

NOTE

CLOWNING AROUND WITH FINAL AGENCY ACTION

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While Chevron and Auer deference dominate the administrative law literature, another doctrine—the final agency action requirement—has been perverted by the lower federal courts. Several circuits have developed an undergrowth of formalistic rules that tighten the Supreme Court’s standard, as it was laid out in Bennett v. Spear. This development ignores the Court’s decades-old refrain that the final agency action requirement should be flexible. Unfortunately, this development comes at the worst possible time. The interconnectedness of federal and state agencies has led to a sort of division of labor. Data collection, designations, and enforcement are increasingly divided across different agencies. Because the lower federal courts have been increasingly formalistic with the final agency action requirement, there is an ever-increasing number of agency actions that will evade judicial scrutiny. To demonstrate how and why the lower federal courts should correct their course, this Note looks at almost a century of precedent, the development of “fusion centers” after 9/11, and a very peculiar case from the Sixth Circuit involving clowns.

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INTRODUCTION

On September 16, 2017, thousands of protesters wearing face paint, clown-themed shirts, and carrying signs reading “Make America Whoop Again” descended on the National Mall.¹ The group was comprised of members of the Juggalos, the fans of the infamous band Insane Clown Posse (ICP). The Juggalos came to the National Mall to protest their unprecedented designation by the National Gang Intelligence Center (NGIC) as a “loosely-organized hybrid gang.”² In addition to the political demonstrations, the group also pursued litigation to remove themselves from the NGIC Report.³

The NGIC was created by Congress in 2005 to aggregate and analyze information on gang activity from law enforcement agencies across the country.⁴ The NGIC was just one of several “fusion centers” that cropped up in the mid-2000s.⁵ Federal fusion centers aggregate and analyze information that can be used by state and federal law enforcement, federal agencies, and the states’ own fusion centers. Fusion centers were one piece in a massive restructuring of government that occurred after the 9/11 terror attacks.⁶ Investigations after 2001 concluded that the federal government failed to efficiently aggregate information, analyze intelligence, and coordinate inter-agency action.⁷ The post-9/11 emphasis on creating the infrastructure for data collection, analysis, and replication creates a through line that leads directly to the creation of the NGIC.⁸

¹ Brandon Carter, *The Best Signs from the ‘Juggalo March’ in Washington*, THE HILL, (Sept. 16, 2017), <http://thehill.com/blogs/blog-briefing-room/news/351013-the-best-signs-from-the-juggalo-march-in-washington>.

² NAT’L GANG INTELLIGENCE CTR., 2011 NATIONAL GANG TREAT ASSESSMENT EMERGING TRENDS 22 (2011) [hereinafter “2011 NGIC Report”].

³ *Parsons v. U.S. Dep’t of Justice*, 801 F.3d 701, 716 (6th Cir. 2015).

⁴ *See Violence Against Women and Department of Justice Reauthorization Act of 2005*, Pub. L. 109–162, § 207, 119 Stat. 2960, 3093–94 (codified at 34 U.S.C. § 41507) (2006).

⁵ The NGIC describes itself as a “multi-agency fusion center” that seeks to educate and inform enforcement efforts across state and federal institutions. NAT’L GANG INTELLIGENCE CTR., 2015 NATIONAL GANG REPORT 6 (2015) [hereinafter 2015 NGIC Report].

⁶ *See After 9/11, Fusion Centers Evolve Public Safety Culture Toward Inter-Agency Cooperation*, ENVISAGE TECHNOLOGIES (Jan. 7, 2014), <http://www.envisagenow.com/after-911-fusion-centers-evolve-public-safety-culture-toward-inter-agency-cooperation>. *See generally* NAT’L SECURITY COUNCIL, NATIONAL STRATEGY FOR INFORMATION SHARING: SUCCESSSES AND CHALLENGES IN IMPROVING TERRORISM-RELATED INFORMATION SHARING (2007) (describing the trend towards “fusion centers,” for which the purpose is to “develop . . . national networks that promote[] the adoption of vertical information sharing between federal, state, and local agencies.”).

⁷ *See NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES, THE 9/11 COMMISSION REPORT* 79–80, 267, 321, 394–95 (2004).

⁸ *Cf.* Kevin Carroll, *Want to Stop Cross-border Gangs? You Need a Nerve Center, Not Trump’s Wall*, WASH. POST, (Feb. 14, 2019, 12:50 PM), https://www.washingtonpost.com/outlook/2019/02/14/want-stop-cross-border-gangs-you-need-nerve-center-not-trumps-wall/?no-redirect=on&utm_term=.8143c5b17416 (linking the creation of fusion centers and data collection agencies with 9/11).

Although the information gathered includes the designation of different gangs, those designations carry no direct legal consequences.⁹ Congress also requires that the NGIC publish a report utilizing their work.¹⁰ Copies of this report are then distributed by the NGIC to state and local law enforcement agencies across the country.¹¹

Even though the NGIC Report's gang designations purportedly do not carry legal effects, the Juggalos faced increased harassment and targeting by police after being listed in the 2011 NGIC Report.¹² In 2014, the American Civil Liberties Union (ACLU) of Michigan sued the Department of Justice and the FBI on behalf of ICP and four plaintiff-Juggalos.¹³ The plaintiffs alleged violations of their Fifth Amendment due process rights and a chill on their freedom of association due to state and federal law enforcement officials' reliance on the NGIC Report.¹⁴ The complaint alleged that the NGIC, by listing the Juggalos in its report, had effectively criminalized being a fan of a counter-culture band.¹⁵

The Juggalos suit was doomed to fail, however, because of the interaction between fusion centers—what they are and how they function—and the emerging formalism of the lower federal courts with respect to a doctrine called the final agency action requirement.¹⁶ The Juggalos' case, *Parsons v. U.S. Dep't of Justice*, was brought in 2014, dismissed for want of standing, reversed by the Sixth Circuit,¹⁷ and then dismissed again for lack of final agency action. The actions of agencies like the NGIC are reviewable under the Administrative Procedure Act (APA) only when “made reviewable by statute” or when they are “final agency action for which there is no other adequate remedy in a court.”¹⁸ The Sixth Circuit ultimately ruled against the Juggalos because the NGIC Report did not have binding legal consequences in and of itself.¹⁹ In *Parsons*, the Sixth Circuit joined the Fourth Circuit in adopting a new standard: agency actions which indirectly result in legal consequences

⁹ *Parsons v. United States Dep't of Justice*, 878 F.3d 162, 169 (6th Cir. 2017).

¹⁰ *Id.* at 164–65.

¹¹ The NGIC published reports in 2009, 2011, 2013, and 2015. *See id.* at 165.

¹² *See Parsons v. U.S. Dept. of Justice*, 801 F.3d 701, 707–09 (2015).

¹³ *Parsons v. U.S. Dep't of Justice*, 30 F. Supp. 3d 648 (E.D. Mich. 2014), rev'd, 801 F.3d 701 (6th Cir. 2015).

¹⁴ *Parsons*, 878 F.3d at 165–66.

¹⁵ *See Parsons*, 801 F.3d at 714.

¹⁶ *See* Kristin E. Hickman & Mark R. Thomson, *Pursuing Pragmatic Finality in Agency Action 1* (Dec. 6, 2017) (unpublished manuscript) (on file with the Antonin Scalia Law School) (“The lower courts have applied finality doctrine highly variably, drawing from the Supreme Court and their own precedent to elaborate *Bennett*'s two-part standard with their own criteria, with applications ranging along a continuum from formal and legalistic to flexible and pragmatic.”).

¹⁷ *Id.* at 706.

¹⁸ 5 U.S.C. § 704 (2012).

¹⁹ *See Parsons v. United States Dep't of Justice*, 878 F.3d 162, 168 (6th Cir. 2017).

but which “flow” directly from a third-party’s action, will not be final for the purposes of APA review.²⁰ The Fourth and Sixth Circuits’ prohibition functions as an elaboration of the Supreme Court’s second prong from *Bennett v. Spear*.²¹ This new rule is predicated on a distinction between the legal effects an agency could directly have on a potential plaintiff and the coercive effects agency action could have as a result of third-party enforcement.²²

It is worth pausing on the implications of this holding. The Sixth Circuit had already found that the Juggalos had standing for their constitutional injuries.²³ The dismissal of the case leaves the Juggalos without an adequate remedy for these violations. The Sixth Circuit alluded to the possibility that plaintiffs could bring § 1983 actions against the individual officers that infringed on their rights,²⁴ but that option is not a realistic avenue for redress. Even if the Juggalos could surmount the hurdle of qualified immunity,²⁵ it is almost impossible to remedy the “chill” on their rights through § 1983. Police officers around the United States are indemnified,²⁶ making it unlikely that there will be much of a financial incentive for police to stop relying on gang designations. Furthermore, this injury is national in scope. Because Juggalos travel all around the country for their celebrations, Juggalos would have to launch expensive § 1983 suits across the country with little prospect for success. In short, the decision means that Juggalos are deprived of a remedy that goes to the heart of the issue, their designation by the NGIC. Managing the downstream effects of the NGIC’s designation is an ineffective half-measure.

²⁰ *Id.* (citing *Flue-Cured Tobacco Coop. Stabilization Corp. v. U.S. Evtl. Prot. Agency*, 313 F.3d 852, 859–62 (4th Cir. 2002)).

²¹ 520 U.S. 154, 177–78 (1997) (“First, the action must mark the ‘consummation’ of the agency’s decisionmaking 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.’”) (emphasis added).

²² See *Flue-Cured*, 313 F.3d at 858–61. Throughout this Note, the terms “third-party effects,” “third-party injuries,” and “third-party enforcement” are used interchangeably to describe the same phenomenon. In *Parsons*, the third-party enforcement was conducted by police. Because of the ubiquitous flow of information from fusion centers like the NGIC to state fusions centers, state police, and federal authorities, the importance of this approach to final agency actions could be profound in the areas of criminal justice, national security, and immigration. See *Parsons*, 878 F.3d at 168.

²³ See generally *Parsons v. U.S. Dept. of Justice*, 801 F.3d 701 (2015).

²⁴ See *Parsons*, 878 F.3d at 171 n.9 (“Although NGIC’s gang designation is not a final agency action . . . our holding does not foreclose the possibility that Appellants could raise their constitutional claims against the individual officers . . . through a § 1983 suit.”).

²⁵ The doctrine of qualified immunity prevents government agents from being held personally liable for § 1983 suits. See William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45, 46 (2016). See also Kit Kinports, *The Supreme Court’s Quiet Expansion of Qualified Immunity*, 100 MINN. L. REV. HEADNOTES 62 (2016).

²⁶ See John C. Jeffries, Jr., *The Right-Remedy Gap in Constitutional Law*, 109 Yale. L.J. 87, 99–110 (1999); Daryl J. Levinson, *Rights Exceptionalism and Remedial Equilibrium*, 99 Colum. L. Rev. 857, 915 (1999).

sure. The effect of the Sixth Circuit rule would be equally applicable across different types of agencies. Because fusion centers and similar agencies operate in the areas of national security, immigration, and criminal justice enforcement, the types of constitutional injuries that will be insulated by a formalistic final agency action rule will be both diverse and severe.

This Note dives into the Sixth Circuit's holding in *Parsons* and attempts to contextualize the prohibition on what we call "third-party harms"—meaning, harms the result from third-party enforcement and was the foreseeable result of some agency action. We conclude that (1) the final agency action requirement has become unmoored from precedent,²⁷ and (2) that the lower federal courts' increasing formalism is incompatible with the realities of the post-9/11 federal government.²⁸

First, the *Parsons* decision's procedural history points to an issue in the doctrine. Prior to dismissing the case for lack of final agency action, the Sixth Circuit had already reversed the district court in concluding that the plaintiffs had standing.²⁹ Meaning that the plaintiffs had demonstrated injury in fact, causation, and redressability. Despite making these findings with respect to an alleged constitutional injury, the court's prohibition on the justiciability of third-party harms under the APA insulated the agency from scrutiny. This result seems at odds with the maxim of the federal courts, that the courts should have the power to remedy the violation of constitutional rights.³⁰ The Sixth Circuit's two opinions in the *Parsons* litigation begets several questions: what exactly is the purpose served by a formalistic application of the final agency action requirement if plaintiffs have satisfied the requirements of standing? Is the purpose of the final agency action requirement to ensure that agency actions lead to legal consequences, or is it to ensure that agency actions have a direct and immediate impact on a person?³¹

²⁷ See Hickman & Thomson, *supra* note 16, at 1 (indicating that the lower federal courts have become increasingly unmoored from the Supreme Court's consistent call for flexibility).

²⁸ See Beau Baumann, *An Administrative Law Approach to Criminal Justice Reform*, CORNELL J.L. & PUB. POL'Y, JLPP BLOG, (Sept. 10, 2018), <http://jlpp.org/blogzine/an-administrative-law-approach-to-criminal-justice-reform/> (exploring the tension between formalism in the final agency action requirement and criminal justice reform).

²⁹ See *Parsons v. U.S. Dept. of Justice*, 801 F.3d 701 (6th Cir. 2015).

³⁰ See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) ("The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of vested legal rights."). *But see* John C. Jeffries, Jr., *The Right-Remedy Gap in Constitutional Law*, 190 YALE L.J. 87 (1999) (exploring the degree to which the federal courts fail to live up to this ideal).

³¹ See William Funk, *Final Agency Action After Hawkes*, 11 N.Y.U. J.L. & LIBERTY 285, 303 (2017) (arguing that these are aims of two separate strands of the case law).

This Note argues that the final agency action doctrine has lost track of its roots.³² In some areas, administrative law is closely linked to the administrative common law that existed prior to the statute's passage.³³ Examining cases from both before the passage of the APA and after, we argue that the final agency action requirement was never meant to shield cases like *Parsons* from judicial review.³⁴ Instead, the pre-APA equivalent of the final agency action requirement was a forerunner to standing. Furthermore, the *Bennett* Court itself likely never intended for its second prong to be interpreted so rigidly. Instead, the body of case law from before and after the passage of the APA suggests that courts should adopt a flexible approach to remedy foreseeable and severe injuries.³⁵

Second, the Fourth and Sixth Circuits' prohibition on third-party harms is increasingly out of step with the structure of the federal government.³⁶ There is a large and consistent body of case law concluding that the realities of the administrative process require flexibility from the final agency action requirement.³⁷ The necessity of flexibility has only increased with time.³⁸ Fusion centers like the NGIC are part of the increasing interconnectedness of federal and state agencies. They portend an increase in (1) interagency and multijurisdictional sharing of data and (2)

³² Cf. Daniel A. Farber, *The Lost World of Administrative Law*, 92 Tex. L. Rev. 1137, 1140 (2014) (arguing that "the actual workings of the administrative state have increasingly diverged from the assumptions animating the APA and classic judicial decisions that followed").

³³ Cf. Evan D. Bernick, *Envisioning Administrative Procedure Act Originalism*, 70 Admin. L. Rev. 807, 809 (2018) (arguing that the text and history behind the APA has been used by courts in several leading cases).

³⁴ See *infra* Section I.

³⁵ See Jonathan H. Adler, *When Is Agency Action Final for Purposes of Judicial Review?*, *The Volokh Conspiracy*, (Apr. 30, 2018, 11:42 AM), <https://reason.com/volokh/2018/04/30/when-is-agency-action-final-for-purposes> (noting the tension between the APA's presumption in favor of judicial review and the undergrowth of formalistic circuit court precedent); see also 5 U.S.C. §704 (authorizing judicial review for "final agency action for which there is no other adequate remedy in a court."); *Abbott Labs v. Gardner*, 387 U.S. 136, 140 (1967) (interpreting the APA as "embod[ying] the basic presumption of judicial review" provided that standing was satisfied).

³⁶ Those circuits are not the only ones that have adopted formalistic rules. See *Ass'n of Flight Attendants-CWA v. Huerta*, 785 F.3d 710, 713 (D.C. Cir. 2015) (holding that statements of policy and interpretive rules could never constitute final agency action); *Belle Co. v. U.S. Army Corps of Engineers*, 761 F.3d 383 (5th Cir. 2014). For criticism of the D.C. Circuit rule in particular, see Funk, *supra* note 31, at 303–05.

³⁷ See, e.g., *U.S. Army Corps of Engineers v. Hawkes Co., Inc.*, 136 S.Ct. 1807, 1815 (2016) (quoting *Abbott Labs* and describing the Court's "pragmatic" approach to finality). Cf. *Bell v. New Jersey*, 461 U.S. 773, 779–80 (1983) ("Our cases have interpreted pragmatically the requirement of administrative finality . . ."); *FTC v. Standard Oil Co. of Calif.*, 449 U.S. 232 (1980) (quoting precedent supporting the "flexible approach to finality").

³⁸ Cf. Margaret Hu, *Big Data Blacklisting*, 67 Fla. L. Rev. 1735, 1740 (2016) ("[T]he interrelationship between various government big data programs, which may on their face appear wholly unrelated, deserves close interrogation.").

increased separation between analysis and enforcement.³⁹ This trend is creating unique challenges for courts,⁴⁰ but the prohibition on third-party harms may altogether shelter some types of agencies from meaningful judicial scrutiny. That courts are limiting scrutiny seems to ignore the fact that Congress established these agencies with third-party enforcement in mind.⁴¹ Congress and the states have established fusion centers across the country to collect data on national security issues⁴² and criminal law enforcement. The decision in *Parsons*, which can be easily applied to identical fusion centers in other contexts, will have important implications. This trend is especially worrisome because of the high-stakes areas in which fusion centers operate.⁴³

The Sixth Circuit's holding creates a unique policy issue: it seems to allow agencies to avoid judicial review by "out-sourcing" enforcement to state and federal officials in other agencies.⁴⁴ Given the interconnectedness of the modern administrative state, whereby information gathering and subsequent enforcement may be divided amongst different agencies and sub-agencies, the *Parsons* approach may limit federal courts' jurisdiction even where third-party enforcement (by either state or federal agencies) is the foreseeable result, if not the essential purpose behind a congressional enactment.

The *Parsons* rule may also further incentivize agencies to stay clear of the notice-and-comment rulemaking process.⁴⁵ If courts ignore the practical effects of agency actions, then agencies can avoid judicial scru-

³⁹ Priscilla M. Reagan & Torin Monahan, *Fusion Center Accountability and Intergovernmental Information Sharing*, 44 PUBLIUS: THE J. OF FEDERALISM 475 (2014) ("With their goals of information sharing, 'connecting the dots,' and moving beyond traditional information silos, fusion centers operate across a variety of jurisdictional boundaries, which often exist in different regulatory and legal environments.").

⁴⁰ See *id.* ("It is generally challenging to design and manage accountability in such multijurisdictional and multipurpose settings."). Cf. Wayne A. Logan & Andrew Guthrie Ferguson, *Policing Criminal Justice Data*, 101 MINN. L. REV. 541, 543 (2014) ("Today, the prevailing zeitgeist of governments is one of database expansion, not quality control or accountability, and a blasé acceptance of data error and its negative consequences for individuals.").

⁴¹ See JOHN ROLLINS, CONGR. RES. SERV., *Fusion Centers: Issues and Options for Congress*, (2008), https://www.everycrsreport.com/files/20080118_RL34070_685308a7155077c35f28662cfa3d2b16daec7ff6.pdf (describing the ways Congress supported fusion centers with the ultimate goal of creating actionable intelligence).

⁴² See *Latif v. Holder*, 28 F. Supp. 3d 1134 (D. Or. 2014) (finding that the FBI's "No-Fly list," which is maintained by the Terrorist Screening Center, violates plaintiffs' due process rights).

⁴³ See U.S. DEP'T OF JUSTICE, *Fusion Center Guidelines: Developing and Sharing Information and Intelligence in a New Era* 14 (2006) (describing inter-agency efforts across law enforcement, national security organizations, and immigration and customs).

⁴⁴ Cf. Abbe R. Gluck et al., *Unorthodox Lawmaking, Unorthodox Rulemaking*, 115 COLUM. L. REV. 1789 (2015) (discussing the trends toward inter-agency delegations and the delegations between state and federal agencies).

⁴⁵ See Funk, *supra* note 31 at 304.

tiny by structuring data collection, data analysis, designations, and enforcement separately.⁴⁶

This Note—focusing on the second prong of *Bennett*—argues that the formalistic approach adopted by the Fourth and Sixth Circuits is anachronistic and should be eschewed in favor of a more pragmatic approach. This Note adopts an approach that takes some inspiration from standing doctrine,⁴⁷ and, as made explicit, the approach the authors take is predicated on a historical understanding of final agency action. We rely on case law from both final agency action and standing to suggest that the two doctrines serve overlapping objectives. With that understanding in mind, we attempt to further the literature on agency finality by offering a more flexible approach to the final agency action requirement.

Section I of this Note details the case law surrounding the second prong of the *Bennett* test. We argue that the *Parsons* approach harkens back to a long-rejected body of law defining agency jurisdiction: the “negative order” doctrine of the early twentieth century. Section I will detail the failings of the “negative order” doctrine and the perverse policy implications of the new formalistic take on agency finality.

Section II will compare the second prong to recent standing doctrine, especially cases dealing with so-called “probabilistic injuries.” We argue that the not-too-distant relative of agency finality, modern standing doctrine, provides a much-needed template for a pragmatic approach. Courts should adopt a sliding scale approach to final agency action. We argue that where agency actions foreseeably induce third-party enforcement that results in a significant injury to plaintiffs, courts should allow these cases to proceed to the merits. Courts should be especially mindful of constitutional injuries—chilling-effect cases in particular—and legislative intent. Where Congress obviously intended for third-party enforcement, courts should be especially receptive to APA challenges.

Finally, Section III will discuss how courts can utilize the pragmatic approach to agency finality when dealing with cases like *Parsons*, where foreseeable legal consequences stem from third-party enforcement. This section will also weigh the benefits of the pragmatic approach. We argue

⁴⁶ Cf. *Soundboard Ass’n v. FTC: The D.C. Circuit Holds that Informal Letters Are Not Eligible for Judicial Review Under the Administrative Procedure Act*, 132 Harv. L. Rev. 1345, 1352 (2019) (arguing that the D.C. Circuit’s formalism risks incentivizing agency to “duck judicial scrutiny”).

⁴⁷ While administrative law has often veered from the administrative common law that influenced the APA, a growing number of scholars have attempted to reconnect administrative law with its roots. See, e.g., Evan D. Bernick, *Envisioning Administrative Procedure Act Originalism*, 70 ADMIN. L. REV. 807 (2018).

that the pragmatic approach has the advantage of partially reconciling the Supreme Court's conflicting line of cases on agency finality.⁴⁸

This Note adds to the literature by shifting the focus to *Bennett's* second prong, as scholars have mostly focused on *Bennett's* first prong, which serves a different objective.⁴⁹ The second prong has confused the lower courts and scholars.⁵⁰ This Note reconnects the second prong with its pre-APA predecessor and the Supreme Court's case law. By demonstrating the perils of adopting the Fourth and Sixth Circuits' rule in the post-9/11 era, we hope to undermine the further spread of formalism in the lower federal courts.

I. THE FINAL AGENCY ACTION REQUIREMENT

The APA predicates judicial review of agency action on a requirement of finality.⁵¹ While finality is correctly conceptualized as a statutory requirement for review, its earliest roots are in pre-APA cases.⁵² The formalistic conception of finality in *Parsons* is remarkably similar to the "negative order" doctrine from early twentieth century administrative law cases.⁵³ Several early cases dealing with both the "negative order doctrine" and the final agency action requirement frame agency finality as a forerunner to modern standing doctrine. Like the negative order doctrine, the formalistic approach used in *Parsons* overly confines judicial review.

This Section demonstrates the similarities between the formalistic *Parsons* approach and the ill-fated negative order doctrine, setting the stage for an alternative approach outlined in subsequent sections. An-

⁴⁸ The Supreme Court has at least three living lines of cases dealing with agency finality: (1) *Frozen Food Express v. U.S.*, 351 U.S. 40 (1956); (2) *Abbott Labs. v. Gardner*, 378 U.S. 136 (1967); and *Bennett v. Spear*, 520 U.S. 154 (1997).

⁴⁹ See Stephen Hylas, *Final Agency Action in the Administrative Procedure Act*, 92 N.Y.U. L. REV. 1644, 1645 (2017) ("The policy behind the finality requirement is a simple one: Temporary day-to-day management decisions are best left to the government agency, while final definitive determinations that cause hardship to private parties should be subject to judicial review."); Mark Seidenfeld, *Substituting Substantive for Procedural Review of Guidance Documents*, 90 TEX. L. REV. 331, 376 (2011) ("The foundation for the [first prong of the *Bennett* test] is avoidance of judicial interference with agency decision making until the agency has completed its own resolution.").

⁵⁰ See *id.* at 379 ("There are serious questions as to whether [the second prong] really should be part of determining finality of a rule under the APA."); *Id.* at 380 ("Perhaps more significantly, this second prong of the finality doctrine has no logical relation to the aim of preventing unnecessary judicial intervention into ongoing agency rulemaking."); Hickman & Thompson, *supra* note 16, at 3 (arguing that "the federal circuit courts of appeals have struggled to understand and apply *Bennett's* two-part standard.").

⁵¹ See 5 U.S.C. § 704 (2012) ("Agency 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.").

⁵² See generally *Rochester Tel. Corp. v. United States*, 307 U.S. 125, 140 (1939).

⁵³ See generally *Proctor & Gamble v. United States*, 225 U.S. 282 (1912).

other underlying theme of this Section—one that is central to the approach of this Note—is that agency finality requires a more holistic approach. While scholars have conventionally explained agency finality through its similarity to ripeness,⁵⁴ that aspect of finality only relates to the first prong of *Bennett*.⁵⁵ The second prong of *Bennett* is more closely related to the negative order doctrine and pre-APA concerns with the constitutional requirement of a “Case” or “Controversy.”⁵⁶ This understanding of the question in *Parsons* informs the importation of standing doctrine into agency finality in subsequent sections.

Before proceeding, it is worth pausing on what exactly the relationship between pre-APA case law and modern administrative law is. Several areas of administrative law—including exhaustion and other APA justiciability requirements—are profoundly influenced by the pre-APA case law.⁵⁷ This relationship between administrative common law and the APA is why the Attorney General’s Manual on the APA remains one of the authoritative tools for interpreting the statute.⁵⁸ Decades after the APA’s enactment in 1946, the standard and normative concerns of *Skidmore* are referenced throughout the case law and literature.⁵⁹ While it is true that administrative law is best understood as an ever-evolving body of common law,⁶⁰ the pre-APA case law remains instructive. The pre-APA case law’s usefulness is especially profound where courts considered issues that reemerge in the modern day and where institutional developments favor *maintaining* the pre-APA understanding. Here, because courts rejected a standard that was identical to the Sixth Circuit’s rule, and because of the rise of fusion centers after 9/11, courts should look to the pre-APA case law for inspiration.

⁵⁴ STEPHEN G. BREYER ET AL., ADMINISTRATIVE LAW AND REGULATORY POLICY: PROBLEMS, TEXT, AND CASES 915 (6th ed. 2006) (arguing that “APA § 704 can be understood to have codified the ‘ripeness’ requirement” from pre-APA caselaw).

⁵⁵ See Mark Seidenfel, *Substituting Substantive for Procedural Review of Guidance Documents*, 90 TEX. L. REV. 331, 378–80 (2011) (noting the tension between the policy underpinnings of the two prongs and questioning whether the second prong “should be part of determining finality of a rule under the APA” at all).

⁵⁶ See *infra* notes 38–43 and accompanying text.

⁵⁷ See, e.g., *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 63 (2004) (arguing that the meaning of “agency action unlawfully withheld” should be understood in light of the pre-APA understanding, because “the APA carried forward the traditional practice prior to its passage”) [hereinafter *SUWA*]; *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 n.31 (1979). Cf. Gillian E. Metzger, *Foreword: Embracing Administrative Common Law*, 80 GEO. WASH. L. REV. 1293, 1298–1302 (2012) (discussing the judicial refinement of a doctrinal framework of administrative law through the APA and case law).

⁵⁸ See *SUWA*, 542 U.S. at 63–64 (“The mandamus remedy was normally limited to enforcement ‘of a specific unequivocal command’ As described in the Attorney General’s Manual on the APA, a document whose reasoning we have often found persuasive.”).

⁵⁹ See *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

⁶⁰ See generally Metzger, *supra* note 57.

A. *Final Agency Action Before Parsons*

The requirement of final agency action was one of several early rules that governed judicial review of the administrative state in its infancy. In the three decades leading to the enactment of the APA in 1946, suits against agencies took an increasingly large share of the federal docket. The federal judiciary responded with three doctrines tailor made to the agency context: primary jurisdiction doctrine,⁶¹ administrative finality doctrine, and negative order doctrine.⁶² The second prong of the final agency action requirement—at least as articulated in *Parsons*—straddles several strands of the negative order doctrine.⁶³

The negative order doctrine was first utilized in *Proctor & Gamble v. United States*,⁶⁴ which involved a complaint from Proctor & Gamble (“P&G”) to the Interstate Commerce Commission (ICC), objecting to rail rate regulations.⁶⁵ After a hearing, the ICC found that the regulations were not illegal under the agency’s governing statute.⁶⁶ P&G filed suit but was unsuccessful before the Supreme Court. The Court ruled that the decision to uphold the regulations was unreviewable.⁶⁷ The decision rested on two ideas: first, that the exercise of power to review “negative orders”—orders which did not compel or forbid any future conduct—was inconsistent with the governing statutory system of agency control; and second, that the ICC’s governing statute evinced an intent to limit judicial review.⁶⁸ For the next two decades, courts refused to review these so-called “negative orders.”

⁶¹ See *Texas & Pac. Ry. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 448 (1907) (holding that matters calling for technical expertise in the area of transportation must first be passed upon by the Interstate Commerce Commission before a court should maintain jurisdiction). Primary jurisdiction operates as a form of abstention, whereby courts that could pass on an administrative law claim will instead allow the agency to decide it. See generally *Far East Conf. v. United States*, 342 U.S. 570, 574 (1952) (describing primary jurisdiction as a principle requiring that “in cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over”).

⁶² See Robert J. Miller, *Review of Administrative Orders: Elimination of the “Negative” Order Doctrine*, 38 MICH. L. REV. 682 (1940) (detailing the increasing importance of administrative law cases and the rise of the three doctrines to help limit judicial review of agency decision-making).

⁶³ Pre-APA finality was markedly different than our modern doctrine of finality. It was a rule of law limiting the scope of issues that a court could decide even when jurisdiction was available. See *Rochester Tel. Corp. v. United States*, 307 U.S. 125, 140 (1939) (“Only questions affecting constitutional power, statutory authority, and the basic prerequisites of proof can be raised.”).

⁶⁴ 225 U.S. 282, 288 (1912).

⁶⁵ *Id.* at 287.

⁶⁶ *Id.*

⁶⁷ *Id.* at 301–02.

⁶⁸ See *id.* at 297–301; see also P.T.M., *Negative Order Doctrine*, 15 IND. L.J. 151, 153 (1939).

The concept of negative orders thereafter came to include cases like *Parsons*—ones in which the challenged agency action was followed by injuries resulting from a third-party’s actions. The doctrine of negative orders came to encompass three loosely-related types of cases, all of which were unreviewable prior to 1939. The first kind of negative order that became unreviewable in *Proctor & Gamble* included cases where an agency action might forbid or compel conduct with binding legal force, but was contingent on some further agency action.⁶⁹ The second kind of negative order included agency actions that amounted to a refusal to grant relief from a statutory or regulatory duty levied on the regulated party.⁷⁰ The last kind of unreviewable negative order included cases “where the action sought to be reviewed does not compel conduct on the part of the person seeking review, but is attacked because it does not forbid or compel conduct by a third person.”⁷¹ *Parsons* and agency finality cases involving third-party effects roughly relate to the third type of “negative order.”

The negative order doctrine was short lived. In the 1930s, amidst the New Deal expansion of the administrative state, the doctrine was slowly eroded before facing a frontal attack in *Rochester Tel. Corp v. United States*.⁷² There, Justice Frankfurter reevaluated each category of the negative order doctrine, acknowledging that

[a]ny distinction . . . between “negative” and “affirmative” orders . . . serves no useful purpose, and insofar as earlier decisions have been controlled by this distinction, they can no longer be guiding.⁷³

While the first type of negative order doctrine survived Frankfurter’s scrutiny, the third did not. Frankfurter interpreted this category as a temporary but unnecessary form of judicial abstention.⁷⁴

Three ideas from the *Rochester* holding are important for the purposes of this Note. First, Frankfurter’s opinion was the first in a long line of Supreme Court cases eschewing formalism in the context of agency finality.⁷⁵ Second, Frankfurter left in place the other three primary limitations on judicial review of agency action: primary jurisdiction, exhaus-

⁶⁹ See *Rochester*, 307 U.S. at 129.

⁷⁰ *Id.*

⁷¹ *Id.* at 130.

⁷² 307 U.S. 125 (1939).

⁷³ *Id.* at 143 (overruling *Proctor & Gamble v. United States*, 225 U.S. 282 (1912)).

⁷⁴ *Id.* at 137 (arguing that *Proctor & Gamble* was “part of the process of adjusting relations between the [ICC] and the courts to effectuate the purposes of the of the Commission”).

⁷⁵ See Miller, *supra* note 62, at 689 (“[T]he opinion is desirable in that it discards a concept which confused the category of reviewable orders, and further it escapes the confinement of rigidly grouping reviewable and non-reviewable orders.”).

tion, and agency finality.⁷⁶ What remained of the negative order doctrine was absorbed by modern agency finality over the next several decades. Third, Frankfurter's opinion framed the then-extant prerequisites for judicial review as a collective forerunner to standing.⁷⁷

Under the Court's perspective, the negative order doctrine, as championed by Justice Holmes in the early twentieth century,⁷⁸ was a rough way of getting at the Article III requirement of a "Case" or "Controversy."⁷⁹ Mixing prudential and constitutional concerns, Frankfurter clearly saw the negative order doctrine as a forerunner to standing. Under this view, Holmes' doctrine was an effort to reconcile common law notions of a judicial power with the emerging administrative state. Frankfurter's citation to *Hayburn's Case*⁸⁰ further indicates that the negative order doctrine was primarily concerned with the requirement of an adversarial proceeding.⁸¹

Rochester was just the first of many instances in which the Court would avoid the kind of formalism advanced in *Parsons*. Framing his decision as a quasi-constitutional one, Frankfurter, at the very least, suggested that the courts are not required to limit their reach to cases involving direct and non-third-party agency effects. But that conclusion is weakened by timing—*Rochester* was decided seven years before the codification of the agency finality requirement in the APA;⁸² rarely do courts frame finality as anything but a statutory requirement.⁸³

After the APA was enacted, the Court grappled with the finality requirement of § 704.⁸⁴ At times, the Court harkened back to Frankfurter's emphasis on the connection between finality and Article III (and

⁷⁶ See *id.* at 687 ("The opinion first affirms the doctrine of primary jurisdiction and necessity of full resort to the administrative process as prerequisites to petitioning for judicial review.").

⁷⁷ See *Rochester*, 307 U.S. at 131 ("Plainly the denial of judicial review in these cases does not derive from a regard for the special functions of administrative agencies. Judicial abstention here is merely an application of the traditional criteria for bringing judicial action into play. Partly these have been written into Article III of the Constitution by what is implied from the grant of 'judicial power' to determine 'Cases' and 'Controversies'" (citing U.S. CONST. art. III, § 2)).

⁷⁸ See *Lehigh Valley R.R. Co. v. United States*, 243 U.S. 412 (1917).

⁷⁹ See *Rochester*, 307 U.S. at 132.

⁸⁰ 2 U.S. 409 (1792).

⁸¹ See *Rochester*, 307 U.S. at 131 n.9.

⁸² See also *Columbia Broad. Sys. Inc. v. United States*, 316 U.S. 407, 417 (1942) ("The regulations are not any the less reviewable because their promulgation did not operate of their own force to deny or cancel a license. It is enough that failure to comply with them penalizes licensees, and appellant, with whom they contract.").

⁸³ See *Darby v. Cisneros*, 509 U.S. 137, 145 (1993) (describing the agency finality requirement as a statutory requirement).

⁸⁴ See *Pennsylvania Railroad Co. v. United States*, 363 U.S. 202 (1960).

indirectly to the nascent doctrine of standing).⁸⁵ But the Court's earliest decisions on finality consistently adopted Frankfurter's flexible approach to defining the courts' jurisdiction over agency action.⁸⁶

An important bridge between Frankfurter's conception of finality requirements (influenced by Article III) and the modern finality doctrine (rooted largely in a comparison with ripeness),⁸⁷ is *Frozen Foods Express v. United States*.⁸⁸ This case asked whether a 71-page ICC report which interpreted a provision on motor-carrier permitting was a final agency action.⁸⁹ A lower court found that it lacked jurisdiction over the case because "[t]he proceeding before the Commission was *not an adversary one*," and because the order was "no more than direct that an investigation be made of the meaning of the statutory language."⁹⁰ The lower court found a lack of jurisdiction because the report did not order the plaintiff to do or refrain from doing anything.⁹¹

The Supreme Court reversed, finding that the lower court had failed to utilize a pragmatic approach.⁹² The Court argued that the ICC had an "immediate and practical impact" on the plaintiff because carriers thereafter were subject to cease-and-desist orders and criminal penalties.⁹³ The Court found that agency orders which are essentially "declaratory" are reviewable because they (1) shape the conduct of regulated parties, and (2) involve concrete consequences.⁹⁴ *Frozen Foods* stands as the first APA case which endorsed a flexible approach to agency finality, even when it came to pre-enforcement review.

Twelve years later, in *Abbot Laboratories v. Gardner*,⁹⁵ the Court maintained its flexible approach, but blurred the lines between agency finality and ripeness. *Abbot Laboratories*, like *Frozen Foods Express*, involved pre-enforcement review, this time of an FDA regulation con-

⁸⁵ See *Id.* at 205 (linking § 704 with Article III by arguing that the challenged agency action "is by no means a mere 'advisory opinion,' its 'legal consequences' are obvious, for if valid it forecloses the 'right' of the Railroad to recover its domestic rates on those shipments").

⁸⁶ *But cf.* *Int'l Longshoremen's & Warehousemen's Union v. Boyd*, 347 U.S. 222, 224 (1954) (in a case concerning a pre-enforcement challenge to a policy of the Seattle District Director of Immigration and Naturalization, Justice Frankfurter warned that a legal ruling "in advance of . . . immediate adverse effect in the context of a concrete case involves too remote and abstract an inquiry for the proper exercise of the judicial function").

⁸⁷ See BREYER, *supra* note 54, at 915.

⁸⁸ 351 U.S. 40 (1956).

⁸⁹ *Id.* at 41. The ICC's interpretation focused on the agricultural exception found in § 203(b)(6) Interstate Commerce Act. The ICC found in its report that commodities did not qualify as "agricultural" within the meaning of the exception.

⁹⁰ *Frozen Food Exp. v. United States*, 128 F. Supp. 374, 378 (1955) (emphasis added).

⁹¹ See *Frozen Food*, 351 U.S. at 43.

⁹² *Id.*

⁹³ *Id.* at 43-44.

⁹⁴ *Id.*

⁹⁵ 387 U.S. 136 (1967).

cerning drug labeling.⁹⁶ But unlike *Frozen Foods Express*, this case ostensibly turned on ripeness. The Court interpreted § 704 of the APA as manifesting a legislative preference for expansive judicial review of agency actions.⁹⁷ It found that the issue presented in the case turned on the fitness of the issue for judicial review and the equities of both parties.⁹⁸ The Court held that the FDA regulation was reviewable because (1) it solely involved an issue of law, (2) the FDA's regulation constituted final agency action,⁹⁹ and (3) the sensitivity inherent to the drug industry meant the equities weighed in favor of the pharmaceutical companies.¹⁰⁰ In doing so, the Court adopted a ripeness test which explicitly incorporated agency finality.

Abbott Laboratories became a leading case not only on ripeness, but also on agency finality.¹⁰¹ The Court later distilled the reasoning from *Abbott Laboratories* in an agency finality case. In *F.T.C. v. Standard Oil Co. of California*, the Court laid out a flexible test for agency finality, scrutinizing whether an agency action entailed “legal or practical effect,”¹⁰² and the definitiveness of the ruling.¹⁰³

The pre-*Bennett* finality landscape was essentially in line with the flexible approach favored by Frankfurter in *Rochester*. Rhetorically, the Court's finality framework lost much of its emphasis on the “Case” or “Controversy” requirement and shifted inexorably towards a comparison with ripeness.¹⁰⁴ But the finality requirement remained flexible, even when it came to pre-enforcement review.¹⁰⁵

Bennett should be read less as a watershed and more as a synthesis—albeit a conflicted one—between the different lines of case law that

⁹⁶ See *id.* at 138.

⁹⁷ *Id.* at 140 n.2 (citing H.R. Rep. No. 1980, 79th Cong., 2d Sess. 41 (1946)) (“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.”).

⁹⁸ *Id.* at 149 (in determining whether a case is ripe for review, a court must assess “the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration”).

⁹⁹ *Id.* at 149.

¹⁰⁰ *Id.* at 149–53.

¹⁰¹ See, e.g., Jason Fowler, *Finality: What Constitutes Final Agency Action? The Practical Implications of the D.C. Circuit's Ruling in Reliable Automatic Sprinkler Co. v. Consumer Product Safety Commission*, 24 J. NAT'L ASS'N ADMIN. L. JUDGES. 311 (2004) (discussing agency finality through the lens of *Abbott Laboratories*).

¹⁰² 449 U.S. 232, 242 (1980).

¹⁰³ *Id.* at 241.

¹⁰⁴ See BREYER, *supra* note 54; Seidenfel, *supra* note 29, at 378–80; Hylas, *supra* note 49, at 1673–74.

¹⁰⁵ *Id.*

preceded it.¹⁰⁶ In *Bennett*, ranch operators and irrigation districts filed a citizen suit alleging violations of the Endangered Species Act (ESA).¹⁰⁷ Part of the Court's justiciability analysis turned on whether biological opinions issued pursuant to the ESA constituted final agency action.¹⁰⁸ Under a new two-prong test, the Court unanimously concluded that they did:

As a general matter, two conditions must be satisfied for agency action to be "final": First, the action must mark the "consummation" of the agency's decisionmaking 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"¹⁰⁹

It was uncontested in the case that the biological opinions satisfied the first prong.¹¹⁰ Under the second prong, the Court reasoned that the biological opinions were sufficiently final because they affected the legal rights of the ranchers and irrigation districts.¹¹¹

While *Bennett* is the leading case on agency finality, its discussion of the new two-prong test is comprised only of a single paragraph that is best read as synthesizing prior case law.¹¹² The first prong of the test is best associated with the finality requirements informed by the concerns with ripeness. This conclusion finds support in the Court's citation to *Chicago Southern Air Lines, Inc. v. Waterman S.S.*,¹¹³ a case primarily concerned with finality's focus on *timing*.¹¹⁴ The first prong was easily satisfied in *Bennett* because the agency's first step before suffering the alleged injury was issuing the biological opinion. The second prong of the test is more closely associated with prudential concerns that accompany the justiciability of agency action. In the last sentence of its analysis of finality, the Court distinguishes the biological opinion from other

¹⁰⁶ See *Hawkes Co.*, 136 S.Ct. at 1818 n.* (Ginsburg, J., concurring) (arguing that *Bennett* did not displace *Abbott Laboratories* or *Frozen Food Express*).

¹⁰⁷ *Bennett v. Spear*, 520 U.S. 154, 154 (1997).

¹⁰⁸ See 16 U.S.C. § 1536.

¹⁰⁹ See *Bennet*, 520 U.S. at 177–79 (1997).

¹¹⁰ *Id.* at 178.

¹¹¹ *Id.* (“[T]he Biological Opinion at issue here has direct and appreciable legal consequences.”).

¹¹² See Hickman & Thomson, *supra* note 16, at 3 (arguing that “*Bennett*’s standard is better understood as synthesizing and building upon the Court’s pre-existing finality jurisprudence.”).

¹¹³ 333 U.S. 103 (1948).

¹¹⁴ See *id.* at 112 (“Review could not be sought until the order was made available, and at that time it had ceased to be merely the Board’s tentative decision and had become one finalized by Presidential discretion.”). See also Hylas, *supra* note 49, at 1674 (noting that some finality decisions are primarily concerned with timing).

cases where finality was lacking by saying that the former, for the purposes of the second prong, would have involved advisory opinions.¹¹⁵ The second prong is, therefore, more closely aligned with Frankfurter's vision of the negative order doctrine—as being a shorthand for the requirement for a “Case” or Controversy.” In this sense, the second prong, as opposed to the first, is more closely related to the pre-*Abbott Laboratories* finality decisions.

Some scholars have noted that the two prongs serve unrelated ends,¹¹⁶ but that notion is influenced by the post-*Abbott Laboratories* view that agency finality is, like ripeness, primarily concerned with timing. A more historically accurate theory posits that the second prong of *Bennett* merely incorporates the interests Justice Frankfurter identified in *Rochester*.¹¹⁷

B. *Parsons and the “Inflexible” Approach to Agency Finality*

Bennett has become the Supreme Court's leading case on agency finality. The Court's two decisions since *Bennett*¹¹⁸ do not squarely address the types of injuries at the center of *Parsons*. The Court's most recent decision in this area came in *United States Army Corp of Engineers v. Hawkes Co., Inc.*¹¹⁹ There, the plaintiffs sought judicial review of a determination that their property came within the Clean Water Act's permitting requirements. The Supreme Court overruled almost all of the circuit courts that had decided this issue by holding that these determinations were final agency actions.

The *Hawkes* Court gave several reasons for its decision: the first prong of *Bennett* was satisfied because the Corps' determinations were rarely revisited and were presumptively valid for at least five years.¹²⁰ The Court also said the second prong of *Bennett* was satisfied. It reasoned that the Corps' determinations give rise to “direct and appreciable legal consequences.”¹²¹ Referencing its pragmatic approach, the Court referenced *Frozen Foods* and found in favor of the plaintiffs. *Hawkes* importantly reaffirmed the Court's emphasis on a pragmatic approach. It formed the backdrop to the opinion in *Parsons*.

¹¹⁵ 520 U.S. 154, 178 (1997) (“Unlike the reports in *Franklin and Dalton*, which were purely advisory and in no way affected the legal rights of the relevant rights of the relevant actors, the Biological Opinion at issue here has direct and appreciable legal consequences.”).

¹¹⁶ See Hylas, *supra* note 49, at 1649 (“Alternatively, as a doctrinal matter, the Supreme Court should consider conceptualizing *Bennett*'s second prong as part of the APA's reviewability exception . . . rather than as a part of the final agency action inquiry.”).

¹¹⁷ See *supra* notes 35–39 and accompanying text.

¹¹⁸ See generally *Sackett v. Env'tl. Prot. Agency*, 566 U.S. 120 (2012); *U.S. Army Corps of Eng'rs v. Hawkes Co., Inc.*, 136 S. Ct. 1807 (2016).

¹¹⁹ 136 S. Ct. 1807 (2016).

¹²⁰ See *id.* at 1813–14.

¹²¹ *Id.* at 1814.

In *Parsons*, the plaintiff-Juggalos asserted that their case was justifiable because their inclusion on the NGIC Report led to violations of their Fifth Amendment due process rights and the chilling of their First Amendment rights.¹²² The third-party effects in that case were carried out by state law enforcement officials. If an agency action exposes an individual to criminal or civil liability, that action usually will have satisfied the second prong of *Bennett*.¹²³ But, in *Parsons*, the plaintiff-Juggalos were undermined by a rule that has, in the absence of much Supreme Court oversight, sprung up in the lower courts.

This rule has its roots in the Fourth Circuit's opinion in *Flue-Cured Tobacco Cooperative Stabilization Corp. v. E.P.A.*,¹²⁴ where the tobacco industry brought suit to challenge an EPA report that detailed the health effects of second-hand smoke.¹²⁵ The Fourth Circuit's rule was predicated on a faulty understanding of a pre-*Bennett* pair of cases, each dealing with the unique circumstance of presidential action.¹²⁶

The first such case was *Franklin v. Massachusetts*.¹²⁷ There, Massachusetts sued to review the state's loss of a seat in the U.S. House of Representatives following the 1990 census.¹²⁸ The statute controlling the census required that the Secretary of Commerce send the President a census report, which would in turn be given to Congress.¹²⁹ The Supreme Court held that the Secretary's report was not a final agency action because the report could not independently alter states' allocation of seats.¹³⁰

A second case, *Dalton v. Specter*,¹³¹ was a challenge to the closure of a naval facility on the recommendation of the Secretary of Defense.¹³² The plaintiffs alleged that the Secretary failed to follow the procedure laid out in the Defense Base Closure and Realignment Act of 1990.¹³³ The Supreme Court held that the recommendation was unreviewable because the reports carried "no direct consequences" because the President was not bound by the report.¹³⁴

¹²² See *Parsons v. United States Dep't of Justice*, 878 F.3d 162, 164 (6th Cir. 2017).

¹²³ See, e.g., *Sackett*, 566 U.S. at 126 (2012) (finding that legal consequences flowed from an EPA order that exposed the plaintiffs to potential future enforcements).

¹²⁴ 313 F.3d 852 (4th Cir. 2002).

¹²⁵ *Id.* at 854.

¹²⁶ See *id.* at 859–60.

¹²⁷ 505 U.S. 788 (1992).

¹²⁸ *Id.* at 790.

¹²⁹ *Id.* at 792.

¹³⁰ *Id.* at 796–98.

¹³¹ *Dalton*, 511 U.S. 462 (1994).

¹³² *Id.* at 466.

¹³³ Pub. L. 101-510, § 104 Stat. 1807-08; *supra* note 100, at 464–66.

¹³⁴ *Dalton*, 511 U.S. at 462.

The Fourth Circuit drew on these two cases to suggest that recommendations were not final agency actions.¹³⁵ Because the recommendations in *Franklin* and *Dalton* were characterized by their persuasive weight, reports to a final decision maker or to those charged with enforcement must also be non-final agency actions.¹³⁶ Critically, the Fourth Circuit argued that the EPA report was comparable to the report in *Franklin* and the recommendation in *Dalton*.¹³⁷ The Court argued that even if other agencies had relied on the EPA's reports in the past, the agencies were, like the President in both cited cases, still free to disregard the report's findings.¹³⁸

But critical examination of *Dalton* and *Franklin* in recent decades demonstrates that weakness of the Fourth Circuit's reasoning. Some scholars suggest that the precedent from these cases is limited to review of cases dealing with transmissions given to the President.¹³⁹ Generally, the APA does not apply to the President's actions, but does apply to the subsequent actions of various agencies.¹⁴⁰ Under this view, the circuits are confused because the Court itself has been imprecise with its reasoning. In *Bennett*, the Court specifically referenced both *Dalton* and *Franklin* in its paragraph discussing agency finality.¹⁴¹ The reference to both cases in *Bennett*—using the language of advisory opinions¹⁴²—suggests that the cases are driven by prudential concerns of discretion that are not typically contemplated by agency finality.¹⁴³

Nonetheless, the Fourth Circuit also made a floodgates argument.¹⁴⁴ While this assertion received such short shrift as to border on *ipse dixit*, it

¹³⁵ *Flue-Cured Tobacco Cooperative Stabilization Corp. v. E.P.A.*, 313 F.3d 852, 860–61 (4th Cir. 2002).

¹³⁶ *Id.*

¹³⁷ *Id.* at 860 (“Like the harms at issue in *Dalton* and *Franklin*, the consequences complained of by plaintiffs stem from independent actions taken by third parties.”).

¹³⁸ *Id.*

¹³⁹ See, e.g., BREYER, *supra* note 54, at 959 (“The president’s transmission of the statement was final, but it was not reviewable because the president is not an ‘agency’ for APA purposes.”) (citing to *Dalton*); *Dalton*, 511 U.S. at 469 (1994).

¹⁴⁰ *Franklin v. Massachusetts*, 515 U.S. 788, 788–89 (1992).

¹⁴¹ 520 U.S. 154, 178 (1997) (“Unlike the reports in *Franklin* and *Dalton*, which were purely advisory and in no way affected the legal rights of the relevant rights of the relevant actors, the Biological Opinion at issue here has direct and appreciable legal consequences.”).

¹⁴² *Id.*

¹⁴³ Cf. Hylas, *supra* note 49, at 1673–74 (“Even if one believes that nonlegislative rules generally ought to be unreviewable when challenged for consistency with statutes, it would still be conceptually and doctrinally more logical to place any such presumption within the APA’s reviewability exception for actions ‘committed to agency discretion by law.’ This is because finality and ripeness are about *timing* while the section 701(a)(2) exception is about *discretion*. When courts apply the exception, they decide for practical and institutional reasons to defer to agency’s discretion and not review the action even though the usual prerequisites to judicial review are met.”).

¹⁴⁴ *Flue-Cured*, 313 F.3d 852, 861 (4th Cir. 2002) (“Furthermore, as a practical matter and of considerable importance, if we were to adopt the position that agency actions producing

patently ignores that plaintiffs still must demonstrate the requirements of standing, as the plaintiff-Juggalos did in *Parsons*.¹⁴⁵ The Fourth Circuit never considered whether other factors, like congressional intent or severity of the injury, could be used.

Even assuming that the Fourth Circuit's reasoning was not flawed, there are several reasons why the principle from *Flue-Cured* should not have been carried over to *Parsons*. First, *Flue-Cured* rested on a reading of *Bennett* that is more attenuated in *Parsons*. The plaintiffs in *Flue-Cured* argued that *Bennett* supported their position because the biological reports at issue mirrored the EPA's report on the risks of second-hand smoking.¹⁴⁶ The Fourth Circuit found this argument unpersuasive because the biological opinion at issue in *Bennett* "altered legal regimes,"¹⁴⁷ while the Report at issue before the court did "not act as a permit or carry any comparable legal consequences."¹⁴⁸ While the relationship between legal consequences and the EPA report in *Flue-Cured* was weakened, *Parsons* more clearly parallels the risk of "substantial civil and criminal penalties, including imprisonment," at issue in *Bennett*.¹⁴⁹ For instance, plaintiff *Parsons* alleged that because of a hatchetman logo on his semi-truck, a Tennessee State Trooper detained him for over an hour without cause, conducting an interrogation and a search of his truck.¹⁵⁰ Other plaintiffs alleged instances of unwarranted police searches, forced removal of ICP tattoos to apply to the Army, and fear of involuntary discharge from the Army because of previously obtained ICP tattoos indicating an affiliation with Juggalo culture.¹⁵¹ These are the exact types of risks contemplated by the Court in *Bennett*.

While the inflexible third-party effects approach that sprung up in opinions like *Flue-Cured* in the aftermath of *Bennett* may be incompatible with the body of case law on agency finality,¹⁵² it seems even more starkly irreconcilable with the "fusion center" model. The Juggalos in *Parsons* were challenging the NGIC's Report on national gang activ-

only pressures on third parties were reviewable under the APA, then almost any agency policy or publication issued by the government would be subject to judicial review.").

¹⁴⁵ See *Parsons*, 801 F.3d at 710.

¹⁴⁶ See *Flue-Cured* 313 F.3d at 861.

¹⁴⁷ *Bennett*, 520 U.S. at 170, 178.

¹⁴⁸ *Flue-Cured*, 313 F.3d at 862.

¹⁴⁹ *Bennett*, 520 U.S. at 170.

¹⁵⁰ See Compl. at 41–44, 149, 156; *Parsons v. U.S. Dep't of Justice*, 801 F.3d 701 (6th Cir. 2015) (No. 2:14CV10071), 2014 WL 465369. The Hatchetman logo, which depicts a man running with an axe in his hand, is the logo of Psychopathic Records, a record label founded by ICP and now synonymous with Juggalos. See also Brian Raftery, *The Rise of the Juggalos*, WIRED (Dec. 2010), http://www.wired.com/2010/11/ff_icp/.

¹⁵¹ See Compl. at 8–13, *Parsons*, 801 F.3d at 648.

¹⁵² Compare *supra* notes 38–64 and accompanying text (analyzing the Court's long-held emphasis on flexibility); see *Flue-Cured*, 313 F.3d at 860 (rejecting the "pragmatic approach" that plaintiffs argued for).

ity.¹⁵³ The NGIC is a self-proclaimed “fusion center.”¹⁵⁴ Fusion centers came into vogue after the 9/11 terror attacks, when a push was made for centralized information gathering.¹⁵⁵ The NGIC was designed to integrate the intelligence assets of numerous federal agencies in order to coordinate the persecution of gang activity.¹⁵⁶ The Sixth Circuit ignored that the NGIC was established precisely to induce third-party enforcement of its findings.

The third-party rule developed by the Fourth Circuit and adopted by the Sixth Circuit functionally made the transmission of reports from agency to agency non-justiciable. Implicit in the implementation of that rule is the principle that plaintiffs should be bringing suit against the agency or party responsible for enforcement, not against the transmitting agency.¹⁵⁷ This, of course, is an ineffective option. The Juggalos are a national group that travels to gather for celebrations of ICP. It would be costly and impractical for the Juggalos to bring constitutional challenges to the downstream enforcements of the NGIC report.

But the purpose of fusion centers is to facilitate enforcement across the country, through state and local officials. Whether or not the reasoning in *Flue-Cured* is congruent with the principles of agency finality, carrying it over to the review of fusion centers has perverse policy implications. By insulating fusion centers from review, courts may be giving the “greenlight” to agencies to insulate their actions from review by essentially outsourcing enforcement to state and federal agencies.

Aside from the policy implications, the adoption of the third-party rule seems dubious because of the type of legal claim brought by the Juggalo-plaintiffs. They alleged that their inclusion on the NGIC Report chilled their First Amendment protections.¹⁵⁸ The Juggalo-plaintiffs drew on overbreadth doctrine, under which, plaintiffs may assert that a rule has a chilling effect on free speech. Because overbreadth doctrine is in tension with the prohibition on asserting the rights of others—another doctrine of standing loosely related to the prohibition on advisory opin-

¹⁵³ See 2015 NGIC Report, *supra* note 5, at 6.

¹⁵⁴ *Id.*

¹⁵⁵ See *supra* note 17 (A major impetus for the proliferation of fusion centers was the perception that bifurcated information gathering posed serious threats to national security). See also Jason Barnosky, *Fusion Centers: What's Working and What Isn't*, BROOKINGS (Mar. 17, 2015), <https://www.brookings.edu/blog/fixgov/2015/03/17/fusion-centers-whats-working-and-what-isnt/>; Brian Peteritas, *Fusion Centers Struggle to Find Their Place in the Post-9/11 World*, GOVERNING (June 2013), <http://www.governing.com/topics/public-justice-safety/gov-fusion-centers-post-911-world.html> (“[w]hen the 9/11 Commission issued its recommendations in 2004 on how the country could guard against future attacks, a key finding was the need for robust information sharing between state and local law enforcement agencies and federal intelligence agencies.”).

¹⁵⁶ See generally *Parson v. U.S. Dep't. of Justice*, 878 F.3d 162, 164–65 (6th Cir. 2017).

¹⁵⁷ See *Parsons*, 878 F.3d at 171 n.9.

¹⁵⁸ *Id.* at 165.

ions—it seems counterintuitive that the second prong of *Bennett*, which serves a similar function, would block judicial review of an agency action. The restrictive approach to agency finality seems particularly incompatible with the overbreadth doctrine, due to its “special standing component and concerns about the ‘chilling’ effects of overbroad laws.”¹⁵⁹

An interesting question not fully addressed in this Note is why the Fourth and Sixth Circuits have adopted formalistic tests for final agency action despite the Court’s repeated calls for pragmatism. There is, of course, the prospect that the lower federal courts have been confused by the multiple still-living lines of final agency action doctrines.¹⁶⁰ *Dalton* and *Franklin* in particular have contributed to the confusion by suggesting that third-party injuries, or perhaps inter-agency reports generally, are not final for APA review. But those cases seem irreconcilable with the outcomes in *Abbott Labs*, *Bennett*, and *Sackett*.¹⁶¹ But, as previously stated, overreliance on these cases is problematic because of the role of the President in both cases.¹⁶²

An alternative theory would posit that a lack of clarity about the different purposes is served by the second, as opposed to the first, prong of *Bennett*. The literature has tended to focus on the comparison between final agency action and ripeness and, while the Court has opined for a flexible approach to both *Bennett* prongs, it has only taken two cases concerning the second prong since *Bennett*.

II. STANDING DOCTRINE AND PROBABILISTIC INJURIES

A core link between standing and final agency action is that the second prong of *Bennett*—as discussed in the previous section—serves a similar function as standing. From Frankfurter’s opinion to contemporaneous administrative law jurisprudence, the Supreme Court has made clear that agency finality was a tool for getting at the Article III requirement of a “Case” or “Controversy.”¹⁶³ Some decisions have specifically

¹⁵⁹ Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 STAN. L. REV. 236, 261 (1994). See also Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844, 848 (1970) (arguing that an overbreadth claim is not “ineluctably vicarious” because the claimant “is asserting his own right not to be burdened by an unconstitutional rule of law”).

¹⁶⁰ See Hickman & Thomson, *supra* note 16, at 12 (“The Court’s own decisions illustrate the difficulty in reconciling some of those precedents.”) (citing numerous final agency action cases to show their inherent conflicts).

¹⁶¹ See *id.*

¹⁶² See BREYER, *supra* note 54 and accompanying text.

¹⁶³ See *Daimler Chrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006) (explaining that if a dispute is not a proper case or controversy, courts may not decide its); *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240–41 (1937) (requiring concrete controversies between parties with actually adverse legal interests).

invoked the prohibition on advisory opinions,¹⁶⁴ which inspires both constitutional and prudential standing requirements. This Section discusses an area of standing jurisprudence where the Court has developed a flexible approach. This Note posits that the flexible approach to Article III's "Case" or "Controversy" requirement serves as a template for a more flexible approach to agency finality.

To establish Article III standing, a plaintiff must demonstrate an injury that is (1) concrete and particularized, and actual or imminent; (2) fairly traceable to the challenged action; and (3) redressable by a favorable ruling.¹⁶⁵

"Probabilistic standing" cases attempt to grapple with an important issue: "Whether and when a plaintiff can predicate Article III standing on the objective probability of sustaining harm and the reasonable concerns flowing from that probability."¹⁶⁶ While the Court has repeatedly held that injury-in-fact must be concrete, imminent, and non-speculative, the Court took a series of cases from 2009 to 2014 that stretched prior notions of imminence. Drawing on the work of Professor Fallon,¹⁶⁷ we contend that the Court has adopted a sliding-scale approach to determine what probability of injury it will require to find Article III standing. This Section charts the development of the probabilistic injury doctrine from 2009 to 2014, outlining how the Court began to consider both the magnitude of an alleged injury and the likelihood of its occurrence. While not always clear in its analysis, the Court assesses the alleged future injury on a sliding scale, considering both the magnitude of the alleged injury and the likelihood of its occurrence.

The Court has placed important limitations on a plaintiff's ability to obtain standing when threatened by future harm. For example, to obtain standing for a future injury, the plaintiff must demonstrate that they face a "real" and "imminent" threat of suffering an injury-in-fact caused by the defendant's conduct.¹⁶⁸ However, imminence is only one part of the analysis to determine if an alleged future injury is too speculative and

¹⁶⁴ See, e.g., *Bennett v. Spear*, 520 U.S. 154, 178 (1997) ("Unlike the reports in *Franklin and Dalton*, which were purely advisory and in no way affected the legal rights of the relevant rights of the relevant actors, the Biological Opinion at issue here has direct and appreciable legal consequences.").

¹⁶⁵ See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

¹⁶⁶ RICHARD H. FALLON, JR. ET AL., *THE FEDERAL COURTS AND THE FEDERAL SYSTEM*, 120 (7th ed. 2015).

¹⁶⁷ See Richard H. Fallon Jr., *The Fragmentation of Standing*, 93 *TEX. L. REV.* 1061 (2015). The treatment of probabilistic standing in this Note draws considerably from Professor Fallon's "off-the-cuff" interpretation, but it goes considerably further in describing a generalizable principle. *Id.* at 1091.

¹⁶⁸ *O'Shea v. Littleton*, 414 U.S. 488 (1974) (internal quotation marks omitted).

thus nonjusticiable.¹⁶⁹ The Court has recognized that the imminence requirement does not necessarily demand that an injury is immediately impending.¹⁷⁰ Rather, so long as a plaintiff could show that an injury was certain to occur, no matter how distant in time, the injury would be “imminent” for the purpose of Article III standing.¹⁷¹

In *Summers*, the Court held that a group of organizations dedicated to protecting the environment did not have standing to prevent the United States Forest Service from exempting small-fire rehabilitation and timber-salvage projects from the notice, comment, and appeal process.¹⁷² After a fire had burned a significant area of the Sequoia National Forest, the Forest Service issued a memo approving the salvage sale of timber on 238 acres of the damaged forest.¹⁷³ In doing so, the Forest Service did not provide notice of its decision to conduct a salvage sale, nor did the Forest Service provide a period for public comment or appeal.¹⁷⁴ Plaintiffs, a group of environmental organizations, filed a complaint, challenging the Forest Service’s failure to provide for notice, comment, and an appeals process.¹⁷⁵

The Court first noted that the alleged future harm was unlikely to occur.¹⁷⁶ The plaintiffs claimed that members of their group had imminent plans to visit the forest areas affected by the Forest Service’s actions.¹⁷⁷ Specifically, the plaintiffs alleged that members had “interests in viewing the flora and fauna of the area” that would be harmed if the project went forward without notice and comment.¹⁷⁸ The plaintiff’s injury, in the Court’s view, was comparable to the alleged injury suffered by the *Lujan* plaintiffs.¹⁷⁹ While there “may be a chance” that a member of one of the environmental organizations would suffer a harm, it was “hardly a likelihood,” and thus not imminent.¹⁸⁰ The Court compared the groups’ “someday” intentions to visit a tract of land affected by the regulations to the intentions of the *Lujan* plaintiffs to travel abroad to view

¹⁶⁹ See F. Andrew Hessick, *Probabilistic Standing*, 106 NORTHWESTERN L. REV. 55, 65 (2012).

¹⁷⁰ See Reg’l Rail Reorganization Act Cases, 419 U.S. 102, 143 (1974).

¹⁷¹ See Hessick, *supra* note 169, at 65 (“Thus, if Paul could somehow demonstrate with certainty that Duncan would attack him in twenty years, Paul would have standing to pursue his claim”). Of course, the more distant in time an alleged future injury is to occur, the more difficulty a plaintiff will have in demonstrating that it would certainly occur.

¹⁷² *Summers v. Earth Island Institute*, 555 U.S. 488, 490 (2009).

¹⁷³ *Id.* at 490.

¹⁷⁴ See *id.*

¹⁷⁵ See *id.*

¹⁷⁶ *Id.* at 495.

¹⁷⁷ *Id.* at 494.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at 492.

¹⁸⁰ *Id.* at 496 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992)).

endangered species.¹⁸¹ While the Court recognized that harm to recreational and aesthetic interests may suffice to grant standing to plaintiffs, the Court found that the plaintiffs could not point with specificity to the parcels of land that would be affected.¹⁸² As a result, the injury was insufficiently imminent.

The Court simultaneously downplayed the magnitude of the alleged harm. The Court explained that the plaintiffs aspirational “wanderings” through the land amounted to less than conjecture.¹⁸³ The plaintiffs, the Court explained, could not “stumble” across affected land and claim it would have been different had their public comments been accepted by the Forest Service.¹⁸⁴ A simple “intention to visit the national forests” could not “confer standing to challenge any Government action affecting any portion of those forests.”¹⁸⁵

The Court thus held that the plaintiffs did not have standing to challenge the Forest Service’s decision because the allegations did not sufficiently allege an imminent injury likely to occur, nor a harm that was sufficiently injurious.¹⁸⁶ As a result, the Court found the allegations to be insufficient to warrant a constitutionally cognizable injury.¹⁸⁷

The *Summers* Court went further, rejecting the dissents’ proposed “realistic threat”¹⁸⁸ standard seemingly adopted by the Court years prior in *Los Angeles v. Lyons*.¹⁸⁹ In dissent, Justice Breyer noted that the majority could not apply a stricter requirement for imminence, explaining that “a threat of future harm may be realistic even where a plaintiff cannot specify precise times, dates, and GPS coordinates.”¹⁹⁰ To Breyer, that the *Summers* plaintiffs could not identify with specificity the sites that would be adversely affected by the Forest Service’s regulations did not show that their harm was insufficiently imminent.¹⁹¹

The Court’s next foray into developing its probabilistic injury doctrine came in its 2010 opinion in *Monsanto Co. v. Geertson Seed*

¹⁸¹ See *Summers*, 555 U.S. at 496 (quoting *Lujan*, 504 U.S. at 564).

¹⁸² See *id.* at 495 (highlighting the fact that the plaintiffs point to “unnamed” parcels of land).

¹⁸³ *Id.* at 495.

¹⁸⁴ See *id.*

¹⁸⁵ *Id.* at 496.

¹⁸⁶ See *id.* at 496 (“Here we are asked to assume not only that Bensman will stumble across a project tract unlawfully subjected to the regulations, but also that the tract is about to be developed by the Forest Service in a way that harms his recreational interests.”).

¹⁸⁷ *Id.*

¹⁸⁸ See *id.* at 505 (Breyer, J., dissenting).

¹⁸⁹ *Los Angeles v. Lyons*, 461 U.S. 95, 106 (1983).

¹⁹⁰ See *Summers*, 555 U.S. at 505–06 (Breyer, J., dissenting).

¹⁹¹ See *id.* at 508–09 (Breyer, J., dissenting) (“To know, virtually for certain, that snow will fall in New England this winter is not to know the name of each particular town where it is bound to arrive.”).

Farms.¹⁹² In *Monsanto*, a group of conventional alfalfa farmers challenged the Animal and Plant Health Inspection Service's (APHIS) decision to approve the deregulation of Roundup Ready Alfalfa (RRA), a type of genetically-engineered alfalfa.¹⁹³ The plaintiffs alleged that by deregulating the genetically engineered RRA, plaintiffs would be forced to undergo substantial and costly testing to confirm that plaintiff's alfalfa remained non-genetically engineered.¹⁹⁴ The Court found both a high magnitude of harm and a high likelihood of harm, thus finding that the conventional alfalfa-farmer plaintiffs properly alleged a constitutionally cognizable injury, and granting the plaintiffs standing.¹⁹⁵

Considering first the magnitude of the harm, the Court turned to plaintiff's declarations to find that genetic testing would inflict substantial economic harms.¹⁹⁶ For example, the Court noted that in order for conventional alfalfa growers to continue marketing their alfalfa to consumers who wished to buy non-genetically-engineered alfalfa, the growers would be required to conduct testing to evaluate potential crop contamination.¹⁹⁷ Noting that there is "zero tolerance" for contaminated alfalfa seed in the organic market, the Court found that deregulation of RRA would simply enact too steep an economic toll on organic farmers.¹⁹⁸ Thus, the magnitude of the injury, to the Court, was substantial.

The Court further noted that these economic harms to conventional alfalfa farmers were likely to occur.¹⁹⁹ As the Court explained, the conventional alfalfa farmers would be forced to undergo such testing "even if their crops are not actually infected with the Roundup Ready gene."²⁰⁰ Even the threat of the introduction of RRA was sufficient to guarantee that the farmers would be forced to conduct testing to confirm that their seeds remained organic. Thus, the injury would occur with or without the RRA *actually* infecting the organic crop of alfalfa.²⁰¹

In 2013, the Court decided *Clapper v. Amnesty International USA*, where it again measured the magnitude and likelihood of an alleged future injury. The plaintiffs in *Clapper* were a group of attorneys and human rights, labor, legal, and media organizers, who sought a declara-

¹⁹² 130 S.Ct. 2743 (2010).

¹⁹³ *Id.* at 2749–50.

¹⁹⁴ *Id.* at 2755.

¹⁹⁵ *Id.* at 2754.

¹⁹⁶ *Id.* at 2755 (recognizing the economic harm inflicted by genetic testing on conventional alfalfa farmers).

¹⁹⁷ *Id.* at 2754–55 (finding that farmers would need to test their crops to obtain certifications that their seeds were not harmed by the introduction of RRA).

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at 2755.

²⁰¹ *Id.* at 2755–56 (noting the risk that the RRA gene would confer glyphosate resistance that would infect the organic alfalfa).

tion that Section 702 of the Foreign Intelligence Surveillance Act of 1978 (FISA) was unconstitutional.²⁰² Codified in 50 U.S.C. § 1881(a), FISA authorized the Attorney General and the Director of National Intelligence to conduct surveillance of those who were not United States persons and reasonably believed to be located outside of the United States.²⁰³ The plaintiffs asserted that they could show a sufficient injury-in-fact through a reasonable likelihood that their communications with targeted individuals would be acquired through FISA-authorized surveillance in the future.²⁰⁴

The *Clapper* plaintiffs alleged that § 1881(a) would compromise their ability to “locate witnesses, cultivate sources, obtain information, and communicate confidential information to their clients.”²⁰⁵ Because of this threat, the plaintiffs claimed that they would be forced to travel abroad to carry out in-person conversations with their clients in order to avoid governmental surveillance of their communications.²⁰⁶ According to the plaintiffs, the cost of protecting the confidentiality sensitive relationships with their clients was a sufficient injury to confer standing to challenge § 1881(a).²⁰⁷ The Court disagreed, again measuring both the magnitude and likelihood of the harm to reject plaintiff’s standing.

The Court explained that the plaintiffs had sought to manufacture standing by incurring costs to avoid any risk of harm.²⁰⁸ To the Court, the *Clapper* plaintiffs have always had a similar incentive to engage in the countermeasures they were undertaking to avoid surveillance.²⁰⁹ These costs were not new to plaintiffs because the prior surveillance of plaintiff’s clients had occurred pursuant to the FISA authority that predated the enactment of § 1881(a).²¹⁰ As a result, the Court concluded that any costs that plaintiffs may have incurred to avoid the interception of their communications under § 1881(a) were “simply the product of their fear of surveillance.”²¹¹

²⁰² *Clapper v. Amnesty International USA*, 568 U.S. 398 (2013). These authorizations would need to be allowed by a Foreign Intelligence Surveillance Court (FISC), which act to approve surveillance of foreign powers and their agents. *See id.* at 402–03. At issue in *Clapper* was § 702 of the FISA Amendments Act, which did not require the Government to demonstrate probable cause that the target of the surveillance was a foreign power or agent of a foreign power. *See id.*

²⁰³ *See* 50 U.S.C. § 1881a (2006 ed., Supp. V); *Clapper*, 568 U.S. at 401.

²⁰⁴ *See Clapper*, 568 U.S. at 401.

²⁰⁵ *Id.* at 406.

²⁰⁶ *Id.* at 406–07.

²⁰⁷ *Id.*

²⁰⁸ *Id.* at 415.

²⁰⁹ *See Clapper*, 568 U.S. at 417.

²¹⁰ *Id.*

²¹¹ *See id.* Under the Court’s holding in *Laird v. Tatum*, the fear of First Amendment violation through governmental data gathering does not constitute a sufficient showing of injury-in-fact. *See Laird v. Tatum*, 408 U.S. 1, 11 (1972) (noting the insufficiency of the plain-

Additionally, the Court emphasized that the alleged harms were unlikely to occur.²¹² Framing the allegations as a mere “speculative chain of possibilities,” the Court held that the plaintiff’s injuries were not traceable to § 1881(a) because there was no sufficient likelihood that their communications would be intercepted at all.²¹³ To the Court, the plaintiffs fear of interception was “highly speculative” and relied on a series of attenuated assumptions.²¹⁴ Comparing the *Clapper* plaintiff’s claims to those of the plaintiffs in *Summers*, the Court again emphasized the importance of the likelihood of future injuries: plaintiffs “do not establish that injury based on potential future surveillance is certainly impending.”²¹⁵ Thus, presented with an untraceable and unlikely injury, the Court rejected plaintiff’s claim for standing.

Most recently, the Court again considered the magnitude of an alleged harm and the likelihood of its occurrence in *Susan B. Anthony List v. Driehaus*.²¹⁶ In *Driehaus*, the Court found that a political-organization plaintiff adequately alleged a threat of future criminal enforcement by the Ohio Election Commission for their intent to engage in political speech, and thus demonstrated a sufficient injury-in-fact.²¹⁷

The plaintiff in *Driehaus* was Susan B. Anthony List (SBA), a pro-life advocacy organization which sought to erect a billboard which would condemn then-Congressman Steve Driehaus’s vote for the Affordable Care Act as voting for “taxpayer funded abortion.”²¹⁸ Before the billboard could be constructed, Driehaus filed a complaint with the Ohio Elections Commission, alleging that SBA had violated Ohio law prohibiting “false statement[s]” during a political campaign.²¹⁹ The Elections Commission initially found probable cause that the statements violated the statute.²²⁰ While Driehaus lost the election, SBA sought to have the Ohio law deemed unconstitutional on the basis that it was threatened by future enforcement of the law against it.²²¹ The Court found the threatened future enforcement of the challenged law sufficient to constitute an Article III injury.²²²

tiff’s fears that the Army’s surveillance of civilian activity would eventually result in action harmful to the plaintiffs).

²¹² *Clapper*, 568 U.S. at 410.

²¹³ *Id.* at 414.

²¹⁴ *Id.* at 410.

²¹⁵ *Id.* at 414.

²¹⁶ *Susan B. Anthony List v. Driehaus*, 134 S.Ct. 2334 (2014).

²¹⁷ *Id.* at 2338.

²¹⁸ *Id.* at 2339 (internal quotation marks omitted).

²¹⁹ See Ohio Rev.Code Ann. § 3517.21(B); *Driehaus*, 134 S.Ct. at 2339.

²²⁰ *Driehaus*, 134 S.Ct. at 2339.

²²¹ *Id.* at 2340.

²²² *Id.* at 2340–43.

First, the threatened enforcement was a sufficiently cognizable injury to be an injury-in-fact.²²³ The Court built on a line cases which held that when an individual is subject to a threat of arrest or enforcement action, actual arrest or enforcement action is not a prerequisite to challenging the law.²²⁴ This is especially true, the Court noted, when the threatened action is threatened by the government, and could thus result in criminal proceedings.²²⁵ Thus, the court affirmed that a credible threat of enforcement is sufficient to constitute a constitutionally cognizable injury-in-fact.

The Court also found that the threat of enforcement was likely to occur, and thus sufficiently imminent.²²⁶ First, the Court pointed out that SBA had alleged specific statements it wished to disseminate in future election cycles.²²⁷ Because the Ohio Elections Commission had already found probable cause to believe that SBA had violated the statute, similar statements would be subject to similar enforcement.²²⁸ Given the past enforcement from the Ohio Elections Commission, the Court concluded that the threat of future enforcement was substantial.²²⁹

Much has been written over the Supreme Court's murky approach to probabilistic injury.²³⁰ While the requirements for Article III standing are seemingly straightforward, they have proven difficult to apply and complicated to analyze, resulting in much scholarly commentary.²³¹ However, the Court's recent probabilistic injury jurisprudence has shown the Court to be analyzing both the magnitude of an alleged future injury and the likelihood that it will occur. From *Summers* to *Driehaus*, a close look at the Court's language may shed light on this two-factor approach.

For example, the Court has been consistently concerned with the magnitude of the harm alleged. The Court has been less concerned with

²²³ *Id.* at 2343.

²²⁴ *See id.* at 2342; *see also* *Steffel v. Thompson*, 415 U.S. 452, 459 (1974) (holding that a plaintiff need not expose himself to arrest prior to be entitled to challenge a statute).

²²⁵ *See Driehaus*, 134 S.Ct. at 2342; *see also* *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128–29).

²²⁶ *Driehaus*, 134 S.Ct. at 2345.

²²⁷ *Id.* at 2343.

²²⁸ *Id.* at 2344.

²²⁹ *See id.* at 2345. The Court also explicitly noted that administrative action may give rise to sufficient harm to justify pre-enforcement review. *See id.*

²³⁰ *See* Andrew C. Sand, *Standing Uncertainty: An Expected-Value Standard for Fear-based Injury in Clapper v. Amnesty International USA*, 113 MICH. L. REV. 711 (2015) (noting three seemingly competing lines of doctrine within the Court's jurisprudence regarding fear-based future injuries); F. Andrew Hessick, *Probabilistic Standing*, 106 NORTHWESTERN L. REV. 55 (2012) (identifying the Court's incoherent and unpredictable standing decisions); Bradford Mank, *Summers v. Earth Island Institute Rejects Probabilistic Standing, But a "Realistic Threat": of Harm is a Better Standing Test*, Faculty Articles and Other Publications, Paper 137 (2010) (identifying an inherent doctrinal tension between *Summers* and *Laidlaw*).

²³¹ *See* Fallon, *supra* note 138, at 1092 ("standing doctrine has grown more fragmented with nearly every Term of the Roberts Court").

future aesthetic injuries, like those injuries the plaintiffs alleged in *Summers* and even *Lujan*. The *Summers* Court looked with disdain on the desire to protect recreational and aesthetic value, noting that the *Summers* plaintiffs' unspecified "wanderings" onto potentially affected land constituted mere conjecture, rather than actual, imminent injury.²³² Such a finding necessarily incorporates some undertaking to measure the magnitude of the alleged future harm.²³³

This view is endorsed by the Court's holdings in *Monsanto* and *Driehaus*, two cases where the Court found standing for an alleged future injury. The alleged injuries in *Monsanto* and *Driehaus* were not insignificant, unlike the alleged injury in *Summers*. In *Monsanto*, the plaintiffs were facing impending chemical and biological testing to confirm that their alfalfa remained organic, which would have imposed substantial economic costs on the conventional farmers.²³⁴ In *Driehaus*, the plaintiffs faced the threat of potential criminal sanction, a severe threat to plaintiff's fundamental rights.²³⁵ Courts take measures to specifically assess gravity of the factual harm alleged in First Amendment cases exactly because such harms risk infringing on fundamental rights.²³⁶

Simultaneously, the Court has considered the likelihood of the harm occurring. Where the Court has found a harm unlikely to occur, the Court has declined to find standing, even when the injury may infringe on a core right.²³⁷ First in *Summers*, the Court measured the likelihood of the alleged harm's occurrence.²³⁸ The alleged future injury in *Summers* was not claimed with sufficient specificity and was thus unlikely to occur. Similarly, in *Clapper*, the Court took particular notice of the fact that the likelihood that the alleged injury would occur was dependent on five separate factual contingencies.²³⁹ As the injury became more remote in time, the Court considered it less imminent because each factual occur-

²³² See discussion, *supra* Part II.C.

²³³ See Hessick, *supra* note 230, at 61 (arguing that courts have imposed a 'minimum-risk requirement' for the threat of an injury to be real).

²³⁴ See *Monsanto*, 130 S.Ct. 2743, 2754–55 (2010); see also Sand, *supra* note 230, at 723 (noting the costs the *Monsanto* plaintiffs were facing as a result of the deregulation of RRA alfalfa).

²³⁵ See *Driehaus*, 134 S.Ct. 2334, 2342–43 (2014); Hessick, *supra* note 230, at 93 (explaining that courts should be more willing to exercise jurisdiction for serious harms, which is measured by the gravity of the factual harm the plaintiff alleges).

²³⁶ See Hessick, *supra* note 230, at 93–94 ("all the plaintiff must show [in the First Amendment context] is that the law targets the conduct that the plaintiff wishes to undertake.").

²³⁷ See, e.g., *Clapper v. Amnesty International USA*, 568 U.S. 398 (2013).

²³⁸ See Sand, *supra* note 230, at 724 (noting that the *Summers* court endorsed a measurement of future injuries that examines the likelihood of harm).

²³⁹ See *Clapper*, 568 U.S. at 414 (calling these contingencies a "speculative chain of possibilities").

rence became less and less likely, and thus insufficient to constitute an injury-in-fact.

In contrast, the Court has considered that the more likely a harm is to occur, the more likely the harm is sufficient to yield Article III standing. In *Driehaus*, the Court considered evidence that previously, plaintiffs had been provisionally found to be in violation of the challenged law as good evidence that the enforcement of the law posed a sufficient future threat.²⁴⁰ In *Monsanto*, the Court found that the threat of forcing organic farmers to conduct testing was likely to occur because they would be forced to conduct testing whether or not their plants were contaminated by RRA.²⁴¹

Taken together, the Court's recent probabilistic injury cases illustrate the Court's consideration of the magnitude of a harm and likelihood of its occurrence when considering whether an alleged future injury constitutes an injury-in-fact. While applying standards seemingly at tension,²⁴² the Court has undertaken a balancing approach, which allows for flexibility when either factor is particularly salient. Viewed at the micro level, the Court's recent standing cases have done little to clarify *what* standard the Court applies when assessing probabilistic injury claims for Article III standing. In fact, the Court seemingly alternates between standards, articulating at different times a "high-likelihood," "reasonable likelihood," and "reasonable risk" test to assess claims based on threatened future injury.²⁴³ Our suggestion is that a step back with a broader perspective may elucidate the Court's approach. Viewed at the macro level, however, the Court has been assessing the magnitude and severity of the harm alleged against the likelihood that it will occur. In the end, this relatively flexible approach is particularly suited for assessing future injuries, where the Court has "an independent obligation to assure that standing exists"²⁴⁴ separate and apart from the factual contingencies alleged by either party.

III. A FLEXIBLE APPROACH TO AGENCY FINALITY

The Court's implicit sliding-scale approach in the probabilistic standing cases provides a template for a similar and flexible approach in the context of agency finality. A similar approach, whereby a court interprets (from the perspective of the agency transmitting a report or recom-

²⁴⁰ See *Driehaus*, 134 S.Ct. at 2345. Note that while the *Clapper* plaintiffs brought similar evidence of past harm, such harm was not traceable to the authority granted by § 1881(a), and thus was not fairly traceable to the challenged law. See *Clapper*, 568 U.S. at 417.

²⁴¹ See *Monsanto*, 130 S.Ct. 2743, 2755 (2010).

²⁴² See Hessick, *supra* note 230.

²⁴³ See Sand, *supra* note 230, at 723.

²⁴⁴ *Summers*, 555 U.S. 499.

mendation) third-party harms according to the magnitude of the harm and probability of third-party enforcement. This rule proceeds from the idea that where an agency action will foreseeably engender third-party actions that result in severe injuries, the initial agency action will be justiciable.

This approach has the benefit of giving courts flexibility. In a case like *Parsons*, courts could proceed to the merits because the alleged harm is severe, constitutional in character, and holds the possibility of criminal prosecution if the plaintiffs can demonstrate that the third-party reliance is foreseeable.²⁴⁵

The Supreme Court has often stated its preference for a “pragmatic” approach to agency finality,²⁴⁶ and the Court has recently demonstrated its commitment to a “pragmatic” approach in *Frozen Food Express v. United States*.²⁴⁷ There, the Court held that an ICC order determining the scope of an exemption for agricultural commodities was final agency action.²⁴⁸ The Court reasoned that even though the order did not guarantee any legal consequences, the decision had the effect of inducing them to seek a special permit.²⁴⁹ The plaintiffs’ case was justiciable because the legal status of their product was changed.

The flexible approach outlined above would treat individuals’ associational rights as being equally important to the business interests of the plaintiffs in *Frozen Food Express*. Instead of changing the legal status of their product, the NGIC Report operated to change the status of their associational activity. An important detail of the plaintiff-Juggalos complaint is that it was not solely focused on the NGIC Report.²⁵⁰ Aside from the Report, the plaintiffs were challenging their designation as a gang in the NGIC—a legal classification that was only communicated through the NGIC Report.²⁵¹ Because gangs become the focus of law enforcement around the country, plaintiffs’ outward association with the Juggalo community was chilled. Like the *Frozen Foods Express* plaintiffs, the plaintiff-Juggalos in *Parsons* are alleging that they are being

²⁴⁵ Cf. *Frozen Food Exp. v. United States*, 351 U.S. 40, 44 (1956) (finding that the finality requirement was met where the agency action would have an “immediate and practical impact” on plaintiff because carriers’ thereafter cease-and-desist orders and criminal penalties).

²⁴⁶ U. S. Army Corps of Eng’rs v. Hawkes Co., Inc., 136 S.Ct. 1807, 1815 (2016) (stressing the “pragmatic” approach [the Court has] long taken to finality”) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967)).

²⁴⁷ 351 U.S. 40 (1956).

²⁴⁸ *Id.* at 43–44 (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 150 (1967)) (“[T]he order ‘had no authority except to give notice of how the Commission interpreted’ the relevant statute, and ‘would have effect only if and when a particular action was brought against a particular carrier.’”).

²⁴⁹ See *id.* at 50.

²⁵⁰ See Appellant’s Reply Brief at 8, *Parsons v. U.S. Dep’t of Justice*, 878 F.3d 162 (2017) (No. 16-2440), 2017 WL 2131546, at 8.

²⁵¹ *Id.*

forced to conform their activities to the will of law enforcement because of an agency action.

While the government might argue that law enforcement is free to disregard the NGIC designation and report, that argument fundamentally ignores the nature of the NGIC and insulates review of significant criminal sanctions. The NGIC's purpose is to induce law enforcement action around particular targets.²⁵² By insulating fusion centers from review, the lower federal courts may be narrowing their jurisdiction over cases involving a host of national security, immigration, and criminal justice determinations. It is not difficult to imagine that the Fourth and Sixth Circuits' approach could be used to game federal jurisdiction. Suppose Congress establishes a fusion center, the goal of which is to collect and centralize data on immigration. If that fusion center published a list of purported undocumented immigrants, it makes little sense that a person wrongly included on that list would be unable to seek judicial review.

The implications of the Fourth and Sixth Circuit rulings on state fusion centers is uncertain.²⁵³ Whether state legislatures will be able to influence state and federal criminal enforcement while also insulating those programs from judicial review remains uncertain.

The Fourth and Sixth Circuits' emphasis on the non-justiciability of third-party harms is not supported in the Supreme Court's finality jurisprudence. Justice Kennedy in *Hawkes Co.*, emphasized the "systematic consequences" that can accrue across multiple agencies even where agencies forego enforcement.²⁵⁴ The Court paid little attention to the fact that the Army Corps of Engineers' determination in *Hawkes Co.* had implications on whether EPA could enforce the Clean Water Act against plaintiffs.²⁵⁵

Several of the policies that underlie the agency finality requirement are inapplicable in *Parsons*. The goal of "prevent[ing] unnecessary judicial intervention into agency proceedings" where agencies maintain options for review of outcomes and procedures is inapplicable as applied to the NGIC.²⁵⁶ The NGIC's Report only signals a decision that has already been made to the public,²⁵⁷ and the action of designating a group as a game is made without notice and comment.

²⁵² *Id.* at 9.

²⁵³ See generally *More About Fusion Centers*, ACLU, <https://www.aclu.org/other/more-about-fusion-centers> (last visited Mar. 13, 2019).

²⁵⁴ *U. S. Army Corps of Eng'rs v. Hawkes Co., Inc.*, 136 S.Ct. 1807, 1816–17 (2016) (Kennedy, J., concurring).

²⁵⁵ See *id.*

²⁵⁶ See *Berry v. U.S. Dep't of Labor*, 832 F.3d 627, 634 (6th Cir. 2016) (citing *Abbott Labs. v. Gardner*, 387 U.S. 136, 149–52 (1967)).

²⁵⁷ See *supra* note 219 and accompanying text.

A formalistic approach also seems at odds with claims of constitutional injury, especially in overbreadth challenges. Scholars have noted that “gangs,” like groups of music fans, associate through clothing and expressive conduct.²⁵⁸ Gang prevention statutes have increasingly come under criticism for predicating criminal sanctions on expressive and associational markers in contravention of the First Amendment.²⁵⁹ Instances where the NGIC’s designation of the Juggalos had a chilling effect have already been discussed at length by other scholars.²⁶⁰

Beyond overbreadth doctrine and the First Amendment, a spectrum of harms would require varying levels of probability that the harm in question would occur. For instance, the potential for criminal punishment should weigh more heavily than the threat of civil sanction.²⁶¹

CONCLUSION

A few scholars have called for a pragmatic approach to final agency action with respect to the first prong of the *Bennett* standard.²⁶² This Note expands on that literature by exploring the agency finality’s connection with standing. The prohibition on third-party effects that has been adopted by the Fourth and Sixth Circuits will shield an increasing amount of agency actions from judicial scrutiny, effectively leaving plaintiffs without a remedy for a host of injuries.

A flexible approach to final agency action, whereby courts, under the second prong of *Bennett*, consider the magnitude of the harm and the likelihood of third-party reliance, will do more to achieve the “pragmatic” approach sought by the Supreme Court.²⁶³ Government has changed rapidly over the last thirty years. Due to the rise of fusion centers, the flexible approach outlined by this Note will be more likely to

²⁵⁸ Zachariah D. Fudge, *Gang Definitions, How Do They Work?: What the Juggalos Teach Us About the Inadequacy of Current Anti-Gang Law*, MARQ. L. REV. 979, 1025 (2014).

²⁵⁹ See, e.g., *R.C. v. State*, 948 So. 2d 48, 51 (Fla. Dist. Ct. App. 2007) (overturning a juvenile’s conviction as a gang member which was predicated on the presence of shirts and book bags with gang symbols); *In re A.G.*, 730 S.E.2d 187, 188 (Ga. Ct. App. 2012) (rejecting the trial court’s finding that four defendants were gang members because of bandanas and gang symbols written in one defendant’s notebook).

²⁶⁰ See Fudge, *supra* note 258, at 1025–27.

²⁶¹ Cf. Fallon, *supra* note 138 (hinting that the prospect of criminal sanctions might weigh in favor of pre-enforcement review).

²⁶² See generally Hickman & Thomson, *supra* note 16, at 2 (arguing for a more flexible standard because “in the absence of more extensive procedural protections, robust judicial review of the reasonableness of agency action is necessary to provide legitimacy to administrative action.”); Hylas, *supra* note 49, at 1650 (arguing for a pragmatic approach to allow for the review of interim policies).

²⁶³ *U. S. Army Corps of Eng’rs v. Hawkes Co., Inc.*, 136 S.Ct. 1807, 1815 (2016) (stressing the “‘pragmatic’ approach [the Court has] long taken to finality”) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967)).

stimulate meaningful judicial review of a constitutional claim like the one in *Parsons*.

This Note connects two justiciability requirements which are rarely mentioned in the same breath. The phenomenon that Professor Fallon would call the “fragmentation of standing”²⁶⁴ applies with equal force to administrative law’s justiciability requirements. By giving a historical approach to the negative order doctrine and multiple lines of final agency action cases, this Note incidentally offers some clarity about the goals behind the APA’s justiciability requirements. After demonstrating that the second prong of *Bennett* is closely related to standing doctrine, this Note naturally borrows from the latter to supplement the former.

²⁶⁴ See generally Fallon, *supra* note 138 (arguing that “[r]ecent years have witnessed the accelerated fragmentation of standing into a multitude of varied, complexly related subdoctrines”).

