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Emergency Rulemaking's Democracy Deficit: Lessons from the United States's Paid Sick Leave Experiment

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EMERGENCY RULEMAKING'S DEMOCRACY DEFICIT: LESSONS FROM THE UNITED STATES'S PAID SICK LEAVE EXPERIMENT

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In this short life
that only lasts an hour
merely
How much — how
little — is
within our
power
Emily Dickinson[1]

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1. EMILY DICKINSON, *A 252*, *in* ENVELOPE POEMS 31 (Marta L. Werner & Jen Bervin trans., New Directions 2016).

INTRODUCTION

Luis Beltran was a maintenance building technician at a nursing home in New Jersey.[2] On March 24, 2020, he performed work in the room of a resident who soon after tested positive for COVID-19.[3] Luis began to feel ill, and the next week, his mother, who cared for his children while he worked, tested positive for COVID-19.[4] Luis was instructed by his local health department to quarantine for two weeks, but his employer repeatedly insisted he return to work earlier.[5] When he did not, he was fired.[6] Luis sued, asserting his statutory right to two weeks of emergency paid sick leave under the novel Families First Coronavirus Response Act (FFCRA).[7] His employer argued that it was entitled to exempt Luis from this leave because "health care providers" could be excluded under the statute.[8] At the time of his termination, the U.S. Department of Labor (DOL) erroneously defined "health care provider" to include people like Luis, who provided no health care but happened to work for a nursing home.[9]

Luis was not alone in being excluded from emergency paid sick leave due to the DOL's overly-broad emergency rule, which was promulgated, with Congress's blessing, without 'notice and comment' rulemaking procedures.[10] The temporary FFCRA, passed at the outset of the COVID-19 pandemic, provided some U.S. workers with two weeks of emergency paid sick leave to quarantine due to COVID-19 exposure or infection and expanded the Family Medical Leave Act to allow parents to take unpaid leave due to COVID-19-related school closures.[11] The federal government subsidized this leave with tax credits.[12] Employers covered by the law could elect to use the "health care provider" and first responder exception to exclude their employees from this emergency paid sick leave.[13] The DOL estimated that 9 million health care workers could be excluded

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2. Beltran v. 2 Deer Park Drive Operations, LLC, No. 20-8454 (MAS) (LHG), 2021 U.S. Dist. LEXIS 37291, at *1–2 (D.N.J. Feb. 28, 2021).

3. *Id.* at *2.

4. *Id.* at *2–3.

5. *Id.* at *3–4.

6. *Id.* at *4.

7. *See id.* at *5.

8. *Id.* at *14–17.

9. *Id.*

10. *See infra* Section I.C.i.

11. *See infra* Section I.B.ii.

12. *See* Families First Coronavirus Response Act, Pub. L. No. 116-127, §§ 7001(a), 7003(a), 134 Stat. 178, 210, 214 (2020).

13. *See id.* §§ 3105, 5102(a).

at their employer's discretion but later admitted that the real figure might exceed that amount.[14] Another conservative estimate found that 5% of the active workforce, or approximately 8 million health care workers and emergency responders, were affected.[15] Seventy-five percent of health care workers and emergency responders were women, and 39% were people of color, including Hispanic individuals and those in non-white racial categories.[16]

Recognizing that the COVID-19 pandemic necessitated making sick leave accessible as soon as possible, Congress statutorily authorized the DOL to bypass notice and comment rulemaking and promulgate a binding regulation using the good cause exception.[17] However, for the first six months of the COVID-19 pandemic, the DOL exceeded its authority under the statute to further limit access to leave: it promulgated a final rule, inconsistent with the language of the FFCRA, allowing employers of *any* health care workers to exclude *all* their employees from emergency paid sick leave — barring many more workers, like Luis, who were not health care providers and whom Congress did not intend to exclude.[18]

In March of 2021, a federal court held that the DOL's erroneous definition of "health care provider" should not apply to cases like Luis's. Instead, the court found that the statute's definition of "health care provider" should be applied and denied the employer's motion to dismiss Luis's claim.[19] A few federal courts have begun to correct

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14. *See* Paid Leave Under the Families First Coronavirus Response Act, 85 Fed. Reg. 19,326, 19,343 (Apr. 6, 2020). An investigation by the DOL's Office of Inspector General later found that this estimate "could be understated because it did not include all the occupations in the Department's expanded definition for health care providers." U.S. DEP'T OF LAB., OFF. OF INSPECTOR GEN., REP. NO. 19-20-009-15-001, COVID-19: WHD NEEDS TO CLOSELY MONITOR THE PANDEMIC IMPACT ON ITS OPERATIONS 2–3 (2020).

15. *See* Michelle Long & Mathew Rae, *Gaps in the Emergency Paid Sick Leave Law for Health Care Workers*, KFF (June 17, 2020), https://www.kff.org/coronavirus-covid-19/issue-brief/gaps-in-emergency-paid-sick-leave-law-for-health-care-workers/ [https://perma.cc/R44U-GT8E] (defining the health care and emergency response workforce as individuals who indicated that their job was in the Census code for pharmaceutical and medicine manufacturing; medical equipment and supplies manufacturing; offices of physicians; outpatient care centers; home health care services; other health care services; hospitals; nursing care facilities; residential care facilities without nursing; individual and family services; community food and housing and emergency services; and justice, public order, and safety activities).

16. *See id.*

17. *See* Families First Coronavirus Response Act § 5111; *see also infra* Sections I.A.ii–iii.

18. *See infra* Section I.C.

19. Beltran v. 2 Deer Park Drive Operations, LLC, No. 20-8454, 2021 U.S. Dist. LEXIS 37291, at *18–19 (D.N.J. Feb. 28, 2021).

the DOL's error and retroactively restore the right to emergency paid sick leave to those who were wrongfully denied it during the first six months of the COVID-19 pandemic.[20] This correction — so far pursued by only a handful of plaintiffs — has only been possible thanks to an activist state Attorney General, receptive federal courts, and the DOL's eventual willingness to back down.[21] It is impossible to know how many potential plaintiffs have lost wages and employment but did not and will not have their pay or employment restored because they and their employers relied on the erroneous rule.

In part because the DOL abused its ability to promulgate a rule using the good cause exception to disregard Congress's clear directive, the FFCRA was underinclusive and insufficiently responsive to an emergency in which millions of workers in the United States suddenly needed paid sick leave and family leave. If the DOL had created a rule that was consistent with the FFCRA, more workers would have received paid sick leave, and fewer people may have died.[22] The purpose of the good cause exception, which allows agencies to bypass a lengthy notice and comment procedure, is to provide agencies the flexibility needed to respond to emergencies quickly.[23] The story of the United States's emergency paid sick leave experiment demonstrates the serious problems that can arise when Congress statutorily authorizes an agency to bypass notice and comment. While the agency may respond more quickly to emergencies and insulate itself from legal challenges to its decision to avoid notice and comment — arguably good things in an emergency — the agency may also exceed its authority and promulgate a rule

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20. *See* Simone v. Harborview Rehab. & Care Ctr., No. 20-3551, 2021 U.S. Dist. LEXIS 105053, at *8–12 (E.D. Pa. June 3, 2021) (following the approach of the courts in *Beltran* and *Payne* and applying the FFCRA's definition of "health care provider" to a nursing home maintenance manager); *see also* Payne v. Woods Servs., Inc., No. 20-4561, 2021 U.S. Dist. LEXIS 28198, at *13–14 (E.D. Pa. Feb. 16, 2021) (holding that the definition of "health care provider" in the FFCRA is the appropriate definition to apply even though the April Rule was in place at the time of the Plaintiff's firing).

21. *See generally Simone*, 2021 U.S. Dist. LEXIS 105053, at *8–12; *Payne*, U.S. Dist. LEXIS 28198, at *13–14. *See also infra* Sections I.C.ii–iii.

22. While empirical research on the impact of the DOL's erroneous rule is lacking, some early studies have shown that people were more likely to stay home while quarantining when they had access to paid leave under the FFCRA. *See infra* text accompanying notes 158–60.

23. *See infra* Sections I.A.ii–iii and Part II.

inconsistent with congressional intent.[24] When this happens, as it did when the DOL implemented the FFCRA, Congress itself has no immediate recourse, and interested parties are unable to formally share information and evidence with the agency. Assuming a party has the requisite legal standing and resources to bring a claim in federal court, the slow and unpredictable nature of the judiciary makes it an unsuitable primary forum for ensuring agency accountability in an emergency.[25] Thus, the loss of the main vehicle for public participation in agency rulemaking — notice and comment — deepens the democratic deficit of agencies whose immense power is delegated by Congress, not derived directly from the people.[26]

Part I of this Note provides a general overview of notice and comment rulemaking, the good cause exception under the Administrative Procedure Act (APA), and statutory authorization to bypass notice and comment. It also explains how the FFCRA was passed by Congress and initially implemented by the DOL, and details how the DOL revised its implementation in response to a lawsuit by the New York Attorney General and an unfavorable federal district court ruling. Part II presents arguments for and against reforming the good cause exception, examines empirical evidence of the FFCRA's effectiveness and shortcomings, and offers alternative emergency rulemaking procedures in existence at the federal and state levels and alternatives proposed by scholars. Part III of this Note proposes a framework of procedural safeguards Congress should stipulate in future emergency legislation where it statutorily authorizes the use of the good cause exception, including a mandatory 30-day post-promulgation comment period and expiration after 90 to 120 days unless the agency promulgates a permanent rule.

I. CASE STUDY: EMERGENCY RULEMAKING AND THE FAMILIES FIRST CORONAVIRUS RESPONSE ACT

The good cause exception is a long-established, narrowly available mechanism for agencies to bypass the notice and comment procedures normally required to create regulations.[27] The decision to invoke the good cause exception under the APA typically lies with

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24. *See* Kevin Hartnett, Jr., Comment, *An Approach to Improving Judicial Review of the APA's "Good Cause" Exception to Notice-and-Comment Rulemaking*, 68 BUFF. L. REV. 1561, 1576 n.76 (2020).

25. *See* Connor Raso, *Agency Avoidance of Rulemaking Procedures*, 67 ADMIN. L. REV. 65, 81 (2015).

26. *See infra* Section II.A.ii.

27. *See infra* Sections I.A.i–ii.

the agency but is subject to judicial review.[28] However, following national crises such as the September 11 terrorist attacks, environmental disasters, and the COVID-19 pandemic, Congress has passed emergency legislation authorizing rulemaking without notice and comment, so that agencies may implement the emergency law quickly to provide relief.[29] The good cause exception and statutory authorization are two avenues for bypassing notice and comment, but agencies cite different statutory authority to get there — the APA, an emergency statute, or sometimes both.[30] Scholars, as well as Congress itself in authorizing statutes, often use the "good cause exception" to refer to both the APA and statutory authorization to bypass notice and comment.[31]

A recent example of statutory authorization is the FFCRA, a bipartisan act passed in March 2020 at the outset of the United States's COVID-19 pandemic.[32] The FFCRA established paid leave related to the pandemic and authorized the DOL to create regulations governing this leave without notice and comment.[33] However, the DOL created a rule that contradicted the plain language of the statute, preventing a large but difficult to define group of U.S. workers from accessing this leave.[34] The New York Attorney General sued the DOL and won in the Southern District of New York, prompting the DOL to correct the rule six months after its

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28. *See, e.g.*, Haw. Helicopter Operators Ass'n v. Fed. Aviation Admin., 51 F.3d 212, 214 (9th Cir. 1995) (upholding the Federal Aviation Administration's (FAA) use of the good cause exception to promulgate air safety rules following fatal air tour accidents); Jifry v. Fed. Aviation Admin., 370 F.3d 1174, 1179–80 (D.C. Cir. 2004) (upholding the FAA's use of the good cause exception to promulgate rules about airline pilot certification following the September 11, 2001, terrorist attacks).

29. *See infra* Section I.A.iii.

30. *See infra* Section I.A.iii.

31. *See infra* Section I.A.iii. This Note aims to use "good cause exception" to refer to the APA, not statutory authorization to bypass notice and comment. However, the FFCRA's statutory authorization provision references the APA's good cause exception; therefore this Note uses the terms interchangeably in that context. *See infra* Section I.B.iv.

32. *See infra* Section I.B.ii.

33. *See infra* Section I.B.v.

34. *See* U.S. DEP'T OF LAB., OFF. OF INSPECTOR GEN., *supra* note 14, at 2–3; *see also infra* Section I.C. Empirical evidence is lacking on how many non-health care workers were excluded from accessing leave because of the overly broad April Rule; the DOL has indicated that using the Bureau of Labor Statistics (BLS) on the health care sector underestimates those affected. *See* U.S. DEP'T OF LAB., OFF. OF INSPECTOR GEN., *supra* note 12, at 9.

creation, and only three months before the FFCRA itself was initially set to expire.[35]

A. Administrative Law Background

The APA governs the procedures federal agencies use to fulfill the policy responsibilities Congress has delegated to them.[36] One of the purposes of the APA is to standardize administrative procedure.[37] The two primary tools agencies have at their disposal to implement statutes are rulemaking, which is quasi-legislative, and adjudication, which is quasi-judicial.[38] Agencies may engage in formal or informal versions of either, and informal rulemaking and formal adjudication have long been the most common.[39] It is well-settled that the judiciary will not require agencies to prioritize rulemaking over adjudication or vice versa.[40]

i. Notice and Comment Rulemaking

An agency action is a rule if it is a "statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy."[41] To create a rule, agencies may engage in informal rulemaking, also known as notice and comment rulemaking.[42] First, the agency must issue a notice of proposed rulemaking (NPRM), published in the *Federal Register*, which must contain a "statement of the time, place, and nature of public rule making proceedings," the legal authority for the proposed rule, and a

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35. *See infra* Sections I.C.ii–iii.

36. *See generally* Administrative Procedure Act, 5 U.S.C. §§ 551–59.

37. *See* Wong Yang Sung v. McGrath, 339 U.S. 33, 41 (1950) ("One purpose [of the APA] was to introduce greater uniformity of procedure and standardization of administrative practice among the diverse agencies whose customs had departed widely from each other."), *superseded by statute on other grounds*, Supplemental Appropriation Act, 1951, 64 Stat. 1044, 1048, *as recognized in* Ardestani v. Immigr. & Naturalization Serv., 502 U.S. 129, 134 (1991).

38. 5 U.S.C. §§ 553–57.

39. *Id.*; *see also* William F. Pedersen, Jr., *Formal Records and Informal Rulemaking*, 85 YALE L.J. 38, 40 (1975) ("The two most common types of agency proceedings, producing orders and rules respectively, are known as formal adjudication and informal rulemaking." (citation omitted)).

40. *See* SEC v. Chenery Corp., 332 U.S. 194, 202 (1947) ("[A]n administrative agency must be equipped to act either by general rule or by individual order. To insist upon one form of action to the exclusion of the other is to exalt form over necessity.").

41. 5 U.S.C. § 551(4).

42. *Id.* §§ 553(b)–(c).

summary of the content of the proposed rule or of the subjects and issues involved.[43]

Once notice is issued, the agency must give the public a meaningful opportunity to participate in the rulemaking by accepting written or oral comments, data, and arguments.[44] The APA does not establish a uniform minimum comment period, but comment periods for most rulemakings stay open for at least 30 days.[45] The executive branch has recommended comment periods of at least 60 days.[46] While many agencies state that their policy is to allow comment periods of 60 days or longer, a 2011 study found that the mean duration is approximately 39 days, and the median duration is 32 days.[47] Agencies sometimes grant extensions to collect more information from interested parties or improve the quality of responses.[48] The agency considers these submissions, then issues a "concise general statement of . . . basis and purpose" that responds to vital questions raised by materially cogent comments.[49] However, if the final rule is modified in light of public

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43. *Id.* §§ 553(b)(1)–(3).

44. *Id.* § 553(c); *see also* United States v. Nova Scotia Food Prods. Corp., 568 F.2d 240, 251 (2d. Cir. 1977) (holding that under 5 U.S.C. § 553(c), the agency should have disclosed the scientific data they relied upon in creating the proposed rule so that interested persons would have a *meaningful* opportunity to respond during the comment period).

45. *See* Steven J. Balla, Public Commenting on Federal Agency Regulations: Research on Current Practices and Recommendations to the Administrative Conference of the United States 3–6 (Mar. 15, 2011) (unpublished report), https://www.acus.gov/sites/default/files/documents/Consolidated-Reports-%2B-Memoranda.pdf [https://perma.cc/Y58U-N8AB].

46. *See* Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Oct. 4, 1993) ("[E]ach agency should afford the public a meaningful opportunity to comment on any proposed regulation, which in most cases should include a comment period of not less than 60 days."); *see also* Exec. Order No. 13,563, 76 Fed. Reg. 3,821 (Jan. 18, 2011) ("To the extent feasible and permitted by law, each agency shall afford the public a meaningful opportunity to comment through the Internet on any proposed regulation, with a comment period that should generally be at least 60 days."); Memorandum for the Heads of Executive Departments and Agencies, 86 Fed. Reg. 7,223 (Jan. 20, 2021) ("This memorandum reaffirms the basic principles set forth in [Executive Order 12866] and in Executive Order 13563 . . . .").

47. *See* Balla, *supra* note 45, at 3–4 (explaining the main arguments for long comment periods — to give interested parties adequate time to respond to often sophisticated proposals — and short comment periods — ensuring that rulemaking is efficient and generates information that will be useful to agency decisionmakers).

48. *See id.* at 7.

49. 5 U.S.C. § 553(c); *see also Nova Scotia Food Prods. Corp.*, 568 F.2d at 252–53 ("It is not in keeping with the rational process to leave vital questions, raised by comments which are of cogent materiality, completely unanswered.").

comments, it must be a "logical outgrowth" of the proposed rule.[50] A final rule is a "logical outgrowth" of a proposed rule only if interested parties could have anticipated that the change was possible, and thus reasonably should have participated in the comment period.[51]

ii. The APA's Good Cause Exception

Unless the enabling statute[52] requires notice and comment rulemaking, the APA allows agencies to elect to bypass this procedure "when the agency for good cause finds" that using notice and comment would be "impracticable, unnecessary, or contrary to the public interest."[53] The agency must include a brief statement of its reasoning for finding good cause in the rule issued.[54]

The decision to use the APA's good cause exception usually rests with the agency and may be challenged in federal court.[55] The good cause exception is not meant to be an "'escape clause' in the sense that the agency has discretion to disregard . . . the facts[,]" but is "narrowly construed and only reluctantly countenanced" by the judiciary.[56] The Ninth Circuit regards the good cause exception as

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50. 5 U.S.C. § 553(b)(3); *see also* Veterans Just. Grp. v. Sec'y of Veterans Affs., 818 F.3d 1336, 1344 (Fed. Cir. 2016) ("Where a proposed rule is modified in light of public comment, the modified rule may be promulgated as a final rule without additional notice and opportunity for comment, so long as the final rule is a 'logical outgrowth' of the proposed rule . . . . A final rule is a logical outgrowth of a proposed rule only if interested parties should have anticipated that the change was possible, and thus reasonably should have filed their comments on the subject during the notice-and-comment period." (internal citations and quotations omitted)).

51. *Veterans Just. Grp.*, 818 F.3d at 1344; *see also* Long Island Care at Home, Ltd. v. Coke, 551 U.S. 158, 167–68, 174–75 (2007) (holding that, unless Congress specifically tasks the agency with making a rule, withdrawal of a proposed rule is reasonably foreseeable and therefore a logical outgrowth); Allina Health Servs. v. Sebelius, 746 F.3d 1102, 1108–09 (D.C. Cir. 2014) (holding that a final rule that is the opposite result of the proposed rule is not reasonably foreseeable and is therefore not a logical outgrowth).

52. Enabling statute has been defined as "a statute that confers (as to an administrative agency) the power or authority to engage in conduct not previously allowed." *Enabling Statute*, *MERRIAM-WEBSTER*, https://www.merriam-webster.com/legal/enabling%20statute [https://perma.cc/H3WF-PBHR] (last visited Oct. 31, 2021).

53. 5 U.S.C. § 553(b)(B).

54. *Id.*

55. *See* sources cited *supra* note 28.

56. N.J. Dep't of Env't Prot. v. EPA, 626 F.2d 1038, 1045–46 (D.C. Cir. 1980) (quoting S. DOC. NO.79-248, at 200 (1946)); *see also* Jifry v. Fed. Aviation Admin., 370 F.3d 1174, 1179 (D.C. Cir. 2004) ("The exception excuses notice and comment in emergency situations, or where delay could result in serious harm." (internal citations omitted)).

"essentially an emergency procedure" because emergencies "are the most common" situations that justify the exception.[57] However, agencies have increasingly used the good cause exception in recent decades. From 1995 to 2012, one scholar found that agencies exempted almost 52% of rules from notice and comment.[58] A Government Accountability Office (GAO) study in 2012 found that from 2003 to 2010, agencies cited the good cause exception for 61% of nonmajor rules and 77% of major rules.[59] The federal circuit courts apply different standards when reviewing an agency's decision to use the good cause exception, such as arbitrary and capricious or *de novo* review.[60]

While agencies successfully employing the good cause exception are not required to receive comments, sometimes they invite comments after the rule has taken effect. This process is called "interim final rulemaking," whereby the rule takes effect immediately, but the agency may choose to revise it based on comments received post-promulgation.[61] The Administrative Conference of the United States (ACUS), an independent federal agency that recommends improvements to administrative process and procedure, has recommended that agencies receive comments post-promulgation when they invoke the good cause exception because notice and comment would be "impracticable" or "contrary to the public interest."[62] ACUS does not recommend a post-promulgation comment period, however, for rules that address temporary emergencies or "expire by their own terms within a relatively brief period," such as a rule that closes airspace for an air show.[63]

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57. United States v. Valverde, 628 F.3d 1159, 1164–65 (9th Cir. 2010) (internal citations omitted).

58. Raso, *supra* note 25, at 91–92 n.125 (noting that the DOL exempted 50.4% of final rules from notice and comment during the same period).

59. U.S. GOV'T ACCOUNTABILITY OFF., GAO-13-21, FEDERAL RULEMAKING: AGENCIES COULD TAKE ADDITIONAL STEPS TO RESPOND TO PUBLIC COMMENTS 37 (2012).

60. *Compare* Sorensen Comm. Ltd. v. FCC, 755 F.3d 702, 706 (D.C. Cir. 2014) (applying *de novo* review), *and* United States v. Reynolds, 710 F.3d 498, 502 (3d Cir. 2013) (noting that "the Fourth and Sixth Circuits have not stated a standard but appear to use *de novo* review" and declining to decide the appropriate standard of review), *with* United States v. Johnson, 632 F.3d 912, 928 (5th Cir. 2011) (applying arbitrary and capricious review), *and* United States v. Dean, 604 F.3d 1275, 1278 (11th Cir. 2010) (applying arbitrary and capricious review). *See generally* Hartnett, *supra* note 24.

61. ADMIN. CONF. OF THE U.S., RECOMMENDATION 95-4: PROCEDURES FOR NONCONTROVERSIAL AND EXPEDITED RULEMAKING (1995).

62. *Id.* at 4.

63. *Id.* at 4–5.

iii. Statutory Authorization to Bypass Notice and Comment Rulemaking

Occasionally, Congress will statutorily authorize or require an agency to promulgate a permanent rule without using notice and comment.[64] In these cases, the agency usually cites the statute rather than the APA's good cause exception provision as its authority to bypass notice and comment.[65] Congress may simply require or authorize the agency to bypass notice and comment, or may reference the good cause exception of the APA.[66] The GAO analyzed 123 major rules from 2003 to 2010 that were promulgated without notice and comment and found that 38 of them cited 18 different statutory authorities either requiring or authorizing agencies to do so.[67] The GAO found that about 70% of the 123 rules involved distributing federal payments to the public, such as disaster relief and health care cost reimbursements; foregoing notice and comment expedited the distribution of funds to beneficiaries.[68]

Statutory authorization has proven a useful tool in emergencies. For example, two months after the September 11 terrorist attacks, Congress passed the Aviation and Transportation Security Act, which created the Transportation Security Administration, led by an Administrator.[69] The statute provides that "if the Administrator determines that a regulation or security directive must be issued immediately in order to protect transportation security, the Administrator shall issue the regulation or security directive without providing notice or an opportunity for comment and without prior approval of the Secretary [of Transportation]."[70] Further, the GAO study identified several statutes authorizing agencies to bypass notice

64. U.S. GOV'T ACCOUNTABILITY OFF., GAO-13-21, *supra* note 59, at 18, 20–21.

65. *Id.* at 20–21.

66. *Compare* Aviation and Transportation Security Act, Pub. L. No. 107-71, 115 Stat. 597, 600 (2001) (to be codified as 49 U.S.C. § 114(l)(2)(A)) ("[T]he Under Secretary shall issue the regulation . . . without providing notice or an opportunity for comment . . . ."), *with* Families First Coronavirus Response Act, Pub. L. No. 116-127, § 5111, 134 Stat. 178, 201 (2020) (to be codified as 29 U.S.C. § 2601 note) ("The Secretary of Labor shall have the authority to issue regulations for good cause under sections 553(b)(B) and 553(d)(A) of title 5, United States Code . . . .").

67. *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-13-21, *supra* note 59, at 18, 20–21; *see also id.* at 3 n.6 ("A major rule is one that, among other things, has resulted in or is likely to result in an annual effect on the economy of $100 million or more.").

68. *Id.* at 21.

69. 49 U.S.C. §§ 114(a)–(b)(1).

70. *Id.* § 114(l)(2)(A).

and comment to establish climate-related disaster relief programs.[71] However, statutory authorization is also used outside the emergency context — the 2008 Farm Bill required that certain programs be implemented without notice and comment, resulting in 12 major rules.[72]

B. The FFCRA Statute: Creation and Design

Congress statutorily authorized the use of the good cause exception in the FFCRA.[73] Because statutory authorization has become a key way for Congress to direct agencies to implement emergency relief, the FFCRA is a crucial case study of the problems that can arise when Congress explicitly permits an agency to bypass notice and comment rulemaking and imposes no other procedural requirements to address the democracy deficit that ensues.[74]

i. Emergency Paid Sick Leave Was the Product of Bipartisan Compromise

That the FFCRA was the product of bipartisan compromise makes it even more troubling that the DOL under then-President Donald J. Trump would abuse its ability to bypass notice and comment to flout the plain meaning of the statute and bar some workers from emergency paid sick leave. Prior to March 2020, there was no federally guaranteed paid sick time or paid family leave in the United States, making the U.S. an outlier among countries ranked highly for economic and human development.[75] The COVID-19 pandemic changed that, prompting the infamously gridlocked U.S. Congress to

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71. For example, a rule establishing disaster relief programs to provide hurricane assistance after four particularly devastating hurricanes in 2005; rules establishing disaster relief programs for livestock and catfish producers in disaster or emergency areas during a two-year period; and a rule establishing an assistance program for livestock, honeybee, and farm-raised fish producers who suffered losses due to disease or adverse weather such as blizzards and wildfires. U.S. GOV'T ACCOUNTABILITY OFF., GAO-13-21, *supra* note 59, at 47–48, 55.

72. *Id.* at 7; *see also id.* at 18–19 (featuring a table showing 12 major rules).

73. Families First Coronavirus Response Act, Pub. L. No. 116-127, § 5111, 134 Stat. 178, 201 (2020).

74. *See* Nicholas Bagley, *Remedial Restraint in Administrative Law*, 117 COLUM. L. REV. 253, 260 (2017) (explaining that agencies lack the "democratic pedigree" possessed by Congress and its institutional capacity to channel public values).

75. *See* HYE JIN RHO, SHAWN FREMSTAD & JARED GABY-BIEGEL, CTR. FOR ECON. & POL'Y RSCH., CONTAGION NATION 2020: UNITED STATES STILL THE ONLY WEALTHY NATION WITHOUT PAID SICK LEAVE 3 (2020) (comparing the United States to 21 other countries with high living standards according to the United Nations' Human Development Index).

negotiate bipartisan legislation to address the impending national crisis. On January 20, 2020, the Centers for Disease Control and Prevention confirmed the United States's first COVID-19 case in Washington State.[76] On March 18, 2020, Representative Nita Lowey of New York introduced the FFCRA.[77]

On March 12 and 13, 2020, House Speaker Nancy Pelosi (D-CA) and Treasury Secretary Steven Mnuchin engaged in intense negotiations, speaking by phone 13 times before reaching a deal.[78] Shortly thereafter, then-President Donald J. Trump endorsed the FFCRA on Twitter, specifically the paid sick leave provision, and encouraged all Republicans and Democrats to vote for it.[79] In the early hours of March 14, 2020, the U.S. House of Representatives passed the FFCRA with overwhelming bipartisan support.[80] House Minority Leader Kevin McCarthy (R-CA) offered rare praise of

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76. *See* Morning Edition, *1st Case of Coronavirus Confirmed in Washington State*, NPR (Jan. 22, 2020, 5:06 AM), https://www.npr.org/2020/01/22/798392221/1st-u-s-case-of-coronavirus-confirmed-in-washington-state [https://perma.cc/NQ8Y-P256]. *But see* Jaclyn Diaz, *Coronavirus Was in U.S. Weeks Earlier Than Previously Known, Study Says*, NPR (Dec. 1, 2020, 2:50 AM), https://www.npr.org/sections/coronavirus-live-updates/2020/12/01/940395651/coronavirus-was-in-u-s-weeks-earlier-than-previously-known-study-says [https://perma.cc/QDZ7-AW84].

77. *See* H.R. 6201, 116th Cong. (2020).

78. Erica Werner et al., *House Passes Coronavirus Economic Relief Package with Trump's Support*, WASH. POST (Mar. 14, 2020), https://www.washingtonpost.com/us-policy/2020/03/13/paid-leave-democrats-trump-deal-coronavirus/ [https://perma.cc/5NB9-ZVLY].

79. Donald Trump (@realDonaldTrump), TWITTER (Mar. 13, 2020, 8:42 PM), https://www.thetrumparchive.com/?searchbox=%22%5C%22free+coronavirus+tests%5C%22%22 [https://perma.cc/3293-ZFAG] ("I fully support H.R. 6201: Families First CoronaVirus Response Act, which will be voted on in the House this evening. This bill will follow my direction for free CoronaVirus tests, and paid sick leave for our impacted American Workers. I have directed . . . . "); Donald Trump (@realDonaldTrump), TWITTER (Mar. 13, 2020, 8:42 PM), https://www.thetrumparchive.com/?searchbox=%22I+encourage+all+Republicans+and+Democrats+to+come+together+and+VOTE+YES%21%22 [https://perma.cc/7GD3-Z56S] (" . . . the Secretary of the Treasury and the Secretary of Labor to issue regulations that will provide flexibility so that in no way will Small Businesses be hurt. I encourage all Republicans and Democrats to come together and VOTE YES! I will always put . . . . "); Donald Trump (@realDonaldTrump), TWITTER (Mar. 13, 8:42 PM), https://www.thetrumparchive.com/?results=1&searchbox=%22being+of+American+families+FIRST.+%22 [https://perma.cc/U7UH-557F] (" . . . the health and well-being of American families FIRST. Look forward to signing the final Bill, ASAP!").

80. The House of Representatives passed the FFCRA 363-40: 223 Democrats and 140 Republicans were in favor, 40 Republicans opposed; nine Democrats and 17 Republicans did not vote. *Roll Call 102/Bill Number: H.R. 6201*, U.S. HOUSE REPRESENTATIVES CLERK (Mar. 14, 2020, 12:51 AM), https://clerk.house.gov/Votes/2020102 [https://perma.cc/GA8G-KMXG].

Speaker Pelosi for inviting House Republicans to "come together to put the American public first."[81] Then-President Trump again took to Twitter to praise the "[g]ood teamwork between Republicans & Democrats" in passing the FFCRA.[82]

Two amendments that were proposed, but ultimately failed, demonstrate the truly bipartisan nature of the final bill. On March 18, 2020, Senator Patty Murray (D-WA) proposed an amendment that would have provided protected paid sick time to employees nationwide for themselves or to care for a sick family member or child; employees would have earned one hour of paid sick time for every 30 hours worked, and the employer would have been reimbursed by the Treasury Department for the wages paid to the individual using such leave in 2020 and 2021.[83] The amendment failed along party lines with all Democrats in favor and all Republicans opposed.[84] Senator Ron Johnson (R-WI) proposed an amendment that would have stricken emergency paid sick leave and family leave and the attendant tax credit in their entirety but would have instituted a tax credit for state-provided unemployment insurance to those who could not work due to the same COVID-19-related reasons as provided for in the original bill.[85] The amendment failed, nearly along party lines.[86] Shortly thereafter, the U.S. Senate passed the FFCRA almost unanimously.[87] President Trump signed the FFCRA into law later that day.[88]

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81. Werner et al., *supra* note 78.

82. Donald Trump (@realDonaldTrump), TWITTER (Mar. 14, 2020, 7:37 AM), https://www.thetrumparchive.com/?results=1&searchbox=%22good+teamwork%22 [https://perma.cc/798G-QDMF].

83. 166 CONG. REC. S1, 808–810 (daily ed. Mar. 18, 2020) (SA 1559 Title I Sec. 201(b)(1), Title III Sec. 302(a)(1)(A)).

84. *Roll Call Vote 116th Congress — 2nd Session*, U.S. SENATE (Mar. 18, 2020, 2:05 PM), https://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=116&session=2&vote=00074 [https://perma.cc/XC3E-W2S6].

85. 166 CONG. REC. S1,808 (daily ed. Mar. 18, 2020).

86. Forty-eight Republicans and two Democrats were in favor, 45 Democrats and three Republicans were opposed; two Republicans did not vote. *Roll Call Vote 116th Congress — 2nd Session*, U.S. SENATE (Mar. 18, 2020, 2:53 PM), https://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=116&session=2&vote=00075 [https://perma.cc/G8A9-R3UT].

87. The Senate passed the FFCRA 90-8; the eight Nays were Republicans, and two Republicans did not vote. *Roll Call Vote 116th Congress — 2nd Session*, U.S. SENATE (Mar. 18, 2020, 3:32 PM), https://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=116&session=2&vote=00076 [https://perma.cc/J4M3-3RRY].

88. H.R. 6201, 116th Cong. (2020).

ii. The Families First Coronavirus Response Act

The FFCRA contained two acts related to emergency leave: the Emergency Paid Sick Leave Act (EPSLA), which provided eligible U.S. workers with two weeks of emergency paid sick leave should they or someone in their household receive a quarantine order due to the COVID-19 disease, and the Emergency Family Medical Leave Expansion Act (Expanded FMLA), which expanded the Family Medical Leave Act to allow parents to take leave due to COVID-19-related school and childcare closures.[89] While employers were required to provide paid leave upfront, the federal government footed the bill: employers could claim a tax credit equivalent to 100% of the qualified sick and family leave wages paid.[90]

The EPSLA provided for 80 hours — two five-day, 40-hour work weeks — of paid sick leave for full-time employees who were unable to work due to at least one of six qualifying reasons related to COVID-19: (1) the employee was subject to a government-issued quarantine or isolation order; (2) a health care provider advised the employee to self-quarantine; (3) the employee was symptomatic and seeking a diagnosis; (4) the employee was caring for someone who falls under (1) or (2); (5) the employee was caring for their child whose place of care was closed; or (6) the employee was experiencing "any other substantially similar condition" specified by the Secretary of Health and Human Services in consultation with the DOL and Treasury Department.[91] Emergency paid sick leave was limited to ten days because, according to one critic, "Republican leadership in the House and Senate didn't want to set a precedent" that could fuel momentum for a national paid leave policy.[92]

Expanded FMLA created an additional reason why an employee could take ten weeks of paid leave under the 1993 Family Medical Leave Act (FMLA) if they were:

> [U]nable to work (or telework) due to a need for leave to care for the son or daughter under 18 years of age of such employee if the school or place of care has been closed, or the child care provider of

89. *See generally* Families First Coronavirus Response Act, Pub. L. No. 116-127, §§ 3101–106, 5101–111, 134 Stat. 178, 189–92, 195–201 (2020).

90. *See id.* §§ 7001(a), 7003(a), 134 Stat. at 210, 214.

91. *See id.* §§ 5102(a)–(b). Part-time workers were entitled to the average number of hours they worked over a typical two-week period. *Id.* § 5102(b)(2)(B).

92. *See* Steven Findlay, *Congress Left Big Gaps in the Paid Sick Days and Paid Leave Provisions of the Coronavirus Emergency Legislation*, HEALTH AFFS. BLOG (Apr. 29, 2020), https://www.healthaffairs.org/do/10.1377/hblog20200424.223002/full/ [https://perma.cc/84AD-3EJR].

> such son or daughter is unavailable, due to a public health emergency.[93]

This family leave could be combined with emergency paid sick leave for a total of 12 weeks of leave.

Because the FFCRA resulted from genuine political compromise, it already contained significant exceptions before the DOL exceeded the bounds of the statute to bar even more U.S. workers from accessing leave. The first major exception was based on employer size. While all public employers were subject to the FFCRA, private employers with 500 or more employees were not.[94] In 2020, approximately 59.7 million individuals worked for private-sector employers that employed 500 or more employees, thus the FFCRA excluded nearly 48% of the private sector workforce.[95] The justification was that large companies already offer paid leave and therefore did not require a federal tax subsidy.[96] The DOL later estimated that in March 2020, 88% of private industry workers at establishments with 500 or more employees had access to paid sick leave.[97] However, it is unlikely that this group had access to the paid sick leave equivalent of what the FFCRA guaranteed; about two-thirds of employees with paid sick leave accrue a fixed number of paid sick days per year, and only 28% of that group have 10 to 14 days after one year of service.[98] Further, 79% of employees with paid sick leave either cannot carry over unused sick days to future years or are limited; in the private sector, the median cap is 20 days.[99] Finally, access to paid sick leave differs drastically across the income

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93. Families First Coronavirus Response Act § 3102.

94. *See id.* § 5110(2)(B)(i)(I)(aa), 134 Stat. at 199.

95. *See Table F: Distribution of Private Sector Employment by Firm Size Class: 1993/Q1 Through 2019/Q1, Not Seasonally Adjusted*, U.S. BUREAU LAB. STAT., https://www.bls.gov/web/cewbd/table_f.txt [https://perma.cc/N64M-2295] (last visited Oct. 4, 2021).

96. *See* Findlay, *supra* note 92.

97. U.S. DEP'T OF LAB., USDL-20-1792, EMPLOYEE BENEFITS IN THE UNITED STATES — MARCH 2020 3 (2020) [hereinafter USDL-20-1792], https://perma.cc/CWW3-KJPC. Notably, DOL released these estimates immediately following the New York Attorney General's successful lawsuit challenging the DOL's underinclusive implementation of the FFCRA, a damning report by the DOL's Office of the Inspector General, and the DOL's revision of its regulations, and therefore may be seen as an attempt to retroactively justify the DOL's actions. *See infra* Section I.C.

98. Drew DeSilver, *As Coronavirus Spreads, Which U.S. Workers Have Paid Sick Leave — And Which Don't?*, PEW RSCH. CTR. (Mar. 12, 2020), https://www.pewresearch.org/fact-tank/2020/03/12/as-coronavirus-spreads-which-u-s-workers-have-paid-sick-leave-and-which-dont/ [https://perma.cc/57UE-9EXZ].

99. *Id.*

spectrum; it is "nearly universal at the upper ends of the wage distribution" and "becomes scarcer the less money one makes."[100]

The FFCRA also provided that employers with fewer than 50 employees could claim an exemption "when the imposition of such requirements would jeopardize the viability of the business as a going concern."[101] In 2020, 33.8 million individuals, or approximately 27% of the private-sector workforce, worked for employers with fewer than 50 employees.[102] The DOL estimated that in March 2020, 67% of private industry workers employed by small businesses had access to paid sick leave.[103] This carve-out likely sought to protect small businesses from a large and sudden cost while the U.S. economy was in freefall, but critics point out that such a cost was only upfront because the federal government would reimburse firms for the leave provided via a tax credit.[104]

The compromises congressional Republicans obtained limited the scope of COVID-19-related paid sick leave, though congressional Democrats still sought to fill the gaps in the FFCRA. On May 15, 2020, the House passed the HEROES Act, which would have expanded the FFCRA to employers with 500 or more employees and removed the health care provider exemption.[105] The bill died in the Republican-controlled Senate.[106] Despite the election of President Joseph R. Biden and the Democrats narrowly winning back the Senate, Democrats did not prioritize preserving or expanding emergency paid family and sick leave. This is evident in the FFCRA's eventual extension. As originally designed, the mandate that

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100. *Id.* 92% of workers in the top quarter of earnings (making more than $32.21 per hour) had access to some form of paid sick leave in 2019, compared to just 31% of workers in the lowest-earning tenth (making $10.80 per hour or less). *Id.*

101. Families First Coronavirus Response Act, Pub. L. No. 116-127, §§ 3102, 5111(2), 134 Stat. 178, 189, 201 (2020); *see also Families First Coronavirus Response Act: Questions and Answers*, U.S. DEP'T LAB. [hereinafter *FFCRA Q&A*, U.S. DEP'T OF LAB.], https://www.dol.gov/agencies/whd/pandemic/ffcra-questions#58 [https://perma.cc/F2ST-TX42] (last visited Nov. 7, 2021) (explaining when "small business exemption apply to exclude a small business from the provisions of the Emergency Paid Sick Leave Act and Emergency Family and Medical Leave Expansion Act").

102. *See Table F: Distribution of Private Sector Employment by Firm Size Class: 1993/Q1 Through 2019/Q1*, *supra* note 95.

103. *See* USDL-20-1792, *supra* note 97, at 18.

104. *See* Findlay, *supra* note 92.

105. *See* H.R. 6800, 116th Cong. (2020).

106. *Id.*; *see also* Long & Rae, *supra* note 15.

employers provide this leave expired on December 31, 2020.[107] However, on December 27, 2020, Congress amended the FFCRA to allow employers to voluntarily provide leave through March 31, 2021, and still receive the attendant tax credit.[108] President Biden's COVID-19 "American Rescue Plan" had initially proposed reinstating mandatory leave through the end of September 2021, but the final version of the stimulus package merely extended optional leave through September 30, 2021.[109]

iii. The Health Care Providers and First Responders Exception

The FFCRA also provided that "[a]n employer of an employee who is a health care provider or an emergency responder may elect to exclude such employee" from emergency paid sick leave and Expanded FMLA.[110] In defining "health care provider," the FFCRA adopted the 1993 FMLA definition.[111] The FMLA defines "health care provider" as "a doctor of medicine or osteopathy" authorized to practice by a State or "any other person determined by the Secretary [of Labor] to be capable of providing health care services."[112] The FFCRA's "health care provider" exception was perhaps justified by the essential nature of health care services during the pandemic and this group's existing access to leave.[113] The FFCRA was not the only paid sick leave option for health care workers; the DOL estimated that 84% of health care and social assistance employees in the private

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107. Families First Coronavirus Response Act, Pub. L. No. 116-127, §§ 3102(a)(1), 5109, 134 Stat. 178, 189, 198 (2020). *See generally FFCRA Q&A*, U.S. DEP'T OF LAB., *supra* note 101.

108. *See FFCRA Q&A*, U.S. DEP'T OF LAB., *supra* note 101.

109. *See* H.R. 1319, 117th Cong. (2021); *see also* Evandro C. Gigante et al., *Congress Passes American Rescue Plan: What Employers Need to Know*, NAT'L L. REV. (Mar. 11, 2021), https://www.natlawreview.com/article/congress-passes-american-rescue-plan-what-employers-need-to-know [https://perma.cc/SYL2-BGMT]; Tami Luhby & Katie Lobosco, *Here's What's in the Senate Stimulus Plan*, CNN (Mar. 6, 2021, 4:23 PM), https://www.cnn.com/2021/03/04/politics/stimulus-senate-democrats-proposal/index.html [https://perma.cc/QNE3-ZJJR].

110. Families First Coronavirus Response Act §§ 3105, 5102(a).

111. *See id.* § 5110(4).

112. 29 U.S.C. § 2611(6).

113. No member of Congress justified or criticized exempting health care providers from emergency paid sick leave on the record while the FFCRA was being debated from March 13–18, 2020. *See generally* 166 CONG. REC. H1,687 (2020). Senator Charles Schumer (D-NY) came the closest when he stated, "[p]ublic health officials and researchers and doctors on the frontlines must continue to do the difficult and noble work they are now engaged in" while "[t]he American people must hunker down." 116 CONG. REC. S1,749 (2020) (statement of Sen. Charles Schumer).

industry had access to paid sick leave.[114] However, while most health care employers already offered paid sick leave, such leave usually requires accrual and therefore did not guarantee ten days of quarantine leave, as the FFCRA did.[115]

iv. Congress Statutorily Authorized Rule Promulgation Without Notice and Comment

Recognizing the need to make paid leave accessible to U.S. workers immediately, Congress statutorily authorized the DOL to bypass notice and comment rulemaking procedures to implement the FFCRA. The FFCRA provides that the DOL "shall have the authority to issue regulations *for good cause*" under the APA "to exclude certain health care providers and emergency responders from the definition of employee" under the FFCRA, "including by allowing the employer of such health care providers and emergency responders to opt out."[116] However, the need for an immediately effective rule created the risk of a bad one. By explicitly authorizing the DOL to invoke the good cause exception, Congress protected the DOL from a procedural challenge on those grounds, even if the rule "offered little in substance to protect American families from economic harm resulting from COVID-19."[117] Though, at least one commentator has recognized that had Congress not authorized the use of the good cause exception, the DOL probably would have been entitled to use it anyway.[118]

C. The FFCRA Regulation: Implementation, Legal Challenge, and Revision

Shortly after Congress passed the FFCRA, the DOL invoked its statutory authority to implement the law without notice and comment.[119] The DOL's overly-broad definition of a "health care provider" received heavy criticism from Congress and the interested public.[120] However, because of Congress's statutory authorization to use the good cause exception, the only formal venue to challenge the

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114. *See* USDL-20-1792, *supra* note 97, at 18.

115. *See* Long & Rae, *supra* note 15.

116. Families First Coronavirus Response Act § 5111(1) (emphasis added).

117. *See* Hartnett, *supra* note 24.

118. *See id.*

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

120. *See infra* Section I.C.i.

DOL's rule was in federal court, which the New York Attorney General did successfully.[121] As a result, the DOL revised its rule in September 2020, after six months of erroneously curtailing workers' ability to access paid sick leave.[122]

i. The DOL's Initial Implementation of the FFCRA and Early Critiques

Because Congress statutorily authorized the use of the good cause exception, the DOL was able to act extraordinarily quickly to implement the FFCRA with a binding regulation. On April 6, 2020, the DOL published a Final Rule implementing the FFCRA, effective April 2, 2020.[123] The DOL invoked its authority under both the APA and the FFCRA to bypass notice and comment, explaining that it sought to "avoid economic harm to American families" facing "difficult choices in balancing work, child care, and the need to seek medical attention for illness caused by the virus."[124] Notice and comment rulemaking "would likely delay final action on this matter by weeks or months, and would, therefore, complicate and likely preclude the [DOL] from successfully exercising the authority created by" the FFCRA.[125] Finally, the DOL recognized that delaying implementation of the FFCRA would run counter to FFCRA's main purpose of "enabling employees to leave the workplace now to help prevent the spread of COVID-19."[126] However, because the rule's creation was so rushed, on April 10, 2020, the DOL made minor amendments, effective on that day.[127] The April Rule defined "health care provider" for the purposes of the exemption extremely broadly.[128] For example, "an English professor, librarian, or cafeteria

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121. *See infra* Section I.C.ii.

122. *See infra* Section I.C.iii.

123. Paid Leave Under the Families First Coronavirus Response Act, 85 Fed. Reg. at 19,326.

124. *See id.* at 19,342.

125. *See id.*

126. *See id.*

127. Paid Leave Under the Families First Coronavirus Response Act, 85 Fed. Reg. 20,156 (Apr. 10, 2020).

128. The April Rule defined "health care provider" accordingly:

> (i) For the purposes of this definition Employees who may be exempted from Paid Sick Leave or Expanded Family and Medical Leave by their Employer under the FFCRA, a health care provider is anyone employed at any doctor's office, hospital, health care center, clinic, post-secondary educational institution offering health care instruction, medical school, local health department or agency, nursing facility, retirement facility, nursing home, home health care provider, any facility that performs laboratory or

manager at a university with a medical school would all be 'health care providers' under the Rule."[129]

The April Rule was strongly criticized by Congress and former government officials almost immediately after it was implemented. On the day the rule went into effect, two members of Congress sent a letter to then-Labor Secretary Eugene Scalia explaining that the overbroad health care provider exemption "violate[d] congressional intent" and providing the appropriate interpretation.[130] In addition, three former Obama-era DOL officials characterized the Trump Administration's DOL as working "aggressively to restrict benefits that Congress clearly intended to provide" in its implementation of the FFCRA.[131] In their view, the FFCRA's health care provider exception was narrow, and the DOL had taken advantage to over-broaden it: "[T]he cashier in a hospital gift shop or even a contractor that provides payroll processing for a medical school could be denied

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> medical testing, pharmacy, or any similar institution, Employer, or entity. This includes any permanent or temporary institution, facility, location, or site where medical services are provided that are similar to such institutions.
>
> (ii) This definition includes any individual employed by an entity that contracts with any of these institutions described above to provide services or to maintain the operation of the facility where that individual's services support the operation of the facility. This also includes anyone employed by any entity that provides medical services, produces medical products, or is otherwise involved in the making of COVID-19 related medical equipment, tests, drugs, vaccines, diagnostic vehicles, or treatments. This also includes any individual that the highest official of a State or territory, including the District of Columbia, determines is a health care provider necessary for that State's or territory's or the District of Columbia's response to COVID-19.
>
> (iii) Application limited to leave under the EPSLA and the EFMLEA. The definition of "health care provider" contained in this subsection applies only for the purpose of determining whether an Employer may elect to exclude an Employee from taking leave under the EPSLA and/or the EFMLEA, and does not otherwise apply for purposes of the FMLA or section 5102(A)(2) of the EPSLA.").

See id. at 19,351 § 826.30(c)(1).

129. New York v. U.S. Dep't of Lab., 477 F. Supp. 3d 1, 14 (S.D.N.Y. 2020); *see also* Complaint at 17–18, New York v. U.S. Dep't of Lab., 477 F. Supp. 3d 1 (S.D.N.Y. 2020) (No. 20 Civ. 3020), 2020 U.S. Dist. LEXIS 137116.

130. Letter from Patty Murray, U.S. Sen., & Rosa DeLauro, U.S. Rep., to Eugene Scalia, Sec'y of Lab., U.S. Dep't of Lab. (Apr. 1, 2020) [hereinafter Murray & DeLauro Letter].

131. Chris Lu, M. Patricia Smith & David Weil, *Why Americans Don't Know About Their Right to Paid Sick Leave*, NEWSWEEK (May 4, 2020, 9:00 AM), https://www.newsweek.com/why-americans-dont-know-about-their-right-paid-sick-leave-opinion-1501532 [https://perma.cc/K3EP-C8QV].

paid sick leave . . . ."[132] Still, the DOL did not budge, and the April Rule remained law.

ii. The N.Y. Attorney General's Lawsuit and the S.D.N.Y. Decision

While the DOL was unresponsive to these calls for revision, New York Attorney General Letitia James's office was listening. On April 14, 2020, Attorney General James sued the DOL in the Southern District of New York — New York being the only state to do so on this basis — arguing in part that the DOL's Final Rule expanded the term "health care provider" "far beyond both its plain meaning and the FMLA definition" adopted by the FFCRA, therefore "expos[ing] millions of American workers to exclusion from emergency family leave and paid sick leave as authorized by the FFCRA."[133]

In *New York v. U.S. Department of Labor*, S.D.N.Y. Judge Paul Oetken agreed with New York that the DOL overly restricted access to leave.[134] The court struck down the DOL's broad definition of "health care provider" because "the statute unambiguously forecloses the Final Rule's definition."[135] The FFCRA's "broad grant of authority" to promulgate a rule without notice and comment "is not limitless."[136] The statute directed the DOL to determine which employees were capable of providing health care services and promulgate a regulation excluding them; instead, the DOL's definition "hinges entirely on the identity of the *employer*."[137] The court noted that even if the statute was ambiguous and it gave credence to the DOL's purposive argument — that a broad definition exempts employees essential to the healthcare system during the pandemic — the DOL's definition "cannot stand" because it "includes employees whose roles bear *no nexus whatsoever* to the provision of healthcare services, except the identity of their employers, and who are not even arguably necessary or relevant to the healthcare system's vitality."[138] A report by the DOL's Office of Inspector General (OIG) published shortly after the ruling also found that the April Rule "significantly broadened the definition of health care providers . . . as opposed to the original definition established by

132. *Id.*
133. Complaint, *supra* note 129.
134. 477 F. Supp. 3d 1, 15 (S.D.N.Y. 2020).
135. *Id.* at 14.
136. *Id.*
137. *Id.* at 14–15 (emphasis in original).
138. *Id.* at 15 (emphasis in original).

the FMLA" and recognized this as a major challenge to DOL's implementation of the FFCRA.[139]

iii. The DOL's September 2020 Rule Revision in Response to the S.D.N.Y. Decision

Following the S.D.N.Y. decision, the DOL had a range of legal options, from compliance to obstruction.[140] Toward the latter end of the spectrum, the agency could have tried to render the decision moot by appealing to the Second Circuit, which could have stayed the district court ruling until it heard the appeal.[141] By running the clock in this manner, the DOL could have ensured its April Rule would remain in effect nearly until the FFCRA was originally set to expire, at the end of 2020.[142]

Instead, the DOL complied with the decision, revising the Rule on September 16, 2020 to correct the overly broad health care provider exception.[143] The DOL explained that it opted to revise the definition in a new emergency rule:

> Given the statutory authorization to invoke exemptions from the usual requirements to engage in notice-and-comment rulemaking and to delay a rule's effective date, the time-limited nature of the FFCRA leave benefits, the urgency of the COVID-19 pandemic and the associated need for FFCRA leave, and the pressing need for clarity in light of the District Court's decision.[144]

The new definition of "health care provider" followed the FMLA definition, and included any other employee "capable of providing health care services, meaning he or she is employed to provide diagnostic services, preventive services, treatment services, or other services that are integrated with and necessary to the provision of patient care and, if not provided, would adversely impact patient

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139. U.S. DEP'T OF LAB., OFF. OF INSPECTOR GEN., *supra* note 14, at 7.

140. *See id.* at 9 (noting that the DOL reviewed its legal options following the S.D.N.Y. decision).

141. *See* Kacie Candela, *Federal Family and Sick Leave for Covid-19 Expanded by New York District Court*, BERKE-WEISS L. PLLC (Aug. 13, 2020), https://www.berkeweisslaw.com/blog/2020/8/13/federal-family-and-sick-leave-for-covid-19-expanded-by-new-york-district-court [https://perma.cc/Z4RE-9H8B].

142. Families First Coronavirus Response Act, Pub. L. No. 116-127, §§ 3102(a)(1), 5109, 134 Stat. 178, 189, 198 (2020).

143. Paid Leave Under the Families First Coronavirus Response Act, 85 Fed. Reg. 57,677 (Sept. 16, 2020) (to be codified at 29 C.F.R. pt. 826).

144. *Id.* at 57,678 (citations omitted).

care."[145] Finally, six months into the pandemic, those whom Congress intended to cover could access emergency paid leave.

II. THE GOOD CAUSE EXCEPTION: THE DEBATE, ALTERNATIVES, AND REFORM PROPOSALS

The decision to invoke the good cause exception usually lies with the agency. Therefore, reviewing courts have developed case law addressing two key questions: (1) under what circumstances agencies should invoke the good cause exception, and (2) which standard courts should use to review this choice.[146] However, because Congress statutorily authorized the DOL to use the good cause exception to implement the FFCRA, it barred parties and courts from asking whether the COVID-19 pandemic justified the DOL's bypassing notice and comment rulemaking — though few commentators would disagree that it did.[147] Instead, statutory authorization charts a new line of inquiry: whether eliminating these first order questions without establishing additional procedural safeguards unduly risks abuse of agency discretion.

A. The Cases For and Against Using the Good Cause Exception

There are two main perspectives on agencies' use of the good cause exception to bypass notice and comment rulemaking: one views the good cause exception as a crucial mechanism for agency flexibility when situations demand quick action, and the other is concerned about the loss of democratic accountability and possible increased risk of error.[148] Both perspectives are crucial to understanding the benefits and costs of Congress's decision to statutorily authorize the DOL to use the good cause exception to implement the FFCRA.

i. The Good Cause Exception Promotes Agency Flexibility and Enabled the DOL to Implement the FFCRA Quickly

One perspective on the good cause exception recognizes that the limitations of notice and comment rulemaking — particularly the slow speed and high cost — outweigh its benefits in emergency situations, during which agencies need to act quickly. While the good cause exception has legitimate non-emergency uses, the key justification for

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145. *Id.* at 57,690 (quoting Families First Coronavirus Response Act § 826.30(c)(1)(B)).

146. *See generally* Hartnett, *supra* note 24.

147. *See id.* at 1576; *see also supra* Sections I.B.iv, I.C.ii.

148. *See infra* Sections II.A.i–ii.

its existence is that "the time necessary to solicit and evaluate public comments may foreclose government's ability to react swiftly," especially to "fast-moving events."[149]

Supporters of the good cause exception also note that it would be very difficult for Congress to write a "comprehensive and prescriptive statutory definition" limiting its use in such a way that achieves the desired effect across all agencies.[150] Therefore, Congress should "rely more extensively on agency-specific requirements than on generally applicable requirements like the APA."[151] However, the FFCRA demonstrates that Congress is willing to and can speak directly on which rulemaking procedures shall be used to implement an emergency statute, despite going no further than authorizing the DOL to bypass notice and comment.

In practice, Congress's willingness to authorize the use of the good cause exception allowed the DOL to act even more quickly and with more flexibility than if Congress had left the DOL to invoke the good cause exception itself or set a deadline for the DOL to promulgate a rule. Agencies risk litigation by invoking the good cause exception without further statutory authorization: one scholar found that from 1995 to 2012, agencies prevailed in their decision to invoke the APA's good cause exception in 67% of cases.[152] Sometimes agencies point to tight congressional deadlines to justify the invocation of the good cause exception, with mixed results.[153] In the late 1970s, Congress put the Environmental Protection Agency (EPA) on a strict timetable to promulgate rules about air quality standards.[154] After missing the deadline by one month, the EPA issued a final rule without notice and comment, effective immediately, and invoked the good cause exception on the grounds that Congress's deadline rendered notice and comment impracticable.[155] The EPA then sought post-promulgation comments for 60 days and changed the rule in response to comments received.[156] Still, by one author's estimation, the EPA

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149. Ellen R. Jordan, *The Administrative Procedure Act's "Good Cause" Exemption*, 36 ADMIN. L. REV. 113, 115–18 (1984); *see also* United States v. Valverde, 628 F. 3d 1159, 1165 (9th Cir. 2010) ("The good cause exception is essentially an emergency procedure." (quoting Buschmann v. Schweiker, 676 F.2d 352, 357 (9th Cir. 1982))).

150. Raso, *supra* note 25, at 121–22.

151. *Id.* at 124.

152. *See id.* at 90.

153. *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-13-21, *supra* note 59, at 20–21.

154. *See* Jordan, *supra* note 149, at 125–26.

155. *See id.*

156. *See id.* at 126–27.

faced at least 42 challenges in ten circuits to its invocation of the good cause exception, and courts in five circuits sustained these challenges.[157] While this example is distinguishable from the monumental national emergency the FFCRA aimed to address, it demonstrates the potential cascade of litigation Congress shielded the DOL from by not setting a deadline and instead statutorily authorizing rule promulgation without notice and comment.

The argument for agency flexibility and swift action is supported by studies showing that, simply, the FFCRA worked. Despite the DOL's initial underinclusive implementation, recent empirical evidence shows that the FFCRA was effective at encouraging sick people to stay home, thus slowing the spread of COVID-19. One study analyzing cell phone data found that the FFCRA increased the average number of hours at home, thereby reducing the share of individuals likely at work.[158] Another study found that in states where employees gained access to paid sick leave through the FFCRA — because these states lacked state-level paid sick leave — there were 400 fewer confirmed cases per state per day and that therefore it did help "flatten the curve."[159] However, this study notes that the benefit might have been limited to the short term because employees who took their finite leave as a precaution were unable to access it later in the pandemic, forcing them to work while sick and potentially spread the virus.[160]

ii. The Good Cause Exception Undermines Democratic Participation and Agency Accountability and Deprived the DOL of Valuable Information

The other major view of agency decision making sees bypassing notice and comment as undermining important rule of law values, such as "promoting public deliberation in the rulemaking process, guarding against agency arbitrariness, making agencies accountable both to the public and to Congress, and providing valuable

157. *See id.* at 126–28.

158. *See* Martin Andersen et al., *Paid Sick-Leave and Physical Mobility: Evidence from the United States During a Pandemic* (Nat'l Bureau of Econ. Rsch., Working Paper No. 27138, 2020).

159. *See* Stefan Pichler, Katherine Wen & Nicolas R. Ziebarth, *COVID-19 Emergency Sick Leave Has Helped Flatten the Curve in the United States*, 39 HEALTH AFFS. 2197, 2202 (2020).

160. *See id.* at 2203 (noting that in times of economic hardship, when employees are afraid of losing their jobs, employees who already exhausted their finite leave are at a heightened risk of choosing to work sick and potentially spread the COVID-19 virus).

information."[161] It is widely recognized that notice and comment rulemaking helps to "reconcile agencies' democratic deficit with their immense power,"[162] legitimizing government bodies whose decision making power was delegated by Congress and not derived directly from the electorate.[163]

Notice and comment rulemaking also has important practical benefits, such as promoting "accurate, well-informed decisionmaking and participant satisfaction with the way government operates."[164] The agency benefits by receiving information from interested parties that aid it in sensible rulemaking, and the public benefits from the opportunity to have a direct say in the regulations that will affect them.[165] Had the DOL engaged in a post-promulgation comment period for the FFCRA, it would have gathered information that could have helped it make better decisions about how best to allocate its funding for enforcement and outreach. A report by the Bureau of Labor Statistics shows that the pandemic caused about 14% of businesses to increase the amount of paid sick leave they offer their employees since the beginning of 2020.[166] While it is possible that the FFCRA helped normalize paid sick leave, it may also be the case that employers began offering paid sick leave because they did not know they could receive a tax credit for doing so through the statute.

The DOL OIG conducted an investigation in August 2020 and found the agency enforcement and outreach efforts to be directionless and lacking.[167] For example, the DOL's Wage and Hour Division had established a workgroup to oversee FFCRA-related education and outreach efforts comprised of experts in policy, compliance, communications, enforcement, training, and data analytics.[168] However, the OIG investigation found that the DOL lacked a

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161. Raso, *supra* note 25, at 67.

162. Bagley, *supra* note 74, at 260.

163. *See* Jordan, *supra* note 149, at 116–17; *see also* Michael Asimow, *Interim-Final Rules: Making Haste Slowly*, 51 ADMIN. L. REV. 703, 708 (1999).

164. Jordan, *supra* note 149, at 115.

165. *See id.* at 116.

166. There was a rough correlation between offering paid sick leave and government shutdown orders: utilities, which almost never closed, led the pack, whereas arts and educational institutions suffered widespread shutdowns and were the least likely to have expanded paid sick leave. *See* Tim Ryan, *Pandemic Led 14% of Biz Locations to Boost Paid Sick Leave*, LAW360 (Dec. 8, 2020, 3:49 PM), https://www.law360.com/articles/1335296/pandemic-led-14-of-biz-locations-to-boost-paid-sick-leave [https://perma.cc/JF7T-MVPC].

167. *See* U.S. DEP'T OF LABOR, OFF. OF INSPECTOR GEN., *supra* note 14, at 10–11.

168. *See id.* at 10.

strategy for this working group's efforts.[169] It further found that the DOL had no concrete plans to spend the $2.5 million Congress allocated it in the June 2020 CARES Act for enforcement and outreach to educate employers and employees about the FFCRA.[170] Notice and comment would have given the public the opportunity to communicate directly with the DOL on the FFCRA's implementation and would have given the agency access to valuable information early in the pandemic.

Notice and comment is also instrumental in promoting congressional control over the administrative state; it enables Congress to gather information, require that agencies examine certain issues, and determine how certain constituents will be affected by regulations.[171] When agencies invoke the good cause exception, Congress loses these tools and must rely on other mechanisms of control, such as oversight hearings, audit and document requests, commissioning GAO investigations, and writing letters to agency heads — the last of which was often used following the DOL's implementation of the FFCRA.[172] However, these tools are hampered by limited resources, hyper-polarization, and shifting congressional attention and priorities from election to election.[173] Therefore, when agencies invoke the APA's good cause exception in its current form, the judiciary is "the only entity that has exercised meaningful (albeit imperfect) oversight over agency avoidance of procedural requirements", though often with slow and unpredictable results.[174] This is also the case when Congress has statutorily authorized the use of the good cause exception, as in the FFCRA, but the agency invites a court challenge by promulgating a rule that blatantly contravenes the statute.

A major critique of the good cause exception, particularly in emergency situations, is that it increases the risk of error. "[S]ome rules promulgated under the good cause exemption have been based on faulty or inadequate information and have produced unanticipated and undesirable effects. Public participation probably would have led

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169. *See id.* at 10–11.

170. *See id.*; *see also* Letter from U.S. Reps. Jimmy Gomez, Rosa DeLauro & Carolyn Maloney to Eugene Scalia, Sec'y of Lab., U.S. Dep't of Lab. (Oct. 2, 2020) [hereinafter Gomez, DeLauro & Maloney Letter].

171. *See* Raso, *supra* note 25, at 118–19.

172. *See id.* at 120–21; *see also* Murray & DeLauro Letter, *supra* note 130.

173. *See* Raso, *supra* note 25, at 120–21.

174. *Id.* at 119.

to better decisions in these cases,"[175] and would have increased public perception of fairness and acceptance of the rule. One generous view of the April Rule's erroneously broad definition of a "health care provider" is that it was such an error. While it is not clear that the effect of the April Rule — excluding many more U.S. workers from emergency paid leave than Congress intended — was sincerely unanticipated or undesirable to then-Secretary Eugene Scalia's DOL, a post-promulgation comment period may have prompted the agency to revise the rule much sooner than the New York Attorney General's lawsuit ultimately did.[176]

Regardless of whether the April Rule was intentionally overbroad, the OIG investigation found that while the DOL acted quickly, it continued to face challenges implementing and enforcing the FFCRA.[177] Most significantly, the report found that the April Rule's broader definition for health care providers presented a "major challenge" to ensuring that "all those who are eligible for FFCRA's emergency paid leave benefits [were] able to take advantage of those benefits."[178] The OIG did not attempt to estimate how many millions of U.S. workers were erroneously denied leave under the April Rule, finding only that the estimate of 9 million might be "understated because it didn't include all of the occupations in the Department's expanded definition for health care provider."[179] The DOL's ability to conduct on-site investigations and enforce compliance with the FFCRA was also hampered by social distancing efforts and the agency's remote work policy.[180]

B. Good Cause Exception and Reform Proposals and Alternatives

To alleviate the democracy deficit caused by bypassing notice and comment, various alternatives to the federal good cause exception have been proposed or are already in effect in other contexts. Scholars have proposed specific reforms to the federal APA's good cause exception, such as mandatory post-promulgation comments and

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175. James Yates, *"Good Cause" Is Cause for Concern*, 86 GEO. WASH. L. REV. 1438, 1451 (2018).

176. *See infra* Sections II.B.i–iii.

177. *See* U.S. DEP'T OF LAB., OFF. OF INSPECTOR GEN., *supra* note 14, at 2.

178. *See id.*

179. *See id.* at 2–3, 9.

180. *See id.* at 4–6 (explaining that, instead of on-site investigations, all but the most serious complaints were being investigated remotely, which limits efficiency, or being resolved through conciliation).

expiration dates.[181] There are also emergency rulemaking alternatives in use — with varying degrees of success — at the federal and state levels, such as the Occupational Safety and Health Administration (OSHA) Emergency Temporary Standards and state APAs.[182] This Note will examine the emergency rulemaking procedures proposed by scholars, used by OSHA, and set out in the Model State APA and New York's and Virginia's APAs.[183]

i. Proposals to Reform the Federal APA's Good Cause Exception

Legal scholars, particularly those who are concerned about the good cause exception's democracy deficit, have been proposing reforms for decades.[184] One longtime proposal is to require a comment period after an emergency rule is promulgated.[185] However, one drawback of this model is that the comment period "is often considered a waste of time by the public, which views the agency as having made its decision."[186] Additionally, both the agency and regulated parties may become biased in favor of the emergency rule.[187] At an institutional level, "[t]here are significant risks to our democratic system where agencies are given a second shot at explaining away" notice and comment after the rule has been promulgated.[188]

One way to overcome the weaknesses of a post-promulgation comment period is by placing an automatic expiration date on emergency rules.[189] This would limit agencies' ability to use emergency rules as permanent solutions and would "make any post-

181. *See infra* Section II.B.i.

182. *See infra* Sections II.B.i–iii.

183. *See infra* Section II.B.iii.

184. *See supra* Section II.A.ii; *see also* Nathanael Paynter, Comment, *Flexibility and Public Participation: Refining the Administrative Procedure Act's Good Cause Exception*, 2011 U. CHI. LEGAL F. 397, 399 (2011) ("[I]n order to limit the power given to agencies acting in a quasi-legislative capacity, and to protect basic principles of representative democracy in rulemaking, changes to the good cause exception are necessary."); James Kim, Note, *For a Good Cause: Reforming the Good Cause Exception to Notice and Comment Rulemaking Under the Administrative Procedure Act*, 18 GEO. MASON L. REV. 1045, 1070–71 (2011).

185. *See* Jordan, *supra* note 149, at 116, 168.

186. *Id.* at 171.

187. *See* Yates, *supra* note 175, at 1452.

188. *Id.* at 1452, 1461 (arguing that because of these risks, major rules, which are rules that have at least $10 million in consequences, should have to undergo pre-promulgation notice and comment, with a notable exception for rules that address "an immediate emergency or risk of emergency to public health, safety, or welfare").

189. *See* Jordan, *supra* note 149, at 171.

promulgation comment period more productive, since the agency will have to take further action to review and reissue a final rule for congressional approval."[190] However, automatic expiration dates may hurt compliance with the emergency rule; regulated entities will be on notice that rules may change or disappear, and therefore will be less likely to voluntarily incur the often high costs associated with compliance.[191] How well firms comply with temporary rules may also influence whether and how much the agency changes the rule following the comment period.[192]

Some scholars have proposed more limited reforms of the good cause exception. Because generalization beyond what already exists in the APA would be difficult, Congress could consider creating agency-specific procedural requirements.[193] Another proposal is to make the good cause exception unavailable for major rules: those with an economic impact of over $100 million must undergo pre-promulgation notice and comment.[194]

ii. OSHA Emergency Temporary Standards

Mandatory expiration dates on emergency regulations promulgated without notice and comment is not a novel proposal, though it has hit some stumbling blocks at the federal level in the workplace context. Under the Occupational Safety and Health Act of 1970,[195] OSHA has the ability to either promulgate a rule using a variation of traditional notice and comment under Section 6(b)[196] or issue an Emergency Temporary Standard (ETS) under Section 6(c).[197] The ETS provision empowers OSHA to bypass notice and

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190. *Id.* at 172.
191. *See id.* at 173–74.
192. *See id.* at 174.
193. *See* Raso, *supra* note 25, at 73.
194. *See* Yates, *supra* note 175, at 1445.
195. *See generally* Pub. L. 91-596, 84 Stat. 1590. *See also* 29 U.S.C. §§ 651–78.
196. *See* 29 U.S.C. § 655(b)(2).
197. *See id.* § 655(c).

> The Secretary shall provide, without regard to the requirements of chapter 5, title 5, Unites States Code, for an emergency temporary standard to take immediate effect upon publication in the Federal Register if he determines — (A) that employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards, and (B) that such emergency standard is necessary to protect employees from such danger. (2) Such standard shall be effective until superseded by a standard promulgated in accordance with the procedures prescribed in paragraph (3) of this subsection. (3) Upon publication of such standard in the Federal Register the Secretary shall commence a proceeding

comment if the Secretary determines that employees "are exposed to a grave danger" from exposure to harmful substances, and an ETS is "necessary to protect employees from such danger."[198] Unlike under the good cause exception, once an ETS is published, it also serves as notice for a mandatory post-promulgation comment period.[199] The ETS remains in effect for six months or until a permanent rule promulgated using notice and comment supersedes it, whichever comes first.[200]

OSHA has only issued 11 ETSs since its creation in 1970 and has only issued two ETS since courts struck down its 1983 ETS on asbestos.[201] Of the first nine issued, only three were unchallenged in court.[202] Of the six that were, four were fully vacated or stayed, and one was partially vacated.[203] Only one challenged ETS survived.[204]

> Of the five cases that were not challenged or that were fully or partially upheld by the courts, OSHA issued a permanent standard either within the six months required by the statute or within several months of the six-month period and always within one year of the promulgation of the ETS.[205]

However, after 1980, a combination of court decisions and new federal laws put additional requirements on OSHA's rulemaking procedure that helped disincentivize the use of ETSs.[206]

Some members of Congress, groups in health care and meat processing, and workers had hoped OSHA would promulgate an ETS to address the COVID-19 pandemic.[207] At least nine COVID-19

> in accordance with section 6(b) of this Act, and the standard as published shall also serve as a proposed rule for the proceeding. The Secretary shall promulgate a standard under this paragraph no later than six months after publication of the emergency standard as provided in paragraph (2) of this subsection.

Id.

198. *Id.*

199. *See id.*

200. *See id.*

201. *See* COVID-19 Vaccination and Testing; Emergency Temporary Standard, 86 Fed. Reg. 61,551–54 (Nov. 5, 2021); *see also* SCOTT D. SZYMENDERA, CONG. RSCH. SERV., R46288, OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION (OSHA): EMERGENCY TEMPORARY STANDARDS (ETS) AND COVID-19 6, 27 (2021).

202. *See id.*

203. *See id.*

204. *See id.*

205. *See id.* at 6.

206. *See id.*

207. *See id.*; *see also* Letter from Members of Cong. to Kevin McCarthy, Republican Leader, U.S. House of Reps. (July 14, 2020); Letter from A Better Balance et al. to U.S. House of Reps. (Apr. 29, 2020).

relief bills in the 116th Congress would have required OSHA to promulgate an ETS to address workplace exposure to COVID-19; this provision ultimately did not make it into the FFCRA or other COVID-19 relief laws.[208] These hopes and efforts were realized in June 2021, when OSHA issued its first ETS in nearly four decades, establishing new requirements to protect healthcare workers who are at high risk of exposure to COVID-19.[209] In November 2021, OSHA issued another COVID-19 ETS, requiring employees with 100 or more employees to develop, implement, and enforce a mandatory COVID-19 vaccination policy or an optional vaccination policy with regular testing and mask-wearing requirements for unvaccinated employees.[210]

iii. State Emergency Rule Procedures: The 2010 Model State APA, New York, and Virginia

In addition to the federal APA, all 50 states have their own state APAs.[211] These state APAs can serve as "laboratories of democracy," testing reforms that could be implemented at the federal level.[212] However, state APA emergency procedures are not perfectly analogizable to the federal APA because state agencies face different emergencies than federal agencies, such as complying with deadlines for federal funding.[213]

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208. *See* SZYMENDERA, *supra* note 201.

209. 29 C.F.R. §§ 1910.502, 1910.504–05, 1910.509 (2021); *see also* Press Release, U.S. Dep't of Lab., US Department of Labor's OSHA Issues Emergency Temporary Standard to Protect Healthcare Workers from the Coronavirus (June 10, 2021), https://www.dol.gov/newsroom/releases/osha/osha20210610-0 [https://perma.cc/4ZYA-8R83].

210. *See* COVID-19 Vaccination and Testing; Emergency Temporary Standard, 85 Fed. Reg. 61,402, 61,402, 61,551–54 (Nov. 5, 2021).

211. *State Administrative Procedure Acts*, BALLOTPEDIA, https://ballotpedia.org/State_administrative_procedure_acts [https://perma.cc/KR7X-U66D] (last visited Apr. 15, 2021).

212. *See* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("[A] single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

213. *See, e.g.*, REVISED MODEL STATE ADMIN. PROC. ACT § 309 (NAT'L CONF. OF COMM'RS ON UNIF. STATE L. 2010) (permitting the invocation of emergency rulemaking to prevent "the loss of federal funding for an agency program"); *see also* VA. CODE ANN. § 2.2-4011(B) (2021) (allowing emergency rulemaking when a federal regulation requires compliance within 280 days or less from its enactment).

The non-partisan Uniform Law Commission routinely publishes a Model State APA, most recently in 2010.[214] No state has yet enacted the 2010 Model State APA.[215] The 2010 Model State APA's Section 309 provides that an agency may bypass full notice and comment if it finds that "an imminent peril to the public health, safety, or welfare or the loss of federal funding for an agency program requires the immediate adoption of an emergency rule."[216] The agency must publish its reasons for such a finding.[217] Unlike the federal good cause exception, Section 309 mandates an expiration date for emergency rules: 180 days, with the option for a 180-day renewal.[218] Adopting an emergency rule does not preclude notice and comment rulemaking; nor does it prohibit the adoption of a new emergency rule if "the agency finds that the imminent peril to the public health, safety, or welfare or the loss of federal funding for an agency program still exists" when the original emergency rule expires.[219]

Section 309 was adapted from the 1961 Model State APA and Virginia's State APA.[220] New York State's emergency rulemaking provision is based on the 1961 Model State APA; the former provides for emergency rule expiration after 90 days, with the option to readopt the rule for two additional 60-day periods.[221] The agency may readopt the emergency rule once if it has submitted a notice of proposed rulemaking and may readopt a second time if it has solicited and assessed public comments.[222] Emergency rules addressing "security authorizations, corporate or financial structures or reorganization thereof" may be exempted from the expiration requirement "if the agency finds that the purpose of the rule would be frustrated if subsequent notice procedures were required."[223] The agency is not required to engage in a post-promulgation comment period; however, it must provide notice about whether it intends to

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214. *See State Administrative Procedure Acts, Revised*, UNIF. L. COMM'N, https://www.uniformlaws.org/committees/community-home?communitykey=f184fb0c-5e31-4c6d-8228-7f2b0112fa42&tab=groupdetails (last visited Apr. 15, 2021). The states and jurisdictions that have enacted previous Model APAs are Alabama, Arizona, Arkansas, Connecticut, Delaware, Iowa, Kansas, Montana, Tennessee, Washington D.C., and Wyoming. *Id.*

215. *See id.*

216. *See* REVISED MODEL STATE ADMIN. PROC. ACT § 309.

217. *See id.*

218. *See id.*

219. *See id.*

220. *See id.* § 309 cmt.

221. *See id.*; *see also* N.Y. A.P.A. LAW § 202(6)(b) (Consol. 2021).

222. *See* N.Y. A.P.A. LAW § 202(6)(e).

223. *Id.* § 202(6)(c).

engage in full notice and comment, explain the statutory authority and reasons for the emergency rule, give the dates the rule will take effect and expire, provide a regulatory impact statement and flexibility analysis, and provide the contact information of a representative who can answer questions about the rule.[224]

Virginia's APA statute also contains an emergency rulemaking provision.[225] If an agency believes an emergency situation necessitates a rule, it must consult with and receive permission from the Attorney General before promulgation; the Governor has the final say as to whether the rule is truly necessary.[226] When a state or federal law imposes a deadline of 280 days or less to act, an agency may propose an emergency rule without consulting the Attorney General, but the Governor must still approve the rule before it takes effect.[227] Virginia imposes an expiration date on all emergency rules, albeit a long one: 18 months.[228] The agency may issue related emergency rules within this period, but the clock starts with the first emergency rule.[229] As in New York, the agency must decide relatively quickly whether it will want to make the emergency rule permanent; it must publish a notice within 60 days of the emergency regulation's effective date, and propose a replacement regulation within 180 days of the same.[230] If the agency tries but fails to adopt a replacement rule before the emergency rule expires, the Governor may authorize re-adoption of the emergency rule for a period no longer than six months.[231] The decision to readopt the emergency rule is not subject to judicial review.[232]

The Model State APA, New York, and Virginia good cause provisions offer a variety of alternatives that could be incorporated at the federal level in emergency and/or agency-specific legislation, despite the fact that they were designed with the additional purpose of complying with deadlines imposed by federal regulations and for federal funding.[233] Most importantly, they demonstrate that procedural safeguards such as a mandatory post-promulgation

224. *See id.* § 202(6)(d).
225. *See generally* VA. CODE ANN. § 2.2-4011 (2021).
226. *See id.* § 2.2-4011(A).
227. *See id.* § 2.2-4011(B).
228. *See id.* § 2.2-4011(C).
229. *See id.*
230. *See id.*
231. *See id.* § 2.2-4011(D).
232. *See id.*
233. *See supra* text accompanying note 213.

comment period and expiration dates with the limited possibility of extension can work in practice.

III. A PROCEDURAL FRAMEWORK FOR EMERGENCY RULEMAKING WHEN THE GOOD CAUSE EXCEPTION IS STATUTORILY AUTHORIZED

This Note proposes a series of procedural safeguards when Congress statutorily authorizes agencies to bypass notice and comment rulemaking in future emergencies based on lessons learned from the DOL's initial erroneous implementation of the FFCRA. First, Congress should continue to regard statutory authorization as an effective legislative tool because it succeeded in shielding the DOL from judicial review of what was truly an "emergency," which has had a severe chilling effect on OSHA's use of ETSs.[234] However, statutory authorization should only be used in true emergencies: situations in which the depth and breadth of the harm a delay in rulemaking would cause substantially outweigh the harm of bypassing notice and comment.[235] Congress has already effectuated this principle in the context of public health emergencies,[236] national security,[237] and disaster relief programs.[238] This should be Congress's guiding principle when crafting future emergency legislation.

When Congress is faced with another true emergency justifying statutory authorization to bypass traditional notice and comment, it should mandate a set of procedures that help restore some of the democratic process that is lost.[239] The first procedural safeguard should be that the emergency rule automatically serves as notice of proposed rulemaking,[240] just as OSHA's ETSs do.[241] Beginning on the effective date of the emergency rule, the agency should be required to engage in a 30-day comment period, even if the agency does not intend to make the emergency rule permanent or is unsure whether it will do so. A 30-day comment period is the ideal length for an emergency rule because it is only slightly less than the mean and

234. *See* SZYMENDERA, *supra* note 201, at 6, 22.

235. *See* Jordan, *supra* note 149, at 115, 118.

236. *See* Families First Coronavirus Response Act, Pub. L. No. 116-127, § 5111, 134 Stat. 178, 201 (2020) (emphasis added).

237. *See supra* text accompanying notes 69–70.

238. *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-13-21, *supra* note 59, at 47–48, 55.

239. *See* Bagley, *supra* note 74, at 260.

240. See 5 U.S.C. §§ 553(b)(1)–(3) for what NPRM typically requires.

241. *See* 29 U.S.C. § 655(c).

median comment periods agencies use for non-emergency rules, 39 and 32 days, respectively.[242]

One critique of this approach is that it is a waste of agency resources to mandate post-promulgation notice and comment if the agency intends to let the emergency rule expire, particularly when the emergency requiring the rule passes quickly.[243] Further, if interested members of the public believe the agency plans to let the rule expire, they may be disincentivized from commenting because they assume doing so would be pointless.[244] However, even if an emergency rule will expire, post-promulgation notice and comment serves three other essential purposes: it (1) helps the agency gather information quickly and develop expertise about an emergency, which by definition is a situation where information is scarce and in high demand;[245] (2) addresses the democracy deficit by giving the public a non-judiciary avenue to criticize an agency's implementation of an emergency law;[246] and (3) could prompt the agency to beneficially revise the emergency rule before it expires.[247]

Congress should also mandate that the emergency rule expire 90 days after the rule becomes effective, unless the agency promulgates a permanent rule based on comments received during the first 30-day period.[248] This would leave the agency 60 days to review comments and either promulgate a revised permanent rule or decide to let the emergency rule expire; either way, the agency should be required to explain its choice in a concise general statement when the new rule is promulgated, or the emergency rule expires, whichever comes first.[249] The new permanent rule would be subject to judicial review under the

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242. *See* Balla, *supra* note 45, at 5.

243. *See* ADMIN. CONF. OF THE U.S., *supra* note 61.

244. *See* Jordan, *supra* note 149, at 171.

245. *See* Raso, *supra* note 25, at 118–19; *see also Emergency*, *MERRIAM-WEBSTER*, https://www.merriam-webster.com/dictionary/emergency [https://perma.cc/P38R-LN2F] (last visited May 31, 2021) (defining emergency as "an unforeseen combination of circumstances or the resulting state that calls for immediate action").

246. *See* Bagley, *supra* note 74, at 260; *see also* Raso, *supra* note 25, at 118–19.

247. The DOL revised its implementation of the FFCRA three times before the law's mandatory provision expired on December 31, 2020. *See* Paid Leave Under the Families First Coronavirus Response Act, 85 Fed. Reg. 20,156 (Apr. 10, 2020); *see also* Paid Leave Under the Families First Coronavirus Response Act, 85 Fed. Reg. 57,677 (Sept. 16, 2020); Paid Leave Under the Families First Coronavirus Response Act, 85 Fed. Reg. 19,326 (Apr. 6, 2020).

248. *See* Appendix A (showing examples of expiration dates for emergency rules at the federal and state levels); *see also* Jordan, *supra* note 149, at 171.

249. *See* 5 U.S.C. § 553(c); *see also* United States v. Nova Scotia Food Prods. Corp., 568 F.2d 240, 252–53 (2d. Cir. 1977).

"logical outgrowth" standard, like any other rule.[250] However, because the use of statutory authorization implies that Congress believes having a quickly-assembled emergency rule is better than having no rule at all, it is imperative that courts ruling against the agency on the new permanent rule employ the equitable remedy of remand without vacatur, which allows the rule to stay in effect while the agency reconsiders it.[251]

Congress should allow for one 30-day extension on the expiration date of the emergency rule if the agency is still reviewing comments or a permanent rule is pending. The 2010 Model State APA, New York, and Virginia all allow emergency rule extensions, and New York's opportunity for a second extension is premised on whether comments are solicited and assessed.[252] The use of the extension should not preclude the agency from allowing the rule to expire or issuing a new permanent rule, but the proposed concise general statement requirement should still apply. Congress should insulate the agency's decision to use the 30-day extension from judicial review, as Virginia does.[253] While doing so removes any incentive for the agency not to use the extension, judicial review of such a short extension would undermine agency flexibility and would likely be moot by the time a court ruled.[254] Further, given that 60 days — the length of the proposed period between the end of the mandatory comment period and the expiration of the emergency rule — is a relatively brief amount of time to promulgate a permanent rule, agencies deserve some flexibility to take a little more time to ensure that the permanent rule is not written hastily or plagued by the same missteps as the initial emergency rule.[255]

Congress should also statutorily authorize the agency to revise the emergency rule without notice and comment as often as needed during the 90 to 120-day period the rule is in effect. As with the extension, this will give the agency the flexibility it needs — and needed twice during the FFCRA — to correct errors in rushed

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250. *See* 5 U.S.C. § 553(b)(3); *see also* Veterans Just. Grp., LLC v. Sec'y of Veterans Affs., 818 F.3d 1336, 1344 (Fed. Cir. 2016).

251. *See* ADMIN. CONF. OF THE U.S., RECOMMENDATION 2013-6, REMAND WITHOUT VACATUR (2013).

252. *See* Appendix A; *see also* REVISED MODEL STATE ADMIN. PROC. ACT § 309 (NAT'L CONF. OF COMM'RS ON UNIF. STATE LAWS 2010); N.Y. A.P.A. LAW § 202(6)(e) (Consol. 2021); VA. CODE ANN. § 2.2-4011(D) (2021).

253. *See* VA. CODE ANN. § 2.2-4011(D) (2021).

254. *See* Jordan, *supra* note 149, at 115, 118 (recognizing that agency flexibility is crucial in an emergency).

255. *See* Yates, *supra* note 175, at 1451.

rules.[256] Virginia similarly allows additional emergency regulations as needed addressing the subject matter of the initial emergency regulation.[257] However, as Virginia does, Congress should clarify that revisions do not affect the effective date for the comment period, expiration date, and extension.[258] When Congress statutorily authorized the DOL to implement the FFCRA, it gave the DOL the authority "to issue regulations for good cause."[259] The DOL — reasonably, given the plural "regulations" — justified its September 2020 revisions by invoking this statutory authorization to bypass notice and comment rulemaking.[260] However, Congress should be even more explicit in future emergency legislation that revisions are permitted, especially if it also imposes deadlines for post-promulgation notice and comment procedures, as are recommended here.

Revisions during the 90 to 120-day emergency rule period present notice and logical outgrowth issues for a new permanent rule the agency may promulgate. With a 30-day comment period beginning on the emergency rule's effective date, the public will have neither a meaningful opportunity to comment on any revisions made toward the end of this period nor any opportunity to comment on revisions made after.[261] However, this is not a cause for concern. Agencies have good faith reasons to revise an emergency rule after the comment period but before allowing it to expire or promulgating a new permanent rule: to correct an error or address an urgent issue brought to the agency's attention during the comment period.[262] Further, under this proposal, emergency rule revisions would be subject to the mandatory expiration date.[263] Finally, the public will have the opportunity to comment on the subject matter of the emergency rule during the 30-day comment period, which allows for more participation than presently exists.

A valid critique of this proposal is that the deadlines for the comment period, rule expiration, and extension are all shorter than

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256. *See id.*

257. *See* VA. CODE ANN. § 2.2-4011(C) (2021).

258. *See id.*

259. Families First Coronavirus Response Act, Pub. L. No. 116-127, § 5111, 134 Stat. 178, 201 (2020).

260. Paid Leave Under the Families First Coronavirus Response Act, 85 Fed. Reg. 57,677 (Sept. 16, 2020).

261. *See* 5 U.S.C. § 553(c). *See generally* United States v. Nova Scotia Food Prods. Corp., 568 F.2d 240, 252–53 (2d. Cir. 1977).

262. *See* Yates, *supra* note 175, at 1451.

263. *See* Jordan, *supra* note 149, at 172.

the analogous deadlines in use at the federal and state levels.[264] Such a strict timeline undermines the critical flexibility that emergency rule mechanisms are meant to enable.[265] However, such a short timeline is necessary because it would ensure agency accountability faster and more effectively than judicial review, which is unpredictable and, as demonstrated by the FFCRA litigation, can take at least six months.[266] Finally, this framework would not undermine the good cause exception generally because this Note only proposes that the framework be included in emergency legislation statutorily authorizing an agency to bypass traditional notice and comment. Emergencies demand not only swift rules but effective ones. This framework would avoid what happened with the FFCRA by preserving agency flexibility during emergencies while ensuring that the interested public and Congress have the opportunity to formally engage with the substance of emergency rules.[267]

These additional procedures would have been effective at ensuring that the DOL's implementation of the FFCRA was consistent with the statute and would have had positive externalities as well. A post-promulgation comment period would have prompted the DOL to gather information from Congress and interested parties such as trade associations, workers' rights groups, unions, business groups, and health care providers about early stumbling blocks to accessing and providing leave under the FFCRA, as well as from lawyers scrambling to advise employees of their rights and employers of their obligations.[268] This information could have caused the DOL to fix the April Rule's overly broad health care provider exception at least two months earlier, in response to comments received when promulgating a permanent rule following the emergency rule's expiration after 90 to 120 days.[269] Further, given the unprecedented and changing nature of the COVID-19 pandemic, this information could have given the DOL a better sense of how best to spend its $2.5 million on outreach and enforcement and closed at least part of the information gap caused by remote investigations.[270] In short, these procedural safeguards could have made the FFCRA even more effective and

264. *See* Appendix A.
265. *See* Jordan, *supra* note 149, at 115, 118.
266. *See supra* Section I.C.
267. *See supra* Section I.C.
268. *See generally* U.S. DEP'T OF LAB., OFF. OF INSPECTOR GEN., *supra* note 14.
269. *See supra* Sections I.C.iii, II.B.
270. *See* U.S. DEP'T OF LAB., OFF. OF INSPECTOR GEN., *supra* note 14, at 10–11; *see also* Gomez, DeLauro & Maloney Letter, *supra* note 170.

accessible to U.S. workers during the pandemic, potentially saving lives.

CONCLUSION

The COVID-19 pandemic will eventually end, but future emergencies will again necessitate agency flexibility and immediately effective regulations. The story of the FFCRA shows the real risk that agencies may misuse the ability to promulgate rules without notice and comment when they are insulated from judicial review of the decision to do so; agencies may exceed the scope of their authority, and the concerns of Congress, interested parties, and the public may go unsolicited and ignored. As the implementation of the FFCRA demonstrates, the stakes — for democracy and human life — are high. Therefore, Congress should not confer statutory authorization to bypass notice and comment rulemaking lightly and should require additional procedures to ensure agency accountability without sacrificing upfront flexibility. The solution most likely to strike that balance is a mandatory 30-day post-promulgation comment period, a 90-day expiration date with the possibility of a single 30-day extension unless a permanent rule is promulgated, and the ability to revise the emergency rule without notice and comment during the rule's 90- to 120-day term.

APPENDIX A

Figure 1: Emergency Rulemaking Alternatives to the Good Cause Exception

	Emergency Rule Expiration	**Extension or Renewal of Emergency Rule**	
OSHA	6 months *(Emergency Rule is notice for mandatory post-promulgation comment period)*	No renewal	
2010 Model State APA	180 days (6 months)	180 days (6 months)	
New York State APA	90 days (3 months)	60 days (2 months) *(if notice issued)*	60 days (2 months) *(if comments solicited and assessed)*
Virginia State APA *(Issuing and Extending Emergency Rules Require Governor's Approval)*	18 months Notice within 60 days (2 months) Replace within 180 days (6 months)	6 months	