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SUMMARY

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The Good Cause Exception to Notice and Comment Rulemaking

If authorized by Congress, federal agencies can issue rules that bind the public with the force and effect of statutes. The Administrative Procedure Act (APA) generally requires agencies to provide public notice and opportunity for comment before they issue such rules, but the statute allows agencies to skip these steps when they "for good cause find" that compliance with ordinary rulemaking procedures would be "impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. § 553(b)(B). Agencies regularly invoke this "good cause" exception to issue a subset of their rules without any pre-publication notice or opportunity for public comment. In doing so, however, these agencies often provide opportunities for post-publication comment and issue superseding rules that respond to those comments.

Federal courts have scrutinized agencies' reliance on the good cause exception in dozens of cases. *See, e.g.*, *California v. Azar*, 911 F.3d 558, 575–78 (9th Cir. 2018); *United States v. Reynolds*, 710 F.3d 498, 509–14 (3d Cir. 2013); *Mack Truck, Inc. v. EPA*, 682 F.3d 87, 93–95 (D.C. Cir. 2012). While these judicial inquiries are fact-bound and context-dependent, several generalizable patterns emerge. For instance, courts have widely held that the good cause exception should be narrowly construed, that rulemaking procedures are "unnecessary" only when agencies take non-discretionary actions or issue rules that are of little or no interest to the public, and that rulemaking procedures are most often "impracticable" or "contrary to the public interest" if regulatory delay would threaten public health or welfare—but only if those threats are documented in an administrative record. *See, e.g.*, *Util. Solid Waste Activities Grp. v. EPA*, 236 F.3d 749, 754–55 (D.C. Cir. 2001); *Hawai'i Helicopter Operators Ass'n v. FAA*, 51 F.3d 212, 214 (9th Cir. 1995).

Courts sometimes reject agencies' good cause findings. When they do so, courts may nullify rules that were issued without pre-publication notice and comment. That remedial outcome is less likely if agencies provide opportunities for post-publication comment and then issue superseding final rules. When agencies take these post-publication steps, courts may dismiss good cause challenges as moot and may treat agency noncompliance with the APA's pre-publication notice and comment requirements as harmless error. *See, e.g.*, *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 591 U.S. 657, 684 (2020).

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Introduction

The Administrative Procedure Act (APA) generally requires agencies to provide advance notice and solicit public comment before issuing certain rules, but it excuses compliance with ordinary rulemaking procedures if an agency "for good cause finds" that those procedures would be "impracticable, unnecessary, or contrary to the public interest."[1] Agencies frequently rely on the APA's good cause exception to issue rules without any pre-publication notice and comment.[2] This report examines that practice. It begins by situating the good cause exception in the broader legal context of APA rulemaking. Next, it describes procedures that agencies often employ when invoking the exception. It then synthesizes caselaw on the good cause exception, identifying considerations that lead courts to uphold or reject agencies' findings of good cause. Finally, this report concludes by highlighting some considerations for Congress.

Agency Rulemaking

The APA establishes procedural requirements that federal agencies must follow when taking various actions, including "rulemaking."[3] "Rulemaking" under the APA is "the agency process for formulating, amending, or repealing a rule."[4] A "rule," in turn, is "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency."[5]

Rulemaking can be "formal" or "informal."[6] Formal rulemaking, which entails a trial-like proceeding before an agency tribunal, is required only when a statute provides for rulemaking "on the record."[7] Because most statutes do not contain that phrase, formal rulemaking is rare.[8] Far more common is informal rulemaking, also known as notice and comment rulemaking, which is governed by the procedures codified at 5 U.S.C. § 553.

Requirements for Informal Rulemaking

In relevant part, § 553 requires an agency to publish a notice—commonly called a Notice of Proposed Rulemaking (NPRM)—in the *Federal Register*.[9] The agency must include within that NPRM a description of the proposed rule and the legal authority on which it rests.[10] After publishing an NPRM, the agency must give "interested persons" an opportunity to comment on the proposed rule by submitting "written data, views, or arguments," which the agency must "consider[]."[11] The agency must then include in its final rule "a concise general statement of" the

[1] 5 U.S.C. §§ 551, 553(b)(B).

[2] *See infra* notes 26, 27 and accompanying text.

[3] 5 U.S.C. § 551–559.

[4] *Id.* § 551(5).

[5] *Id.* § 551(4).

[6] CRS Report RL32240, *The Federal Rulemaking Process: An Overview*, coordinated by Maeve P. Carey (2013).

[7] 5 U.S.C. §§ 556–557.

[8] United States v. Fla. E. Coast Ry. Co., 410 U.S. 224, 234–38 (1973).

[9] 5 U.S.C. § 553(b).

[10] *Id.*

[11] *Id.* § 553(c).

rule's "basis and purpose"[12] and must defer the effective date of the final rule until at least thirty days after it is published in the *Federal Register*.[13] Because the APA defines "rulemaking" to include the amendment or repeal of rules, these procedures apply when agencies issue, delete, or modify their rules.[14]

Section 553's requirements apply when agencies make rules that bind the public.[15] These "legislative" (or "substantive") rules have the "force and effect of law," and the Supreme Court has described § 553's rulemaking procedures as "foster[ing] the fairness and deliberation that should underlie . . . pronouncement[s] of such force."[16] As the Court explained, "Notice and comment gives affected parties fair warning of potential changes in the law and an opportunity to be heard on those changes—and it affords the agency a chance to avoid errors and make a more informed decision."[17] Lower courts have also observed that the inclusion of public comments in administrative records "enhance[s] the quality of judicial review,"[18] and some jurists have suggested that, by enabling public participation in the rulemaking process, notice and comment procedures may help to legitimate regulation by unelected officials.[19]

Exceptions to Otherwise Applicable Procedural Requirements

Section 553's procedural requirements for informal rulemaking are subject to four exceptions. First, agencies need not provide pre-publication notice of, or take comment on, rules governing internal "agency organization, procedure, or practice," "interpretative rules," and "general statements of policy," none of which bind the public with the force and effect of law.[20] Second, Congress can create statute-specific exemptions from some or all of § 553's requirements, though a "subsequent statute" will "supersede or modify" those requirements only if "it does so expressly."[21] Third, rules regarding "military or foreign affairs function[s] of the United States,"

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[12] *Id.*

[13] *Id.* § 553(d).

[14] *Id.* § 551(5); *see also* Perez v. Mortg. Bankers Ass'n, 575 U.S. 92, 100 (2015) (noting that § 551 "mandate[s] that agencies use the same procedures when they amend or repeal a rule as they used to issue the rule in the first instance").

[15] *See* APA: LEGISLATIVE HISTORY, S. DOC. NO. 79-248, at 358 (2d Sess. 1946) ("the legislative functions of administrative agencies shall so far as possible be exercised only upon public participation after notice").

[16] United States v. Mead Corp., 533 U.S. 218, 230 (2001).

[17] Azar v. Allina Health Servs., 587 U.S. 566, 582 (2019).

[18] UMW v. Mine Safety & Health Admin., 407 F.3d 1250, 1259 (D.C. Cir. 2005).

[19] *See* DHS v. Regents of Univ. of Cal., 591 U.S. 1, 58 n.13 (2020) (Thomas, J., concurring in part) ("[T]he notice and comment process at least attempts to provide a 'surrogate political process' that takes some of the sting out of the inherently undemocratic and unaccountable rulemaking process.") (quoting Michael Asimow, *Interim-Final Rules: Making Haste Slowly*, 51 ADMIN. L. REV. 703, 708 (1999)); *see also* Am. Hosp. Ass'n v. Bowen, 834 F.2d 1037, 1044 (D.C. Cir. 1987) (notice and comment procedures seek to "reintroduce public participation and fairness to affected parties after governmental authority has been delegated to unrepresentative agencies") (quoting Batterton v. Marshall, 648 F.2d 694, 703 (D.C.Cir.1980)).

[20] 5 U.S.C. § 553(b)(A); *see also* Perez v. Mortg. Bankers Ass'n, 575 U.S. 92, 97 (2015) ("The absence of a notice-and-comment obligation makes the process of issuing interpretive rules comparatively easier for agencies than issuing legislative rules. But that convenience comes at a price: Interpretive rules 'do not have the force and effect of law and are not accorded that weight in the adjudicatory process.'") (quoting Shalala v. Guernsey Mem. Hosp., 514 U.S. 87, 99 (1995)); John F. Manning, *Nonlegislative Rules*, 72 GEO. WASH. L. REV. 893 (2004).

[21] 5 U.S.C. § 559. The Supreme Court and lower courts have held that statutes outlining distinct procedural requirements for specific agency actions can override the APA's rulemaking procedures even without specifically referencing the APA. *E.g.*, Marcello v. Bonds, 349 U.S. 302, 309–10 (1955); Asiana Airlines v. FAA, 134 F.3d 393, 397 (D.C. Cir. 1998); *see generally* Dorsey v. United States, 567 U.S. 260, 273–74 (2012) (interpreting a statute's express reference requirement to create "a less demanding interpretive requirement" because "a later Congress . . . remains free to repeal" or modify the earlier statute either expressly or by implication).

"agency management or personnel," or "public property, loans, grants, benefits, or contracts" are categorically excluded from § 553's requirements.[22] Fourth—and the focus of this report—an agency can skip § 553(b)'s notice and comment procedures when it "for good cause finds" that following those procedures would be "impracticable, unnecessary, or contrary to the public interest" and when it "incorporates" that finding "and a brief statement of reasons therefore" into the rule.[23] An agency can also bypass § 553(d)'s requirement of a thirty-day deferred effective date "for good cause found and published with the rule."[24]

Agencies that invoke the good cause exception may bypass not just the procedural requirements of § 553 but also procedural requirements in other statutes. Those requirements include, for example, procedures in the Congressional Review Act, the Regulatory Flexibility Act, and the Unfunded Mandates Reform Act.[25]

Agencies' Use of the Good Cause Exception

Agencies routinely invoke the good cause exception for a subset of their legislative rules. According to a 2012 analysis by the Government Accountability Office (GAO), between 2003 and 2010, approximately 44% of non-major rules and 35% of major rules were published without NPRMs.[26] Of those rules, approximately 61% of non-major rules and 77% of major rules relied on findings of good cause to justify departure from ordinary rulemaking procedures, though, as GAO observed, agencies can—and frequently do—justify departures from ordinary rulemaking procedures by invoking other APA exceptions alongside the good cause exception.[27]

The Good Cause Exception in Practice: Direct and Interim Final Rules

Although the good cause exception allows agencies to forgo public notice and comment entirely, agencies that invoke the exception often provide some opportunity for the public to comment on

[22] 5 U.S.C. § 553(a)(1), (2).

[23] *Id.* § 553(b)(B).

[24] *Id.* § 553(d)(3). Legislative rules that "grant[] or recognize[] an exemption or relieve[] a restriction" are also exempt from the thirty-day deferred effective date, as are "interpretative rules and statements of policy." *Id.* § 553(d)(1), (2).

[25] Under the Congressional Review Act, major rules generally cannot take effect until sixty days after publication in the *Federal Register* or congressional receipt, *id.* § 801(a)(3), unless an agency invokes the good cause exception, *id.* § 808. The only rules subject to the Regulatory Flexibility Act are those "for which the agency publishes a general notice of proposed rulemaking pursuant to section 553(b) of this title." 5 U.S.C. § 601(2). Similarly, the requirements in Title II of the Unfunded Mandates Reform Act apply only if an agency must issue an NPRM. 2 U.S.C. § 1532(a). For a discussion of these statutory requirements, *see* Carey, *supra* note 6.

[26] U.S. GOV'T ACCOUNTABILITY OFF., GAO-13-21, FEDERAL RULEMAKING: AGENCIES COULD TAKE ADDITIONAL STEPS TO RESPOND TO PUBLIC COMMENTS 8 (2012) [hereinafter GAO STUDY]. The GAO Study adopts the term "major rules" from the Congressional Review Act, which defines "major rules" to include rules that will have or be likely will have an annual effect on the economy of $100 million or more, as determined by the Office of Information and Regulatory Affairs. 5 U.S.C. § 804(2).

[27] GAO STUDY, *supra* note 26, at 15. For examples of rules that invoke multiple APA exceptions, *see, e.g.*, Revision of National Environmental Policy Act Implementing Procedures, 90 Fed. Reg. 29676, 29680–81 (July 3, 2025) (to be codified at 10 C.F.R. parts 205 and 1021) (invoking the good cause exception and the exception for rules of agency procedure); Imposition and Collection of Civil Penalties for Certain Immigration-Related Violations, 90 Fed. Reg. 27439, 27454–56 (June 27, 2025) (to be codified at 8 C.F.R. parts 281, 1003, and 1280) (invoking the good cause exception, foreign affairs exception, and exception for rules of agency procedure).

rules *after* those rules are published. Agencies typically do this by issuing direct final rules (DFRs) or interim final rules (IFRs).[28]

In general, a DFR is a rule that becomes effective following a post-publication comment period unless the agency receives adverse public comments. If an agency receives adverse comments, it will typically withdraw the rule and publish the substance of the DFR as an NPRM, initiating normal notice and comment rulemaking procedures.[29]

An IFR is a rule that becomes effective upon publication but also invites public comment. When issuing an IFR, an agency typically announces that it will respond to significant comments and issue a superseding final version of the rule with any necessary modifications. Until that happens, however, the IFR functions as a binding final rule.[30]

While the APA does not expressly authorize DFRs or IFRs, the Administrative Conference of the United States (ACUS) has long advocated their use when agencies invoke the good cause exception.[31] Some agencies have also codified IFR and DFR procedures.[32]

IFRs and DFRs are commonplace. The 2012 GAO study referenced above found that IFRs accounted for roughly 15% of major rules and 4% of non-major rules issued from 2003 through 2010.[33] Another analysis found that agencies issued roughly 100–300 DFRs per year between 1995 and 2016.[34]

The Good Cause Exception and Inter-Party Presidential Transitions

The good cause exception can take on added significance in the months before and after inter-party presidential transitions. During these periods, outgoing Administrations may increase the pace of rulemaking, and incoming Administrations may quickly repeal or delay the rules issued

[28] *See* Carey, *supra* note 6 (discussing IFRs and DFRs); *see also* MARK SQUILLACE, BEST PRACTICES FOR AGENCY USE OF THE GOOD CAUSE EXEMPTION FOR RULEMAKING (2024) (report to the Admin. Conf. of the United States), https://www.acus.gov/document/best-practices-agency-use-good-cause-exemption-rulemaking-final-report [https://perma.cc/6MBS-W93P].

[29] Ronald M. Levin, *More on Direct Final Rulemaking: Streamlining, Not Corner-Cutting*, 51 ADMIN. L. REV. 757 (1999); Ronald M. Levin, *Direct Final Rulemaking*, 64 GEO. WASH. L. REV. 1 (1995).

[30] Michael Asimow, *Interim-Final Rules: Making Haste Slowly*, 51 ADMIN. L. REV. 703, 726 (1999); *see also* Kristin E. Hickman & Mark Thomson, *Open Minds and Harmless Errors: Judicial Review of Postpromulgation Notice and Comment*, 101 CORNELL L. REV. 261 (2016). GAO found that, between 2003 and 2010, agencies did not respond to comments on roughly one-third of major rules that were issued as IFRs. GAO STUDY, *supra* note 26, at 28. A more recent analysis concluded that when agencies issued IFRs, they did not issue superseding final rules 69% and 82% of the time in the Obama Administration and first Trump Administration, respectively. DAN BOSCH, AMERICAN ACTION FORUM, INTERIM FINAL RULES: NOT SO INTERIM (2020), https://www.americanactionforum.org/research/interim-final-rules-not-so-interim/ [https://perma.cc/YK8H-QZHJ].

[31] ACUS is an independent federal agency that identifies improvements in the procedures that agencies use to conduct regulatory programs. For examples of past ACUS recommendation regarding IFRs and DFRs, *see* Admin. Conf. of the United States, Adoption of Recommendations, Administrative Conference Recommendation 2024-6, Public Engagement in Agency Rulemaking Under the Good Cause Exemption, 89 Fed. Reg. 106406, 106408–09 (2024); Admin. Conf. of the United States, Special Committee to Review the Government in the Sunshine Act, Recommendation 95-4, Procedures for Noncontroversial and Expedited Rulemaking, 60 Fed. Reg. 43108, 43110 (1995).

[32] For an example of agency IFR and DFR procedures, *see* 40 C.F.R. § 721.170(d)(4) (2025).

[33] GAO STUDY, *supra* note 26, at 41.

[34] PHILIP A. WALLACH & NICHOLAS W. ZEPPOS, BROOKINGS INST., CONTESTATION OF DIRECT FINAL RULES DURING THE TRUMP ADMINISTRATION, (2018), https://www.brookings.edu/articles/contestation-of-direct-final-rules-during-the-trump-administration/ [https://perma.cc/GZ6Q-2KVP]. For reference, federal agencies issue between 3,000 and 4,000 rules per year. GAO STUDY, *supra* note 26, at 1.

by their predecessors.[35] Agencies have attempted to use the good cause exception, among other regulatory tools, to pursue both of those aims.[36] Commentators have documented these uses during the first Trump Administration and the first years of the Biden Administration.[37] The good cause exception has played a significant role in the early months of the second Trump Administration as well. On April 9, 2025, the President directed agency heads to invoke the exception when repealing regulations that they claim to be unlawful.[38] Agencies have also claimed good cause when extending compliance deadlines on rules that are currently under reconsideration[39] or when repealing rules pursuant to specific presidential directives.[40]

The Good Cause Exception and the Courts

Courts, not agencies, have the last word on whether good cause exists to forgo ordinary rulemaking procedures.[41] As the relevant House Committee report explained, the good cause exception "is not an 'escape clause' which may be exercised at will but requires legitimate grounds supported in law and fact."[42] While these grounds must be supplied "in the first instance by the agency concerned," "their propriety . . . must be sustainable upon inquiry by . . . reviewing court[s]," which must "prevent avoidance of the requirements of the bill by any manner or form of indirection."[43]

Based in part on this legislative history, courts have widely held that the good cause exception should be "narrowly construed and only reluctantly countenanced" and that agency findings of good cause should be closely scrutinized.[44] Courts have disagreed, however, on what standard of review to apply in good cause cases. Some courts have applied a *de novo* standard of review, with

[35] For a general discussion of rulemaking during periods of presidential transition, *see* Anne Joseph O'Connell, *Agency Rulemaking and Political Transitions*, 105 NW. U. L. REV. 471 (2015); *see also* CRS In Focus IF12723, *Presidential Transitions: Midnight Rulemaking*, by Maeve P. Carey.

[36] *See, e.g.*, Env't Def. Fund v. EPA, 515 F. Supp. 3d 1135, 1150–51 (D. Mont. 2021) (rejecting EPA's finding of good cause to issue an immediately effective rule during a period of presidential transition); Nat. Res. Def. Council v. Abraham, 355 F.3d 179, 206 (2d Cir. 2004) (rejecting the Department of Energy's finding of good cause to postpone without notice and comment a rule issued during a period of presidential transition).

[37] Bethany A. Davis Noll & Richard L. Revesz, *Presidential Transitions: The New Rules*, 39 YALE J. ON REG. 1100, 1149–52 (2022).

[38] Memorandum Directing the Repeal of Unlawful Regulations, 2025 DAILY COMP. PRES. DOC. 466 (Apr. 9, 2025).

[39] *E.g.*, Extension of Deadlines in Standards of Performance for New, Reconstructed, and Modified Sources and Emissions Guidelines for Existing Sources: Oil and Natural Gas Sector Climate Review Final Rule, 90 Fed. Reg. 35966 (July 31, 2025) (to be codified at 40 C.F.R. pt. 60); National Emission Standards for Hazardous Air Pollutants: Integrated Iron and Steel Manufacturing Facilities Technology Review: Interim Final Rule, 90 Fed. Reg. 29485 (July 3, 2025) (to be codified at 40 C.F.R. pt. 64).

[40] *E.g.*, Removal of National Environmental Policy Act Implementing Regulations, 90 Fed. Reg. 10610 (Feb. 25, 2025) (to be codified at 40 C.F.R. parts 1500–1508); Repeal of the Definition of Showerhead, 90 Fed. Reg. 15647 (Apr. 15, 2025) (to be codified at 10 C.F.R. pt. 430).

[41] *See* 5 U.S.C. §§ 702, 706 (providing for judicial review of agency action and defining the scope of review).

[42] APA: LEGISLATIVE HISTORY, S. DOC. NO. 79-248, at 258–60 (2d Sess. 1946).

[43] *Id.* at 279.

[44] Util. Solid Waste Activities Grp. v. EPA, 236 F.3d 749, 754 (D.C. Cir. 2001) (quoting Tenn. Gas Pipeline Co. v. FERC, 969 F.2d 1141, 1144 (D.C.Cir.1992); *accord* Nat. Res. Def. Council v. Nat'l Highway Traffic Safety Admin., 894 F.3d 95, 114 (2d Cir. 2018); United States v. Reynolds, 710 F.3d 498, 507–08 (3d Cir. 2013); U.S. Steel Corp. v. EPA, 595 F.2d 207, 214 (5th Cir. 1979); California v. Azar, 911 F.3d 558, 575 (9th Cir. 2018); United States v. Dean, 604 F.3d 1275, 1279 (11th Cir. 2010); Mid Continent Nail Corp. v. United States, 846 F.3d 1364, 1380 (Fed. Cir. 2017).

no deference accorded to agencies' findings of good cause.[45] Other courts have examined good cause findings under the arbitrary and capricious standard, asking whether agencies' actions were reasonable and reasonably explained but otherwise deferring to agency judgments.[46] Still others have reviewed agencies' legal conclusions *de novo* and agencies' factual findings under the arbitrary and capricious standard.[47]

It is unclear if these disagreements have had much practical effect. Courts generally agree that the good cause exception should be narrow, and courts and commentators have observed that this narrow construction appears to drive much of the analysis in good cause cases regardless of which standard of review courts apply.[48] In any event, *Loper Bright Enterprises v. Raimondo* likely settles the inter-circuit debate.[49] There, the Supreme Court held that courts reviewing agency action under the APA must decide questions of statutory interpretation using their own independent judgment while using arbitrary and capricious review to examine agency policymaking and factfinding.[50] That mixed standard closely tracks the third approach noted above.

Judicial Interpretations of the Good Cause Exception

Courts have described the good cause inquiry as "inevitably fact- or context-dependent,"[51] and commentators have noted that this case-by-case approach yields decisions that defy bright-line rules.[52] Still, several patterns emerge from the body of good cause caselaw. These recurrent patterns, which are summarized below, help to illustrate when rulemaking procedures are "impracticable, unnecessary, or contrary to the public interest" and thus waivable for good cause.

Rulemaking Procedures Are "Unnecessary" If the Public Has Little or Nothing to Say About the Underlying Rule

Courts have generally held that rulemaking procedures are "unnecessary" only when agencies take non-discretionary ministerial actions or issue rules that are of little or no interest to the regulated public.[53] Under this interpretation, which finds strong support in the APA's legislative

[45] *E.g.*, United States v. Cain, 583 F.3d 408, 420–21 (6th Cir. 2009); *see also id.* at 434 n.4 (Griffin, J., dissenting) ("It appears that the majority has reviewed de novo the Attorney General's finding of good cause.").

[46] *E.g.*, United States v. Johnson, 632 F.3d 912, 928 (5th Cir. 2011); *see generally* FCC v. Prometheus Radio Project, 592 U.S. 414, 423 (2021) (explaining that courts applying the arbitrary and capricious standard will not substitute their policy judgment for that of the agency and will uphold agency action so long as it falls "within a zone or reasonableness").

[47] *E.g.*, Sorenson Commc'ns Inc. v. FCC, 755 F.3d 702, 706 & n.3 (D.C. Cir. 2014).

[48] *See Reynolds*, 710 F.3d at 507–08; *see also* Nicholas Bagley, *Remedial Restraint in Administrative Law*, 117 COLUM. L. REV. 253, 283 n.203 (2017) (noting that disagreements about the applicable standard of review in good cause cases "may be more apparent than real"). *But see* Note, Kyle Schneider, *Judicial Review of Good Cause Determinations Under the Administrative Procedure Act*, 73 STAN. L. REV. 237, 275–78 (2021) (arguing for *de novo* review in good cause cases).

[49] 603 U.S. 369 (2024).

[50] *Id.* at 391–93; CRS Report R48320, *Loper Bright Enterprises v. Raimondo and the Future of Agency Interpretations of Law*, by Benjamin M. Barczewski (2024).

[51] Mack Trucks, Inc. v. EPA, 682 F.3d 87, 93 (D.C. Cir. 2012) (quoting Mid-Tex. Elec. Coop. v. FERC, 822 F.2d 1123, 1132 (D.C. Cir. 1987).

[52] Juan J. Lavilla, *The Good Cause Exemption to Notice and Comment Rulemaking Requirements Under the Administrative Procedure Act*, 3 ADMIN. L.J. 317, 343–44 (1989).

[53] *See Mack Trucks, Inc.*, 682 F.3d at 94 ("This prong of the good cause inquiry is 'confined to those situations in (continued...)

history, the "unnecessary" prong of the good cause exception is foreclosed if the public demonstrates its interest by meaningfully objecting to a rule.[54] Applying this reasoning, at least one court held that agencies cannot skip ordinary rulemaking procedures simply by declaring their own regulations unlawful, as "the question [of] whether . . . regulations are indeed defective is one worthy of notice and an opportunity to comment."[55]

The analysis may differ when agencies act to repeal rules that courts—rather than agencies—have already deemed legally defective. While the caselaw in this area is sparse, the U.S. Court of Appeals for the D.C. Circuit's (D.C. Circuit) decision in *Friends of Animals v. Bernhardt* provides some guidance.[56] That case concerned rules that the Department of the Interior (DOI) issued without notice and comment.[57] In an earlier case, the D.C. Circuit declared those rules procedurally infirm and remanded them to DOI so that the department could reissue its rules following proper procedures.[58] Instead, DOI formally withdrew its rules, again without going through notice and comment.[59] The plaintiffs in *Friends of Animals* challenged that withdrawal, arguing that DOI was obliged to take comment before acting.[60] The D.C. Circuit disagreed, though its opinion was narrow.[61] The court cautioned that "if only part of a rule that has gone through notice and comment is held illegal and an agency wishes to abandon the whole rule, it is obliged to use notice and comment."[62] The court also suggested that repeal without notice and comment would be unjustified if a court had "only remanded a rule" so that the agency could provide "an adequate explanation" for its action.[63] *Friends of Animals* thus holds only that notice and comment will be "unnecessary" when an agency acts to repeal a rule that was previously "struck down because the agency failed to promulgate the rule through proper procedures."[64]

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which the administrative rule is a routine determination, insignificant in nature and impact, and inconsequential to the industry and to the public.'") (quoting Util. Solid Waste Activities Grp. v. EPA, 236 F.3d 749, 755 (D.C. Cir. 2001)); *accord* Nat. Res. Def. Council v. Nat'l Highway Traffic Safety Admin., 894 F.3d 95, 114 (2d Cir. 2018); *see also* Metzenbaum v. FERC, 675 F.2d 1282, 1291 (D.C. Cir. 1982) (per curiam) (taking comment on a "non-discretionary" action would have been a "futile gesture" and was therefore "unnecessary").

[54] *See* APA: LEGISLATIVE HISTORY, S. DOC. NO. 79-248, at 258 (2d Sess. 1946) ("'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."); U.S. Dep't of Just., U.S. Att'y Gen.'s Manual on the APA 30–31 (1947) [hereinafter Att'y Gen.'s Manual] ("'Unnecessary' refers to the issuance of a minor rule in which the public is not particularly interested."); *see also* Chrysler Corp. v. Brown, 441 U.S. 281, 302 n.31 (1979) ("[W]e have given some weight to the Attorney General's Manual . . . , since the Justice Department was heavily involved in the legislative process that resulted in the Act's enactment in 1946.").

[55] Consumer Energy Council of Am. v. FERC, 673 F.2d 425, 447 n. 79 (D.C. Cir. 1982), *aff'd sub nom.*, Process Gas Consumers Grp. v. Consumer Energy Council, 463 U.S. 1216 (1983); *see also* Action on Smoking & Health v. Civ. Aeronautics Bd., 713 F.2d 795, 800 (D.C. Cir. 1983) (per curiam) ("Bald assertions that the agency does not believe comments would be useful cannot create good cause to forgo notice and comment procedures."). Some commentators have also maintained that agencies must seek public comment not just on whether a rule is illegal but also on how to correct a rule's perceived legal defects. *See* Reed Shaw, *Setting the Record Straight on the APA's "Good Cause" Exception*, YALE J. ON REG.: NOTICE & COMMENT (May 16, 2025), https://www.yalejreg.com/nc/setting-the-record-straight-on-the-apas-good-cause-exception-by-reed-shaw/ [https://perma.cc/DJR7-PHTL].

[56] 961 F.3d 1197 (D.C. Cir. 2020).

[57] *Id.* at 213–14.

[58] *Id.* at 214.

[59] *Id.* at 214.

[60] *Id.* at 217.

[61] *Id.* at 218.

[62] *Id.* at 218.

[63] *Id.* at 218.

[64] *Id.* at 218–19.

Serious Threats to Public Safety Can Render Rulemaking Procedures "Impracticable" and "Contrary to the Public Interest"

Most good cause litigation concerns the exception's first and third prongs, which allow agencies to bypass rulemaking procedures when circumstances render those procedures "impracticable" or "contrary to the public interest." The relevant committee report describes those two prongs in largely overlapping terms: rulemaking procedures are "impracticable" when they would "unavoidably prevent[]" agencies from the "due, timely, and required" execution of their functions, while the same procedures are "contrary to the public interest" when they "unreasonably prevent an agency from fulfilling its duty."[65] Any distinction between these prongs is often blurred in practice. Agencies frequently claim that circumstances support a finding of good cause under both prongs, and reviewing courts rarely distinguish between them.[66]

Agencies invoking the good cause exception often claim that rulemaking procedures are both "impracticable" and "contrary to the public interest" because imminent threats to public safety justify expedited regulatory action.[67] Such claims sometimes prevail. For example, in *Biden v. Missouri*, the Supreme Court held that the Secretary of Health and Human Services had permissibly bypassed notice and comment procedures when issuing an emergency rule aimed at blunting an anticipated surge in COVID-19 cases[68]; in *Tri-County Telephone Association v. FCC*, the D.C. Circuit upheld the Federal Communications Commission's use of the good cause exception when issuing rules intended to address the "ongoing emergency" caused by hurricane-damaged telecommunications infrastructure[69]; and in *Hawai'i Helicopters Association v. FAA*, the U.S. Court of Appeals for the Ninth Circuit (Ninth Circuit) held that the Federal Aviation Administration could skip notice and comment when issuing targeted safety rules following seven fatal helicopter accidents in the previous nine months.[70]

By contrast, courts sometimes reject agencies' claims of good cause after concluding that agency-invoked emergencies did not justify departures from ordinary rulemaking procedures. When doing so, courts usually stress the narrowness of the good cause exception and emphasize that agencies must provide factual support for their good cause findings.[71] Thus, "speculation" about potential harms "unsupported by the administrative record" has not sufficed,[72] and agencies

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[65] APA: LEGISLATIVE HISTORY, S. DOC. NO. 79-248, at 258 (2d Sess. 1946).

[66] *See* GAO STUDY, *supra* note 26, at 16–17 (noting frequency with which agencies cite multiple elements of the good cause exception); *see also* Mark Seidenfeld, *Rethinking the Good Cause Exemption to Notice and Comment Rulemaking in Light of Interim Final Rules*, 75 ADMIN. L. REV. 787, 795 (2023) (noting the semantic and practical overlap between the "impracticable" and "public interest" prongs of the good cause exception).

[67] *See* California v. Azar, 911 F.3d 558, 575 (9th Cir. 2018) ("[T]he good cause exception is usually invoked in emergencies.").

[68] 595 U.S. 87 (2022) (per curiam).

[69] 999 F.3d 714 (D.C. Cir. 2021) (per curiam).

[70] 51 F.3d 212 (9th Cir. 1995).

[71] *See, e.g.*, E. Bay Sanctuary Covenant v. Trump, 932 F.3d 742, 777 (9th Cir. 2018) (holding that the good cause exception is "essentially an emergency procedure" and reserved for situations where "delay would do real harm") (quoting United States v. Valverde, 628 F.3d 1159, 1165 (9th Cir. 2010)); *see also id.* at 778 n.16 ("The Government claims that courts cannot 'second-guess' the reason for invoking the good cause exception as long as the reason is 'rational.' But an agency invoking the good cause exception must 'make a sufficient showing that good cause exists.'") (quoting Nat. Res. Def. Council v. Evans, 316 F.3d 904, 912 (9th Cir. 2003)); United States v. Reynolds, 710 F.3d 498, 513 (3d Cir. 2013) ("Situations that fit within the serious harm justification for good cause require some set of facts and circumstances showing why the harm at issue demonstrates a need to waive the notice and comment requirements.").

[72] *California*, 911 F.3d at 577; *see also* Sorenson Commc'ns Inc. v. FCC, 755 F.3d 702, 707 (D.C. Cir. 2014) ("Though no particular catechism is necessary to establish good cause, something more than an unsupported assertion is (continued...)

cannot establish good cause by generally invoking the public safety rationale of the statutes that they are acting under.[73] Rather, courts typically demand that agencies "point to something specific that illustrates a particular harm that will be caused by" following ordinary rulemaking procedures.[74] Courts also generally insist that when agencies invoke threats to public safety to support findings of good cause, those agencies must act quickly and cannot create or worsen emergency conditions through their own delay.[75]

Threats of Substantial and Unforeseeable Economic Harm May Support a Finding of Good Cause

Courts have occasionally allowed agencies to bypass notice and comment procedures to avoid major economic disruption. For instance, in *National Federation of Federal Employees v. Devine*, the D.C. Circuit held that looming "actuarial disarray" that "might have posed a serious threat to the financial stability" of the federal employee health insurance program was "an 'emergency' within the scope of the 'good cause' exception."[76] The emergency that supported good cause in *American Federation of Government Employees v. Block* was "economic harm and disruption to" poultry producers and attendant "shortages or increases in consumer prices."[77] In both cases, however, the D.C. Circuit also stressed that the agencies had been compelled to act quickly by unforeseen adverse judicial decisions.[78]

Courts have declined to treat more predictable regulatory costs as grounds for the good cause exception. In *Mack Truck, Inc. v. EPA*, for example, the D.C. Circuit held that EPA had erred by bypassing notice and comment procedures so that the agency could more quickly relieve a regulated entity of its compliance burden.[79] According to the court, EPA's approach would "give agencies 'good cause' under the APA every time a manufacturer in a regulated field felt a new regulation imposed some degree of economic hardship," which would often be the case.[80] The U.S. Court of Appeals for the Federal Circuit has adopted similar reasoning, holding that "an assertion of mere pocketbook (or balance-sheet) harm to regulated entities is generally not

required."); Tenn. Gas Pipeline Co. v. FERC, 969 F.2d 1141, 1146–47 (D.C. Cir. 1992) (An agency "cannot claim[] good cause without offering any evidence, beyond its asserted expertise.").

[73] *Reynolds*, 710 F.3d at 512.

[74] United States v. Brewer, 766 F.3d 884, 890 (8th Cir. 2014) (quoting *Reynolds*, 710 F.3d at 513). Illustrating the fact-intensive nature of the good cause inquiry, courts have concluded that the same general emergency—the COVID-19 pandemic—warranted a departure from ordinary rulemaking procedures in some contexts but not in others. *Compare Biden*, 595 U.S. at 96–97 (good cause based on COVID-19), *with* Florida v. Becerra, 544 F. Supp. 3d 1241, 1296 (M.D. Fla. 2021) and Ass'n of Cmty. Cancer Ctrs. v. Azar, 509 F. Supp. 3d 482, 497 (D. Md. 2020) (no good cause based on COVID-19).

[75] *See* Chamber of Com. v. DHS, 504 F. Supp. 3d 1077, 1088 (N.D. Cal. 2020) (collecting cases holding that agencies' delays of between six and eight months belied their findings of good cause); *see also* San Diego Air Sports Ctr., Inc. v. FAA, 887 F.2d 966, 970 (9th Cir. 1989) (agency that waited two years to issue emergency rules did not properly invoke the good cause exception). *But see Biden*, 595 U.S. at 96–07 (holding that the two months that an agency spent preparing an emergency rule was not "'delay' inconsistent with" a finding of good cause).

[76] 671 F.2d 607, 611 (D.C. Cir. 1982) (per curiam); *cf.* Sorenson Commc'ns Inc. v. F.C.C., 755 F.3d 702, 706–07 (D.C. Cir. 2014) (holding that an "unsustainable payout rate" from a government fund was "[c]ause for concern" but "hardly a crisis" sufficient to support a finding of good cause).

[77] 655 F.2d 1153, 1157 (D.C. Cir. 1981).

[78] *Devine*, 671 F.2d at 611; *Block*, 655 F.2d at 1157.

[79] 682 F.3d 87 (D.C. Cir. 2012).

[80] *Id.* at 94.

sufficient to establish good cause as nearly every agency rule imposes some kind of economic cost."[81]

Agencies May Invoke the Good Cause Exception When § 553's Procedural Requirements Would Lead to Harmful Behavior

Courts sometimes allow agencies to bypass § 553's procedural requirements when adherence to those requirements could "precipitate activity" by regulated parties "that would harm the public welfare."[82] This circumstance occurred several times in cases challenging price controls that the Federal Energy Administration imposed during the oil crisis of the 1970s.[83] Upholding that agency's use of the good cause exception, the Temporary Emergency Court of Appeals agreed that "the announcement of a price increase at a future date could have resulted in producers withholding crude oil from the market," thereby worsening shortages, while advance notice of a price freeze could have led to a "massive rush to raise prices."[84] Although those rationales rested on the Federal Energy Administration's predictive judgment, the court consistently held that the agency had reasonably concluded that ordinary rulemaking procedures would have likely spurred the very market behaviors that the rules were designed to prevent.[85]

Outside the price control context, courts have been less willing to uphold good cause findings that rested on agencies' predictions about third-party behavior. *Tennessee Gas Pipeline Co. v. FERC* is illustrative. There, the D.C. Circuit rejected the Federal Energy Regulatory Commission's (FERC's) claim that advance notice of stricter permitting requirements would cause developers to expedite environmentally damaging projects before the new requirements took effect.[86] Distinguishing the price control cases noted above, the court explained that while "prices can be changed rapidly to accommodate shifts in regulatory policy," construction projects "are planned well in advance and take time to accomplish."[87] The court found that FERC had offered no evidence that developers would or could use advance notice to avoid the new permitting requirements, and it refused to accept what it described as FERC's bare assertions of expertise as the basis for a finding of good cause.[88]

The Ninth Circuit cited a similar lack of evidence when it twice rejected the Department of Homeland Security's claim that advance notice of changed asylum procedures would cause a surge in border crossings during the public comment period.[89] According to the court, a stronger evidentiary showing was necessary because advance notice of a rule will "likely often, or even

[81] Mid Continent Nail Corp. v. United States, 846 F.3d 1364, 1381 (Fed. Cir. 2017).

[82] Mobil Oil Corp. v. Dep't of Energy, 728 F.2d 1477, 1492 (Temp. Emer. Ct. App. 1983).

[83] *Mobil Oil Corp.*, 728 F.2d at 1490–94; Nader v. Sawhill, 514 F.2d 1064, 1065 (Temp. Emer. Ct. App. 1975); DeRieux v. Five Smiths, Inc., 499 F.2d 1321, 1332–33 (Temp. Emer. Ct. App. 1974). The Federal Energy Administration was a predecessor of the Department of Energy. Department of Energy Organization Act of 1977 § 301(a), 42 U.S.C. § 7151(a).

[84] *Mobil Oil Corp.*, 728 F.2d at 1493 (first quoting *Nader*, 514 F.2d at 1068; and then quoting *DeRieux*, Inc., 499 F.2d at 1332). The origins and history of the Temporary Emergency Court of Appeals, which was created in 1971 and abolished in 1992, are summarized on the Federal Judicial Center website, https://www.fjc.gov/history/courts/temporary-emergency-court-appeals-1971-1992 [https://perma.cc/YS2S-VV7M].

[85] *Mobil Oil*, 728 F.2d at 1493.

[86] 969 F.2d 1141, 1144–46 (D.C. Cir. 1992).

[87] *Id.* at 1146.

[88] *Id.*

[89] E. Bay Sanctuary Covenant v. Trump, 932 F.3d 742, 777–78 (9th Cir. 2018); E. Bay Sanctuary Covenant v. Biden, 993 F.3d 640, 675–76 (9th Cir. 2021).

always" cause some temporary increase in the conduct that the rule seeks to regulate.[90] If that dynamic alone supplied good cause, the Court reasoned, then the good cause exception "would often" swallow the notice and comment rule.[91]

Considerations That Do Not Individually Support a Finding of Good Cause May Do So in Combination

Courts have identified several recurring considerations that, standing alone, do not establish good cause. For example, the temporary nature of a rule "cannot in itself justify a failure to follow notice and comment procedures."[92] The same is true of an agency's desire to issue rules by a statutory deadline,[93] provide enhanced regulatory clarity,[94] and act despite limited financial or human resources.[95]

Nevertheless, courts have occasionally found that several of these factors in combination supported a finding of good cause.[96] *Petry v. Block* is a case in point.[97] There, the D.C. Circuit held that the Department of Agriculture's Food and Nutrition Service had properly invoked the good cause exception when issuing rules under the Omnibus Budget Reconciliation Act of 1981.[98] That law "imposed a complex web of administrative duties"—including multiple required rulemakings within a limited period—that fell to just three full-time agency employees.[99] While acknowledging that neither "strict congressionally imposed deadlines" nor "agency under-staffing," standing alone, would "warrant invocation of the good cause exception," the court concluded that, taken together, those two factors supported a finding of good cause.[100]

[90] *E. Bay Sanctuary Covenant v. Biden*, 993 F.3d at 676.

[91] *Id.*; *accord* Cap. Area Immigrants' Rts. Coal. v. Trump, 471 F. Supp. 3d 25, 46 (D.D.C. 2020).

[92] Mid-Tex Elec. Co-op. v. FERC, 822 F.2d 1123, 1132 (D.C. Cir. 1987).

[93] *See, e.g.*, Asiana Airlines v. FAA, 134 F.3d 393, 398 (D.C. Cir. 1998) ("Statutory language imposing strict deadlines, standing alone, does not constitute sufficient good cause under § 553 or an express modification pursuant to § 559 justifying departure from standard notice and comment.").

[94] *See, e.g.*, California v. Azar, 911 F.3d 558, 576 (9th Cir. 2018) ("[A]n agency's desire to eliminate more quickly legal and regulatory uncertainty is not by itself good cause.").

[95] *See, e.g.*, Nat'l Venture Cap. Ass'n v. Duke, 291 F. Supp. 3d 5, 17 (D.D.C. 2017) (An "agency's concern for its (or its components') own bottom line hardly constitutes the sort of emergency necessary to invoke good cause.").

[96] *See generally* United States v. Valverde, 628 F.3d 1159, 1164 (9th Cir. 2010) (describing the good case inquiry as "sensitive to the totality of the factors at play") (quoting Alcaraz v. Block, 746 F.2d 593, 612 (9th Cir. 1984)).

[97] 737 F.2d 1193 (D.C. Cir.1984).

[98] *Id.* at 1200.

[99] *Id.* at 1200–02.

[100] 737 F.2d at 1203; *see also Mid-Tex Elec. Co-op.*, 822 F.2d at 1132–33 ("[W]hile none of the . . . factors FERC pressed would constitute 'good cause' standing alone, the combined effect of the cited considerations [including the limited duration of the challenged rule and the existence of a previously compiled administrative record] leads us to accept FERC's conclusion that delaying its interim rule would be contrary to the public interest."); Methodist Hosp. of Sacramento v. Shalala, 38 F.3d 1225, 1237 (D.C. Cir. 1994) (citing *Petry v. Block* for the proposition that a tight statutory deadline for rulemaking under a "complex" statutory scheme rendered rulemaking procedures impracticable). *But see* Asiana Airlines v. FAA, 134 F.3d 393, 397 (D.C. Cir. 1998) (criticizing the discussion of the good cause exception in *Methodist Hospital of Sacramento* and describing that section of the opinion as unnecessary to the disposition of the case).

Good Cause Under § 553(d) Is Often, but Not Necessarily Always, Good Cause Under § 553(b)

Upon a finding of good cause, agencies can bypass § 553(b)'s notice and comment requirements *and* § 553(d)'s requirement that rules become effective not less than thirty days after publication in the *Federal Register*.[101] Those requirements serve related but distinct purposes. The former "ensure[s] public participation in rulemaking," while the latter "give[s] affected parties time to adjust their behavior before the final rule takes effect."[102] The two provisions differ in another respect: Under § 553(b)(B), good cause to bypass notice and comment procedures exists only when those procedures are "impracticable, unnecessary, or contrary to the public interest,"[103] while § 553(d)(3) contains no such express limitation.[104]

These differences have led some courts to conclude that "different standards govern the applicability of the good cause exceptions" under § 553(b)(B) and § 553(d)(3).[105] On this view, § 553(d)(3)'s good cause exception entails a less demanding showing and requires only that agencies "balance the necessity for immediate implementation against principles of fundamental fairness which require that all affected persons be afforded a reasonable amount of time to prepare for the effective date of its ruling."[106]

Despite this strand in the caselaw, agencies often rely on the same justification to bypass requirements under both § 553(b) and § 553(d), and courts frequently do not distinguish between those requirements when reviewing agencies' findings of good cause.[107] Thus, while a finding of good cause under § 553(d)(3) might not support a finding of good cause under § 553(b)(B) (and vice versa),[108] distinctions between those provisions frequently collapse in practice.

Remedies for Improper Invocations of the Good Cause Exception

When agencies invoke the good cause exception, they issue rules without following the procedural requirements in § 553(b), § 553(d), or both. If courts reject agencies' findings of good cause, then those underlying rules violate "procedure required by law."[109] The APA's "scope of review" provision, codified at 5 U.S.C. § 706, instructs reviewing courts to "set aside" such rules while also taking "due account" of the "rule of prejudicial error." According to the Supreme Court, that reference to "prejudicial error" creates something akin to the "harmless error rule,"

[101] 5 U.S.C. § 553(b)(B), (d)(3).

[102] Riverbend Farms, Inc. v. Madigan, 958 F.2d 1479, 1485 (9th Cir. 1992).

[103] 5 U.S.C. § 553(b)(B).

[104] *See id.* § 553(d)(3).

[105] Am. Fed'n of Gov't Emps. v. Block, 655 F.2d 1153, 1156 (D.C. Cir. 1981).

[106] United States v. Gavrilovic, 551 F.2d 1099, 1105 (8th Cir.1977); *see also* U.S. Steel Corp. v. EPA, 605 F.2d 283, 289–90 (7th Cir. 1979), United States v. Gould, 568 F.3d 459, 481 (4th Cir. 2009) (Michael, J., dissenting) (asserting that "courts have regarded § 553(d)(3)'s good cause standard as distinct from and somewhat more flexible than § 553(b)(B)'s good cause standard").

[107] *E.g.*, E. Bay Sanctuary Covenant v. Trump, 932 F.3d 742, 777 n.15 (9th Cir. 2018); United States v. Johnson, 632 F.3d 912, 927–30 (5th Cir 2011); United States v. Cain, 583 F.3d 408, 423–24 (6th Cir. 2009); United States v. Valverde, 628 F.3d 1159 (9th Cir. 2010); United States v. Reynolds, 710 F.3d 498, 509−14 (3d Cir. 2013); Nw. Airlines v. Goldschmidt, 645 F.2d 1309, 1320–21 (8th Cir. 1981).

[108] *See, e.g.*, Riverbend Farms, Inc. v. Madigan, 958 F.2d 1479, 1485–87 (9th Cir. 1992) (holding that an agency had good cause to bypass § 553(d)'s thirty-day requirement, but not § 553(b)'s notice and comment requirement).

[109] 5 U.S.C. § 706.

which applies "in ordinary civil litigation"[110] and directs reviewing courts to "disregard all errors and defects that do not affect any party's substantial rights."[111] Section 706 thus raises two potential remedial questions: Is a given violation harmless? If not, how should a court "set aside" a procedurally defective agency action?

The answers depend in part on the violation at issue. At least one court has held that a violation of § 553(d) is prejudicial only if a plaintiff can show that it was harmed by a prematurely effective rule *during* the requisite thirty-day notice period.[112] Even assuming a finding of prejudice, two other courts have concluded that rules issued in violation of § 553(d) should be "set aside" by "denying" them "effectiveness for the mandated 30 days" while "allowing [them] to take effect in full thereafter."[113]

By contrast, courts have widely held that an agency's "utter failure" to comply with § 553(b)'s notice and comment requirements "cannot be considered harmless if there is any uncertainty at all as to the effect of that failure."[114] This reasoning ensures a finding of prejudice in many cases.[115] As one court explained, parties that cannot comment cannot develop a record for judicial review, and without a record, it is "very difficult for a reviewing court to say with certainty whether . . . comments would have had some effect if they had been considered when the issue was open."[116] Only in unusual circumstances, such as when an agency's "substantive rule is 'the only reasonable one,'" have courts interpreted the lack of notice and comment to be harmless.[117]

Courts often "set aside" rules issued without notice and comment by nullifying, or "vacating," those rules.[118] Some have questioned whether this is advisable[119] or even legal,[120] but vacatur

[110] FDA v. Wages & White Lion Invs., 145 S. Ct. 898, 901 (2025); *see also* Att'y Gen.'s Manual, *supra* note 54, at 110 (APA's reference to "the rule of prejudicial error" "sums up in succinct fashion the 'harmless error' rule applied by the courts in the review of lower court decisions as well as of administrative bodies, namely, that errors which have no substantial bearing on the ultimate rights of the parties will be disregarded).

[111] Fed. R. Civ. P. 61; *accord* 28 U.S.C. § 2111.

[112] *Johnson*, 632 F.3d at 930.

[113] Prows v. Dep't of Just., 938 F.2d 274, 275–76 (D.C. Cir. 1991) (per curiam); *accord* Rowell v. Andrus, 631 F.2d 699, 704 (10th Cir. 1980).

[114] Sugar Cane Growers Co-op. v. Veneman, 289 F.3d 89, 96 (D.C. Cir. 2002); *accord* United States v. Reynolds, 710 F.3d 498, 516 (3d Cir. 2013); *see also* United States v. Johnson, 632 F.3d 912, 930 (5th Cir. 2011) (An "administrative body's APA deficiency is not prejudicial 'only when [it] is one that clearly had no bearing on the procedure used or the substance of decision reached.'") (alteration in original) (quoting U.S. Steel Corp. v. EPA, 595 F.2d 207, 215 (5th Cir.1979)); *accord* Cal. Wilderness Coal. v. U.S. Dep't of Energy, 631 F.3d 1072, 1090 (9th Cir. 2011); *see also* United States v. Stevenson, 676 F.3d 557, 565 (6th Cir. 2012) (The "key to whether an agency's procedural error in promulgating a rule is harmless error hinges not on whether the same rule would have issued absent the error, but whether the affected parties had sufficient opportunity to weigh in on the proposed rule.").

[115] *See* Nat. Res. Def. Council v. Wheeler, 955 F.3d 68, 85 (D.C. Cir. 2020) (noting that "we have not been hospitable to government claims of harmless error in cases in which the government . . . fail[ed] to provide notice") (alterations in original) (quoting Allina Health Servs. v. Sebelius, 746 F.3d 1102, 1109 (D.C. Cir. 2014)).

[116] *Reynolds*, 710 F.3d at 518 (3d Cir. 2013) (quoting McLouth Steel Prods. v. Thomas, 838 F.2d. 137, 1324 (D.C. Cir. 1988)).

[117] *Id.* (quoting Sheppard v. Sullivan, 906 F.2d 756, 762 (D.C. Cir. 1990)).

[118] *See Wheeler*, 955 F.3d at 85 (describing the "[f]ailure to provide the required notice and to invite public comment . . . [as] a fundamental flaw that normally requires vacatur of the rule." (first alteration in original (quoting Heartland Reg'l Med. Ctr. v. Sebelius, 566 F.3d 1913, 199 (D.C. Cir. 2009)).

[119] *See generally* Bagley, *supra* note 48 (urging the adoption of a context-sensitive remedial approach rather than a presumption of vacatur). *But see* Christopher Walker, *Against Remedial Restraint*, 117 COLUM. L. REV. ONLINE 106 (2017).

[120] For arguments that the APA's "set aside" language does not create a default remedy of universal vacatur, *see*, e.g., Mem. from Att'y Gen., Litigation Guidelines for Cases Presenting the Possibility of Nationwide Injunctions (Sep. 13, (continued...)

remains a common APA remedy.[121] Rather than vacate a legally deficient rule, a court may instead elect to leave the rule in place while the agency corrects any errors.[122] This practice of "remand without vacatur" is the exception rather than the rule, however, and even courts that employ it as a remedy for some procedural violations still tend to vacate rules issued without any pre-publication notice or comment.[123] Vacatur is thus the remedy in many good cause cases.[124]

The remedial analysis is more complex—and may be more forgiving—when agencies issue IFRs, take post-publication comment on those IFRs, and then issue superseding final rules. Once those superseding final rules become effective, any procedural challenges to the now-replaced IFR may be dismissed as moot.[125] Also, following the Supreme Court's decision in *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, superseding final rules are themselves insulated, to a considerable degree, from procedural challenge.[126] Before that decision, many lower courts viewed post-publication comment periods with skepticism, reasoning, as one court put it, that taking "comments after all the crucial decisions have been made is not the same as permitting active and well-prepared criticism to become a part of the decision-making process."[127] Proceeding from this premise, some courts regarded post-publication comment periods as meaningful only if agencies could demonstrate "real open-mindedness toward the position set

2018), https://www.justice.gov/archives/opa/press-release/file/1093881/dl?inline= [https://perma.cc/4E4G-KS59]; Aditya Bamzai, *The Path of Administrative Law Remedies*, 98 NOTRE DAME L. REV. 2037 (2023); John Harrison, *Vacatur of Rules Under the Administrative Procedure Act*, 40 YALE J. ON REG. BULL. 119 (2023); United States v. Texas, 599 U.S. 693–704 (2023) (Gorsuch, J., concurring). For counter-arguments, *see, e.g.*, Mila Sohoni, *The Past and Future of Universal Vacatur*, 133 YALE L.J. 2305 (2024); Ronald M. Levin, *Vacatur, Nationwide Injunctions, and the Evolving APA*, 98 NOTRE DAME L. REV. 1997 (2023); Corner Post, Inc. v. Bd. of Governors, 603 U.S. 799, 826–43 (2024) (Kavanaugh, J., concurring).

[121] *See* Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs, 145 F.3d 1399, 1409 (D.C. Cir. 1998) ("We have made clear that '[w]hen a reviewing court determines that agency regulations are unlawful, the ordinary result is that the rules are vacated—not that their application to the individual petitioners is proscribed.'") (alteration in original) (quoting Harmon v. Thornburgh, 878 F.2d 484, 495 n. 21 (D.C. Cir. 1989)). Referring to the "established practice" of vacatur, Chief Justice Roberts described judges on the D.C. Circuit as vacating agency action "five times before breakfast" because "that's what you do in an APA case." Transcript of Oral Argument at 35, United States v. Texas, 599 U.S. 670 (2023) (No. 22-58).

[122] Courts decide whether to remand without vacating actions by weighing "the 'seriousness of the [actions'] deficiencies' and the likely 'disruptive consequences' of vacatur.'" Allina Health Servs. v. Sebelius, 746 F.3d 1102, 1110 (D.C. Cir. 2014) (quoting Allied–Signal, Inc. v. U.S. Nuclear Regulatory Comm'n, 988 F.2d 146, 150–51 (D.C.Cir.1993)). Courts and commentators have grappled with whether remand without vacatur is consistent with § 706's command to "set aside" unlawful action. *E.g.*, Checkosky v. SEC, 23 F.3d 452, 467 (D.C. Cir. 1994), *superseded by rule as stated in* Marrie v. SEC (D.C. Cir. 2004); Ronald M. Levin, *"Vacation" at Sea: Judicial Remedies and Equitable Discretion in Administrative Law*, 53 DUKE L.J. 291 (2003); Admin. Conf. of the United States, Adoption of Recommendations and Statement Regarding Administrative Practice and Procedure, Recommendation 2013-6, Remand Without Vacatur, 78 Fed. Reg. 76269, 76272 (Dec. 17, 2013).

[123] *See* Am. Great Lakes Ports Ass'n v. Schultz, 962 F.3d 510, 512 (D.C. Cir. 2020) (describing remand without vacatur as "the exception rather than the rule"); *see also Wheeler*, 955 F.3d at 85 (contrasting failure to provide notice and comment with other procedural defects that may warrant remand without vacatur). *But see* Sugar Cane Growers Co-op. v. Veneman, 289 F.3d 89, 98 (D.C. Cir. 2002) (remanding without vacating a rule issued without notice and comment).

[124] *E.g.*, Mack Trucks, Inc. v. EPA, 682 F.3d 87, 89 (D.C. Cir. 2012).

[125] *See* Massachusetts v. HHS, 923 F.3d 209, 221 (1st Cir. 2019) (holding that "there is no justiciable controversy regarding the procedural defects of IFRs that no longer exist") (quoting California v. Azar, 911 F.3d 558, 569 (9th Cir. 2018); *accord* Safari Aviation Inc. v. Garvey, 300 F.3d 1144, 1150 (9th Cir. 2002); Nat. Res. Def. Council v. U.S. Nuclear Regul. Comm'n, 680 F.2d 810, 814–15 (D.C. Cir. 1982).

[126] 591 U.S. 657, 683–86 (2020).

[127] Maryland v. EPA, 530 F.2d 215, 222 (4th Cir. 1975), *vacated sub nom.*, EPA v. Brown, 431 U.S. 99 (1977).

forth in the IFRs."[128] Other courts declined to give any effect to post-publication comment.[129] The Supreme Court rejected both approaches in *Little Sisters of the Poor*. There, the Court dismissed the "open-minded test" as lacking any basis in the APA and treated an agency's request for post-publication comment on an IFR as functionally equivalent to a request for pre-publication comment on an NPRM. The Court concluded that any technical APA violation arising from an agency's use of an IFR rather than an NPRM was harmless.[130]

Considerations for Congress

Courts have described the APA's exceptions from otherwise applicable rulemaking requirements as "accomodat[ing] situations where the policies promoted by public participation in rulemaking are outweighed by the countervailing considerations of effectiveness, efficiency, expedition and reduction in expense."[131] Congress has long debated whether the good cause exception properly balances those competing interests.

One view, articulated by the Senate Judiciary Committee in the 97th Congress, is that the exception has proven "unsatisfactory" because it "gives an agency only limited guidance" and thus "relies greatly on agency discretion to determine when normal rule making procedures should not be applied."[132] Consistent with that perspective, several bills would have narrowed the good cause exception, for example, by limiting its scope to "imminent threat[s] to public health or safety or similar exigent circumstance[s]."[133] Some commentators have endorsed versions of this legislative approach; others have criticized it.[134] Those in the latter camp claim that the good cause exception must be broadly worded if it is to apply in widely divergent regulatory contexts across the federal government.[135] In their view, replacing one expansive good cause exception with another would make little practical difference, while adopting an overly restrictive formulation might unduly restrict agencies and produce unintended outcomes.[136]

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[128] Pennsylvania v. President United States, 930 F.3d 543, 568−69 (3d Cir. 2019), *rev'd and remanded sub nom.* Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania, 591 U.S. 657 (2020); *accord* Advocates for Highway & Auto Safety v. Fed. Highway Admin., 28 F.3d 1288, 1292 (D.C. Cir. 1994).

[129] *See* Hickman & Thomson, *supra* note 30, at 286 & n. 151 (collecting cases).

[130] *Little Sisters of the Poor*, 591 U.S. at 683–86. For a critique of the Supreme Court's reasoning in *Little Sisters of the Poor*, *see* Kristin E. Hickman & Mark R. Thomson, *Textualism and the Administrative Procedure Act*, 98 NOTRE DAME L. REV. 2071, 2093–2102 (2023).

[131] Guardian Fed. Sav. & Loan Ass'n v. Fed. Sav. & Loan Ins. Corp., 589 F.2d 658, 662 (D.C. Cir. 1978).

[132] STAFF OF S. COMM. ON THE JUDICIARY, 97TH CONG., THE REGULATORY REFORM ACT, S. REP. NO. 97-284, at 108 (1981).

[133] Truth in Regulations Act of 2017, S. 580, 115th Cong. § 3(a) (2017); *see also* S. 1070, 86th Cong. § 1003(d) (1959) (authorizing "temporary or emergency rules" only "where an agency finds that (1) immediate adoption of the rule is imperatively necessary for the preservation of public health, safety, or welfare, or (2) compliance with the requirements of this section would be contrary to the public interest"). These proposed changes to § 553(b)(B) mirror pre-enactment debates about the scope of the good cause exception, when Congress considered and rejected language that would have allowed agencies to bypass rulemaking procedures only "because of unavoidable lack of time or other emergency." APA: LEGISLATIVE HISTORY, S. DOC. NO. 79-248, at 140 (2d Sess. 1946).

[134] *See* Note, Kyle Schneider, *Judicial Review of Good Cause Determinations Under the Administrative Procedure Act*, 73 STAN. L. REV. 237, 259–60 & n.152 (2021) (collecting proposals to amend the scope of the good cause exception while criticizing that approach).

[135] *Id.* at 261–63.

[136] *Id.*; *see also* Admin. Conf. of the United States, Recommendations of the Administrative Conference, § 305.83-2, The "Good Cause" Exemption from APA Rulemaking Requirements, 48 Fed. Reg. 31179, 31180–81 (July 7, 1983) (recommending certain procedural reforms governing agencies' use of the good cause exception, but recommending against otherwise making the exception "more stringent").

Rather than narrow the good cause exception, Congress could regularize procedures for agencies that invoke the exception. A proposed Regulatory Accountability Act, as introduced in the 118th Congress, exemplifies this approach. Under that bill, an agency invoking the exception's "unnecessary" prong could bypass ordinary rulemaking procedures but only to issue a DFR, which would convert to an NPRM if the agency received "significant adverse comment within 60 days" of the rule's publication.[137] An agency invoking the "impracticable" or "contrary to public interest" prongs would have to issue an IFR, which would expire within 180 days unless the agency initiated ordinary rulemaking procedures to issue a superseding final rule.[138] These proposed revisions are broadly consistent with reforms proposed by ACUS.[139]

Rather than amend the APA, Congress could create targeted agency or subject-matter-specific deviations from the APA's general terms. In the past, Congress has done so by directing agencies to adopt IFRs without mandating findings of good cause.[140] However, courts have sometimes struggled to determine whether Congress's provision of alternative rulemaking procedures sufficed to displace the APA's notice and comment requirements.[141] Thus, while a statute need not "employ magical passwords in order to effectuate an exemption from" the APA,[142] if Congress intends to authorize agencies to issue rules without following §553's procedures, it could consider saying so explicitly.[143]

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[137] S. 3208, 118th Cong. § 3(g)(3)(B) (2018).

[138] *Id.* § 3(g)(3)(C).

[139] Admin. Conf. of the United States, Adoption of Recommendations, Administrative Recommendation 2024-6, Public Engagement in Agency Rulemaking Under the Good Cause Exemption, 89 Fed. Reg. 106406, 106408–09 (Dec. 30, 2024).

[140] *See, e.g.*, Asiana Airlines v. FAA, 134 F.3d 393, 398 (D.C. Cir. 1998) (interpreting 49 U.S.C. § 45301(b)(2)).

[141] *See* Mann Constr., Inc. v. United States, 27 F.4th 1138, 1144–47 (6th Cir. 2022) (discussing the challenge "of determining whether" a given statute "indicates that Congress intended to abrogate the APA's notice-and-comment requirements in a 'clear' or 'plain' way" and collecting cases).

[142] Marcello v. Bonds, 349 U.S. 302, 310 (1955).

[143] *See, e.g.*, 30 U.S.C. § 956 ("Except as otherwise provided in this chapter, the provisions of sections 551 to 559 and sections 701 to 706 of Title 5 shall not apply to the making of any order, notice, or decision made pursuant to this chapter, or to any proceeding for the review thereof."); 42 U.S.C. § 7607(d) ("The provisions of section 553 through 557 and section 706 of title 5 shall not, except as expressly provided in this subsection, apply to actions to which this subsection applies.").

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