FEDERAL STATUTES AND REGULATIONS — ADMINISTRATIVE PROCEDURE ACT — D.C. CIRCUIT HOLDS RULES ARE FINAL WHEN MADE AVAILABLE FOR PUBLIC INSPECTION. — *Humane Society of the United States v. USDA*, 41 F.4th 564, *reh'g denied*, 54 F.4th 733 (D.C. Cir. 2022).

The Administrative Procedure Act[1] (APA) provides that agencies must undergo notice-and-comment rulemaking to repeal, delay, or otherwise modify a finalized rule,[2] but it does not specify when a rule becomes "final."[3] Incoming Presidents have taken advantage of this ambiguity to respond to leftover rulemakings from the prior presidency without notice and comment,[4] both by ordering the withdrawal of completed rules that have yet to be published in the *Federal Register* and by delaying the effective date of published rules that have yet to go into effect.[5] Recently, in *Humane Society of the United States v. USDA*,[6] the D.C. Circuit foreclosed the first response, holding that a rule becomes final — and an agency must thus undergo notice and comment to repeal it — when the Office of the Federal Register (OFR) makes the rule available for public inspection prior to publication.[7] Commentators have argued that the D.C. Circuit's decision will have "broad implications" for presidential authority over the rulemaking process, making it more difficult for new administrations to reverse the last-minute decisions of their predecessors.[8] But for an incoming President, *Humane Society*'s bark may be worse than its bite since new administrations remain empowered to *suspend* the implementation of newly finalized rules. Because such suspensions will likely increase as a result of the

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[1] 5 U.S.C. §§ 551, 553–559, 701–706.

[2] Am. Hosp. Ass'n v. Bowen, 834 F.2d 1037, 1044 (D.C. Cir. 1987).

[3] This comment uses "repeal" to refer to the action of revoking a finalized rule and "withdraw" to refer to the action of revoking an unfinalized rule.

[4] For more information on the phenomenon of "midnight rulemaking," or the increased regulatory activity that tends to occur in the final months of a presidential administration, see Jack M. Beermann, *Midnight Rules: A Reform Agenda*, 2 MICH. J. ENV'T & ADMIN. L. 285, 287 (2013).

[5] *See* Anne Joseph O'Connell, *Agency Rulemaking and Political Transitions*, 105 NW. U. L. REV. 471, 473 (2011); *see also* William M. Jack, Comment, *Taking Care that Presidential Oversight of the Regulatory Process Is Faithfully Executed: A Review of Rule Withdrawals and Rule Suspensions Under the Bush Administration's Card Memorandum*, 54 ADMIN. L. REV. 1479, 1482 (2002) (describing repeated instances where "an incoming Administration ordered the withdrawal of pending regulations or the delay of effective dates of published regulations").

[6] 41 F.4th 564 (D.C. Cir. 2022).

[7] *Id.* at 565.

[8] *E.g.*, MARK FEBRIZIO, GEO. WASH. UNIV. REGUL. STUD. CTR., COURT DECISION EXTENDS THE PERIOD FOR ISSUING MIDNIGHT RULES 1 (2022), https://regulatorystudies.columbian.gwu.edu/sites/g/files/zaxdzs4751/files/2022-08/gwrsc_commentary_febrizio_midnight_rules_public_inspection_2022_08_10.pdf [https://perma.cc/EX4S-G8LZ]; *see also* Jonathan H. Adler, *D.C. Circuit Makes It More Difficult for New Administrations to Stop "Midnight" Rules*, REASON: VOLOKH CONSPIRACY (July 22, 2022, 10:37 AM), https://reason.com/volokh/2022/07/22/d-c-circuit-makes-it-more-difficult-for-new-administrations-to-stop-midnight-rules [https://perma.cc/N4YK-KC7U].

opinion, the D.C. Circuit's holding risks prolonging uncertainty during political transitions for regulators and regulated entities alike.

Humane Society arose from efforts to stop the abuse of competitive show horses in the United States. To improve these horses' gaits, some trainers employ an abusive practice known as "soring,"[9] which Congress outlawed in the Horse Protection Act of 1970[10] (HPA). In 2016, the U.S. Department of Agriculture, which was charged with administering the HPA, proposed a rule providing that it would accredit and train inspectors to check for soring at horse shows.[11] After five months of notice and comment, the USDA posted a finished, signed rule on its website[12] and deposited it with the OFR, which subsequently made it available for public inspection on January 19, 2017.[13] The following day, President Trump took office, and his Chief of Staff Reince Priebus immediately issued a memorandum ordering the withdrawal of all rules "sent to the OFR but not published in the Federal Register."[14] The USDA subsequently withdrew the horse-soring rule without notice and comment.[15]

The Humane Society of the United States challenged the USDA's actions in the U.S. District Court for the District of Columbia, contending that the soring rule had been finalized, and thus notice and comment was required to repeal it.[16] The USDA moved to dismiss, arguing that the soring rule was not final for APA purposes because it had not been published in the *Federal Register*.[17] The district court agreed with the USDA and dismissed the suit.[18] Observing that the APA "provide[s] little explicit guidance on the finality of agency rules," the district court looked to context and case law to conclude that rules become final at publication in the *Federal Register*.[19] Regarding context, one of the APA's basic tenets is that "regulations do not take effect until they are

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[9] Soring is the practice of improving a horse's gait by deliberately inflicting pain using a variety of methods, including by applying caustic chemicals to a horse's front legs. *See generally* Leslie Wylie, *Soring: A Short History of an Incredibly Stupid Practice*, HORSE NATION (Apr. 15, 2012), https://www.horsenation.com/2012/04/15/soring-a-short-ish-history-of-an-incredibly-stupid-practice [https://perma.cc/KF44-5KTZ].

[10] 15 U.S.C. §§ 1821–1831.

[11] *See* Licensing of Designated Qualified Persons and Other Amendments, 81 Fed. Reg. 49,112, 49,112 (proposed July 26, 2016) (to be codified at 9 C.F.R. pt. 11). The USDA for years let horse-show organizers hire their own inspectors to check for soring, but proposed this new rule in light of the obvious conflict of interest between horse-show organizers and the inspectors they hired. *See Humane Soc'y*, 41 F.4th at 566.

[12] *Humane Soc'y*, 41 F.4th at 566, 567. The D.C. Circuit did not rule on the legal effect, if any, of posting the rule on the USDA's website. *Id.* at 575.

[13] *Id.* at 567.

[14] Memorandum for the Heads of Executive Departments and Agencies; Regulatory Freeze Pending Review, 82 Fed. Reg. 8346, 8346 (Jan. 20, 2017).

[15] *Humane Soc'y*, 41 F.4th at 567.

[16] Complaint for Declaratory and Injunctive Relief ¶¶ 106–09, Humane Soc'y of the U.S. v. USDA, 474 F. Supp. 3d 320 (D.D.C. 2020) (No. 19-cv-02458).

[17] *Humane Soc'y*, 474 F. Supp. 3d at 326.

[18] *Id.* at 335.

[19] *Id.* at 330.

published in the Federal Register,"[20] and although the APA allows unpublished rules to be enforced against parties with actual notice of them, it still requires such rules to be published.[21] Regarding case law, the D.C. Circuit in *Kennecott Utah Copper Corp. v. U.S. Department of the Interior*[22] had concluded that a rule submitted to the OFR for "confidential processing" prior to being made available for public inspection had "never bec[o]me a binding rule requiring repeal or modification."[23] In sum, nothing "support[ed] a rule that prevents agencies from withdrawing rules prior to their publication in the Federal Register."[24]

The D.C. Circuit reversed and remanded.[25] Writing for the panel, Judge Tatel[26] concluded that rules are final when they are filed for public inspection by the OFR and that the USDA's unilateral repeal of the soring rule thus violated the APA.[27] Beginning with statutory context, the court observed that the Federal Register Act[28] (FRA), which governs the publication of all documents (including rules) in the *Federal Register*, "contemplates that a rule may be prescribed *before* publication"[29] and provides that documents sent to the OFR become "valid" against the public when they are filed for public inspection.[30] The FRA also allows for "prepublication enforcement against parties with actual notice," which suggests that publication is not required for rules to gain legal effect.[31] The APA contains similar provisions, such as a "good cause" exemption from its requirement that substantive rules be published thirty days prior to their effective date,[32] implying that agencies can and do "prescribe rules with effective dates before publication."[33]

The court then moved to case law, distinguishing *Kennecott* on the grounds that the draft rule at issue there was withdrawn at confidential processing,[34] had not yet been made available for public inspection, and

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[20] *Id.* (citing Nat. Res. Def. Council v. Nat'l Highway Traffic Safety Admin., 894 F.3d 95, 106 (2d Cir. 2018)).

[21] *Id.* at 330–31 (citing 5 U.S.C. § 552(a)(1)).

[22] 88 F.3d 1191 (D.C. Cir. 1996).

[23] *Humane Soc'y*, 474 F. Supp. 3d at 331 (quoting *Kennecott*, 88 F.3d at 1208).

[24] *Id.* at 335.

[25] *Humane Soc'y*, 41 F.4th at 575.

[26] Judge Tatel was joined by Judge Millett.

[27] *Humane Soc'y*, 41 F.4th at 575.

[28] 44 U.S.C. §§ 1501–1511.

[29] *Humane Soc'y*, 41 F.4th at 569.

[30] *Id.* at 570 (citing 44 U.S.C. §§ 1503, 1507). Rebutting the dissent's point that the FRA was enacted prior to the APA, the court pointed out that the FRA was codified "without substantial change in 1968," two years after the APA itself was codified. *Id.* at 572.

[31] *Id.* at 570.

[32] *Id.* at 572 (citing 5 U.S.C. § 553(d)).

[33] *Id.* at 573.

[34] After an agency files a rule with the OFR, the OFR's internal regulations require the agency to hold the rule for "confidential processing" and then make it available for public inspection before publication. *Id.* at 569 (quoting 1 C.F.R. § 17.1 (2022)).

was thus never "valid" against the public under the FRA.[35] The court also distinguished two out-of-circuit cases involving immigration rules because they did not involve procedural challenges.[36] Finally, the court observed that the only out-of-circuit opinion to tackle the question at issue directly, *Arlington Oil Mills, Inc. v. Knebel*,[37] had held that "lack of formal publication does not preclude the effectiveness of an otherwise valid agency action."[38] These precedents made the court "[c]onfident" that the APA requires agencies to undergo notice and comment before repealing a rule made available by the OFR for public inspection.[39]

Judge Rao dissented.[40] She first took issue with the majority's characterization of *Kennecott*, arguing that it "drew a sharp line between documents sent to OFR on the one hand" and "'binding' regulations published in the Federal Register on the other."[41] Judge Rao then moved to the APA's text, observing that the statute requires substantive rules to be published and generally provides (subject to several exceptions) that "[s]uch rules cannot have legal effect . . . until publication."[42] For Judge Rao, these provisions suggested that "an agency's rulemaking discretion continues up until the point of publication," a conclusion bolstered by case law discussing publication as a "final agency action" for the purposes of judicial review.[43] She also criticized the majority for relying so heavily on the FRA, which she argued was "limited by the APA's more specific provision[s]" involving substantive rules.[44] Ultimately, Judge Rao cautioned that the majority was impermissibly

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[35] *Id.* at 573. *Kennecott* contains language describing the rule at issue as "never . . . subject to amendment or repeal" because it "had not yet been published." Kennecott Utah Copper Corp. v. U.S. Dep't of the Interior, 88 F.3d 1191, 1209 (D.C. Cir. 1996). But the court waved this passage away as a "single descriptive sentence" of dictum. *Humane Soc'y*, 41 F.4th at 574.

[36] *Humane Soc'y*, 41 F.4th at 574 (citing Zhang v. Slattery, 55 F.3d 732, 749 (2d Cir. 1995); Chen v. INS, 95 F.3d 801, 805 (9th Cir. 1996)). In *Zhang v. Slattery*, 55 F.3d 732, the petitioner challenged his deportation order in a habeas action by invoking a rule that had not been published in the *Federal Register*, and the court rejected his claim on the grounds that the rule's effective date "was never filled in." *Id.* at 749. In *Chen v. INS*, 95 F.3d 801, the petitioner challenged his deportation order, also in a habeas action, based on a proposed rule that had never been published, and the court denied his claim because the rule was to become "effective only on the date of publication." *Id.* at 805. Neither action took the form of an APA challenge.

[37] 543 F.2d 1092 (5th Cir. 1976).

[38] *Humane Soc'y*, 41 F.4th at 574 (quoting *Arlington Oil Mills*, 543 F.2d at 1099).

[39] *Id.* at 575.

[40] *Id.* at 575 (Rao, J., dissenting).

[41] *Id.* at 577 (quoting Kennecott Utah Copper Corp. v. U.S. Dep't of the Interior, 88 F.3d 1191, 1208 (D.C. Cir. 1996)).

[42] *Id.* at 578 (citing 5 U.S.C. §§ 552(a)(1), 553(d)).

[43] *Id.* at 578; *see also id.* at 579 (citing, inter alia, FTC v. Standard Oil Co. of Cal., 449 U.S. 232, 239 (1980) (noting that "publication" of regulations constituted "final agency action subject to judicial review"); Nat. Res. Def. Council v. Wheeler, 955 F.3d. 68, 78 (D.C. Cir. 2020) (observing that publication marked the "culmination" of the rulemaking process)).

[44] *Id.* at 581. In particular, Judge Rao took issue with the majority's point that the FRA allows for prepublication enforcement of substantive rules against parties with actual notice, since the cases the majority cited to support this proposition involved "military notices" or other rules promulgated via various exceptions in the APA, as opposed to typical substantive rules. *Id.* at 581–82.

"impos[ing] additional procedural requirements on agencies,"[45] which she warned would lead to "numerous disruptions for both agencies and courts."[46]

The D.C. Circuit's decision was described as highly consequential for executive authority during political transitions. Mark Febrizio, for instance, argued that the opinion gave "a newly inaugurated president . . . less control over rules published during their administration" and expressed concern that it would "invite[] more poorly justified rules" by the outgoing administration.[47] Professor Jonathan Adler similarly observed that the case "implicate[d] broader questions about the ability of the [incoming] President to set policy priorities for the federal government."[48] But incoming administrations remain able to suspend finalized rules that have yet to go into effect, blunting *Humane Society*'s impact on presidential control. Such suspensions will likely increase as a result of the *Humane Society* rule, which risks prolonging uncertainty during political transitions for both regulators and the parties they regulate.

When Presidents leave office, they do not go quietly. Instead, in the last three months of an outgoing administration, "[t]here is a documented increase in the volume of regulatory activity,"[49] a phenomenon known as "midnight rulemaking," which has persisted for at least four decades.[50] Not all finalized rules go into effect by inauguration on January 20, however, meaning that new administrations take office with a not-insignificant number of inoperative midnight rules left over from the outgoing presidency.[51] Before *Humane Society*, new administrations typically responded to such rules in two ways: by withdrawing unpublished rules deposited at the OFR without notice and comment, and

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[45] *Id.* at 583 (citing Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519, 544 (1978)).

[46] *Id.* at 584; *see also id.* at 584–85 (discussing the lack of a clear remedy in midnight-rule cases such as the one at issue, as well as the unclear implications of the majority's rule on the APA's tolling provisions).

[47] FEBRIZIO, *supra* note 8, at 2.

[48] Adler, *supra* note 8.

[49] Beermann, *supra* note 4, at 286. Professor Jack Beermann explains that agencies finalize rules at a greater rate during the lame-duck period for an array of reasons, including a desire to "enact as many of their policies into law as possible before an incoming administration . . . takes office," *id.* at 300–01, and an effort to make up for "delays" when "other priorities ma[d]e particular rulemaking proceedings seem less urgent until the deadline of . . . transition approaches," *id.* at 305.

[50] *See* O'Connell, *supra* note 5, at 504 (observing that "cabinet departments finished more [significant rulemakings] in the last quarter of President Clinton's Administration . . . than in any other quarter in the data for that presidency," a pattern repeated by the George W. Bush Administration); *see also* Cristina M. Rodríguez, *The Supreme Court, 2020 Term — Foreword: Regime Change*, 135 HARV. L. REV. 1, 49 (2021). *But see* Anne Joseph O'Connell, *Political Cycles of Rulemaking: An Empirical Portrait of the Modern Administrative State*, 94 VA. L. REV. 889, 953 (2008) (observing that, except for during the George H.W. Bush Administration, midnight rulemaking has been significantly less pronounced with respect to independent agencies).

[51] *See, e.g.*, Jack, *supra* note 5, at 1485–86 (describing how the incoming George W. Bush Administration successfully withdrew 124 regulations, including forty final rules, from the OFR's publication queue).

by suspending the effective dates of published rules that had yet to go into effect, also without notice and comment, by way of the APA's various exceptions.[52] When the Trump Administration took office in early 2017, it continued this trend.[53]

After *Humane Society*, future presidential administrations will likely treat unpublished rules sent to the OFR and made available for inspection the same way they have approached published rules with future effect — by suspending the implementation of all of them without public input. Incoming administrations have compelling reasons to continue suspending midnight rules: if a new administration dislikes a given rule, suspension can buy an agency time to gather data "affecting [the rule's] factual underpinnings" or information about "changed economic or social circumstances," both of which could eventually support repeal.[54] Moreover, even if a new administration finds "no problems with the vast majority" of midnight rules,[55] it might value suspensions as a means of weighing the costs and benefits of "chang[ing] the prior administration's rules" or "focus[ing] on moving forward with the new agenda."[56] Thus, contrary to commentators' fears,[57] there is no reason to expect that *Humane Society* will wrest incoming Presidents of authority to deal with leftover midnight rules. Rather, suspensions will likely increase in number in the wake of *Humane Society*, encompassing the unpublished rules on file with the OFR that were affected by the D.C. Circuit's ruling.

While suspensions ensure a degree of presidential control over midnight rules, an increase in their use risks creating uncertainty for both agencies and the entities they regulate. Prior to *Humane Society*, agencies considered withdrawal of rules sent to the OFR — when such withdrawals were allowed — to be practically more efficient and legally less risky than suspensions.[58] Practically, withdrawals were an easy way for a new administration to immediately block the actions of the prior administration without notice and comment and get to work fashioning a new regulatory agenda.[59] In other words, by withdrawing midnight rules, incoming administrations were able to make them disappear at

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[52] *See* Beermann, *supra* note 4, at 289 (identifying these as "common strategies" deployed by incoming administrations in response to midnight rulemaking).

[53] *See* James Yates, Essay, *"Good Cause" Is Cause for Concern*, 86 GEO. WASH. L. REV. 1438, 1449 (2018); Tim Devaney, *Trump Administration Withdraws 23 Rules from* Federal Register, THE HILL (Jan. 24, 2017, 11:07 AM), https://thehill.com/regulation/315839-trump-administration-withdraws-23-rules-from-federal-register [https://perma.cc/69A7-GQ8F].

[54] Peter D. Holmes, *Paradise Postponed: Suspensions of Agency Rules*, 65 N.C. L. REV. 645, 646 (1987).

[55] Beermann, *supra* note 4, at 340 n.178.

[56] *Id.* at 340.

[57] *See* sources cited *supra* note 8.

[58] *See* Jack M. Beermann, *Presidential Power in Transitions*, 83 B.U. L. REV. 947, 994 (2003) (arguing that courts should not interfere with agency decisions to withdraw a rule absent independent reasons for concern).

[59] *See* O'Connell, *supra* note 5, at 511 (suggesting that "new administrations pull proposed regulations they do not like").

negligible fiscal and political cost. Suspensions, on the other hand, ultimately require a costly choice between "expend[ing] political capital to reverse the prior administration's rule, or . . . enforc[ing] a rule that is contrary to the incoming administration's political preferences."[60]

Legally, before *Humane Society*, regulators and commentators generally assumed that withdrawing rules made available for public inspection by the OFR was permissible.[61] Suspensions, conversely, have always existed in a legal gray area.[62] They are typically understood to be final agency actions, which under the APA generally require notice and comment and publication at least thirty days prior to going into force.[63] Yet incoming administrations regularly invoke the APA's two "good cause" exceptions[64] to get around these requirements.[65] Courts, in turn, have been inconsistent in answering the question of what constitutes good cause,[66] as well as how long is "too long" of a unilateral suspension.[67] Due to a lack of clear guideposts, agencies impose delays of varying lengths[68] and provide variable explanations of "good cause" to justify them.[69] For regulators, then, suspensions are practically and legally hazardous in a way that withdrawals, prior to *Humane Society*, were not.

For regulated parties, too, suspensions create more practical and legal uncertainty than withdrawals. Practically, withdrawals send a clear message to regulated parties that a given requirement will not be

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60 Beermann, *supra* note 4, at 309.

61 *See, e.g.*, *id.* at 370 (noting, in 2013, that "it is lawful for incoming administrations to withdraw rules that have been submitted to the *Federal Register* but not yet published").

62 *See, e.g.*, Jack M. Beermann, *Are Rules Effective Before Publication? Reflections on the D.C. Circuit's Decision in* Humane Society v. USDA, YALE J. ON REG.: NOTICE & COMMENT (Oct. 6, 2022), https://www.yalejreg.com/nc/are-rules-effective-before-publication-reflections-on-the-d-c-circuits-decision-in-humane-society-v-usda-by-jack-m-beermann [https://perma.cc/U22F-9M4J] (describing suspensions as "always [having] been plagued by procedural uncertainty").

63 *See, e.g.*, O'Connell, *supra* note 5, at 530 ("[S]uspension often counts as a final agency action, and thus is typically reviewable in court under the APA if the challenger has standing to sue.").

64 *See* 5 U.S.C. § 553(b)(3)(B) (exempting rules from notice and comment when the agency finds, for good cause, that the procedure is "impracticable, unnecessary, or contrary to the public interest"); *id.* § 553(d)(3) (exempting rules from the general requirement of publication thirty days prior to effectiveness for "good cause found and published with the rule").

65 *See* Beermann, *supra* note 4, at 335–37; *see also id.* at 340–49 (collecting examples from the Reagan to Obama Administrations).

66 *See* Kyle Schneider, Note, *Judicial Review of Good Cause Determinations Under the Administrative Procedure Act*, 73 STAN. L. REV. 237, 252 (2021).

67 A rough consensus seems to be that the longer a suspension is, the more likely it requires notice and comment. *See* Beermann, *supra* note 58, at 994; *see also* Pub. Citizen v. Dep't of Health & Hum. Servs., 671 F.2d 518, 520 (D.C. Cir. 1981) (Edwards, J., dissenting) (distinguishing "a decision to suspend indefinitely regulations" to allow "wholesale reevaluation of a major regulatory program" from "a temporary measure for preserving the status quo").

68 The Bush Administration, for example, initially imposed sixty-day delays on the Clinton Administration's midnight rules, but then imposed "further delays without notice and comment" in cases where the regulations were "still under review." Beermann, *supra* note 4, at 344; *see also id.* at 343 n.195.

69 For instance, the Reagan Administration justified its delays by citing, inter alia, the nation's "economic condition," *id.* at 341, the need to review the "benefits" of a given rule, *id.* at 342, and the mere existence of a presidential directive ordering the delay, *id.*

enacted.[70] Suspensions, on the other hand, create extended unpredictability: a suspended rule may go into effect at some point in the future, or the agency might seek to repeal it. As Professors Bethany Davis Noll and Richard Revesz explain, "[r]egulated entities often need to make substantial investments in order to comply with regulatory requirements," and "[w]ith too much regulatory vacillation, companies may put off investment decisions until the uncertainty is resolved."[71] Thus, the financial stability of regulated entities affected by a suspended rule may suffer, since such entities are in the dark about when, or if, they will have to come into compliance.[72]

Legally, the pathway to challenging withdrawals, as *Humane Society* itself showed, was relatively straightforward. Suspensions are another story: While regulated parties may be able to get them struck down on judicial review,[73] many suspensions are short, which makes them more difficult to challenge.[74] In addition, as noted, the legal standards governing suspensions are unclear, both with respect to what constitutes "good cause" to delay a rule's effective date unilaterally and how long an "indefinite postponement" must be to make it "tantamount to a revocation,"[75] thus necessitating notice and comment.[76] Finally, suspensions risk incentivizing agency gamesmanship: if a regulated entity challenges a suspension via suit, the agency could simply lift the suspension, mooting the challenge.[77] Taken together, these three factors mean that regulated parties do not have a clear path to legal recourse when challenging suspensions in court, and the judiciary will continue to struggle to develop standards governing their use.

At bottom, although *Humane Society* foreclosed an expedient method of addressing the leftover rulemakings of prior presidencies, new administrations remain able to unilaterally suspend the implementation of midnight rules with future effect, notwithstanding the APA's procedural requirements for final agency action. This pathway brings with it practical inefficiencies and legal uncertainties for agencies and regulated parties during political transitions, underscoring the need for courts — or Congress — to craft a uniform standard for tackling agencies' invocation of APA exceptions when delaying the implementation of finalized midnight rules.

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[70] *See id.* at 357.

[71] Bethany A. Davis Noll & Richard L. Revesz, *Regulation in Transition*, 104 MINN. L. REV. 1, 95 (2019).

[72] *See* Schneider, *supra* note 66, at 257 (noting that for regulated parties, the result of a lack of uniform standards for suspensions "is an unpredictable landscape that reduces administrability without clear benefits").

[73] *See* Holmes, *supra* note 54, at 647–62 (surveying judicial review of procedural challenges to rule suspensions in the early Reagan Administration).

[74] *See* Beermann, *supra* note 58, at 993.

[75] Nat. Res. Def. Council, Inc. v. EPA, 683 F.2d 752, 763 n.23 (3d Cir. 1982).

[76] *See supra* notes 62–69 and accompanying text.

[77] *See* O'Connell, *supra* note 5, at 530.