AN INCH OR A MILE: HOW THE FIFTH CIRCUIT OPENED THE DOOR TO CHALLENGING FEDERAL ADMINISTRATIVE AGENCY INFORMAL GUIDANCE

J. Travis Lee

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I. INTRODUCTION

Federal administrative agencies have a duty to protect the public's interest and keep the public safe.[1] These agencies, like the Environmental Protection Agency (EPA), Federal Energy Regulatory Commission (FERC), and Commodity Futures Trading Commission (CFTC), just to name a few, accomplish these duties by developing and enforcing regulations tied to their statutory authority either (1) on their own initiative or (2) under express statutory directives from Congress that they fashion regulations.[2] Federal agencies, however, are subject to the Administrative Procedure Act (APA) that provides limitations on how an agency develops and enforces regulations.[3] The APA outlines the procedures agencies must follow when developing formal and informal regulations, which also includes agency informal guidance.[4] This case note focuses on the controversy surrounding agencies use of informal guidance to assist regulated entities with regulatory compliance.[5] Federal agencies provide this guidance with a disclaimer that guidance documents are not legally binding.[6] This regulatory approach puts regulated entities in a precarious position because if an entity chooses not to follow the guidance it immediately exposes itself to agency enforcement action.[7] If an entity chooses to follow the guidance, the agency can still contradict itself or revoke the guidance because it claimed the guidance was not binding in the first place.[8]

Generally, federal agency guidance documents have not been considered final agency action because traditional legal theory suggested those documents were only considered interpretive or suggestive opinions.[9] Accordingly, injured regulated entities could not seek judicial relief against this guidance because they could

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1. ANDREW F. POPPER ET AL., ADMINISTRATIVE LAW: A CONTEMPORARY APPROACH 5-9 (4th ed. 2021).

2. *See Our Mission and What We Do*, EPA, https://www.epa.gov/aboutepa/our-mission-and-what-we-do (last visited Apr. 29, 2025); *What FERC Does*, FERC, https://ferc.gov/what-ferc-does (last updated Feb. 7, 2025); *Indus. Oversight*, CFTC, https://www.cftc.gov/IndustryOversight/index.htm (last visited Mar. 14, 2025).

3. 5 U.S.C. §§ 551-559 (1966).

4. POPPER ET AL., *supra* note 1, at 36-46.

5. Agency informal guidance includes regulatory interpretations, policy statements, enforcement action discretion, and regulatory compliance guidance. *See* KATE R. BOWERS, CONG. RSCH. SERV., LSB10591, AGENCY USE OF GUIDANCE DOCUMENTS 1 (2021), https://www.everycrsreport.com/files/2021-04-19_LSB10591_9477746a9161f3ee6f2d127a70eb84cdcec6e4df.pdf (provides background and historical context regarding the perception that agency informal guidance is typically not judiciable).

6. *EPA Guidance; Administrative Procedures for Issuance and Public Petitions; Rescission*, EPA, https://www.epa.gov/laws-regulations/epa-guidance-administrative-procedures-issuance-and-public-petitions-rescission (last visited Jan. 7, 2024).

7. Joshua D. Blank & Leigh Z. Osofsky, *The Inequity of Informal Guidance*, 75 VAND. L. REV. 1093, 1097 (2022), https://vanderbiltlawreview.org/lawreview/2022/05/the-inequity-of-informal-guidance/ (Taxpayers can be negatively impacted from reliance on IRS guidance documents that claims guidance is not binding to the agency).

8. *Id.* at 1097.

9. BOWERS, *supra* note 5, at 1-2.; *see also Pacific Gas and Elec. Co. v. FPC*, 506 F.2d 33, 38 (D.C. Cir. 1974) ("An administrative agency has available two methods for formulating policy that will have the force of law. An agency may establish binding policy through rulemaking procedures by which it promulgates substantive rules, or through adjudications which constitute binding precedents. A general statement of policy is the outcome of neither a rulemaking nor an adjudication; it is neither a rule nor a precedent but is merely an an-

not establish Article III standing or show the agency violated the APA.[10] However, a recent federal circuit court ruling has changed this traditional view, at least in one jurisdiction, by setting a new precedent that has provided a road map to regulated entities that believe they have been injured by agency informal guidance on how to challenge that guidance through the judiciary.[11]

In July 2023, in *Clarke v. CFTC*, the United States Court of Appeals for the Fifth Circuit (Fifth Circuit) broke from precedent when it held that federal agency no-action letters (NAL) can meet the criteria of final agency action; thus, allowing judicial review.[12] The Fifth Circuit reached its decision despite several opposing threshold arguments from the Appellee (CFTC).[13] In reaching its decision on this central issue, the Fifth Circuit performed an in-depth legal analysis on each threshold argument made by the opposing parties, which included arguments on Article III standing and procedural questions under the APA.[14]

As a result of the *Clarke* decision, the Fifth Circuit has opened the door for regulated entities to challenge and seek judicial relief against administrative agency informal guidance that was previously considered non-justiciable and provided a road map on how to do it.[15] Because this new precedent involves Article III standing and procedural questions under the APA, this decision will transcend entities regulated by the CFTC.[16] Indeed, the *Clarke* decision will have implications for all federal administrative agencies within the jurisdiction of the Fifth Circuit that use informal guidance as part of the agency's regulatory scheme, and will serve as a very persuasive case in other jurisdictions.[17] As a result, this decision could be the conduit for entities in the energy industry to challenge no-action recommendations and other informal guidance issued by federal administrative agencies, when the entities can show they relied on the guidance, and show an injury directly linked to that reliance.[18]

Through an extensive background and analysis of legal principles, this case note will establish a link from the Fifth Circuit's decision in *Clarke* to a predictable application to regulated energy entities in the Fifth Circuit's jurisdiction and possibly beyond to other jurisdictions.[19]

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nouncement to the public of the policy which the agency hopes to implement in future rulemakings or adjudications. A general statement of policy, like a press release, presages an upcoming rulemaking or announces the course which the agency intends to follow in future adjudications.").

10. *See* EPA, SMALL ENTITY COMPLIANCE GUIDE FOR OIL AND NAT. GAS SECTOR: EMISSION STANDARDS FOR NEW, RECONSTRUCTED, AND MODIFIED SOURCES 1 (Aug. 2016), https://www.epa.gov/sites/default/files/2016-08/documents/2016-compliance-guide-oil-natural-gas-emissions.pdf (EPA offers this compliance guidance for NSPS OOOOa but states that it cannot be relied upon or create enforceable rights).

11. Clarke v. CFTC, 74 F.4th 627, 635-40 (5th Cir. 2023).

12. *Id.* at 635-39, 646.

13. *Id.* at 635.

14. *Id.* at 635-40.

15. *Clarke*, 74 F.4th at 635-40; *see also EPA Rescinds Rule on Guidance Documents*, EPA (May 12, 2021), https://www.epa.gov/newsreleases/epa-rescinds-rule-guidance-documents.

16. *See* discussion *infra* Parts III.C.1, C.2.

17. *See* discussion *infra* Parts III.C.1, C.2.

18. *See* discussion *infra* Part III.C.2.

19. *See* discussion *infra* Part II.

II. BACKGROUND

A. A Brief History & Authority of Federal Administrative Agencies

Congress' power to create federal agencies flows from Article II, Section 2, Clause 2 of the Constitution of the United States.[20] The first federal administrative agency dates back to 1789 when Congress created the Department of Foreign Affairs.[21] However, administrative agencies arguably had their most explosive growth during the Progressive Era and under former President Franklin D. Roosevelt's "New Deal."[22] Today, there are over 400 federal administrative agencies.[23] Governed by the APA, these administrative agencies derive their power to develop and promulgate regulations from Congress.[24] In some instances, administrative agencies develop regulations because Congress has passed a law directing a particular agency to initiate the rule-making process on particular issues.[25] However, in most instances, an agency, on its own accord, within its scope of legal responsibility and authority, initiates the rule-making process on certain issues based on issue priority.[26] Whether an administrative agency promulgates a rule at the direction of Congress or on its own accord, the rules and regulations that flow from administrative law actions may be clear in some cases, but less clear in other instances.[27]

B. A Brief Overview of the Administrative Procedure Act

The APA, first passed by Congress in 1946, outlined administrative procedures improving the administration of justice within federal agencies.[28] In 1966 the APA was codified in 5 U.S.C. and enumerated in sections 551-559, and sections 701-706.[29] The APA outlines many procedures that federal agencies must follow, however, the following sections are most applicable in this case note: section 551 provides the definitions; section 552 lists public notice requirements; section 553 specifies the requirements and process surrounding formal and informal

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20. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW, at xliii (6th ed. 2019).

21. Jeannie Ricketts, *A Very Brief History of Federal Administrative Law*, OKLA. BAR J. (Nov. 18, 2017), https://www.okbar.org/barjournal/nov2017/obj8830ricketts/.

22. *Judicial Review of Executive Agency Actions*, FED. JUD. CTR., https://www.fjc.gov/history/administration/judicial-review-executive-agency-actions (last visited Mar. 15, 2025) (The Progressive Era occurred between 1890 and 1920, and the New Deal was a series of government funded projects that occurred between 1933-1938, during President Roosevelt's terms, to combat the effects of the Great Depression.).

23. *Agencies*, FED. REG., https://www.federalregister.gov/agencies (last visited Apr. 10, 2025); *see also Executive Agencies Under Federal Law*, JUSTIA (May 2024), https://www.justia.com/administrative-law/executive-agencies/.

24. OFF. OF THE FED. REG., A GUIDE TO THE RULEMAKING PROCESS, https://uploads.federalregister.gov/uploads/2013/09/The-Rulemaking-Process.pdf (last visited Apr. 10, 2025).

25. *Id.*

26. *Id.*

27. *See generally Clear Rules Versus Gray Areas*, 7SAGE L. SCH., https://7sage.com/lawschool/lesson/4-4-clear-rules-versus-gray-areas/ (last visited Apr. 13, 2025).

28. Administrative Procedure Act, Pub. L. No. 404, ch. 324, 60 Stat. 237 (1946).

29. Jeffrey S. Lubbers, *Putting the U.S. Administrative Procedure Act in Perspective*, THE REGUL. REV. (Nov. 8, 2022), https://www.theregreview.org/2022/11/08/lubbers-putting-the-u-s-administrative-procedure-act-in-perspective/.

rule making; section 553(b)(A) provides an exemption to the general notice and comment requirement under informal rule-making for agency policy statements, interpretations, and other specific agency rules and procedures; section 558 expresses the agency's power and ability to impose sanctions.[30] Sections 701-706 discuss the right to judicial review, including when actions are reviewable, the scope of judicial review, and venue.[31]

C. Right of Review Under the Administrative Procedure Act

Under section 702 of the APA, a party is entitled to judicial review if the party is suffering from a legal wrong or has been adversely affected because of final agency action.[32] However, under section 701, judicial relief from a federal court may be limited or forbidden by other statutes or when "agency action is committed to agency discretion by law,"[33] where, for example, an agency decides whether to commence an enforcement action. The presumption, however, is that most final agency actions are reviewable.[34]

The APA, under section 704, outlines what actions are reviewable by a court.[35] Under section 704, only "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review."[36] Other agency action, including preliminary, procedural, and intermediate rulings, become reviewable when final agency action occurs.[37]

D. Final Agency Action

In section 704, the APA expresses that judicial review of an agency action is only available upon final agency action; however, what constitutes "final agency action" is not specifically stated or discussed under the APA.[38] In *Bennett v. Spear*, the Supreme Court (Court) developed a test that requires two conditions to be met for an agency action to be considered final under the APA.[39] The Court held, as a general matter, that "'[f]irst, the action must mark the 'consummation' of the agency's decision-making process — it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'"[40]

30. 5 U.S.C. §§ 551-559 (1966).
31. *Id.* §§ 701-706.
32. *Id.* § 702.
33. *Id.* § 701(a)(1)-(2).
34. Heckler v. Chaney, 470 U.S. 821, 838 (1985).
35. 5 U.S.C. § 704.
36. *Id.*
37. *Id.*
38. *Id.*
39. Bennett v. Spear, 520 U.S. 154, 177-78 (1997).
40. *Id.* at 177-78.

E. Committed to Agency Discretion by Law

The APA, under section 701(a)(2), lists "committed to agency discretion by law" as one of two instances when judicial review of agency action is not appropriate; however, "committed to agency discretion by law" is not defined nor discussed plainly within the APA.[41] The Court in *Heckler v. Chaney* explored this question in great detail.[42] The Court determined "committed to agency discretion by law" was a narrow exception that applies only when the "substantive statute [leaves] the court with 'no law to apply'" to a particular agency action.[43] By contrast, when a substantive statute does offer a court "law to apply" to the limits of an agency's discretion, then the particular agency action is not committed to agency discretion by law; therefore, the agency action is judicially reviewable under section 701(a)(2).[44]

F. So, What is a No-Action Letter and What is it Good For?

Under section 553(b)(A), regarding informal rulemaking, administrative agencies can exercise enforcement discretion by providing "no-action letters" (NAL) to a requesting regulated entity.[45] When a rule is promulgated and presents confusion, ambiguity, or vagueness on certain issues, a regulated entity may seek general compliance guidance from an agency or, more specifically guidance on-whether the agency would seek enforcement action for certain conduct.[46] An agency can issue informal guidance on how it interprets the rule, how the rule applies, what a regulated entity must do to comply with the rule, and, among other things, the agency can issue guidance on whether specific practices would or would not be subject to enforcement action by the agency.[47]

G. Prior Judicial Decisions Regarding No-Action Letters

Prior to the Fifth Circuit's decision in *Clarke*, three other federal circuits had held that a NAL was not justiciable.[48] While each of these three circuits had their own reasoning, each circuit's decision essentially came down to a determination that a NAL was not "final agency action"; therefore, a NAL was not legally binding and not fit for judicial review.[49] In *Bd. of Trade of City of Chicago*, the Seventh Circuit concluded that a NAL was not judicially reviewable because it did not constitute a final decision and the NAL did not include "any legal conclusions"

41. 5 U.S.C. § 701(a)(2).

42. *Heckler*, 470 U.S. at 826; *see also* Citizens to Pres. Overton Park v. Volpe, 401 U.S. 402, 410, 413 (1971) (holding that "committed to agency discretion by law" is applicable in "rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply,'" but that when there is "law to apply," the exception is not applicable).

43. Heckler, 470 U.S. at 826.

44. *Id.* at 834-35.

45. 5 U.S.C. § 553(b)(A).

46. *Id.*

47. FERC, NO-ACTION LETTERS (July 26, 2024), https://www.ferc.gov/enforcement-legal/enforcement/no-action-letters.

48. *Clarke*, 74 F.4th at 646 (Graves, J., dissenting).

49. *Id.*

that pertained to a governing statute or regulation and was more of a recommendation.[50] In *N.Y.C Emps. Ret. Sys.*, the Second Circuit determined that a NAL was merely "interpretive," and because it was only interpretive, a NAL did not impose a binding legal relationship between the parties.[51] The Second Circuit opined that a NAL "is an informal response" from an agency official that did not constitute "an official statement."[52] In *Trinity Wall St.*, the Third Circuit held that a NAL was not binding because the letter only included "informal views of the staff" on whether to recommend an enforcement action against the defendant in that case.[53]

H. Scope of Review: Arbitrary and Capricious

The scope of judicial review is defined under section 706 of the APA, where it enumerates what types of agency action a federal court must find "unlawful and set aside."[54] Under section 706(2), a federal court must find agency action unlawful if a court determines the action, among other things, to be arbitrary and capricious.[55] The arbitrary and capricious standard only "requires that agency action be reasonable and reasonably explained."[56] Judicial review under this standard is "deferential," that is, a court must only ensure that the particular "agency has acted within a zone of reasonableness and, in particular, has reasonably considered the relevant issues and reasonably explained the decision."[57] This is not to suggest, however, that the reviewing court acts as a mere rubber stamp; the courts have identified various categories of conduct that will be considered arbitrary and capricious.[58] For example, courts have held agency action to be arbitrary and capricious for the following reasons: (1) failing to adequately explain its reasoning for departing from existing precedent or changing its position, (2) failing to consider arguments or comments raised by a particular party, and (3) failing to show "a

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50. *Id.*; *see also* Board of Trade v. SEC, 883 F.2d 525, 530 (7th Cir. 1989) (holding a no-action letter "is a staff position regarding enforcement action only and should not be understood to express any legal conclusions regarding the applicability of statutory or regulatory provisions of the federal securities laws.").

51. *Clarke*, 74 F.4th at 646; *see also* N.Y.C. Emps.' Ret. Sys. v. SEC, 45 F.3d 7, 12 (2nd Cir. 1995) (holding a "no-action letter, however, is an informal response, and does not amount to an official statement of the SEC's views. No-action letters are deemed interpretive because they do not impose or fix a legal relationship upon any of the parties.").

52. *N.Y.C. Emps.' Ret. Sys*., 45 F.3d at 12.

53. *Clarke*, 74 F.4th at 646; *see also* Trinity Wall St. v. Wal-Mart Stores, Inc., 792 F.3d 323, 331 (3rd Cir. 2015) (holding "no-action letters are not binding — they reflect only informal views of the staff and are not decisions on the merits — Trinity's proposal still had life.").

54. 5 U.S.C. § 706(2).

55. *Id.* § 706(2)(A)-(F).

56. FCC v. Prometheus Radio Project, 141 S.Ct. 1150, 1158 (2021).

57. *Id*. at 1158 (Courts are deferential to agency decisions and will presume when an agency takes a specific action that it is valid. A court places the burden on the plaintiff challenging the action to show that a particular agency's action is not valid.)

58. Motor Vehicle Mfrs. Assn. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983) (holding the APA arbitrary and capricious standard, however, is a narrow view that requires the agency to show a "rational connection between the facts found and the decision made," and that an agency cannot "'(1) 'rely on factors deemed irrelevant by Congress'; (2) 'fail to consider important aspects of [the] problem'; (3) 'present an explanation that is either implausible or contrary to the evidence'; or (4) reach a decision that 'is not supported by substantial evidence in the [administrative] record.'").

rational connection between the facts found and the choice made"; an agency's decision may also be set aside if not supported by substantial evidence.[59]

I. Justiciability Doctrines at Issue

Justiciability refers to a set of judicially-created doctrines that aid a court in determining if a matter is appropriate to be heard in a federal court.[60] Federal courts will examine five justiciability doctrines to determine if a particular case is justiciable; however, only two were at issue in *Clarke v. CFTC*: standing and mootness."[61]

Standing is the second of the justiciability doctrines and is considered the most important of the five doctrines.[62] Judicial standing includes three (3) constitutional standing requirements for a federal court to hear a case: (1) a real injury must have occurred or will imminently occur, (2) the injury is traceable to the defendants conduct, and (3) that a favorable decision from a federal court would redress or provide relief to the plaintiff's injury.[63]

Mootness is the fourth and most flexible of the doctrines.[64] The mootness doctrine generally requires that a plaintiff show that there is a live controversy at all stages of litigation and not just at the time the claim is filed.[65] However, the Court has recognized three exceptions under the mootness doctrine, only two of which were at issue in the *Clarke* case: (1) "wrongs capable of repetition but evading review," and (2) class action lawsuits where the named party settles, but the remaining party members still have a live controversy.[66]

J. The History and Evolution of Judicial Deference to Agency Interpretation

Judicial deference is a doctrine based on the principal that a reviewing court should "defer" to the appropriate agency's reasonable interpretation of ambiguous or vague language contained in statutory or regulatory text.[67] The policy behind this doctrine, while historically controversial, has rested in the belief that more weight should be given to the interpretation of the agency entrusted with administering the statute or regulation, rather than a court.[68]

Over time, the Court has established three prominent doctrines that courts have utilized in deciding administrative law cases: *Auer*, *Chevron*, and *Skidmore* deference.[69] While *Auer*, *Chevron*, and *Skidmore* deference all refer to a court

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59. *See* FCC v. Fox Television Stations, Inc., 556 U.S. 502, 513-15 (2009); NorAm Gas Transmission Co. v. FERC, 148 F.3d 1158, 1165 (D.C. Cir. 1990); Burlington Truck Lines, Inc. v. U.S., 371 U.S. 156, 168 (1962).

60. CHEMERINSKY, *supra* note 20, at 39.

61. *Id.* at 40.

62. *Id.* at 44.

63. *Id.* at 44-45.

64. CHEMERINSKY, *supra* note 20, at 85.

65. *Id.*

66. *Id.* at 85-88.

67. Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 Yale L.J. 908 (2017).

68. *Id.*

69. Christopher J. Walker, *Attacking Auer and Chevron Deference: A Literature Review*, 16 GEO. J.L. & PUB. POL'Y 103, 105, 110 (2018).

deferring to an interpretation made by an administrative agency concerning ambiguous language, there are distinctions between all three.[70] *Auer* has applied when an agency made an interpretation of its own regulations, whereas *Chevron* applied when an agency offered an interpretation of ambiguous language in a statute it was charged with administering.[71] *Skidmore* deference has been used to resolve both statutory and regulatory ambiguity; however, it has been characterized as weaker deference than *Auer* and *Chevron*.[72] *Skidmore* aims at giving an agency its due respect when it offers its interpretation of ambiguous or vague statutory or regulatory language.[73] Accordingly, a court's decision to grant *Skidmore* deference has turned on whether a court was persuaded that an agency's interpretation was thorough, valid in reasoning, and consistent with previous pronouncements.[74]

Skidmore deference was quasi-replaced by court rulings in *Chevron v. NRDC* in 1984, and *Auer v. Robbins* in 1997.[75] In *Chevron*, the Court established a two-step test to determine if judicial deference would be given to an agency's statutory interpretation.[76] Under step-one, a court must evaluate whether Congress had expressly spoken on the exact question at bar using the traditional tools of statutory construction to ascertain whether the statute was unambiguous, and if so, that court would hold that as controlling and deliver its ruling accordingly.[77] Under step-two, if a court found Congress had not expressly spoken on the question at bar, then a court, instead of imposing its own interpretation, would defer to an agency's interpretation of the statutory language, provided it was a "permissible construction of the statute."[78]

The *Chevron* deference doctrine held from 1984, until 2024, when the Court overturned it in *Loper Bright Enterprises v. Raimondo*.[79] In *Loper Bright*, the Court overturned *Chevron* on the basis that it was a court's duty to utilize the "traditional tools of statutory construction" when resolving ambiguous statutory language and must not simply defer to an agency's interpretation for resolution.[80] Thus, the decision in *Loper Bright* re-established *Skidmore* deference as a means that allows a court to balance its duty of determining what the law is,[81] but also

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70. *Id.* at 105-10.

71. *Id.*

72. *See generally* Skidmore v. Swift & Co., 323 U.S. 134 (1944); *see also* POPPER ET AL., *supra* note 1, at 759.

73. *Skidmore*, 323 U.S. at 140.

74. *Id.*

75. *See generally* Chevron, U.S.A., Inc., v. NRDC, Inc., 467 U.S. 837 (1984); Auer v. Robbins, 519 U.S. 452 (1997).

76. *Chevron, U.S.A., Inc*., 467 U.S. at 842-43.

77. *Id.*

78. *Id.*

79. *See generally* Loper Bright Enters. v. Raimondo, 603 U.S. 369 (2024).

80. *Id.* at 373, 412-13.

81. Marbury v. Madison, 5 U.S. 137, 177 (1803) (the Court held that "[i]t is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.").

giving the agency charged with administering the statute its due respect before a court reaches its conclusion and delivers its ruling.[82]

In *Auer*, the Court established that lower courts must defer to an agency's interpretation of its own ambiguous regulatory language, unless the interpretation is "plainly erroneous or inconsistent with the regulation."[83] However, while *Auer* has not been overturned like *Chevron*, it was later constrained in *Kisor v. Wilkie*.[84] In *Kisor*, the Court placed constraints on how lower court's should decide on whether to afford *Auer* deference to an agency's interpretation of its own rules and regulations.[85] First, a court must find that the language in the regulation is truly ambiguous and "exhaust all the traditional tools of statutory construction" to reconcile it.[86] Second, the agency interpretation must be reasonable.[87] Third, a court must find the agency's interpretation is of "the character and context" that should be entitled "to controlling weight."[88] Fourth, a court must find the agency's interpretation was based on the particular agency's "substantive experience."[89] Lastly, a court must find the agency's interpretation reflects "fair and considered judgement."[90]

III. ANALYSIS

A. Factual Background and Procedural History of Clarke v. CFTC

1. Factual Background

In 2014, Victoria University (University), a college in New Zealand, produced a futures trading program and trading platform called "PredictIt" that predicts the outcome of future political elections.[91] PredictIt allows individuals to make financial trades based on what elections or federal legislation the program forecasts.[92] Typically this type of contract is regulated by the Commodity Exchange Act (CEA) and the CFTC, and generally requires such a contract to be registered as "a designated contract market or swap execution facility."[93] In 2014, hoping to avoid registering PredictIt under the CEA, the University requested a determination regarding enforcement discretion from the CFTC's Division of Market Oversight (DMO), outlining self-imposed limitations the University would

82. *Skidmore*, 323 U.S. at 140.
83. *Auer*, 519 U.S. at 461.
84. *See generally* Kisor v. Wilkie, 588 U.S. 558 (2019).
85. *Id.*
86. *Id.* at 558, 574.
87. *Id*. at 575.
88. *Kisor*, 588 U.S. at 576.
89. *Id.* at 577.
90. *Id.* at 579.
91. *Clarke*, 74 F.4th at 633-34.
92. *Id.*
93. *Id.* at 634.

abide by if granted its enforcement no-action request.[94] The DMO issued the University a NAL as it requested, provided the University would abide by all the terms it had agreed to in its original request.[95]

In August 2022, the DMO sent a letter to the University revoking its NAL because it claimed the University had not honored the terms of the NAL, though the DMO did not specify what terms had been violated.[96] Further, the letter informed the University that all remaining "contracts and positions" associated with an open interest in the PredictIt market should be closed and liquidated by 11:59 p.m. Eastern Standard Time on February 15, 2023.[97]

2. Procedural History

In September 2022, after the DMO rescinded the University's NAL, several other parties (Appellants) who used PredictIt jointly filed a lawsuit against CFTC in the United States District Court for the Western District of Texas (District Court).[98] In their claim, Appellants alleged that CFTC's revocation of the NAL was arbitrary and capricious because the agency failed to include any explanation of its decision to revoke the NAL and failed to follow other procedural steps outlined in section 558 of the APA.[99] Accordingly, Appellants filed an expedited motion requesting a preliminary injunction against CFTC's action to revoke the NAL.[100] In response, the CFTC filed a motion to dismiss the case, stating that the Appellants' claim was not justiciable.[101]

The magistrate judge overseeing the case recommended Appellants' case be transferred to the federal district court in Washington D.C., during which time, three months lapsed. During that period, the District Court judge failed to rule on Appellants' preliminary injunction motion.[102] The inaction of the District Court to rule on Appellants' motion was perceived as an effective denial, leading Appellants to file an appeal to the Fifth Circuit.[103] The CFTC responded to Appellants' appeal by filing a motion to dismiss claiming the Fifth Circuit lacked jurisdiction; however, the Fifth Circuit, citing *Carson v. Am. Brands, Inc.*, held that it did have jurisdiction to hear the matter and granted Appellants a temporary injunction pending the outcome of the appeal.[104]

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94. *Id.*

95. *Clarke*, 74 F.4th at 634.

96. *Id.*

97. *Id.* at 634-35.

98. *Id.* at 635.

99. *Clarke*, 74 F.4th at 635; *see also* 5 U.S.C. § 558 (1966) (this section requires that if an agency is to impose sanctions, revoke, or suspend a license that the agency notify the licensee with facts supporting the action and give the licensee a chance to become compliant with the law).

100. *Clarke*, 74 F.4th at 635.

101. *Id.*

102. *Id.*

103. *Id.*

104. *Clarke,* 74 F.4th at 635; *see also* Carson v. Am. Brands, Inc., 450 U.S. 79, 88-90 (1981) (holding that a federal court of appeals can review an order by a district court, even if the order does not explicitly deny a petitioner's preliminary injunction request, because a party could suffer irreparable harm if not given an immediate appeal on the issue).

In March 2023, after the Fifth Circuit granted the Appellants' injunction, the CFTC withdrew the NAL rescission it issued the University and substituted it with a new revocation letter.[105] The CFTC's new revocation letter did provide some explanation of why it revoked the NAL issued to the University and gave the University an opportunity to respond; the CFTC then filed a new motion to dismiss, claiming the case had become moot.[106] In May 2023, the Fifth Circuit held that the CFTC's NAL rescission was probably arbitrary and capricious[107] and that CFTC's objections lacked merit in this case.[108] Accordingly, the Fifth Circuit denied both parties' motions and remanded the case back to the lower court, while clarifying that the CFTC was enjoined from forcing the PredictIt trading platform to close and prohibited the agency from interfering with the trading platform until sixty (60) days following the date a final judgment was made on the case.[109]

B. Four Threshold Issues at Bar

1. Why the Fifth Circuit was Correct in Holding Appellants' Appeal was Not Moot

The CFTC argued Appellants' appeal was moot because, even though the agency revoked the original NAL in August 2022, in March 2023, the agency issued a subsequent revocation letter the agency claimed provided an explanation for the revocation and gave the University an opportunity to be heard.[110] The CFTC also claimed that because the revocation letter merely expressed a preliminary determination, there was nothing in the letter a court could review.[111] However, Appellants claimed the agency's action of withdrawing one letter just to replace it with another similar letter did not moot their case; instead, Appellants argued this action fell into an exception to the mootness doctrine called "voluntary cessation."[112]

The Fifth Circuit agreed with Appellants and concluded that there were two exceptions to the mootness doctrine in this case: (1) there are multiple parties in this action that have at least some interest in the outcome of the case; and (2) the voluntary cessation exception, when an agency replaces one law with a similar law

105. *Clarke*, 74 F.4th at 635.

106. *Id.*

107. The Fifth Circuit did not make a merits determination of whether the CFTC's action was arbitrary and capricious. One of the requirements to receive a preliminary injunction is a party must show that it has a substantial *likelihood* of succeeding based on the merits of the case. The Fifth Circuit determined the action was likely arbitrary and capricious, which satisfied Appellant's burden to qualify for injunctive relief. *Id.* at 640-41.

108. *Id.* at 633.

109. *Clarke*, 74 F.4th at 635.

110. *Id.* at 636.

111. *Id.*

112. *Id.*; *see also* CHEMERINSKY, *supra* note 20, at 87 (voluntary cessation arises when the person that is engaged in the wrongful conduct voluntarily ceases that conduct, but can resume the wrongful conduct at any time the person chooses.).

that adversely effects a plaintiff in the same way, the case is not moot.[113] Accordingly, the Fifth Circuit opined that the latter revocation letter sent to the University in March 2023, not only failed to provide all the relief Appellants sought in their claim, the letter, as a practical matter, provided Appellants with nothing; the letter only gave the University an opportunity to object, but provided no like opportunity for Appellants.[114] For these reasons, the Fifth Circuit held that Appellants' case was not moot.[115]

2. The NAL Rescission by the CFTC was "Final Agency Action"

The CFTC also argued that the revocation of the NAL did not meet the criteria of "final agency action," which would allow judicial review under the APA.[116] However, the Fifth Circuit explained that "agency action" is defined under the APA and limited to an "agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act."[117] The CFTC attempted to persuade the Fifth Circuit that the CEA did not allow agency staff to "license trading facilities" and that the NAL itself did not actually entitle the recipient to do anything.[118] In opposition, Appellants contended that the NAL was a "form of permission" to operate the PredictIt trading platform, which seemingly fell into one of the limited agency actions defined under the APA.[119] The Fifth Circuit, agreeing with Appellants on each point, explained that agency action is a broad term that was meant to cover all actions by an agency when exercising its power.[120] The Fifth Circuit reasoned the University only requested the NAL from the CFTC to get the agency's permission to operate the PredictIt trading platform without registering it and for reassurance the agency would not take enforcement action against the University before it invested significant financial resources into the trading platform.[121] To support its determination, the Fifth Circuit explained that the plain language and terms in the NAL supported the Appellants' claim that the NAL was a form of permission that previous courts have held constituted a license under the APA; therefore, withdrawing the NAL should be considered agency action.[122]

Lastly, the Fifth Circuit enumerated a two pronged test to determine if agency action is indeed final and proper for judicial review: '"[(1)] the action must mark the consummation of the agency's decisionmaking process — it must not be of a merely tentative or interlocutory nature;' and '[(2)] the action must be one by

113. *Clarke*, 74 F.4th at 636.; *see also* Knox v. Serv. Emps. Int'l Union, Loc. 1000, 567 U.S. 298, 307 (2012) (holding "[a] case becomes moot only when it is impossible for a court to grant [] 'any effectual relief whatever' to the prevailing party" and "[a]s long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot.").

114. *Clarke*, 74 F.4th at 636.

115. *Id.*

116. *Id.*

117. *Id.* at 637 (quoting 5 U.S.C. § 551(13)).

118. *Clarke*, 74 F.4th at 637.

119. *Id.*

120. *Id.*

121. *Id.*

122. *Clarke*, 74 F.4th at 637; *see generally* Atl. Richfield Co. v. United States, 74 F.2d 1193, 1200 (D.C. Cir. 1985); *and* Gallagher & Ascher Co. v. Simon, 687 F.2d 1067, 1072-76 (7th Cir. 1982).

which rights or obligations have been determined, or from which legal consequences will flow.'"[123] The CFTC argued that neither prong was met in the case at bar, claiming that granting and revoking a NAL is an interlocutory action, which does not consummate an agency's decision making process.[124] Additionally, the CFTC argued two more points: (1) the NAL was only a recommendation by the DMO staff on whether the CFTC should take enforcement action against the University; and (2) the NAL revocation did not have any legal consequences because PredictIt could still be used regardless of whether the DMO provided no-action relief and the CFTC was still free to seek enforcement action against the University, notwithstanding the NAL issued to the University by the DMO.[125] In contrast, Appellants argued that the NAL withdrawal was final agency action because the decision to withdraw was unappealable and exposed any party using PredictIt to enforcement action by the CFTC.[126]

The Fifth Circuit agreed with Appellants and held that both prongs of the test were met and that the NAL withdrawal was final agency action.[127] For the consummation prong, the Fifth Circuit reasoned the analysis turned on whether the NAL withdrawal allowed for subsequent agency review and determined that it did not.[128] The Fifth Circuit focused its reasoning on the fact that once the DMO made its decision, the decision was unappealable by the recipient "and subjects impacted parties to enforcement proceedings."[129] The CFTC's own regulations, the Court pointed out, express that a recipient "may rely" on the DMO's NAL.[130] Regarding the legal consequences prong, the Fifth Circuit found this legal issue analogous to its previous decision in *Data Marketing*. The CFTC's statement that the University could rely on its prior no action letter "bound the Department to some degree and withdrew its previously held discretion."[131] The Fifth Circuit then addressed the second revocation letter from March 2023, and explained how that letter did not change the fact that the agency's action was final.[132] The March 2023 letter did indicate that the University could make objections, however, the letter did not indicate if the agency would reconsider its withdrawal of the NAL; instead, it just accused the University of violating the terms of the NAL and declared it void.[133] This forced all users of PredictIt to either abandon the use of the trading platform

123. *Clarke*, 74 F.4th at 637; *see also Bennett*, 520 U.S. at 177-78.

124. *Clarke*, 74 F.4th at 638.

125. *Id.*

126. *Id.*

127. *Id.*

128. *Clarke*, 74 F.4th at 638.

129. *Id*.

130. *Id.*; *see also* 17 C.F.R. § 140.99(a)(2) (2024).

131. *Clarke*, 74 F.4th at 638; *see also* Data Mktg. P'ship, L.P. v. U.S. Dep't of Lab., 45 F.4th 846, 854 (5th Cir. 2022) (holding "'it is 'well-established that 'where agency action withdraws an entity's previously held discretion, that action alters the legal regime, binds the entity, and thus qualifies as final agency action.'").

132. *Id.* at 638-39.

133. *Id.* at 638-39.

or potentially be exposed to enforcement action from the CFTC. For those reasons, the Fifth Circuit concluded the revocation of the NAL did meet final agency action under the APA.[134]

3. The NAL Rescission by CFTC was not "Committed to Agency Discretion by Law" and Therefore Judicially Reviewable

The next threshold issue was whether the CFTC's NAL withdrawal should have been deemed "committed to agency discretion by law," which would make judicial review improper.[135] The CFTC argued that its decision fell into this category and likened it to classic committed to agency discretion scenarios such as when an agency decides to seek enforcement against an entity, or not, or discretionary decisions whether to prosecute.[136] The Fifth Circuit disagreed with CFTC's argument finding those examples distinct from the issue in this case.[137] In this case, the CFTC's discretion to enforce the law is not being challenged; rather, only the withdrawal of the NAL, a regulatory instrument.[138] That NAL ensured the University there would not be a recommendation by the DMO for the CFTC to seek enforcement action for the intended use of PredictIt that was in violation of the CEA for not registering it, which the CFTC's own regulations state recipients could rely on.[139] The cases the CFTC based its argument on might possibly apply if a third party was challenging the NAL on the basis that the DMO was wrong to issue it. However, in this case, the affected parties were challenging the revocation of the NAL on the basis that the agency did so improperly.[140] For those reasons, and because the Fifth Circuit has law to apply in this case satisfying *Heckler*, it held that the NAL withdrawal was not committed to agency discretion by law.[141]

4. The Fifth Circuit was Correct in Holding Appellants had Article III Standing

The last threshold issue the Fifth Circuit reasoned through was regarding whether Appellants had article III standing: (1) an injury, (2) that was traceable to CFTC's conduct, and (3) of the kind that a federal court could redress.[142] The CFTC argued that Appellants lacked standing because the University was the recipient of the revoked NAL and it was absent from the claim. However, and unsurprisingly, Appellants argued that they did satisfy each of those standing requirements.[143] The Fifth Circuit agreed with Appellants for several reasons.[144] First,

134. *Id.* at 639.

135. *Data Mktg. P'ship,* 45 F.4th at 639; *See* discussion *supra* Part II.E.

136. *Clarke*, 74 F.4th at 639; *see also Heckler*, 470 U.S. at 831-32 (explaining that a decision by an agency to refuse to seek enforcement is typically not proper for judicial review).

137. *Clarke*, 74 F.4th at 639.

138. *Id.*

139. *Id.*; *see also* 17 C.F.R. § 140.99(a)(2).

140. *Clarke*, 74 F.4th at 639.

141. *Id.*; *see* discussion *supra* Part II.G; *see also Heckler*, 470 U.S. at 831-32.

142. *Clarke*, 74 F.4th at 639.

143. *Id.*

144. *Id.* at 639-40.

Appellants, comprised of market operators and traders and academic institutions, satisfied their standing requirements because they were able to show multiple injuries as a result of the CFTC's withdrawal of the NAL which impacted the use of the PredictIt trading platform.[145] Specifically, Appellants were able to show financial harm resulting from market distortion and significant funds being withdrawn from the PredictIt Market that started when the CFTC first revoked the NAL, and that harm continued because of the prohibition to enter new markets due to the shutdown order within the revoked NAL.[146] Secondly, the Fifth Circuit found the Appellants' injuries to be directly traceable to the CFTC's decision to withdraw the NAL.[147] The intended operation of PredictIt was based solely on the no-action recommendation provided in the NAL and the withdrawal placed the PredictIt Market in financial peril that harmed Appellants.[148] Lastly, the Fifth Circuit concluded that a favorable ruling for the Appellants would provide redress for their injuries by allowing the PredictIt trading platform to continue operating by the same terms outlined in the original NAL, until the District Court could hear Appellants' claim against CFTC.[149] The CFTC argued against the conclusion that Appellants had standing by arguing that, per CFTC regulations, only the recipient (the University) of the NAL could rely on it, and that the Appellants' injury was hypothetical in either case because the alleged injury is based on the University's decision to continue using PredictIt as it was or cease operating the platform, independently of the NAL.[150] However, the Fifth Circuit disagreed with the CFTC's counterarguments and held that regardless of what the CFTC regulations may state, under the APA, anyone that is adversely affected by a final agency action can bring a lawsuit against that agency seeking judicial relief and Appellants fell under that category; therefore, the Fifth Circuit held that Appellants had article III standing.[151]

C. Future Implications of the Decision in Clarke v. CFTC

1. How the Fifth Circuit Opened the Door to Challenging Federal Agency Informal Guidance

Many administrative agencies, such as the EPA, FERC, and CFTC, just to name a few, issue various types of guidance documents that include general policy statements, interpretive rules, how the agency might enforce regulations, and possible enforcement discretion.[152] NALs fall under enforcement discretion, but the basis of a NAL could also derive from those other types, so the decision in *Clarke* has the potential to make great impacts beyond just the CFTC and NALs to include

145. *Id.* at 640.

146. *Clarke*, 74 F.4th at 640.

147. *Id.*

148. *Id.*

149. *Id.*

150. *Clarke*, 74 F.4th at 640; *see also* 17 C.F.R. § 140.99(a)(2).

151. *Clarke*, 74 F.4th at 640; *see also* 5 U.S.C. § 702.

152. *See* BOWERS, *supra* note 5, at 1 (provides background on agency informal guidance documents and historical context regarding the perception that agency informal guidance is typically not judiciable).

all other administrative agencies and the guidance those agencies publish.[153] In certain situations, the EPA, FERC, CFTC, and other agencies, including other agencies that regulate the energy industry, will provide informal guidance to regulated entities that avoids something more formal and complicated, such as rulemaking that would likely require notice-and-comment.[154] Similarly, these agencies also produce guidance documents on how staff and regulated entities should evaluate and comply with nuanced topics in various compliance and permitting processes.[155] For example, EPA has no-action assurance guidance that essentially states such guidance is not binding on EPA outside of a formal enforcement hearing.[156] While that may be true, the Fifth Circuit's decision in *Clarke* suggests parties who believe themselves to be adversely affected by no-action guidance, notwithstanding an agency's declaration that its guidance is non-binding, may fare better than they have historically in challenging such guidance. They will still have to establish that the agency's action gave them bona fide reliance, but the Fifth Circuit has opened the door for them to make that argument and suggests there will be future litigation on NALs and likely other agency informal guidance documents.[157] However, that opening does not ensure that the party challenging a guidance document in court will succeed.

A little over a year after the *Clarke* decision, a case was brought before the Fifth Circuit where the National Center for Public Policy Research (plaintiff) argued a NAL issued by SEC (defendant) should be treated as binding, citing *Clarke* as its basis.[158] In that case, Kroger, a third-party, requested a NAL from the defendant for proposing to exclude a proxy statement that the plaintiff prepared and wished to be included in Kroger's 2023 proxy material.[159] The defendant found "some basis" for Kroger's exclusion and issued the NAL.[160] The plaintiff first asked the defendant to rescind the NAL, then appealed to the Fifth Circuit when the defendant would not rescind.[161] The plaintiff argued that the NAL, like in

153. Neal E. Kumar et al., *Court to CFTC: Take No Action on PredictIt Event Contract No-Action Relief*, WILLKIE COMPLIANCE (Aug. 3, 2023), https://complianceconcourse.willkie.com/articles/court-to-cftc-take-no-action-on-predictit-event-contract-no-action-relief/.

154. *Id.*; *see also* TODD GARVEY, CONG. RSCH. SERV., R41546, A BRIEF OVERVIEW OF RULEMAKING AND JUDICIAL REVIEW 7 (Mar. 27, 2017), https://sgp.fas.org/crs/misc/R41546.pdf (discussing what types of agency documents are considered binding and what documents must go through notice-and-comment).

155. EPA, EJ IN AIR PERMITTING: PRINCIPLES FOR ADDRESSING ENVIRONMENTAL JUSTICE CONCERNS IN AIR PERMITTING (Dec. 2022), https://nepis.epa.gov/Exe/ZyPDF.cgi/P10178PB.PDF?Dockey=P10178PB.PDF (Internal memorandum outlining eight principles the EPA has identified it should use to examine the disproportionate effect on environmental justice communities).

156. Memorandum from Courtney M. Price, Assistant Adm'r for Enf't & Compliance Monitoring, EPA, on Policy Against "No Action" Assurances to Assistant Adm'rs, Reg'l Adm'rs, Gen. Couns. & Inspector Gen. (Nov. 16, 1984), https://www.epa.gov/sites/default/files/2013-10/documents/noactionass-mem.pdf (explaining that the EPA has a policy against providing definitive assurances outside of a formal enforcement hearing).

157. *Clarke*, 74 F.4th at 640.

158. National Ctr. for Pub. Pol'y Rsch. v. SEC, No. 23-60230, 2004 WL 4784358, at *1, *5 (5th Cir. Nov. 14, 2024).

159. *Id.* at *2.

160. *Id.*

161. *Id.*

Clarke, was "final agency action" that was fit for judicial review.[162] The Fifth Circuit, however, distinguished this case from *Clarke* and held that the NAL in this context was not binding because the defendant's NAL was neither final nor considered an agency action under the APA.[163] The Fifth Circuit reasoned that the NAL in *Clarke* acted as a granting instrument that constituted a license under the APA, and when the agency rescinded the NAL, it became "final agency action."[164] In *National Center for Public Policy Research v. SEC*, the Fifth Circuit reasoned that the NAL was akin to advice and reflected the agency's enforcement discretion; therefore, not a license, not final agency action, and not fit for judicial review under the APA.[165]

2. How Energy Companies Benefit from the *Clarke* Decision

The *Clarke* decision has potential impacts beyond just the CFTC; the *Clarke* decision, at least within the jurisdiction of the Fifth Circuit, will have impacts on all federal agencies, and the companies those agencies regulate, including energy companies.[166]

Currently, there are many new and proposed regulations that will affect energy companies for years to come.[167] Just to name a few, agencies such as the EPA, FERC, Department of Energy (DOE), Occupational Safety and Health Administration (OSHA), Pipeline and Hazardous Materials Safety Administration (PHMSA), and U.S. Fish & Wildlife Service (USFWS) revise existing regulations and fashion new regulations annually, which typically impacts energy companies in some way.[168] It is very likely that each of those regulations, when finalized, will require that an agency provide guidance to energy companies subject to those regulations on how the agency interprets any ambiguity and actions the company must take to comply.[169] These actions could fall under an array of regulations or alternative compliance methods.[170] For energy companies that fall under the jurisdiction of the Fifth Circuit, the legal reasoning provided in the *Clarke* decision

162. *National Ctr. for Pub. Pol'y Rsch*., 2004 WL 4784358, at *5.

163. *Id.*; *see also* 5 U.S.C. § 551(13).

164. *National Ctr. for Pub. Pol'y Rsch*., 2004 WL 4784358, at *5.

165. *Id.* at *5-6.

166. *See* discussion *supra* Part III.C.1.

167. *See generally Document Search*, FED. REG., https://www.federalregister.gov/documents/search?conditions%5Bagencies%5D%5B%5D=environmental-protection-agency&conditions%5Bsignificant%5D=1&conditions%5Btopics%5D%5B%5D=environmental-protection&conditions%5Btype%5D%5B%5D=PRORULE#advanced (last visited Apr. 10, 2025).

168. *See generally Document Search*, REGS.GOV, https://www.regulations.gov/search?commentEndDateFrom=2025-03-20&commentEndDateTo=2025-03-26&documentTypes=Notice%2CRule%2CProposed%20Rule&sortBy=commentEndDate (last visited Mar. 20, 2025).

169. *See generally* EPA, SMALL ENTITY COMPLIANCE GUIDE FOR OIL AND NATURAL GAS SECTOR: EMISSION STANDARDS FOR NEW, RECONSTRUCTED, AND MODIFIED SOURCES (Aug. 2016), https://www.epa.gov/sites/default/files/2016-08/documents/2016-compliance-guide-oil-natural-gas-emissions.pdf.

170. *Id.*; *see also* Letter from Penny E. Lassiter, Acting Div. Dir., EPA, to Rhonda Jeffries, Env't Programs Manager, Okla. Dep't of Environmental Quality (Apr. 9, 2019), https://www.epa.gov/sites/default/files/2020-07/documents/ok_deq_ri_for_appendix_f_04-09-19.pdf (EPA provides regulatory interpretation to ODEQ regarding quality assurance procedures in 40 C.F.R. § 60, app. F).

could give energy companies a means of legal recourse regarding withdrawn or contradicted agency guidance.[171] However, to be successful, a company must show the guidance: (1) stems from, or is considered, an "agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act,"[172] (2) the company would have to show the guidance was "final agency action,"[173] (3) that there was an injury linked to the reliance upon the agency's guidance, and (4) that the agency forfeited its discretion when it withdrew its guidance.[174] This would give energy companies more protection if an agency revokes or contradicts its regulatory and permitting guidance, recommendations, or enforcement discretion because the *Clarke* decision, at least in the Fifth Circuit's jurisdiction, will potentially force an agency to articulate an adequate reason now to withdrawal its guidance or face an arbitrary and capricious issue.[175] The *Clarke* decision may only be binding in the Fifth Circuit's jurisdiction, but other jurisdictions should find *Clarke's* reasoning compelling.[176]

IV. CONCLUSION

Energy companies, like companies in other industries, are regulated by many federal agencies such as FERC, PHMSA, and EPA.[177] These agencies, like many others, use informal guidance documents, including NALs, as part of their regulatory scheme to carry out their duty to develop and enforce regulations.[178] While the Fifth Circuit's decision in *Clarke* to hold that a NAL can meet the justiciability and APA requirements and to allow judicial review may not result in the Appellants winning their ultimate case in this instance, this new precedent has likely opened the door to energy companies being able to legally challenge agency NALs and similar agency informal guidance that were previously considered non-justiciable.[179] What made the Fifth Circuit's decision possible in this case, was that instead of just pointing to previous court decisions regarding NALs, the Fifth Circuit, using a paradigm framework approach, considered each issue, step-by-step, while applying the applicable law to each issue.[180] Using this approach, the Fifth Circuit was able to fletch out that NALs are not automatically non-binding; rather, NAL's can be fit for judicial review.[181] And when regulated entities have relied

171. *See generally* Clarke, 74 F.4th 627 (5th Cir. 2023).

172. 5 U.S.C. § 551(13).

173. *Bennett*, 520 U.S. at 177-78.

174. *Clarke*, 74 F.4th at 638-39.

175. *Id.* at 644.

176. Matthew L. Schafer, *Federal Law, Federal Courts, and Binding and Persuasive Authority*, THE WRITING CTR., GEO. UNIV. L. CTR. 2 (2013), https://www.law.georgetown.edu/wp-content/uploads/2018/07/Matthew-Schafer-FederalLawFederalCourtsandBindingandPersuasiveAuthority.pdf (discussing the difference between binding and persuasive authority).

177. *Document Search*, *supra* note 168.

178. *Oil and Gas Industry: A Research Guide — U.S. Regulatory Agencies*, LIBR. OF CONG., https://guides.loc.gov/oil-and-gas-industry/laws/agencies (last visited Apr. 28, 2025); *see also* source cited *supra* note 5 and accompanying text.

179. *Clarke*, 74 F.4th at 636-39, 646.

180. *Id.* at 635-40, 646.

181. *Id.* at 635-40.

on agency guidance, to their detriment, agencies should be bound to the informal guidance it issued, unless as the APA allows, the agency has provided an adequate reason for the rescission of that guidance.[182] Surely agencies and other proponents of *Auer* and *Skidmore* deference would agree an agency's interpretations and other forms of guidance should be something energy companies and other regulated entities can rely upon and once reliance is established that an agency should not only stand by its guidance, but also be bound to it.[183]

After all, what is the real point in asking an agency to provide guidance if no regulated entity can rely on it in the first place nor seek judicial relief if the agency arbitrarily and capriciously contradicts or rescinds it?[184]

The consequence of the Fifth Circuit's holding in *Clarke* has at least two possibilities.[185] First, there will likely be more challenges to agency actions involving informal guidance that uses *Clarke* as the legal basis.[186] The Fifth Circuit's reasoning in *Clarke* and *National Center for Public Policy Research* has certainly provided regulated entities a good road map on how to craft an argument to challenge informal guidance and when.[187] Second, it is possible that the decision in *Clarke* may lead to agencies being more hesitant to issue NAL's and other informal guidance in the future.[188] Hopefully agency's do not choose that path because the various types of informal guidance documents they have produced in the past have been valuable to regulated entities, including energy companies, and the public.[189]

J. Travis Lee[*]

182. *See* William Funk, *Agency guidance documents and NRDC v.* EPA, TRENDS (ABA Section of Env't, Energy, and Res., Chi., Ill.), May 2012, https://www.americanbar.org/content/dam/aba/publications/trends/2012/Trends_May_June_2012.pdf; *see also* discussion *supra* Part II.J.

183. *See* discussion *supra* Part II.J.

184. U.S. DEP'T OF JUST., JUSTICE MANUAL: 1-19.00 — PRINCIPLES FOR ISSUANCE AND USE OF GUIDANCE DOCUMENTS (Apr. 2022), https://www.justice.gov/jm/1-19000-limitation-issuance-guidance-documents-1#:~:text=Unlike%20rules%20promulgated%20through%20the,still%20serve%20many%20valuable%20functions.

185. *See generally* Clarke, 74 F.4th 627 (5th Cir. 2023).

186. *National Ctr. for Pub. Pol'y Rsch*., 2004 WL 4784358, at *5

187. *See Clarke*, 74 F.4th at 636-39, *and National Ctr. for Pub. Pol'y Rsch*., 2004 WL 4784358, at *6-7.

188. Ronald Filler, *Ask the Professor — What Will Be the Impact of the Recent Fifth Circuit Decision in Clarke v. CFTC on Future CFTC No-Action Letters?*, 43 FUTURES & DERIVATIVES L. REP. 8, 12 (2023), https://digitalcommons.nyls.edu/cgi/viewcontent.cgi?article=2602&context=fac_articles_chapters

189. ADMIN. CONF. OF THE U.S., AGENCY GUIDANCE THROUGH POLICY STATEMENTS (Dec. 22, 2017), https://www.acus.gov/recommendation/agency-guidance-through-policy-statements.

* Travis Lee is a third-year law student at the University of Tulsa College of Law and student case note editor of the *Energy Law Journal*. Travis would like to thank Mr. Patrick Traylor of Vinson & Elkins for making him aware of the case and primary issue this note discusses. Travis also wants to thank Mr. Harvey Reiter, Mr. Buford Pollett, Ms. Warigia Bowman, and Gwen Savitz for their assistance and guidance throughout the drafting and publication process. Travis would also like to thank his many family, friends, ELJ peers, and co-workers for their support.