

Meet Me in the Middle: The Search for the Appropriate Standard of Review for the APA’s Good Cause Exception

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ABSTRACT: Section 553 of the Administrative Procedure Act (“APA”) governs informal agency rulemaking and requires agencies to proceed through what is known as “notice-and-comment” rulemaking. The good cause exception to these proceedings allows agencies to bypass notice-and-comment rulemaking and immediately promulgate a rule if the agency has good cause to do so. The appropriate standard of review for an agency’s use of the good cause exception is ambiguous. Some courts review the action de novo, while others apply a lesser, more deferential “arbitrary and capricious” standard. This Note advocates that the appropriate standard of review is yet a third standard that strikes a middle ground between de novo review and deferential review. In doing so, this Note examines the inadequacies of applying either standard on their own in order to highlight the strength of a mixed or blended standard. This standard satisfies the purpose of the APA and would serve as a clear guide to agencies for future use of the good cause exception.

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I. INTRODUCTION

In response to the ever-growing network of federal administrative agencies in the United States, Congress passed the Administrative Procedure Act (“APA”) in 1946.¹ The Act was meant to govern the agency functions of rulemaking, adjudication, and licensing. Most importantly, the Act provided for agency accountability by requiring agencies to notify the public of proposed rules and to allow the public to participate in the rulemaking process.² Today, more than 70 years after the passage of the Act, the network of federal administrative agencies has grown significantly.³ There are “2,840,000 federal workers in 15 departments, 69 agencies and 383 nonmilitary sub-agencies.”⁴ As a result of such growth, many scholars worry that the rise of a fourth branch challenges America’s constitutionally

1. Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified at 5 U.S.C. §§ 551–59 (2012)).

2. See U.S. DEP’T OF JUSTICE, ATTORNEY GENERAL’S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 6 (1947) (noting that soon after the passage of the APA in 1946, government agencies began calling on the Department of Justice for guidance and “advice on the meaning of the various provisions of the Act,” the Manual being a culmination of the work stemming from those requests); see also Robert S. Shwartz, *Delineation in the Exceptions to the Notice and Comment Provisions of the Administrative Procedure Act*, 57 GEO. WASH. L. REV. 1069, 1072 n.25 (1989) (“The Manual was prepared primarily as a guide for the agencies themselves but was made available to the general public due to heavy demand (undoubtedly due to the lack of legislative history).”).

3. Jonathan Turley, *The Rise of the Fourth Branch of Government*, WASH. POST: OPINIONS (May 24, 2013), https://www.washingtonpost.com/opinions/the-rise-of-the-fourth-branch-of-government/2013/05/24/c7faaado-c2ed-11e2-9fe2-6ee52doeb7c1_story.html (“For much of our nation’s history, the federal government was quite small. In 1790, it had just 1,000 nonmilitary workers. In 1962, there were 2,515,000 federal employees. Today, we have 2,840,000 federal workers”); see also Jared Meyer, *How to Fight the Fourth Branch of Government*, FORBES: OPINION (July 12, 2016, 8:31 AM), <http://www.forbes.com/sites/jaredmeyer/2016/07/12/how-to-fight-the-fourth-branch-of-government/#65373e7363eb> (“Today’s administrative state is truly an unaccountable fourth branch of government, with control over how regulations are issued, enforced, and litigated.”).

4. Turley, *supra* note 3.

mandated system of checks and balances. This fourth branch has been described as an “administrative state of sprawling departments and agencies that govern with increasing autonomy and decreasing transparency.”⁵ This network of federal administrative agencies has more “impact on the lives of citizens” than the legislative, executive, and judicial branches combined.⁶

In fact, most of the country’s federal “laws” are actually rules and regulations that federal agencies have promulgated and subsequently adopted without significant oversight or accountability.⁷ One study found that in 2007, Congress passed only 138 public laws, while federal agencies enacted nearly 3,000 rules and over 60 significant regulations.⁸ Of course, Congress has the power to create federal agencies, delegate legal authority, and control the purse strings, but any attempt to rein in the vast network of federal administrative agencies by cutting their funding would be futile and akin to “running a locomotive with an on/off switch.”⁹ Although federal agencies are also subject to judicial review, the judiciary grants broad deference to agencies, especially when agencies are interpreting laws and determining the scope of their jurisdiction.¹⁰ One area of agency action where the level of judicial deference is not clear is when agencies invoke the good cause exception to the informal rulemaking process.

When agencies invoke the good cause exception, there are two main standards of review, *de novo* and “arbitrary and capricious”—circuit courts have not consistently applied either. For example, consider challenges to the Attorney General’s use of the good cause exception in promulgating a rule that retroactively applies the Sex Offender Registration and Notification Act (“SORNA”).¹¹ The Fourth and Sixth Circuits review these cases using a *de novo* standard of review, while the Fifth and Eleventh circuits apply the more deferential “arbitrary and capricious” standard of review.¹² The circuit split on

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. See *City of Arlington v. FCC*, 569 U.S. 290, 307 (2013) (holding that agencies are afforded *Chevron* deference, which means an examination of whether the agency decision was made on a “permissible construction” of the statute in question, even when determining the reach of their jurisdiction); *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 866 (1984) (creating broad deference for agency decision-making in holding that “[w]hen a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency’s policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail”).

11. Sex Offender Registration and Notification Act, Pub. L. No. 109-248, tit. 1, 120 Stat. 590 (2006) (codified as amended at 34 U.S.C.A. §§ 20911–32 (West 2017)).

12. For the cases in which the court examined the Attorney General’s good cause invocation under the *de novo* standard of review, see *United States v. Cain*, 583 F.3d 408, 434 n.4 (6th Cir. 2009) (Griffin, J., dissenting) (applying *de novo* review although not explicitly indicating use of that standard); and see generally *United States v. Gould*, 568 F.3d 459 (4th Cir. 2009) (same).

this issue has created an ambiguity that frustrates the legislative purpose of the APA and fails to provide federal agencies with clear guidance on how to properly invoke the good cause exception in the future.

This Note argues that both the *de novo* standard and the “arbitrary and capricious” standard are inadequate. It then proposes the Supreme Court adopt a mixed standard that fulfills the purpose of the APA and serves as a clear guide to agencies for future use of the good cause exception. To begin, Part II will provide a summary of the history and legislative purpose of the APA, outline the informal rulemaking process and its exceptions under the APA, and detail the use of the good cause exception through the example of SORNA. Part III examines the two competing standards of review, *de novo* and “arbitrary and capricious,” that the circuit courts employ when reviewing the Attorney General’s use of the good cause exception; it also highlights the relative weaknesses and inadequacies of each standard. Part IV argues that the Supreme Court should grant certiorari to establish a mixed standard of review when reviewing challenges to the good cause exception.

II. BACKGROUND

Before this Note examines the ambiguity surrounding judicial review of the good cause exception, this Part provides historical background of the APA and SORNA. First, Part II.A explores the origins and the legislative purpose of the APA. Then, Part II.B summarizes the informal agency rulemaking process under the APA and the good cause exception to the usual rulemaking procedures. Part II.C discusses SORNA and the Attorney General’s use of the good cause exception to promulgate a rule that applies SORNA’s registration requirements retroactively. Finally, Part II.D explains *de novo* review and “arbitrary and capricious” review.

A. THE ADMINISTRATIVE PROCEDURE ACT

In 1934, a Special Committee of the American Bar Association laid the foundation for what would become the APA.¹³ The Committee’s first official report and legislative proposal “was aimed at coping with ‘the evils notoriously prevalent’ among administrative tribunals.”¹⁴ For example, before the passage of the APA, intense lobbying and politicking by members of the legislature

For the cases in which the court examined the Attorney General’s good cause invocation under an “arbitrary and capricious” standard of review, see *United States v. Johnson*, 632 F.3d 912, 928 (5th Cir. 2011); and *United States v. Dean*, 604 F.3d 1275, 1278 (11th Cir. 2010). For a detailed analysis of these particular cases and the argument that neither standard is adequate on its own for courts to review the invocation of the good cause exception, see *infra* Part III.

13. Walter Gellhorn, *The Administrative Procedure Act: The Beginnings*, 72 VA. L. REV. 219, 219 (1986) (detailing the discussion and debate that surrounded the beginnings of what eventually became the APA).

14. *Id.* (quoting *Report of the Special Committee on Administrative Law*, in REPORT OF THE FIFTY-SEVENTH ANNUAL MEETING OF AMERICAN BAR ASSOCIATION 539, 544 (1934)).

and interested parties was described as “open intimidation.”¹⁵ In fact, the parties that submitted briefs and other evidentiary documents were not shy about “mak[ing] personal and private visits to the members of [administrative] boards . . . to urge by every device they [could] a determination favorable to their interests.”¹⁶

The attempt to cure such ailments and create uniformity in the ever-growing federal agencies culminated more than 20 years later, in 1946, when Congress passed the APA.¹⁷ The Act’s purpose was “[t]o improve the administration of justice by prescribing fair administrative procedure,”¹⁸ by guiding agencies in their roles as adjudicators and rule makers, and to allow the public significant opportunity to participate in the rulemaking process.¹⁹ The APA achieves this goal in the “three main agency functions: rulemaking[], adjudication[], and licensing.”²⁰ It “serves to police improper agency behavior, protect public safety, and secure proper entitlements.”²¹ In other words, the APA “is to administrative law what the Constitution is to constitutional law.”²²

The 1947 *Attorney General’s Manual on the APA* outlines four general principles of the Act.²³ The manual was meant to serve as a guide for agencies navigating the APA.²⁴ Because clear legislative history from the House and Senate was slim, the manual soon became available to the public and has become a respected source of the APA’s history.²⁵ Even the Supreme Court has used the manual as a historical guide, calling it “a contemporaneous interpretation previously given some deference by this Court because of the role played by the Department of Justice in drafting the legislation.”²⁶ The

15. Max Radin, *The Courts and Administrative Agencies*, 23 CALIF. L. REV. 469, 477 (1935).

16. *Id.*

17. See Gellhorn, *supra* note 13, at 232 (providing a detailed look at the decades of rather harsh discussion and debate leading up to the APA, yet, in the end, noting that the Act’s passage was “in an atmosphere of happy accord” and culminated “what had been begun as an exercise of the imagination”).

18. Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified at 5 U.S.C. §§ 551-59 (2012)).

19. *The Administrative Procedure Act (APA)*, ELECTRONIC PRIVACY INFO. CTR., https://epic.org/open_gov/Administrative-Procedure-Act.html (last visited Dec. 14, 2017).

20. *Id.*

21. *Id.*

22. RICHARD J. PIERCE, JR., *ADMINISTRATIVE LAW* 3 (2008).

23. U.S. DEP’T OF JUSTICE, *supra* note 2, at 9.

24. *Id.* at 6.

25. See generally Shwartz, *supra* note 2.

26. *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 546 (1978). *Vermont Yankee* is a seminal case for administrative law in which the Supreme Court held that section 553 of the APA “establishe[s] the maximum procedural requirements” agencies must follow and that the courts are not allowed to add procedural requirements beyond section 553 unless the requirements are necessary in order to give meaning to the APA. *Id.* at 523-24.

authoritative manual asserts that the four basic guiding principles of the APA are:

1. To require agencies to keep the public currently informed of their organization, procedures and rules.
2. To provide for public participation in the rule making process.
3. To prescribe uniform standards for the conduct of formal rule making and adjudicatory proceedings . . . which are required by statute
4. To restate the law of judicial review.²⁷

Overall, these underlying principles draw the outer boundaries for agency action in rulemaking and adjudication.²⁸

“[W]hen Congress creates an agency,” it delegates extensive powers to the agency to operate in its specific realm of responsibility.²⁹ Agencies have “the power to issue rules” with “legally-binding effect[s]” and reach “final decisions in adjudicatory disputes,” much like the judiciary.³⁰ In terms of the rulemaking power, the APA dictates uniform standards of conduct to achieve the goals of encouraging public participation and providing full information. This Note will focus on the applicable procedures of section 553 of the APA, which governs informal rulemaking.

B. MEANT TO BE BROKEN: RULEMAKING UNDER THE APA AND THE GOOD CAUSE EXCEPTION

Section 553 of the APA sets forth the procedures and requirements that agencies must follow when they are “formulating, amending, or repealing a rule.”³¹ A rule includes “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.”³² Most importantly, for agencies to promulgate, amend, or repeal a legislative rule,³³ they generally must proceed through

27. U.S. DEP’T OF JUSTICE, *supra* note 2, at 9 (citations omitted).

28. 5 U.S.C. §§ 553, 556–57 (2012).

29. PIERCE, *supra* note 22, at 1.

30. *Id.*

31. 5 U.S.C. § 551(5).

32. *Id.* § 551(4).

33. VANESSA K. BURROWS & TODD GARVEY, CONG. RES. SERV., R41546, A BRIEF OVERVIEW OF RULEMAKING AND JUDICIAL REVIEW 1 (2011) (defining legislative rules as “rules made pursuant to congressionally delegated authority”). One example of a legislative rule is the Attorney General’s rule making SORNA apply retroactively. This rulemaking was a legislative rule because the Attorney General was acting under congressional authority as provided by SORNA. For a useful analysis of the various tests courts use to determine legislative rules from interpretive rules (which are not subject to notice-and-comment procedures under section 553 of the APA) see Morgan Douglas Mitchell, Note, *Wolf or Sheep?: Is an Agency Pronouncement a Legislative Rule, Interpretive Rule, or Policy Statement?*, 62 ALA. L. REV. 839, 841 (2011) (“Because the availability of judicial review turns upon how an agency’s statement is classified—substantive, interpretive, or

notice-and-comment procedures under section 553(c) of the APA.³⁴ Section 553 requires agencies to go through a three-step process for rulemaking. First, an agency that wishes to promulgate a final rule must begin by issuing a Notice of Proposed Rulemaking (“NOPR”) to the public.³⁵ Then, the agency is required to receive and consider comments from the public and other interested persons for at least 30 days.³⁶ These parties are free to submit “written data, views, or arguments with or without opportunity for oral presentation.”³⁷ This is known as the “notice and comment” period. Finally, after this period of time, the agency can issue a final rule. The agency issues the final rule with a statement of its “basis and purpose.”³⁸ Through the notice-and-comment scheme, elected officials have the opportunity to participate in the rulemaking by submitting comments or by informally meeting with agency officials in an effort to influence the decision-making process.³⁹ In all, the informal rulemaking process promotes efficiency, fairness, and an overall “more rationally coherent rule.”⁴⁰ Most importantly, the process enhances political accountability of unelected agency administrators because it allows for public input.⁴¹

Even though the APA generally requires agencies to follow the procedures for informal rulemaking outlined above, the statute allows a good cause exception. Under this exception, agencies can depart from the usual notice-and-comment process if “the agency for good cause finds” that following such procedures would be “impracticable, unnecessary, or contrary to the public interest.”⁴² This departure is called interim rulemaking.

policy statement—agencies often attempt to circumvent the cumbersome notice and comment requirements by calling their statements ‘internal guidance’ or by claiming that the statements are not ‘final agency action’ for the court to review.”).

34. 5 U.S.C. § 553(c).

35. *Id.* § 553(b).

36. *Id.* § 553(d).

37. *Id.* § 553(c).

38. *Id.*

39. PIERCE, *supra* note 22, at 63 (The process of elected officials informally meeting with agency administrators is known as “jawboning.”).

40. Alan B. Morrison, *The Administrative Procedure Act: A Living and Responsive Law*, 72 VA. L. REV. 253, 255 (1986) (agreeing with Justice Scalia “who observed that ‘perhaps the most notable development in federal government administration during the last two decades is the constant and accelerating flight away from individualized, adjudicatory proceedings to generalized disposition through rulemaking’” (citing Antonin Scalia, *Vermont Yankee: The APA, the D.C. Circuit, and the Supreme Court*, 1978 SUP. CT. REV. 345, 376)); see *Dismas Charities, Inc. v. U.S. Dep’t of Justice*, 401 F.3d 666, 680 (6th Cir. 2005) (asserting public input in informal rulemaking is meant to achieve “the wisest rules” possible); PIERCE, *supra* note 22, at 61–62.

41. PIERCE, *supra* note 22, at 63.

42. 5 U.S.C. § 553(b)(3)(B). See generally JARED P. COLE, CONG. RES. SERV., R44356, THE GOOD CAUSE EXCEPTION TO NOTICE AND COMMENT RULEMAKING: JUDICIAL REVIEW OF AGENCY ACTION (2016) (highlighting the current disagreement in the courts over the proper standard of review for good cause exceptions to notice-and-comment rulemaking). For a brief examination of the different exceptions to notice-and-comment rulemaking, see 5 U.S.C. § 553(a) (relevant

Interim rulemaking is not expressly mentioned in the APA. It occurs when “an agency adopts a rule without public comment, makes it immediately effective, and then seeks comments post-promulgation” in order to issue a final rule.⁴³ Interim rulemaking occurs after the Attorney General invokes the good cause exception.⁴⁴ When an agency invokes the good cause exception, it is able to bypass the 30-day publication requirement⁴⁵ and immediately promulgate an interim rule. This exception is typically “used because of some felt urgency in instituting a regulation immediately. It frequently involves regulations that are deeply controversial; the agency solicits comment for its own edification or to identify possible bases of legal challenge, but will not alter the rule unless the comment *persuades* it to do so.”⁴⁶

Agency administrators make numerous factual and procedural determinations in the course of deciding whether to issue an interim rule or a final rule. The APA offers little guidance for the agency since it does not specifically outline what constitutes good cause, but merely states that it can be used if the typical notice-and-comment rulemaking would be “impracticable, unnecessary, or contrary to the public interest.”⁴⁷ Good cause cases can be divided into a few different “categories: (1) emergencies; (2) contexts where prior notice would subvert the underlying statutory scheme; and (3) situations where Congress intends to waive Section 553’s requirements.”⁴⁸ For example, if Congress delegates power to an agency to

provision detailing those agency rulemakings which are wholly exempt from notice-and-comment procedures); and BURROWS & GARVEY, *supra* note 33, at 5–9 (exceptions to the usual informal rulemaking procedures include those rules which are “wholly exempt”: rules involving military or foreign affairs, a matter of agency management, or a matter relating to public property).

43. PETER L. STRAUSS ET AL., *GELLHORN AND BYSE’S ADMINISTRATIVE LAW: CASES AND COMMENTS* 173–74, (11th ed. 2011) (discussing the interim-rule to direct-final rulemaking process); see also Michael Asimow, *Interim-Final Rules: Making Haste Slowly*, 51 ADMIN. L. REV. 703, 710 (1999) (“Interim-final rules adopted under the good cause exception strike a compromise between a perceived need for immediate adoption of a rule and the values of public participation and regulatory analysis.”).

44. STRAUSS ET AL., *supra* note 43, at 173.

45. 5 U.S.C. § 553(d)(3).

46. Ronald M. Levin, *Direct Final Rulemaking*, 64 GEO. WASH. L. REV. 1, 3 (1995) (footnote omitted) (examining the difference between direct-final rulemaking and interim-final rulemaking, both of which are exceptions to the APA section 553 procedures on informal rulemaking).

47. 5 U.S.C. § 553(b)(B).

48. COLE, *supra* note 42, at 5. For a case where emergency or concern for public safety constituted good cause, see *Jifry v. FAA*, 370 F.3d 1174, 1178–80 (D.C. Cir. 2004) (holding that promulgating a rule to suspend and revoke pilot certificates “without notice and comment” was necessary on security grounds). For cases where congressional intent or congressional waiver constituted good cause, see *Am. Transfer & Storage Co. v. Interstate Commerce Comm’n*, 719 F.2d 1283, 1293 (5th Cir. 1983) (finding good cause for waiver of notice-and-comment procedures because the agency’s promulgation of an interim rule was needed in order to comply with a new law set forth by Congress); and *Phila. Citizens in Action v. Schweiker*, 669 F.2d 877, 885–86 (3d Cir. 1982) (holding that a congressionally imposed deadline that made compliance with section 553 impracticable constituted good cause). For a case where good cause was found because advance notice of a rule would have caused harm to the public, see *Nader v. Sawhill*, 514

promulgate a rule regulating the amount of time pilots can fly, the agency would carefully weigh the public safety ramifications of proceeding through a 30-day notice-and-comment procedure or immediately promulgating an interim rule.⁴⁹ Similarly, the agency will also rely on its particular expertise and industry knowledge to determine what amount of flight time is actually safe and feasible for the industry. In particular, when an agency's use of section 553(b)(B) is called into question by the courts, the agency "bear[s] the burden of persuasion in convincing a court that good cause exists, and the exception is not . . . be[ing] used as an 'escape clause' to avoid rulemaking procedures" at the agency's convenience.⁵⁰ Furthermore, courts are cautious to not let the exception "swallow the rule" and therefore hold that an agency cannot baldly claim comments are unnecessary in order to bypass the procedures.⁵¹

In addition to the ambiguity surrounding the precise meaning of the good cause exception, courts also disagree about what standard of review should apply when agencies invoke the exception.⁵² The problem with discordant standards is exemplified by the numerous challenges to the Attorney General's rule making SORNA's registration requirements for sexual offenders apply retroactively.⁵³

C. THE EXCEPTION IN ACTION: SORNA AND THE GOOD CAUSE EXCEPTION

This Note examines the good cause exception within the context of SORNA because the Attorney General's use of the exception in applying the registration requirements retroactively has been challenged in numerous circuit courts with inconsistent results. Congress passed the Adam Walsh Child Protection and Safety Act ("AWA") in 2006.⁵⁴ Title I of AWA contains

F.2d 1064, 1068 (Temp. Emer. Ct. App. 1975) (ruling that good cause was present where notice to the public of a price increase would worsen oil supply shortages).

49. See *Jifry*, 370 F.3d at 1178–80.

50. COLE, *supra* note 42, at 9 (footnote omitted); see *Tenn. Gas Pipeline Co. v. Fed. Energy Reg. Comm'n*, 969 F.2d 1141, 1144 (D.C. Cir. 1992) (stating the good cause exception is not something that can be "arbitrarily utilized at the agency's whim" (quoting *Am. Fed'n of Gov't Emps. v. Block*, 655 F.2d 1153, 1156 (D.C. Cir. 1981))).

51. COLE, *supra* note 42, at 9; see *Action on Smoking & Health v. Civil Aeronautics Bd.*, 713 F.2d 795, 800–01 (D.C. Cir. 1983) ("The agency [here, the Civil Aeronautics Board] cannot have its proverbial cake and eat it too.").

52. See COLE, *supra* note 42, at 14–16 (reviewing the discordant holdings of circuit courts when it comes to the Attorney General's use of the good cause exception in applying SORNA retroactively).

53. *Id.* at 14; see *Sex Offender Registration and Notification Act*, Pub. L. No. 109-248, tit. 1, 120 Stat. 590 (2006) (codified as amended at 34 U.S.C.A. §§ 20911–32 (West 2017)); *United States v. Reynolds*, 710 F.3d 498, 506–09 (3d Cir. 2013) (discussing the appropriate standard of review for challenges to the Attorney General's invocation of the good cause exception in applying SORNA retroactively and providing a brief overview of the disagreement in the circuits surrounding the appropriate standard of review).

54. *Adam Walsh Child Protection and Safety Act of 2006*, Pub. L. No. 109-248, 120 Stat. 587 (codified as amended in scattered sections of 18 U.S.C. and 42 U.S.C.).

SORNA.⁵⁵ SORNA creates a nationwide registration system for sex offenders by establishing minimum standards of registration and notification.⁵⁶ This means sex offenders are required to “register their place of residence and employment” with the state.⁵⁷ The states are tasked with maintaining these records for public access.⁵⁸ The Act also grants “[t]he Attorney General . . . the authority to specify the applicability of the requirements of [SORNA] to sex offenders convicted before the enactment of [SORNA] . . . and to prescribe rules for the registration of any such sex offenders and for other categories of sex offenders”⁵⁹ In 2007, the Attorney General invoked the good cause exception to bypass notice-and-comment rulemaking requirements and issued an interim rule that applied SORNA’s registration requirements to sex offenders convicted before the law’s enactment.⁶⁰ The Attorney General argued that his agency had good cause to bypass section 553’s requirements because it was necessary “to eliminate any possible uncertainty about the applicability of the Act’s requirements” and “to protect the public from sex offenders who fail to register through prosecution and the imposition of criminal sanctions.”⁶¹ The Attorney General made factual and procedural determinations in reaching these conclusions.

After issuing this interim rule, the Attorney General “proposed guidelines for implementation of the act and solicited comments.”⁶²

55. *Id.*

56. See James Kim, Comment, *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, 1060 (2011). This comment argues that the exception to notice-and-comment rulemaking provided by section 553(b)(B) should be read narrowly and that the appropriate standard of review for good cause cases is *de novo* review. *Id.* at 1047. Additionally, the comment provides a helpful and detailed explanation of SORNA, including a review of the criminal penalties a sexual offender can face under the Act. *Id.* at 1061; see also Office of the Attorney General; The National Guidelines for Sex Offender Registration and Notification, 73 Fed. Reg. 38,030 (July 2, 2008).

57. COLE, *supra* note 42, at 14; see 42 U.S.C. § 16,913 (2012) (outlining SORNA registration requirements for sex offenders).

58. 42 U.S.C. § 16,912.

59. *Id.* § 16,913(d); see *Reynolds v. United States*, 565 U.S. 432, 445 (2012) (holding that SORNA’s registration requirements did not automatically apply retroactively, rather the retroactivity of the notification and registration requirements did not exist until agency action by the Attorney General). Office of the Attorney General; The National Guidelines for Sex Offender Registration and Notification, 73 Fed. Reg. at 38,030.

60. Office of the Attorney General; Applicability of the Sex Offender Registration and Notification Act, 72 Fed. Reg. 8894, 8896–97 (Feb. 28, 2007) (to be codified at 28 C.F.R. pt. 72); see 28 C.F.R. § 72.3 (2017) (the official interim rulemaking by the Attorney General which applies the registration and notification requirements of SORNA retroactively).

61. Office of the Attorney General; Applicability of the Sex Offender Registration and Notification Act, 72 Fed. Reg. at 8896.

62. COLE, *supra* note 42, at 14 n.133. For more on the process of interim-final rulemaking, see Asimow, *supra* note 43, at 710–11. It is important to note that “[s]olicitation of post-effective comments, consideration of such comments, preparation of a basis and purpose statement, and adoption of a final-final rule modifying the interim-final rule are all time consuming chores that an agency assumes voluntarily” for agencies are not required by the APA to go through this

Although, in 2008, the Attorney General issued the final rule applying SORNA retroactively,⁶³ the interim rule carried the force of law and so law enforcement officials began to enforce it in 2006.⁶⁴ Some individuals, who were subsequently convicted for failing to register as sex offenders under the Attorney General's interim rule, challenged the Attorney General's use of the good cause exception.⁶⁵ The circuit courts have not consistently applied the appropriate standard of review for these challenges.⁶⁶

D. A TALE OF TWO STANDARDS OF REVIEW

When courts review agency action, they use a variety of legal standards that altogether are “conceptually distinct . . . from judicial review of trial court proceedings.”⁶⁷ When reviewing agency actions, courts examine the agency's “factual findings, discretionary decisions, and legal conclusions.”⁶⁸ The amount of deference afforded to an “agency's decision varies depending on which agency action is under review.”⁶⁹ When agencies fail to maintain proper procedure, courts apply a *de novo* standard of review.⁷⁰ In contrast, when agencies reach a discretionary, factual conclusion, the courts apply an “arbitrary and capricious” standard of review.⁷¹

APA section 706(2)(A) governs discretionary conclusions and states that a reviewing court shall “hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion,

process after issuing an interim final rule. *Id.* at 711. For a useful comparison of direct-final rulemaking to interim-final rulemaking, see Kristin E. Hickman, *Unpacking the Force of Law*, 66 VAND. L. REV. 465, 473–84 (2013).

63. See Office of the Attorney General; The National Guidelines for Sex Offender Registration and Notification, 73 Fed. Reg. 38,030, 38,030–01, 38,046–47 (July 2, 2008).

64. COLE, *supra* note 42, at 14 & n.134; see *Chrysler Corp. v. Brown*, 441 U.S. 281, 295 (1979) (“It has been established in a variety of contexts that properly promulgated, substantive agency regulations have the ‘force and effect of law.’”); U.S. DEP’T OF JUSTICE, *supra* note 2, at 30 n.3 (also asserting that substantive rules have the force of law).

65. COLE, *supra* note 42, at 14 n.134 (“For an individual arrested for behavior occurring before the promulgation of the final rule, the government’s authority to arrest the individual rested on the interim rule issued without notice and comment. If the interim rule was issued in violation of the APA, then it is invalid and cannot sustain an individual’s conviction.”).

66. See *infra* Part III.

67. COLE, *supra* note 42, at 9; see David Zaring, *Reasonable Agencies*, 96 VA. L. REV. 135, 143 n.23 (2010) (asserting that the APA is afforded distinct judicial review standards that are not “duplicated by the standards of review used by appellate courts to review trial courts”).

68. COLE, *supra* note 42, at 9.

69. *Id.* at 10 & n.90 (“Scholars have . . . criticized judicial application of these categories for lacking doctrinal consistency.” (citing William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083, 1090, 1120–36 (2008))). Eskridge and Baer examine over 1,000 Supreme Court cases concerning agency interpretation of a statutory issue in order to assert “the proper role of agency deference in Supreme Court jurisprudence.” Eskridge & Baer, *supra*, at 1090.

70. 5 U.S.C. § 706(2)(F) (2012).

71. *Id.* § 706(2)(A).

or otherwise not in accordance with law.”⁷² Courts that apply the “arbitrary and capricious” standard of review “must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.”⁷³

For example, a court may conclude that an agency rule is arbitrary and capricious if the agency . . . relied on factors [that] 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 could not be ascribed to a difference in view or the product of agency expertise.⁷⁴

This standard requires courts to give significant deference to agency decision-making so that courts do not “substitute [their] judgment for that of the agency.”⁷⁵

In contrast, section 706(2)(D) of the APA governs procedural challenges to agency action. The section states that an action made “without observance of procedure required by law” must be held unlawful by a reviewing court.⁷⁶ Procedural challenges are thereby reviewed under a *de novo* standard of review, which “is a much more ‘exacting standard’ than the ‘deferential’ posture of arbitrary and capricious review.”⁷⁷ In fact, “*de novo* review is . . . the

72. *Id.*

73. *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416–20 (1971) (holding that the district court could not rely solely on litigation affidavits in determining a formal finding on behalf of the agency). In this case, the Supreme Court established a basic legal framework for judicial review of agency action. *See generally id.*

74. *Motor Vehicle Mfrs. Ass’n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). If the court finds any “deficiencies” in the reasonableness of an agency’s determinations, it must “not supply a reasoned basis for the agency’s action that the agency itself has not given.” *Id.* (citing *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947)).

75. *Id.* (acknowledging that although the “arbitrary and capricious” standard is deferential to agency decision-making, the agency still has to “examine the relevant data and articulate a satisfactory explanation for its action,” and when reviewing the agency’s explanation, a court has to “consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment” (quoting *Bowman Transp., Inc. v. Ark.-Best Freight Sys., Inc.*, 419 U.S. 281, 285 (1974))).

76. 5 U.S.C. § 706(2)(D).

77. *COLE*, *supra* note 42, at 13–14; *see also Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 376–78 (1989) (holding that the decision by the Corps of Engineers not to prepare a supplemental environmental impact statement was reviewable under the “arbitrary and capricious” standard; however, the Court also noted that when applying this standard “courts should not automatically defer to the agency’s express reliance on an interest in finality without carefully reviewing the record A contrary approach would not simply render judicial review generally meaningless, but would be contrary to the demand that courts ensure that agency decisions are founded on a reasoned evaluation ‘of the relevant factors’” (quoting *Citizens to Pres. Overton Park*, 401 U.S. at 416)); *Nat. Res. Def. Council, Inc. v. EPA*, 683 F.2d 752, 760, 765–67 (3d Cir. 1982) (holding good cause was not established by the Environmental Protection Agency

strictest standard of review” and affords no deference to lower courts or agency action.⁷⁸ As a result of the different consequences of each standard, selecting a standard of review can be vital to the outcome of judicial review of agency action.⁷⁹

Despite numerous opportunities to review the Attorney General’s use of the good cause exception to apply SORNA retroactively, the Supreme Court of the United States has failed to grant certiorari and determine the appropriate standard of review courts should use when an agency invokes the good cause exception. Until the Supreme Court outlines the appropriate standard of review for the use of the good cause exception, defendants and laypersons alike will continue to suffer from their inability to participate in the informal rulemaking process, which is a specific principle of the APA and plays an important role in the check on administrative power.

III. NO GOOD STANDARD FOR THE GOOD CAUSE EXCEPTION

By failing to definitively outline the proper standard of review, the Supreme Court has allowed the exception to the rule that otherwise ensures public participation and open information to go virtually unchecked. The Attorney General’s decision to retroactively apply SORNA and the confusion stemming from that decision is one example of how the lack of a standard leads to inconsistent outcomes. As explored later, even courts that use the same standard of review reach different conclusions.⁸⁰

One thing that courts agree on is that the good cause exception should be “narrowly construed.”⁸¹ “This ‘interpretive framework has been developed separate and apart from [the APA’s text], [and is instead] derived from the legislative history of the good cause exception.’”⁸² However, this limiting

in failing to publish amendments to a final rule concerning discharge of toxins into the public water supply because an executive order prompted a postponement of the amendments).

78. ROBERT E. LARSEN, *NAVIGATING THE FEDERAL TRIAL* § 16:18 (2017 ed.).

79. COLE, *supra* note 42, at 14; *see infra* Part III (examining the inadequacies of both the de novo standard of review and the “arbitrary and capricious” standard of review in judicial review of an agency’s invocation of the good cause exception to informal rulemaking—particularly in the context of SORNA and the Attorney General’s rule making the registration and notification requirements of the Act apply retroactively).

80. *Compare* United States v. Gould, 568 F.3d 459, 469–70 (4th Cir. 2009) (applying a de novo standard of review and upholding the defendant’s SORNA conviction after finding the Attorney General had good cause to invoke the exception because of the need for legal certainty and public safety), *with* United States v. Cain, 583 F.3d 408, 419–22 (6th Cir. 2009) (applying a de novo standard of review to overturn the defendant’s SORNA conviction because the Attorney General’s need to eliminate legal uncertainty surrounding SORNA was not a sufficient reason to bypass notice-and-comment rulemaking procedures).

81. COLE, *supra* note 42, at 9 (quoting Mack Trucks, Inc. v. EPA, 682 F.3d 87, 93 (D.C. Cir. 2012) (“We have repeatedly made clear that the good cause exception ‘is to be narrowly construed and only reluctantly countenanced.’”)).

82. *See id.*, at 14 (first alteration in original) (quoting United States v. Reynolds, 710 F.3d 498, 507–08 (3d Cir. 2013) (deciding not to determine the appropriate standard of review for good cause

principle is where courts' congruity ends.⁸³ Perhaps the biggest reason courts disagree as to what standard of review is appropriate stems from the courts' failure to properly characterize the agency's action under review. Some circuit courts review the good cause exception as a discretionary or factual decision, while other courts review it as a legal conclusion.⁸⁴

This Part explores the inadequacies of the two standards of review that circuit courts currently apply when examining the use of the good cause exception. Part III.A provides the factual foundations of numerous cases in which the plaintiffs sought to challenge the Attorney General's interim SORNA rulemaking under the APA. Part III.B examines the cases where courts used the *de novo* standard of review and pinpoints certain inadequacies with this standard of review. Part III.C explores the cases where the courts applied an "arbitrary and capricious" standard of review and also highlights the failures of this approach. Until the Supreme Court defines the proper standard of review, agencies will continue to employ the exception without adequate guidance and reasoning, and the courts will continue to grope for an appropriate standard that satisfies section 706 of the APA.

A. THE COMMON FACTS

SORNA cases all take a common path⁸⁵: The defendant was a sexual offender prior to the enactment of SORNA in July of 2006.⁸⁶ At the time of his conviction, the defendant lived in a state that had an established sexual

exception rulemaking because the Attorney General's actions under SORNA failed even the most deferential standard of review: the "arbitrary and capricious" standard)).

83. See *id.* at 9 (citing 5 U.S.C. § 706(2)(A), (D) (2012), which together direct the courts on the proper standard of review to use when reviewing agency procedural and discretionary decisions).

84. *Id.* at 13. For cases where the court applied an "arbitrary and capricious" standard, see *United States v. Garner*, 767 F.2d 104, 116–17 (5th Cir. 1985) ("Because the central focus of the arbitrary and capricious standard is on the rationality of the agency's 'decisionmaking,' rather than its actual decision, '[i]t is well-established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself.'" (alteration in original) (citing *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983))); and *Wash. State Farm Bureau v. Marshall*, 625 F.2d 296, 306–07 (9th Cir. 1980) (holding that the Secretary of Labor had good cause to bypass notice-and-comment rulemaking in promulgating a rule to remove certain pesticides from fruit fields where 10- and 11-year-olds would be working). For cases where the court applied a *de novo* standard of review, see *Sorenson Commc'ns Inc. v. FCC*, 755 F.3d 702, 706 (D.C. Cir. 2014) ("[A]n agency has no interpretive authority over the APA; we cannot find that an exception applies simply because the agency says we should." (citation omitted)); and *Cain*, 583 F.3d at 421 ("[G]ood cause to suspend notice and comment must be supported by more than the bare need to have regulations." (alteration in original) (quoting *Nat'l Ass'n of Farmworkers Orgs. v. Marshall*, 628 F.2d 604, 621 (D.C. Cir. 1980))).

85. The cases to be examined in detail by this Note are *United States v. Johnson*, 632 F.3d 912 (5th Cir. 2011); *United States v. Dean*, 604 F.3d 1275 (11th Cir. 2010); *Cain*, 583 F.3d 408; and *Gould*, 568 F.3d 459.

86. See *Johnson*, 632 F.3d at 914; *Dean*, 604 F.3d at 1276; *Cain*, 583 F.3d at 410; *Gould*, 568 F.3d at 461.

offender registry.⁸⁷ The state registry “required the defendant to register and maintain up-to-date information” about his address.⁸⁸ After SORNA’s heightened registration requirements went into effect, the defendant travelled across state borders and subsequently failed to register his status in that new state.⁸⁹ The defendant was consequently arrested in the new state and charged with failure to provide notice and register his status pursuant to SORNA requirements.⁹⁰ The defendant filed a motion to dismiss his indictment and argued that the Attorney General’s interim rule was issued in violation of the APA because the Attorney General did not establish good cause for bypassing the notice-and-comment procedures of section 553.⁹¹ However on appeal, the result of the case depends on which circuit the defendant filed in.⁹²

B. DE NOVO REVIEW

The Fourth and Sixth Circuits have reviewed the Attorney General’s use of the good cause exception under a de novo standard of review.⁹³ In

87. See *Johnson*, 632 F.3d at 914; *Dean*, 604 F.3d at 1276; *Cain*, 583 F.3d at 411; *Gould*, 568 F.3d at 461.

88. See *Kim*, *supra* note 56, at 1063–64 (discussing the common facts of cases in which the criminal defendant challenged the Attorney General’s use of the good cause exception in promulgating a rule to apply SORNA retroactively).

89. See *Johnson*, 632 F.3d at 914; *Dean*, 604 F.3d at 1276; *Cain*, 583 F.3d at 411; *Gould*, 568 F.3d at 461.

90. See *Johnson*, 632 F.3d at 914; *Dean*, 604 F.3d at 1276; *Cain*, 583 F.3d at 410; *Gould*, 568 F.3d at 461; see also 42 U.S.C. § 16913(b)–(d) (2012) (outlining the registration requirements for convicted sex offenders, and the Attorney General’s rulemaking power over those requirements).

91. See generally *Johnson*, 632 F.3d 912; *Dean*, 604 F.3d 1275; *Cain*, 583 F.3d 408; *Gould*, 568 F.3d 459.

92. See *infra* Part III.B–C (examining the circuit courts’ application of de novo and “arbitrary and capricious” standards of review).

93. See *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) (highlighting the “Fourth and Sixth Circuits’ application of *de novo* review, although these courts do not specifically state the standard they applied”); *Cain*, 583 F.3d at 434 n.4 (Griffin, J., dissenting) (“It appears that the majority has reviewed de novo the Attorney General’s finding of good cause.”); *Gould*, 568 F.3d at 470. It is important to note that “the Ninth, Third, and Eighth Circuits [have] expressly declined to decide the appropriate standard of review, ruling that the Attorney General’s invocation of good cause would fail even under the deferential arbitrary and capricious standard.” *COLE*, *supra* note 42, at 15. For a Third Circuit case, see *Reynolds*, 710 F.3d at 509 (“We conclude that the Attorney General’s assertion of good cause fails even the most deferential standard of arbitrary and capricious. Just what is the applicable standard of review for agency determinations that good cause justifies waiver of notice and comment is a question for another day.” (citation omitted)). For an Eighth Circuit case, see *Brewer*, 766 F.3d at 888 (“[W]e agree with the Third Circuit that the Attorney General’s assertion of good cause fails under any of the above standards.”). For a Ninth Circuit case, see *United States v. Valverde*, 628 F.3d 1159, 1162 (9th Cir. 2010) (“Because we would, under either standard, affirm the dismissal of the indictment on the ground that no validly promulgated regulation had

particular, in *United States v. Gould*, the Fourth Circuit upheld SORNA's retroactivity for three reasons.⁹⁴ First, the court accepted the "need for legal certainty" in establishing whether SORNA's registration and notification requirements applied retroactively.⁹⁵ Second, the Fourth Circuit agreed that a delay in implementing the Attorney General's rule posed a significant danger to public safety. In doing so, the court relied heavily on the Attorney General's assertion that proceeding through notice and comment would subject the public to the "commission of additional sexual assaults and child sexual abuse or exploitation offenses by sex offenders that could have been prevented had local authorities and the community been aware of [the offender's] presence."⁹⁶ Third, the court was satisfied that the Attorney General provided a time period for public comment after the interim rule was promulgated.⁹⁷

Interestingly, the Sixth Circuit also applied *de novo* review of the Attorney General's action, but in examining the same key factors, the *United States v. Cain* court reached the opposite result and overturned the retroactivity.⁹⁸ First, the court did not find the Attorney General's rationale that bypassing the notice-and-comment procedure was necessarily persuasive.⁹⁹ In fact, the Sixth Circuit argued that a "desire to provide immediate guidance, without more, does not suffice for good cause."¹⁰⁰ If this desire was enough, the court argued, the "agency would be able to invoke good cause for every rule promulgated, whether a real need existed or not."¹⁰¹ Furthermore, the court noted that Congress already created a long enough period of delay for the Attorney General by choosing to delegate the regulatory authority rather than promulgate a law itself.¹⁰² Also, the court was skeptical about the fact that "the Attorney General himself gave no

applied SORNA retroactively to Valverde at the time of his failure to register, we need not determine whether a *de novo* or an abuse of discretion standard of review applies here.").

94. The court reached its conclusion in this case in what has been described as "an abbreviated fashion." COLE, *supra* note 42, at 15.

95. *Gould*, 568 F.3d at 470.

96. Office of the Attorney General; Applicability of the Sex Offender Registration and Notification Act, 72 Fed. Reg. 8894, 8896–97 (Feb. 28, 2007) (to be codified at 28 C.F.R. pt. 72) (outlining the Attorney General's interim rulemaking to apply SORNA's requirements to previous convicted sexual offenders, regardless of whether their state had an existing notification and registration requirement).

97. *Gould*, 568 F.3d at 470 ("In the circumstances, we conclude that the Attorney General had good cause to invoke the exception to providing the 30-day notice.").

98. *Cain*, 583 F.3d at 422–23.

99. *Id.* at 421–22.

100. *Id.* (quoting *Mobil Oil Corp. v. Dep't of Energy*, 610 F.2d 796, 803 (Temp. Emer. Ct. App. 1979) (holding that the Department of Energy failed to comply with section 553 rulemaking procedures when it promulgated a rule adjusting price regulations; further, such an action was held to be arbitrary and capricious under the standards of the APA)).

101. Kim, *supra* note 56, at 1066.

102. *Cain*, 583 F.3d at 421.

explanation for his own seven-month delay in issuing regulations, which doubtless significantly contributed to any uncertainty.”¹⁰³

Second, the court drew a sharp distinction between the public safety concern in this rulemaking and the safety concern in other agency rules that warranted the good cause exception.¹⁰⁴ In the latter cases, the court believed that “existing regulations insufficiently protected public safety,” and the agencies had adequately provided specific reasons why an emergency, or interim, regulation was necessary.¹⁰⁵ In the context of SORNA retroactivity, “the Attorney General gave no specific evidence of actual harm to the public in his conclusory statement of reasons, and gave no explanation for why he could act in an emergency fashion.”¹⁰⁶ Finally, in finding no good cause for the Attorney General’s interim rulemaking, the Sixth Circuit asserted that in cases of criminal law, notice and the opportunity to comment on proposed regulations is especially important, and “[t]he fact that the regulation imposes a new obligation, on pain of severe criminal sanctions, only reinforces the need for the statutory protections in place when an agency engages in quasi-legislation.”¹⁰⁷

These cases not only use the same standard of review to reach different conclusions based on extremely similar facts and the same statement of reasoning from the Attorney General, but they also present an inherent problem in applying *de novo* review to agency decision-making: The standard alone is not sufficient to review the good cause exception. Under section 706(2)(D) of the APA, courts employ the *de novo* standard of review “to ensure that agency actions, findings, and conclusions are completed in ‘observance of procedure required by law.’”¹⁰⁸ In the context of SORNA retroactivity, the Attorney General’s interim rulemaking did require an exercise in the interpretation of section 553(b)(B): the good cause exception provision.¹⁰⁹ However, the use of the *de novo* standard directly conflicts with

103. *Id.* The Sex Offender Notification and Registration Act was passed July 27, 2006, and the Attorney General’s interim rule was not subsequently issued until February 2, 2007. *See* Sex Offender Registration and Notification Act, Pub. L. No. 109-248, tit. 1, 120 Stat. 590 (2006) (codified as amended at 34 U.S.C.A. §§ 20911-32 (West 2017)); Office of the Attorney General; The National Guidelines for Sex Offender Registration and Notification, 73 Fed. Reg. 38,030, 38,030-01, 38,046-47 (July 2, 2008).

104. *Cain*, 583 F.3d at 422.

105. *Id.*

106. *Id.*

107. *Id.* (“[C]ertainly, a criminal prosecution founded on an agency rule should be held to the strict letter of the APA.” (quoting *United States v. Picciotto*, 875 F.2d 345, 346 (D.C. Cir. 1989))).

108. *United States v. Reynolds*, 710 F.3d 498, 507 (3d Cir. 2013) (quoting 5 U.S.C. § 706(2)(D) (2012)) (holding that the Attorney General’s rulemaking applying SORNA retroactively was invalid); *see also* 5 U.S.C. § 706(2)(D) (outlining the scope of review for courts to use when reviewing agency action).

109. For the Attorney General’s interim rulemaking, *see* Office of the Attorney General; Applicability of the Sex Offender Registration and Notification Act, 72 Fed. Reg. 8894, 8896-97 (Feb. 28, 2007) (to be codified at 28 C.F.R. pt. 72). For the Attorney General’s final rulemaking,

the more deferential “arbitrary and capricious” standard that the courts apply when reviewing factual determinations made by an agency.¹¹⁰ As courts continue to wrestle with this issue, it is clear that “the close examination required by *de novo* review is inconsistent with the deference afforded under the arbitrary and capricious standard.”¹¹¹ For, “[t]he exacting standard applicable in determining whether an agency has failed to comply with the [APA’s] procedural requirements [of notice and comment] for its action contrasts with the deferential standard applicable to substantive challenges to agency action.”¹¹²

C. “ARBITRARY AND CAPRICIOUS” REVIEW

The Fifth and Eleventh Circuits have reviewed the good cause exception under an “arbitrary and capricious” standard.¹¹³ Derived from section 706(2)(A), the “arbitrary and capricious” standard recognizes the knowledge and technical expertise a respective agency has on the subject in question. It therefore requires the courts to defer to the informed and discretionary decisions of the responsible federal agencies.¹¹⁴ Furthermore, in the context of SORNA, the Attorney General argued that the “arbitrary and capricious” standard should govern his action to bypass notice-and-comment procedures because the decision was based on factual determinations.¹¹⁵

In *United States v. Dean*, the Eleventh Circuit accepted the Attorney General’s determinations for good cause and upheld the defendant’s SORNA conviction. In doing so, the court heavily relied on the concern for public

see Office of the Attorney General; The National Guidelines for Sex Offender Registration and Notification, 73 Fed. Reg. 38,030, 38,030–01, 38,046–47 (July 2, 2008).

110. See 5 U.S.C. § 706(2)(A) (stating that agency findings and determinations found by the courts to be “arbitrary and capricious” shall be held unlawful).

111. *Reynolds*, 710 F.3d at 508 (citation omitted).

112. *Nat’l Res. Def. Council v. EPA*, 683 F.2d 752, 760 (3d Cir. 1982).

113. *United States v. Brewer*, 766 F.3d 884, 888 (8th Cir. 2014) (“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 (discussing the use of the “arbitrary and capricious” standard by the Fifth and Eleventh Circuits in the context of the SORNA good cause exception); see, e.g., *United States v. Johnson*, 632 F.3d 912, 928 (5th Cir. 2011); *United States v. Dean*, 604 F.3d 1275, 1278 (11th Cir. 2010) (stating that agency actions under the APA are reviewed under the “arbitrary and capricious” standard”).

114. See *Kleppe v. Sierra Club*, 427 U.S. 390, 412 (1976) (“Absent a showing of arbitrary action, we must assume that the agencies have exercised this discretion appropriately.”); *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971) (“Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one.”). For an interesting article addressing the convergence of agency deference and criminal liability, see generally Sanford N. Greenberg, *Who Says It’s a Crime?: Chevron Deference to Agency Interpretations of Regulatory Statutes that Create Criminal Liability*, 58 U. PITT. L. REV. 1 (1996).

115. Supplemental Brief for the United States at 18, *Reynolds*, 710 F.3d 498 (No. 08-4747), 2012 WL 2956857, at *18.

safety.¹¹⁶ For, “[i]n practical terms, the retroactive rule reduced the risk of additional sexual assaults and sexual abuse by sex offenders by allowing federal authorities to apprehend and prosecute them.”¹¹⁷ Even though SORNA’s circumstances did not constitute an emergency, the court extended the public safety rationale for good cause to this situation because “delay [in promulgating a rule] could result in serious harm.”¹¹⁸ Overall, the court reasoned “[p]ublic safety is improved by federal law that allows the federal government to pursue sex offenders,” especially to the extent that “additional criminal sanction . . . increases the likelihood of [sexual offender] registration.”¹¹⁹

Additionally, the Eleventh Circuit addressed the Attorney General’s statement that the interim rule was necessary in order to establish certainty for law enforcement and already convicted sex offenders.¹²⁰ The court held that because the Attorney General “was granted sole discretion” to promulgate a rule to apply SORNA retroactively and was simultaneously given no specific guidance on how to do so by Congress, the need to establish legal certainty was reasonable.¹²¹ In fact, the court reasoned that the Attorney General’s rationale on this front was particularly compelling because people “who were affected by the rule were already convicted of their prior crimes and need[ed] to know whether to register.”¹²² Altogether, the Eleventh Circuit found the agency’s invocation of the good cause exception to be sound.¹²³

In contrast, the Fifth Circuit did not find good cause for the Attorney General to circumvent the notice-and-comment procedures, even though this court reviewed the agency’s action under the same “arbitrary and capricious” standard of review.¹²⁴ Just like the Fourth and Sixth Circuits, where the courts reached two different conclusions under the same standard of review,¹²⁵ the Fifth and the Eleventh Circuits applied an “arbitrary and capricious” standard of review and reached two different conclusions.

The Fifth Circuit’s decision in *United States v. Johnson* applied an “arbitrary and capricious” standard of review but did not find the Attorney General’s

116. See *Dean*, 604 F.3d at 1281 (“We conclude that the public safety argument advanced by the Attorney General is good cause for bypassing the notice and comment period.”).

117. *Id.*

118. *Id.* (quoting *Jifry v. FAA*, 370 F.3d 1174, 1179 (D.C. Cir. 2004)).

119. *Id.*

120. *Id.*; Office of the Attorney General; Applicability of the Sex Offender Registration and Notification Act, 72 Fed. Reg. 8894, 8896–97 (Feb. 28, 2007) (to be codified at 28 C.F.R. pt. 72).

121. *Dean*, 604 F.3d at 1280.

122. *Id.* (noting, however, that “[w]hile this reason alone may not have established the good cause exception [in this case], it does count to some extent”).

123. *Id.* at 1282.

124. See generally *United States v. Johnson*, 632 F.3d 912 (5th Cir. 2011).

125. See *supra* Part III.B (outlining the differing conclusions of the Fourth and Sixth Circuits in reviewing the Attorney General’s invocation of the good cause exception to informal rulemaking).

reasons for bypassing notice-and-comment persuasive.¹²⁶ In particular, the court did not accept the agency's concern for delaying the implementation of a retroactive rule because the interim rule "did not distribute new information to local authorities" since the state authorities "could have prosecuted most of the[] offenders before the [interim] rule."¹²⁷ Furthermore, the court believed that "Congress could have expressly waived the APA procedural requirements in SORNA if it feared those requirements would produce significant harm or excessive delay."¹²⁸ In terms of the cited uncertainty of how to apply SORNA, the Fifth Circuit argued that, in fact, "[t]he possibility of an alteration to the interim rule after its promulgation *increases* rather than eliminates uncertainty."¹²⁹ In the end, the court determined that in promulgating a rule to apply SORNA retroactively, "[t]raditional notice-and-comment process with promptly promulgated final rules was the clearest path to clarify the Act" and to "arbitrary and capricious" decision-making by the Attorney General.¹³⁰

The only thing clear about the standard of review is that the proper standard is unclear.¹³¹ The Fourth and Sixth Circuits apply a *de novo* standard.¹³² But the *de novo* standard is typically only employed for reviewing procedural or legal conclusions. This approach fails to appropriately consider an agency's factual determinations—determinations that are typically reviewed under a more deferential standard of "arbitrary and capricious."¹³³ Conversely, the Fifth and Eleventh Circuits apply the deferential "arbitrary and capricious" standard. However, applying only this standard fails to appropriately consider an agency's procedural process or legal conclusions—conclusions which are typically reviewed *de novo*.¹³⁴ It is clear that applying

126. *Johnson*, 632 F.3d at 928. However, it is important to note that although the Fifth Circuit did not find good cause for the Attorney General's interim rulemaking, the court ultimately upheld the defendant's conviction because the lack of good cause was "harmless error." *Id.* at 933. The "harmless error" rule demands courts to consider prejudicial error in reviewing agency decisions. *See Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 659–60 (2007).

127. *See Johnson*, 632 F.3d at 928.

128. *Id.*

129. *Id.* at 929 (quoting *United States v. Gould*, 568 F.3d 459, 479 (4th Cir. 2009) (Michael, J., dissenting)).

130. *Id.*

131. *See United States v. Reynolds*, 710 F.3d 498, 507 (3d Cir. 2013) (reviewing the recent circuit splits surrounding the appropriate standard of review for agency use of the good cause exception to informal rulemaking, specifically in the context of SORNA retroactivity).

132. *Gould*, 568 F.3d at 461; *United States v. Cain*, 583 F.3d 408, 434 n.4 (6th Cir. 2009) (Michael, J., dissenting).

133. *See supra* Part II.D (comparing and contrasting the scope of review for agency action under the good cause exception to informal rulemaking).

134. *Johnson*, 632 F.3d at 928; *United States v. Dean*, 604 F.3d 1275, 1278 (11th Cir. 2010).

only the *de novo* standard or only the “arbitrary and capricious” standard is inadequate.¹³⁵

IV. THE BEST STANDARD OF REVIEW FOR AGENCY USE OF THE GOOD CAUSE EXCEPTION

The Supreme Court should grant certiorari and establish a new, explicit standard of review for the good cause exception to informal rulemaking under the APA. An explicit standard is necessary because the APA was passed with the intent to achieve public notification and participation in federal rulemaking, which has grown to have a pervasive impact on the daily lives of every American.¹³⁶ The circuit courts continue to struggle to identify and apply a standard of review for this agency action that adequately protects the legislative purpose of the APA and also provides clear guidelines for agencies operating under the exception.

This Part argues that the appropriate standard of review for the good cause exception is a mixed standard of review that finds an appropriate middle ground. In other words, it considers the bifurcated procedural and factual determinations agencies must make. Part IV.A explains how the proposed mixed standard of review in cases will operate in challenges to an agency’s use of the good cause exception. Part IV.B details how the proposed mixed standard of review adequately achieves the legislative purposes of the APA. Finally, Part IV.C outlines how the new mixed standard of review will be beneficial in guiding an agency’s future use of the good cause exception.

A. STRIKING A MIDDLE GROUND

The appropriate standard of review for the good cause exception is a mixed standard of review that carefully considers both the factual and procedural determinations that agencies make when using the good cause exception. The Fourth and Sixth Circuits apply a *de novo* standard of review, which is usually reserved for procedural challenges to agency action.¹³⁷ However, this standard ignores the factual determinations agencies must make during interim rulemaking and is completely inconsistent with the more deferential “arbitrary and capricious” review that such factual

135. See *supra* Part III.C (explaining the problems with applying an “arbitrary and capricious” standard of review); see also *supra* Part III.B (explaining the problems with applying a *de novo* standard of review).

136. See *supra* Part I (discussing the growth of the administrative state in American politics and how the network of federal administrative agencies has become known as the “fourth branch of government”); *supra* Part II.A (describing the history of the Administrative Procedure Act and its intent to rein in federal administrative agencies and provide for public notification and participation).

137. See 5 U.S.C. § 706(2)(D) (2012); *supra* Part III.B (explaining the good cause exception under a *de novo* standard of review).

conclusions are generally afforded.¹³⁸ At the same time, the Fifth and Eleventh Circuits use an “arbitrary and capricious” standard that, on its own, is also inadequate because it ignores the procedural process of agency action.¹³⁹ Therefore, the best standard would strike a middle ground between *de novo* review and “arbitrary and capricious” review.

The mixed standard of review would require a court to examine an agency’s justification or reason for waiving notice-and-comment procedures under a *de novo* standard. The court would also review *de novo* whether the facts established by the agency “reveal justifiable reliance on the reason.”¹⁴⁰ At the same time, the court would apply the more deferential “arbitrary and capricious” standard for any factual determinations made by the agency as justification for using the good cause exception.¹⁴¹ In practice, a court would apply this bifurcated analysis to each challenge to the good cause exception.

Most importantly, the mixed standard of review is consistent with the text of section 706, which governs the scope of review for agency action, because the mixed standard does not require courts to use just one or the other standard of review. Such coherence and “conformance with § 706 is important because of the Supreme Court’s direction that ‘[t]he standards to be applied on review are governed by the provisions of § 706.’”¹⁴²

138. See *supra* Part II.B (discussing the factual and procedural determinations that are made by an agency in deciding whether to promulgate an interim or final rule).

139. See *supra* Part III.C (explaining that the “arbitrary and capricious” standard fails to consider an agency’s procedural process or legal conclusions).

140. See *United States v. Reynolds*, 710 F.3d 498, 508 (3d Cir. 2013) (explaining the bifurcated analysis of *Schweiker*’s mixed standard of review for good cause exception challenges); see also *Phila. Citizens in Action v. Schweiker*, 669 F.2d 877, 883, 886 (3d Cir. 1982) (examining the use of the good cause exception by the Secretary of Health and Human Services by using a mixed, or bifurcated standard of review).

141. *Reynolds*, 710 F.3d at 508. It is important to note that the *Reynolds* court only discusses the bifurcated standard of review suggested in *Schweiker*, but does not adopt a standard of review for good cause exception challenges. See *id.* at 508–09. Also, the *Reynolds* court expresses some doubts concerning *Schweiker*’s use of a mixed standard of review “because the decision appears to be an outlier from the body of good-cause case-law from this Court, as well as other courts of appeals.” *Id.* However, this Note is not dissuaded from arguing that, although an outlier, the mixed standard of review provided in *Schweiker* should be adopted by the Supreme Court as the appropriate standard of review for challenges to an agency’s use of the good cause exception. See *infra* Part IV.C (asserting that when courts are reviewing the invocation of the good cause exception in informal rulemaking, a mixed standard of review is the best standard to apply for numerous reasons).

142. *Reynolds*, 710 F.3d at 509 (alteration in original) (quoting *Heckler v. Chaney*, 470 U.S. 821, 828 (1985)); see *Dickinson v. Zurko*, 527 U.S. 150, 154–55 (1999) (“[r]ecognizing the importance of maintaining a uniform approach to judicial review of administrative action” found in section 706 to hold that deviations from the standards “must be clear[ly]” established by statute or common law).

B. SERVING THE PURPOSE OF THE APA

The mixed standard of review is the best standard for challenges to the good cause exception because it is consistent with the legislative purpose of the APA. The purpose of the APA is to provide guidance to agencies regarding their operations as adjudicators and rule makers, as well as provide significant opportunity for public notification and participation in the rulemaking process through notice-and-comment rulemaking.¹⁴³ However, Congress also recognizes the immediacy and authority with which an agency may need to act and therefore grants agencies an exception to the notice-and-comment procedures if they have “good cause.”¹⁴⁴ Regardless of the rulemaking procedure an agency uses to promulgate its rule, the agency action is reviewable by a court, which allows for public examination and participation. When the good cause exception is used to promulgate a rule and the court is unclear about which standard of review to apply, the purpose of the APA in allowing open and public participation is diminished. It is a dangerous practice to unabashedly allow governing authorities to bypass without appropriate review, one of the fundamental tenets of our democracy.

The mixed standard of review this Note proposes would fulfill the legislative purpose of the APA by ensuring that agencies bypass public notice-and-comment only when it is absolutely necessary. Such an important check on the power of the “fourth branch of government” should not be viewed as an inconsequential step in the rulemaking process. The mixed standard ensures that courts defer to agencies’ decisions in their areas of expertise and factual determinations, but also requires that any action that involves procedural or legal determinations receives more scrutiny. Applying the adequate standard of review protects the public from an overzealous and ever-growing federal administrative agency and works to maintain the functionality of the APA that Congress so carefully constructed more than 50 years ago.¹⁴⁵

C. GUIDING AGENCIES’ FUTURE USE OF THE GOOD CAUSE EXCEPTION

Since one of the legislative goals of the APA is to provide clear guidance for administrators, any adequate standard of review should actually offer a clear guide for agencies proceeding through the rulemaking process. The current circuit split regarding the appropriate standard of review fails to provide such guidance. Some circuits apply *de novo* review; others apply the more deferential “arbitrary and capricious” standard; in still others, the courts have explicitly chosen not to determine an appropriate standard.

143. See *supra* Part II.A (describing the history of the Administrative Procedure Act and the legislative purpose behind it).

144. 5 U.S.C. § 553(b)(B) (2012).

145. See *supra* Parts I–II.A (examining the crafting of the APA and the alarming growth of the “administrative state” in America).

Additionally, even amongst circuits that have applied the same standard of review, the outcomes have been inconsistent.¹⁴⁶

Fortunately, the mixed standard of review that this Note proposes supplies federal agencies with a clear and concise application of the appropriate standard of review for each particular determination an agency makes. Administrators know their procedural and legal determinations will receive more scrutiny and their factual determinations will receive more deference, in recognition of an agency's expertise and knowledge. All ambiguity is eliminated. Most importantly, once administrators are clear as to what type of review their decisions and actions will receive, they can work towards making better decisions from the outset.

V. CONCLUSION

Overall, the circuit split surrounding the appropriate standard of review for the good cause exception to informal rulemaking under section 553(b)(B) has created ambiguity and confusion for agency administrators and the public alike. Just in the context of the Attorney General applying SORNA retroactively, the Fourth and Sixth Circuits have reviewed the action *de novo*, while the Fifth and Eleventh Circuits decided the issue under the more deferential "arbitrary and capricious" standard of review. Each standard of review, applied on its own, is inadequate to protect public participation in agency rulemaking and to provide agencies with guidance. Because the good cause exception involves a bifurcated practice of both procedural and factual determinations, the appropriate standard of review must be a mixed standard of review. Therefore, the United States Supreme Court should grant certiorari and establish a mixed standard of review for agency use of the good cause exception. The mixed standard of review applies *de novo* review to procedural determinations and "arbitrary and capricious" review to factual determinations. Most importantly, the mixed standard of review serves the legislative purpose of the APA and provides adequate public participation protection and agency guidance for future good cause exception rulemaking.

146. See *supra* Part III (detailing the different standards used by the circuit courts). Compare *United States v. Johnson*, 632 F.3d 912, 928 (5th Cir. 2011), and *United States v. Dean*, 604 F.3d 1275, 1278 (11th Cir. 2010), with *United States v. Gould*, 568 F.3d 459, 461 (4th Cir. 2009), and *United States v. Cain*, 583 F.3d 408, 410 (6th Cir. 2009).