INTERIM FINAL RULES AND THE APA: SOME RULE OF LAW PROBLEMS

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INTRODUCTION

Almost a century ago in *Crowell v. Benson*,[1] Chief Justice Charles Evans Hughes highlighted the benefits of delegating certain classes of issues to administrative agencies for "prompt, continuous, expert, and inexpensive" resolution,[2] but cautioned that unfettered agency discretion risked "establish[ing] a government of a bureaucratic character alien to our system."[3] When Congress enacted the Administrative Procedure Act[4] (APA) in 1946, it offered a broad framework to negotiate this tension – between administrative power and the rule of law[5] – by balancing "a range of variables, including stability, constraints on executive power, accountability, and the need for expedition and energy, for vigorous government."[6] In the following decades, as agencies and the lower courts gave content to the APA's vague generalities, a hydraulic give-and-take emerged: agencies sought avenues for efficient, expertise-driven policymaking, and courts answered by erecting various limits on administrative power.[7]

One avenue of efficiency is the "interim final" rule (IFR). Used with increasing frequency since the 1980s,[8] IFRs are promulgated without notice and comment using the APA's "good

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[1] 285 U.S. 22 (1932).

[2] *Id.* at 46.

[3] *Id.* at 56. The normative implications of Chief Justice Hughes' statement are outside the scope of this Essay, which takes his words at face value. For an interesting exploration of these implications, see Evan Bernick, *The Regulatory State and Revolution: How (Fear of) Communism Has Shaped Administrative Law*, YALE J. ON REG.: NOTICE & COMMENT (Aug. 11, 2019), https://www.yalejreg.com/nc/the-regulatory-state-and-revolution-how-fear-of-comm-unism-has-shaped-administra-tive-law-by-evan-bernick/.

[4] Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended at 5 U.S.C. §§ 551, 553–559, 701–706).

[5] This Essay, following Professor Jeremy Waldron, defines the "rule of law" as the idea that "people in positions of authority should exercise their power within a constraining framework of well-established public norms rather than in an arbitrary, ad hoc, or purely discretionary manner," and that "citizens should respect and comply with legal norms, even when they disagree with them." Jeremy Waldron, *The Rule of Law*, *in* STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., Summer 2020 ed.), https://plato.stanford.edu/entries/rule-of-law/. *See also* A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 179–201, 324–401 (7th ed. 1908) (describing the tension between the rule of law and an overly bureaucratic administrative state).

[6] CASS R. SUNSTEIN & ADRIAN VERMEULE, LAW & LEVIATHAN: REDEEMING THE ADMINISTRATIVE STATE 30 (2020).

[7] *See* Antonin Scalia, Vermont Yankee*, the APA, and the D.C. Circuit*, 1978 SUP. CT. REV. 345, 381 (describing how lower courts, and particularly the D.C. Circuit, attempted to craft restrictions on agencies that "restore[d] the balance which the Supreme Court's consistent approval of 'the contrivance of more expeditious administrative methods' had upset").

[8] *See* Michael Asimow, *Interim-Final Rules: Making Haste Slowly*, 51 ADMIN. L. REV. 703, 712–15 (1999).

cause" exception.[9] Although the IFR is immediately binding,[10] the agency simultaneously invites public input on it.[11] The agency then issues a "final final" rule (FFR) that – at least theoretically – is edited to respond to the comments received.[12]

IFRs have long threatened the rule-of-law values undergirding the informal rulemaking process, a threat since intensified by the Supreme Court's 2020 decision in *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*,[13] which appeared to "write [the APA's informal rulemaking procedures] out of the statute entirely."[14] *Little Sisters*' questionable reading of the APA, which made interim-final rulemaking markedly easier than it was before, nudges the administrative state towards the "government of a bureaucratic character" against which Chief Justice Hughes cautioned.[15] But just as the hydraulics of our legal system have responded to bold assertions of administrative power in the past, so too can they respond to *Little Sisters* and cabin the use of IFRs: by way of arbitrary-and-capricious review, and (in certain cases), by limiting agencies' invocations of the APA's good cause exception. Through these pathways, lower courts can rein in the unfettered administrative discretion *Little Sisters* appears to allow, restoring the APA's balance between administrative power and the rule of law.

This Essay proceeds as follows. Part I offers a brief history of the use and judicial review of IFRs. Part II discusses the rule-of-law values undergirding various constraints on agency action, and argues that the IFR process represents a threat to these values – a threat the Court in *Little Sisters* disregarded. Part III offers two devices lower courts can use to cabin the IFR process while remaining faithful to the APA's text.

I. A BRIEF HISTORY OF IFRS

Since the 1980s, agencies have relied on the IFR process to promulgate a growing number of rules. This Part describes the rise of IFRs, the various approaches the circuit courts took in evaluating their validity prior to 2020, and the effect of *Little Sisters* on these approaches.

A. The Rise of IFRs

The familiar procedure of notice-and-comment rulemaking, set forth in § 553 of the APA, requires that agencies publish a general notice of a proposed rulemaking in the *Federal Register*, give "interested persons an opportunity to participate in the rule making" by submitting comments, and then, "[a]fter consideration of the relevant matter presented," issue a final rule along with a "concise general statement of [its] basis and purpose."[16] In the wake of the wholesale

[9] *See* 5 U.S.C. § 553(b)(3)(B). *See also* Kyle Schneider, Note, *Judicial Review of Good Cause Determinations Under the Administrative Procedure Act*, 73 STAN. L. REV. 237, 248 (2021).

[10] "Immediately" is a slight overstatement, as rules generally must be published thirty days before going into effect. *See* 5 U.S.C. § 553(d).

[11] *See* Asimow, *supra* note 8, at 711.

[12] In reality, many IFRs are never replaced by FFRs. *See* Dan Bosch, *Interim Final Rules: Not So Interim*, AM. ACTION FORUM (Dec. 8, 2020), https://www.americanactionforum.org/res-earch/interim-final-rules-not-so-interim/.

[13] 143 S. Ct. 2367 (2020).

[14] Kristen E. Hickman, *Did Little Sisters of the Poor Just Gut APA Rulemaking Procedures?*, YALE J. ON REG: NOTICE & COMMENT (July 9, 2020), https://www.yalejreg.com/nc/did-little- sisters-of-the-poor-just-gut-apa-rulemaking-procedures/.

[15] Crowell v. Benson, 285 U.S. 22, 56 (1932).

[16] 5 U.S.C. § 553(b)–(c).

shift from formal adjudication to informal rulemaking in the 1960s, however,[17] courts grafted various additional requirements onto this relatively sparse text.[18] Such requirements, coupled with the development of so-called "hard look" review in the 1970s–80s,[19] transformed notice-and-comment rulemaking from a simple, streamlined procedure into a "cumbersome and costly" one.[20]

IFRs emerged as a way to circumvent this process while retaining some of its benefits. The APA contains several exceptions, including a "good cause" exception that permits agencies to forego notice and comment if the procedure would be "impracticable, unnecessary, or contrary to the public interest."[21] By using this exception to promulgate a binding IFR, an agency is able to swiftly respond to a perceived problem or a statutory command to act, avoiding the burdens of adhering to § 553's paper hearing requirements.[22] And by soliciting postpromulgation comments after issuing an IFR (which is legally unnecessary if the good cause exception applies), the agency can reap some of the benefits of public participation in rulemaking, gaining "valuable information . . . at low cost."[23] As a result of such comments, the FFR is less likely to contain mistakes and may be better suited to "deal[ing] with unexpected and unique applications or exceptional situations" to which the comments adverted.[24]

In light of these advantages, agencies have embraced IFRs with increasing enthusiasm since the 1980s. The trend is especially pronounced with respect to so-called "major" rules – those with an economic impact of $100 million or more. In 2018, James Yates observed that agencies averaged seven major IFRs per year during President Clinton's second term, which increased to eight during the George W. Bush Administration and ten during the Obama Administration.[25] But even outside the context of major rules, agencies are using the IFR process more frequently than they once did,[26] suggesting a widespread belief within the administrative state that agencies

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[17] *See* Ronald M. Levin, *The Administrative Law Legacy of Kenneth Culp Davis*, 42 SAN DIEGO L. REV. 315, 324 (2005).

[18] *See, e.g.*, Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375, 394 (D.C. Cir. 1973) (agencies must disclose material studies on which they relied); United States v. Nova Scotia Food Prods. Corp., 568 F.2d 240, 252 (2d Cir. 1977) (agencies must give meaningful consideration to significant comments); Chocolate Mfrs. Ass'n of U.S. v. Block, 755 F.2d 1098, 1105 (4th Cir. 1985) (agencies must craft final rules that are a "logical outgrowth" of the proposed rule).

[19] *See generally* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983).

[20] Asimow, *supra* note 8, at 708.

[21] 5 U.S.C. § 553(b)(3)(B). Each of these three prongs has a distinct statutory meaning. According to the APA's legislative history, "'[i]mpracticable' means a situation in which the due and required execution of the agency functions would be unavoidably prevented by its undertaking public rule-making proceedings. 'Unnecessary' means unnecessary so far as the public is concerned, as would be the case if a minor or merely technical amendment in which the public is not particularly interested were involved. Public interest supplements the terms 'impracticable' or 'unnecessary'; it requires that public rule making procedures shall not prevent an agency from operating and that, on the other hand, lack of public interest in rule making warrants an agency to dispense with public procedure." ADMINISTRATIVE PROCEDURE ACT: LEGISLATIVE HISTORY, 79TH CONG., 1944–46, at 200 (1946) [hereinafter APA LEGISLATIVE HISTORY].

[22] *See* Asimow, *supra* note 8, at 707.

[23] *Id.*

[24] *Id.* at 708.

[25] James Yates, Essay, *Good Cause is Cause for Concern*, 86 GEO. WASH. L. REV. 1438, 1449 (2018). Major rules are subject to a sixty-day delay in implementation pursuant to the Congressional Review Act, *see* 5 U.S.C. §§ 801–808, as well as a cost-benefit analysis that must be submitted to the Office of Information and Regulatory Affairs, *see* Exec. Order No. 12,866, 3 C.F.R. 638 (1993). Given these additional procedural hurdles, it makes sense that agencies seeking to enact significant policy initiatives would want to minimize delays wherever possible.

[26] *See* Yates, *supra* note 25, at 1450.

can "get their rules implemented . . . quickly and economically by foregoing prepromulgation notice and comment."[27] Put simply, IFRs "have become part of the rulemaking routine."[28]

B. IFRs in the Circuit Courts

The rise of IFRs has put the judiciary "in an awkward position."[29] On one hand, the good cause exception is generally understood to be narrow, existing "principally to give agencies flexibility in dealing with emergencies and typographical errors, plus the occasional situation in which advance notice would be counterproductive."[30] On the other hand, once an agency has promulgated an IFR, invited postpromulgation comments, and issued an FFR after considering those comments, it has arguably adhered to the letter of the APA's informal rulemaking provisions.[31] Moreover, the APA's judicial review provisions include a harmless error rule,[32] suggesting that categorically declaring all IFRs to be procedurally invalid without investigating the prejudice, if any, caused by the procedure would itself violate the APA.

As Professors Kristen E. Hickman and Mark Thomson explain, these competing considerations led the circuit courts to adopt an array of approaches to addressing the procedural validity of IFRs.[33] Certain courts "declined to give any effect to postpromulgation notice and comment" on the grounds that upholding IFRs would "provide a powerful disincentive for agencies to comply with § 553's prepromulgation notice-and-comment requirements."[34] Others "treated postpromulgation notice and comment as curing or mooting procedural defects" in all IFRs.[35] Still other courts developed an intermediate approach called the "open mind" standard, upholding the procedural validity of rules "subjected to postpromulgation notice and comment if, during the postpromulgation notice-and-comment period, the agency kept an 'open mind' with respect to the comments it received" as reflected in the FFR.[36] Finally, in a handful of cases involving the EPA, courts invalidated an IFR for being procedurally defective but remanded to the agency without vacatur, which in turn "effectively require[d] a second round of postpromulgation comment" limited to "those parties that petitioned the court for relief."[37] This

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[27] Kristen E. Hickman & Mark Thomson, *Open Minds and Harmless Errors: Judicial Review of Postpromulgation Notice and Comment*, 101 CORNELL L. REV. 261, 266 (2016).

[28] Asimow, *supra* note 8, at 712. Congress, too, has on occasion authorized the IFR process in agencies' organic statutes. *See id.* at 712 n.40 (providing examples touching, inter alia, social security, mine safety, and environmental protection matters).

[29] Hickman & Thomson, *supra* note 27, at 263.

[30] Kristen E. Hickman, *Coloring Outside the Lines: Examining Treasury's (Lack Of) Compliance with Administrative Procedure Act Rulemaking Requirements*, 82 NOTRE DAME L. REV. 1727, 1782 (2007).

[31] *See* Asimow, *supra* note 8, at 726 (outlining the contours of this argument). *But see* Hickman, *supra* note 14 (critiquing such an interpretation for ignoring the repeated use of the word "after" in § 553); *infra* section III.B (offering further criticisms).

[32] *See* 5 U.S.C. § 706; APA LEGISLATIVE HISTORY, *supra* note 21, at 214 ("The requirement that account shall be taken 'of the rule of prejudicial error' means that a procedural omission which has been cured by affording the party the procedure to which he was originally entitled is not a reversible error.").

[33] Hickman & Thomson, *supra* note 27, at 285.

[34] *Id.* at 286; *see also id.* n. 151 (collecting cases from the Fifth, Fourth, and Third Circuits).

[35] *Id.* at 291; *see also id.* n. 169 (collecting cases from the Tenth and Federal Circuits).

[36] *Id.* at 294; *see also id.* nn. 176–177 (collecting cases from the D.C., Third, and Federal Circuits). The "open mind" standard is "implicitly rooted" in the APA's harmless error rule. *Id.* at 295.

[37] Hickman & Thomson, *supra* note 27, at 302. This remedy is legally controversial. *Id.* at 304. Even so, Professor Ronald Levin has argued that it has a basis in the traditional equitable discretion of the federal courts. *See generally* Ronald M. Levin, *"Vacation" at Sea: Judicial Remedies and Equitable Discretion in Administrative Law*, 53 DUKE L.J. 291 (2003).

diverse collection of views led Hickman and Thomson to conclude, in 2016, that "courts have struggled to resolve" the issue of how to consistently evaluate IFRs under the APA framework.[38]

C. *IFRs After* Little Sisters

In *Little Sisters*, the Supreme Court finally brought some clarity to the IFR issue, rejecting the "open mind" standard and strongly implying that IFRs are always valid so long as the agency invites postpromulgation comments and issues an FFR, even if the agency lacks good cause to issue the IFR in the first place. *Little Sisters* arose from two IFRs promulgated pursuant to the Affordable Care Act (ACA).[39] The ACA requires that employers offer insurance that includes "preventative care and screenings," but delegates authority to define this term to the Health Resources and Services Administration (HRSA), a subsidiary of the Department of Health and Human Services (HHS).[40] Soon after Congress enacted the ACA, HRSA determined that the preventative care plans had to include contraceptive coverage, but exempted "certain religious nonprofits" from the requirement.[41] Such nonprofits could "self-certify" their religious objections to the insurance provider, who would in turn "direct the insurer to exclude contraceptive coverage from the organization's plan."[42] But in 2017, the Trump Administration issued two IFRs – invoking the good cause exception – that did away with the self-certification process and simply allowed any employer with a religious or moral objection to decline to offer contraceptive coverage to its employees.[43] Simultaneously, HRSA invited public comments on the IFRs.[44]

Pennsylvania challenged the IFRs in the U.S. District Court for the Eastern District of Pennsylvania, which issued a nationwide preliminary injunction.[45] Among other concerns, the district court expressed serious doubt that HRSA had good cause to dispense with notice and comment.[46] The district court also rejected the idea that inviting postpromulgation comments itself cured the procedural defects in the IFRs, since "an agency may seek post-issuance commentary only if and only *after* having shown that it had good cause to avoid notice-and-comment rulemaking."[47] The Trump Administration appealed, and while the appeal was pending before the Third Circuit, HRSA issued FFRs "virtually identical" to the IFRs.[48] The Third Circuit subsequently affirmed the District Court, applying the "open mind" standard to conclude that "[t]he notice and comment exercise surrounding the Final Rules does not reflect any real open-mindedness toward the position set forth in the IFRs."[49]

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[38] Hickman & Thomson, *supra* note 27, at 268.

[39] Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of the U.S. Code).

[40] Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania, 140 S. Ct. 2367, 2373 (2020).

[41] *The Supreme Court, 2019 Term – Leading Cases*, 134 HARV. L. REV. 410, 560–61 (2020).

[42] *Id.* at 561.

[43] *Id.*

[44] *Little Sisters*, 140 S. Ct. at 2378.

[45] Pennsylvania v. Trump, 281 F. Supp. 3d 553, 585 (E.D. Pa. 2017).

[46] *See id.* at 572.

[47] *Id.* at 575 (emphasis added).

[48] *Little Sisters*, 140 S. Ct. at 2379.

[49] Pennsylvania v. President of the United States, 930 F.3d 543, 568–69 (3d Cir. 2019).

The Supreme Court reversed, concluding that because HRSA had promulgated FFRs after providing notice and an opportunity for comment, there was no procedural error.[50] Writing for a majority of five, Justice Thomas "decline[d] to evaluate the final rules under the open-mindedness test," which violated the "general proposition," first set forth in *Vermont Yankee Nuclear Power Corp. v. NRDC*,[51] that "courts are not free to impose upon agencies specific procedural requirements that have no basis in the APA."[52] Concluding that § 553 only requires "adequate notice" and "an opportunity to participate in the rule making" through comments, the Court explained that HRSA "complied with each of these statutory procedures"[53]: the IFRs themselves constituted notice, and were issued concurrently with an invitation to "interested parties . . . to submit comments."[54] In a footnote, the Court further noted that "[b]ecause . . . the IFRs' request for comment satisfies the APA's rulemaking requirements," there was no need to reach the argument that "the Departments lacked good cause to promulgate the . . . IFRs" in the first place.[55]

As several commentators noted, *Little Sisters* seemed to not only endorse the IFR process,[56] but also contemplate that agencies could issue IFRs *irrespective* of good cause, potentially gutting § 553's requirements for the mine-run of substantive rules.[57] The Court thus followed the handful of circuit courts that had taken the most permissive view towards IFRs,[58] embracing the idea that postpromulgation opportunity for comment, coupled with an FFR, cures any procedural defects present in an IFR.

II. IFRS AND THE RULE OF LAW

The APA's notice-and-comment process strikes a balance between administrative power, with all its advantages of flexibility and expertise, and rule-of-law values. This Part describes those values and the manner in which the APA's notice-and-comment process embodies them. It then offers an account of how IFRs aggrandize agency discretion at the expense of the rule of law, disrupting the APA's "compromise[]" between these "opposing . . . forces."[59] Finally, this Part explains how *Little Sisters*, through an overly literalistic and non-contextual interpretation of the APA's text, ignored the threat.

A. Rule-of-Law Values in the Administrative State

In the mid-twentieth century, legal philosopher Lon Fuller posited that law could not exist without a "fundamental framework within which the making of law takes place," a framework

[50] *Little Sisters*, 140 S. Ct. at 2386.

[51] 435 U.S. 519 (1978).

[52] *Id.* at 2385.

[53] *Id.* at 2386.

[54] *Id.*

[55] *Id.* n.14.

[56] *See, e.g.*, Katie Keith, *Supreme Court Upholds Broad Exemptions to Contraceptive Mandate – For Now*, HEALTH AFFAIRS (Jul. 9, 2020), https://www.healthaffairs.org/do/10.1377/fore-front.20200708.110645/.

[57] *See, e.g.*, Hickman, *supra* note 14 ("[T]he Court has come pretty close to, if not writing APA § 553(b) and (c) out of the statute completely, then at least minimizing those provisions to the point of irrelevancy in most instances.").

[58] *See supra* note 35 and accompanying text.

[59] Wong Yang Sung v. McGrath, 339 U.S. 33, 40 (1950).

understood and accepted by both the sovereign and the public.[60] Central to this jurisprudential theory was what Fuller termed the "internal morality of law itself," the notion that "the authority to make law must be supported by moral attitudes that accord to it the competency it claims."[61] In *The Morality of Law*, Fuller set forth eight principles that he argued infused a legal system with the requisite sense of morality: laws must be (1) generally applicable, (2) sufficiently publicized; (3) prospective in effect; (4) clearly understandable; (5) consistent with each other; (6) reasonable in what they ask of the populace; (7) relatively stable and unchanging; and (8) congruent, by their terms, with how they are enforced in practice.[62] To Fuller, a system that failed to adhere to some or all of these rules was incapable of "creat[ing] anything that can be called law, even bad law," since "[l]aw by itself is powerless to bring . . . morality into existence."[63]

As Professors Cass Sunstein and Adrian Vermeule have explained at length, the APA offers adaptable, expert-driven modes of policymaking that are nonetheless limited by Fullerian values.[64] This balance is especially visible in the APA's "most significant" innovation[65]: notice-and-comment rulemaking. Section 553 of the APA and the judicial opinions explicating it set forth two basic requirements. First, the agency must provide the public with notice of a proposed rulemaking and an opportunity for comment.[66] Second, the agency must offer a reasoned justification for its final rule after "consider[ing]" the comments received,[67] or, in the alternative, explain why there is good cause to depart from § 553's normal procedures.[68] The notice requirement embodies a "cluster" of Fullerian principles.[69] It provides that proposed rules are adequately publicized, such that "they may be subject to public criticism."[70] It guards against retroactivity.[71] And it ensures, by inviting feedback from interested parties, that the proposed rule does not "command[] the impossible" and can be adequately followed, giving it the practical force of law.[72] Similarly, the reasoned explanation requirement promotes clarity, forcing agencies to square their ultimate choice with the evidence before them, as well as existing law.[73] Finally,

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[60] Lon L. Fuller, *Positivism and Fidelity to Law: A Reply to Professor Hart*, 71 HARV. L. REV. 630, 639 (1958).

[61] *Id.* at 645.

[62] *See* LON L. FULLER, THE MORALITY OF LAW: REVISED EDITION 33–94 (1969).

[63] *See* Fuller, *supra* note 60, at 645.

[64] *See generally* SUNSTEIN & VERMEULE, *supra* note 6; Cass R. Sunstein & Adrian Vermeule, *The Morality of Administrative Law*, 131 HARV. L. REV. 1924 (2018).

[65] Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 514 (1989).

[66] *See* 5 U.S.C. § 553(b)(1)–(3).

[67] *Id.* § 553(c).

[68] *See id.* § 553(b)(3)(B) (requiring rules promulgated pursuant to the good cause exception to contain a "brief statement of reasons" why "notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest").

[69] Kevin M. Stack, *An Administrative Jurisprudence: The Rule of Law in the Administrative State*, 115 COLUM. L. REV. 1985, 1988 (2015).

[70] FULLER, *supra* note 62, at 51. *See also* David S. Rubenstein, *Taking Care of the Rule of Law*, 86 GEO. WASH. L. REV. 168, 227–28 (2018).

[71] *See* FULLER, *supra* note 62, at 51–65 (discussing the dangers posed by retroactive laws). *See also* SUNSTEIN & VERMEULE, *supra* note 6, at 58–59 (discussing *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204 (1988), which announced a presumption against retroactivity in rulemaking as a "background principle, apparently reflecting part of the morality of administrative law").

[72] FULLER, *supra* note 62, at 79. *See also* United States v. Nova Scotia Food Prods. Corp., 568 F.2d 240, 253 (2d Cir. 1977).

[73] *See* Stack, *supra* note 69, at 1988–89. The APA's text itself suggests that only minimal explanation is necessary. *See* 5 U.S.C. § 553(c) (requiring final rules to be accompanied by a "concise general statement of their basis and purpose"). But arbitrariness review and the paper hearing rules associated with § 553 effectively require agencies to provide significantly more elaborate

§ 553's structure – of a standard procedure followed by limited, enumerated exceptions – itself establishes the general rule that agencies cannot dispense with notice-and-comment on an ad hoc basis, abiding Fuller's concern that if the lawmaker "habitually disregards his own rules, he may find his system of law disintegrating."[74]

B. Rule-of-Law Problems Posed by IFRs

1. Fullerian Failures of Clarity, Generality, and Publicity

The IFR process represents a risk to a panoply of rule-of-law values embedded in the notice-and-comment process. Most obviously, the process frustrates the values of clarity and generality. After *Little Sisters*, it also frustrates the value of publicity.

Start with clarity and generality. Even before the Court decided *Little Sisters*, agencies routinely justified IFRs through questionable invocations of the good cause exception: given the high costs of the notice-and-comment process and the fact that the good cause exception is enforced inconsistently[75] (and evaluated under varying standards of judicial review),[76] agencies have a strong incentive to invoke the exception to promulgate IFRs, notwithstanding the risk that a court might invalidate them later.[77] Citing this incentive, Hickman and Thomson conclude that "at least a significant percentage of agency regulations lacking prepromulgation notice and comment are not, in fact, exempt from those procedures under the APA."[78]

IFRs promulgated pursuant to the good cause exception, then, have clarity and generality problems due to their impermissibly *ad hoc* character: because a reasoned justification is not possible, the agency is left to make an essentially arbitrary decision to depart from § 553's typical procedures, which in turn is evaluated on an arbitrary basis by the courts. A pair of cases arising out of one of the Biden Administration's COVID-19 vaccine rules illustrates these failures in practice. In September 2021, HHS announced that the conditions of participation in the federal Head Start Program would be amended to include a COVID-19 vaccination requirement.[79] At the end of November, HHS promulgated an IFR to this effect, invoking the "impracticable" and "public interest" prongs of the good cause exception.[80] The IFR was promptly challenged in multiple lawsuits. On January 1, 2022, the U.S. District Court for the Western District of Louisiana held that the IFR was procedurally invalid because HHS lacked good cause, observing that "[i]t took [HHS] almost three months . . . to prepare the [IFR]," and concluding that "the situation was not so urgent that notice and comment was not required."[81] Evaluating the same fact pattern, the U.S. District Court for the Eastern District of Michigan reached the opposite result two months

justifications for final rules. *See* Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385, 1397, 1419 (1992).

[74] FULLER, *supra* note 62, at 48.

[75] *See* Schneider, *supra* note 9, at 251–52.

[76] *See id.* at 252–57.

[77] *See* Hickman & Thomson, *supra* note 27, at 266. *See also* Kirsten E. Hickman, *The Limitations of* Law and Leviathan, YALE J. ON REG: NOTICE & COMMENT (April 22, 2021), https://www.yalejreg.com/nc/law-leviathan-redeeming-the-administrative-state-part-10/ (citing data suggesting a "highly aggressive agency conception of what constitutes good cause").

[78] Hickman & Thomson, *supra* note 27, at 266.

[79] *See* Livingston Educ. Serv. Agency v. Becerra, 589 F. Supp. 3d 697, 704 (E.D. Mich. 2022).

[80] *Id.* at 704.

[81] Louisiana v. Becerra, 577 F. Supp. 3d 483, 500 (W.D. La. 2022).

later, holding that the "82 days that it took to publish the IFR after it was first announced did not 'constitute[] "delay" inconsistent with the Secretary's finding of good cause.'" [82]

These courts' division on the good cause issue reveals the clarity and generality issues inherent in the IFR process. As to clarity, HHS offered a host of factual reasons why good cause applied,[83] but did not attempt to connect them to the prongs of the exception ("impracticable" and "public interest") it invoked.[84] As to generality, HHS's inability to provide a reasoned explanation grounded in the APA contributed to the appearance that HHS had arbitrarily selected the IFR process over standard rulemaking – especially in light of HHS's delay between announcing the IFR and promulgating it. And when the question reached the courts, they split without providing guidance beyond the fact-bound ruling that the eighty-two-day wait was (or was not) too long, perpetuating the cycle of incoherence and arbitrary decisionmaking, or what Fuller called a "fail[ure] to develop any significant rules at all."[85]

The rule-of-law problems that arise when agencies opportunistically invoke the good cause exception to promulgate IFRs are intensified by *Little Sisters*. If, as *Little Sisters* suggested, notice and comment before the issuance of a binding pronouncement is optional, agencies can ignore the procedure at will, issuing IFRs that double as notice while inviting postpromulgation comments, and then issuing FFRs if the IFRs are challenged.[86] In this universe, agencies do not need to even attempt to show good cause to avoid notice and comment and can instead disregard § 553's general order of operations whenever they want, rendering it a nullity.[87] Such disregard pushes the IFR process closer to a purely *ad hoc* mode of decisionmaking with no discernible standards than it was before *Little Sisters*, when agencies had an obligation to at least try and link an IFR to one of the APA's "good cause" prongs.

Little Sisters brings with it a third Fullerian failure, too, threatening the publicity safeguarded by the notice-and-comment process. IFRs, like all substantive rules, are subject to the APA's requirement of publication in the *Federal Register* thirty days before going into effect, which provides a modicum of notice to the public.[88] But prepromulgation comments foster additional dimensions of publicity, opening up the "internal procedures of deliberation and consultations" by which a binding rule is made and exposing the rule to scrutiny *before* it acts on the public.[89] In this way, post- and prepromulgation comments are not the same: once an agency has published a binding IFR, it is "less likely . . . [to] deviate from its position" in the FFR.[90] If the public feels that that an invitation for postpromulgation comments is a mere *pro forma* exercise, such an attitude could create a malaise whereupon "citizens [do] not take seriously the opportunity to offer comments" and perceive that the "resulting rules . . . [are] less the product of a

[82] *Livingston Educ. Serv.*, 589 F. Supp. 3d at 711 (quoting Biden v. Missouri, 142 S. Ct. 647, 654 (2022)).

[83] *See* Vaccine and Mask Requirements To Mitigate the Spread of COVID-19 in Head Start Programs, 86 Fed. Reg. 68052, 68058 (2021).

[84] *See Louisiana*, 577 F. Supp. 3d at 499.

[85] FULLER, *supra* note 62, at 47.

[86] *See* Hickman, *supra* note 14 (describing this reading of *Little Sisters*).

[87] *See id.*

[88] *See* 5 U.S.C. § 553(d); Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania, 140 S. Ct. 2367, 2386 (2020).

[89] FULLER, *supra* note 62, at 50.

[90] Hickman & Thomson, *supra* note 27, at 287.

representative process and more the product of bureaucratic fiat."[91] The IFR process, in other words, risks making rules appear illegitimate due to a lack of genuine public input.

Unsurprisingly, courts cognizant of the Fullerian morality of the APA's notice-and-comment process have repeatedly expressed an intuition (in contexts outside interim-final rulemaking) that agencies should not be empowered to ignore that process whenever it is convenient to do so. For instance, in *Tennessee Gas Pipeline Co. v. FERC*,[92] the D.C. Circuit rejected the argument that "the limited nature of [a] rule" could "justify a failure to follow notice and comment procedures."[93] To rule otherwise, the court cautioned, would allow the APA's exceptions to "soon swallow the notice and comment rule."[94] In *Northern Mariana Islands v. United States*,[95] the U.S. District Court for the District of Columbia came to a similar conclusion, holding that a statutorily mandated eighteen-month implementation period did not constitute good cause to dispense with notice and comment. There, too, the court observed that accepting such an argument would "swallow the [notice-and-comment] rule, as every agency obligated to develop a new federal program in a finite amount of time could decide that it had good cause to dispense with public participation in rulemaking."[96] Both *Tennessee Gas* and *Northern Mariana Islands* seemed to express a "mood"[97] that giving agencies broad discretion to dispense with prepromulgation comments would threaten the rule-of-law values implicit in § 553. But the IFR process as interpreted in *Little Sisters* appears to grant agencies precisely this sort of discretion.

2. Little Sisters' *Refusal to Recognize the Problem*

Little Sisters could have responded to the rise of IFRs by recognizing the problems they posed under the APA's framework. Instead, the Court engaged in a questionable reading of § 553's text that failed to respect the rule-of-law principles underlying it. As Hickman explains, § 553's description of the comment process, through repeated uses of the word "after," assumes that comments *follow* notice but *precede* the issuance of a final, binding rule.[98] The good cause exception empowers agencies to entirely dispense with this requirement.[99] Thus, the concept of inviting "postpromulgation comments" on a binding rule is alien to the APA's text: rather, the APA gives agencies the choice either (a) to seek comments before promulgating a binding rule, or (b) to forgo the procedure entirely after making a showing of good cause. So *Little Sisters*' decision to treat *postpromulgation* comments on an IFR the same as *prepromulgation* comments on a typical rule,[100] despite being justified textually, finds no support in § 553 read *con*textually.[101]

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[91] *Id.* at 287–88.

[92] 969 F.2d 1141 (D.C. Cir. 1992).

[93] *Id.* at 1145.

[94] *Id.*

[95] 686 F. Supp. 2d 7 (D.D.C. 2009).

[96] *Id.* at 16.

[97] *Cf.* Universal Camera Corp. v. NLRB, 340 U.S. 474, 487 (1951).

[98] *See* Hickman, *supra* note 14. *See also* 5 U.S.C. § 553(c) ("*After* notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making . . . . *After* consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose.") (emphasis added).

[99] *See* 5 U.S.C. § 553(b)(3)(B).

[100] *See* Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania, 140 S. Ct. 2367, 2386 (2020).

[101] *Cf.* West Virginia v. EPA, 142 S. Ct. 2587, 2607 (2022) ("It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.").

From this, it follows that inviting postpromulgation comments on an IFR is *never* relevant to its procedural legality: if an agency has good cause, it can (but does not have to) invite postpromulgation comments, and if an agency lacks good cause, it *must* offer prepromulgation comments. Consequently, the *Little Sisters* Court's footnote[102] observing that its decision mooted the good cause issue makes little sense: since postpromulgation comments should not count as an "opportunity to participate" under § 553's general provisions, the only way the FFRs in *Little Sisters* could have been valid was if the agency had good cause to dispense with prepromulgation comments. The Court's conclusion to the contrary ignores the "implicit procedural logic"[103] of § 553 in lieu of an overly wooden, literalistic interpretation. And because the Court ignored that logic, it also ignored certain values – clarity, generality, and publicity – that infuse the informal rulemaking process with Fullerian morality.[104] The result is an erosion of agencies' broader legitimacy as lawmakers: as Hickman pointedly wrote after the Court announced *Little Sisters*, "[w]e likely will get more agency regulations faster" as a result of an increased use of IFRs, "but in the end, we may not like the cost."[105]

III. CABINING THE IFR

Little Sisters' reliance on the APA's text to reject court-crafted constraints on agency discretion recalls a chestnut of administrative law, *Vermont Yankee*, which offers lessons for those concerned about the threat IFRs pose to the rule of law. This Part briefly describes the analytical link between *Vermont Yankee* and *Little Sisters*. Then, drawing on how the law developed after *Vermont Yankee*, it provides two ways lower courts can draw on the APA to constrain the IFR process.

A. Lessons from Vermont Yankee

Vermont Yankee purported to rely on the APA's text to conclude that "reviewing courts are generally not free to impose [additional procedural rights not enumerated in the APA] if agencies have not chosen to grant them."[106] But in reaching this conclusion, the Court arguably ignored other sections of the APA,[107] instead embracing the idea that "procedural mandates need some kind of [positive] legal foundation."[108] Four decades later, *Little Sisters* relied heavily on *Vermont Yankee* to reject the "open-mindedness test" as the sort of common law-esque procedural

[102] *See Little Sisters*, 140 S. Ct. at 2386 n.14.

[103] SUNSTEIN & VERMEULE, *supra* note 6, at 18.

[104] *See supra* notes 65–74 and accompanying text.

[105] Hickman, *supra* note 14. Interestingly, Hickman has also argued that "none of the Fullerian principles of administrative law morality are inconsistent with interim-final rulemaking, even where the agency lacks good cause," instead critiquing IFRs for their effects on regulated parties, who "feel[] ignored, skeptical of the agency's motives, and resentful of the rules in question." *See* Hickman, *supra* 77. But these effects are symptomatic of a legal system that lacks the necessary Fullerian morality. *See* FULLER, *supra* note 62, at 33–38 (offering a parable describing various results of immoral lawmaking, including "resent[ment], *id.* at 35, "near revolution," *id.* at 36, and "popular discontent," *id.* at 37).

[106] Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519, 524 (1978).

[107] *See* Kenneth Culp Davis, *Administrative Common Law and the* Vermont Yankee *Opinion*, 1980 UTAH L. REV. 3, 12 (citing 5 U.S.C. § 559, which provides that the APA does not "limit or repeal additional requirements . . . otherwise recognized by law," for the proposition that the APA imposes only *minimum* procedural requirements and permits reviewing courts to "add to [those] protections").

[108] SUNSTEIN & VERMEULE, *supra* note 6, at 95.

requirement the Court had long renounced.[109] *Little Sisters*, too, is arguably inconsistent with the language of the APA,[110] but like *Vermont Yankee*, reflects a methodological commitment to "judicial restraint and . . . strict judicial adherence to [the APA's] . . . text," read in isolation.[111]

Despite appearances, however, *Vermont Yankee* did not actually leave "the formulation of procedures . . . [entirely] within the discretion of . . . agencies."[112] Rather, as then-Professor Antonin Scalia observed, *Vermont Yankee* only barred courts from "supplementing" the APA's procedures in a common-law fashion.[113] The opinion was noticeably silent on "expansive interpretation[s] of the language of the APA itself" that had the *effect* of imposing new procedures on agencies, and "its silence on this point seem[ed] to be an implicit approval" of such a practice.[114] *Vermont Yankee* also endorsed the substantive policing of a rule's content through 5 U.S.C. § 706's arbitrary-and-capricious review provision, a constraint the Court had been developing since 1971.[115]

In the years following *Vermont Yankee*, then, "judicial decisions reinterpreting the APA in a relatively permanent fashion" persisted, imposing new hurdles on agencies and raising the costs of the informal rulemaking process. Though not without their critics,[116] such decisions were a natural continuation of what the courts had been doing for decades: devising tools within the APA framework to ensure, as agencies asserted power in new ways, that the administrative state remained within the bounds of the law's morality. Lower courts concerned about the rise of IFRs can take a lesson from *Vermont Yankee*, then, and use arbitrary-and-capricious review, as well as well as procedural constraints grounded in § 553's text, to rein in the IFR process.

B. The Substantive Approach: Policing IFRs and FFRs Through Arbitrary-and-Capricious Review

The first – and best – option for lower courts is to expose IFRs and FFRs to a searching form of arbitrary-and-capricious review on the ground that they are overbroad and thus lack a rational connection to the purported issue the agency is trying to address. Call this the "substantive" approach. When evaluating an agency action under the arbitrary-and-capricious standard, courts must ask, among other things, whether the agency articulated a "rational connection between the facts found and the choice made."[117] This requirement often implicates a question of fit – of whether the "scope" of a rule accords with "the problem the agenc[y] set[s] out to address."[118] One of the virtues of inviting prepromulgation comments, of course, is that an agency can adjust

[109] *See* Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania, 140 S. Ct. 2367, 2386 (2020) ("We have repeatedly stated that the text of the APA provides the 'maximum procedural requirements' that an agency must follow in order to promulgate a rule.") (quoting Perez v. Mortgage Bankers Ass'n, 575 U.S. 92, 102 (2015)).

[110] *See supra* notes 98–105 and accompanying text.

[111] Scalia, *supra* note 7, at 344.

[112] Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519, 524 (1978).

[113] Scalia, *supra* note 7, at 397.

[114] *Id.* at 394.

[115] *Vt. Yankee*, 435 U.S. at 535 n.14. *See also* Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 419–20 (1971) (imposing the obligation to develop a "full administrative record" in informal proceedings, *id.* at 420, so as to allow a court to evaluate whether an agency provided an "adequate explanation" for its action, *id.*).

[116] *See, e.g.*, Am. Radio Relay League, Inc. v. F.C.C., 524 F.3d 227, 248 (D.C. Cir. 2008) (Kavanaugh, J., concurring in part, concurring in the judgment in part, and dissenting in part).

[117] Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co, 483 U.S. 29, 43 (1983).

[118] Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania, 140 S. Ct. 2367, 2398 (2020) (Kagan, J., concurring).

the reach of a proposed rule after receiving submissions providing precise information about the problem at issue.[119] But IFRs, which are promulgated without public input, deprive the agency of the ability to make this sort of adjustment. FFRs, which are issued after the agency invites postpromulgation comments on an IFR, have a similar issue, since "regulatory inertia," as well as "status quo bias, confirmation bias, and commitment bias" all make the agency less likely to significantly alter the IFR in the FFR.[120] So compared to a typical notice-and-comment rule, both IFRs and FFRs have a potential overbreadth problem.

Justice Kagan raised the overbreadth issue concurring in the judgment in *Little Sisters*. She observed that HRSA had justified the IFRs at issue, which did away with the previous self-certification requirement, as necessary to assuage certain groups' "sincere religious objections" to the contraceptive mandate.[121] But the IFRs "exempted *all employers* with objections to the mandate, even if the [previous] accommodation met their religious needs."[122] This, to Justice Kagan, meant that the rules "went beyond what the Departments' justification supported – raising doubts about whether the solution lack[ed] a 'rational connection' to the problem."[123]

Taking a cue from Justice Kagan, lower courts have since used the "fit" issue to strike down IFRs as arbitrary and capricious. *Texas v. Becerra*,[124] a case arising from the Biden Administration's vaccine mandate for Medicare- and Medicaid-certified healthcare employers, is instructive. In November 2021, the Centers for Medicare and Medicaid Services issued an IFR announcing the mandate and simultaneously requested postpromulgation comments.[125] The IFR was soon challenged, including in the U.S. District Court for the Northern District of Texas. In issuing a preliminary injunction, the court concluded that the challengers were likely to succeed on their claim that the IFR failed arbitrariness review for three reasons relating to overbreadth.[126] First, HHS justified the IFR based on data "elicited from . . . long-term-care" facilities, but applied the rule to all facilities, including "psychiatric residential treatment facilities . . . and community-care oriented health centers."[127] Second, the IFR "fail[ed] to consider the disruptions to staff shortages and healthcare resources especially in rural areas for its enforcement."[128] Third, the IFR lacked the option of a "regular testing" requirement as an "alternative to vaccination," and failed to exempt "employees and contractors . . . [who] telework and administrative employees who have little to no patient contact."[129]

The Supreme Court, evaluating other district court opinions enjoining the same IFR in *Missouri v. Biden*,[130] ultimately concluded that the mandate was likely not arbitrary and

[119] *See* Jacob Gersen & Adrian Vermeule, *Thin Rationality Review*, 114 MICH. L. REV. 1355, 1396 (2016).
[120] Hickman & Thomson, *supra* note 27, at 287.
[121] *Little Sisters*, 140 S. Ct. at 2398 (Kagan, J., concurring).
[122] *Id.* (emphasis added).
[123] *Id.* at 2399.
[124] 575 F. Supp. 3d 701 (N.D. Tex. 2021).
[125] *See* Medicare and Medicaid Programs; Omnibus COVID-19 Health Care Staff Vaccination, 81 Fed. Reg. 61555 (2021).
[126] *See Texas*, 575 F. Supp. 3d at 721.
[127] *Id.*
[128] *Id.*
[129] *Id.* at 723.
[130] 142 S. Ct. 647 (2022) (per curiam).

capricious, citing the "challenges posed by the global pandemic."[131] Nevertheless, the opinion from the Northern District of Texas hints at the sort of analysis that might successfully cabin the IFR process in situations less dire than a large-scale health crisis like COVID-19. This substantive approach has several advantages. First, it takes account of the APA's harmless error rule,[132] reserving courts the discretion to uphold an IFR or FFR if the agency's failure to adhere to § 553's normal order of operations does not result in any prejudice. Second, it allows courts to address both IFRs and FFRs, avoiding the problem that under *Little Sisters*, any procedural issues surrounding the good cause exception are apparently mooted whenever an agency provides postpromulgation comment and issues an FFR. Third, it enables courts to impose the targeted remedy of remand without vacatur, which offers appealing flexibility when, for instance, an IFR makes large changes to a regulatory scheme and is challenged after regulated parties have already begun to adjust their conduct to adhere to it.[133]

In sum, the substantive approach would provide courts with a workable means of raising the costs of the IFR process, pushing agencies back towards the APA's baseline of inviting prepromulgation comments and furthering the Fullerian values that baseline promotes.[134] It would also preserve the availability of IFRs in exceptional circumstances where, as *Missouri* suggests, a departure from the APA's normal order of operations might be warranted in the name of efficiency and dispatch.[135]

C. The Procedural Approach: Policing IFRs Through the Good Cause Exception

A second – though less effective – means of policing the IFR process is to more stringently limit agencies' use of the good cause exception to promulgate IFRs. Call this the "procedural" approach. Such an approach would impose de novo review on agency invocations of good cause[136] and demand a link between an agency's reasons for using the IFR process and the prong of the good cause exception it seeks to invoke, allowing for the development of consistent standards.[137] Like the substantive approach, the procedural approach allows courts to take account of the APA's harmless error rule[138] and provide the remedy of remand without vacatur where appropriate.[139] But unlike the substantive approach, the procedural approach only reaches IFRs, not FFRs promulgated following an opportunity for comment. Moreover, because the

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[131] *Id.* at 654. *Cf.* Adrian Vermeule, *Our Schmittian Administrative Law*, 122 HARV. L. REV. 1095 (2009) (explaining how the parameters for good cause are "dialed down in times of perceived crisis" and "dialed up again when the crisis has passed," rendering the exception a "temporar[y] . . . legal grey hole").

[132] *See* 5 U.S.C. § 706(2).

[133] *See* Levin, *supra* note 37, at 298–99. Given the number of "major" rules (as defined in Exec. Order No. 12,866) implemented via the IFR process, this is not a speculative possibility. *See supra* note 25 and accompanying text.

[134] *See supra* section II.B.2 (discussing these values). *See also* Hickman, *supra* note 14.

[135] *See* Missouri v. Biden, 142 S. Ct. 647, 651 (2022) (per curiam).

[136] *See* Schneider, *supra* note 9, at 269 (recommending this reform).

[137] *See* 5 U.S.C. § 553(b)(3)(B). Courts are inconsistent in conducting good cause analyses within the framework of these three prongs. For instance, in the two Head Start Program cases described in Part II, *supra*, neither court linked the prongs of the good cause exception invoked by HHS with the factual reasons it offered for dispensing with notice and comment. *See* Livingston Educ. Serv. Agency v. Becerra, 589 F. Supp. 3d 697, 711–12 (E.D. Mich. 2022); Louisiana v. Becerra, 577 F. Supp. 3d 483, 499–501 (W.D. La. 2022).

[138] *See* Schneider, *supra* note 9, at 248 (describing how courts frequently "find improper use of the [good cause] exception to be harmless error when comments are accepted after promulgation").

[139] *See, e.g.*, Sugar Cane Growers Co-op. of Fla. v. Veneman, 289 F.3d 89, 98 (D.C. Cir. 2002).

procedural approach targets the good cause exception writ large, it risks overly narrowing it (even outside the IFR context), frustrating agencies' ability to respond to genuine emergencies.[140]

A case from the U.S. District Court for the District of Maryland, *Association of Community Cancer Centers v. Azar*,[141] illustrates how the procedural approach might work in practice. In November 2020, HHS issued an IFR that "require[d] reimbursements made for certain drugs covered by Medicare Part B to be based on the lowest price in a group of 'most favored nations' rather than the average U.S. sales price."[142] HHS justified its invocation of good cause on the grounds that delay would be "contrary to the public interest," asserting that "COVID-19 . . . has created an emergency in Medicare Part B drug pricing."[143] The court rejected this rationale, observing that the "public interest" prong of good cause typically only applies where "it [is] necessary to issue rules of life-saving importance immediately, or where delaying implementation of a rule would jeopardize the very reason for implementing the rule."[144] Here, the IFR merely aimed to "alleviate general financial instability."[145] The court concluded that the IFR was likely procedurally invalid, warranting preliminary injunctive relief.[146]

The *Community Cancer Centers* court used the procedural approach to cabin the IFR process in two ways. First, it did not defer to HHS's assertion of good cause.[147] Second, it rigorously analyzed the link between the purported ground for good cause and the content of the IFR.[148] As noted in Part II, inconsistent enforcement of the good cause exception incentivizes agencies to invoke it for tenuous reasons, giving IFRs and opinions evaluating them an ad hoc quality.[149] But de novo review, coupled with guidance from the courts rooted in the APA's three categories and prior caselaw, addresses these concerns.[150] Consequently, even though the procedural approach does not work in all cases after *Little Sisters* and has its own risks, it could, where applicable, further the Fullerian values safeguarded by a principled use of the good cause exception.[151]

CONCLUSION

Despite their intuitive appeal, IFRs disrupt the compromise the APA strikes between administrative power and the rule of law. On one hand, the APA gives agencies broad discretion to craft policy using informal rulemaking. On the other, it cabins this discretion by creating a procedural order of operations agencies must follow, including the provision of notice (which

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[140] *See* Vermeule, *supra* note 131, at 1123 (noting that the drafters of the APA "expressly anticipated" that the good cause exception would "cover administrative action in emergencies").

[141] 509 F. Supp. 3d 482 (D. Md. 2020).

[142] *Id.* at 488; *see also* Most Favored Nation (MFN) Model, 85 Fed. Reg. 76180 (2020).

[143] Ass'n of Cmty. Cancer Centers, 509 F. Supp. at 497.

[144] *Id.* at 496.

[145] *Id.* at 497.

[146] *See id.* at 501.

[147] *See id.* at 495 ("Courts review an agency's finding of good cause de novo.").

[148] *See id.* at 497–98.

[149] *See supra* section II.B.1.

[150] *See* Schneider, *supra* note 9, at 281–82 (arguing that while "[i]t may be impossible to precisely enumerate the factors relevant to evaluating the substance of future good cause assertions," *id.* at 282, de novo review, along with the "careful testing of arguments against the record," *id.* at 281, will deter agencies from "skip[ping] the APA's procedural requirements merely because they can get away" with it, *id.* at 282).

[151] *See supra* section II.B.1 (discussing these values)

ensures that rules are publicized, prospective, and reasonable) and the requirement of a reasoned explanation (which ensures that rules are clear). In this way, the APA and the judicial opinions giving it content are part of a project, dating back to *Crowell*, in which the courts and Congress both worked to balance the virtues of administrative power with the morality of administrative law so as to guard against the development of a lawless bureaucracy.[152]

The IFR process threatens this project, moving the needle towards administrative power and away from the rule of law. It incentivizes agencies to exploit the APA's good cause exception to minimize rulemaking costs, leading to incoherent explanations and the appearance of ad hoc decisionmaking. And when interpreted expansively, it permits agencies to dispense with notice and comment without invoking good cause at all, clouding the rulemaking process and intensifying the appearance of ad hoc decisionmaking. In an era marked by a "fundamental assault on the legitimacy of the administrative state," the risks posed by IFRs unshaped by public input and unconstrained by rule-of-law values play into critics' worst fears – fears *Little Sisters* failed to acknowledge. The time is ripe, then, for courts to cabin the IFR process, reassert the APA's settlement between administrative power and the rule of law, and redeem the "authority" of agencies to "make law[s]" that bind us all.[153]

[152] *See* SUNSTEIN & VERMEULE, *supra* note 6, at 8–10; Crowell v. Benson, 285 U.S. 22, 56 (1932).

[153] Fuller, *supra* note 60, at 645.