standards than a citizen suit, then the government could bring an action under that difficult-to-meet standard and preclude citizen enforcement actions. That suit would likely have a higher chance of failure due to the higher standards imposed by the government. For these reasons, citizen suits cannot completely fill the gaps caused by underenforcement when statutes rely on federal enforcement. Severe underenforcement therefore can cripple complex statutory schemes with these characteristics.

2. Constitutional and Balance of Powers Concerns

Severe underenforcement also presents two broad constitutional concerns and other pragmatic balance of powers issues. First, severe

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[197] When states sue to protect their "quasi-sovereign interests, [they are] entitled to special solicitude in [the] standing analysis." *See* Massachusetts v. EPA, 549 U.S. 497, 520 (2007). What that means is still not entirely clear, but it seems that states can more easily satisfy Article III standing requirements. *See* Benjamin Ewing & Douglas A. Kysar, *Prods and Pleas: Limited Government in an Era of Unlimited Harm*, 121 YALE L.J. 350, 397–98 (2011). *See generally* Jonathan Remy Nash, *Sovereign Preemption State Standing*, 112 NW. U. L. REV. 201 (2017) (exploring when a state has standing to sue the government based on Executive Branch underenforcement).

[198] Indeed, some scholars argue that the tightening of standing requirements has allowed for administrative overreach. *See, e.g.*, RICHARD A. EPSTEIN, THE CLASSICAL LIBERAL CONSTITUTION 101–32 (2014).

[199] *See supra* note 116 and accompanying text. The McKittrick Policy is not a perfect example because it applies in the criminal context and citizen-suit provisions cannot compel criminal enforcement. However, a similar policy for civil actions would raise this issue.

[200] *See, e.g.*, Toxic Substance Control Act, 15 U.S.C. § 2619(b) (2012); Clean Water Act, 33 U.S.C. § 1365(b) (2012).

[201] *See* 15 U.S.C. § 2619(b); 33 U.S.C. § 1365(b); Miller, *supra* note 189, at 409. State suits may also be precluded if the federal government sues, and vice versa, due to concerns of overfiling and overenforcement. *See, e.g.*, Harmon Indus. v. Browner, 191 F.3d 894, 902 (8th Cir. 1999) (finding that EPA cannot file suit if the state has filed suit under its delegated powers under RCRA). *But see, e.g.*, United States v. Power Eng'g Co., 303 F.3d 1232, 1240 (10th Cir. 2002) (finding that EPA can file suit if it gives the state notice).

underenforcement potentially violates the constitutional principle underlying separation of powers, and specifically the Presentment Clause,[202] by effectively allowing the President to repeal laws. Second, severe underenforcement may also violate the Take Care Clause[203] because the President either is suspending or dispensing with the laws or is not faithfully executing the laws. In addition, the lack of judicial review for severe underenforcement presents sub-constitutional balance of powers concerns.

First, severe underenforcement potentially allows the Executive to effectively repeal laws, which is a legislative power.[204] The President has one chance to veto a statute under the Presentment Clause.[205] Severe underenforcement after a statute has been passed, however, can achieve substantially the same effect: although the statute remains on the books, it is rarely enforced.[206] Suppose that a President faces difficulty in achieving her policy goals, or wants to expeditiously enact policies while she has a Congress that will not oppose her, and directs an agency to only bring a few enforcement actions per year under a particular statute.[207] The abdication exception, as it is currently interpreted, likely does not allow review of these decisions not to enforce. Unless the agency completely stopped enforcing the statute or adopted a general enforcement policy—which is unlikely, considering how easy it is to sidestep those prerequisites—these nonenforcement decisions would remain unreviewable under the APA. Even if congressional members were to sue the President for a constitutional violation of the Presentment Clause or other separation of powers principles, it is unclear whether they would have standing or whether the suit would be

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202 U.S. CONST. art. I, § 7, cl. 2.

203 U.S. CONST. art. II, § 3.

204 This ultimately may be a temporary repeal because the next administration can just as easily undo it. One vivid example is how the Trump Administration rescinded the Obama Administration's memorandum establishing DACA. *See* Memorandum from Elaine C. Duke, Acting Sec'y, Dep't of Homeland Sec., to James W. McCament, Acting Dir., U.S. Citizenship & Immigration Servs., et al., Rescission of the June 15, 2012 Memorandum Entitled "Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children" (Sept. 5, 2017), https://www.dhs.gov/news/2017/09/05/memorandum-rescission-daca [https://perma.cc/J9FG-DMKB]. For more on the original memoranda establishing DACA, see *supra* note 14.

205 U.S. CONST. art. I, § 7, cl. 2.

206 That implied statutory repeals are disfavored, *see* Carcieri v. Salazar, 555 U.S. 379, 395 (2009), makes this especially egregious: The President can accomplish through severe underenforcement what otherwise takes concerted legislative effort.

207 This is not so farfetched. *See* Price, *Enforcement Discretion*, *supra* note 32, at 687 ("In an era of partisan polarization and legislative gridlock, Presidents often cannot count on Congress to develop legislative solutions to perceived problems, or even to negotiate over such solutions in good faith. Nevertheless, the public increasingly holds the President accountable for all failures of national policy. Reliance on all forms of executive authority, without resort to Congress, thus becomes a nearly irresistible temptation for modern Presidents."). Consider the Obama Administration's underenforcement of certain immigration directives as a potential example. *See supra* notes 14 & 41.

nonjusticiable under the political question doctrine.[208] Severe underenforcement is thus potentially unreviewable under the APA and nonjusticiable under the Presentment Clause.

Second, severe underenforcement may violate the Take Care Clause. Under the Take Care Clause, the President "shall take Care that the Laws be faithfully executed."[209] Once a law is passed, the President is the one tasked with ensuring that it is enforced, even if she retains some discretion enforcing it.[210] The President cannot totally ignore a law or dispense with it as to certain

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[208] Congress likely has standing to sue when the President fails to enforce a duly enacted and unambiguous statute. *See* Coleman v. Miller, 307 U.S. 433, 446 (1939). Yet it is unclear how far that extends to severe underenforcement rather than total nonenforcement. *See generally* Bethany R. Pickett, Note, *Will the Real Lawmakers Please Stand Up: Congressional Standing in Instances of Presidential Nonenforcement*, 110 NW. U. L. REV. 439 (2016) (analyzing Congressional standing and political question precedent and arguing that members of Congress should have standing to sue when there is executive nonenforcement).

Notably, in 2014, the House of Representatives sued various Obama Administration officials based on the implementation of the Affordable Care Act (ACA), including the Administration's delay in implementing certain provisions. *See* U.S. House of Representatives v. Burwell, 130 F. Supp. 3d. 53, 57 (D.D.C. 2015) (mem.). The plaintiffs presented two theories for standing, which the district court termed the "Non–Appropriation Theory" and the "Employer–Mandate Theory." *See id.* at 70. The gist of the Non–Appropriation Theory was that the "Executive ha[d] spent billions of dollars without a valid appropriation, in direct contravention of [the Appropriations Clause]." *Id.* at 69. The Employer–Mandate Theory alleged that the Secretary of the Treasury "ha[d] not abided by the employer mandate as it was enacted in the ACA, thereby 'nullifying' the law." *Id.* (quoting plaintiff's complaint).

The court first found that the House had standing for its constitutional claims under the Non–Appropriation Theory, see *id.* at 74, highlighting that it was a specific constitutional claim that "the Executive ha[d] drawn funds from the Treasury without a congressional appropriation" in violation of the Constitution. *See id.* at 70. As for the Employer–Mandate Theory, which contained the claim challenging the delayed implementation of the ACA, the House essentially argued "that any member of the Executive who exceeds his statutory authority is unconstitutionally legislating." *Id.* at 75. That "argument prove[d] too much" for the court. *Id.* Holding otherwise, according to the court, would transform "every instance of an extra-statutory action" into "a cognizable constitutional violation, redressable by Congress through a lawsuit." *Id.* But this "would contradict decades of administrative law and precedent." *Id.* ("In sum, Article I is not a talisman; citing its most general provisions does not transform a statutory violation into a constitutional case or controversy.").

While the court did not address the abdication exception, or the issues implicated by severe underenforcement or total nonenforcement, this case suggests that the House (and the Senate) would likely not have standing in such situations because they would lack a cognizable injury. And although the House might have standing under a Non–Appropriation Theory for specific constitutional violations of the Appropriations Clause, delays in implementing laws, instances of severe underenforcement, or total nonenforcement are unlikely to present that situation—in fact, fewer resources may be spent. Thus, Congress may lack the ability to redress these issues through constitutional claims in the courts.

[209] U.S. CONST. art. II, § 3.

[210] This is arguably despite policy differences with the enacting or current Congress. *See* Robert J. Delahunty & John C. Yoo, *Dream On: The Obama Administration's Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause*, 91 TEX. L. REV. 781, 794 (2013).

persons.[211] Doing so is an exercise of an unconstitutional suspension or dispensing power.[212] Severe underenforcement, though, closely resembles an exercise of such a power because the law has effectively been suspended or dispensed with as to certain situations.[213] And even if severe underenforcement is not a suspension or dispensing of the laws, it may be an *unfaithful* execution of the laws, which is arguably unconstitutional.[214] The exact scope of the Take Care Clause, however, is an open question, and it is unclear whether a claim under the Take Care Clause is even justiciable.[215]

In sum, severe underenforcement is generally unreviewable under the APA and *Chaney*. Claims that severe underenforcement violates the Presentment Clause or Take Care Clause are likely nonjusticiable. Outside of the courtroom, Congress has little realistic power or incentive to check the President's underenforcement;[216] inside it, members may lack standing to

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[211] *See* Kendall v. United States *ex rel.* Stokes, 37 U.S. (12 Pet.) 524, 613 (1838) ("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.").

[212] *See id.*; Blackman, *supra* note 70, at 219–33; Delahunty & Yoo, *supra* note 210, at 803–08. The suspension power is "the power to set aside the operation of a statute for a time." LOIS G. SCHWOERER, THE DECLARATION OF RIGHTS, 1689, at 59–60 (1981). Similarly, the dispensing power is "the power to grant permission to an individual or a corporation to disobey a statute." *Id.* at 60.

[213] For instance, the deferred-action immigration initiatives under the Obama Administration allowed certain groups that were statutorily designated as unlawfully present to gain lawful-presence status. *See supra* note 14. That may have constituted an exercise of the dispensing power.

[214] I use "arguably" because the Court has rarely discussed what constitutes a violation of the Take Care Clause. Some scholars, however, have argued that an unfaithful execution of the laws is unconstitutional. *See* Blackman, *supra* note 70, at 267–80; Randy Barnett, *The President's Duty of Good Faith Performance*, WASH. POST: VOLOKH CONSPIRACY (Jan. 12, 2015), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/01/12/the-presidents-duty-of-good-faith-performance/?utm_term=.470959fffb0f [https://perma.cc/WQJ4-2W2L].

[215] The most relevant case on justiciability is *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475 (1866), in which Mississippi sued President Andrew Johnson to enjoin enforcement of the Reconstruction Acts. The Court found that the President's duties in enforcing laws involved discretion, rather than being mere ministerial duties, and thus "court[s] ha[d] no jurisdiction of a bill to enjoin the President in the performance of his official duties." *Id.* at 501; *see also Kendall*, 37 U.S. (12 Pet.) at 600 (denying "the power of the judiciary to interfere in advance, and to instruct the executive . . . how to act"). Justiciability was also an issue debated in the briefs of the recent case of *Texas v. United States*. 809 F.3d 134 (5th Cir. 2015). In fact, the Supreme Court added the question of whether DAPA violated the Take Care Clause when it granted certiorari. *See* United States v. Texas, 136 S. Ct. 906 (2016). But because the Court affirmed by an equally divided vote, *see* United States v. Texas, 136 S. Ct. 2271 (2016), the question remains unresolved.

[216] Using the power of the purse to reduce spending for underenforced statutes would likely do little; moreover, using it to reduce other spending may result in electoral backlash or other negative consequences (such as underenforcement of those statutes). There are realistically few effective checks on Presidential inaction. *See* Jeffrey A. Love & Arpit K. Garg, *Presidential Inaction and the Separation of Powers*, 112 MICH. L. REV. 1195, 1199 (2014). Arguably, one potential check is the electoral process and the potential subsequent destruction of the President's legacy. But it is unclear how much the electoral process is a check on a President facing a recalcitrant Congress, a President lacking any compelling

sue. The judiciary has thus closed all avenues for review of severe underenforcement policies. In doing so, it has inappropriately bowed out of its duty to interpret the law.[217]

Severe underenforcement also upsets the balance of powers among the three branches. For instance, severe underenforcement relieves pressure on Congress to consider whether certain statutes are still aligned with current preferences.[218] This could potentially "reduce incentives for lawmakers to undertake the hard bargains and difficult votes that are often necessary to enact significant legislation."[219] Consequently, although Congress is the branch entrusted with making policy decisions and is most directly accountable to the electorate, it might no longer make these pivotal decisions.

Moreover, courts' failure to review severe underenforcement can add to the already high levels of interbranch conflict.[220] The lack of judicial review and judicial remedy in cases of severe underenforcement removes the judiciary from its potential role as arbiter, which can exacerbate interbranch tensions.[221] For instance, if the President escalates policy-driven nonenforcement and underenforcement efforts due to Congressional gridlock and the judiciary will not step in, Congress may escalate its responses.[222] Rather than easing gridlock, this can intensify it.[223]

To be sure, there are important concerns about letting courts review underenforcement that should not be dismissed. For example, the President is in a tough situation when faced with an obstructionist Congress or with a pressing issue that requires an immediate response. Some scholars have argued that when Congress refuses to enact legislation or policies, it is appropriate for the President to respond with nonenforcement and underenforcement.[224] Moreover, the President may have a prerogative not to

incentive to garner public support (such as a President serving her second term who will personally face little electoral backlash), or even simply on a President who cares little about approval ratings.

[217] *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."); *cf.* Steven G. Calabresi, *Textualism and the Countermajoritarian Difficulty*, 66 GEO. WASH. L. REV. 1373, 1382–83 (1998) (advocating for the idea of the federal judiciary as a separation of powers umpire).

[218] *See* Price, *Politics*, *supra* note 9, at 1146; Stuntz, *supra* note 185, at 546–49.

[219] Price, *Politics*, *supra* note 9, at 1147.

[220] *See id.* at 1145–46.

[221] *See id.*

[222] *Id.* at 1146.

[223] *Id.*

[224] *See, e.g.*, David E. Pozen, *Self-Help and the Separation of Powers*, 124 YALE L.J. 2, 7 (2014) (arguing that nonenforcement tactics are a proportional and appropriate response to violations of legislative norms such as obstructive filibustering).

enforce laws in certain situations, such as when there is a compelling public necessity[225] or when the President believes a law to be unconstitutional.[226]

Courts reviewing severe underenforcement may also upset the separation of powers and interbranch balance in three ways. First, the Executive must have some discretion in allocating scarce enforcement resources,[227] especially when enforcing criminal statutes.[228] Permitting courts to review nonenforcement decisions may endanger that discretion. Second, allowing courts to review, and perhaps mandate, enforcement potentially collapses the boundaries between the Judicial and Executive Branches by effectively allowing the judiciary to enforce the laws.[229] Lastly, there may be a diminishment of judicial authority if the Executive refuses to comply with a court's order.[230]

These are legitimate concerns, but allowing judicial review of severe underenforcement under the APA does not necessarily implicate them. Severe underenforcement exceeds the individual discretion contemplated by prosecutorial discretion.[231] The Court recognized this in establishing the abdication exception in the first place.[232] In addition, a court need not mandate enforcement. If the court reviews a general policy amounting to abdication, then it can find that policy arbitrary and capricious under the APA,[233] which alleviates the above concerns.[234]

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[225] *See* Delahunty & Yoo, *supra* note 210, at 808–35. Professors Delahunty and Yoo do generally limit this executive prerogative power to the national security and foreign affairs contexts. *See id.* at 823–28 (discussing how "American constitutional practice shows that [the prerogative power] has been reserved to national security and foreign affairs").

[226] *See* Saikrishna Bangalore Prakash, *The Executive's Duty to Disregard Unconstitutional Laws*, 96 GEO. L.J. 1613, 1616–17 (2008); Stepanicich, *supra* note 73, 1536–38.

[227] *See* Stepanicich, *supra* note 73, at 1538–39.

[228] *See, e.g.*, Town of Castle Rock v. Gonzales, 545 U.S. 748, 761 (2005) (discussing "[t]he deep-rooted nature of law-enforcement discretion, even in the presence of seemingly mandatory legislative commands").

[229] *See* Price, *Law Enforcement*, *supra* note 75, at 1573. *But see* Sunstein, *supra* note 25, 669–71 (arguing that this "promotes rather than undermines" separation of powers in cases of statutory violations by the Executive).

[230] *But see* Sunstein, *supra* note 25, at 670–71 (rejecting this argument).

[231] *See supra* note 121 and accompanying text.

[232] *See* Heckler v. Chaney, 470 U.S. 821, 833 n.4 (1985).

[233] *See* 5 U.S.C. § 706 (2012).

[234] A finding that the policy was arbitrary and capricious would send the policy back to the agency rather than require immediate enforcement. *See* Motor Vehicle Mfrs. Ass'n of the U.S., v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 57 (1983) (remanding to the Court of Appeals with instructions to remand to the agency for further consideration after finding that the policy in question was arbitrary and capricious). Any new policy the agency devised would have to not constitute severe underenforcement to escape another finding of arbitrary and capricious in a later suit.

C. Underenforcement as Abdication

Most courts and scholars have interpreted *Chaney*'s abdication exception as including total nonenforcement but not severe underenforcement. As previously discussed, they have misread *Chaney* to preclude review of anything except total nonenforcement.[235] Moreover, this interpretation overlooks the serious concerns that severe underenforcement poses—many of which align with those that total enforcement also presents. To alleviate these concerns, courts should interpret severe underenforcement as amounting to abdication sufficient to rebut *Chaney*'s presumption of unreviewability.[236]

The main obstacle to adopting a severe underenforcement approach is that courts are unwilling to infer a general policy from repeated nonenforcement and unofficial agency representations. Admittedly, it is easier in some cases to infer that there is a policy than in others. Recall the McKittrick Policy, in which the DOJ required prosecutors to request specific jury instructions in prosecutions under the ESA. There, the DOJ had internally disseminated the policy through a memorandum, which likely made it easier for the court to infer a general policy from the pattern of underenforcement.[237]

Rather than refuse to evaluate whether severe underenforcement is occurring, courts should look beyond the fact that agencies are still partially enforcing statutes or have not adopted a general enforcement policy. Instead, courts must be more willing to infer a general policy amounting to abdication from a pattern of severe underenforcement consisting of, for example,

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[235] *See supra* Section II.C.

[236] This is superior to a solution that involves Congressional action. True, there are actions that Congress could take, such as requiring agencies to publish when they adopt policies that amount to severe underenforcement so that those policies could be reviewed. But this is an inferior option for three reasons. First, it may violate the Constitution. If the statute curtailed Presidential oversight of how the laws are executed, it could be infringing upon the President's powers under the Take Care Clause. *See generally* Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541 (1994) (arguing that the text of the Constitution supports a unitary Executive and that the President must have stricter control over the Executive Branch). Second, it is pragmatically unlikely. It is hard to imagine that Congress can overcome the inertia required to pass a statute that requires this of agencies, especially when Congress may have little incentive to do so. *Cf.* Martin H. Redish & Shane V. Nugent, *The Dormant Commerce Clause and the Constitutional Balance of Federalism*, 1987 DUKE L.J. 569, 592–94 (explaining Congressional inertia in passing statutes). Something that may hinder a President whose party has a majority in Congress would likely not garner enough Congressional support. *See* Josh Blackman, *Gridlock*, 130 HARV. L. REV. 241, 242–43 (2016). Third, publicizing enforcement policies curtails enforcement's deterrent strength. *See* Price, *Politics*, *supra* note 9, at 1138 ("[E]nforcement transparency will often be counterproductive: the more public the nonenforcement policy, the stronger the signal to regulated parties that they may organize their behavior around the enforcement policy rather than the statute or regulation."); *see also supra* note 176–84 and accompanying text.

[237] *See supra* note 116 and accompanying text.

multiple or systematic agency refusals to enforce a provision or statute. This ensures that agencies cannot severely underenforce a statute while escaping judicial review under the APA. Because a policy that severely underenforces a statute and qualifies for the abdication exception is likely to be arbitrary and capricious,[238] broadening the interpretation will result in review that acts as a meaningful check.

Under this approach, the result in *PETA*[239] may have differed. In that case, the D.C. Circuit refused to find a general policy of nonenforcement even though the agency itself had essentially admitted in multiple individual responses that it refused to enforce the statute because it believed that the agency had no jurisdiction.[240] If the court had been willing to look more closely at those representations and how the agency was enforcing the statute overall, it may have found that the agency was consciously and expressly underenforcing the statute to such a degree as to implicate the concerns involved in severe underenforcement. In such a case, a court should find that the claim qualifies for the abdication exception and is thus reviewable.

Adopting a severe underenforcement approach will not only alleviate the pressing concerns previously outlined but will also provide incentives for agencies to be more thoughtful in their enforcement. The availability of judicial review (or lack thereof) impacts agency decisions.[241] Knowing that meaningful judicial review under the APA lurks around the corner might increase the likelihood that decision-makers will adhere more closely to legislative intent in enforcing statutes, whereas knowing that courts use the total nonenforcement approach could have the opposite impact.[242]

To be sure, the severe underenforcement approach leads to more potential review of agency action, and in general, courts would prefer to defer to agencies. But this potential increase in opportunities for judicial review should not be a huge concern. First, very few cases would even qualify for the abdication exception, as evidenced by the low number of cases that have arisen since *Chaney* that have even referenced the exception. Those cases, however, present the dire concerns explored above, and thus the need for potential review in those few cases would outweigh concerns about allowing more review of agency action. And second, this approach aligns with the APA because the discretion involved in severe underenforcement exceeds the discretion contemplated by the APA's

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[238] *See supra* notes 119 & 129.

[239] People for the Ethical Treatment of Animals v. U.S Dep't of Agric., 7 F. Supp. 3d 1 (D.D.C. 2013).

[240] *Id.* at 12.

[241] *See* Sunstein, *supra* note 25, at 656.

[242] *See id.* at 656–57.

exception from judicial review for agency action "committed to agency discretion by law."[243] This therefore would not constitute an unmandated extension of judicial review but one that fits within the structure of the APA, as recognized by the Court in *Chaney*.[244]

A more pragmatic issue this approach may pose is manageability concerns for courts. As previously noted, this Note defines severe underenforcement as underenforcement so severe that it reaches the same pragmatic result as total nonenforcement. Finding the line between individual discretion and severe underenforcement can admittedly be difficult. For instance, myriad reasons could potentially explain why the DOJ failed to enforce the relevant provision of the ESA despite the high number of Mexican wolf killings, such as a lack of resources or evidence. In those cases, a kind of burden-shifting scheme might emerge: once the challenger has shown that there has been severe underenforcement, like with the ESA's taking prohibition, the burden might shift to the defending agency to demonstrate that it is applying discretion on a case-by-case basis rather than consciously, expressly, and severely underenforcing the statute. In doing so, courts may look at ongoing attempts at enforcement, such as whether the incident was investigated, or require explanations from the defending agencies. It is possible that a court may struggle with parsing through complicated explanations. But this analysis is not too much to ask of courts because this is the type of analysis that courts do daily, especially in the administrative law context.

CONCLUSION

The Court's decision in *Chaney* to render agency nonenforcement presumptively unreviewable under the APA necessarily recognized the importance of executive discretion in enforcing the laws. In doing so, it also left the door open for agencies to categorically not enforce or severely underenforce statutes and escape judicial review. But the *Chaney* Court also established the abdication exception to prevent agencies from escaping review under the APA. Courts and scholars, however, have consistently interpreted the abdication exception as only encompassing total nonenforcement or as requiring a general enforcement policy. Courts have thus let potential agency abdication, in the form of severe underenforcement, continue unchecked.

This poses two sets of serious concerns. The first involves how severe underenforcement harms complex statutory schemes that have overlapping

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[243] 5 U.S.C. § 701(a)(2) (2012); *see also supra* note 25 and accompanying text.

[244] *See supra* Section II.C.

civil and criminal penalties and that heavily rely on federal enforcement. The second involves how severe underenforcement potentially violates the Constitution's Presentment and Take Care Clauses and creates balance of powers concerns. To alleviate these concerns, courts should interpret *Chaney*'s abdication exception to encompass severe agency underenforcement as well as total nonenforcement. Otherwise, there is no effective way to review severe underenforcement under the APA to determine whether it is arbitrary and capricious. Allowing review in these situations would alleviate the pressing concerns that severe underenforcement poses and would fully vindicate the judicial branch's role, as recognized in *Chaney*, of checking agency abdication.