

COMMENT

ALLEVIATING RESTRICTIONS ON CDC RULEMAKING: LESSONS FROM THE COVID-19 PANDEMIC

ELENA POMPONIO*

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INTRODUCTION

The Centers for Disease Control and Prevention (CDC) is the United States’ public health agency that protects the public from “health, safety, and security threats.”¹ Since its inception, the CDC has evolved to address

* J.D. Candidate, American University Washington College of Law (2024); B.A. Political Science, West Virginia University (2021). I would like to thank Professor Jeffery Lubbers for sharing his ideas and guiding me through Administrative Law, and Professor Robert Dinerstein for his edits and much appreciated support as my advisor. Lastly, I want to thank the *Administrative Law Review* staff for their assistance in preparing this piece.

1. *CDC Organization*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc>

emerging health threats materializing around the world.² With every new challenge to public health, the CDC evolves as an agency, responding as it deems necessary to accomplish its mission: to protect public health.³ When the COVID-19 virus presented itself as a global pandemic, the CDC was once again tasked to combat a new challenge.⁴ However, this time the CDC exercised broad regulatory powers to keep Americans safe as the severity of the pandemic became more clear.⁵ Given that several of the CDC's regulatory efforts were unprecedented, some courts deemed the CDC's actions to be beyond the scope of its authority as an administrative agency.⁶

The evolution of the CDC began in 1946 when the Public Health Service established the Communicable Disease Center to prevent the spread of malaria.⁷ Later on, the CDC's handling of poliomyelitis and the influenza epidemic established the agency's credibility and ensured its survival.⁸ The

.gov/about/organization/cio.htm (Feb. 21, 2023).

2. See generally *CDC Timeline 1940s-1970s*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/museum/timeline/> (Apr. 4, 2023) (providing a timeline of many of the Centers for Disease Control and Prevention's (CDC's) momentous contributions to public health since its formation in 1946).

3. See *Mission, Role, and Pledge*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/about/organization/mission.htm> (Apr. 29, 2022).

4. See Lena H. Sun, *CDC, Under Fire for Covid Response, Announces Plans to Revamp Agency*, WASH. POST, <https://www.washingtonpost.com/health/2022/04/04/walensky-cdc-revamp-pandemic/> (Apr. 4, 2022, 6:45 PM) (quoting the CDC's Director Rochelle Walensky stating, "Never in its 75-year history has CDC had to make decisions so quickly, based on often limited, real-time, and evolving science.").

5. See Lindsay F. Wiley, *Why the Supreme Court's Eviction Moratorium Reasoning Doesn't Extend to the CDC Transit Mask Order*, HARV. L. REV. BLOG (Feb. 28, 2022), <https://blog.harvardlawreview.org/why-the-supreme-courts-eviction-moratorium-reasoning-doesnt-extend-to-the-cdc-transit-mask-order/> (explaining the CDC draws its power from Public Health Service Act (PHSA) section 361, which authorizes federal health officials to "make and enforce such regulations as in [their] judgment are necessary to prevent the introduction, transmission, or spread of communicable diseases").

6. See WEN W. SHEN, CONG. RSCH. SERV., R46758, *SCOPE OF CDC AUTHORITY UNDER SECTION 361 OF THE PUBLIC HEALTH SERVICE ACT (PHSA)* (2021) (detailing courts' decisions on the scope of the CDC's authority under section 361).

7. *Our History - Our Story*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/about/history/index.html> (Apr. 19, 2023).

8. See Bindu Tharian, *Centers for Disease Control and Prevention*, NEW GA. ENCYC., <https://www.georgiaencyclopedia.org/articles/science-medicine/centers-for-disease-control-and-prevention/> (Mar. 28, 2021) (describing how the CDC struggled to survive until the mid-1950s health crises when the CDC helped identify and combat the poliomyelitis issue, and when the agency gathered data and developed national guidelines for an influenza vaccine).

CDC then further solidified its status when it played a key role in the eradication of smallpox.⁹ Given the expanded scope of the CDC's activities, its name was changed in 1970 to Center for Disease Control; Center later became Centers, "and Prevention" was added in 1992, but the acronym stayed the same.¹⁰ Today, the CDC is one of the major operating components of the Department of Health and Human Services (HHS).¹¹ To date, the CDC's role and scope have not stopped evolving and if the COVID-19 pandemic is any indication, the urgency to have an agency at the ready is of utmost importance.

Although the COVID-19 pandemic showcased the need for agency action, there is a recent trend in court decisions toward limiting administrative agency power.¹² There is more at stake when the challenged action taken by an administrative agency could immediately save millions of lives—as is the case with many emergency rules the CDC may need to promulgate in a pandemic.¹³ Given the need to act quickly and efficiently at the outset of a public health crisis, the scope of the CDC's authority must be clarified, and the agency should consider current applications of the Administrative Procedure Act (APA) and judicial review of agency action.¹⁴

Although three years after its inception, the threat of COVID-19 appears to be less serious,¹⁵ this was not the first public health crisis, nor will it be the

9. See *Historical Perspectives History of CDC*, CTRS. FOR DISEASE CONTROL & PREVENTION: MORBIDITY & MORTALITY WKLY. REP. (June 28, 1996), <https://www.cdc.gov/mmwr/preview/mmwrhtml/00042732.htm>.

10. *Id.*

11. *Our History - Our Story*, *supra* note 7.

12. See Gillian E. Metzger, *1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1 (2017) (explaining the trend of antiregulatory and antigovernment forces).

13. See Requirement for Persons to Wear Masks While on Conveyances and at Transportation Hubs, 86 Fed. Reg. 8,025 (Feb. 3, 2021) (implementing a mask mandate to protect the public from the spread of COVID-19); see also Andrew J. Twinamatsiko & Katie Keith, *Judicial Deregulation and Health Policy*, O'NEILL INST. FOR NAT'L & GLOB. HEALTH L. (May 5, 2022), <https://oneill.law.georgetown.edu/judicial-deregulation-and-health-policy/> (explaining how delegation of authority by Congress to federal agencies is especially important for health policy because of the "specialized, complex nature of health care").

14. See generally Administrative Procedure Act, 5 U.S.C. §§ 701–706 (detailing when judicial review of agency action is applicable and the scope of judicial review).

15. The Biden Administration announced its plan to end a national health emergency and public-health emergency declaration for COVID-19 on May 11, 2023. See Sharon LaFraniere & Noah Weiland, *U.S. Plans to End Public Health Emergency for Covid in May*, N.Y. Times, <https://www.nytimes.com/2023/01/30/us/politics/biden-covid-public-health-emergency.html> (Feb. 3, 2023). Despite more than 500 people on average dying each day from COVID-19, "at the

last.¹⁶ Therefore, judicial invalidation of public health agency regulations produces much broader potential consequences than it does in other areas of regulation.¹⁷ The current evolving risk of “mpox”¹⁸ illustrates how quickly new or old health threats arise.¹⁹ As the leading national agency in charge of public health, the CDC will be expected to handle the next public health crisis, whether it be mpox or another devastating and deadly disease. The CDC’s response to the COVID-19 pandemic was far from perfect, and the agency noted it will implement significant changes after an internal review of its procedures.²⁰ Implementing these changes will benefit the CDC and will

three-year mark, the coronavirus is no longer upending everyday life to the extent it once did.” *Id.*

16. See generally *Past Pandemics*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/flu/pandemic-resources/basics/past-pandemics.html> (Aug. 10, 2018) (detailing information on past pandemics); Mamta Murthi, *Preparing Now for the Next Health Emergencies*, WORLD BANK (Feb. 9, 2023), <https://blogs.worldbank.org/voices/preparing-now-next-health-emergencies> (asserting that “the future is likely to bring more frequent public-health crises” due to a variety of anthropogenic factors such as climate change and interactions between humans and animal species).

17. See Joe Hernandez & Selena Simmons-Duffin, *The Judge Who Tossed Mask Mandate Misunderstood Public Health Law, Legal Experts Say*, NPR (Apr. 19 2022, 6:23 PM), <https://www.npr.org/sections/health-shots/2022/04/19/1093641691/mask-mandate-judge-public-health-sanitation> (describing how a court’s decision to strike down the CDC’s mask mandate poses “really drastic and dire consequences for public health”); see also Lauren Weber & Anna Maria Barry-Jester, *Conservative Blocs Unleash Litigation to Curb Public Health Powers*, KFF HEALTH NEWS (July 18, 2022), <https://kffhealthnews.org/news/article/conservative-blocs-litigation-curb-public-health-powers/> (detailing how COVID-era litigation has endangered the fundamental tools, like mandatory vaccinations and health orders, that public health workers rely on).

18. This Comment will use the term “mpox” following the CDC’s decision to update the term to reduce stigma and other issues associated with the prior terminology “monkeypox” and to align with a recent World Health Organization decision. See *2022 Outbreak Cases & Data*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/poxvirus/monkeypox/response/2022/index.html> (May. 10, 2023, 2:00 PM).

19. See *id.* The latest records on the CDC’s website confirm there have been a total of 30,395 cases of mpox with forty-two cases resulting in death in the United States. *Id.* (as of May 10, 2023). Although mpox is not as easily transferrable and nowhere near as deadly as the COVID-19 virus, it nevertheless demonstrates how quickly new or old health threats can arise. See Knvul Sheikh, *How Serious is Monkeypox?*, N.Y. TIMES (Oct. 7, 2022), <https://www.nytimes.com/article/monkeypox-virus-covid.html> (explaining how mpox differs from COVID-19).

20. See Krista Mahr, *CDC Director Orders Agency Overhaul, Admitting Flawed Covid-19 Response*, POLITICO (Aug. 17, 2022, 12:01 PM), <https://www.politico.com/news/2022/08/17/cdc-agency-overhaul-covid-19-response-00052384> (providing background on the CDC’s report following an internal review). For the full report listed on the CDC’s website, see *Summary Report*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/about/org>

likely help with its damaged public perception.²¹ However, COVID-era litigation and conflicting applications of administrative law doctrines pose external obstacles to the CDC.²² Specifically, courts' application of the largely undefined "major questions doctrine"²³ in statutory interpretations of the Public Health Services Act of 1944 (PHSA) and the APA's rulemaking requirements²⁴ are examples of issues the CDC will confront going forward. To enable the most effective nationwide response to an emergency health threat, the CDC must address how COVID-era litigation could potentially limit its future actions and strategize how to best adapt to these limitations.

Part I of this Comment details the rulemaking requirements set forth in the APA and explains how agencies have typically invoked the good cause exceptions to the APA's rulemaking requirements. Part II discusses the PHSA and explains how courts have interpreted the scope of the CDC's authority under this statute. Part III elaborates on judicial review of agency rulemaking and the major questions doctrine as it applies to the review of the CDC's potential actions. Finally, Part IV provides recommendations for alleviating restrictions on the CDC's rulemaking authority and asserts that it is crucial for the CDC to understand the scope of its authority and its limits to efficiently handle a future public health crisis.

anization/cdc-moving-forward-summary-report.html (Sept. 1, 2022).

21. The CDC's public perception was negatively impacted during its response to COVID-19 because many viewed the CDC as being politicized. To understand former CDC directors' thoughts on the politicization of the CDC, see Jeffery Koplan, Julie Gerberding, Richard Besser & Tom Frieden, *The CDC was Damaged by Marginalization and Politicization. This is How Biden Can Fix It*, NBC (Jan. 14, 2021, 4:30 AM), <https://www.nbcnews.com/think/opinion/cdc-was-damaged-marginalization-politicization-how-biden-can-fix-it-ncna1254135>. Further, public perception is an important consideration for the CDC, as perception can erode the CDC's influence when providing guidance to the States. See Pien Huang, *Battle Over CDC's Powers Goes Far Beyond Travel Mask Mandate*, NPR (Apr. 21, 2022, 5:42 PM), <https://www.npr.org/sections/health-shots/2022/04/21/1094123780/battle-over-cdcs-powers-goes-far-beyond-travel-mask-mandate> (noting how the CDC's "soft powers" of persuading through reputation and reason weakened after its COVID-19 response).

22. See Weber & Barry-Jester, *supra* note 17.

23. See KATE R. BOWERS & DANIEL J. SHEFFNER, CONG. RSCH. SERV., LSB10745, THE SUPREME COURT'S "MAJOR QUESTIONS" DOCTRINE: BACKGROUND AND RECENT DEVELOPMENTS 1–2 (2022) (explaining how although the Supreme Court has not yet precisely defined the major questions doctrine, the Court has rejected agency authority under this doctrine when the authority involves an issue of "vast economic and political significance" and is unsupported by clear statutory language).

24. See *infra* Part I (detailing the APA's procedural rulemaking requirements and explaining how agencies invoke the good cause exceptions to these requirements).

I. AGENCY RULEMAKING

The APA governs the procedure of administrative agencies' actions.²⁵ As an administrative agency, the CDC must comply with the specific procedural requirements laid out in § 553 of the APA when it conducts rulemaking.²⁶ Section 553 requires an agency to publish a general notice of its proposed rule in the Federal Register that includes a “statement of the time, place, and nature of [the] public rule making proceedings;” reference to its legal authority to propose the rule; and either the terms or a description of what the proposed rule will address.²⁷ An agency must then provide an opportunity for interested parties to submit comments on the proposed rule before it becomes legally binding.²⁸ After an agency receives and considers public comments, it must incorporate a “concise general statement of their basis and purpose” into the final rule.²⁹ Further, acknowledging certain exceptions, § 553 requires an agency to publish its final rule at least thirty days before its effective date.³⁰

If an agency fails to adhere to these rulemaking procedures in § 553, a reviewing court may render an agency's rule invalid for noncompliance with the APA.³¹ However, the APA does provide several exceptions to § 553's rulemaking requirements.³² One such exception arises if the agency finds “for good cause” that the notice-and-comment procedures would be “impracticable, unnecessary, or contrary to public interest,” in which case it may be excused from those ordinary rulemaking requirements.³³ Additionally, upon finding good cause, an agency may make a rule effective immediately instead of waiting the typical thirty-day delay that is required in § 553.³⁴ When an agency invokes either of the good cause exceptions, it is required to incorporate its findings and a brief statement of reasons describing why there is good cause to forgo ordinary notice-and-comment procedures and allow for the rule to take immediate effect.³⁵ The language in the good cause exception

25. 5 U.S.C. §§ 551–59, 561–70a, 701–06.

26. See § 553. The APA defines rulemaking as the “agency process for formulating, amending, or repealing a rule.” § 551(5).

27. § 553(b).

28. See § 553(c).

29. *Id.*

30. § 553(d).

31. See JONATHAN M. GAFFNEY, CONG. RSCH. SERV., LSB10558, JUDICIAL REVIEW UNDER THE ADMINISTRATIVE PROCEDURE ACT (APA) (2020).

32. See § 553(b).

33. § 553(b)(B).

34. § 553(d)(3).

35. § 553(b)(B), (d)(3).

to notice-and-comment is more specific than the general language in the good cause exception for avoiding the thirty-day delayed effective date requirement; however, commentators have concluded that showing good cause under both exceptions is typically based on similar findings.³⁶

The good cause exceptions to ordinary rulemaking procedures are justified in balancing the importance of public participation with the need for efficient government action.³⁷ Congress intended these exceptions to be read narrowly to ensure agencies remain accountable to the requirements laid out in the APA.³⁸ With respect to the terms, “impracticable,” “unnecessary,” or “contrary to the public interest,” the APA’s legislative history separately defines each term to describe the situations that allow for good cause exceptions.³⁹ Agencies generally use the “unnecessary” ground for exception to issue “minor technical amendments.”⁴⁰ Agencies typically apply the “impracticable” and “contrary to the public interest” prongs of the good cause exception together given that they are closely related.⁴¹ Courts have found that the invocation of the “impracticable” and “contrary to the public interest” prongs of the good cause exception are generally limited to situations where a delay in effectuating the rule may result in serious harm.⁴²

In its response to the COVID-19 pandemic, the CDC issued multiple “orders” without providing for notice-and-comment or allowing for the thirty-day delayed effective date requirement.⁴³ In *Health Freedom Defense*

36. JEFFERY S. LUBBERS, *A GUIDE TO FEDERAL AGENCY RULEMAKING* 106 (6th ed. 2018) (explaining the difference between the two good cause exceptions).

37. James Yates, “*Good Cause*” is *Cause for Concern*, 86 *GEO. WASH. L. REV.* 1438, 1442 (2018).

38. See *N.J., Dep’t of Env’t Prot. v. EPA*, 626 F.2d 1038, 1045–46 (D.C. Cir. 1980) (explaining that the “Senate Committee responsible for the APA warned” that an exception based on emergency situations is not an “escape clause,” and an agency must make and publish a true and supported finding of necessity or emergency); *Mid Continent Nail Corp. v. United States*, 999 F. Supp. 2d 1307, 1323 (Ct. Int’l Trade 2014) (finding that permitting the good cause exception in an instance that always exists in the trade context that the agency deals with would “swallow the rule” and “nullify the APA’s limitation on summary agency action”).

39. LUBBERS, *supra* note 36, at 107.

40. *Id.*

41. *Id.*

42. See *U.S. Steel Corp. v. EPA*, 595 F.2d 207, 214 (5th Cir. 1979) (finding that EPA’s statement of the preliminary nature of the designation undercut their own good cause argument); *Regeneron Pharms., Inc. v. U.S. Dep’t of Health & Hum. Servs. (HHS)*, 510 F. Supp. 3d 29, 47 (S.D.N.Y. 2020) (stating the admitted lack of change of outcome on the agency’s part showed the good cause exception should not apply).

43. See *Requirement for Persons to Wear Masks While on Conveyances and at Transportation Hubs*, 86 *Fed. Reg.* 8,025 (Feb. 3, 2021); *Temporary Halt in Residential*

Fund, Inc. v. Biden,⁴⁴ for example, the CDC faced scrutiny for its failure to comply with rulemaking procedures when it issued an order that required the public to wear masks while traveling on conveyances.⁴⁵ The CDC first described the order as not a “rule” within the meaning of the APA.⁴⁶ However, the CDC noted that in the event of a court classifying the order as a rule, there was good cause to forgo prior public notice-and-comment and avoid a delay in the effective date because the public health emergency caused by COVID-19 rendered notice-and-comment and any delay in the order taking effect impracticable and contrary to the public’s health.⁴⁷ After properly determining that the CDC’s order was a rule within the APA definition, the court in *Health Freedom Defense Fund* found that because the CDC had not adequately explained its reasoning behind invoking the good cause exception, the rule violated the APA’s rulemaking requirements.⁴⁸

Although it appears clear that the good cause exceptions are intended to be read narrowly and for an urgent set of circumstances, it would also seem that a mask mandate to protect the nation from spiraling deaths due to a pandemic would meet this narrow requirement.⁴⁹ In the face of a future public health crisis, the CDC will likely need to invoke the good cause exceptions to § 553’s rulemaking requirements to allow its rules to immediately take effect to combat the threat of an infectious disease. Therefore, the CDC should ensure proper procedures are in place to best avoid scrutiny for noncompliance with the APA.

Evictions in Communities with Substantial or High Transmission of COVID-19 to Prevent the Further Spread of COVID-19, 86 Fed. Reg. 43,244 (Aug. 6, 2021); Framework for Conditional Sailing and Initial Phase COVID-19 Testing Requirements for Protection of Crew, 85 Fed. Reg. 70,153 (Nov. 4, 2020).

44. 599 F. Supp. 3d 1144 (M.D. Fla. 2022).

45. See *id.* at 1153–55, 1166–68.

46. *Id.* at 1167.

47. Requirement for Persons to Wear Masks While on Conveyances and at Transportation Hubs, 86 Fed. Reg. 8,025, 8,030 (Feb. 3, 2021).

48. See *Health Freedom Def. Fund, Inc.*, 559 F. Supp. 3d at 1166–76.

49. See Reed Shaw, “Good Cause” for a Good Cause: Using an APA Exception to Confront the COVID-19 Crisis, 21 J. L. SOCIETY 116, 147 (2021) (describing the COVID-19 pandemic and its consequential economic devastation as “the exact kind of emergency situation that Congress anticipated for the use of the ‘good cause’ exception”).

II. STATUTORY AUTHORITY OF THE CDC

The CDC derives its authority from the PHS Act.⁵⁰ Section 361 of the PHS Act titled “Control of Communicable Diseases” authorizes the Secretary of HHS to issue regulations “necessary to prevent the introduction, transmission, or spread of” foreign and interstate communicable diseases.⁵¹ HHS, in turn, delegated certain powers in the statute to the CDC, providing that whenever the CDC Director finds measures taken by state health authorities “insufficient” to prevent the spread of disease, the Director may take measures they deem “reasonably necessary” to prevent the spread of disease, “including inspection, fumigation, disinfection, sanitation, pest extermination, and destruction of animals or articles believed to be sources of infection.”⁵² Therefore, the CDC’s authority is limited to what is defined in the PHS Act and delegated to it by HHS.⁵³ The first of the five subsections of section 361 of the PHS Act, section 361(a), provides as follows:

The Surgeon General, with the approval of the Secretary, is authorized to make and enforce such regulations as in his judgment are necessary to prevent the introduction, transmission, or spread of communicable diseases from foreign countries into the States or possessions, or from one State or possession into any other State or possession. For purposes of carrying out and enforcing such regulations, the Surgeon General may provide for such inspection, fumigation, disinfection, sanitation, pest extermination, destruction of animals or articles found to be so infected or contaminated as to be sources of dangerous infection to human beings, and other measures, as in his judgment may be necessary.⁵⁴

While some courts interpret the language in section 361(a) broadly, other

50. See Public Health Service Act (PHSA), Pub. L. No. 78-410, § 361, 58 Stat. 682, 703–04 (1944). The PHS Act is codified in Title 42 of the United States Code; however, federal officials and lawmakers typically refer to provisions in Title 42 by the section numbering in the original legislation. See NAT’L ACADEMIES OF SCI., ENG’G, & MED., IMPROVING THE CDC QUARANTINE STATION NETWORK’S RESPONSE TO EMERGING THREATS 174 n.8 (2022) [hereinafter NAT’L ACADEMIES]. This Comment refers to the section numbering and titles as they appear in the original legislation while citing to the relevant title and section number of the United States Code.

51. See PHS Act § 361 (codified at 42 U.S.C. § 264). Although the statute explicitly delegates authority to the “Surgeon General,” a series of agency reorganizations by Congress transferred all of the Surgeon General’s statutory authority to the Secretary of Health, Education, and Welfare, which is now the Secretary of HHS. See 42 U.S.C. § 264; SHEN, *supra* note 6, at 11–12.

52. 42 C.F.R. § 70.2 (2021).

53. See Nat’l Fed’n of Indep. Bus. (NFIB) v. OSHA, 142 S. Ct. 661, 664–65 (2022) (describing administrative agencies as “creatures of statute,” possessing only the authority Congress provides).

54. 42 U.S.C. § 264(a).

courts read it narrowly.⁵⁵ The following three subsections of section 361 provide specifics for regulations relating to the apprehension, detention, or conditional release of individuals.⁵⁶ Section 361(b) specifies that an agency may only issue regulations providing for the apprehension, detention, or conditional release of individuals for the purpose of preventing the spread of a communicable disease that the President designates in an executive order per the Secretary's recommendation.⁵⁷ Section 361(c) clarifies that regulations providing for apprehension, detention, examination, or conditional release of individuals typically apply only to individuals entering the States from a foreign country.⁵⁸ However, section 361(d) states that regulations providing for the apprehension and examination of an individual who is not entering from a foreign country are acceptable when the individual is "reasonably believed to be infected with a communicable disease in a qualifying stage" and the individual is moving from one state to another state or could infect individuals moving from one state to another state.⁵⁹ Finally, section 361(e) provides that regulations promulgated under this section may not supersede state law "except when it conflicts with an exercise of Federal authority under this section."⁶⁰

Before the COVID-19 pandemic, the CDC primarily relied on the statutory authority granted by the PHS Act to issue and refine regulations concerning quarantine and isolation of individuals believed to be at risk of spreading a contagious disease.⁶¹ However, the scale and exigent nature of COVID-19 led the CDC to invoke its authority under section 361 more broadly.⁶² While some courts found the CDC's broad exercise of authority permissible under the PHS Act, other courts—and ultimately the Supreme Court—opted for a narrow interpretation of the PHS Act and concluded certain actions exceeded the CDC's statutory authority.⁶³ Clarifying the

55. *See id.*; SHEN, *supra* note 6, at 24.

56. 42 U.S.C. § 264(b)–(d).

57. § 264(b).

58. § 264(c).

59. § 264(d). "The term 'qualifying stage' with respect to a communicable disease means" the disease "is in a communicable stage" or "is in a precommunicable stage, if the disease would be likely to cause a public health emergency if transmitted to other individuals." § 264(d)(2).

60. § 264(e).

61. *See* SHEN, *supra* note 6, at 12–13.

62. *See* Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 85 Fed. Reg. 55,292, 55,293 (Sept. 4, 2020) (relying on its authority under section 361, the CDC issued an order to halt residential evictions nationwide to prevent the further spread of COVID-19).

63. *Compare* Brown v. Azar, 497 F. Supp. 3d 1270 (N.D. Ga. 2020) (concluding the CDC

scope of the CDC's authority under the PHSa is crucial because regardless of how serious the issue the CDC seeks to address is, the CDC "may not exercise its authority in a manner that is inconsistent with the administrative structure that Congress enacted into law."⁶⁴

A. *Broad Interpretation of the CDC's Statutory Authority*

Some courts have opted for a broader interpretation of agency's authority under section 361 due to the "catch-all" phrase at the end of the statute, noting that "and other measures, as in his judgment may be necessary," demonstrates that Congress intended the statute to be flexible to cope with emerging health threats.⁶⁵ In *Independent Turtle Farmers of Louisiana, Inc. v. United States*,⁶⁶ the district court determined that the list in section 361(a) of possible measures an agency may take "does not act as a limitation upon the types of regulations that may be enacted under [s]ection 361."⁶⁷ Further, the court noted that the phrase granting the Secretary the authority to enact necessary measures precluded interpretation of the list as exhaustive.⁶⁸ Several lower courts adopted a similarly broad interpretation of the CDC's authority under section 361 when reviewing the CDC's issuance of an order that imposed a nationwide moratorium on evictions of any tenants who live in a county experiencing a high risk of COVID-19 transmission.⁶⁹

The district court in *Brown v. Azar*,⁷⁰ for example, found the grant of

had the authority to issue a temporary halt in residential evictions during the COVID-19 pandemic under the PHSa), *with Tiger Lily, LLC v. U.S. Dep't of Hous. & Urb. Dev. (HUD)*, 5 F.4th 666 (6th Cir. 2021) (finding that the CDC did not have the authority under the PHSa to issue an order halting evictions), *and Ala. Ass'n of Realtors v. HHS*, 141 S. Ct. 2485 (2021) (following the series of lower court rulings, the Supreme Court concluded the CDC's eviction moratorium was outside the scope of the CDC's authority under the PHSa).

64. See *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125 (2000) (quoting *ETSI Pipeline Project v. Missouri*, 484 U.S. 495, 517 (1988)).

65. See 42 U.S.C. § 264(a); *Indep. Turtle Farmers of La., Inc. v. United States*, 703 F. Supp. 2d 604, 618–20 (W.D. La. 2010). Although the court in this case analyzed whether the FDA had the authority to enact a regulation restricting the sale of turtles, the authority the FDA relied on was under section 361. *Id.* at 618–19.

66. 703 F. Supp. 2d 604 (W.D. La. 2010).

67. *Id.* at 620.

68. *Id.* at 619–20.

69. See *Ala. Ass'n of Realtors v. HHS*, No. 21–5093, 2021 WL 2221646, at *1 (D.C. Cir. June 2, 2021) (*per curiam*) (determining that the CDC's eviction moratorium falls within the plain text of § 361(a)); *Brown v. Azar*, 497 F. Supp. 3d 1270, 1280–81 (N.D. Ga. 2020) (same).

70. 497 F. Supp. 3d at 1270.

authority under section 361 of the PHSA broad enough to enable the CDC to issue its eviction moratorium because the delegation provision in section 361 is similar to statutes that give an agency the authority to “prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of the Act,” which the court noted generally evidences Congress’ intent to give an agency broad power to enforce all provisions of an act.⁷¹ The court stated that because the CDC’s order issuing the eviction moratorium was necessary to control the COVID-19 pandemic, the CDC was authorized to issue it.⁷² Although the court in *Brown* found this determination to be enough basis on which to rest its entire conclusion, the court went on to address how the list of measures specified in section 361(a) was non-exhaustive, noting that because the language of section 361(a) provides for the CDC to take measures to prevent the spread of disease as it deems necessary “including” the enumerated items, the list cannot be the only measures the CDC may take.⁷³ The court in *Brown* reasoned that the Supreme Court has repeatedly held that the word “including” signifies “enlargement, not limitation” in a statute.⁷⁴

B. A Narrow Reading of the CDC’s Statutory Authority

On the contrary, many court rulings on cases challenging the CDC’s COVID-era actions relying on the PHSA interpreted the statute narrowly.⁷⁵ Following the conflicting series of lower court rulings regarding the scope of the CDC’s authority to issue the eviction moratorium, the Supreme Court held in *Alabama Ass’n of Realtors v. Department of Health and Human Services*⁷⁶ that the CDC exceeded its statutory authority in invoking the eviction moratorium to slow the spread of COVID-19.⁷⁷ To invoke the moratorium,

71. *Id.* at 1281 (quoting *Gonzales v. Oregon*, 546 U.S. 243, 259 (2006)).

72. *Id.*

73. *See id.* at 1281–82. The plaintiffs in this case appealed the decision; however, following the Supreme Court’s ruling in *Ala. Ass’n of Realtors*, the appeal was dismissed as moot. *Brown v. Sec’y, HHS*, 20 F.4th 1385, 1385 (11th Cir. 2021). This case is only used as an example of a broader interpretation a court could use to analyze the CDC’s authority under section 361.

74. *Brown*, 497 F. Supp. 3d at 1282.

75. *See Skyworks, Ltd. v. Ctrs. for Disease Control & Prevention (CDC)*, 524 F. Supp. 3d 745, 759 (N.D. Ohio 2021) (finding that the eviction order exceeds the CDC’s statutory authority under the PHSA); *Tiger Lily, LLC v. HUD*, 5 F.4th 666, 673 (6th Cir. 2021) (same).

76. 141 S. Ct. 2485 (2021) (per curiam).

77. *Id.* (repealing Temporary Halt in Residential Evictions in Communities with Substantial or High Transmission of COVID-19 to Prevent the Further Spread of COVID-

the CDC relied on the first sentence of section 361(a) of the PHSA, contending that it provided the CDC broad authority to take whatever measures it deemed necessary to control the spread of COVID-19.⁷⁸ However, the Court reasoned that the second sentence of section 361(a) “informs the grant of authority” by providing a list of measures that may be necessary.⁷⁹ The Court described how the measures listed in section 361(a)—“inspection, fumigation, disinfection, sanitation, pest extermination, destruction of animals or articles found to be so infected or contaminated as to be sources of dangerous infection to human beings”—all directly related to preventing the spread of disease because the measures are directed at identifying, isolating, and destroying the disease itself.⁸⁰

In contrast, the Court determined that the eviction moratorium related to interstate infection in such an indirect way that it was a stretch for the CDC to rely on section 361(a) to provide it with the authority to invoke the order.⁸¹ Following the Supreme Court’s holding in *Alabama Ass’n of Realtors*, the question remains of what actions are left for the CDC to take in the face of a future pandemic.⁸² While the Court made clear that the CDC does not have the authority to issue regulations relating to evictions under the current section 361, it left undecided what CDC actions would be permissible.⁸³ Uncertainty about the scope of its authority to act to combat a future pandemic creates a risk of the CDC experiencing unnecessary delay to a process that depends on a quick and efficient response.

Since Congress enacted section 361 in 1944, it has only significantly amended the provision once following the 2001 anthrax attacks.⁸⁴ The 2002 amendments expanded the HHS Secretary’s authority to enable the

19, 86 Fed. Reg. 43,244 (Aug. 6, 2021)).

78. 86 Fed. Reg. at 43,244.

79. *Ala. Ass’n of Realtors*, 141 S. Ct. at 2488.

80. See 42 U.S.C. § 264(a); *Ala. Ass’n of Realtors*, 141 S. Ct. at 2488.

81. See *Ala. Ass’n of Realtors*, 141 S. Ct. at 2488 (“If evictions occur, some subset of tenants might move from one State to another, and some subset of that group might do so while infected with COVID-19. This downstream connection between eviction and the interstate spread of disease is markedly different from the direct targeting of disease that characterizes the measures identified in the statute.” (citation omitted)).

82. See *Ala. Ass’n of Realtors*, 141 S. Ct. at 2489.

83. See *id.*

84. See SHEN, *supra* note 6, at 11 (describing how Congress updated section 361 once in 2002 “as part of the Public Health Security and Bioterrorism Preparedness and Response Act of 2002” to respond to bioterrorist threats after the anthrax attacks). Congress also amended section 361 in 1971 to clarify that the term “States” includes several states and the District of Columbia. *Id.*

nation to more effectively respond to public health emergencies given what was learned from the anthrax attacks.⁸⁵ Just as the anthrax attacks demonstrated the need for congressional reform of the PHSA, the COVID-19 pandemic demonstrates it is time for Congress to act again.⁸⁶

III. JUDICIAL DEFERENCE

A person who is adversely affected or aggrieved by an agency's action is entitled to judicial review of that action under the relevant statute the agency claims as the basis of its authority.⁸⁷ A reviewing court is directed to set aside an agency action that it deems unlawful.⁸⁸ When reviewing actions taken by administrative agencies, the Supreme Court has established different levels of deference to afford to administrative agencies.⁸⁹ In *Chevron U.S.A., Inc. v. Natural Resources Defense Council*,⁹⁰ the Court delineated a two-step framework for review of agency actions.⁹¹ At step one, the question is whether Congress addressed

85. See Public Health Security and Bioterrorism Preparedness and Response Act of 2002 § 142, Pub. L. No. 107-188, 116 Stat. 594, 626-27; SHEN, *supra* note 6, at 11 (noting that the 2002 amendments “primarily expanded the HHS Secretary’s authority in two ways”: (1) by eliminating a provision that allowed the Secretary to issue quarantine rules only if they were recommended by the National Advisory Health Council, and (2) permitting the quarantine of individuals who are reasonably believed to be in the “precommunicable stage” if the disease would be likely to cause a public health emergency if spread).

86. See C. STEPHEN REDHEAD, DONNA U. VOGT & MARY TIEMANN, CONG. RSCH. SERV., RL31263, PUBLIC HEALTH SECURITY AND BIOTERRORISM PREPAREDNESS AND RESPONSE ACT (P.L. 107-188): PROVISIONS AND CHANGES TO PREEXISTING LAW 1-2 (2002) (explaining the anthrax attacks’ impact on the public health system).

87. 5 U.S.C. § 702.

88. § 706 (“The reviewing court shall—(1) compel agency action unlawfully withheld or unreasonably delayed; and (2) hold unlawful and set aside agency action, findings, and conclusions found to be—(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (D) without observance of procedure required by law . . .”).

89. See *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984) (explaining that if a statute is “silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute”); *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001) (considering the limits of *Chevron* deference owed to administrative interpretation and implementation of a statutory provision); *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (holding that when an agency interprets its own regulations, the agency’s interpretation is controlling unless plainly erroneous).

90. 467 U.S. 837 (1984).

91. Despite *Chevron* still being good law, the Supreme Court has not cited it as a basis for its

the specific issue before the court.⁹² If Congress has addressed the issue, the court enforces Congress's unambiguous intent.⁹³ However, if the court concludes the statute is ambiguous or silent about the specific issue, then the court defers to the agency's reasonable interpretation.⁹⁴ *Chevron* deference is justified by the idea that "[t]he responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones"⁹⁵ Further, agencies are more familiar with the changing facts and circumstances of the subjects they are regulating and should be provided with the flexibility to adapt rules and policies to these changing facts and circumstances.⁹⁶

After *Chevron*, the Supreme Court laid out additional considerations for reviewing courts beyond the initial two-step framework.⁹⁷ In *FDA v. Brown & Williamson Tobacco Corp.*,⁹⁸ the Court considered whether the Food and Drug Administration (FDA) was authorized to regulate tobacco products.⁹⁹ The Court noted that when determining whether Congress has directly spoken on the specific issue, as would be the first step of the *Chevron* analysis, the inquiry is also shaped by the nature of that specific issue.¹⁰⁰ The Court described the premise of *Chevron* deference to an agency's interpretation of a statute as based on the idea that when Congress makes a statute ambiguous, it has implicitly delegated authority to the agency to fill in statutory gaps.¹⁰¹

holding since 2016, and it has ignored it in several recent cases involving agency statutory interpretation. See James Kunhardt & Anne Joseph O'Connell, *Judicial Deference and the Future of Regulation*, BROOKINGS (Aug. 18, 2022), <https://www.brookings.edu/research/judicial-deference-and-the-future-of-regulation/>. Although the Supreme Court has not addressed *Chevron* recently, lower courts continue to raise *Chevron* in opinions. See Stephen Alexander Vaden, *Chevron Deference in the Circuit Courts: An Empirical Study*, THE FEDERALIST SOC'Y (Aug. 17, 2016), <https://fedsoc.org/commentary/fedsoc-blog/chevron-deference-in-the-circuit-courts-an-empirical-study>.

92. See *Chevron*, 467 U.S. at 842.

93. See *id.* at 842–43.

94. See *id.* at 843.

95. *Id.* at 866.

96. *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 41–42 (1983) (quoting *Permian Basin Area Rate Cases*, 390 U.S. 747, 784 (1968)).

97. See *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000).

98. *Id.*

99. *Id.* at 125–26.

100. See *id.* at 159. The Court relied on a law review article written by Justice Breyer to support this assertion. See *id.* (quoting Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 370 (1986)). However, Justice Breyer disagreed with the majority and dissented in the case. *Id.* at 161 (Breyer, J., dissenting).

101. *Id.* at 159.

The Court followed this reference to *Chevron* by noting that “[i]n extraordinary cases, however, there may be reason to hesitate before concluding that Congress has intended such an implicit delegation.”¹⁰²

Further, in *King v. Burwell*,¹⁰³ the Court reviewed the meaning of a statutory phrase in a provision of the Affordable Care Act dealing with the distribution of tax credits for buying health insurance and the Internal Revenue Service’s (IRS) interpretation of that provision.¹⁰⁴ The Court addressed *Chevron* but did not apply it as the framework for judicial review in the case.¹⁰⁵ The Court, citing *Brown & Williamson*, decided that the *Chevron* doctrine was inapplicable to the question in this case—whether tax credits were available for citizens who purchased health insurance on Federal Exchanges—because it was a question of “deep economic and political significance.”¹⁰⁶ The Court reasoned that if Congress wanted to assign such a question, which was crucial to the workability of the Affordable Care Act, to an administrative agency, then it would have expressly done so.¹⁰⁷ The Court further noted that it was especially unlikely that Congress would have delegated this authority to the IRS given the agency’s lack of expertise in the healthcare area.¹⁰⁸ Nevertheless, after declining to invoke *Chevron*, the Court upheld the IRS interpretation.¹⁰⁹

This form of review of agency actions where courts consider whether the initial question is “major” became known as the major questions doctrine,¹¹⁰ a label which the Court expressly adopted in *West Virginia v. EPA*.¹¹¹ In holding that the EPA lacked the statutory authority under the Clean Air Act to regulate carbon emissions to combat climate change, the Court stated that the case was a “major questions case.”¹¹² The Court addressed the reason for adopting the major questions doctrine in express terms, explaining that the doctrine identifies a body of law that developed over several significant cases where the Court saw a particular and recurring problem of agencies asserting extensive power beyond what Congress could reasonably be understood to have granted.¹¹³ Thus, lower

102. *Id.*

103. 576 U.S. 473 (2015).

104. *Id.* at 483.

105. *Id.* at 485–86.

106. *Id.* (internal quotations omitted).

107. *Id.* at 486.

108. *Id.*

109. *See id.* at 485–86, 498.

110. *See BOWERS & SHEFFNER, supra* note 23.

111. 142 S. Ct. 2587 (2022).

112. *Id.* at 2610.

113. *Id.* at 2609.

courts now invoke this doctrine as a method to bypass issues of the degree of deference to be afforded to agencies.¹¹⁴ This means that unless the CDC's authority is expressly delineated by Congress, future CDC actions could very well be called into question under the major questions doctrine, as it is hard to imagine what emergency actions to protect public health could not be classified as having a significant economic or political impact.

Given that the Supreme Court has yet to provide clear guidelines for the major questions doctrine, comparing recent cases where the doctrine was invoked to cases where it was not is the best tactic so far to understand the scope of the doctrine.¹¹⁵ Two cases in particular provide insight on what the Court may view as a situation that raises the major questions doctrine: *Biden v. Missouri*¹¹⁶ and *National Federation of Independent Business (NFIB) v. OSHA*.¹¹⁷ In *Biden*, the Court determined that the HHS Secretary, acting through Centers for Medicare & Medicaid (CMS), could require medical facilities receiving federal funds to ensure that its workers are vaccinated against COVID-19.¹¹⁸ Despite the question of requiring a large amount of employees to receive the COVID-19 vaccine being what many—including the dissenting justices—view as a major question, the majority did not invoke the major questions doctrine in its reasoning.¹¹⁹

However, in *NFIB*, when the Court considered virtually the same question as in *Biden*—whether an agency had the statutory authority to mandate COVID-19 vaccines in the workplace—the Court applied the major questions doctrine and found that the petitioners were likely to succeed on the claim that the agency exceeded its statutory authority.¹²⁰ In *NFIB*, the Court considered whether the Secretary of Labor, acting through OSHA, had the authority to issue a rule mandating that employers with more than

114. See Natasha Brunstein & Richard L. Revesz, *Mangling the Major Questions Doctrine*, 74 ADMIN. L. REV. 217, 219 (2022) (noting that the major questions doctrine was only invoked in five cases before the end of the Trump Administration and describing the increase in application of the doctrine as supporting a “deregulatory assault on the administrative state”).

115. See KATE R. BOWERS, CONG. RSCH. SERV., IF12077, THE MAJOR QUESTIONS DOCTRINE 1 (2022).

116. 142 S. Ct. 647 (2022) (per curiam).

117. 142 S. Ct. 661 (2022) (per curiam).

118. See 142 S. Ct. at 653.

119. See *id.* at 658 (2022) (Thomas, J., dissenting) (describing HHS's rule as “undoubtedly significant” given that it “requires millions of healthcare workers to choose between losing their livelihoods and acquiescing to a vaccine they have rejected for months”).

120. See *NFIB*, 142 S. Ct. at 668 (2022) (Gorsuch, J., concurring) (stating that the Court rightly applied the major questions doctrine to conclude that OSHA did not clearly have the statutory authority to authorize its vaccine mandate.)

100 employees require those employees to receive the COVID-19 vaccine.¹²¹ Although the Court reviewed the actions of different agencies under different statutes, the underlying question of whether an administrative agency through its enabling statutes has the authority to mandate vaccines is the same in *Biden* and *NFIB*.¹²² And yet, only in *NFIB* was the question significant enough to raise the major questions doctrine.¹²³

One notable difference between *NFIB* and *Biden* is the amount of people the Court noted would be impacted by the agencies issuing the vaccine mandates.¹²⁴ In *Biden*, the vaccine mandate was limited to the healthcare industry and would affect around ten million workers.¹²⁵ By contrast, in *NFIB*, the vaccine mandate would affect workers across all industries, an estimate of around eighty-four million employees.¹²⁶ While this is only one difference between the two cases, it nevertheless provides agencies, such as the CDC, a factor to consider when promulgating rules.

IV. RECOMMENDATIONS

Ensuring that the CDC is in the best position to handle a future public health crisis requires a coordinated effort within the federal government. The CDC should ensure to the best of its abilities that it can act quickly and efficiently by implementing internal procedures and coordinating with other White House offices to address recent restrictions on its rulemaking authority. While the CDC acknowledged specific issues after its internal review, it has not addressed issues raised in recent litigation.¹²⁷ Recognizing current applications of judicial review of agency actions and application of the APA is crucial to ensuring the CDC is wholly capable of combatting the next potential emergency public health threat. There are two approaches to alleviating the restrictions on the CDC's rulemaking authority: through Congress and through the CDC.

A. Congressional Reform: Amending the Public Health Service Act

The clearest solution to allow the CDC more flexibility to carry out its

121. *Id.* at 662 (per curiam).

122. *Compare id.*, with *Biden*, 142 S. Ct. at 650 (per curiam).

123. *See NFIB*, 142 S. Ct. at 668 (Gorsuch, J., concurring).

124. *Compare id.* at 667 (impacting around 84 million people), with *Biden*, 142 S. Ct. at 655 (Thomas, J., dissenting) (impacting around 10 million people.)

125. *See Biden*, 142 S. Ct. at 657.

126. *See NFIB*, 142 S. Ct. at 662.

127. *See Sun*, *supra* note 4.

public health mission is for Congress to enact legal reforms to modernize the PHSA.¹²⁸ Given that the PHSA was enacted in 1944 and has since only seen one major amendment, the Act is not equipped to cover major societal changes that increase the threat of infectious diseases.¹²⁹ Further, the uncertainty created by recent court decisions regarding whether section 361 should be interpreted broadly or narrowly could be remedied in part by Congress updating the section 361 authority.¹³⁰ Although the drafters of the PHSA explicitly stated that the provisions in section 361 are “written in broader terms in order to cope with emergency situations we cannot now foresee,” recent application of the major questions doctrine poses complications to the CDC relying on a court following a broad interpretation of the PHSA when reviewing its actions.¹³¹ The major questions doctrine calls for Congress to speak clearly when it delegates authority of economic and political significance to an administrative agency, yet as the drafters of the PHSA recognized, Congress cannot predict unforeseen health emergencies that will require the CDC to take specific actions not expressly dictated.¹³²

Regardless of the fact that Congress cannot incorporate all potential mitigating measures an agency may take into section 361, COVID--19 and recent litigation have provided some specific examples that Congress could clarify as expressly delegated authority under section 361.¹³³ After reviewing recent court decisions involving the CDC, a committee of the National Academies provided recommendations for modernizing the PHSA to ensure the CDC has the authority to effectively prevent and mitigate future health threats.¹³⁴ The committee recommended Congress amend the PHSA to add a new subsection that would specify measures the CDC could take in addition to the enumerated list in section 361(a).¹³⁵ Drawing on language used in other subsections, the committee proposed a section 361(f) that would provide as follows:

Regulations prescribed under this section may provide for restrictions on or requirements for persons engaged in international or interstate travel,

128. See NAT'L ACADEMIES, *supra* note 50, at 171 (providing detailed recommendations for Congress to modernize the PHSA to clarify the scope and limits of the CDC's authority).

129. See *id.* (noting globalization as an example of a major societal change that can amplify the threat of infectious diseases).

130. See *id.*

131. See SHEN, *supra* note 6, at 31.

132. See *West Virginia v. EPA*, 142 S. Ct. 2587, 2605 (2022); SHEN, *supra* note 6, at 31.

133. See Requirement for Persons to Wear Masks While on Conveyances and at Transportation Hubs, 86 Fed. Reg. 8,025 (Feb. 3, 2021).

134. See NAT'L ACADEMIES, *supra* note 50, at 171.

135. *Id.* at 195.

requirements to wear face coverings or other personal protective equipment in specified settings, restrictions on mass gatherings, occupancy limits or sanitation requirements for gathering places, and protections related to housing and employment for the purpose of supporting compliance with public health guidance. These measures may be prescribed in the absence of individualized risk assessments only upon a determination by the HHS secretary that:

- (1) a public health emergency exists as set forth in section 247d(a) of this title;
- (2) apprehension, detention, examination, and conditional release of individuals based on known or reasonably suspected infection or exposure and inspection, fumigation, disinfection, sanitation, pest extermination, or destruction of animals or articles found to be infected or contaminated would not be effective in preventing the introduction, transmission, or spread of a designated list of communicable diseases from foreign countries into the States or possessions, or from one State or possession into any other State or possession; and
- (3) [State, tribal, local, and territorial] regulations are insufficient to prevent the introduction, transmission, or spread of communicable diseases from foreign countries into the States or possessions, or from one State or possession into any other State or Possession.¹³⁶

Congress should amend section 361 of the PHS Act to adopt the committee's proposed subsection to allow the CDC more flexibility to carry out public health measures in the face of an emergency. The COVID-19 pandemic brought to light specific measures that can be implemented to prevent the spread of an infectious airborne disease.¹³⁷ The CDC should have clearly stated authority to implement these measures to combat the next public health crisis. The committee's proposed subsection provides specific language that would prevent courts from relying on the enumerated list in section 361(a) as the only "necessary measures" the CDC may take.¹³⁸ The committee's proposed subsection also provides safeguards to ensure the CDC's power does not expand without limits.¹³⁹

By allowing for agencies to implement additional measures—such as face mask mandates—only when measures specified under section 361(a)–(d) are ineffective, there is a public health emergency, and state and local government actions are insufficient to prevent the spread of disease, the committee's proposed subsection also makes it clear that regulations prescribed under the proposed subsection are only to be used

136. *Id.* at 196.

137. *See* Requirement for Persons to Wear Masks While on Conveyances and at Transportation Hubs, 86 Fed. Reg. 8,025, 8,026.

138. *See* NAT'L ACADEMIES, *supra* note 50, 194–96; 42 U.S.C. § 264(a).

139. *See* NAT'L ACADEMIES, *supra* note 50, at 191–94.

in the direst situations.¹⁴⁰ Unfortunately, no bills have been introduced so far to propose amending section 361 to allow the CDC broader authority as the committee's proposed subsection would.¹⁴¹ On the contrary, several recently introduced bills would have the opposite effect and specifically dictate that the CDC has no authority under the PHSA to require individuals to wear a mask during travel.¹⁴²

B. Perfecting Good Cause as an Exception to the APA's Rulemaking Requirements

The CDC should set forth internal standards and guidance for when it is relying on the good cause exceptions to the APA's rulemaking requirements.¹⁴³ When dealing with an emergency situation, such as a future health crisis, the CDC will need to act quickly in issuing regulations to combat the threat.¹⁴⁴ Therefore, the CDC may often need to bypass the notice-and-comment requirement of the APA and allow the regulation to immediately take effect.¹⁴⁵ The CDC needs to be mindful of all possible issues a reviewing court may take with the agency bypassing the APA's requirements and shape its actions accordingly.¹⁴⁶ The CDC should ensure that when it is attempting to show good cause to forgo notice-and-comment and avoid the thirty-day effective date requirement, it should always provide detailed findings and rationale supporting its decisions.¹⁴⁷ Although following the written terms of the APA would require only a "brief statement of reasons," some courts have relied on a lack of explanation as demonstrating good cause did not exist.¹⁴⁸

140. *See id.* at 195–96.

141. *See id.* at 190–91.

142. *See, e.g.,* H.R. 375, 117th Cong. (1st Sess. 2021) ("To provide that no persons may be required to wear a face covering on Federal property or while traveling in interstate commerce, and for other purposes.").

143. *See* 5 U.S.C. § 553(b)(B).

144. *See* Requirement for Persons to Wear Masks While on Conveyances and at Transportation Hubs, 86 Fed. Reg. 8,025, 8,026 (Feb. 3, 2021).

145. *See* 5 U.S.C. § 553.

146. *See generally* Health Freedom Def. Fund, Inc. v. Biden, 599 F. Supp. 3d 1144 (M.D. Fla. 2022) (highlighting the outcome of the CDC fast tracking their actions).

147. *See id.* at 1167–68 (noting how the APA requires findings and a statement of reasons for invoking the good cause exception to notice-and-comment and finding the CDC's explanation for its mask mandate to be "a single conclusory sentence" that "does not carry its burden" to invoke the good cause exception).

148. *See id.* at 1167–69 (determining that the CDC did not properly explain its reasoning for relying on the good cause exemption).

As discussed above, in *Health Freedom Defense Fund*, the court took issue with the CDC forgoing the APA's rulemaking requirements, claiming that the agency failed to provide a sufficient explanation for invoking good cause to promulgate its rule immediately and without offering notice-and-comment.¹⁴⁹ While it may be clear that issuing a mask mandate to protect the nation from an increase in deaths warrants a good cause exception, the CDC may not have foreseen the extreme politicization of a mask mandate and the potential methods reviewing courts could use to strike down the regulation.¹⁵⁰ Given what is at stake in a public health crisis, the CDC must ensure its rules are not struck down by courts for preventable reasons, such as lack of detailed findings and explanations for invoking the good cause exception.¹⁵¹

In *Florida v. Becerra*,¹⁵² the court scrutinized the CDC for its failure to comply with notice-and-comment procedures when the CDC issued a conditional no-sail order aimed at re-opening the cruise ship industry following its previous series of no-sail orders that halted the cruise ship industry from operating.¹⁵³ The CDC claimed, as it did in *Health Freedom Defense Fund* regarding the mask mandate, that the conditional no-sail order was not a rule within the meaning of the APA, or if it was, the agency had good cause to forgo typical notice-and-comment procedures and avoid a delay in the order taking effect.¹⁵⁴ The CDC should ensure it follows appropriate procedures to allow for transparency and to foster the public's trust.¹⁵⁵ Instead of attempting to claim its rules are not "rules" within the meaning of the APA, the CDC should issue "interim-final" rules.¹⁵⁶ The

149. *See id.* While many view the court's rationale in this case as problematic, it nevertheless demonstrates a situation that the CDC should be aware of when promulgating rules in a future emergency. *See* Joe Hernandez & Selena Simmons-Duffin, *The Judge Who Tossed Mask Mandate Misunderstood Public Health Law, Legal Experts Say*, NPR (Apr. 19 2022, 6:23 PM), <https://www.npr.org/sections/health-shots/2022/04/19/1093641691/mask-mandat-e-judge-public-health-sanitation> (quoting Georgia State University law professor Erin Fuse Brown on her thoughts about the court's reasoning in *Health Freedom Defense Fund*: "If one of my students turned in this opinion as their final exam, I don't know if I would agree that they had gotten the analysis correct").

150. *See* Weber & Barry-Jester, *supra* note 17.

151. *See* 5 U.S.C. § 553.

152. 544 F. Supp. 3d 1241 (M.D. Fla. 2021)

153. *See id.* at 1295–97; Framework for Conditional Sailing and Initial Phase COVID-19 Testing Requirements for Protection of Crew, 85 Fed. Reg. 70,153 (Nov. 4, 2020).

154. *See Becerra*, 544 F. Supp. 3d at 1294; *Health Freedom Def. Fund*, 599 F. Supp 3d at 1167.

155. *See* NAT'L ACADEMIES, *supra* note 50, at 192 (calling for reforms to ensure the CDC is following appropriate procedures set forth in the APA, Congressional Review Act, and other statutes).

156. *See* Michael Asimow, *Interim-Final Rules: Making Haste Slowly*, 51 ADMIN. L. REV. 703,

CDC can then offer a post-promulgation opportunity for final comment to allow the public the opportunity to comment on the rule.¹⁵⁷ The CDC may then have the opportunity to take into account the public's comments and confirm its rule before a court has the opportunity to review.¹⁵⁸

In *Little Sisters of the Poor v. Pennsylvania*,¹⁵⁹ a case about a contraceptive mandate, the Supreme Court chose not to address whether the government had good cause to forgo notice-and-comment; the Court reasoned that since the government had allowed post-promulgation notice-and-comment, it was unnecessary to address this argument.¹⁶⁰ If the CDC allows for post-promulgation notice-and-comment every time it issues a rule under the good cause exceptions then by the time a reviewing court has the opportunity to review a challenged rule, it may find any notice-and-comment arguments unnecessary to address.¹⁶¹ Further, a number of courts have noted that allowing and considering post-promulgation comments strengthens the view that even if the agency's initial good cause claim was wrongful, it could be considered a harmless error.¹⁶²

C. *Delineating the Scope of Judicial Review of CDC Actions*

While the CDC could not have foreseen the application of the major questions doctrine in the context of a pandemic given the limited application of the doctrine until recent cases, the CDC is now aware of its use and should coordinate internally to strategize the best approach to avoid running afoul of the doctrine during judicial review.¹⁶³ The major questions doctrine calls

704 (1999) (explaining interim-final rulemaking as adopting rules that commence without public comment and prior notice but allow for post-effective public comment).

157. See Adoption of Recommendations, 60 Fed. Reg. 43,108, 43,112–13 (Aug. 18, 1995) (recommending that agencies using interim-final rulemaking should always provide for post-promulgation comment when issuing rules where prepromulgation comment is excused under the good cause exemption of 5 U.S.C. § 533(b)(3)(B) as “impracticable” or “contrary to the public interest”).

158. See LUBBERS, *supra* note 36, at 105 (noting that courts look more favorably on an agency action when the agency has responded in good faith to post-promulgation comments).

159. 140 S. Ct. 2367 (2020).

160. See *id.* at 2386 n.14.

161. See *id.* at 2384–86.

162. See LUBBERS, *supra* note 36, at 104–05 (explaining that while a post-promulgation comment opportunity is not a substitute for pre-promulgation comment, it puts an agency in a better position on judicial review).

163. Carrie Jenks, Hannah Oakes Dobie & Sara Dewey, *Supreme Court Embraces the Major Questions Doctrine as Limiting but Leaving the Door Open for Power Sector GHG Regulations*, ENV'T & ENERGY

for Congress to speak clearly when it is directing authority of vast economic and political significance to an administrative agency.¹⁶⁴ Amending the PHSA to include more specific language of actions the CDC may take will provide the CDC a means to avoid running afoul of the doctrine.¹⁶⁵ For example, if Congress amends the PHSA to specify that regulations prescribed under section 361 include requiring individuals to wear face coverings in specified settings, a reviewing court could not say that Congress did not speak clearly in delegating this authority to the CDC.¹⁶⁶ However, Congress cannot account for unforeseen events that may prompt the CDC to take actions that are not delegated to it in specific language. When the CDC promulgates future rules that do not have a clear direct nexus to preventing the spread of disease because they affect an area outside of public health—like eviction moratoria—or are affecting a vast majority of people, the rule may be challenged, and courts may invoke the major questions doctrine to invalidate the rule.¹⁶⁷

Many scholars have grappled with how to define the scope of the major questions doctrine given its inconsistent application over the years.¹⁶⁸ Recently, the Supreme Court appears to have drawn a faint line in invoking the major questions doctrine in cases where the impact of the rule affects what the Court determines is a significant amount of people.¹⁶⁹ When the

L. PROGRAM (July 1, 2022), <https://eelp.law.harvard.edu/2022/07/supreme-court-embraces-the-major-questions-doctrine-as-limiting-but-leaving-the-door-open-for-power-sector-ghg-regulations/> (noting that the Supreme Court embraced the major questions doctrine in its 2022 *West Virginia v. EPA* decision, and that prior to the decision, this was not the anticipated outcome).

164. See *West Virginia v. EPA*, 142 S. Ct. 2587, 2605, 2614 (2022) (linking the requirement that Congress should “speak clearly” about significant questions, which the Court has relied on in the past, to the major questions doctrine).

165. See *supra* notes 129–31 and accompanying text.

166. With respect to the eviction moratorium, some of the reviewing lower courts raised the question of whether it would raise a nondelegation problem if Congress had expressly delegated authority to the CDC to issue regulations such as the eviction moratorium. See, e.g., *Tiger Lily LLC v. HUD*, 992 F.3d 518, 523 (9th Cir. 2021). This would be worth considering to ensure amendments to the PHSA do not go so far that nondelegation issues are raised.

167. See *Ala. Ass’n of Realtors v. HHS*, 141 S. Ct. 2485, 2490 (2021) (per curiam).

168. See, e.g., Beau J. Baumann, *The Major Questions Doctrine Reading List*, YALE J. ON REGUL.: NOTICE & COMMENT (Nov. 21, 2022), <https://www.yalejreg.com/nc/the-major-questions-doctrine-reading-list-by-beau-j-baumann/> (assembling various literature regarding the major questions doctrine).

169. Compare *Biden v. Missouri*, 142 S. Ct. 647, 652–53 (2022) (per curiam) (choosing not to invoke the major questions doctrine and finding it permissible for the HHS Secretary to mandate vaccines in the healthcare industry), with *NFIB v. OSHA*, 142 S. Ct. 661, 665 (2022)

CDC considers promulgating a rule that might have a significant effect on a vast amount of people and affects an area that is not directly in line with the agency's expertise, CDC leadership, in coordination with other executive branch entities, should first consider if the CDC is the best agency to promulgate the rule.¹⁷⁰ The CDC's overall goal is to protect public health, and while the CDC may find that issuing a certain rule is the best way to achieve this goal, the CDC may not always be the agency in the best position to do so.¹⁷¹ Considering the CDC's eviction moratorium, for example, the order affected a large number of people, and according to the Supreme Court, the nexus between the order and the need to prevent the spread of disease was far from direct.¹⁷² Ultimately, it is unlikely that any other administrative agency had the authority to issue the eviction moratorium; however, it nevertheless exemplifies a situation that should give rise to asking whether the CDC is the best agency to act.¹⁷³ Further, when a coordinated government examination determines that the CDC is the agency with the clearest authority to issue a rule that is necessary to protect public health but lacks a clear nexus to preventing the spread of disease because it affects an area outside of public health, the CDC should communicate with other agencies to ensure it is acting in the most effective way.¹⁷⁴

When the CDC issues a rule that has a direct nexus to public health but affects a significant amount of people, the CDC should issue several minor rules that have the same larger effect, but each individually impact a smaller range of people. For example, instead of issuing one rule requiring individuals to wear masks while traveling on all conveyances, the CDC should issue one rule requiring people to wear masks on airplanes, one rule requiring people to wear masks on trains, one rule requiring people to wear masks on buses, and so forth. This could potentially work around a court

(per curiam) (invoking the major questions doctrine and finding it impermissible for OSHA to mandate vaccines, weekly testing, and masks in the workplace when it would affect workers across all industries).

170. See 86 Fed. Reg. 43,244, 43,245 (instating an eviction moratorium).

171. See DAVID CARPENTER, CONG. RSCH. SERV., LSB10632, LITIGATION OF THE CDC'S EVICTION MORATORIUM 7 (2021).

172. See *supra* notes 76–82 and accompanying text.

173. See CARPENTER, *supra* note 171, at 2–6 (explaining the statutory and constitutional challenges to the CDC's eviction moratorium).

174. See Ilya Somin, *The CDC's New Eviction Moratorium Has Virtually all the Same Flaws as the Old*, VOLOKH CONSPIRACY (Aug. 3, 2021, 9:41 PM), <https://reason.com/volokh/2021/08/03/the-cdcs-new-eviction-moratorium-has-virtually-all-the-same-flaws-as-the-old/> (describing how the CDC's eviction moratorium was flawed in many aspects).

invoking the major questions doctrine when reviewing a rule because evaluated individually, the regulations would affect a smaller amount of people.¹⁷⁵ The difference in the amount of people affected by the agency's actions in *Biden* versus the agency's actions in *NFIB* could provide insight into how "significant" the Court views a certain rule and detail more of a guideline for the CDC to avoid major questions when it's issuing its rules.¹⁷⁶ The CDC should issue individual minor rules that are targeted at a specific and smaller group of people, like in *Biden*, instead of one wide-reaching major rule that impacts a significant amount of people like in *NFIB*.¹⁷⁷

Although issuing a series of minor rules is a tactic for the CDC to consider, it does present some notable downfalls. Issuing a series of minor rules like the example illustrated above in such an obvious way may lead a reviewing court to view the tactic as a ruse. Further, the CDC would then be required to make separate explanations for each of its minor rules, slowing the process and perhaps straining agency resources with the stress of issuing multiple regulations at once. For example, in the above illustration of promulgating minor rules requiring masking on public transportation, the CDC would need individual explanations to emphasize the need for individual rules for each subset of transportation modalities. Regardless of the downfalls, it is a tactic for the leadership within CDC to consider.

The Supreme Court appears to have adopted the major questions doctrine in part as a cautionary note to agencies to recognize the required separation of powers and how issuing major rules is likely beyond the bounds of administrative agencies' authority under the Constitution.¹⁷⁸ That being said, by issuing minor rules, the CDC would arguably be doing what the Court wanted and avoiding major questions.¹⁷⁹ Further, the CDC should not be faulted for developing new tactics to accomplish its mission because that appears to be exactly what the current Court is doing with the major questions doctrine.¹⁸⁰

Ultimately, the best approach for the CDC to determine the scope of its

175. See *Biden v. Missouri*, 142 S. Ct. 647, 652–53 (2022) (per curiam) (choosing not to apply the major questions doctrine in a situation where the challenged rule would only affect a specific and smaller group of people).

176. See *id.* at 650–51; *NFIB v. OSHA*, 142 S. Ct. 661, 665 (2022) (per curiam).

177. See *NFIB*, 142 S. Ct. at 668; *Biden*, 142 S. Ct. at 650–51.

178. See *West Virginia v. EPA*, 142 S. Ct. 2587, 2616–17 (2022) (Gorsuch, J., concurring).

179. See *id.*

180. See, e.g., John C. Coffee, Jr., *The Most Dangerous Branch: Is the Supreme Court Dismantling the Administrative State?*, THE CLS BLUE SKY BLOG (Mar. 7, 2022), <https://clsbluesky.law.columbia.edu/2022/03/07/the-most-dangerous-branch-is-the-supreme-court-dismantling-the-administrative-state/> (providing a brief overview on recent Supreme Court decisions).

authority and navigate the major question doctrine is to coordinate within the government to strategize the most efficient plan for responding to a future pandemic. The CDC could consult the Department of Justice Office of Legal Counsel to determine the current scope of its authority to issue emergency rules in a future pandemic.¹⁸¹ Although this option may present issues if the Office of Legal Counsel issues an opinion that is unfavorable to the CDC, the CDC could at least prepare to handle these recent restrictions and avoid issuing rules beyond the scope of its authority just to eventually have a reviewing court invalidate them. Having an official opinion issued by the Office of Legal Counsel might also prompt action within the government to come up with more substantial solutions to any restrictions on the CDC's rulemaking authority.¹⁸²

CONCLUSION

Despite being the primary agency charged with protecting public health, the CDC's authority and procedures have been relatively underexamined. However, even if the CDC had been fully prepared and funded to handle the COVID-19 pandemic, it would still likely have encountered external barriers given that it expanded on its authority to an unprecedented extent.¹⁸³ The CDC acted unprecedentedly because, since its establishment, there had never been a situation that required it to take the type of urgent and expansive action that the COVID-19 pandemic required.¹⁸⁴ While the CDC had its own missteps during its pandemic response, the lack of coordination between state and federal responses further exacerbated the pandemic in the United States, with devastating results compared to other high-income countries.¹⁸⁵

181. See *Office of Legal Counsel*, U.S. DEP'T OF JUST., <https://www.justice.gov/olc> (last visited May 9, 2023) (explaining how the Office of Legal Counsel provides legal advice to all executive branch agencies and listing recent opinions it issued).

182. WALTER E. DELLINGER, DAWN JOHNSEN, RANDOLPH MOSS, CHRISTOPHER SCHROEDER, JOSEPH R. GUERRA, BETH NOLAN, ET AL., *PRINCIPLES TO GUIDE THE OFFICE OF LEGAL COUNSEL* 2, 5 (2004).

183. See CARPENTER, *supra* note 171, at 1.

184. See Sun, *supra* note 4.

185. See Beth Duff-Brown, *Federalism Meets the COVID-19 Pandemic: Thinking Globally, Acting Locally*, STAN. HEALTH POL'Y (Apr. April 2, 2020), <https://healthpolicy.fsi.stanford.edu/news/federalism-meets-covid-19-pandemic-thinking-globally-acting-locally>; see also Kevin Kavanagh, *How Does the US Response to COVID-19 Compare With the Rest of the World?*, INFECTION CONTROL TODAY (Mar. 22, 2022), <https://www.infectioncontroltoday.com/view/how-does-us-response-covid-19-compare-rest-world-> (comparing the United States to countries like Sweden, Canada and Australia, where the United States was outperformed).

When a disease poses such an emergent threat that millions of lives are at risk, the CDC should lead the nation based on science, and it should have the legal authority to do so without facing backlash from other branches of government. At the very least, the CDC should be prepared to face and handle restrictions imposed by courts given the likelihood of challenges to its authority to act. Regardless of whether Congress amends the PHS Act to provide the CDC with the flexibility and authority to act, the CDC should cultivate its own measures to ensure it is doing its part to enact the most effective responses to future public health crises.