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An Approach to Improving Judicial Review of the APA’s “Good Cause” Exception to Notice- and-Comment Rulemaking

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INTRODUCTION

Congress passed the Families First Coronavirus Response Act to ensure that workers suffering from COVID-19 could use their paid sick leave.¹ It charged the Secretary of Labor with administering the law by issuing necessary rules.² Since the ordinary process for promulgating regulations under the Administrative Procedure Act

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1. Pub. L. No. 116-127, 134 Stat. 178 (2020).
2. See Paid Leave Under the Families First Coronavirus Response Act, 85 Fed. Reg. 19,326 (Apr. 6, 2020).

(“APA”),³ the notice-and-comment procedure,⁴ can take months or even years to complete,⁵ Congress stipulated that

3. Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.). For a discussion of the history and purpose of the APA, see George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557, 1559 (1996).

4. See Administrative Procedure Act, 5 U.S.C. § 553(b)–(c) (2018). Notice-and-comment is an informal rulemaking process that agencies must follow when issuing a rule, which consists of three steps. First, an agency looking to promulgate a binding rule must publish a notice of proposed rulemaking (“NPRM”) in the Federal Register at least thirty days before the rule’s effective date. § 553(b), (d). At this stage, the agency is merely proposing a rule which is not yet in effect. The notice must provide the time, place, and nature of public rulemaking proceedings; it must reference the legal authority under which the rule is proposed; and it must include either the terms or substance of the proposed rule or a description of the subjects and issues involved. § 553(b)(1)–(3). Second, after issuing the NPRM, the agency must give “interested persons” an opportunity to participate in the rulemaking by submitting “written data, views, or arguments.” § 553(c). In other words, the agency must allow those who might be particularly affected by the rule to comment on it and voice their concerns. Finally, after consideration of the public comments, the agency issues a final rule and accompanies it with a “concise general statement” of the rule’s basis and purpose. *Id.*

This process also applies when an agency looks to amend or repeal a rule. § 551(5). If an agency’s organic statute requires rulemaking to be “on the record after opportunity for an agency hearing,” then the APA’s *formal* rulemaking procedures located in sections 556 and 557 are required. § 553(c); see also *United States v. Fla. E. Coast Ry. Co.*, 410 U.S. 224, 235 (1973) (holding that under 1966 amendment to the Interstate Commerce Act, language of provision authorizing Commission to act “after hearing” was not equivalent of a requirement that a rule be made “on the record after opportunity for an agency hearing” so as to trigger stricter rulemaking proceedings under the APA). Other types of rulemaking include hybrid, direct-final, and negotiated. See TODD GARVEY & DANIEL T. SHEDD, CONG. RESEARCH SERV., R41546, A BRIEF OVERVIEW OF RULEMAKING AND JUDICIAL REVIEW 1 (2017). By far the most common form of rulemaking—and the focus of this Comment—is informal. See MAEVE P. CAREY, CONG. RESEARCH SERV., RL32240, THE FEDERAL RULEMAKING PROCESS: AN OVERVIEW 5 (2013) (“Informal rulemaking, also known as ‘notice and comment’ rulemaking, is used much more frequently.”).

5. Despite the widely recognized public benefits associated with notice-and-comment, see, e.g., *Dismas Charities, Inc. v. U.S. Dep’t of Justice*, 401 F.3d 666, 680 (6th Cir. 2005) (explaining that public participation in informal rulemaking is meant to generate “the wisest rules” possible); Michael Asimow, *Interim-Final Rules: Making Haste Slowly*, 51 ADMIN. L. REV. 703, 707–08 (1999) (“Public input provides valuable information to rulemaking agencies at low cost to the agencies. Rules adopted with public participation are likely to be more effective and less

the circumstances fit within the APA's "good cause" exception.⁶ Accordingly, the regulations implementing the law took effect the day they were published.

The good cause exception allows an agency to bypass notice-and-comment,⁷ and the thirty-day publication requirement "when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the

costly to administer than rules written without such participation. They contain fewer mistakes. They are more likely to deal with unexpected and unique applications or exceptional situations."); Ernest Gellhorn, *Public Participation in Administrative Proceedings*, 81 YALE L.J. 359, 369 (1972) (expressing the "axiomatic" need for public participation in a process that is so similar to the legislative process); Ellen R. Jordan, *The Administrative Procedure Act's "Good Cause" Exemption*, 36 ADMIN. L. REV. 113, 116–17 (1984) (arguing that public participation in rulemaking makes the apparent lack of political accountability of agency administrators more palatable); Alan B. Morrison, *The Administrative Procedure Act: A Living and Responsive Law*, 72 VA. L. REV. 253, 255 (1986) (explaining that the informal rulemaking process promotes efficiency, fairness, and an overall "more rationally coherent rule"), it is also well known that notice-and-comment can be quite burdensome, costly, and time-consuming. *See* Jordan, *supra*, at 118 (suggesting that in some situations the value of public participation may be outweighed by the need for efficiency); Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385, 1397 (1992) (asserting that subjects of progressive social regulation and their trade associations have "fiercely resisted the rulemaking process, seeking to lard it up with procedural, structural, and analytical trappings that have the predictable effect of slowing down the agency"); Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59, 60 (1995) (noting various studies that bolster the complaints of administrative law scholars that agency rulemaking has become ossified). As a result, agencies often try to take advantage of exceptions to notice-and-comment when they are available.

6. Pub. L. No. 116-127, 134 Stat. 178, 190 (2020). Congressional intent to waive notice-and-comment is one of the few scenarios this Comment contends is worthy of the exception. *See infra* Part I.

7. An agency's decision to invoke the APA's good cause exception also relieves it of obligations outside of the APA. For example, when an agency promulgates a rule under the good cause exception it does not have to comply with the Regulatory Flexibility Act, which requires the agency to prepare impact statements of the rule on small business. Asimow, *supra* note 5, at 709. In addition, the agency does not have to perform the requirements of the Unfunded Mandates Reform Act, which requires the agency to provide cost-benefit analyses for certain significant regulatory actions. *Id.* at 709–10.

public interest.”⁸ The exception’s aim is to “strike a pragmatic compromise between the costs and delays inherent in complying” with informal rulemaking and “the public benefits that accrue from complying with those provisions.”⁹ To effectuate this balance, the legislative history of the APA provides that the exception should be narrowly construed and should not be used as an “escape clause.”¹⁰

The good cause exception has become central to the notice-and-comment process,¹¹ but federal courts have

8. Administrative Procedure Act, 5 U.S.C. § 553(b)(B), (d) (2018). The APA enumerates three categories of exceptions to its informal rulemaking procedures, one of which is the good cause exception. A second cluster of rules are “wholly exempt” from the requirements of section 553. JARED P. COLE, CONG. RESEARCH SERV., R44356, *THE GOOD CAUSE EXCEPTION TO NOTICE AND COMMENT RULEMAKING: JUDICIAL REVIEW OF AGENCY ACTION 1* (2016). This group is comprised of rules pertaining to (1) a military or foreign affairs function of the United States, (2) a matter relating to agency management or personnel, or (3) a matter relating to public property, loans, grants, benefits, or contracts. § 553(a)(1)–(2). The final group contains “nonlegislative” rules, which are exempt from section 553(b) and (c)’s notice-and-comment requirements. “Nonlegislative” rules, as opposed to legislative or substantive rules, do not purport to carry the “force of law” and thus do not bind the public’s behavior. COLE, *supra*, at 2. These rules come in three flavors. First are rules concerning “agency organization, procedure, or practice.” § 553(b)(3)(A). The second type are “interpretative” rules. *Id.* Generally speaking, an interpretative rule merely clarifies existing obligations, it does not create new ones. Finally, section 553(b)(3)(A) also exempts “general statements of policy” from notice-and-comment procedures.

9. Asimow, *supra* note 5, at 707.

10. S. REP. No. 79–752, at 200 (1945) [hereinafter SENATE REPORT].

11. In 2012, the Government Accountability Office (GAO) found that about 35% of major rules and about 44% of nonmajor rules were issued without an NPRM between 2003 and 2010. *See* U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-13-21, *FEDERAL RULEMAKING: AGENCIES COULD TAKE ADDITIONAL STEPS TO RESPOND TO PUBLIC COMMENTS 8* (2012). Of the agency rules examined in the GAO’s sample, agencies invoked the good cause exception in 77% of major rules and 61% of nonmajor rules promulgated without an NPRM. *Id.* at 15. Major rules are those that the Office of Information and Regulatory Affairs determines to, among other things, have or be likely to have an annual effect on the economy of \$100 million or more. 5 U.S.C. § 804(2); *see also* Adrian Vermeule, *Our Schmittian Administrative Law*, 122 HARV. L. REV. 1095, 1125 (2009) (“It is hard to overemphasize the importance of the ‘good cause’ exception. Notice-and-comment rulemaking is central to modern administrative law and practice, and at the

struggled in cases where they review its use, leading to uncertainty and inconsistent outcomes.¹² This uncertainty is especially problematic given the exception's potential to undermine basic principles of representative democracy when abused.¹³ Many are already uneasy about the dangers of a growing administrative state.¹⁴ So to help settle at least one of those fears, it is critical that courts ensure the good cause exception is used only when absolutely necessary.

center of the statutory procedures for notice-and-comment rulemaking is an open-ended override for emergency situations.”).

12. See Connor Raso, *Agency Avoidance of Rulemaking Procedures*, 67 ADMIN L. REV. 65, 87–90 (2015).

13. See James Yates, Comment, “*Good Cause*” is Cause for Concern, 86 GEO. WASH. L. REV. 1438, 1463 (2018) (“The increased use of the good cause exception has far-reaching effects. The exception undermines our democratic system because it permits agencies to issue rules without public participation. Previous presidents have used this mechanism to promulgate rules, none with more success than Obama. Now Trump is using it to try to unravel the rules Obama implemented before leaving office. This game of administrative ping pong threatens the legitimacy of our administrative state. It allows agencies to regulate without public participation and encourages abuse during administration changes.”); Nathanael Paynter, Comment, *Flexibility and Public Participation: Refining the Administrative Procedure Act’s Good Cause Exception*, 2011 U. CHI. LEGAL F. 397, 399 (2011) (“[I]n order to limit the power given to agencies acting in a quasi-legislative capacity, and to protect basic principles of representative democracy in rulemaking, changes to the good cause exception are necessary.”).

14. See, e.g., *City of Arlington, Tex. v. FCC*, 569 U.S. 290, 313 (2013) (Roberts, J., dissenting) (“The Framers could hardly have envisioned today’s ‘vast and varied federal bureaucracy’ and the authority administrative agencies now hold over our economic, social, and political activities. *Ibid.* [T]he administrative state with its reams of regulations would leave them rubbing their eyes.” (quoting *Alden v. Maine*, 527 U.S. 706, 807 (1999) (Souter, J., dissenting))). The constitutional infirmity of the administrative state, however, is only ostensible. Analyzed with care, constitutional text, structure, and history can be synthesized to provide support for the administrative state. See Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 64–65 (1994) (interpreting James Madison’s suggestion to the Committee of the Whole that executive power includes powers “not Legislative nor Judiciary” as referring to “administrative” power); Garrett West, Note, *Congressional Power Over Office Creation*, 128 YALE L.J. 166, 177 (2018) (arguing that the Necessary and Proper Clause and the Appointments Clause, read together, grant Congress the authority to create executive-branch offices).

One of the reasons for the confusion is substantive. Courts struggle in their attempt to identify the types of circumstances that warrant use of the exception. This is mainly due to the vagueness in the statutory language.¹⁵ So to balance the need for public participation in agency rulemaking with the desire for administrative efficiency in that process, courts should ensure that only compelling, clearly circumscribed situations qualify for the exception. This Comment argues, as others have, that those circumstances are (1) where prior notice would subvert the underlying statutory scheme; (2) where Congress intends to waive notice-and-comment; and (3) emergencies.¹⁶

Another cause for confusion involves a circuit split over the proper standard for reviewing an agency's use of the exception.¹⁷ Some review the action *de novo*,¹⁸ others for arbitrary and capriciousness.¹⁹ This Comment argues that neither is sufficient, since either approach treats an agency's good cause determination as a one-dimensional action rather than the multifaceted decision that it is. In other words, applying arbitrary and capricious review, on its own, to an agency's decision to use good cause affords deference to agencies in areas where it is not due—namely to legal conclusions—and applying only *de novo* review withholds deference in areas where the agency should receive it—namely to factual determinations.²⁰ Accordingly, this

15. See James Kim, Note, *For a Good Cause: Reforming the Good Cause Exception to Notice and Comment Rulemaking Under the Administrative Procedure Act*, 18 GEO. MASON L. REV. 1045, 1070–71 (2011).

16. See generally *id.*

17. This Comment focuses on “administrative law in the trenches—in the federal courts of appeal,” which is “the terrain in which administrative law actually operates.” Vermeule, *supra* note 11, at 1097.

18. See *infra* note 106 and accompanying text.

19. See *infra* note 108 and accompanying text.

20. Cf. Louis J. Virelli III, *Deconstructing Arbitrary and Capricious Review*, 92 N.C.L.R. 721, 724 (2014) (rejecting a “one-dimensional” approach that treats arbitrary and capricious review as a unitary concept—“as applying the same standard in the same way across all manner of agency conduct”—and instead

Comment argues for a two-step analysis, where the standard of review at step one is "arbitrary and capricious," and the standard at step two is *de novo*. At least one court and one commentator advocate for such a review, calling it the "mixed" standard.²¹ These approaches to improving judicial review of the good cause exception are consistent with the spirit and the text of the APA;²² they better embrace the "complexity and multidimensional nature" of agency rulemaking;²³ and they further the purpose of the narrowly-prescribed good cause exception. Just as importantly, they will ensure consistency in courts' examination of the exception as contemplated by the APA.

The remaining Parts of this Comment proceed as follows: Part I aims to help courts identify, in the first instance, precisely what circumstances are so compelling as to merit the use of the exception, arguing that the vagueness of the statutory language contributes to this difficult task.²⁴ To do

arguing that arbitrary and capricious review should divide administrative decisions into their constituent parts).

21. See *United States v. Reynolds*, 710 F.3d 498, 509 (3d Cir. 2013); Kelli M. Golinghorst, Note, *Meet Me in the Middle: The Search for the Appropriate Standard of Review for the APA's Good Cause Exception*, 103 IOWA L. REV. 1277, 1300 (2018). This Comment employs the terms "mixed," "bifurcated," and "two-step analysis" interchangeably to mean the same thing—a standard of review that applies one standard to factual determinations and another to legal conclusions.

22. See *Reynolds*, 710 F.3d at 509 (arguing that the "mixed" standard "is consistent with the text of § 706" because that section "includes no requirement that only one provision of the section be applied to a particular review" which enables courts "to apply one standard to legal determinations and another to factual determinations made in an administrative decision").

23. Virelli, *supra* note 20, at 727.

24. See Vermeule, *supra* note 11, at 1123 ("But what exactly are the 'terms' that the agency must obey? The APA's text is largely vacuous on this point; 'good cause' is an open-ended standard that essentially delegates the issue to future decisions of agencies and judges."). Another problem is, of course, politics. At least for politically contentious or economically significant rules, judges of different affiliations might choose to uphold a particular rule despite a dubious good cause claim or strike it down notwithstanding a strong one. *Cf. Yates*, *supra* note 13, at 1449–50 (2018). Analyzing this political element is, however, beyond the scope of this Comment.

so, Part I collects a number of federal decisions that have dealt with an agency's use of good cause in compelling circumstances and files them according to their respective fact patterns. This Part argues that only these compelling fact patterns warrant dispensing with notice-and-comment. Part II discusses the circuit split over the standard of review of the good cause exception, describing the "mixed" standard as it was discussed by the Third Circuit in *Reynolds* in its analysis of a prior decision, *Philadelphia Citizens in Action v. Schweiker*.²⁵ Then, Part II argues that the "mixed" standard is correct and offers some justifications for it. In doing so, Part II addresses a fundamental disagreement driving the circuit split that this Comment contends has not been sufficiently explored: whether to classify good cause as a "legal conclusion" or a "discretionary decision."²⁶ To answer this question, Part II argues first that good cause actually consists of two distinct parts or steps: (1) the agency's factual findings supporting its decision to invoke good cause; and (2) the ultimate conclusion that these findings are so compelling as to rise to the level of rendering prior notice-and-comment "impracticable, unnecessary, or contrary to the public interest."²⁷ The issue is how to classify the second step. Part II ultimately concludes that such action is a legal conclusion subject to de novo review. Finally, Part III argues that the mixed standard is not an outlier despite the *Reynolds* court referring to it as one.²⁸ Specifically, as a practical matter, other circuits have applied some form of mixed review, whether or not they declared that they were applying such review.

25. 669 F.2d 877 (3d Cir. 1982).

26. See *COLE*, *supra* note 8, at 13.

27. 5 U.S.C. § 553(b)(B) (2018); cf. Babette E. L. Boliek, *Agencies in Crisis? An Examination of State and Federal Agency Emergency Powers*, 81 *FORDHAM L. REV.* 3339, 3363 (2013).

28. Cf. *COLE*, *supra* note 8, at 14 n.129 ("It is unclear whether other courts that apply de novo review to agency good cause determinations would recognize [the mixed standard] as distinct.").

I. WHAT CONSTITUTES "GOOD CAUSE"?

Before discussing the standard of review, this Part aims to help courts identify precisely what circumstances are sufficiently compelling so as to merit the use of the good cause exception. This substantive difficulty compounds the problems associated with the circuit split over the standard of review²⁹ and can be attributed to the vagueness of the statutory language itself.³⁰ The exception's language is skeletal; it only limits good cause to broad, open-ended situations where prior notice-and-comment would be "impracticable, unnecessary, or contrary to the public interest."³¹ According to the Senate Judiciary Committee:

"Impracticable" means a situation in which the due and required execution of the agency functions would be unavoidably prevented by its undertaking public rule-making proceedings. "Unnecessary" means unnecessary so far as the public is concerned, as would be the case if a minor or merely technical amendment in which the public is not particularly interested were involved. "Public interest" supplements the terms "impracticable" or "unnecessary"; it requires that public rule-making procedures shall not prevent an agency from operating and that, on the other hand, lack of public interest in rule making warrants an agency to dispense with public procedure.³²

The Attorney General's APA manual also endorsed these interpretations.³³ But although the language purports to suggest separate categories, agencies and courts have not treated them as distinct.³⁴ In particular, "impracticable" and

29. See *COLE*, *supra* note 8, at 4; *Raso*, *supra* note 12, at 113 ("[E]ven the most diligent courts may struggle to treat each of the many different combinations of case facts consistently.").

30. *Kim*, *supra* note 15, at 1071; see also *Vermeule*, *supra* note 11, at 1123 ("The APA's text is largely vacuous[.] . . . 'good cause' is an open-ended standard that essentially delegates the issue to future decisions of agencies and judges.").

31. 5 U.S.C. § 553(b)(B).

32. SENATE REPORT, *supra* note 10, at 200.

33. *Yates*, *supra* note 13, at 1443 (citing U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 30-31 (1947)).

34. See *Juan J. Lavilla, The Good Cause Exemption to Notice and Comment*

“contrary to the public interest” often cover the same situations.³⁵ This overlap permits too much discretion and leads to judicial disagreements over precisely what circumstances rise to the level of good cause, all other things being equal.

One way to cabin agency discretion is to create a more pronounced, fact-based separation between these categories. To do so, it is helpful to explore the various types of fact scenarios that courts have deemed sufficient to justify dispensing with notice-and-comment. Accordingly, this Part files these cases into three distinct contexts: (1) where prior notice would subvert the underlying statutory scheme; (2) where Congress intends to waive notice-and-comment; and (3) emergencies.³⁶ Each is reviewed below.

A. *Where Prior Notice Would Undermine the Statutory Scheme*

One frequent context where courts have upheld an agency’s decision to invoke good cause is where the claim was that prior notice would frustrate the underlying statutory scheme.³⁷ Deciding whether the exception is warranted in these cases requires courts to examine the “nature” of the interests that could be harmed by prior notice and weigh them against the preference for public participation.³⁸ Such a situation frequently arises in areas of economic regulation.³⁹ A famous example occurred in *Mobil Oil Corp. v. Department of Energy*.⁴⁰ In that case, the Federal Energy

Rulemaking Requirements Under the Administrative Procedure Act, 3 ADMIN. L.J. 317, 351 (1989) (noting the “formalistic” approach to the good cause exemption is not followed in administrative practice or by courts (internal quotation marks omitted)); Kim, *supra* note 15, at 1050.

35. See Jordan, *supra* note 5, at 118–19; Kim, *supra* note 15, at 1050.

36. COLE, *supra* note 8, at 4–5; see also Kim, *supra* note 15, at 1053.

37. COLE, *supra* note 8, at 8; Kim, *supra* note 15, at 1055.

38. See Lavilla, *supra* note 34, at 381; Kim, *supra* note 15, at 1055.

39. Lavilla, *supra* note 34, at 381; Kim, *supra* note 15, at 1055.

40. 728 F.2d 1477 (Temp. Emer. Ct. App. 1983).

Administration ("FEA") invoked the good cause exception when it issued an interim-final rule ("IFR") that regulated oil price controls.⁴¹ The new rule sought to clarify a loophole in existing regulations that oil sellers were taking advantage of to avoid FEA regulations.⁴² In support of its decision to uphold the FEA's decision to invoke good cause, the Temporary Emergency Court of Appeals reasoned that if the FEA were to disclose the rule for notice-and-comment, oil sellers would then become aware of the ambiguity in the law and distort the market—a problem that the price control regulation sought to remedy.⁴³

A similar case is *DeRieux v. Five Smiths, Inc.*⁴⁴ There, the Economic Stabilization Act of 1970 imposed a freeze on season ticket pricing to professional football games.⁴⁵ President Nixon issued an executive order pursuant to the Act, and the ensuing regulations implementing the price controls were promulgated without notice-and-comment

41. *Id.* at 1482. In addition to bypassing notice-and-comment, the agency also does not have to wait thirty days for the rule to become effective. 5 U.S.C. § 553(d) (2018). This advantage is described as "interim rulemaking." *See generally* Asimow, *supra* note 5. An "interim-final" rule is thus a rule adopted by an agency that becomes immediately effective without pre-promulgation notice-and-comment. Such rules are sometimes referred to as "temporary" rules or "final rules; comments requested." But the term "interim-final" is used most often, and so it will be used here. *Id.* at 705 n.7. A clumsier sounding (but still quite apt) term is "final-final" rule, which refers to the rule that supplants an interim-final rule in light of post-promulgation comments. *Id.* at 705. Normally, when an agency decides to issue an interim-final rule, the adopting agency will declare that it will consider post-effective public comments, will modify the rule in light of those comments, and will then adopt a final-final rule. *Id.* at 704. However, the agency is not legally required to do so. Unless a statute provides otherwise, an agency's duty under § 553 is completely discharged after adopting a rule under the good cause exception (or any other APA exception). *See id.* at 711. Solicitation of post-promulgation comments, consideration of such comments, preparation of a statement of basis and purpose, and modification of the interim-final rule in light of the comments are all actions that an agency assumes voluntarily. *Id.*

42. *Id.*

43. *Id.* at 1490–92.

44. 499 F.2d 1321 (Temp. Emer. Ct. App. 1974).

45. *Id.* at 1326.

under the good cause exception.⁴⁶ The Temporary Emergency Court of Appeals upheld the use of the exception, reasoning that advance notice of the price freeze would have caused a massive effort to raise prices before the freeze deadline.⁴⁷ This, the court said, would lead to greater price inflation, which was precisely the problem that the price controls intended to address.⁴⁸

More recently, a district court judge in Washington, D.C., vacated an IFR promulgated jointly by the Departments of Justice and Homeland Security (the “Departments”). The IFR required migrants to seek protections from each country they traveled through on their way to the southern border before they could petition for asylum.⁴⁹ The Departments argued that good cause was warranted because making the rule available for comment before it became final could lead to a surge of asylum seekers at the border, since they would ostensibly rush to file a petition before the rule went into effect and restricted their rights.⁵⁰ They also argued that their “experience has been that when public announcements are made regarding changes in our immigration laws and procedures, there are dramatic increases in the numbers of aliens who enter or attempt to enter the United States along the southern border.”⁵¹ This, the Departments claimed, “would be destabilizing and would jeopardize the lives and welfare of aliens who could surge to the border to enter the United

46. *Id.* at 1331.

47. *Id.* at 1332–33.

48. *Id.*

49. *See* Asylum Eligibility and Procedural Modifications, 84 Fed. Reg. 33,829, 33,829–30 (July 16, 2019); *see also* Capital Area Immigrants’ Rights Coal. v. Trump, No. 19-2530, 2020 U.S. Dist. LEXIS 114421, at *6 (D.D.C. June 30, 2020).

50. *Capital Area Immigrants’ Rights Coal.*, 2020 U.S. Dist. LEXIS 114421, at *14.

51. Asylum Eligibility and Procedural Modifications, 84 Fed. Reg. at 33,841; *see also* *Capital Area Immigrants’ Rights Coal.*, 2020 U.S. Dist. LEXIS 114421, at *40.

States before the rule took effect.”⁵² The District Court was not persuaded, holding that the record did “not contain sufficient evidence” that this surge would occur while criticizing the Departments for relying heavily on a two-year-old article from the Washington Post in making their argument.⁵³

B. *Where Congress Intends to Waive Notice-and-Comment*

An agency’s decision to invoke good cause and bypass notice-and-comment might also be justified by congressional intent.⁵⁴ In such a case, Congress has either explicitly or implicitly required the agency to promulgate the rule in question immediately.⁵⁵ Courts have generally accepted an agency’s use of good cause where meeting a statutory deadline makes it impracticable to engage in pre-promulgation notice-and-comment.⁵⁶ For example, in *Asiana*

52. Asylum Eligibility and Procedural Modifications, 84 Fed. Reg. at 33,841; see also *Capital Area Immigrants’ Rights Coal.*, 2020 U.S. Dist. LEXIS 114421, at *40.

53. *Capital Area Immigrants’ Rights Coal.*, 2020 U.S. Dist. LEXIS 114421, at *41. The court continued:

Even assuming that the rule was likely to have had a similar effect as the regulatory change described in the article, the article contains no evidence that that change caused a surge of asylum seekers at the border—let alone one on a scale and at a speed that would have jeopardized their lives or otherwise have defeated the purpose of the rule if notice-and-comment rulemaking had proceeded In fact, the article lacks any data suggesting that the number of asylum seekers increased *at all* during this time—only that more asylum seekers brought children with them.

Id. at *42; see also Jacqueline Thomsen, *‘Failure Is Striking’: Trump-Tapped Judge Throws Out Administration’s Asylum Restriction*, LAW.COM (July 01, 2020, 8:37 AM), <https://www.law.com/nationallawjournal/2020/07/01/failure-is-striking-trump-tapped-judge-throws-out-administrations-asylum-restriction/>.

54. Lavilla, *supra* note 34, at 353–54.

55. See Kim, *supra* note 15.

56. See *Methodist Hosp. of Sacramento v. Shalala*, 38 F.3d 1225, 1236–38 (D.C. Cir. 1994) (holding that good cause allowed Secretary of Health and Human Services to promulgate regulations modifying method for reimbursing Medicare providers where Congress had set a five-month time table from date of enactment

Airlines v. Federal Aviation Administration (“FAA”),⁵⁷ the FAA, pursuant to the Federal Aviation Administration Reauthorization Act, issued an IFR without notice-and-comment, allowing it to collect \$100 million in overflight fees.⁵⁸ The FAA cited an express statutory deadline as cause for bypassing notice-and-comment, although the agency did allow post-promulgation opportunity to comment before issuing a final-final rule.⁵⁹ In upholding the agency’s IFR, the court noted that an express statutory deadline, without more, is insufficient to justify the use of the good cause exception.⁶⁰ But where a deadline is coupled with congressional intent to waive notice-and-comment, as was the case here, good cause is justified.⁶¹

In some cases, however, Congress might express an intent to waive notice-and-comment without establishing a statutory deadline.⁶² In such circumstances, courts must decide whether Congress’s general policy in favor of public participation is outweighed by its intent to expedite an agency’s promulgation of a rule.⁶³ For instance, in *Sepulveda v. Block*,⁶⁴ the Secretary of Agriculture issued an IFR revising the food stamp statute.⁶⁵ In upholding the secretary’s decision, the Second Circuit cited a Senate report that reflected Congress’s discontent with the slow

of statute to date new procedures were to go into effect and changes were exceedingly complex); *see also* Lavilla, *supra* note 34, at 354. *But see* U.S. Steel Corp. v. EPA, 595 F.2d 207, 213 (5th Cir. 1979) (holding that the “mere existence” of a deadline, without more, is usually insufficient to establish good cause).

57. 134 F.3d 393 (D.C. Cir. 1998).

58. *Id.* at 395.

59. *Id.*

60. *Id.* at 398–99.

61. *See id.* at 398.

62. *See* Lavilla, *supra* note 34, at 356; Kim, *supra* note 15, at 1058.

63. Kim, *supra* note 15, at 1058.

64. 782 F.2d 363 (2d Cir. 1986).

65. *Id.* at 364.

implementation of the provisions enacted the year prior.⁶⁶

Contrast that case with *Levesque v. Block*,⁶⁷ where the First Circuit rejected an IFR promulgated without notice-and-comment despite evidence of Congress's intent that the rule be issued expeditiously.⁶⁸ That case involved the Omnibus Budget Reconciliation Act of 1981, which authorized the Secretary of Agriculture to give effect to the act according to his sole discretion, qualified only by the need for "orderly implementation."⁶⁹ The court essentially held that "orderly" did not mean "immediate," in this case, and so it was inappropriate for the secretary to dispense with notice-and-comment.⁷⁰

More recently is *New York v. United States Department of Labor*.⁷¹ On April 1, 2020, the Department of Labor ("DOL") issued a Final Rule implementing the provisions of the Families First Coronavirus Response Act ("FFCRA"), a statute passed by Congress in response to the COVID-19 pandemic's life-altering impacts on American workers.⁷² The Final Rule was promulgated without notice-and-comment pursuant to the DOL's statutory authority to "issue regulations for good cause under sections 553(b)(B) and 553(d)(A) . . . as necessary, to carry out the purposes of this Act."⁷³ As reasons for its decision to invoke this authority, the agency explained:

The COVID-19 pandemic has escalated at a rapid pace and scale, leaving American families with difficult choices in balancing work, child care, and the need to seek medical attention for illness caused by the virus. To avoid economic harm to American families facing

66. *Id.* at 366.

67. 723 F.2d 175 (1st Cir. 1983).

68. *Id.* at 184.

69. *Id.* (internal quotation marks omitted).

70. *Id.* at 184–85.

71. No. 20-CV-3020, 2020 WL 4462260 (S.D.N.Y. Aug. 3, 2020).

72. Pub. L. No. 116-127, 134 Stat. 178 (2020).

73. *Id.* at 190.

these conditions, a decision to undertake notice-and-comment rulemaking would likely delay final action on this matter by weeks or months, and would, therefore, complicate and likely preclude the Department from successfully exercising the authority created [under FFCRA]. Moreover, such delay would be counter to one of the FFCRA's main purposes in establishing paid leave: enabling employees to leave the workplace now to help prevent the spread of COVID-19.⁷⁴

The agency's decision to forego notice-and-comment was not challenged, however.⁷⁵ This is because congressional authorization to invoke good cause was baked into FFCRA itself.⁷⁶

C. *Emergencies*

Far and away the most relevant scenario in a world shaped by a pandemic is a good cause claim on the basis of an emergency.⁷⁷ Courts have generally upheld an agency's decision to invoke good cause and bypass notice-and-comment where there was some compelling exigency.⁷⁸

74. Paid Leave Under the Families First Coronavirus Response Act, 85 Fed. Reg. 19,326, 19,342 (Apr. 6, 2020).

75. See generally *New York*, 2020 WL 4462260.

76. Even though the court ultimately severed the offending provisions from the DOL's Final Rule for substantive reasons, *id.* at *13, a procedural challenge to the agency's decision to invoke good cause would likely not have been successful, even if Congress had not explicitly authorized it. To be sure, the DOL's rule offered little in substance to protect American families from economic harm resulting from COVID-19. We might even say that the rule *invited* harm by excluding certain employees from receiving paid leave. But the question is more procedural. The question is whether a *delay* in promulgating the rule would have resulted in imminent harm, not whether the rule itself results in harm. In this case it would have. A delay in promulgating *something* would have visited serious consequences on the American workers who needed to know how FFCRA would be administered in order to plan their departure from the workplace and prevent the spread of the disease. So, in essence, the DOL was permitted to issue an immediately effective rule given its circumstances, just not a bad one.

77. Cf. Vermeule, *supra* note 11, at 1123 (“[E]xceptions to [notice-and-comment] are a critical testing ground for the administrative law of emergencies.”).

78. Kim, *supra* note 15, at 1053.

However, this is a high bar.⁷⁹ Courts generally require that the situation be so compelling as to pose an immediate threat to public health, safety, or welfare.⁸⁰ To determine whether a situation is so sufficiently grave as to merit a finding of good cause, courts examine the "nature" of the interest that is threatened, and decide whether that situation warrants a departure from notice-and-comment.⁸¹ Ultimately, the analysis tends to be highly contextual and fact intensive.⁸²

Imminent threats to human life and physical security normally constitute a grave enough situation to justify use of the good cause exception.⁸³ In *Hawaii Helicopter Operators Ass'n v. Federal Aviation Administration*,⁸⁴ the FAA bypassed notice-and-comment in promulgating new air-safety rules after a series of helicopter air-tour accidents.⁸⁵ The FAA cited as justification for its decision an urgent threat to public safety, including the fact that there were twenty air-tour accidents and twenty-four fatalities within the last three years.⁸⁶ The court held that the FAA's finding of good cause was valid, pointing out that no motive other than public safety was conceivable for waiving notice-and-comment.⁸⁷

However, the evidence of an immediate threat to human

79. *See id.* ("Courts, however, have not upheld good cause findings in every instance where an agency faces an urgent situation, as that would encourage the agency to use the good cause exception as an 'escape clause'" (citing Layne M. Campbell, Comment, *Agency Discretion to Accept Comment in Informal Rulemaking: What Constitutes "Good Cause" Under the Administrative Procedure Act*, 1980 BYU L. REV. 93, 96 (1980))).

80. *Id.* (citations omitted).

81. *See Lavilla, supra* note 34, at 363.

82. *See id.*

83. Kim, *supra* note 15, at 1054.

84. 51 F.3d 212 (9th Cir. 1995).

85. *Id.* at 214.

86. *Id.*

87. *Id.* at 214–15.

life must be compelling.⁸⁸ In *Texas Food Industry Ass'n v. United States Department of Agriculture*,⁸⁹ the Department of Agriculture ("DOA") imposed a new labeling requirement for uncooked and partially cooked meat and poultry products without notice-and-comment.⁹⁰ As justification, the DOA cited a public health emergency stemming from E. coli contamination and continuing instances of undercooked hamburgers.⁹¹ The court rejected the DOA's finding of good cause, reasoning that the E. coli outbreak was geographically isolated and was the result of negligence of fast food chains.⁹²

The protection of the economic health of the country as a whole might also merit a finding of good cause.⁹³ In *Reeves v. Simon*,⁹⁴ the Temporary Emergency Court of Appeals held that the Federal Energy Office ("FEO") was able to bypass notice-and-comment when it issued a rule prohibiting gas-station operators from reserving their available fuel for regular customers.⁹⁵ In doing so, the court explained that good cause was justified by a national emergency resulting from violence at gas stations due to fuel shortages.⁹⁶

Finally, in *Jifry v. Federal Aviation Administration*,⁹⁷ the FAA in conjunction with the Transportation Security Administration ("TSA") published new rules governing the

88. Kim, *supra* note 15, at 1054; *see also* Hedge v. Lyng, 689 F. Supp. 884, 893 (D. Minn. 1987) (holding that Secretary of Agriculture's concern about possible disruption of his existing calendar if regulations governing election of FmHA county committee members were not expeditiously adopted did not rise to level of an "emergency," such as would constitute good cause).

89. 842 F. Supp. 254 (W.D. Tex. 1993).

90. *Id.* at 256–57.

91. *Id.* at 257.

92. *Id.* at 260.

93. Kim, *supra* note 15, at 1055.

94. 507 F.2d 455 (Temp. Emer. Ct. App. 1974).

95. *Id.* at 457–58.

96. *Id.* at 459. These events took place during the 1973 Oil Crisis.

97. 370 F.3d 1174 (D.C. Cir. 2004).

revocation of airman certificates if a pilot was found to be a security risk in the wake of 9/11.⁹⁸ The agency reasoned that prior notice-and-comment “could delay the ability of TSA and the FAA to take effective action to keep persons found by TSA to pose a security threat from holding an airman certificate,” and that dispensing with the process was “necessary to prevent a possible imminent hazard to aircraft, persons, and property within the United States.”⁹⁹

Two pilots challenged these rules, arguing that they lacked a “rational basis” because the FAA already had the statutory authority to do what the rules prescribed, and therefore notice-and-comment was not “impracticable, unnecessary or contrary to the public interest.”¹⁰⁰ The D.C. Circuit found that Congress only gave the FAA permissive authority and that the rules mandated the process by which an individual’s pilot certificate would automatically be revoked if the TSA notified the FAA that a pilot posed a security risk.¹⁰¹ The court ultimately held that the agencies’ “legitimate concern over the threat of further terrorist acts involving aircraft in the aftermath of September 11, 2001,” was enough to constitute good cause.¹⁰²

As these cases show, courts have generally upheld an agency’s use of good cause where (1) delay would frustrate the purpose of a legislative objective; (2) Congress intended to waive notice-and-comment; or (3) there was an emergency.¹⁰³ To balance the need for public participation in rulemaking with the desire for efficiency in that process, courts should ensure that only these compelling situations qualify for the exception.¹⁰⁴

98. *Id.* at 1176–77.

99. *Id.* at 1179 (internal quotation marks omitted).

100. *Id.* at 1178.

101. *Id.* at 1179.

102. *Id.* at 1179–80.

103. *See Kim, supra* note 15, at 1054–58.

104. For a discussion of the various legislative attempts to reform the exception

II. THE CASE FOR THE “MIXED” STANDARD OF REVIEW

Identifying precisely what circumstances warrant a finding of good cause is only half of the battle, however. There is still the procedural confusion over the appropriate standard of review to apply to an agency’s decision that good cause exists.¹⁰⁵ Some courts say the action should be

and an argument that Congress should amend the language to reflect only these narrow circumstances, see generally *id.* This Comment focuses on what courts can do now to better handle the exception without having to wait for legislative reform.

105. Because *de novo* review is a much more “exacting” standard than the deferential posture of arbitrary and capricious review, COLE, *supra* note 8, at 13–14, the selection of a standard should be vital to the outcome. It appears that it hasn’t been in many cases. Take for example the circuits’ review of the attorney general’s IFR applying SORNA retroactively. In that context, the Fourth and Sixth Circuits reviewed the attorney general’s decision to invoke the exception *de novo*. In contrast, the Fifth and Eleventh Circuits reviewed for arbitrary and capriciousness. However, the results in these cases do not seem to follow from the chosen standards of review. For instance, the Fourth and Sixth circuits both applied *de novo* review, but reached opposite outcomes. Similarly, the Fifth and Eleventh circuits went in different directions but under the arbitrary and capricious standard. Some might say that this incongruence suggests, as courts and scholars have argued, that the standard of review does not matter. *See, e.g., Dickinson v. Zurko*, 527 U.S. 150, 163 (1999) (“[W]e have failed to uncover a single instance in which a reviewing court conceded that the use of one standard rather than the other would in fact have produced a different outcome.”); Ernest Gellhorn & Glen O. Robinson, *Perspectives on Administrative Law*, 75 COLUM. L. REV. 771, 780 (1975) (famously stating that in the context of judicial review of administrative decisions, “the rules governing judicial review have no more substance at the core than a seedless grape”); David Zaring, *Reasonable Agencies*, 96 VA. L. REV. 135, 138 (2010) (“[C]ourts do not, in the end, discern the differences among these various doctrines, frequently do not distinguish among the doctrines in application, and probably do not really care which standard of review they apply most of the time.”); *cf. Int’l Bhd. of Elec. Workers v. NLRB*, 448 F.2d 1127, 1142 (D.C. Cir. 1971) (Leventhal, J., dissenting) (prematurely believing that he had found the “case dreamed of by law school professors” where the agency’s findings, though “clearly erroneous,” were “nevertheless” supported by “substantial evidence”). Judge Richard Posner is slightly more optimistic, suggesting that there are just two standards—“plenary,” and “deferential”—which *are* operationally capable of having an impact on the outcome. *United States v. Boyd*, 55 F.3d 239, 242 (7th Cir. 1995). But Judge Posner acknowledges the folly of trying to draw any other palpable distinctions. *See id.* (“We are not fetishistic about standards of appellate review. We acknowledge that there are more verbal formulas for the scope of appellate review (plenary or *de novo*, clearly erroneous, abuse of discretion, substantial evidence, arbitrary and capricious,

reviewed de novo,¹⁰⁶ arguing that an agency's decision to bypass notice-and-comment is a failed "observance of procedure required by law" under 5 U.S.C. § 706(2)(D).¹⁰⁷ Others advocate for the more deferential "arbitrary and capricious" standard under 5 U.S.C. § 706(2)(A).¹⁰⁸ This Part argues that neither is sufficient, since either approach treats an agency's good cause determination as a one-dimensional action rather than the multifaceted decision that it is. In other words, applying arbitrary and capricious review, on its own, to an agency's decision to use good cause affords deference to agencies in areas where it is not due—namely legal conclusions—and applying only de novo review

some evidence, reasonable basis, presumed correct, and maybe others) than there are distinctions actually capable of being drawn in the practice of appellate review.”). This Comment assumes, as one should hope, that the standard of review matters.

106. See, e.g., *Nat. Res. Def. Council v. Nat'l Highway Traffic Safety Admin.*, 894 F.3d 95, 113 (2d Cir. 2018); *Sorenson Commc'ns Inc. v. FCC*, 755 F.3d 702, 706 (D.C. Cir. 2014) (calling an agency's use of good cause a “legal conclusion” and thus the standard of review “is *de novo*”); *United States v. Brewer*, 766 F.3d 884, 888 (8th Cir. 2014) (“The Fourth and Sixth Circuits, however, applied de novo review.”); *United States v. Reynolds*, 710 F.3d 498, 507 (3d Cir. 2013) (noting that the Fourth and Sixth Circuits applied de novo review without explicitly saying so); *United States v. Cain*, 583 F.3d 408, 434 n.4 (6th Cir. 2009) (Griffin, J., dissenting) (“It appears that the majority has reviewed de novo the attorney general's finding of good cause.”); *United States v. Gould*, 568 F.3d 459, 470 (4th Cir. 2009).

107. See *Reynolds*, 710 F.3d at 506 (“*De novo* review follows from the limited scope of review provided to courts in § 706(2)(D) to ensure that agency actions, findings, and conclusions are completed in ‘observance of procedure required by law,’ which is a legal question for which *de novo* review would typically be utilized.” (citing *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 376–77 (1989))); see also COLE, *supra* note 8, at 13. But see *Meister v. U.S. Dep't of Agric.*, 623 F.3d 363, 370–71 (6th Cir. 2010) (acknowledging that cases brought under section 706(2)(D) are reviewed de novo but conceding that the court's review “as a practical matter is often more deferential than that” and that “the arbitrary-and-capricious standard frequently governs”).

108. See *United States v. Johnson*, 632 F.3d 912, 928 (5th Cir. 2011); *United States v. Dean*, 604 F.3d 1275, 1278 (11th Cir. 2010); see also *Brewer*, 766 F.3d at 888 (“This deferential standard appears similar to the approach taken by the Fifth and Eleventh Circuits, which each used an arbitrary-and-capricious standard.”); *Reynolds*, 710 F.3d at 507 (noting “the Fifth and Eleventh Circuits’ use of the arbitrary and capricious standard in their SORNA decisions”).

withholds deference in areas where the agency should receive it—namely factual determinations.¹⁰⁹ Accordingly, this Part argues for a two-step analysis, where the standard of review at step one is “arbitrary and capricious,” and the standard at step two is *de novo*. At least one court and one commentator advocate for such a review, calling it the “mixed” standard.¹¹⁰

Section II.A provides an overview of such a standard as discussed in the Third Circuit’s decision in *Reynolds*. Then, Section II.B argues that the mixed standard as depicted in *Reynolds* is the correct standard because it is consistent with the spirit and the text of the APA,¹¹¹ better embraces the complex and multidimensional nature of agency rulemaking,¹¹² and allocates a more accurate amount of deference to an agency’s use of the good cause exception. Most importantly, this approach will ensure consistency in courts’ interpretations of good cause as employed in the APA.

A. *Reynolds’s Middle Ground*

This Comment’s two-step analysis can be traced to the Third Circuit’s decision in *Reynolds*. In that case, the Third Circuit noted that the standard of review question “has not received in-depth analysis despite the disagreement on the ultimate conclusion” and that “only the Fifth and Ninth Circuits have directly linked their discussion of the standard to § 706.”¹¹³ The court proceeded to supply that analysis,

109. *Cf. Virelli, supra* note 20, at 724 (rejecting a “one-dimensional” approach that treats arbitrary and capricious review as a unitary concept—as applying the same standard in the same way across all manner of agency conduct—and instead arguing that arbitrary and capricious review should divide administrative decisions into their constituent parts).

110. *See Reynolds*, 710 F.3d at 509; *Golinghorst, supra* note 21, at 1300.

111. *See Reynolds*, 710 F.3d at 509.

112. *Virelli, supra* note 20, at 727.

113. *Reynolds*, 710 F.3d at 507. Section 706 of the APA, titled “Scope of Review,” enumerates the available standards a reviewing court can use when “set[ting] aside agency action.” 5 U.S.C. § 706(2)(A)–(F) (2018).

stating that the disagreement over the standard of review “is heightened by the absence of an expressed standard in many non-SORNA¹¹⁴ good cause decisions by courts of appeals.”¹¹⁵ Instead, these cases were resolved by interpreting the good cause exception with a limiting principle, “commonly formulated as a direction that ‘good cause’ should be ‘narrowly construed.’”¹¹⁶ These courts have explained that this framework dictates that “circumstances justifying reliance on the good cause exception are indeed rare and will be accepted only after the court has examined closely proffered rationales justifying the elimination of public procedures.”¹¹⁷ This regime, the court noted, “has been developed separate and apart from § 706, derived from the legislative history of the good cause exception.”¹¹⁸ The court acknowledged that this principle seems to point towards de novo review, but pulled back and stated that “the close examination required by de novo review is inconsistent with the deference afforded under the arbitrary and capricious

114. The *Reynolds* case entered the discussion in the context of the attorney general’s retroactive application of the Sex Offender Registration and Notification Act (“SORNA”) without notice-and-comment, which is the primary stage for the debate over the appropriate standard of review. See generally COLE, *supra* note 8; Golinghorst, *supra* note 21; Kim, *supra* note 15.

115. *Reynolds*, 710 F.3d at 507; see also COLE, *supra* note 8, at 14 (“Complicating matters, however, is the practice of some courts to not clearly adopt either standard, but focus instead on simply ‘narrowly constru[ing]’ the provision.” (citing *Mid-Tex Elec. Coop. v. Fed. Energy Regulatory Comm’n*, 822 F.2d 1123, 1132 (D.C. Cir. 1987); *Nat. Res. Def. Council, Inc. v. EPA*, 683 F.2d 752, 764 (3d Cir. 1982))).

116. *Reynolds*, 710 F.3d at 507 (citations omitted); see also *California v. Azar*, 911 F.3d 558, 575 (9th Cir. 2019) (not applying a standard of review to the good cause exception but declaring that “[g]ood cause is to be ‘narrowly construed and only reluctantly countenanced’” (quoting *Alcaraz v. Block*, 746 F.2d 593, 612 (9th Cir. 1984))); see also Lavilla, *supra* note 34, at 333–34 n.66 (1989) (collecting cases applying a narrow construction of the good cause exemption).

117. *Reynolds*, 710 F.3d at 507 (internal quotation marks omitted) (quoting *Nat. Res. Def. Council, Inc. v. EPA*, 683 F.2d 752, 764 (3d Cir. 1982)).

118. *Id.* at 508 (citing *Am. Iron & Steel Inst. v. EPA*, 568 F.2d 284, 291–92 (3d Cir. 1977)).

standard.”¹¹⁹ Then, citing *Philadelphia Citizens in Action v. Schweiker*,¹²⁰ a previous Third Circuit decision, the *Reynolds* court suggested that the narrow-construction principle can be applied in a way where arbitrary and capricious review and de novo review can coexist: by using a “mixed” standard.¹²¹

In *Schweiker*, the Third Circuit reviewed de novo whether “shortness of time can []ever constitute good cause for invoking the [good cause] exemption.”¹²² Simultaneously, the court applied arbitrary and capricious review to determine whether the agency’s claim that alternative procedures were impracticable was correct.¹²³ After discussing this, the court in *Reynolds* explained the “mixed” standard:

Schweiker’s bifurcated analysis shows that the narrow-construction limiting-principle supports the third standard available—a mixed standard—consistent with both *de novo* and arbitrary and capricious review. This mixed standard requires that we review *de novo* whether the agency’s asserted reason for waiver of notice and comment constitutes good cause, as well as whether the established facts reveal justifiable reliance on the reason. But any factual determinations made by the agency to support its proffered reason are subject to arbitrary and capricious review.¹²⁴

119. *Id.* (citing *Nat. Res. Def. Council*, 683 F.2d at 760, 764).

120. 669 F.2d 877 (3d Cir. 1982).

121. *Reynolds*, 710 F.3d at 508.

122. 669 F.2d at 883.

123. *Id.* at 886.

124. *Reynolds*, 710 F.3d at 508. The APA does not explicitly mention the standard for reviewing factual determinations in informal proceedings such as notice-and-comment rulemaking. See 5 U.S.C. § 706(2)(A)–(F) (2018). However, the APA provides that factual findings made in formal proceedings are reviewed for “substantial evidence.” § 706(2)(E) (requiring a court to set aside agency action that is “unsupported by substantial evidence in a case subject to sections 556 and 557”). Although a similar provision does not exist for *informal* proceedings, courts consider the APA’s arbitrary and capricious standard found in section 706(2)(A) to be a “catchall” provision for judicial review of agency actions, including factual determinations made in informal rulemaking. See *Ass’n of Data Processing Serv. Orgs., Inc. v. Bd. of Governors of the Fed. Reserve Sys.*, 745 F.2d 677, 683 (D.C.

This analysis, the *Reynolds* court noted, “is consistent with the text of § 706 because it includes no requirement that only one provision of the section be applied to a particular review” and “allows [courts] to apply one standard to legal determinations and another to factual determinations made in an administrative decision.”¹²⁵ The court’s analysis more or less ended here, as it ultimately declined to adopt any of these standards and resolve the tension, holding that the agency’s assertion of good cause failed “even the most deferential standard.”¹²⁶

Cir. 1984) (holding that the scope of review provisions of the APA are “cumulative” and that section 706(2)(A)’s arbitrary and capricious provision is a “catchall” that “enabl[es] courts to strike down, as arbitrary, agency action that is devoid of needed factual support”). The Supreme Court has explained that this review requires courts to determine whether the agency’s factual findings are supported by “substantial evidence” in light of the “whole record.” *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951). Under this test, courts determine whether the facts are supported by “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Id.* (quoting *Consol. Edison Co. v. Labor Bd.*, 305 U.S. 197, 229 (1938)). So although judicial review of discretionary decisions and factual determinations share the same textual footing in the APA, they are reviewed under separate and distinct substantive tests. *See infra* note 135 (discussing hard-look review for discretionary decisions).

125. *Reynolds*, 710 F.3d at 509.

126. *Id.* This technique is not uncommon. Because of the confusion surrounding the appropriate standard of review, some courts avoid the question altogether by finding that the agency’s use of the exception fell even under the most deferential option. *See, e.g.*, *Pennsylvania v. President United States*, 930 F.3d 543, 567 n.22 (3d Cir. 2019) (“Though the review standard for agency assertions of good cause remains an open question in our circuit, we need not answer that question here. Even applying the most deferential of the potential standards—reviewing the agency’s good cause determination to see if it is arbitrary and capricious—the IFRs cannot stand.” (citation omitted)); *United States v. Brewer*, 766 F.3d 884, 888 (8th Cir. 2014) (“While we recognize that [the circuit split] is unhelpful, we agree with the Third Circuit that the attorney general’s assertion of good cause fails under any of the above standards.”); *Mack Trucks, Inc. v. EPA*, 682 F.3d 87, 93 (D.C. Cir. 2012) (“But we need not decide the standard of review since, even if we were to review EPA’s assertion of ‘good cause’ simply to determine if it is arbitrary or capricious, 5 U.S.C. § 706(2)(A), we would still find it lacking.”). The reverse is also true. *See United States v. Cain*, 583 F.3d 408, 434 n.4 (6th Cir. 2009) (Griffin, J., dissenting) (arguing for arbitrary and capricious review but realizing that “under either standard of review, good cause has been shown”). This strategy is used outside of the good cause context as well. *See, e.g.*, *Romer v. Evans*, 517 U.S. 620, 631–32 (1996) (declining to adopt a level

B. *Justifications For the “Mixed” Approach*

This Section aims to pick up where *Reynolds* left off and offer some additional justifications for the bifurcated standard. Mainly, a two-step approach is correct because it better embraces the multidimensional nature of the good cause exception,¹²⁷ thus allocating a more accurate amount of deference to an agency’s use of the exception. When courts review an agency’s use of the exception they generally examine (1) the agency’s factual findings supporting its decision to invoke good cause; and (2) the ultimate conclusion that these findings are so compelling as to rise to the level of good cause.¹²⁸ These two components of the good cause exception are separate and distinct. As such, they should be treated differently and should receive a different amount of deference.¹²⁹ And applying either *de novo* or arbitrary and

of scrutiny for discrimination on the basis of sexual orientation because the state law at issue fell under the most deferential level of scrutiny); *Nat. Res. Def. Council v. Nat’l Marine Fisheries Serv.*, 421 F.3d 872, 878–89 (9th Cir. 2005) (“We need not resolve this question here, because even under the *Chevron* standard of review, the 2002 quota was based on an impermissible construction of the Act.”); *Pension Benefit Guar. Corp. v. Wilson N. Jones Mem’l. Hosp.*, 374 F.3d 362, 369 (5th Cir. 2004) (“We do not need to decide whether the [agency]’s interpretation of annuity starting date warrants *Chevron* deference because it is clear that the [agency]’s order may be upheld as a matter of law under the less deferential standard set forth in [Mead].”).

127. *Cf. Virelli*, *supra* note 20, at 727.

128. *Cf. Boliek*, *supra* note 27, at 3363.

129. Breaking down an agency action into its constituent parts and applying different standards to each part is not a new idea. In his article *Deconstructing Arbitrary and Capricious Review*, Professor Louis J. Virelli III developed a multifaceted “deconstruction” model which aims to apply varying degrees of arbitrary and capricious review to each individual component of an agency’s action. The model reveals a subset of discrete inquiries within arbitrary and capricious review that courts can use to properly check agency action while promoting administrative efficiency and legitimacy. Virelli, *supra* note 20, at 737. In doing so, it distinguishes between “first-order” agency conduct, which includes “modes of self-education and information gathering,” and “second-order” agency conduct, which includes an agency’s “choice of relevant factors to influence its final policy conclusions and the relationship between that conclusion and the agency’s supporting rationale.” *Id.* at 738. Each of these types of agency behavior, according to the model, are subject to varying degrees of deference based upon their proximity to the ultimate policy choice made by the agency. *Id.* at 738–39.

capricious review by themselves ignores these important differences. For instance, underlying any given good cause claim are the agency's factual determinations,¹³⁰ which generally implicate the agency's expertise and thus should receive deference.¹³¹ So applying de novo review in a blanket fashion would ignore the case for deference to an agency's factual findings.¹³² Therefore, it is appropriate that the first step in this bifurcated analysis is to apply arbitrary and capricious review to the agency's underlying factual determinations.

Analyzing the second step, the agency's ultimate conclusion that the underlying findings are so compelling as to rise to the level of good cause, is less straight forward. This is because courts appear to disagree about whether to classify good cause as a "legal conclusion" or a "discretionary decision."¹³³ This distinction matters because the amount of deference owed to the agency's ultimate decision to invoke good cause depends on this classification.¹³⁴ If the decision is classified as discretionary, then it would seem that arbitrary and capricious review should apply through and through, that is, to both steps one and two.¹³⁵ In contrast, those in the

130. See *Alcaraz v. Block*, 746 F.2d 593, 612 (9th Cir. 1984) ("Our inquiry into whether the Secretary properly invoked 'good cause' proceeds case-by-case, sensitive to the totality of the factors at play."); Vermeule, *supra* note 11, at 1123 ("[Good cause] cases are exceedingly factbound.").

131. See *Scheduled Airlines Traffic Offices, Inc. v. Dep't of Def.*, 87 F.3d 1356, 1361 (D.C. Cir. 1996).

132. Golinghorst, *supra* note 21, at 1297.

133. See *COLE*, *supra* note 8, at 13.

134. *Id.* at 10

135. Judge Leventhal of the D.C. Circuit ultimately coined the term "hard-look" review to describe the type of review afforded to an agency's discretionary decisions. See *Greater Bos. Television Corp. v. FCC*, 444 F.2d 841, 851 (D.C. Cir. 1970) (stating that an agency decision should be overturned "if the court becomes aware, especially from a combination of danger signals, that the agency has not really taken a 'hard look' at the salient problems, and has not genuinely engaged in reasoned decision-making" (footnote omitted)); Harold Levanthal, *Environmental Decisionmaking and the Role of the Courts*, 122 U. PA. L. REV. 509, 514 (1974) ("The court does not make the ultimate decision, but it insists that the

official or agency take a ‘hard look’ at all relevant factors.”). Hard-look review has since become synonymous with arbitrary and capricious review. Virelli, *supra* note 20, at 727–28. Under this approach, the reviewing court’s role is “to make sure that agency ‘expertise’ does not disguise agency refusal to deal with agonizing questions or with cogent opposition to its intended direction.” Patricia M. Wald, *Judicial Review of Complex Administrative Agency Decisions*, 462 ANNALS AM. ACAD. POL. & SOC. SCI. 72, 77 (1982). So long as the agency has not “shirked this fundamental task,” then the court “exercises restraint and affirms the agency’s action even though this court would on its own account have made different findings” *Greater Bos. Television Corp.*, 444 F.2d at 851. The Supreme Court endorsed this movement towards a new approach to arbitrary and capricious review, *see* *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415–17 (1971), then cemented its applicability by famously stating a number of factors that courts must consider when reviewing an agency’s action for arbitrariness:

Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it cannot be ascribed to a difference in view or the product of agency expertise.

Motor Vehicle Mfrs. Ass’n v. State Farm Mutual Auto. Ins., 463 U.S. 29, 43 (1983). Although normally described as a “doctrine of deference,” Virelli, *supra* note 20, at 761, arbitrary and capricious review under the hard-look approach provides meaningful constraint against otherwise unchecked agency discretion, a much-needed consolation for the lack of constitutional text supporting the administrative state. *See* Thomas J. Miles & Cass R. Sunstein, *The Real World of Arbitrariness Review*, 75 U. CHI. L. REV. 761, 768 (2008) (“[A]rbitrariness review can be seen as a response to the uneasy constitutional position of agencies wielding broad discretionary power; perhaps such review can reintroduce surrogate safeguards for the decline of constitutional checks on agency authority.”); Sidney A. Shapiro & Richard E. Levy, *Heightened Scrutiny of the Fourth Branch: Separation of Powers and the Requirement of Adequate Reasons for Agency Decisions*, 1987 DUKE L.J. 387, 440 (1987) (“[Hard-look] review acknowledges the unique constitutional position of agencies outside the tripartite system of government envisioned by the Framers, and compensates through heightened scrutiny of agency decisions in the form of the requirement that agencies give adequate reasons.”). At the same time, hard-look review limits courts in their ability to impermissibly intrude upon institutional values such as agency expertise and independence. *See State Farm*, 463 U.S. at 53 (“[Passing upon the generalizability of field studies] is precisely the type of issue which rests within the expertise of [the agency], and upon which a reviewing court must be most hesitant to intrude.”); *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947) (fearing that reviewing courts, in supplying their own reasons, would tread “into the domain which Congress has set aside exclusively for the administrative agency”); Emily Hammond Meazell, *Presidential Control, Expertise, and the Deference Dilemma*, 61 DUKE L.J. 1763, 1772 (2012) (“Naturally, expertise also figures into judicial review as a reason for deference to agencies.”).

de novo camp would say that such action is a “legal conclusion,”¹³⁶ an interpretation of the APA’s text which agencies do not have authority to do.¹³⁷

An agency’s ultimate decision to invoke good cause after relying on its factual findings is a legal conclusion, not a discretionary decision.¹³⁸ The APA is unlike an agency’s organic statute where the agency’s expertise can be brought to bear on a particular statutory provision.¹³⁹ Rather, a good cause claim is an exercise of “statutory interpretation upon which the court is ready and able to substitute its judgment for that of the agency” about whether its circumstances rise to the level of good cause.¹⁴⁰ So although agencies are experts

136. See, e.g., *Sorenson Commc’ns Inc. v. FCC*, 755 F.3d 702, 706 (D.C. Cir. 2014) (“Therefore, our review of the agency’s legal conclusion of good cause is *de novo*.”); *Iowa League of Cities v. EPA*, 711 F.3d 844, 872 (8th Cir. 2013) (agreeing with the Ninth Circuit that the rationale for deferring to an agency action is not present where the question is whether the agency has followed the law).

137. See, e.g., *Sorenson*, 755 F.3d at 706 (“[A]n agency has no interpretive authority over the APA.”); *Reno-Sparks Indian Colony v. EPA*, 336 F.3d 899, 910 n.11 (9th Cir. 2003) (“This Court reviews *de novo* the agency’s decision not to follow the APA’s notice and comment procedures. The agency is not entitled to deference because complying with the notice and comment provisions when required by the APA ‘is not a matter of agency choice.’” (quoting *Sequoia Orange Co. v. Yeutter*, 973 F.2d 752, 757 n.4 (9th Cir. 1992))); *Campanale & Sons v. Evans*, 311 F.3d 109, 120 n.14 (1st Cir. 2002) (“We are unaware of any line of cases that allows an agency to make a binding determination that it has complied with specific requirements of the law.”); *Envirocare of Utah, Inc. v. Nuclear Regulatory Comm’n*, 194 F.3d 72, 79 n.7 (D.C. Cir. 1999) (“[W]hen it comes to statutes administered by several different agencies—statutes, that is, like the APA and unlike the standing provision of the Atomic Energy Act—courts do not defer to any one agency’s particular interpretation.”); *Warden v. Shalala*, 149 F.3d 73, 79 (1st Cir. 1998) (reviewing *de novo* whether an agency’s rule was substantive or interpretive under the APA’s exception for interpretive rules); *Zaring*, *supra* note 105, at 146 (“*De novo* review is appropriate when agencies are interpreting laws that they do not have a special responsibility to administer, like the Constitution, the APA, or Title VII.”).

138. The subtle question of whether to classify good cause as a discretionary decision or a legal conclusion, and the reasons for doing so, for purposes of the standard of review has yet to receive any in-depth treatment. See generally *COLE*, *supra* note 8; *Golinghorst*, *supra* note 21.

139. JAMES T. O’REILLY, *ADMINISTRATIVE RULEMAKING* § 3:14 (2020 ed. 2020).

140. *Id.*; *Wells v. Schweiker*, 536 F. Supp 1314, 1324 (E.D. La. 1982) (“[T]he

in their particular fields,¹⁴¹ “‘good cause’ is a term of art in a statute,” and “the courts are equally or more capable than an agency is to interpret the APA term ‘good cause’ without deference to an agency’s view of the APA.”¹⁴² Professor James T. O’Reilly’s argument on this topic merits quotation in full:

On matters of public procedural rights before administrative agencies, the courts do not readily defer to agency preferences where private persons are affected. Although the federal courts might defer to agency choices on an objective definitional question, the existence of good cause is a question of statutory interpretation

Secretary argues that his determination that good cause existed to dispense with s 553 procedures is to be reviewed only for abuse of discretion. I conclude that I am bound by the Fifth Circuit’s approach [which] subjected the agency’s determination of good cause to independent review This standard of review is especially appropriate here, since Mrs. Wells alleges the legal insufficiency of the Secretary’s assertion of good cause, an issue of statutory interpretation traditionally committed to courts.”); *see also, e.g.*, *Mack Trucks, Inc. v. EPA*, 682 F.3d 87, 93 (D.C. Cir. 2012) (giving “no particular deference” to the agency in holding that notice-and-comment was not “impracticable” for agency’s rule because it did not stave off any imminent threat to the environment or safety or national security); *id.* at 94 (holding that the “unnecessary” prong of the exception is confined to those situations in which the administrative rule is a routine determination, insignificant in nature and impact, and inconsequential to the industry and to the public); *Mobil Oil Corp. v. Dep’t of Energy*, 610 F.2d 796, 803 (Temp. Emer. Ct. App. 1979) (stating that it is “axiomatic” that a conclusory recitation of good cause does not constitute good cause while holding that a desire to provide immediate guidance, without more, is insufficient to bypass notice-and-comment); *Nat’l Venture Capital Ass’n v. Duke*, 291 F. Supp. 3d 5, 15, 17 (D.D.C. 2017) (reviewing *de novo* and holding that alleged expense of implementing rule allowing certain foreign entrepreneurs to obtain immigration parole did not justify Department of Homeland Security’s failure to comply with APA’s notice-and-comment requirements); *Hedge v. Lyng*, 689 F. Supp. 884, 893 (D. Minn. 1987) (holding that Secretary of Agriculture’s concern about possible disruption of his existing calendar if regulations governing election of FmHA county committee members were not expeditiously adopted did not rise to level of an “emergency,” such as would constitute good cause).

141. Cameron B. Alston, *Oregon Natural Resources Council v. United States Forest Service*, 27 *ECOLOGY L.Q.* 727, 740–41 (2000).

142. O’REILLY, *supra* note 139; *see also* *Scheduled Airlines Traffic Offices, Inc. v. Dep’t of Def.*, 87 F.3d 1356, 1361 (D.C. Cir. 1996) (“[W]e face a pure question of statutory interpretation independent of the complex factual determinations or policy judgments particularly within agencies’ expertise. The question under the APA is not whether the Department acted arbitrarily or capriciously, as in ordinary challenges to procurement decisions, but rather whether it acted in accordance with [federal] law.”).

first and foremost. Congress did not delegate the express power to enforce the APA to any particular agency; good cause definitions involve no agency-specific expertise; so under the statute, the agency should not expect to be able to interpret good cause without justifying it under very careful judicial scrutiny.

Both the courts' attentiveness to public participation values, and the attentiveness of the courts to legislative history, should warn agencies not to adopt rules without spelling out their good cause claim in express terms.¹⁴³

The view that invoking good cause is a legal conclusion would also be well supported by a majority of courts, given that *de novo* review is the majority approach.¹⁴⁴ Lastly, classifying the decision as such is more consistent with the APA's legislative history, since characterizing the action as a discretionary decision could potentially transform the exception into an "escape clause," controverting legislative intent.¹⁴⁵ Therefore, it makes good sense that the second step in this analysis would be for the court, after reviewing the agency's factual findings for arbitrary and capriciousness, to apply *de novo* review to the agency's ultimate decision to rely on those findings in deciding that good cause exists. To help guide this part of the analysis, courts should determine whether the circumstances before them fit into one of the circumscribed categories described in Part I *supra*.¹⁴⁶

143. O'REILLY, *supra* note 139.

144. Kim, *supra* note 15, at 1077.

145. See SENATE REPORT, *supra* note 10, at 200.

146. See *supra* Part I.

III. THE “MIXED” APPROACH IS NOT AN OUTLIER

Since *Reynolds*, the mixed standard has received very little scholarly support, with only one commentator advocating on its behalf.¹⁴⁷ A possible reason for this is because the *Schweiker* decision “appears to be an outlier from the body of good-cause case-law from [the Third Circuit], as well as other courts of appeals.”¹⁴⁸ This Part argues that the mixed standard that was used in *Schweiker*, as conceptualized thus far in this Comment, is not an outlier.¹⁴⁹ Specifically, as a practical matter, the D.C. Circuit, the Temporary Emergency Court of Appeals,¹⁵⁰ and at least one Fifth Circuit district court have applied some form of mixed review, whether or not they explicitly declared they were applying such review.

For instance, in *Sorenson Commissions, Inc. v. Federal Communications Commission*, the D.C. Circuit examined whether the FCC had good cause when it issued several IFRs raising standards for telecommunications service providers.¹⁵¹ In doing so, the court declared that its “review of the agency’s legal conclusion of good cause is *de novo*.”¹⁵² To give deference, the court noted, “would be to run afoul of congressional intent.”¹⁵³ However, in a footnote the court

147. See generally Golinghorst, *supra* note 21; see also Miriam R. Stiefel, Comment, *Invalid Harms: Improper Use of the Administrative Procedure Act’s Good Cause Exemption*, 94 WASH. L. REV. 927 (2019) (acknowledging *Reynolds*’s mixed standard).

148. *United States v. Reynolds*, 710 F.3d 498, 508–09 (3d Cir. 2013).

149. Cf. COLE, *supra* note 8, at 14 n.129 (“It is unclear whether other courts that apply *de novo* review to agency good cause determinations would recognize [the mixed standard] as distinct.”).

150. The Temporary Emergency Court of Appeals was abolished by The Act of October 29, 1992, Pub. L. 102-572, 106 Stat. 4506, and both its jurisdiction and its pending cases were transferred to the U.S. Court of Appeals for the Federal Circuit.

151. 755 F.3d 702 (D.C. Cir. 2014).

152. *Id.* at 706.

153. *Id.*

stated that it will “defer to [the] agency’s factual findings and expert judgments therefrom, unless such findings and judgments are arbitrary and capricious.”¹⁵⁴ This bifurcated analysis is precisely the type of review the *Reynolds* court attributed to the *Schweiker* decision.¹⁵⁵

Another case is *Mobil Oil Corp. v. Department of Energy*.¹⁵⁶ There, the FEA bypassed notice-and-comment in issuing a regulatory change in oil price controls.¹⁵⁷ The new rule clarified an ambiguity in existing regulations that oil sellers were taking advantage of to avoid FEA regulations.¹⁵⁸ In upholding the FEA’s decision to invoke good cause, the Temporary Emergency Court of Appeals reviewed whether there were “compelling circumstances surrounding the discriminatory pricing practices cited by the agency.”¹⁵⁹ In this instance, the court was reviewing whether the agency’s anticipated consequences for engaging in notice-and-comment rose to the level of good cause. Accordingly, the court reviewed that determination under a *de novo* standard,¹⁶⁰ ultimately finding that “the threat to the public would be sufficiently dire for good cause to be found.”¹⁶¹

The court continued to address “whether, as a matter of fact, [the agency’s] finding of good cause is supported by the administrative record.”¹⁶² Here the court was reviewing whether the circumstances the agency claimed to warrant good cause had adequate factual support. The court

154. *Id.* at n.3.

155. *See supra* note 124 and accompanying text.

156. 728 F.2d 1477 (Temp. Emer. Ct. App. 1983).

157. *Id.* at 1482.

158. *Id.*

159. *See id.* at 1491.

160. *See id.* at 1486–87 (“We are free to make an independent determination of the legal question as to whether the agency has made a showing of good cause.”).

161. *Id.* at 1492.

162. *Id.*

acknowledged that “[a]n agency’s procedural compliance with statutory norms . . . is subject to close[] scrutiny,” but so far as “the requisite procedures involve factual determinations, deference is still afforded to agency judgments. The ultimate question remains whether or not the agency’s action was arbitrary and capricious, that is, unreasonable.”¹⁶³ The court proceeded to analyze the evidence and concluded “that the record supports [the agency’s] good cause finding.”¹⁶⁴

Finally, a less explicit example is *Texas Food Industry Ass’n v. United States Department of Agriculture*.¹⁶⁵ In that case, the DOA imposed a new labeling requirement for uncooked and partially cooked meat and poultry products without notice-and-comment.¹⁶⁶ As justification, the DOA cited a public health emergency stemming from E. coli contamination and continuing instances of undercooked hamburgers.¹⁶⁷ The court rejected the DOA’s finding of good cause, reasoning that the E. coli outbreak was geographically isolated and was the result of negligence of fast food chains.¹⁶⁸ In addition, the court found that the costs of compliance with the rule drastically outweighed the benefits of issuing the rule immediately.¹⁶⁹ In essence, the court just did not think the agency’s circumstances were captured by the language of the rule, and in order to be faithful to Congress’s intent, the court stated:

The public is served by federal agencies following the guidelines that Congress has established. Some federal agencies are given extraordinary powers but those powers may not be casually exercised. Indeed, those powers are extraordinary primarily

163. *Id.* at 1486 (citations omitted).

164. *Id.* at 1493.

165. 842 F. Supp. 254 (W.D. Tex. 1993).

166. *Id.* at 256–57.

167. *Id.* at 257.

168. *Id.*

169. *Id.* at 261.

because the agencies are only permitted to invoke such powers in truly rare and extraordinary circumstances. Such an extraordinary circumstance has not been presented in this action.¹⁷⁰

The court did not state the standard of review here, but it did make an independent evaluation as to whether good cause existed and rejected the use of a “conclusory statement that normal procedures were not followed because of . . . ‘good cause.’”¹⁷¹ This is consistent with de novo review. But at the same time, the court “in no way attempt[ed] to substitute its own judgment for the collective wisdom of the USDA . . . regarding effective methods and approaches to combat the problems of food-borne illnesses.”¹⁷² This language has more of a deferential posture.

As these cases show, the *Schweiker* decision is no outlier. Other courts have resolved good cause cases in a way that is consistent with both de novo and arbitrary and capricious review. Such an approach is “consistent with the text of § 706” since that section “includes no requirement that only one provision of the section be applied to a particular review,” which enables courts “to apply one standard to legal determinations and another to factual determinations made in an administrative decision.”¹⁷³ In addition, this approach “embraces the complexity and multidimensional nature of administrative policymaking”¹⁷⁴ and thus should be explicitly adopted by other circuits in order to avoid further confusion and uncertainty in this area.

170. *Id.*

171. *Id.* at 259 (quoting *Mobil Oil Corp. v. Dep't of Energy*, 610 F.2d 796, 803 (Temp. Emer. Ct. App. 1975)).

172. *Id.* at 261.

173. *United States v. Reynolds*, 710 F.3d 498, 509 (3d Cir. 2013).

174. *Virelli*, *supra* note 20, at 727.

CONCLUSION

The good cause exception has been applied inconsistently across the federal circuits. Part of this divergence is substantive. Courts struggle in identifying precisely what circumstances warrant good cause. This is mostly due to the vagueness of the statutory language. Because it is unlikely that Congress will amend the language any time soon,¹⁷⁵ courts should make their own efforts to limit dispensing with public participation in agency rulemaking to just three situations: (1) where prior notice would subvert the underlying statutory scheme; (2) where Congress intends to waive notice-and-comment; and (3) emergencies. In addition, federal courts differ on the appropriate standard of review. Some review the action *de novo*, others under the arbitrary and capricious standard. Neither is sufficient on its own since a one-dimensional approach to the good cause exception does not allocate the appropriate amount of deference to the agency's decision to use good cause. Instead, courts should use a two-step approach that applies arbitrary and capricious review to the agency's factual determinations and *de novo* review to the agency's legal conclusion of good cause. Such an approach is consistent with the spirit and the text of the APA, furthers the purpose of the narrowly-prescribed good cause exception, and better captures the multidimensional nature of administrative rulemaking by allocating a more accurate amount of deference to an agency's decision to use good cause. Finally, such an approach is not an outlier: other circuits have applied some form of mixed review to the agency's decision to use good cause as a practical matter. To avoid further confusion and uncertainty in this area, other circuits should explicitly adopt the same approach.

175. See Paynter, *supra* note 13, at 399 (acknowledging the several failed attempts by Congress to amend the exception's language, making it unlikely that the language will be amended now (especially by one of the most divided Congresses in recent memory)); Kim, *supra* note 15, at 1051–52, 1070–73 (documenting these failed attempts but asking Congress to try again).