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TO WITHDRAW OR NOT TO WITHDRAW: REVIEWABILITY OF AN AGENCY'S WITHDRAWN PROPOSED RULE

Jane E. Carmody*

Abstract: Federal agencies propose thousands of regulations in any given year. The Administrative Procedure Act requires such agencies to follow certain procedures when enacting rules and regulations. However, when an agency proposes a new rule that is purely discretionary—not mandated by Congress—it may withdraw the proposed rule at any point before the rule is finalized. In October 2017, the Centers of Medicare and Medicaid (CMS) withdrew a proposed rule that, if enacted, would have required long-term care facilities to recognize out of state same-sex marriages as a condition of Medicare and Medicaid participation. In its formal withdrawal published in the Federal Register, CMS reasoned that the proposed rule was no longer necessary due to the U.S. Supreme Court decision in *Obergefell v. Hodges*.

This Comment examines the circumstances under which a district court can review an agency's withdrawal of a discretionary proposed rule. For nearly forty years, the D.C. Circuit has held that withdrawn discretionary rules may be ripe for judicial review if two requirements are met: (1) the withdrawal signals final agency action and (2) the agency created an adequate and precise record pursuant to informal notice-and-comment rulemaking. However, some commentators, notably former Ninth Circuit Judge Alex Kozinski, argue that an agency's decision to withdraw a proposed rule is wholly discretionary and thus unreviewable in light of the U.S. Supreme Court decision *Heckler v. Chaney*.

This Comment concludes by arguing that judicial review of withdrawn discretionary proposed rules is necessary to prevent arbitrary and capricious agency action. Moreover, despite Judge Kozinski's concerns, arbitrary and capricious review supplies a reviewing court with the critical tools to review withdrawn discretionary rules.

INTRODUCTION

In 2013, not all states allowed same-sex couples to marry. Later that year, however, the fight for marriage equality gained a historic victory. In *United States v. Windsor*,¹ the U.S. Supreme Court struck down the Defense of Marriage Act (DOMA) as unconstitutional.² Under section 3

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1. 570 U.S. 744 (2013).

2. *Id.* at 774–75.

of DOMA, the federal government actively defined marriage as “a legal union between one man and one woman as husband and wife.”³ The Court held that this provision violated the Fifth Amendment’s promise of Due Process.⁴ Thus, the federal government could no longer determine the validity of a couple’s marriage based upon the sex of the spouses. The holding of *Windsor*, however, did not prevent states from banning same-sex marriages.⁵

On December 12, 2014, the Centers for Medicare and Medicaid (CMS),⁶ published a notice of proposed rulemaking in the Federal Register.⁷ The proposed rule, an action of the Obama Administration, sought to ensure that skilled nursing facilities, also referred to as long-term care facilities, complied with the holding in *Windsor*.⁸ Long-term care facilities provide “skilled nursing care and related services for residents who require medical or nursing care, or rehabilitation services for the rehabilitation of injured, disabled, or sick persons.”⁹ CMS requires long-term care facilities to comply with conditions of participation in order to receive Medicare and Medicaid funding.¹⁰

In light of the *Windsor* decision, the Obama Administration’s proposed CMS rule sought to add additional requirements for participation in the federal Medicare program. These requirements ensured “equal treatment to spouses, regardless of their sex.”¹¹ This included recognizing the marriages of same-sex couples even if the state in which the facility was located did not allow same-sex couples to marry.¹² At the time, the

3. Defense of Marriage Act, H.R. 3396, 104th Cong. § 3 (1996); see 1 U.S.C. § 7 (2012) *invalidated* by *United States v. Windsor*, 570 U.S. 744 (2013); *Windsor*, 570 U.S. at 751.

4. *Windsor*, 570 U.S. at 774–76; see U.S. CONST. amend. V (“[N]or shall any person be . . . deprived of life, liberty, or property, without due process of law.”).

5. See *Same-Sex Marriage, State by State*, PEW RESEARCH CTR. (June 26, 2015), <http://www.pewforum.org/2015/06/26/same-sex-marriage-state-by-state/> [<https://perma.cc/9E93-G5XH>].

6. CMS is the agency within the Department of Health and Human Services (DHHS) responsible for administering U.S. healthcare programs. CTRS. FOR MEDICARE & MEDICAID SERVS., <https://www.cms.gov/About-CMS/About-CMS.html> [<https://perma.cc/NQV9-9AFX>].

7. Medicare and Medicaid Program; Revisions to Certain Patient’s Rights Conditions of Participation and Conditions for Coverage, 79 Fed. Reg. 73,873 (proposed Dec. 12, 2014) (to be codified at 42 C.F.R. pts. 416, 418, 482, 483, and 485).

8. *Id.*; *Windsor*, 570 U.S. at 772 (finding that “DOMA’s principal effect is to identify a subset of state-sanctioned marriages and make them unequal,” thus violating the Fifth Amendment).

9. 42 U.S.C. § 1395i-3(a)(1)(A)–(B) (2012).

10. 42 C.F.R. § 483.1(a)–(b) (2018).

11. Medicare and Medicaid Program; Revisions to Certain Patient’s Rights Conditions of Participation and Conditions for Coverage, 79 Fed. Reg. at 73,874.

12. *Id.*

Medicare participation requirements deferred to state law regarding the definition of marriage.¹³ The proposed rule would have ensured that same-sex spouses were “recognized and afforded equal rights in certain Medicare and Medicaid-participating facilities.”¹⁴ Under the proposed rule, facilities could no longer defer to state law regarding marriage *and* receive federal support.¹⁵

The proposed CMS rule, however, never took effect.¹⁶ On October 4, 2017, after the change in presidential administration, CMS formally withdrew the proposed rule.¹⁷ The agency cited one reason for the withdrawal—the 2015 U.S. Supreme Court decision *Obergefell v. Hodges*.¹⁸

In *Obergefell*, the Court determined that the Fourteenth Amendment protected a person’s fundamental right to marriage.¹⁹ The majority in *Obergefell* held that states could no longer prohibit same-sex couples from getting married—effectively legalizing same-sex marriage in all fifty states.²⁰ Because of this ruling, CMS reasoned that *Obergefell* “requires a state to license a marriage between two people of the same sex, and to recognize same-sex marriages lawfully performed in other States.”²¹ CMS therefore, withdrew the proposed rule because *Obergefell* “addresse[s] many of the concerns raised in the December 2014 proposed rule.”²² Thus, CMS believed the proposed rule was redundant.

The withdrawal of the proposed CMS rule by the Trump Administration is not unconventional. New presidential administrations often clean house of unwanted regulatory structures.²³ Withdrawn

13. *Id.*

14. *Id.*

15. *Id.*

16. Medicare and Medicaid Programs; Revisions to Certain Patient’s Rights Conditions for Participation and Conditions for Coverage; Withdrawal, 82 Fed. Reg. 46,181 (withdrawn Oct. 4, 2017).

17. *Id.*

18. *Id.*; 576 U.S. ___, 135 S. Ct. 2584 (2015).

19. 135 S. Ct. at 2602–03.

20. *Id.* at 2604–05.

21. Medicare and Medicaid Programs; Revisions to Certain Patient’s Rights Conditions for Participation and Conditions for Coverage; Withdrawal, 82 Fed. Reg. at 46,181.

22. *Id.*

23. *See, e.g.*, Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 4435 (Jan. 26, 2009), <https://www.gpo.gov/fdsys/pkg/FR-2009-01-26/pdf/E9-1639.pdf> [<https://perma.cc/2MWX-VCTQ>] (On January 20, 2009, the Obama Administration sent a memorandum ordering department heads to “[w]ithdraw from the OFR all proposed or final regulations that have not been published in the Federal Register so that they can be reviewed and approved by a department or agency head.”); Memorandum for the Heads and Acting Heads of

proposed rules, however, highlight a unique area of administrative law. Should courts be able to review agency actions that are wholly discretionary? If yes, then under what standard? How much deference should be given to agencies for deciding to withdrawal a proposed rule?

When an agency engages in rulemaking, several legal mechanisms within the Administrative Procedure Act (APA) operate to ensure sound agency decision-making. For example, the APA requires an agency to: (1) support its findings with factual evidence;²⁴ (2) act within its relevant constitutional and statutory authority;²⁵ and (3) act in a manner that is not “arbitrary” or “capricious.”²⁶ The APA also provides several judicial review provisions that enable courts to review agency decision-making.²⁷ For example, not every agency decision is judicially reviewable—the APA only allows courts to review “final agency action.”²⁸ This includes both affirmative action by an agency and also an agency’s “failure to act.”²⁹ Because of this requirement, courts cannot review agency decisions that are “committed to agency discretion by law.”³⁰

Withdrawn discretionary proposed rules, however, do not easily fit into the categories of agency action or inaction, and the U.S. Supreme Court has yet to weigh in on the appropriate categorization for these actions under the APA. Thus, even though CMS invested significant time and resources into the proposed rule, there is a possibility that the action of withdrawing the proposed rule is not judicially reviewable under the APA. Without judicial review, an agency could pull the plug on a proposed rule’s progress with little to no accountability.³¹

This Comment uses the Obama Administration’s proposed CMS rule and the Trump Administration’s subsequent withdrawal to discuss the reviewability of withdrawn discretionary proposed rules. Focusing on the withdrawn proposed CMS rule as a case study, this Comment argues that

Executive Departments and Agencies, 66 Fed. Reg. 7702 (Jan. 24, 2001), <https://www.gpo.gov/fdsys/pkg/FR-2001-01-24/pdf/01-2368.pdf> [<https://perma.cc/5S3A-VGKR>] (On January 20, 2001, the Bush Administration sent a similar memorandum to department heads that they should “send no proposed or final regulation to the Office of the Federal Register (the ‘OFR’) unless and until a department or agency head appointed by the President after noon on January 20, 2001, reviews and approves the regulatory action”).

24. 5 U.S.C. § 706(2)(E) (2012).

25. *Id.* § 706(2)(B)–(C).

26. *Id.* § 706(2)(A).

27. *Id.* §§ 701–06; see Eric Biber, *Two Sides of the Same Coin: Judicial Review of Administrative Agency Action and Inaction*, 26 VA. ENVTL. L.J. 461, 464 (2008).

28. 5 U.S.C. § 704.

29. *Id.* § 551(13).

30. *Id.* § 701(a).

31. *See id.* § 553.

judicial review of withdrawn discretionary proposed rules is both appropriate and necessary to prevent agency abuse of power. Furthermore, judicial review of withdrawn discretionary proposed rules forces agencies to engage in non-arbitrary decision-making.

This Comment proceeds in four parts. Part I discusses the administrative rulemaking process and how withdrawn discretionary proposed rules fit into the APA's framework. It then outlines the APA's judicial review provisions and the requirements to challenge agency action. Part II describes the regulatory history of the Obama Administration's discretionary proposed rule. It then discusses the particulars of the proposed CMS rule and the added protections the rule would have given LGBT older adults. Furthermore, Part II describes the protections, if any, *Obergefell* provides to LGBT older adults. Part III sketches the progression of judicial review of withdrawn discretionary proposed rules and the lens through which courts review the agency's reasoning behind such withdrawals. It then outlines both the prevailing view of the D.C. Circuit and Judge Kozinski's dissenting viewpoint on judicial review. Lastly, Part IV argues that review of withdrawn discretionary proposed rules is an appropriate exercise of judicial power under the APA to ensure non-arbitrary agency decision-making.

I. ADMINISTRATIVE RULEMAKING AND WITHDRAWN RULES

Through rulemaking, federal agencies have an immense impact on a wide array of national policies.³² The rulemaking process generally begins with an act of Congress granting rulemaking authority to an agency, which allows the agency to then implement rules to effectuate the purpose and goals of the statute.³³ On average, federal agencies “issue more than 3,000 final rules each year” on a variety of topics.³⁴ In comparison, the 115th Congress passed just ninety-seven laws—including seventy-four bills and twenty-three joint-resolutions.³⁵

32. Jonathan Turley, *The Rise of the Fourth Branch of Government*, WASH. POST (May 24, 2013), https://www.washingtonpost.com/opinions/the-rise-of-the-fourth-branch-of-government/2013/05/24/c7faaad0-c2ed-11e2-9fe2-6ee52d0eb7c1_story.html?utm_term=.ac47aaf72db [<https://perma.cc/G9TY-JZ5R>].

33. MAEVE P. CAREY, CONG. RESEARCH SERV., RL32240, THE FEDERAL RULEMAKING PROCESS: AN OVERVIEW 1 (2013), <https://fas.org/sgp/crs/misc/RL32240.pdf> [<https://perma.cc/25ML-GDJ5>].

34. *Id.*

35. Danny Vink, *What Congress Actually Did in 2017*, POLITICO (Dec. 26, 2017, 3:06 PM), <https://www.politico.com/agenda/story/2017/12/26/congress-secret-achievements-000604> [<https://perma.cc/4YNY-RX38>].

Despite this vast and expanding power, courts are constrained in reviewing some agency actions under the APA.³⁶ Withdrawn discretionary proposed rules, like the proposed CMS rule, occupy a unique space within administrative law. Withdrawn discretionary proposed rules do not necessarily represent agency action or inaction—raising the question of whether judicial review is proper.³⁷ Furthermore, the U.S. Supreme Court has remained silent on whether withdrawn discretionary proposed rules are judicially reviewable.³⁸ The D.C. Circuit, however, has ruled in the affirmative, holding that withdrawn discretionary proposed rules are in fact subject to judicial review.³⁹

This Part discusses the mechanics and history of the reviewability of withdrawn discretionary proposed rules. It begins by summarizing the administrative rulemaking process. Next it explores the various hurdles in challenging this type of discretionary agency action. Finally, this Part surveys the D.C. Circuit's application of the arbitrary and capricious review standard to an agency's reasoning for withdrawing proposed rules.

A. *The APA Sets Forth Requirements for the Rulemaking Process*

Before a rule is proposed, withdrawn, finalized, or even challenged, an agency must comply with certain formalities.⁴⁰ Virtually all agency rulemaking goes through the informal rulemaking process, as opposed to

36. See Ronald M. Levin, *Understanding Unreviewability in Administrative Law*, 74 MINN. L. REV. 689, 693–702 (1990) (“The APA’s judicial review chapter provides that agency action is normally subject to review, but also states in section 701(a) that the chapter ‘does not apply to the extent that (1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law.’ The first of the two numbered clauses does not create interpretation difficulties (although there may be uncertainty as to whether a given statute actually precludes review). The cryptic language of the second clause, however, has generated tremendous confusion.”).

37. Jacob E. Gersen & Anne Joseph O’Connell, *Hiding in Plain Sight? Timing and Transparency in the Administrative State*, 76 U. CHI. L. REV. 1157, 1188 (2009).

38. *Id.* at 1190.

39. See Nat. Res. Def. Council, Inc. v. SEC, 606 F.2d 1031, 1047 (D.C. Cir. 1979) (“[I]n light of the strong presumption of reviewability, discretionary decisions not to adopt rules are reviewable where, as here, the agency has in fact held a rulemaking proceeding and compiled a record narrowly focused on the particular rules suggested but not adopted.”). Some scholars note that the D.C. Circuit is “the second most important court” in the United States because of its unique position in reviewing the bulk of agency actions. Aaron Nielson, *D.C. Circuit Review – Reviewed: The Second Most Important Court?*, YALE J. ON REG.: NOTICE & COMMENT (Sept. 4, 2015), <http://yalejreg.com/nc/d-c-circuit-review-reviewed-the-second-most-important-court-by-aaron-nielson/> [<https://perma.cc/PPH7-AP2Y>].

40. Jack M. Beermann & Gary Lawson, *Reprocessing Vermont Yankee*, 75 GEO. WASH. L. REV. 856, 856 (2007).

formal rulemaking.⁴¹ When an agency engages in informal rulemaking it must comply with the requirements of section 553 of the APA.⁴² Even though this section of the APA does not define rulemaking, it imposes three constraints on agencies seeking to adopt a final rule.⁴³ First, a “[g]eneral notice of proposed rule making [must] be published in the Federal Register.”⁴⁴ The notice of proposed rulemaking only needs to include “the terms or substance of the proposed rule or a description of the subjects and issues involved.”⁴⁵ Next, the agency must allow for an open comment period so that the general public has “an opportunity to participate in the rule making” process.⁴⁶ This can be by “written data, views, or arguments with or without opportunity for oral presentation.”⁴⁷ Lastly, the agency “shall incorporate” a “concise general statement of [the rule’s] basis and purpose.”⁴⁸ This overall framework is often referred to as “notice-and-comment” rulemaking and only applies to legislative rules.⁴⁹ Legislative rules “create rights, impose obligations, or effect change in existing law pursuant to authority delegated by Congress.”⁵⁰ Notice-and-comment rulemaking is not needed for “interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice.”⁵¹

Once the public has had an opportunity to comment, an agency can move forward in finalizing the rule or issuing a new or modified version for additional notice-and-comment consideration.⁵² At this stage, an agency may also decide to abandon the proposed rule, as CMS did with

41. *Id.*; see *United States v. Fla. E. Coast Ry.*, 410 U.S. 224, 236–38 (1973) (holding that formal rulemaking is only required if the organic act states that rulemaking must take place “on the record”).

42. 5 U.S.C. § 553 (2012).

43. *Id.* These three requirements do not apply to “interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice.” *Id.* Those types of agency rules are beyond the scope of this Comment.

44. 5 U.S.C. § 553(b).

45. *Id.* § 553(b)(3).

46. *Id.* § 553(c).

47. *Id.*

48. *Id.*

49. Beermann & Lawson, *supra* note 40, at 856 (citations omitted).

50. *L.A. Closeout, Inc. v. DHS*, 513 F.3d 940, 942 (9th Cir. 2008) (citing *Hemp Indus. Ass’n v. DEA*, 333 F.3d 1082, 1087 (9th Cir. 2003)); see 5 U.S.C. § 551(4).

51. 5 U.S.C. § 553(b)(3)(A).

52. ERULEMAKING PROGRAM MGMT. OFFICE, EPA, REGULATORY TIMELINE, https://www.regulations.gov/docs/FactSheet_Regulatory_Timeline.pdf [<https://perma.cc/C6NQ-9KNSJ>].

the 2014 proposed rule.⁵³ Regardless of whether an agency decides to formally adopt a proposed rule or withdraw a proposed rule, it must explain why it is taking such action.⁵⁴

B. A Reviewing Court Must Comply with the APA's Limitations on Judicial Review

The APA specifies the appropriate standard of review for an agency's decision to act or not to act.⁵⁵ Under the APA, an agency's action must be "final" before a reviewing court can assess the agency's reasoning.⁵⁶ A two-part test determines when an agency action is "final."⁵⁷ First, the action must symbolize the end of the agency's decision-making process.⁵⁸ Second, the action must be one in which "rights and obligations" have been determined or from which "legal consequences flow."⁵⁹ For example, when an agency engages in notice-and-comment rulemaking and ultimately promulgates a rule subject to the procedures of section 553 of the APA, it constitutes final agency action, which is subject to judicial review.⁶⁰

Even though the final promulgation of a rule easily satisfies the two-part finality test, agency inaction may also—in limited situations—satisfy the finality requirement.⁶¹ In the case of inaction, an agency has not started the rulemaking process and the status quo remains unchanged.⁶² Thus, a proper challenge to agency inaction is allowed only under exceedingly narrow circumstances. For example, a court may review agency inaction if an agency is "compelled by law to act within a certain time period, but the manner of its action is left to the agency's

53. *Env'tl. Integrity Project v. McCarthy*, 139 F. Supp. 3d 25, 39 (D.C. Cir. 2015).

54. *Beermann & Lawson*, *supra* note 40, at 880 (explaining that after the comment period, the agency must "articulate explicitly all of the key issues of fact, law, and policy raised" during the notice-and-comment period).

55. 5 U.S.C. §§ 701–706 (governing judicial review of agency actions in the absence of a governing statute's specific reviewing structure).

56. *Id.* § 704; *Franklin v. Massachusetts*, 505 U.S. 788, 796–97 (1992).

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

58. *Id.*

59. *Id.*

60. 5 U.S.C. § 704.

61. *Gersen & O'Connell*, *supra* note 37, at 1187–88.

62. *See Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 63 (2004) (holding that failure to act by an agency "is simply the omission of an action without formally rejecting a request—for example, the failure to promulgate a rule or take some decision by a statutory deadline").

discretion” and the agency fails to act.⁶³ In this situation, a court could “compel” the agency to act because its inaction was “unlawfully withheld or unreasonably delayed.”⁶⁴ Therefore, withdrawn rules could be categorized as final agency action, but that is not always the case.⁶⁵

The text of the APA excludes judicial review in two instances.⁶⁶ First, if the agency’s governing statute explicitly “precludes judicial review,” then courts are prohibited from reviewing the agency’s action.⁶⁷ Second, the APA prohibits courts from reviewing an agency action if the action “is committed to agency discretion by law.”⁶⁸ Despite this bright line designation, the U.S. Supreme Court has nevertheless indicated that Congressional intent surrounding the judicial review provisions of the APA indicate that they “must be given ‘hospitable’ interpretation.”⁶⁹ The Court further stated that “[t]he legislative material elucidating that seminal act manifests a congressional intention that it cover a broad spectrum of administrative actions.”⁷⁰ Congressional legislative history also indicates that the APA should apply to a broad range of agency action:

To preclude judicial review under this bill a statute, if not specific in withholding such review, must upon its face give clear and convincing evidence of an intent to withhold it. The mere failure to provide specially by statute for judicial review is certainly no evidence of intent to withhold review.⁷¹

63. *Id.* at 65.

64. 5 U.S.C. § 706(1).

65. Gersen & O’Connell, *supra* note 37, at 1194.

66. 5 U.S.C. § 701(a).

67. *Id.*; see *Abbott Labs. v. Gardner*, 387 U.S. 136, 141 (1967), *abrogated on other grounds*, *Califano v. Sanders*, 430 U.S. 99 (1977) (“[O]nly upon a showing of ‘clear and convincing evidence’ of a contrary legislative intent should courts restrict access to judicial review.” (quoting *Rusk v. Cort*, 369 U.S. 367 (1962))).

68. 5 U.S.C. § 701(a)(2); see *Berry v. U.S. Dep’t of Labor*, 832 F.3d 627, 634 (6th Cir. 2016) (“The phrase ‘committed to agency discretion by law’ is a term of art in administrative law, representing ‘a very narrow exception’ to judicial review for two particular types of discretionary agency action.” (quoting *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971))).

69. *Abbott Labs.*, 387 U.S. at 140–41; see, e.g., *Duncan v. Muzyn*, 833 F.3d 567, 576 (6th Cir. 2016) (“Reviewability is the norm. Courts strongly presume the reviewability of agency action.”); *Pinnacle Armor, Inc. v. United States*, 648 F.3d 708, 718 (9th Cir. 2011) (“In general, there is a ‘strong presumption that Congress intends judicial review of agency action.’” (quoting *Helgeson v. Bureau of Indian Affairs*, 153 F.3d 1000, 1003 (9th Cir. 1988))).

70. *Abbott Labs.*, 387 U.S. at 140.

71. H.R. REP. NO. 79-1980, at 275 (1946).

C. *Withdrawn Discretionary Proposed Rules Fall in the Middle of the Rulemaking Process*

Withdrawn proposed rules exist in a space between final agency action and agency inaction.⁷² A withdrawn proposed rule represents an agency's decision to begin the rulemaking process, but it also represents an incomplete rulemaking process.⁷³ Generally, withdrawn rules can be divided into three broad categories.⁷⁴ The first two categories are judicially reviewable.⁷⁵ First, some statutes explicitly address agency decisions to withdraw a proposed rule.⁷⁶ For example, several environmental statutes, such as the Endangered Species Act,⁷⁷ account for this type of agency action. Under the Endangered Species Act, when the agency seeks to list a particular species, pursuant to notice-and-comment rulemaking, it has three options: (1) conclude within one year that the species is endangered and then list the species, (2) conclude that the particular species is not endangered and withdraw the listing, and (3) extend the potential listing by six months if there is scientific disagreement about the potential endangerment.⁷⁸ However, if the agency ultimately decides to withdraw the listing because the species is not endangered, that action can be challenged.⁷⁹ Most statutes, however, "do not explicitly contemplate the abandonment of proposed rulemakings."⁸⁰ Second, "even if the statutory scheme does not explicitly contemplate" an agency withdrawal, "courts will often review agency decisions to abandon proposed action if the applicable statute imposes mandatory obligations on the agency to act."⁸¹ Third, if Congress delegated rulemaking authority to an agency without delineating specific action, an agency has the

72. Gersen & O'Connell, *supra* note 37, at 1188.

73. *Id.*

74. *Id.* at 1188–89.

75. *Id.*

76. *Id.* at 1188.

77. 16 U.S.C. § 1533(b)(6) (2012). The Clean Air Act is another example of when a statutory scheme explicitly contemplates a withdrawn proposed rule. *See* 42 U.S.C. § 7412(b)(2)–(3) (2012).

78. 16 U.S.C. § 1533(b)(6).

79. *See, e.g., Tucson Herpetological Soc. v. Salazar*, 566 F.3d 870, 872 (9th Cir. 2009) (Plaintiffs "contend that the Secretary of the Interior's (the 'Secretary') decision to withdraw a rule proposing that the flat-tailed horned lizard (the 'lizard') be listed as a threatened species is contrary to the requirements of the Endangered Species Act"); *Save Our Springs v. Babbitt*, 27 F. Supp. 2d 739, 741 (W.D. Tex. 1997) (challenging the Secretary of the Interior's "decision to withdraw the proposed listing of the Barton Springs salamander (*Eurycea sosorum*)").

80. Gersen & O'Connell, *supra* note 37, at 1189.

81. *Id.*

discretion to propose and withdraw rules to effectuate the intent of Congress.⁸² Less consensus exists around the reviewability of the third category of withdrawn rules because these actions represent wholly discretionary agency decision-making and the U.S. Supreme Court has yet to weigh in.

II. THE REGULATORY HISTORY OF THE 2014 CMS WITHDRAWN DISCRETIONARY PROPOSED RULE

This Part explores CMS's 2014 proposed rule and its subsequent formal withdrawal in the Federal Register. In doing so, this Part highlights what protections the rule would have provided the growing population of LGBT older adults in long-term care facilities. Over the next fifteen years, the nation's senior population is expected to grow at an unprecedented rate.⁸³ As this segment of the population continues to increase, the reliance on long-term care facilities will also rise because many older adults do not have the necessary savings to continue to live independently or pay for an in-home nursing aide.⁸⁴

All adults, especially LGBT older adults, need spaces that are conducive to aging successfully.⁸⁵ However, affordable housing for older adults is lacking overall, let alone LGBT-inclusive housing.⁸⁶ Current LGBT older adults need inclusive spaces that embrace their identity because of the systemic and historical discrimination against those individuals over the last several decades.⁸⁷ Without federal protections for LGBT people in long-term care facilities, LGBT older adults often face discrimination in those settings.⁸⁸

82. See generally OFFICE OF THE FED. REGISTER, A GUIDE TO THE RULEMAKING PROCESS (2011), https://www.federalregister.gov/uploads/2011/01/the_rulemaking_process.pdf [<https://perma.cc/2DE4-E2DL>].

83. BIPARTISAN POLICY CTR., HEALTHY AGING BEGINS AT HOME 7 (2016), <https://bipartisanpolicy.org/wp-content/uploads/2016/05/BPC-Healthy-Aging.pdf> [<https://perma.cc/4JG9-526R>].

84. *Id.* Medicare Part A covers skilled nursing care facilities, including meals, a shared room, medications, physical therapy, and other services. See *Skilled Nursing Facility (SNF) Care*, U.S. CTRS. FOR MEDICARE & MEDICAID SERVS., <https://www.medicare.gov/coverage/skilled-nursing-facility-care.html> [<https://perma.cc/E4UH-HADE>].

85. MOVEMENT ADVANCEMENT PROJECT & SAGE, UNDERSTANDING ISSUES FACING LGBT OLDER ADULTS 7 (2017), <https://www.lgbtmap.org/file/understanding-issues-facing-lgbt-older-adults.pdf> [<https://perma.cc/6WNS-B95J>].

86. *Id.*

87. *Id.*

88. Although the topic is largely outside the scope of this Comment, the Nursing Home Reform Act and relevant regulations provide standardized requirements that "an institution must meet in order to qualify to participate as skilled nursing facility in the Medicare program, and as a nursing facility

A. *The Proposed CMS Rule Would Have Codified Certain Rights for LGBT Couples in Long-Term Care Facilities*

In 2014, CMS proposed a rule that would have altered certain Medicare participation requirements, also known as “conditions of participation,” for long-term care facilities that receive federal funding.⁸⁹ CMS officially published the proposed rule in the Federal Register on December 12, 2014.⁹⁰ Prior to the proposed rule, Medicare and Medicaid requirements for patient’s rights provisions deferred to state law regarding the definition of marriage.⁹¹

CMS stated that the purpose of the proposed rule was “to ensure that same-sex spouses . . . are recognized and afforded equal rights in Medicare and Medicaid participating facilities.”⁹² The proposed rule would have required long-term care facilities to conform to the U.S. Supreme Court’s holding in *Windsor*.⁹³ When the Court decided *Windsor*, same-sex marriage was illegal in the majority of states, and more than 70% of states either had constitutional or statutory bans on same-sex marriage.⁹⁴ Furthermore, under DOMA, the federal government also defined marriage as a “union between one man and one woman.”⁹⁵

After the *Windsor* ruling that DOMA was unconstitutional, the federal government could no longer discriminate against legally performed same-sex marriages.⁹⁶ However, the Court did not rule on the legality of state

in the Medicaid program.” 42 C.F.R. § 483.1(b) (2018). The regulations also state that each facility “must treat each resident with respect and dignity.” *Id.* § 483.10(a)(1). However, the Act does not make it illegal to discriminate against residents based on their sexual orientation. Furthermore, the federal Fair Housing Act (FHA) prohibits discrimination based on “race, color, religion, sex, familial status, or national origin.” 42 U.S.C. §§ 3601–3619, 3631 (2012). The FHA does not expressly prohibit discrimination on the basis of sexual orientation. Individual states, however, may provide protections that the federal government does not provide.

89. Medicare and Medicaid Program; Revisions to Certain Patient’s Rights Conditions of Participation and Conditions for Coverage, 79 Fed. Reg. 73,873 (proposed Dec. 12, 2014) (to be codified at 42 C.F.R. pts. 416, 418, 482, 483, and 485).

90. *Id.*

91. *Id.* at 73,874.

92. *Id.* at 73,873.

93. *Id.*; see *United States v. Windsor*, 570 U.S. 744, 771–72 (2013). Under DOMA, plaintiff Edith Windsor could not claim a federal estate tax exemption for surviving spouses after her wife passed away. The IRS denied her claim because the exemption did not apply to same-sex marriages. However, in a 5-4 decision, Justice Kennedy held that “DOMA’s principal effect is to identify a subset of state-sanctioned marriages and make them unequal,” thus violating the Fifth Amendment. *Id.* at 772.

94. *Same-Sex Marriage, State by State*, *supra* note 5 (scroll to year 2013 on the United States map).

95. 1 U.S.C. § 7 (2012), *invalidated by Windsor*, 570 U.S. 744.

96. 570 U.S. at 772.

laws banning same-sex marriage. Therefore, CMS’s proposed rule would have required Medicare and Medicaid participating long-term care facilities to recognize out of state same-sex marriages, even if the facility’s state law made them illegal.⁹⁷ At the time, only seventeen states had legalized same-sex marriage.⁹⁸ Without federal recognition, long-term care facilities located in states that did not recognize same-sex marriage could disregard a resident’s marriage, even if it was legally performed in another state.⁹⁹ For example, under federal long-term care facility regulations, a resident has the right to appoint a representative who has decision-making power for the resident in the event of decisional incapacity.¹⁰⁰ The proposed rule would have added language that established “a requirement that, the same-sex spouse of a resident must be afforded treatment equal to that afforded to an opposite-sex spouse if the marriage was valid in the jurisdiction in which it was celebrated.”¹⁰¹

However, the proposed rule never took effect, even though CMS began informal notice-and-comment rulemaking.¹⁰² Following the initial publication of the proposed rule, the U.S. Supreme Court decided another landmark same-sex marriage case, *Obergefell v. Hodges*.¹⁰³ In a 5-4 decision, the Court held that state same-sex marriage bans violated the Fourteenth Amendment’s Due Process and Equal Protection Clauses.¹⁰⁴ As a result of this ruling, all fifty states must allow same-sex couples to obtain marriage licenses—effectively legalizing same-sex marriage throughout the country.¹⁰⁵ On October 4, 2017, CMS withdrew the proposed rule by publishing a formal notice of withdrawal in the Federal Register.¹⁰⁶ In the notice, CMS cited only one reason for the agency’s

97. Medicare and Medicaid Program; Revisions to Certain Patient’s Rights Conditions of Participation and Conditions for Coverage, 79 Fed. Reg. 73,873 (proposed Dec. 12, 2014) (to be codified at 42 C.F.R. pt. 416, 418, 482, 483, and 485).

98. *Same-Sex Marriage, State by State*, *supra* note 5.

99. Medicare and Medicaid Program; Revisions to Certain Patient’s Rights Conditions of Participation and Conditions for Coverage, 79 Fed. Reg. at 73,874.

100. *Id.* at 73,875.

101. *Id.*

102. Medicare and Medicaid Programs; Revisions to Certain Patient’s Rights Conditions for Participation and Conditions for Coverage; Withdrawal, 82 Fed. Reg. 46,181 (withdrawn Oct. 4, 2017).

103. 576 U.S. ___, 135 S. Ct. 2584 (2015).

104. *Id.* at 2604–05; *see also* U.S. CONST. amend. XIV, § 1.

105. *Same-Sex Marriage, State by State*, *supra* note 5.

106. Medicare and Medicaid Programs; Revisions to Certain Patient’s Rights Conditions for Participation and Conditions for Coverage; Withdrawal, 82 Fed. Reg. at 46,181.

decision to withdraw the proposed rule, the U.S. Supreme Court's decision in *Obergefell*.¹⁰⁷

Considering *Obergefell*'s impact on the proposed rule, CMS reasoned that the landmark decision "addressed many of the concerns raised in the December 2014 proposed rule."¹⁰⁸ CMS stated that "the Supreme Court held that the Due Process and Equal Protection clauses of the Fourteenth Amendment requires a state to license a marriage between two people of the same-sex, and to recognize same-sex marriages lawfully performed in other States."¹⁰⁹ Thus, the proposed rule was no longer needed because *Obergefell* accomplished the same goal.

B. The Obergefell Ruling Does Not Provide LGBT Older Adults Added Protection Beyond Marriage Recognition

In January 2015, the U.S. Supreme Court granted certiorari to a group of cases from the Sixth Circuit that upheld the same-sex marriage bans of four states: Kentucky, Michigan, Ohio, and Tennessee.¹¹⁰ The consolidated case, *Obergefell v. Hodges*, provided an opportunity for the U.S. Supreme Court to define sexual orientation as a quasi-suspect class for the first time.¹¹¹ The plaintiffs sought to answer the question of whether the Due Process Clause or the Equal Protection Clause of the Fourteenth Amendment required states to include same-sex couples within the definition of marriage.¹¹²

Leading up to this landmark case, three competing theories existed as to how the U.S. Supreme Court would handle the classification of sexual orientation as a quasi-suspect class within the Equal Protection tiers of scrutiny.¹¹³ The first theory suggested that the Court could have struck down the same-sex marriage ban without declaring sexual orientation a

107. *Id.*

108. *Id.*

109. *Id.*

110. *Obergefell v. Hodges*, 575 U.S. ___, 135 S. Ct. 1039 (2015) (mem.); *DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014), *rev'd by Obergefell*, 135 S. Ct. 2584.

111. *But cf.* *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985) (refusing to define mental disability as a quasi-suspect class for purposes of equal protection analysis). The U.S. Supreme Court "has extended suspect status to classifications based on national origin and alienage in addition to those based on race." *Quasi-Suspect Classes and Proof of Discriminatory Intent: A New Model*, 90 YALE L.J. 912, 915 (1981). *See id.* Quasi-suspect status is afforded to "classifications based on gender." Suspect and quasi-suspect classifications trigger different levels of scrutiny. *Id.*

112. *DeBoer*, 772 F.3d at 399.

113. Maxwell L. Stearns, *Obergefell, Fisher, and the Inversion of Tiers*, 19 U. PA. J. CONST. L. 1043, 1046 (2017).

quasi-suspect class by solely relying on an animus theory.¹¹⁴ The animus theory, which resides within rational basis review, is grounded within demonstrated animus towards a “politically unpopular group.”¹¹⁵ The second theory would have treated sexual orientation as a form of gender-based discrimination, thereby placing it within the intermediate tier of scrutiny.¹¹⁶ The third theory relied on equating same-sex marriage to anti-miscegenation laws, thus placing the analysis within the strict scrutiny tier.¹¹⁷

In *Obergefell*, however, the U.S. Supreme Court decided the case in a manner that avoided the tiers of Equal Protection altogether. Instead, the Court’s analysis rested on the Fourteenth Amendment’s Due Process clause.¹¹⁸ The Court determined that marriage is a fundamental right held within Due Process’s promise of liberty.¹¹⁹ Resting the decision on the Fourteenth Amendment’s Due Process clause creates a narrow holding.¹²⁰ “Because *Obergefell* was laser focused on the fundamental right to marry and not the nature of the classification, . . . future courts can easily distinguish *Obergefell*.”¹²¹ Even though *Obergefell* legalized same-sex marriage in all fifty states, LGBT people are still left without the protection of a suspect class.¹²² Without this protection, LGBT older adults in federal and state funded long-term care facilities lack the ability to fully challenge discrimination based upon their sexual orientation.

III. THE HURDLES IN CHALLENGING WITHDRAWN PROPOSED RULES

This Part discusses judicial review of withdrawn discretionary proposed rules and the lens through which courts review the agency’s reasoning behind such withdrawals. It outlines the prevailing viewpoint

114. *Id.* at 1101.

115. *Id.* at 1058; see *Romer v. Evans*, 517 U.S. 620 (1996) (striking down Colorado’s Amendment 2 to the state constitution prohibiting sexual orientation from inclusion in state antidiscrimination laws under animus rationale).

116. Stearns, *supra* note 113, at 1101.

117. *Id.*

118. *Obergefell v. Hodges*, 576 U.S. ___, 135 S. Ct. 2584 (2015).

119. *Id.* at 2591.

120. Peter Nicolas, *Obergefell’s Squandered Potential*, 6 CALIF. L. REV. CIR. 137, 142 (2015) (“The Court’s failure to declare sexual orientation a suspect classification has resulted in concrete harm to gays and lesbians . . . [L]ower courts have repeatedly upheld laws discriminating on the basis of sexual orientation.”).

121. *Id.*

122. *Id.*

of the D.C. Circuit—that withdrawn discretionary proposed rules are judicially reviewable if certain conditions are fulfilled. This Part also discusses the dissenting viewpoints to judicial review, primarily former Ninth Circuit Judge Alex Kozinski’s criticism of the D.C. Circuit’s approach. Specifically, Judge Kozinski finds that the D.C. Circuit’s approach contravenes the U.S. Supreme Court’s decision in *Heckler v. Chaney*.¹²³ Lastly, this Part explains the APA’s arbitrary and capricious review standard and how it applies to withdrawn discretionary proposed rules.

A. Withdrawn Discretionary Proposed Rules Are Reviewable If Certain Criteria Are Satisfied

As previously discussed, there are three categories of withdrawn proposed rules.¹²⁴ Judicial review of the first two categories remains unquestioned.¹²⁵ However, the third category of withdrawn proposed rules are creatures of agency discretion and provide a unique challenge to judicial review for several reasons.¹²⁶ First, this agency action is not mandated or explicitly contemplated by the governing organic statute.¹²⁷ Second, on its face, the text of the APA bars judicial review of discretionary actions, unlike those that are required by statute.¹²⁸ Lastly, the U.S. Supreme Court has remained silent on the reviewability of discretionary withdrawals. However, the U.S. Supreme Court has recognized that the APA should generally be read to cover a broad range of agency action and that the judicial review sections should be read in a “hospitable” manner.¹²⁹

In the absence of a U.S. Supreme Court decision, the D.C. Circuit has held that withdrawn discretionary proposed rules are nonetheless reviewable.¹³⁰ The D.C. Circuit’s precedent has sharply diverted from the actual text of the APA, which states that actions reserved to an agency’s discretion are not reviewable by the judicial branch.¹³¹

123. *Heckler v. Chaney*, 470 U.S. 821 (1985).

124. *See supra* Part I.

125. Gersen & O’Connell, *supra* note 37, at 1189–90; *see supra* section I.C.

126. *Id.* at 1190.

127. *Id.*

128. 5 U.S.C. § 701(a)(2) (2012).

129. *Abbott Labs. v. Gardner*, 387 U.S. 136, 140–41 (1967), *abrogated on other grounds*, *Califano v. Sanders*, 430 U.S. 99 (1977).

130. *Nat. Res. Def. Council, Inc. v. SEC*, 606 F.2d 1031 (D.C. Cir. 1979).

131. 5 U.S.C. § 701(a)(2).

The most extensive analysis of the D.C. Circuit's view of withdrawn discretionary proposed rules appears in *Natural Resources Defense Council, Inc. v. SEC*.¹³² The U.S. Securities and Exchange Commission (SEC) withdrew "proposed disclosure rules" after a substantial notice-and-comment period, including "nineteen days of public hearings."¹³³ On appeal, the SEC argued that the district court "erred because the SEC's decision not to adopt rules was nonreviewable."¹³⁴ The SEC relied exclusively on section 701(a)(2) of the APA to make a textual argument that discretionary actions by agencies are not reviewable.¹³⁵ The D.C. Circuit disagreed, rejecting the SEC's argument and stating that section 701(a)(2) "creates a strong presumption of reviewability that can only be rebutted by a clear showing that judicial review would be inappropriate."¹³⁶

Even though the D.C. Circuit held that section 701(a)(2) creates a presumption of reviewability,¹³⁷ the court of appeals refused to issue a per se rule.¹³⁸ Rather, the D.C. Circuit cautioned that review of withdrawn discretionary proposed rules will not be proper in every case.¹³⁹ Thus, courts must balance an agency's expertise with section 701(a)(2)'s presumption of reviewability.¹⁴⁰

In light of this balance, the D.C. Circuit created two procedural hurdles that a withdrawal must satisfy for a reviewing court to determine if the agency correctly withdrew the proposed rule.¹⁴¹ First, the withdrawal must signal the completion of the agency's regulatory process; the action must represent the agency's determination that it will not tinker with the proposed issue further.¹⁴² The agency is often in the best position to discern "internal management considerations as to budget and personnel; evaluations of its own competence; weighing of competing policies within a broad statutory framework."¹⁴³ Similarly, the agency is also the best

132. 606 F.2d 1031 (D.C. Cir. 1979).

133. *Id.* at 1037–39.

134. *Id.* at 1043.

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.* at 1047.

139. *Id.*

140. *Id.* at 1046–47.

141. Gersen & O'Connell, *supra* note 37, at 1192.

142. *Ctr. for Auto Safety v. Nat'l Highway Traffic Safety Admin.*, 710 F.2d 842, 847–48 (D.C. Cir. 1983).

143. *Nat. Res. Def. Council, Inc. v. SEC*, 606 F.2d 1031, 1046 (D.C. Cir. 1979).

party to determine whether the timing is right to promulgate a new rule.¹⁴⁴ Second, the reviewing court needs to assess a sufficient record documenting the agency's decision.¹⁴⁵ Thus, in *Natural Resources Defense Council*, review of the withdrawn proposed rule was proper because the SEC held "extensive rulemaking proceedings narrowly focused on the particular rules at issue, and [had] explained in detail its reasons for not adopting those rules"¹⁴⁶ In sum, the D.C. Circuit has ultimately furnished an amorphous standard where review is proper if "the agency has in fact held a rulemaking proceeding and compiled a record narrowly focused on the particular rules suggested but not adopted."¹⁴⁷

Even if a withdrawal of a proposed rule is concrete and specific enough to surpass the D.C. Circuit's hurdles to review, the court of appeals will give an immense amount of deference to the agency's decision to withdraw.¹⁴⁸ Deference is given because "[t]he whole point of notice-and-comment rulemaking, after all, is that the comments which the agency receives may induce it to abandon or modify its initial views."¹⁴⁹ Because of the unique procedural posture of withdrawn discretionary proposed rules, the D.C. Circuit will "give more deference to an agency's decision to withdraw a proposed rule than we give to its decision to promulgate a new rule or to rescind an existing one."¹⁵⁰ However, an agency will not receive unlimited deference because the notice of a proposed rule "oblige[s] the agency to consider the comments it received and to articulate a reasoned explanation for its decision."¹⁵¹ Thus, the D.C. Circuit has articulated the following standard: an agency cannot "terminate . . . rulemaking for no reason whatsoever."¹⁵²

More recently, the Ninth Circuit appeared to be in lockstep with the D.C. Circuit on the reviewability of withdrawn discretionary proposed rules.¹⁵³ In *Animal Legal Defense Fund v. Veneman*,¹⁵⁴ several animal

144. *Id.*

145. *Id.* at 1046–47.

146. *Id.* at 1047.

147. *Id.*

148. *Williams Nat. Gas Co. v. Fed. Energy Regulatory Comm'n*, 872 F.2d 438, 443 (D.C. Cir. 1989).

149. *Id.* at 446.

150. *United Mine Workers v. U.S. Dep't of Labor*, 358 F.3d 40, 43 (D.C. Cir. 2004); *see also Williams Nat. Gas Co.*, 872 F.2d at 443–44.

151. *Williams Nat. Gas Co.*, 872 F.2d at 450.

152. *Id.* at 446.

153. *See Animal Legal Def. Fund v. Veneman (Veneman I)*, 469 F.3d 826 (9th Cir. 2006), *vacated en banc*, 490 F.3d 725 (9th Cir. 2007).

154. 469 F.3d 826 (9th Cir. 2006), *vacated en banc*, 490 F.3d 725 (9th Cir. 2007).

welfare organizations sued the U.S. Department of Agriculture (USDA) for its decision not to adopt a “Draft Policy” that would have provided guidance to zoos, research facilities, and other similar entities for “how to ensure the psychological well-being of nonhuman primates in order to comply with the Animal Welfare Act (AWA).”¹⁵⁵ The Draft Policy remained a draft for three years until the USDA’s Deputy Administrator for Animal Care announced that USDA was withdrawing the action.¹⁵⁶ The plaintiffs challenged the decision to withdraw the Draft Policy as arbitrary and capricious.¹⁵⁷

Initially, the Ninth Circuit relied on the D.C. Circuit case, *Natural Resources Defense Council*, to summarize the two-step process for reviewing the withdrawal of proposed discretionary rules. First, “[t]he agency must ‘have held a rulemaking proceeding.’”¹⁵⁸ Second, the agency “must have ‘compiled a record narrowly focused on the particular rules suggested but not adopted.’”¹⁵⁹ The Ninth Circuit determined that USDA’s actions satisfied the two-step process and remanded the case back to the district court to determine whether the decision to withdraw was arbitrary and capricious.¹⁶⁰ The Ninth Circuit’s decision, however, was eventually overturned and vacated en banc.¹⁶¹

B. The Reviewability of Withdrawn Discretionary Proposed Rules in Light of the U.S. Supreme Court’s Decision in Heckler v. Chaney

The D.C. Circuit’s decision in *Natural Resources Defense Council* predates the landmark U.S. Supreme Court decision in *Heckler v. Chaney*. *Heckler* determined certain discretionary actions by an agency are unreviewable.¹⁶² In *Heckler*, the respondents had been sentenced to death “by lethal injection of drugs under the laws of the States of Oklahoma and Texas.”¹⁶³ Respondents argued that the specific lethal injection drugs had not been approved for use on humans.¹⁶⁴ Despite this contention, the FDA refused to take “various investigatory and enforcement actions” to prevent

155. *Id.* at 829.

156. *Id.* at 831.

157. *Id.* at 829.

158. *Id.* at 843 (quoting *Nat. Res. Def. Council, Inc. v. SEC*, 606 F.2d 1031 (D.C. Cir. 1979)).

159. *Id.*

160. *Id.* at 844.

161. *Animal Legal Def. Fund v. Veneman (Veneman II)*, 490 F.3d 725 (9th Cir. 2007).

162. *Heckler v. Chaney*, 470 U.S. 821, 837–38 (1985).

163. *Id.* at 823.

164. *Id.*

the perceived violations of the FDA.¹⁶⁵ Therefore, the respondents filed suit seeking to compel the FDA to undertake adjudicatory procedures.¹⁶⁶ The Court acknowledged that section 701(a)(2) of the APA and case precedent dictated a presumption of reviewability.¹⁶⁷ However, that presumption did not apply to an agency's decision to pursue discretionary enforcement actions.¹⁶⁸

The Court stated that agencies, not the courts, are better equipped to sift through the numerous variables associated with whether an agency should pursue enforcement actions.¹⁶⁹ This agency decision, the Court held, "involves a complicated balancing of a number of factors which are peculiarly within its expertise."¹⁷⁰ Furthermore, the Court noted that when an agency chooses not to pursue enforcement actions, "it generally does not exercise its *coercive* power over an individual's liberty or property rights."¹⁷¹ However, when an agency chooses to act, "that action itself provides a focus for judicial review."¹⁷² Thus, the reviewing court is better able to assess whether "the agency exceeded its statutory powers."¹⁷³ The Court cautioned that discretionary enforcement action is only presumptively unreviewable.¹⁷⁴ Moreover, the Court also made it quite clear that it was not deciding the reviewability of discretionary rulemaking.¹⁷⁵

Former Judge Alex Kozinski, in a recent Ninth Circuit opinion,¹⁷⁶ dissented from the *Veneman I* majority's decision to review the USDA's withdrawn Draft Policy.¹⁷⁷ He argued vigorously in favor of the non-

165. *Id.*

166. *Id.*

167. *Id.* at 830–31.

168. *Id.* at 831.

169. *Id.* at 831–32 ("Thus, the agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all. An agency generally cannot act against each technical violation of the statute it is charged with enforcing.").

170. *Id.* at 831.

171. *Id.* at 832.

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.* at 825 n.2, 831–32.

176. *Veneman I*, 469 F.3d 826, 844 (9th Cir. 2006) (Kozinski, J., dissenting), *vacated en banc*, 490 F.3d 725 (9th Cir. 2007).

177. *Id.*

reviewable nature of withdrawn discretionary proposed rules because of *Heckler*.¹⁷⁸ He argued that *Heckler* rung in a new era of administrative law in which courts should refrain from reviewing certain discretionary agency actions.¹⁷⁹ Judge Kozinski believed his colleagues were stretching the bounds of reviewability under the APA: “[i]n holding that we can review withdrawal of proposed regulations an agency had no duty to adopt, my colleagues overlook the sea-change in administrative law wrought by *Heckler v. Chaney*, which held that we have no authority to review an agency’s discretionary decision *not* to act.”¹⁸⁰

For Judge Kozinski, *Heckler*’s holding sweeps broadly. Even though the holding in *Heckler* did not apply to agency rulemaking, Judge Kozinski argues that the same sentiments should apply to regulations regardless because they “implicate precisely the same concerns addressed in [*Heckler*].”¹⁸¹ He warned that the *Veneman I* majority and the D.C. Circuit’s approach discourages agencies from engaging in discretionary rulemaking “lest they be stuck with them if they cannot convince a federal court that the record supports abandonment.”¹⁸² This expansion, Judge Kozinski argues, completely disregards U.S. Supreme Court precedent and cannot stand.¹⁸³

I. *Massachusetts v. EPA Highlights That Heckler v. Chaney Does Not Apply to Every Discretionary Agency Action*

As discussed above, the APA generally does not allow a court to review discretionary agency action.¹⁸⁴ Furthermore, in *Heckler*, the U.S. Supreme Court made it clear that an agency’s decision *not* to bring enforcement action is presumptively unreviewable.¹⁸⁵ In its 2007 decision, *Massachusetts v. EPA*,¹⁸⁶ the Court addressed judicial review of agency inaction again.¹⁸⁷ This case, however, presented a different regulatory posture; the Court was tasked with reviewing the EPA’s denial of a

178. *Id.*

179. *Id.*

180. *Id.* (emphasis in original).

181. *Id.* at 849.

182. *Id.* at 850.

183. *Id.* at 853.

184. 5 U.S.C. § 701(a)(2) (2012).

185. *Heckler v. Chaney*, 470 U.S. 821, 837–38 (1985).

186. 549 U.S. 497 (2007).

187. *Id.* at 511.

petition for rulemaking.¹⁸⁸ In deciding the case, the Court answered two questions: (1) “whether EPA has the statutory authority to regulate greenhouse gas emissions,”¹⁸⁹ and (2) “whether its stated reasons for refusing to do so are consistent with the statute.”¹⁹⁰

In October 1999, nineteen private organizations filed a petition for rulemaking with the EPA.¹⁹¹ The organizations asked the EPA to regulate “greenhouse gas emissions from new motor vehicles under § 202 of the Clean Air Act.”¹⁹² Fifteen months after the request, the EPA opened public comment for all issues relating to the organizations’ petition.¹⁹³ Over the next five months, the EPA received over 50,000 comments relating to the petition.¹⁹⁴ In 2003, the EPA entered an order denying the petition for rulemaking.¹⁹⁵ In denying the petition for rulemaking, the EPA stated that the “Clean Air Act does not authorize [the] EPA to issue mandatory regulations to address global climate change” and “that even if the Agency had the authority . . . it would be unwise to do so at this time.”¹⁹⁶

After a lengthy discussion of standing, the Court noted that “an agency has broad discretion to choose how best to marshal its limited resources and personnel to carry out its delegated responsibilities.”¹⁹⁷ The Court referenced its decision in *Heckler* to affirm the notion that agency “discretion is at its height when [it] decides not to bring an enforcement action.”¹⁹⁸ The Court noted, however, that there are “key differences” between an agency denial of a petition for rulemaking and a denial of enforcement,¹⁹⁹ and thus refused to extend *Heckler*’s presumption of unreviewability.²⁰⁰ Even though the Court did not extend *Heckler*, it limited *Heckler*’s holding and noted that review of petition denials would

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.* at 510.

192. *Id.*

193. *Id.* at 511.

194. *Id.*; see Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. 52,922, 52,924 (denied petition for rulemaking Sept. 8, 2003).

195. *Massachusetts*, 549 U.S. at 511.

196. *Id.*

197. *Id.* at 527.

198. *Id.*

199. *Id.*; see also Cass R. Sunstein & Adrian Vermeule, *The Law of “Not Now”: When Agencies Defer Decisions*, 103 GEO. L.J. 157, 173 (2014).

200. *Massachusetts*, 549 U.S. at 527–28.

be “extremely limited” and “highly deferential.”²⁰¹ The Court found that judicial review of denials of petitions for rulemaking “are less frequent, more apt to involve legal as opposed to factual analysis, and subject to special formalities, including a public explanation.”²⁰²

The Court ultimately held that the EPA’s reasoning for denying the petition for rulemaking could not stand.²⁰³ The Court determined that the Clean Air Act did in fact contemplate the regulation of greenhouse gases.²⁰⁴ The EPA argued various reasons why regulation was not proper, but for the Court, those reasons missed the mark.²⁰⁵ For example, the EPA noted that the regulation “might impair the President’s ability to negotiate with ‘key developing nations’ to reduce emissions,” and that regulating greenhouse gas emissions would be “inefficient” and “piecemeal.”²⁰⁶

The Court found that EPA’s reasons did not support its decision to deny the petition for rulemaking.²⁰⁷ The EPA could not avoid statutory obligations “by noting the uncertainty surrounding various features of climate change and concluding that it would therefore be better not to regulate at this time.”²⁰⁸ The Court stated that if the “scientific uncertainty [was] so profound that it precludes [the] EPA from making a reasoned judgment . . . [the] EPA *must say so*.”²⁰⁹

C. *An Agency Must Satisfy the APA’s Arbitrary and Capricious Standard in Order to Successfully Withdraw a Proposed Rule*

If a withdrawn discretionary proposed rule satisfies the D.C. Circuit’s two-step reviewability standard, a court will review the agency’s reasoning under the APA’s arbitrary and capricious review standard.²¹⁰ To survive arbitrary and capricious review, the agency’s reasoning must be sufficiently definite because it provides the only window into the agency’s decision to withdraw the rule.²¹¹ The U.S. Supreme Court used

201. *Id.*

202. *Id.* at 527 (quoting *Am. Horse Prot. Ass’n v. Lyng*, 812 F.2d 1, 4 (D.C. Cir. 1987)).

203. *Id.* at 534.

204. *Id.* at 532.

205. *Id.* at 533.

206. *Id.*

207. *Id.* at 534.

208. *Id.*

209. *Id.* (emphasis added); *see* *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947).

210. 5 U.S.C. § 706(2)(A) (2012).

211. *See Chenery Corp.*, 332 U.S. at 196.

this standard to review the EPA's reasoning in *Massachusetts v. EPA*.²¹² The following sections describe the boundaries of the arbitrary and capricious review standard and what is required of an agency to adequately withdraw a proposed rule.

I. The Arbitrary and Capricious Standard and Judicial Review of Agency Action

The APA requires courts to set aside "agency action, findings, and conclusions" if they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with [the] law."²¹³ The landmark decision *Motor Vehicle Manufacturers Ass'n of U.S., Inc. v. State Farm Mutual Auto Insurance Co.*²¹⁴ established certain guidelines for the arbitrary and capricious standard. In *State Farm*, the Court reviewed the National Highway Traffic Safety Administration decision to rescind a Department of Transportation requirement "that new motor vehicles produced after September 1982 be equipped with passive restraints to protect the safety of the [passengers]."²¹⁵ The Court reviewed the agency's decision under the APA's arbitrary and capricious standard.²¹⁶

Arbitrary and capricious review is a relatively narrow and limited judicial tool because reviewing courts cannot substitute their own judgment for an agency's decision.²¹⁷ Consequently, courts are constrained to reviewing only the agency record or the agency's reasoning.²¹⁸ This limited review prevents agencies from constructing post-hoc rationalizations to explain its decisions.²¹⁹ Moreover, in providing an adequate reason, an "agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'"²²⁰ The agency must rely on "relevant factors"²²¹ and the court will consider if the agency

212. *Massachusetts*, 549 U.S. at 534.

213. 5 U.S.C. § 706(2)(A).

214. 463 U.S. 29 (1983).

215. *Id.* at 34.

216. *Id.*

217. *Id.* at 43; *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 419–20 (1971).

218. *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947).

219. *Id.*

220. *State Farm*, 463 U.S. at 43 (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)).

221. *Id.*

has made a “clear error in judgement.”²²² Typically an agency decision will be arbitrary and capricious if it:

[R]elied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation . . . that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.²²³

Arbitrary and capricious review is often referred to as a “hard look”²²⁴ that relies on “statutory, factual, scientific, or otherwise technocratic terms.”²²⁵ The back and forth of politics “cannot properly help to explain administrative action for purposes of arbitrary and capricious review.”²²⁶ Even if politics play a role in the background of an agency’s motivation for action and reasoning, arbitrary and capricious review commands an agency to explain its reasoning in technocratic and factual terms.²²⁷

2. *The Application of Arbitrary and Capricious Review to Withdrawn Discretionary Proposed Rules*

The D.C. Circuit has repeatedly stated that it will review withdrawn discretionary proposed rules through an extremely deferential lens, even more so than it would for other agency actions, such as the “promulgation of . . . new rule[s].”²²⁸ The D.C. Circuit applies such a deferential standard because withdrawn discretionary proposed rules do not alter the “regulatory status quo.”²²⁹ In contrast, when an agency promulgates a new rule, however, it should receive a more exacting review.²³⁰ Thus, an agency must give “a more persuasive justification” for promulgating new rules “than [it] does [for] the decision to retain an existing rule.”²³¹

The D.C. Circuit has made it clear that it is not advocating for a different standard of arbitrary and capricious review in regards to

222. *Id.*

223. *Id.*

224. Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 *YALE L.J.* 2, 5 (2009).

225. *Id.* at 2.

226. *Id.*

227. *Id.*

228. *Williams Nat. Gas Co. v. Fed. Energy Regulatory Comm’n*, 872 F.2d 438, 443 (D.C. Cir. 1989).

229. *Id.*

230. *Id.*

231. *Id.*

withdrawals of discretionary proposed rules.²³² The court “simply note[s] that [its] application of the ‘arbitrary and capricious’ standard must be informed by our recognition that an agency’s decision to retain the status quo may be more easily defensible than a shift in policy would be.”²³³ In sum, the D.C. Circuit relies on the APA’s arbitrary and capricious standard to guide review of an agency’s reasons for a withdrawal, but it will also give an extra deferential nod to the agency’s decision.²³⁴

In 2004, the D.C. Circuit directly addressed its current view of the arbitrary and capricious review standard for withdrawn discretionary proposed rules.²³⁵ In *United Mine Workers v. U.S. Department of Labor*,²³⁶ the D.C. Circuit held that the Mine Safety and Health Administration’s (MSHA) decision to withdraw a proposed rule was arbitrary and capricious.²³⁷ The 1989 proposed rule would have established certain permissible exposure limits “for more than 600 chemical substances that might be present in a mine.”²³⁸ After the notice-and-comment period, which included several public hearings, MSHA withdrew the proposed rule.²³⁹ In withdrawing the rule, MSHA reasoned that “changes in agency priorities” along with “the possible adverse effect . . . of the decision in *AFL-CIO v. OSHA*, in which the Eleventh Circuit had invalidated an [Occupational Safety and Health Administration] rule that set new [permissible exposure limits] for 428 toxic substances” ultimately made the proposed rule useless.²⁴⁰ MSHA also indicated that it had been “more than 13 years since the proposal was published and more than 12 years since the comments were received.”²⁴¹

The agency gave three potential reasons for the D.C. Circuit to review, none of which passed arbitrary and capricious review.²⁴² The D.C. Circuit held that merely stating a “change in agency priorities” does not and cannot guide a reviewing court because it is “merely a reiteration of the

232. *Id.* at 444.

233. *Id.*

234. *Id.* at 443.

235. *United Mine Workers v. U.S. Dep’t of Labor*, 358 F.3d 40, 43 (D.C. Cir. 2004).

236. 358 F.3d 40 (D.C. Cir. 2004).

237. *Id.*

238. *Id.* at 41.

239. *Id.* at 42.

240. *Id.*; *Am. Fed’n of Labor & Cong. of Indus. Orgs. v. OSHA*, 965 F.2d 962, 986–87 (11th Cir. 1992).

241. *United Mine Workers*, 358 F.3d at 42 (quoting Air Quality Chemical Substances and Respiratory Standards, 67 Fed. Reg. 60,611, 60,611 (Sept. 26, 2002)).

242. *Id.* at 44.

decision to withdraw the proposed rule.”²⁴³ The amount of time that passed between proposing the rule and the withdrawal is a reason to hesitate before promulgating, but “not for abandoning altogether.”²⁴⁴ Lastly, MSHA gave no explanation for why *AFL-CIO v. OSHA*²⁴⁵ was “fatal” to the proposed rule.²⁴⁶ Thus, the D.C. Circuit sent it back to the agency to “either proceed with the . . . rulemaking or give a reasoned account of its decision not to do so.”²⁴⁷

IV. WITHDRAWN DISCRETIONARY PROPOSED RULES SHOULD BE REVIEWABLE UNDER THE APA’S ARBITRARY AND CAPRICIOUS STANDARD

In sum, even though the 2014 proposed CMS rule may not have added sweeping protections for LGBT older adults in long-term care facilities, the subsequent withdrawal of the proposed rule by the Trump Administration highlights an uncertain and evolving area of administrative law. The proposed CMS rule falls into the third category of withdrawn discretionary proposed rules—representing both agency action and inaction. The proposed CMS rule also highlights how, even after considerable resources are expended for a rule proposal, agencies can summarily withdraw the proposed rule with little explanation. Furthermore, whether judicial review of an agency’s reasoning for a withdrawal is proper remains on uncertain ground.

The uncertainty surrounding judicial review of withdrawn proposed agency rules stems from the U.S. Supreme Court’s silence. The D.C. Circuit, however, has held that withdrawn proposed rules are reviewable if certain requirements are met.²⁴⁸ Beyond the D.C. Circuit, some judges argue that reviewing withdrawn discretionary proposed rules contravenes *Heckler v. Chaney*,²⁴⁹ in which the U.S. Supreme Court held that courts cannot review an agency’s discretionary non-enforcement decision.²⁵⁰

If, however, a withdrawn discretionary proposed rule fulfills the D.C. Circuit’s reviewability requirements, the court of appeals utilizes the

243. *Id.*

244. *Id.*

245. 965 F.2d 962 (11th Cir. 1992).

246. *United Mine Workers*, 358 F.3d at 44.

247. *Id.* at 45.

248. *Id.* at 43–44; *Nat. Res. Def. Council, Inc. v. SEC*, 606 F.2d 1031, 1047 (D.C. Cir. 1979).

249. *Veneman I*, 469 F.3d 826, 844 (9th Cir. 2006) (Kozinski, J., dissenting), *vacated en banc*, 490 F.3d 725 (9th Cir. 2007).

250. 470 U.S. 821, 837–38 (1985).

APA's arbitrary and capricious standard, unless the organic act specifies otherwise.²⁵¹ In doing so, the D.C. Circuit has repeatedly stated that withdrawn discretionary proposed rules receive enhanced deference, but not an expanded arbitrary and capricious review.²⁵² Thus, the D.C. Circuit will give more deference to an agency's decision to withdraw a proposed rule than it would give to an agency's decision to promulgate a rule.²⁵³

A. *The Arbitrary and Capricious Standard Is the Appropriate Judicial Review Mechanism to Review Withdrawn Discretionary Proposed Rules*

A withdrawn discretionary proposed rule properly before a court contains all the necessary pieces for arbitrary and capricious review. The D.C. Circuit's threshold question for reviewability simply asks whether the APA's process of informal rulemaking has been implemented and to what extent.²⁵⁴ A withdrawn proposed rule may signal final agency action, and through notice-and-comment rulemaking, an agency has likely created an extensive enough record for a reviewing court to adequately assess an agency's reasoning.²⁵⁵ Thus, the holding in *Heckler v. Chaney* should not extend to withdrawn discretionary proposed rules because, unlike an agency's decision *not* to enforce, a withdrawn proposed rule contains an adequate record to assess the agency's reasoning.

Judge Kozinski, however, argues the opposite—*Heckler* forecloses judicial review of withdrawn discretionary proposed rules.²⁵⁶ Furthermore, Judge Kozinski argues that the D.C. Circuit's precedent will have a chilling effect on informal rulemaking.²⁵⁷ Under his view, agencies hesitate before launching into the informal rulemaking process as to avoid ending up with a discretionary rule that they no longer need or want.²⁵⁸

251. 5 U.S.C. § 706(1)(A) (2012); *see* *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 43 (1983).

252. *Williams Nat. Gas Co. v. Fed. Energy Regulatory Comm'n*, 872 F.2d 438, 443–44 (D.C. Cir. 1989).

253. *Id.*

254. *Nat. Res. Def. Council, Inc. v. SEC*, 606 F.2d 1031, 1046 (D.C. Cir. 1979) (noting that review of withdrawn discretionary proposed rules is proper when “the agency has in fact held extensive rulemaking proceedings narrowly focused on the particular rules at issue, and has explained in detail its reasons for not adopting those rules”).

255. *Williams Nat. Gas Co.*, 872 F.2d at 443.

256. *Veneman I*, 469 F.3d 826, 844 (9th Cir. 2006) (Kozinski, J., dissenting), *vacated en banc*, 490 F.3d 725 (9th Cir. 2007).

257. *Id.*

258. *Id.*

While Judge Kozinski correctly highlights that informal rulemaking involves varying levels of discretion and expertise, the informal rulemaking process and the abandonment thereof provides sufficient bounds and specificity for judicial review. Informal notice-and-comment rulemaking contains several procedural boundaries to ensure the creation of an adequate record.²⁵⁹ Discretion in agency enforcement, such as when or how to enforce, does not contain similar bounds,²⁶⁰ thus making review more difficult and inaccurate.

The Court's holding in *Massachusetts v. EPA* further supports the reviewability of withdrawn discretionary proposed rules, even though the case was grounded in a different type of agency action. Withdrawn discretionary proposed rules have more procedural backing within the APA than what is required for a denial of a petition for rulemaking.²⁶¹ Notice-and-comment rulemaking ensures a specific process from which agencies are not allowed to deviate.²⁶² For example, an agency must publish a "statement of their basis and purpose" for every proposed rule, thus when an agency decides to formally withdraw such a rule, the agency must provide a reason that satisfies the arbitrary and capricious standard.²⁶³ Withdrawing proposed rules involves significant agency discretion, but it also involves a highly standardized process that includes the creation of a detailed record. Judicial review of these withdrawals ensures that agencies are not abusing the significant discretion allotted to them by Congress.

B. Arbitrary and Capricious Review Ensures Reasoned and Measured Agency Decision-Making

Arbitrary and capricious review requires an agency to provide adequate reasoning for agency action. The standard requires a logical connection between the rationale and the action itself.²⁶⁴ This highly deferential standard is a relatively low bar, as the standard recognizes that agency discretion is often rooted in agency expertise and it is not appropriate for courts to usurp an agency's reasoned decision.²⁶⁵ Thus, arbitrary and capricious review ensures a minimum standard of reasoned

259. See 5 U.S.C. § 553(b)-(c) (2012).

260. See *Heckler v. Chaney*, 470 U.S. 821, 830-31 (1985).

261. Compare 5 U.S.C. § 553(b)-(c), with 5 U.S.C. § 553(e).

262. See 5 U.S.C. § 553(b)(1)-(3); Beerman & Lawson, *supra* note 40, at 856.

263. 5 U.S.C. § 553(c).

264. See *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 43 (1983).

265. See *id.*

decision-making in two ways. First, arbitrary and capricious review forces agencies to provide adequate reasons to support their decisions.²⁶⁶ Second, arbitrary and capricious review ensures that reviewing courts have an adequate record to review an agency's reason and that the record logically connects to the agency's decision.²⁶⁷ U.S. Supreme Court precedent has firmly established that a reviewing court can assess only what was provided in the record.²⁶⁸ This precedent securely tethers arbitrary and capricious review as a manageable standard.²⁶⁹

Judge Kozinski's concerns with unfettered judicial review of agency discretion are cured through the D.C. Circuit's already highly deferential standard given to agencies when withdrawing a proposed rule. The D.C. Circuit has repeatedly stated that it will give more deference in reviewing withdrawn discretionary proposed rules than it would accord to a final promulgation of a rule, while not expanding the arbitrary and capricious review standard.²⁷⁰

For example, the withdrawn proposed CMS rule would likely survive arbitrary and capricious review if challenged. CMS stated that there was no longer a need for the proposed rule due to the holding in *Obergefell*.²⁷¹ Like the court in *United Mine Workers of America*, a reviewing court would assess whether CMS adequately explained why *Obergefell* moots the need for the proposed rule.²⁷² In the published withdrawal, CMS noted that *Obergefell* "requires a state to license a marriage between two people of the same sex, and to recognize same-sex marriages lawfully performed

266. *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1947) (requiring agencies to provide a reason for their actions so that courts are adequately prepared to review such decisions and finding that a court cannot supplement its own judgment for what the agency did).

267. *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 419–20 (1971) (remanding because the lower court did not adequately review the full administrative record).

268. *Chenery Corp.*, 318 U.S. at 94.

269. *Id.*

270. *See, e.g., United Mine Workers v. U.S. Dep't of Labor*, 358 F.3d 40, 43 (D.C. Cir. 2004) ("In applying this standard, we give more deference to an agency's decision to withdraw a proposed rule than we give to its decision to promulgate a new rule or to rescind an existing one."); *Williams Nat. Gas Co. v. Fed. Energy Regulatory Comm'n*, 872 F.2d 438, 443 (D.C. Cir. 1989) ("At the same time, however, we believe that the agency's termination of a rulemaking should be reviewed somewhat more deferentially than would its promulgation of a new rule."); *Nat. Res. Def. Council, Inc. v. SEC*, 606 F.2d 1031, 1052 (D.C. Cir. 1979) ("Thus, the considerations that counsel against judicial review of a decision not to adopt rules by informal rulemaking also call for us, when we do review, to exercise special deference.").

271. *Medicare and Medicaid Programs; Revisions to Certain Patient's Rights Conditions for Participation and Conditions for Coverage; Withdrawal*, 82 Fed. Reg. 46,181, 46,181 (withdrawn Oct. 4, 2017).

272. *United Mine Workers*, 358 F.3d at 44.

in other States.”²⁷³ It is true that *Obergefell* requires states to recognize all lawfully performed same-sex marriages, thus the withdrawal likely survives the already deferential arbitrary and capricious review standard. The D.C. Circuit has repeatedly stated that it will use arbitrary and capricious review, but it has also established the agency cannot “terminate . . . rulemaking for no reason whatsoever.”²⁷⁴

Judicial review of withdrawn discretionary proposed rules simply ensures that agencies are not abandoning the rulemaking process for completely arbitrary reasons. Thus, arbitrary and capricious review serves as a perfectly adequate tool to compel reasoned decision-making in withdrawing a proposed rule. Furthermore, the bulk of withdrawn discretionary proposed rules are likely to come at times when political interests may serve as the true motivating force for action.²⁷⁵ Therefore, this standard guarantees that agencies are not abusing their discretionary power and withdrawing proposed rules for arbitrary reasons.

CONCLUSION

The 2017 withdrawal of an Obama Administration proposed rule highlights an unsettled area of administrative law. The proposed CMS rule attempted to provide legal protection for same-sex spouses in the wake of the *Windsor* decision. However, even though the CMS rule garnered ninety-four comments over the course of three years, the agency ultimately decided to withdraw it. In its withdrawal reasoning, CMS stated that the *Obergefell* decision provided what the rule sought to achieve, therefore the rule was unnecessary.

This Comment argues that withdrawn discretionary proposed rules should be subject to judicial review. In reviewing withdrawn discretionary proposed rules, the D.C. Circuit examines an agency’s reasoning under the APA’s arbitrary and capricious standard. In doing so, the D.C. Circuit has repeatedly stated that it will give enhanced deference to withdrawn rules than if the agency promulgated a new rule or rescinded an old rule. Outside the D.C. Circuit, the reviewability of withdrawn discretionary proposed rules is less certain. Former Ninth Circuit Judge Kozinski argues that withdrawn discretionary proposed rules should not be reviewable because of the U.S. Supreme Court’s holding in *Heckler*. However, informal rulemaking initiates a different mechanism under the APA, which provides adequate structures and procedures for the creation of an

273. Medicare and Medicaid Programs; Revisions to Certain Patient’s Rights Conditions for Participation and Conditions for Coverage; Withdrawal, 82 Fed. Reg. at 46,181.

274. *Williams Nat. Gas Co.*, 872 F.2d at 450.

275. See *Watts*, *supra* note 224, at 70–71.

administrative record. Withdrawn discretionary proposed rules should be reviewable under the APA because the arbitrary and capricious standard ensures reasoned agency decision-making and prevents abuse of power.