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Scope of CDC Authority Under Section 361 of the Public Health Service Act (PHSA)

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SUMMARY

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Scope of CDC Authority Under Section 361 of the Public Health Service Act (PHSA)

Since the beginning of the Coronavirus Disease 2019 (COVID-19) pandemic, all levels of government have grappled with how to stem the spread of the disease. Until the recent authorization of several COVID-19 vaccines, community mitigation activities (such as social distancing and use of face covering), combined with traditional tools of communicable disease control (such as testing, contact tracing, quarantine, and isolation)—have been the primary strategies used to reduce or prevent COVID-19 transmission.

Under the United States' federalist system, states and the federal government share regulatory authority over public health matters, with states traditionally exercising the bulk of authority in this area. Consistent with this framework, states and localities have been at the leading edge of the United States' pandemic response in many respects. For instance, to varying degrees, they issued mandates aimed at promoting the relevant public health measures, including temporary stay-at-home orders, restrictions on public gatherings, requirements to wear face coverings under specified circumstances, and quarantine requirements for out-of-state travelers. Because adherence to some of these measures—particularly ones that place restrictions on business operations—resulted in income losses for their residents and businesses, states have also issued orders aimed at alleviating the pandemic's associated economic impact. For example, many states temporarily halted evictions or provided other housing support to assist households that have experienced pandemic-related income losses that rendered them unable to pay rent. The federal government's pandemic response to date includes providing support to states through guidance, technical assistance, and funding, as well as providing certain direct assistance to private entities and individuals, including through several pandemic relief legislations.

The scale and nature of the pandemic have prompted some commentators to call for the imposition of public health orders at the federal level. In their view, coordinated federal action, rather than a patchwork of state-level orders, is the more effective approach to addressing COVID-19, given that the virus that causes COVID-19 is highly transmissible and can cause serious illness in some people. Commentators have considered whether Section 361 of the Public Health Service Act (PHSA) could serve as a source of authority for such federal executive action. Section 361 authorizes the Secretary of Health and Human Services (HHS Secretary)—who, in turn, delegated the authority to the Centers for Disease Control and Prevention (CDC) and the U.S. Food & Drug Administration (FDA)—to issue regulations "necessary" to prevent the foreign and interstate spread of communicable diseases.

In September 2020, the CDC—in the broadest invocation of its Section 361 authority to date—issued an order that nationally halted residential evictions for certain tenants under specified conditions. The CDC concluded that this eviction moratorium was necessary to prevent the interstate spread of COVID-19 because evictions could lead a sizeable portion of the population to become homeless or to relocate to new congregate living situations that increase the risk of COVID-19 transmission. The CDC's order—which could be characterized as both a public health and an economic regulation—could raise larger questions about the scope of agency authority under Section 361, including the CDC's authority to implement transmission control measures that have broader economic implications.

This report analyzes the potential scope of agency authority under Section 361. It begins by providing background regarding Section 361's text and enactment, followed by an overview of the legal principles relevant to analyzing the provision's scope. The report then applies these principles to conclude that transmission control measures that implicate major political and economic questions, or otherwise exceed agency expertise, potentially exceed the bounds of agency discretion under Section 361. The report further considers the text, structure, and legislative history of Section 361 and surmises that the provision may be susceptible to at least two plausible constructions. Under the narrower construction, the authority under Section 361(a) to issue "necessary" regulations would be limited to steps necessary in the enforcement of quarantine. Under a broader reading of Section 361, this authority would encompass any evidenced-based public health measures that do not otherwise involve major political and economic questions, or otherwise exceed constitutional limits. In the context of the COVID-19 pandemic, this broader construction may include, for instance, the authority to mandate face coverings to prevent the interstate and foreign spread of the disease. The report concludes with some considerations for Congress in light of the preceding analysis.

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Since the beginning of the Coronavirus Disease 2019 (COVID-19) pandemic, all levels of government have grappled with how to stem the spread of the disease.[1] Until the recent authorization of several COVID-19 vaccines,[2] community mitigation activities—including healthy hygiene practices, social distancing, avoidance of congregate settings, and use of face masks, combined with the traditional tools of communicable disease control such as detecting, testing, contact tracing,[3] quarantine (of healthy exposed persons),[4] and isolation (of infected persons)[5]—have been the primary strategies used to reduce or prevent COVID-19 transmission.[6] Even as COVID-19 vaccines become available, public health experts caution that the public health measures employed to date should continue,[7] given that data on the ability of the vaccines to reduce the transmission of SARS-CoV-2—the virus that causes COVID-19—and the duration of the vaccine's protection against COVID-19 are still being collected.[8]

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[1] *See, e.g.*, Rachel Treisman, *California Closes Indoor Businesses Statewide as COVID-19 Cases Surge*, NPR (July 13, 2020), https://www.npr.org/sections/coronavirus-live-updates/2020/07/13/890602390/california-closes-indoor-businesses-statewide-as-covid-19-cases-surge; *Deadwood Extends Mask Mandate to March 31*, BLACK HILLS PIONEER (Jan. 5, 2020), https://www.bhpioneer.com/covid-19/deadwood-extends-mask-mandate-to-march-31/article_5aaa7b78-4f84-11eb-b59f-8f3cd80ca94b.html; Sheryl Gay Stolberg, *Biden Unveils a National Pandemic Response That Trump Resisted*, N.Y. TIMES (Jan. 21, 2020), https://www.nytimes.com/2021/01/21/us/politics/biden-coronavirus-response.html.

[2] To date, the FDA issued emergency use authorizations (EUAs) for three COVID-19 vaccines. *See* U.S. FOOD & DRUG ADMIN., *FDA Takes Key Action in Fight Against COVID-19 by Issuing Emergency Use Authorization for First COVID-19 Vaccine* (Dec. 11, 2020), https://www.fda.gov/news-events/press-announcements/fda-takes-key-action-fight-against-covid-19-issuing-emergency-use-authorization-first-covid-19; U.S. FOOD & DRUG ADMIN., *FDA Takes Additional Action in Fight Against COVID-19 by Issuing Emergency Use Authorization for First COVID-19 Vaccine* (Dec. 18, 2020), https://www.fda.gov/news-events/press-announcements/fda-takes-additional-action-fight-against-covid-19-issuing-emergency-use-authorization-second-covid; U.S. FOOD & DRUG ADMIN., *FDA Issues Emergency Use Authorization for Third COVID-19 Vaccine* (Feb. 27, 2021), https://www.fda.gov/news-events/press-announcements/fda-issues-emergency-use-authorization-third-covid-19-vaccine.

[3] Contact tracing is a component of a public health investigation "used to identify the close contacts of persons infected with a communicable disease, notify them of potential exposure, and enable control measures such as quarantining exposed persons." CRS In Focus IF11609, *Contact Tracing for COVID-19: Domestic Policy Issues*, by Kavya Sekar and Laurie A. Harris.

[4] Quarantine refers to the separation of individuals or groups reasonably believed to have been exposed to a contagious disease, but who are not yet ill, from others who have not been so exposed, to prevent the possible spread of the disease. *See* CTRS. FOR DISEASE CONTROL & PREVENTION, *Legal Authorities for Isolation and Quarantine* (Feb. 24, 2020), https://www.cdc.gov/quarantine/aboutlawsregulationsquarantineisolation.html.

[5] Isolation refers to the separation of an individual or group infected with contagious disease from those who are healthy to prevent the spread of the disease. *See id.*

[6] *See* CTRS. FOR DISEASE CONTROL & PREVENTION, *Implementation of Mitigation Strategies for Communities with Local COVID-19 Transmission* (Oct. 29, 2020), https://www.cdc.gov/coronavirus/2019-ncov/community/community-mitigation.html.

[7] *See, e.g.*, Grace Dickinson, *Yes, You Still Need to Wear a Mask After You Get the COVID-19 Vaccine. Here's Why*, PHILA. INQUIRER (Dec. 21, 2020), https://www.inquirer.com/philly-tips/covid-vaccine-coronavirus-mask-vaccinated-efficacy-20201216.html; CTRS. FOR DISEASE CONTROL & PREVENTION, *Post Vaccine Considerations for Healthcare Personnel* (Dec. 13, 2020), https://www.cdc.gov/coronavirus/2019-ncov/hcp/post-vaccine-considerations-healthcare-personnel.html (stating that vaccinated health care providers "should continue to follow all current infection prevention and control recommendations to protect themselves and others from SARS-CoV-2 infection").

[8] *See* U.S. FOOD & DRUG ADMIN., *Pfizer-BioNTech COVID-19 Vaccine Frequently Asked Questions* (Jan. 6, 2021), https://www.fda.gov/emergency-preparedness-and-response/mcm-legal-regulatory-and-policy-framework/pfizer-biontech-covid-19-vaccine-frequently-asked-questions. The vaccines were authorized based on their efficacy in protecting vaccinated individuals from developing COVID-19 symptoms, not on their efficacy in preventing infection by SARS-CoV-2. *See id.* As the FDA notes, however, "[m]ost vaccines that protect from viral illnesses also reduce transmission of the virus that causes the disease by those who are vaccinated," but specific data on the authorized vaccines' ability to reduce the transmission of SARS-CoV-2 are not yet available. *See id.* Questions also remain as to whether the authorized vaccines would protect against new variants of COVID-19. *See* Andrew Joseph, *The Looming*

Under the United States' federalist system, states and the federal government share regulatory authority over public health matters, with states traditionally exercising the bulk of the authority in this area pursuant to their general police power.[9] This power authorizes states, within constitutional limits, to enact laws "to provide for the public health, safety, and morals" of the states' inhabitants.[10] In contrast to this general power, the federal government's power is confined to those powers enumerated in the Constitution.[11]

Consistent with this framework, states and localities have been at the leading edge of the United States' pandemic response in many respects.[12] For instance, to varying degrees, states have issued numerous mandates aimed at promoting the relevant public health measures, including temporary stay-at-home orders that require the closure of nonessential businesses,[13] restrictions on public gatherings,[14] requirements to wear face masks under specified circumstances,[15] and quarantine requirements for out-of-state travelers.[16] Because adherence to some of these measures—particularly ones that place restrictions on business operations—resulted in income losses for their residents and businesses, states also issued orders aimed at alleviating the pandemic's associated economic impact. For example, many states temporarily halted evictions or provided other housing support to assist households that experienced pandemic-related income losses rendering them unable to pay rent.[17] As another example, some states also provided businesses with temporary liability shields that insulate them to varying degrees from tort liabilities related to SARS-CoV-2 exposure.[18]

The federal government's pandemic response to date includes providing support to states through guidance, technical assistance, and funding, as well as providing certain direct assistance to private entities and individuals.[19] This support includes assistance through four COVID-19 supplemental appropriations bills passed in March and April 2020: (1) the Coronavirus Preparedness and Response Supplemental Appropriations Act, 2020;[20] (2) the Families First

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Questions Scientists Need to Answer About the New Variant of the Coronavirus, STAT (Dec. 21, 2020), https://www.statnews.com/2020/12/21/looming-questions-new-variant-coronavirus/.

[9] *See* Elizabeth Y. McCuskey, *Body of Preemption: Health Law Traditions and the Presumption Against Preemption*, 89 TEMPLE L. REV. 95, 113–20 (2016).

[10] Barnes v. Glen Theatre, Inc., 501 U.S. 560, 569 (1991).

[11] *See* CRS Report R45323, *Federalism-Based Limitations on Congressional Power: An Overview*, coordinated by Andrew Nolan and Kevin M. Lewis, at 1.

[12] *See* Rebecca L. Haffajee & Michelle M. Mello, *Thinking Globally, Acting Locally—The U.S. Response to COVID-19*, NEW ENG. J. MED. (May 28, 2020), https://www.nejm.org/doi/10.1056/NEJMp2006740.

[13] See CRS Legal Sidebar LSB10469, *Federal Authority to Lift or Modify State and Local COVID-19 "Stay-at-Home" Orders: Frequently Asked Questions*, by Jay B. Sykes.

[14] *See, e.g.*, S. Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613, 1613 (2020) (discussing California's executive order that places numerical restrictions on public gatherings).

[15] *See* Kaia Hubbard, *These States Have COVID-19 Mask Mandates*, U.S. NEWS (Dec. 2, 2020), https://www.usnews.com/news/best-states/articles/these-are-the-states-with-mask-mandates.

[16] NAT'L GOVERNORS ASSOC., *Status of State COVID-19 Traveler Quarantine Orders/Guidance* (Dec. 18, 2020), https://www.nga.org/traveler-quarantine-order-guidance-covid-19/.

[17] *See* discussion *infra* notes 258–262 and accompanying text.

[18] See CRS Report R46540, *COVID-19 Liability: Tort, Workplace Safety, and Securities Law*, by Kevin M. Lewis et al.

[19] *See, e.g.*, Press Briefing by Vice President Pence and Members of the Coronavirus Task Force (Nov. 19, 2020), https://www.whitehouse.gov/briefings-statements/press-briefing-vice-president-pence-members-coronavirus-task-force-november-19-2020/ ("From very early in this pandemic, at the President's direction, we have followed an approach to this pandemic that was federally supported, state managed, and locally executed.").

[20] Pub. L. No. 116-123, 134 Stat. 146.

Coronavirus Response Act;[21] (3) the Coronavirus Aid, Relief, and Economic Security Act (CARES Act);[22] and (4) the Paycheck Protection Program and Health Care Enhancement Act. Congress then passed the Consolidated Appropriations Act, 2021 in December 2020[23] and the American Rescue Plan Act of 2021 in March 2021.[24]

The scale and nature of the pandemic have prompted some commentators to call for the imposition of public health orders at the federal level.[25] In their view, coordinated federal action, rather than a patchwork of state-level orders, is the more effective approach to addressing the COVID-19 pandemic, given that SARS-CoV-2 is highly transmissible and can cause serious illness in some people.[26] Commentators have considered whether Section 361 of the Public Health Service Act (PHSA) could serve as a source of authority for such federal executive action.[27] Section 361 authorizes the Secretary of Health and Human Services (HHS Secretary)—who, in turn, has delegated the authority to the Centers for Disease Control and Prevention (CDC) and the U.S. Food & Drug Administration (FDA)—to issue regulations "necessary" to prevent the foreign and interstate spread of communicable diseases.[28]

In September 2020, the CDC—in the broadest invocation of its Section 361 authority to date[29]—issued an order that nationally halted residential evictions for tenants making less than $99,000 a year (or $198,000 jointly) through the end of 2020 under specified conditions.[30] The CDC concluded that this eviction moratorium was necessary to prevent the interstate spread of COVID-19 because evictions could lead a sizeable portion of the population to become homeless or relocate to new congregate living situations that increase the risk of COVID-19 transmission.[31]

A recent study of state-level moratoriums concluded that lifting eviction moratoriums was associated with increased COVID-19 incidence and mortality in those states, providing support for CDC's public health rationale.[32] At the same time, the CDC's order followed shortly after the lapse of a narrower eviction moratorium that Congress enacted under the CARES Act as part of a larger effort to provide economic relief to individuals in the earlier months of the pandemic.[33] Thus, the CDC's order—which could be characterized as both a public health and an economic regulation—could raise larger questions about the scope of agency authority under Section 361, including the CDC's authority to implement transmission control measures that have broader economic implications.

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[21] Pub. L. No. 116-127, 124 Stat. 177.

[22] Pub. L. No. 116-136, 134 Stat. 281.

[23] *See* H.R. 133, 116th Cong. (2020).

[24] H.R. 1319, 117th Cong. (2021) (enacted).

[25] *See* Lindsay F. Wiley, *CDC's Boundary-Pushing Eviction Freeze*, AM. CONST. SOC'Y (Sept. 3, 2020), https://www.acslaw.org/expertforum/cdcs-boundary-pushing-eviction-freeze/.

[26] *See* Haffajee & Mello, *supra* note 12.

[27] *See id*.

[28] 42 U.S.C. § 264(a).

[29] *See infra* "Agencies' Use of Section 361 Authority"; *see also* Wiley, *supra* note 25.

[30] 85 Fed. Reg. 55,292, 55,293 (Sept. 4, 2020).

[31] *Id*. at 55, 294–55,296.

[32] *See infra* note 278 and accompanying text.

[33] Coronavirus Aid, Relief, and Economic Security Act § 4024, Pub. L. No. 116-136, 134 Stat. 285, 492 (2020) (codified at 15 U.S.C. § 9058).

This report analyzes the potential scope of agency authority under Section 361. It begins by providing background regarding Section 361's text and enactment,[34] followed by an overview of the relevant legal background—including applicable statutory interpretation and administrative law principles—that are relevant to analyzing the provision's scope.[35] The report then applies these principles to conclude that transmission control measures that implicate major political and economic questions, or otherwise exceed agency expertise, potentially exceed the bounds of agency discretion under Section 361.[36]

The report further considers the text, structure, and legislative history of Section 361 and surmises the provision may be susceptible to at least two plausible constructions.[37] On the narrower end of the spectrum, the authority under Section 361(a) to issue "necessary" regulations might be limited to steps necessary in the enforcement of quarantine.[38] In the modern era, such measures may encompass steps intended to facilitate the identification of quarantinable individuals, such as screening, testing, and contact tracing.[39] Under a broader reading of Section 361, the authority to issue "necessary" regulations might encompass the authority to implement any evidenced-based public health measures that do not otherwise implicate major political and economic questions, or otherwise exceed constitutional limits.[40] In the context of the COVID-19 pandemic, this broader construction may encompass, for instance, the authority to mandate face covering to prevent foreign and interstate transmission of the disease. The report concludes with some considerations for Congress in light of the preceding analysis.

Background on Section 361 of the PHSA

Congress enacted Section 361 as part of the PHSA in 1944.[41] Other than certain amendments made in 2002 discussed below, Section 361 has largely remained the same as initially enacted.[42] This part provides an overview of Section 361's text and related provisions, its history of enactment and amendments, and historical uses of this authority by federal agencies.

The Text of Section 361 and Related Provisions

Section 361 of the PHSA, titled "Control communicable diseases," appears under Part G ("Quarantine and Inspection") of Title III of the PHSA, which sets forth the general powers and duties of the Public Health Service (PHS).[43] Section 361 has five subsections, (a) through (e). Section 361(a) provides:

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[34] *See infra* "The Text of Section 361 and Related Provisions"; "The Enactment and Amendment of Section 361."

[35] *See infra* "Legal Framework."

[36] *See infra* "Possible Outer Limits on Agency Authority Under Section 361."

[37] *See infra* "Plausible Constructions of Section 361."

[38] *See id.*

[39] *See id.*

[40] *See id.*

[41] Pub. L. No. 78-410, 58 Stat. 682, 703–04 (1944).

[42] *See infra* "Amendment of Section 361."

[43] The headings and subheadings referenced in this report are as they appear in the PHSA, and may differ slightly from the versions codified in Title 42 of the U.S. Code. Title 42 of the U.S. Code is a non-positive law title that has been editorially arranged by the Code's editors and includes certain changes in the compiled laws' text to facilitate their inclusion in the Code. *See* U.S. HOUSE OFF. OF THE LEGIS. COUNSEL, OFF. OF THE LAW REVISION COUNS., *Positive Law Codification*, https://uscode.house.gov/codification/legislation.shtml (last visited Mar. 18, 2021).

> The Surgeon General,[44] 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.[45]

Subsections 361(b) through (d) specify the conditions under which regulations may be issued "under this section" to provide for the apprehension, detention, and conditional release of individuals to prevent the introduction or spread of communicable diseases.[46] Subsection (b) limits the issuance of such regulations to prevent the introduction and spread of only those communicable diseases designated by the President (upon the recommendation of the HHS Secretary in consultation with the Surgeon General) in executive orders.[47] The quarantinable communicable diseases designated in Executive Order No. 13,295, as amended, include, among other diseases, severe acute respiratory syndromes that include COVID-19.[48]

These regulations generally apply only to individuals arriving from a foreign country under subsection (c).[49] Under subsection (d), however, the regulations may apply to an individual residing within a state if the individual is reasonably believed to be (1) infected with a communicable disease in a qualifying stage, and (2) moving or about to move from one state to another state, *or* a probable source of infection to individuals who, if infected with such disease, will be moving from one state to another while the disease is in a qualifying stage.[50] The term "qualifying stage," with respect to a communicable disease, is defined as either the disease's (1) communicable stage, or the time period during which an infected person can spread the infection to others; or (2) in a stage preceding this infectious period, if the disease would be likely to cause a public health emergency if transmitted to other individuals.[51]

Subsection (e) sets forth Section 361's preemptive scope. It states that Section 361 preempts any state law that "conflicts with an exercise of federal authority under this section," but otherwise generally preserves state law.[52]

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[44] Although Section 361 by its terms delegates authority to the Surgeon General, the HHS Secretary—following departmental reorganizations ratified by Congress—delegated the authority under this provision to the CDC and FDA. *See infra* notes 120–122 and accompanying text.

[45] 42 U.S.C. § 264(a) (emphasis added).

[46] *Id.* § 264(b)–(d).

[47] *Id.* § 264(b).

[48] *See* 85 Fed. Reg. 56,424, 56,443 (Sept. 11, 2020). Under Executive Order 13,295, as amended, quarantinable "severe acute respiratory syndromes" are diseases that (1) are associated with fever and signs and symptoms of respiratory illness; (2) are capable of being transmitted from person to person; and (3) are either causing, or have the potential to cause a pandemic, or, upon infection, are highly likely to cause mortality or serious morbidity if not property controlled. Exec. Order No. 13,295 (Apr. 4, 2003), as amended by Exec. Order No. 13,375 (Apr. 1, 2005) and Exec. Order No. 13,674 (July 31, 2014).

[49] 42 U.S.C. § 264(c).

[50] *Id.* § 264(a).

[51] *Id.* § 264(d)(2).

[52] *Id.* § 264(e).

For any person detained "in accordance with quarantine laws," Section 322 of the PHSA authorizes the payment for the care and treatment, in a public or private facility, of such individuals.[53]

Section 368 of the PHSA specifies the penalties for violations of regulations "prescribed under [Section 361]."[54] Violators may be subject to statutory penalties of up to one year in jail or a fine of $1,000, or both.[55] Generally applicable criminal statutes on sentencing, however, authorize higher fines.[56] The CDC has incorporated the higher fines into the applicable regulations, which subject violating individuals to a fine up to $100,000 if the violation does not result in death, or a fine of up to $250,000 if the violation results in a death.[57] Violations by organizations are subject to a fine of up to $200,000 per event if the violation does not result in a death, or $500,000 per event if the violation results in a death.[58]

The PHSA provides two sources of assistance in enforcing regulations issued under Section 361. Section 311 authorizes the HHS Secretary to accept state and local assistance in the enforcement of "quarantine regulations made pursuant to this chapter," to the extent such state and local authorities "may be able and willing to provide" such assistance.[59] Additionally, Section 365 directs customs officers (e.g., Customs and Border Protection officers) and Coast Guard officers "to aid in the enforcement of quarantine rules and regulations," but prohibits the provision of any additional compensation, other than actual and necessary traveling expenses, for providing such services.[60]

The Enactment and Amendment of Section 361

The PHSA, signed into law by President Franklin D. Roosevelt on July 3, 1944, substantially consolidated and revised all then-existing laws affecting the PHS.[61] The PHS—now comprised of eight agencies designated by the Department of Health and Human Services (HHS) following several departmental reorganizations[62]—was at the time a public health agency headed by the Surgeon General.[63] The PHS traced its roots to a system of marine hospitals established in 1798.[64] Over the ensuing century and a half, however, the Agency saw its functions grow in a piecemeal

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[53] *Id.* § 249.

[54] *Id.* § 271(a). As noted in *supra* note 43, the codified version of this section heading ("Penalties for violation of quarantine laws") is slightly different from the version in the PHSA ("Penalties"). *See* Pub. L. No. 78-410, 58 Stat. 682, 706.

[55] 42 U.S.C. § 271(a).

[56] *See* 18 U.S.C. §§ 3559, 3571(b)(5), (c)(5).

[57] *See* 42 C.F.R. § 70.18(a).

[58] *See id.* § 70.18(b).

[59] 42 U.S.C. § 243(a).

[60] *Id.* § 268(b).

[61] *See* Pub. L. No. 78-410, 58 Stat. 682, 682 (1944); *see also* OFF. OF THE SURGEON GEN., *Public Health Service Act, 1944*, 59 PUB. HEALTH REP. 897, 916 (July 14, 1944), *available at* https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2017078/pdf/pubhealthreporig01529-0001.pdf.

[62] *See* CRS Report R44916, *Public Health Service Agencies: Overview and Funding (FY2016-FY2018)*, coordinated by C. Stephen Redhead and Agata Bodie, at 1.

[63] *See* Lynne Page Snyder, *Passage and Significance of the 1944 Public Health Service Act*, 109 PUB. HEALTH REP. 721, 722 (1994).

[64] *See* U.S. NAT'L LIB. OF MED., *Images from the History of the Public Health Service: Introduction*, https://www.nlm.nih.gov/exhibition/phs_history/intro.html (last accessed Oct. 8, 2020); Snyder, *supra* note 63, at 722.

fashion as the federal government expanded its role in public health.[65] Throughout the 19th century, for instance, Congress enacted several laws that expanded the Agency's functions beyond the provision of health care to seamen to include "the supervision of national quarantine (ship inspection and disinfection), the medical inspection of immigrants, the prevention of interstate spread of disease, and general investigations in the field of public health, such as that of yellow fever epidemics."[66]

At the turn of the 20th century, Congress further expanded the Agency's functions to include biomedical research and coordination of state and national public health activities.[67] The PHSA, as explained by one of its drafters,[68] reflects an effort to "to bring together into a single and consistent enactment virtually all of the statutes relating to the [PHS]"—a body of law that "had accumulated over a century and a half, with little system or consistency, with many duplications and a few important gaps, and with an abundance of ambiguity."[69] In commenting on the PHSA at the time of its passage, the *Public Health Report* published by the Office of the Surgeon General similarly described the law as "eliminat[ing] many outmoded regulations and . . . streamlin[ing] the administration of the [PHS]," as well as clarifying and broadening the scope of the PHS's functions.[70]

Consistent with this overall purpose of the PHSA, drafters of the PHSA characterized Section 361 as "confirming" or "strengthening" already existing authorities of the PHS with respect to foreign and interstate quarantine[71]—one of the most well-established public health measures to prevent the spread of communicable disease at the time.[72]

Development of Relevant Federal Law Preceding Section 361

The use of quarantine to prevent the spread of communicable diseases has a long history in Europe and the United States.[73] Even before the development of more specific scientific knowledge of the cause and transmission mode of communicable diseases, the city of Venice engaged in the practice in the early part of the 14th century to treat infected ships, travelers, and

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[65] *See id*.

[66] *See* U.S. NAT'L LIBRARY OF MED., *supra* note 64; OFF. OF THE SURGEON GEN., *supra* note 61, at 917 ("Fundamental reorganization laws expanding [PHS] functions and strengthening its administration have been enacted through the years.").

[67] U.S. NAT'L LIB. OF MED., *supra* note 64.

[68] These comments were made by Alanson W. Willcox, then-Assistant General Counsel of the Federal Security Agency. Along with then-Surgeon General Thomas Parran Jr., Mr. Willcox testified in congressional hearings regarding the bill's purposes as one of its drafters. *See* Hearing Before a Subcomm. on Interstate & Foreign Commerce on H.R. 3379: A Bill to Codify the Laws Relating to the Public Health Service, and for Other Purposes, 78th Cong. 64 (1944) [hereinafter Hearing on H.R. 3379] (noting that Mr. Willcox was among "the ones who worked on this bill, as far as the lawyers are concerned"); Snyder, *supra* note 63, at 723.

[69] Alanson W. Willcox, *The Public Health Service Act, 1944*, 7 SOC. SEC. BULL. 15, 15 (1944); *see also* Snyder, *supra* note 63, at 723 (noting PHSA's drafters "sifted through more than 100 years' worth of earmarked acts, appropriations measures, Presidential Executive Order, and regulations").

[70] OFF. OF THE SURGEON GEN., *supra* note 61, at 916.

[71] *See, e.g.*, Willcox, *supra* note 69, at 16, 17 (noting then-Surgeon General Parran—a principal architect of the law—asserted that the PHSA also "confirms the broad powers and duties of the [PHS] with respect to foreign and interstate quarantine").

[72] *See infra* "Development of Relevant Federal Law Preceding Section 361."

[73] *See, e.g.*, RALPH C. WILLIAMS, THE UNITED STATES PUBLIC HEALTH SERVICE, 1798–1950, at 63–69 (Commissioned Officers Ass'n of the U.S. Pub. Health Serv. 1951).

merchandise.[74] This quarantine system gradually spread throughout Europe and, in some places, the measures encompassed "drastic destruction, such as the burning of all goods belonging to infected persons."[75] The term itself traces its origin to the Italian word *quarantina*, or the period of forty days that arriving suspect ships and passengers had to spend at a landing station remote from the city and harbor under the quarantine procedures in place in Europe during the Middle Ages.

In the United States, the first quarantine restrictions were enacted at a local level by the colonies in Colonial America.[76] At the turn of the 18th century, the predominant concern regarding communicable diseases—primarily smallpox and yellow fever—was their introduction by sea from foreign ports, rather than domestic sources.[77] Following the American Revolution, states transferred and expanded colonial regulations governing quarantine into state law, empowering state and local governments to exclude all people and goods from elsewhere—including other parts of the United States—on public health grounds.[78]

Given the strong local character of quarantine, the federal government's role in quarantine began tentatively, and not until twenty years after the American Revolution.[79] The first federal law enacted by Congress that directly addressed quarantine merely authorized the President, at the request of a state, to assist in the execution of state quarantines.[80] The recurrences of deadly epidemics in the 19th century, however, prompted Congress to make further forays into federal quarantine efforts.

During the Civil War, which lasted from 1861 to 1865, more soldiers died from infectious diseases than on the battlefield, highlighting the inadequacies of then-existing public health laws implemented at the state and local levels.[81] Following several severe outbreaks of yellow fever in 1877 and 1878,[82] Congress enacted an 1878 law that empowered the Surgeon General, then the head of the Marine Hospital Service (MHS)—the predecessor agency to PHS—to create federal quarantine regulations to prevent the introduction of contagious or infectious diseases into the United States, but stipulated that federal regulations must not conflict with or impair those of state and local authorities.[83] The new law also strengthened federal quarantine authority by making the MHS the central agency with which incoming vessels must report incidence of infectious disease, allowing MHS to monitor ships coming from infected ports or bearing infected passengers.[84]

Over the next decade, Congress slowly expanded federal quarantine authority.[85] In the last significant quarantine legislation before the PHSA's enactment, in 1893, Congress enacted a law

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[74] *See id.* at 63.

[75] *See id.*

[76] *See id.* at 65–66; Laura K. Donohue, *Biodefense and Constitutional Constraints*, 4 U. MIA. NAT'L SEC. & ARMED CONFLICT L. REV. 82, 94–95 (2014).

[77] *See* Williams, *supra* note 73, at 65–66; Donohue, *supra* note 76, at 95–97.

[78] Donohue, *supra* note 76, at 110–13, 125.

[79] *Id.* at 126.

[80] An Act Relative to Quarantine, ch. 31, 1 Stat. 474 (1796) (repealed 1799).

[81] *See* Donohue, *supra* note 76, at 136; Jeffrey S. Sartin, *Infectious Diseases During the Civil War: The Triumph of the "Third Army,"* 16 CLINICAL INFECTIOUS DISEASES 580, 580 (1993).

[82] *See* GEDDES SMITH, A PLAGUE ON US 21–22 (1941); *The Yellow Fever Epidemic of 1888*, 12 JAMA 22, 22 (1889).

[83] Act of Apr. 29, 1878 § 5, ch. 66, 20 Stat. 37, 38.

[84] *Id.* § 2.

[85] *See, e.g.*, Act of Mar. 3, 1879, ch. 202, 20 Stat. 484 (repealed 1893); Act of Mar. 27, 1890, ch. 51, 26 Stat. 31.

that expanded federal quarantine authority in several respects.[86] Several provisions of the law appear to focus specifically on preventing the foreign introduction of communicable diseases.[87] The law, for instance, specified the conditions under which a vessel arriving from foreign ports may discharge its cargo or land its passengers in the United States.[88] It also authorized the Secretary of the Treasury to remand an infected vessel to a federal quarantine station—if a state or local quarantine station with sufficient quarantine provisions was not available—"for the necessary disinfection and treatment of the vessel, passengers, and cargo."[89] The law further authorized the President to suspend immigration from a country if introduction of persons or property from such country would increase a "serious danger of the introduction of [cholera or other infectious or contagious diseases] into the United States."[90]

In addition to provisions related to foreign quarantine, however, the law also appeared to more broadly authorize the Secretary of the Treasury to issue rules and regulations "to prevent the introduction of contagious or infectious diseases into the United States from foreign countries, and into one State or Territory or the District of Columbia from another State or Territory or the District of Columbia."[91] This language appears to provide the authority for interstate quarantine and beyond, and required such rules and regulations to operate "uniformly."[92] At the same time, however, the law also appears to limit the Secretary's exercise of this authority at ports and places where there were insufficient or no existing state and local quarantine laws.[93] The law contemplated enforcement of these rules and regulations by state and local authorities, but directed the President to execute and enforce the laws if state authorities fail or refuse to enforce them.[94]

Drafters' Comments on Section 361

Against this backdrop of incremental development of federal law in this area, a drafter of the PHSA—in a House Committee Hearing concerning the bill—said codification on this subject was "most urgently called for," given that then-existing statutes were "long and confused" and overlapping.[95] He described Section 361, enacted under a title of the Act that "contains the basic operating authority of the [PHS]," as concerning "quarantine and inspection and supersedes several complex, outmoded, and inadequate statutes on the subject."[96]

With respect to the first sentence of Section 361(a), which broadly authorizes the Surgeon General to make and enforce necessary regulations to prevent the foreign and interstate spread of communicable diseases, the drafter characterized it as expressing "the gist of a long and complex provision of the act of February 15, 1893."[97] Although the older statute authorized "regulations to prevent the spread into the country, or between the States, of contagious or infectious diseases," it

[86] *See* Act of Feb. 15, 1893, ch. 114, §§ 2–4, 52 Stat. 449, 450 (1893).

[87] *See id.*

[88] *See id.* § 6, 52 Stat. at 452.

[89] *See id.*

[90] *See id.* § 8, 52 Stat. at 452.

[91] *See id.* § 3, 52 Stat. at 450.

[92] *See id.*

[93] *See id.*

[94] *See id.*

[95] Hearing on H.R. 3379, *supra* note 68, at 138.

[96] Willcox, *supra* note 69, at 17.

[97] Hearing on H.R. 3379, *supra* note 68, at 138–39.

conditioned the issuance of such regulations "on the nonexistence or inadequacy of State and local regulations."[98] In the drafter's view, the elimination of this condition removed "nothing of substance," given the drafters' view that (1) the states had already "wholly withdrawn" from foreign quarantine; and (2) as to interstate quarantine, the federal law would be "confined to matters pertaining to the interstate movement of people or things over which the States have both constitutional and practical difficulties in achieving effective control."[99] The drafter further explained that the second sentence of Section 361(a) "would expressly authorize the [PHS] to make inspections and take other steps necessary in the enforcement of quarantine."[100] The enacted language, according to the drafter, "more clearly . . . provide[s] for the disposition of animals and articles which are potential sources of infection."[101]

The drafters further explained that subsections (b) through (d) were "designed to clarify, perhaps enlarge, the authority with respect to the apprehension and detention of individuals."[102] The drafters noted two forms of quarantine authorities were contemplated: first, the authority to deny entry at a port of entry; and second, the authority "to isolate individual persons who are considered dangerous to the community."[103] Subsection (b) was intended as a limitation on the latter form of quarantine, permitting the apprehension, detention, or conditional release of individuals only for diseases specified in executive orders, and also clarifying that conditional release is permissible.[104] Subsection (c) confirmed then-existing quarantine authority over individuals arriving from foreign states.[105] Subsection (d) expanded existing interstate quarantine authority to authorize the quarantine of individuals reasonably believed to be infected with a communicable disease, and who would be moving from state to state or would be a probable source of infection to someone else who would be moving from state to state.[106]

The drafters stated that the contemplated use of Section 361 authority at the time related to a potential use of subsection (d) to implement a "new rapid-treatment technique" to control the spread of venereal disease.[107] At the same time, however, the drafters also emphasized that "these provisions are written in broader terms in order to make it possible to cope with emergency situations which we cannot now foresee."[108] In a separate committee hearing, then-Surgeon General Thomas Parran Jr. similarly echoed the view that the authority under Section 361 "may be very important because of the possibility that strange diseases may be introduced in the country and become a threat," and "[f]lexibility in dealing with such contingencies would be very helpful."[109]

[98] *Id*. at 139.

[99] *Id*.

[100] *Id*.

[101] *Id*.

[102] *Id*.

[103] *Id*.

[104] *Id*. at 140.

[105] *Id*.

[106] *Id*. at 139.

[107] *Id*. at 66–67.

[108] *Id*. at 140.

[109] Hearing before a Subcomm. on Educ. and Labor, 78th Cong. 6 (1944).

Amendment of Section 361

Since it enacted Section 361 in 1944, Congress has substantively amended the provision once, in 2002, as part of the Public Health Security and Bioterrorism Preparedness and Response Act of 2002 (PHSBPRA).[110] Congress enacted PHSBPRA to bolster the nation's ability to respond effectively to bioterrorist threats and other public health emergencies following the anthrax attacks in the fall of 2001.[111] The amendments primarily expanded the HHS Secretary's authority in two ways.[112] First, under Section 361(b), PHSBPRA eliminated a provision that only allowed the Secretary to issue quarantine rules if they were recommended by the National Advisory Health Council.[113] Second, as to interstate quarantine, the law permitted the quarantine of individuals who are reasonably believed to be not only in the communicable stage of an infectious disease, but also in the precommunicable stage, if the disease in question "would be likely to cause a public health emergency if transmitted to other individuals."[114] The PHSBPRA also added a preemption provision as subsection (e).[115]

Agencies' Use of Section 361 Authority

Prior to the COVID-19 pandemic, agencies that were delegated authority under Section 361 generally invoked the provision to issue regulations related to the quarantine and isolation of individuals believed to have been infected or exposed to a contagious disease,[116] as well as the control or treatment of areas, animals, or articles that were susceptible or subject to contamination or infection.[117]

From its enactment to around the 1950s, the PHS primarily invoked its Section 361 authority to issue federal quarantine rules that were similar to the rules in force in 1900, including the examination by federal medical inspectors of most airplanes and vessels entering the United States.[118] Significant medical advances in the 1950s and 1960s—particularly in the development of vaccines—reduced the impact of communicable diseases.[119] That reduced impact, in turn, led to more limited exercise of agencies' Section 361 authority.

By 1970, a series of agency reorganizations greatly reduced the Surgeon General's administrative role and transferred the line authority for PHS's administration to the Assistant Secretary for

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[110] Public Health Security and Bioterrorism Preparedness and Response Act of 2002 § 142, Pub. L. No. 107-188, 116 Stat. 594, 626. Congress also amended Section 361 in 1976 to clarify that for purposes of subsection (d), the term "States" includes only the several States and the District of Columbia. Pub. L. No. 94-317, § 301(b)(1), 90 Stat. 695 (1976).

[111] *See, e.g.*, 147 Cong. Rec. H9212-13 (2001).

[112] *See* H.Rept. 107-481, at 34–35, 114 (2002).

[113] *See id.* at 34.

[114] *See id.* at 35.

[115] PHSBPRA § 142(c), 116 Stat. at 627 (codified at 42 U.S.C. § 264(e)) ("Nothing in this section or section 363, or the regulations promulgated under such sections, may be construed as superseding any provision under State law (including regulations and including provisions established by political subdivisions of States), except to the extent that such a provision conflicts with an exercise of Federal authority under this section or section 363.").

[116] *See* 42 C.F.R. §§ 70.1–70.18 (regulations on interstate quarantine), §§ 71.1–71.63 (regulations on foreign quarantine).

[117] *See* 21 C.F.R. §§ 1240.3–1240.95.

[118] *See* WILLIAMS, *supra* note 73, at 98.

[119] *See* Cristine Russell, *Centers for Disease Control: 40 Years of Demystifying Illness*, WASH. POST, Sept. 4, 1986, at A15.

Health in the Department of Health, Education, and Welfare (HEW),[120] which became the HHS in 1980.[121] Following the reorganizations, the HEW Secretary delegated the Section 361 authority to two agencies: the CDC, the federal government's lead public health agency, and the FDA, which generally regulates the safety and/or efficacy of food, drugs, cosmetics, and other consumer products.[122] Under this delegation, the CDC oversaw foreign quarantine while the FDA oversaw interstate quarantine.[123] By the mid-1970s, the CDC curtailed the exercise of its Section 361 authority to "change[] its focus from routine inspection to program management and problem intervention," having determined that in the modern era, dangers from communicable diseases would primarily come from isolated hot spots.[124] Airplanes and vessels, for instance, were no longer subject to federal quarantine inspection as a matter of course unless the pilot or vessel master reported an illness to the quarantine station.[125] The practice of routinely spraying aircrafts with pesticides was also discontinued.[126]

In 2000, the HHS Secretary transferred the FDA's interstate quarantine authority over persons to the CDC, consolidating all quarantine authority—foreign and interstate—over persons to the CDC.[127] The CDC and the FDA retain concurrent regulatory authority over animals and other products that may transmit or spread communicable diseases, with the CDC exercising foreign quarantine authority and the FDA exercising interstate quarantine authority.[128]

Until the COVID-19 pandemic, the CDC primarily invoked its Section 361 authority to issue and refine regulations relating to quarantine and isolation. Specifically, the CDC has invoked its authority under Section 361(b) through (d): to specify, for instance, the conditions and procedures for subjecting individuals to temporary custody to determine if a federal quarantine or isolation

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[120] Pursuant to then-existing reorganization authority, President Lyndon B. Johnson, in 1966, sent to Congress a Reorganization Plan that empowered the Secretary of HEW to reorganize the PHS. *See* Reorganization Plan No. 3 of 1966; *see also* DEP'T OF HEALTH, EDU., & WELFARE, HISTORY, MISSION, AND ORGANIZATION OF THE PUBLIC HEALTH SERVICE 3 (1976). Pursuant to the Reorganization Plan, in 1968 the HEW Secretary abolished the Office of the Surgeon General (though not the position of Surgeon General itself) and transferred line authority for the administration of PHS to the Assistant Secretary for Health. *See id*.

[121] Between 1932 and 1984, Congress periodically enacted laws that delegated authority to the President to reorganize portions of the federal government according to specific guidelines and procedures. *See, e.g.*, Reorganization Act of 1949, Pub. L. No. 109, 63 Stat. 203; *see also* CRS Report R44909, *Executive Branch Reorganization*, by Henry B. Hogue, at 6–7. Under the pre-1983 procedures, the President's reorganization plan would go into effect unless one or both houses of Congress passed a resolution rejecting the plan—a process referred to as a "legislative veto." *See* Reorganization Act of 1949, § 6, 63 Stat. at 205. In 1983, the Supreme Court held in *INS v. Chadha*, 462 U.S. 919, 956–59 (1983), however, that a one-house veto—to the extent it constitutes a legislative act—violates the Constitution's bicameralism and presentment requirements for lawmaking. To address concerns that *Chadha* raised questions regarding the validity of then-existing reorganization plans—many of which had gone into effect subject to a one-house veto provision—Congress passed legislation in 1984 ratifying all of the reorganization plans that had gone into effect. *See* Pub. L. No. 98-532, 98 Stat. 2705 (1984).

[122] *See* Redhead & Bodie, *supra* note 62.

[123] *See* 65 Fed. Reg. 49,906, 49,907 (2000).

[124] CTRS. FOR DISEASE CONTROL & PREVENTION, *History of Quarantine* (Feb. 12, 2007), http://www.cdc.gov/ncidod/dq/history.htm [https://web.archive.org/web/20091224025958/http://www.cdc.gov/ncidod/dq/history.htm].

[125] *See* 38 Fed. Reg. 16,861, 16,861 (1973).

[126] *See* 60 Fed. Reg. 3596, 3596 (1995) (noting that "in 1979, the [CDC] amended the Foreign Quarantine Regulations (42 CFR Part 71) to discontinue requiring routine spraying because of concern for the health of passengers and crew, and the lack of evidence that aircraft spraying played a significant role in disease control, and the belief that discontinuation of spraying would not present a significant public health threat").

[127] *See* 65 Fed. Reg. 49,906, 49,907 (2000).

[128] *See id*.

order is warranted;[129] for subjecting individuals to medical examination and sample collection by authorized health care providers;[130] and for the issuance of a federal quarantine or isolation order.[131] The CDC has primarily invoked its broader authority under Section 361(a) to implement measures that support or facilitate the exercise of its quarantine or isolation authority. To facilitate the identification of individuals who may have a quarantinable communicable disease, for example, the CDC has invoked its Section 361(a) authority to conduct general traveler health screening at ports of entry and locations of interstate travel,[132] and to impose certain reporting requirements on individuals and commercial carriers to facilitate contact tracing.[133] The CDC also relies on this authority to prohibit individuals subject to a federal quarantine or isolation order from traveling even in intrastate traffic, unless they have received a written travel permit issued by the CDC.[134]

The FDA has primarily invoked its Section 361(a) authority to prohibit the transport or sale of specified animals (e.g., molluscan shellfish, psittacine bird, and turtles) and other products (e.g., garbage for use as swine feed) that the Agency has determined to be susceptible to certain contamination or infection.[135]

In response to the COVID-19 pandemic, the CDC invoked its Section 361 authority to support certain quarantine-related measures. In the early months of the pandemic, CDC invoked its Section 361 authority to impose additional reporting requirements on airlines to provide identifying information about passengers or crew who may be at risk of exposure to a communicable disease.[136] The Agency also required certain travelers arriving from China to be quarantined for 14 days from the day they left China.[137] As a new, more transmissible form of SARS-CoV-2 emerged in England, the CDC also issued an order requiring airlines to verify that every arriving passenger over the age of two departing from any foreign country (1) attests to having received a negative COVID-19 test result during the three calendar days before the flight's departure; and (2) has documentation reflecting such negative test result.[138] For passengers who recovered from COVID-19, the passenger may instead provide documentation from a licensed

[129] *See* 81 Fed. Reg. 54,229, 54,242 (2016).

[130] *See* 42 C.F.R. §§ 70.12, 70.1.

[131] *See id.* § 70.14; 81 Fed. Reg. 54,229, 54,246 (2016).

[132] *See* 42 C.F.R. §§ 70.10, 71.20; 81 Fed. Reg. 54,229, 54,243–44 (2016) (noting that the screening authority applies "broadly to all circumstances where individuals may queue with other travelers because certain communicable diseases may be spread from person to person under such circumstances").

[133] *See, e.g.*, 42 C.F.R. § 70.10(b) (requiring individuals screened under a public health risk assessment to provide basic contact-tracing information which would be used to locate and notify individuals of a potential exposure to a communicable disease); *id.* § 70.11 (requiring pilots of a commercial airline to report to CDC the occurrence on board of any deaths or ill persons among passengers or crew, and to take measures as CDC may direct to prevent the potential spread of the communicable disease); *id.* § 71.4(d) (requiring any airline with a flight arriving into the United States to collect and make certain passenger or crew contact information available to CDC within twenty-four hours of a CDC order); *id.* § 71.5 (similar obligation on vessel operators).

[134] *See id.* § 70.5(d), (e); 81 Fed. Reg. 54,229, 54,243 (2016) (stating that the Agency's Section 361(a) authority extends to the regulation of "certain activities that occur entirely within a State if those activities present a risk of interstate disease spread, as would occur, for instance, in the event of inadequate local control").

[135] *See* 21 C.F.R. §§ 1240.60–1240.62, 1240.65, 1240.75.

[136] *See* 85 Fed. Reg. 7874, 7874 (2020).

[137] *See* CTRS. FOR DISEASE CONTROL & PREVENTION, *Travelers from China Arriving in the United States* (Feb. 7, 2020), https://www.cdc.gov/coronavirus/2019-ncov/travelers/from-china.html [https://web.archive.org/web/20200220004302/https://www.cdc.gov/coronavirus/2019-ncov/travelers/from-china.html].

[138] 86 Fed. Reg. 7387, 7388 (Jan. 28, 2021).

health care provider or public health official stating they are cleared for travel.[139] Although the order does not specify, the CDC appears to have imposed these requirements based on its power under Section 361(a) to conduct general passenger health screenings.[140]

The CDC also invoked its Section 361 more broadly in its COVID-19 pandemic response. In September 2020, the CDC issued an order that halted residential evictions nationwide for tenants making less than $99,000 a year (or $198,000 jointly) through December 2020 under specified conditions.[141] The CDC issued the order fewer than two weeks after the expiration of a different and narrower set of eviction protections Congress enacted under the CARES Act.[142] The CARES Act eviction moratorium—which protected renters from being forced to vacate between March 27 and August 23, 2020—applied only to rental properties receiving certain federal assistance or federally related financing.[143]

The CDC concluded a national eviction moratorium was necessary to prevent the interstate spread of COVID-19 because (1) COVID-19 is highly contagious in congregate settings; (2) as many as 30 to 40 million people could be at risk of eviction; (3) a sizeable portion of that population may become homeless or have to live in new congregate settings that increase the risk of COVID-19 transmission; and (4) states have not done enough to curb COVID-19 transmission.[144] On December 21, 2020, as the CDC eviction moratorium was set to expire, Congress reached an agreement on a COVID-19 relief plan in the Consolidated Appropriations Act, 2021.[145] Among its numerous relief measures, the law legislatively extended the CDC moratorium until January 31, 2021, and provided $25 billion for states and localities to fund emergency rental assistance.[146] On January 29, 2021, the CDC further extended the moratorium until March 31, 2021.[147] In March 2021, Congress enacted the American Rescue Plan Act of 2021 to provide further pandemic relief, including $21.55 billion for emergency rental assistance and $5 billion for new emergency housing vouchers for people at risk of experiencing homelessness and those fleeing domestic, dating, or sexual violence.[148] On March 28, 2021, the CDC further extended the eviction moratorium until June 30, 2021.[149]

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[139] *See id.*

[140] *See id.* at 7391 (stating the Order is issued pursuant to Sections 361 and 365 of the PHSA and 42 C.F.R. § 71.20, which authorize the CDC Director to conduct public health prevention measures at U.S. ports of entry, and § 71.31(b), which authorizes the CDC Director to detain a carrier until completion of the health measures).

[141] 85 Fed. Reg. 55,292, 55,293 (Sept. 4, 2020).

[142] Coronavirus Aid, Relief, and Economic Security Act, § 4024, Pub. L. No. 116-136, 134 Stat. 285, 492 (2020) (codified at 15 U.S.C. § 9058).

[143] 15 U.S.C. § 9058; *see also* CRS Insight IN11516, *Federal Eviction Moratoriums in Response to the COVID-19 Pandemic*, by Maggie McCarty and Libby Perl.

[144] 85 Fed. Reg. at 55,294–96.

[145] H.R. 133, 116th Cong. (2020).

[146] *Id.* div. N, §§ 501–02.

[147] 86 Fed. Reg. 8020, 8020–21 (Feb. 2, 2021).

[148] H.R. 1319, §§ 3201–02, 117th Cong. (2021). The American Rescue Plan Act of 2021 does not address the eviction moratorium, which may be subject to exclusion from the legislation under the procedures for reconciliation, the process through which the law was enacted. *See* CRS Report RL30862, *The Budget Reconciliation Process: The Senate's "Byrd Rule,"* by Bill Heniff Jr., at 5–6 (describing extraneous matters subject to exclusion in reconciliation legislation).

[149] CTRS. FOR DISEASE CONTROL & PREVENTION, TEMPORARY HALT IN RESIDENTIAL EVICTIONS TO PREVENT THE FURTHER SPREAD OF COVID-19 6-7 (Mar. 28, 2021), https://www.cdc.gov/coronavirus/2019-ncov/more/pdf/CDC-Eviction-Moratorium-03292021.pdf.

Legal Framework

The scope of agency authority under Section 361, including the authority to implement certain measures specific to addressing COVID-19, is a question of statutory interpretation. Typically, where Congress has delegated regulatory authority to an executive agency—as it has in the case of Section 361—the agency will interpret, in the first instance, the scope of its statutory authority in issuing implementing regulations that carry out its delegated tasks.[150] The process by which agencies issue regulations is governed by the Administrative Procedure Act (APA), which—among other requirements—sets forth the procedures for rulemaking and other agency actions.[151]

The APA also grants persons who have been adversely affected or aggrieved by agency actions the right to seek judicial review of certain actions.[152] The APA, in turn, directs federal courts to "set aside agency action" that is "not in accordance with law" or "in excess of statutory jurisdiction, authority, or limitations."[153] In other words, this statutory directive authorizes federal courts to invalidate agency actions that exceed an agency's statutory authorization or otherwise violate the law, conferring upon the courts the role of assessing the agency's interpretation of the applicable statute.[154]

To provide context for the analysis of Section 361, this part provides a brief overview of the key legal principles and doctrines that would govern or be relevant to a court's review of CDC's invocation of its Section 361 authority. (More in-depth discussions of these principles may be found in other CRS products.[155])

Statutory Interpretation

The interpretation of federal statutes—whether preceded by agency interpretation or not—is the process by which courts determine a law's meaning by "giv[ing] effect to the intent of Congress."[156] Under separation-of-powers principles, the Constitution gives Congress the power to make the law and the judiciary "the power to pronounce the law as Congress has enacted it."[157] While the task of discerning congressional intent generally involves consideration of a law's "text, structure, purpose, and history,"[158] judges subscribe to different theories of statutory interpretation that emphasize or disfavor some of these available interpretive tools.[159] This choice can often affect the resulting interpretation.[160]

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[150] CRS Report R44954, *Chevron Deference: A Primer*, by Valerie C. Brannon and Jared P. Cole, at 1.

[151] *See, e.g.*, 5 U.S.C. § 553 (requirements for rulemaking), § 554 (requirements for agency adjudication), § 555 (requirements on ancillary matters such as the right to representative in appearances before an agency).

[152] 42 U.S.C. §§ 702, 704 (authorizing review of final agency actions).

[153] *Id.* § 706(2)(A), (C).

[154] United States v. Am. Trucking Ass'ns, Inc., 310 U.S. 534, 542 (1940).

[155] Brannon & Cole, *supra* note 150; CRS Report R45153, *Statutory Interpretation: Theories, Tools, and Trends*, by Valerie C. Brannon.

[156] *Am. Trucking Ass'ns*, 310 U.S. at 542.

[157] King v. Burwell, 135 S. Ct. 2480, 2505 (2015) (Scalia, J., dissenting).

[158] Gen. Dynamics Land Sys. v. Cline, 540 U.S. 581, 600 (2004).

[159] See Brannon, *supra* note 155 at 16–18.

[160] *Compare, e.g.*, Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy, 548 U.S. 291, 298 (2006) (applying a textualist approach to hold that a statutory provision authorizing an award of "reasonable attorneys' fees as part of the costs" does not authorize the compensation of expert fees), *with id.* at 309 (Breyer, J., dissenting) (employing legislative history as a tool of statutory interpretation to construe the provision to more broadly include expert fees as part of the

In general, however, the statutory text and context serve as the starting point of statutory interpretation.[161] When the meaning of specific words in a statute is disputed, and the statute does not define those words, courts generally begin the analysis by considering the "ordinary" meaning of the statutory text.[162] In addition to their own experiences as English speakers, judges often rely on dictionary definitions, other judicial decisions, or official governmental materials as evidence of a text's ordinary meaning.[163] Because words can often have multiple ordinary meanings depending on the context, courts will generally interpret the disputed words within their full statutory scheme.[164] As part of this analysis, courts will generally take into account the remainder of the provision and the statute overall, including how the same words may be used elsewhere in the text, and whether certain constructions support or undermine the operation of the provision or the stated purpose of the act.[165] To facilitate this contextual analysis, and where the statutory text alone may be ambiguous, courts will also often apply various "canons of construction" that have developed over time to serve as guiding principles of statutory interpretation.[166] Some canons are grounded in rules of grammar, while others are grounded in general assumptions about how Congress conveys meaning, or in longstanding judicial presumptions.[167]

For judges who follow the textualist[168] theory of interpretation, a review of the statutory text and context—aided by applicable canons of construction as needed—could generally be the beginning and the end of statutory interpretation.[169] Judges that take a more "purposivist" approach to statutory interpretation, on the other hand, might also look beyond the statutory text and into the statute's legislative history to discern Congress's purpose in enacting the disputed law.[170] Legislative history refers to the record of Congress's deliberations when enacting the law, including committee reports, sponsor statements, and colloquy in hearings.[171] Under this theory of statutory interpretation, Congress's underlying purpose in enacting a statute—even if not incorporated into the statutory language itself—can shed light on Congress's intended meaning for a provision.[172] The Supreme Court has noted that legislative history materials that shed light on the "considered and collective understanding of those . . . involved in drafting and studying proposed legislation" are more reliable than materials such as floor debates that "reflect at best the understanding of individual Congressmen."[173]

statutory award of "reasonable attorneys' fees").

[161] *See* Brannon, *supra* note 154, at 16–18.

[162] *See, e.g.*, Smith v. United States, 508 U.S. 223, 228 (1993) ("When a word is not defined by statute, we normally construe it in accord with its ordinary or natural meaning.").

[163] Brannon, *supra* note 159, at 19–21.

[164] *See id.*

[165] *See, e.g.*, King v. Burwell, 135 S. Ct. 2480, 2491, 2494 (2015).

[166] Brannon, *supra* note 155, at 25.

[167] For a discussion of canons of construction, see Brannon, *supra* note 155, at 25–31.

[168] For a discussion about the dominant theories of statutory interpretation, see Brannon, *supra* note 155, at 10–16.

[169] *See id.* at 18–31; CRS Report R46484, *Understanding Federal Legislation: A Section-by-Section Guide to Key Legal Considerations*, by Victoria L. Killion, at 12–15.

[170] *See* Brannon, *supra* note 155, at 11–13.

[171] *See id.*

[172] *See id.*

[173] Zuber v. Allen, 396 U.S. 168, 186 (1969).

Chevron Deference

In practice, a court's interpretation of a statutory provision is often preceded by agency interpretation that occurs during the course of the agency's implementation of a statutory scheme. Where the provision at issue is one the agency is charged with administering—as opposed to, for instance, a statutory provision generally applicable to all agencies—the court will generally apply the two-step framework outlined by the Supreme Court in *Chevron U.S.A., Inc. v. Natural Resources Defense Council*.[174] This analytical framework generally instructs courts to defer to agencies' reasonable interpretations of ambiguous statutory text.[175] The deference is based in part on agencies' superior subject matter expertise—relative to courts—to address competing interests within complex regulatory schemes.[176] Although courts typically apply the *Chevron* framework to agency interpretations formulated through formal procedures, such as notice-and-comment rulemaking, courts also have discretion to accord deference to agency interpretations reached through more informal means.[177]

The Two-Step Framework

At step one of the *Chevron* analysis, courts examine "whether Congress has directly spoken to the precise question at issue," using the "traditional tools of statutory interpretation."[178] Though judges at times engage in different degrees of searching inquiry, they typically undertake the statutory interpretation analysis described in the preceding section, looking first at the statutory text, its ordinary meaning, and statutory context to determine the existence of any ambiguity.[179] Some judges also take into account relevant legislative history and purpose as part of this analysis.[180] If Congress has spoken, "that is the end of the matter" and courts must enforce the "unambiguously expressed intent of Congress."[181] If the statute is silent or ambiguous, however, step two of *Chevron* instructs courts to defer to a reasonable agency interpretation of the statutory text, even if the court would have otherwise reached a contrary conclusion.[182] In evaluating the reasonableness of an agency's interpretation, courts take into account, among other considerations, the sufficiency of an agency's reasoning and whether the agency interpretation comports with the overall purpose of the statute.[183] In general, at least in the federal courts of appeals, agency interpretations are typically accorded deference when a case is resolved at *Chevron*'s second step, recognizing that an ambiguous statute inherently permits a range of plausible interpretations.[184]

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[174] 467 U.S. 837, 842–43 (1984).

[175] *See id.* at 843–44, 865–66.

[176] *See id.*

[177] *See* Barnhart v. Walton, 535 U.S. 212, 222 (2002) (stating that several factors could be relevant in determining whether *Chevron* deference applies to agency interpretation reached through less formal means, including such as "the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the agency has given the question over a long period of time.").

[178] *See Chevron*, 467 U.S. at 843 & n.9.

[179] *See* Brannon & Cole, *supra* note 150, at 13–16.

[180] *See id.*

[181] *Chevron*, 467 U.S. at 842–43.

[182] *Id.* at 844–45, 865–66.

[183] Brannon & Cole, *supra* note 150, at 19–20.

[184] *Id.* at 17.

The Major Questions Doctrine

On several occasions, the Supreme Court has declined to accord *Chevron* deference to an agency interpretation because the cases presented interpretive questions of such significance that "there may be reason to hesitate before concluding that Congress . . . intended" to delegate resolution of that question to the agency.[185] The Court has not yet fully articulated the parameters of this so-called "major questions" or "major rules" doctrine—phrases developed by legal academia and not yet used by the Court itself.[186] But at least two more recently appointed Justices—Justices Neil Gorsuch and Brett Kavanaugh—have acknowledged the doctrine as a canon of statutory construction established by the Court's precedents.[187] According to their characterization, this canon—grounded in "the constitutional rule that Congress may not divest itself of legislative power by transferring that power to an executive agency"[188]—presumes that Congress, absent express and specific delegation, does not intend to grant agencies the power to fill in statutory gaps concerning "a question of deep economic and political significance that is central to [a] statutory scheme."[189]

To date, the Court has not developed a settled approach to applying the major questions doctrine. In *King v. Burwell*, the Court invoked the doctrine to deem the *Chevron* framework entirely inapplicable, providing the basis for the Court to conduct the interpretive task anew.[190] In the past, however, the Court has primarily applied the doctrine within the *Chevron* framework. In some instances, the Court invoked the doctrine to support its conclusion that the statute at issue, in the *Chevron* step-one analysis, unambiguously precluded an agency's interpretation.[191] Other times, the Court has invoked the doctrine to support its conclusion that the agency interpretation was unreasonable at step two.[192]

Practically speaking, in most cases the invocation of the major questions doctrine results in the Court's conclusion that the agency exceeded its statutory authority.[193] The Court has notably invoked the doctrine to conclude that an agency exceeded its statutory authority in instances

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[185] FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000); *see also, e.g.*, Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 325–28 (2014).

[186] *See, e.g.*, Kevin O. Leske, *Major Questions About the "Major Questions" Doctrine*, 5 MICH. J. ENVTL. & ADMIN. L. 479, 480 n.3 (2016) (listing other scholarly labels for the doctrine and noting "the Court itself does not use a particular name").

[187] *See* Gundy v. United States, 139 S. Ct. 2116, 2141–42 (2019) (Gorsuch, J., dissenting); Paul v. United States, 140 S. Ct. 342 (2019) (statement of Justice Kavanaugh regarding the denial of certiorari).

[188] *See infra* "The Nondelegation Doctrine."

[189] *Gundy*, 139 S. Ct. at 2141 (Gorsuch, J., dissenting); *see also Paul*, 140 S. Ct. at 342 (statement of Kavanaugh, J.) (noting the Court has applied a "statutory interpretation doctrine" related to "major questions," which requires Congress to either "(i) expressly and specifically decide the major policy question itself and delegate to the agency the authority to regulate and enforce; or (ii) expressly and specifically delegate to the agency the authority both to decide the major policy question and to regulate and enforce").

[190] *See* King v. Burwell, 576 U.S. 473, 485 (2015) (holding that the task of interpreting the Affordable Care Act's tax credit provisions was the Court's, and not the Internal Revenue Service's, given that the provisions "involv[e] billions of dollars in spending each year and affect[] the price of health insurance for millions of people").

[191] *See, e.g.*, FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000); MCI Telecomm. Corp. v. AT&T Co., 512 U.S. 218, 229–31 (1994).

[192] *See* Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 325–28 (2014).

[193] *See MCI*, 512 U.S. at 229–31 (holding that the Federal Communications Commission's authority to "modify" the requirement on common carriers to file tariffs with the Agency did not encompass the authority to effectively eliminate the requirement—a major policy decision—for certain long-distance carriers that comprise approximately 40% of this sector of the industry); *see also infra* notes 194–204 and accompanying text.

where the agency newly sought to assert broad authority under a long-existing statute.[194] In *FDA v. Brown & Williamson*, for instance, the Court held that the FDA lacked statutory authority to regulate tobacco products under the Federal Food, Drug, and Cosmetic Act (FD&C Act), which grants general authority to the FDA to regulate, among other items, "drugs" and "devices."[195] In concluding that Congress clearly precluded FDA from asserting jurisdiction to regulate tobacco products, the Court relied in part on the "unique political history" of tobacco regulation, including FDA's prior, consistent disavowal of such jurisdiction since the adoption of the FD&C Act in 1938.[196] The Court also relied on Congress's decisions over the years to squarely reject legislative proposals that would grant FDA such jurisdiction, and its repeated actions precluding any agency from exercising significant policymaking authority in this area.[197] Given this history and "the breadth of the authority that the FDA has asserted" to regulate "an industry constituting a significant portion of the American economy," the Court was "confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency" absent a clear mandate.[198]

The Court has also invoked the doctrine to reject an agency's assertion of authority over a major policy question when the agency lacks the relevant subject matter expertise. In *Gonzales v. Oregon*, for instance, the Court held that the Attorney General lacked authority under the Controlled Substances Act (CSA) to prohibit doctors from prescribing regulated drugs for use in physician-assisted suicide, notwithstanding a state law permitting the procedure.[199] In support of this conclusion, the Court—among other considerations—reasoned that the government's claimed authority was inconsistent with the design of the statute.[200] In the Court's view, the authority claimed by the Attorney General effectively amounted to the authority to make a rule "declaring illegitimate a medical standard of care and treatment of patients that is specifically authorized under state law."[201] The Court noted, however, that the CSA generally "allocates decisionmaking powers . . . so that medical judgments . . . are placed in the hands of the [HHS] Secretary."[202] The CSA's structure thus "conveys unwillingness to cede medical judgments to an executive official who lacks medical expertise."[203] Coupled with the Court's general presumption that "Congress intend[s] to invest interpretive power in the administrative actor in the best position to develop these attributes," the Court concluded that Congress would not have granted the Attorney General "such broad and unusual authority" to make medical judgments absent a clear mandate,

[194] *See infra* notes 195–198 and accompanying text. *See also Util. Air*, 573 U.S. at 325–28 (rejecting as unreasonable the EPA's assertion of authority under the Clean Air Act to impose certain permitting requirements on " millions of small sources" and stating "[w]hen an agency claims to discover in a long-extant statute an unheralded power to regulate 'a significant portion of the American economy,' we typically greet its announcement with a measure of skepticism").

[195] *Brown & Williamson*, 529 U.S. at 125–26. The FDA sought to regulate tobacco products under the FD&C Act by concluding that nicotine is a "drug" and cigarettes and smokeless tobacco are products that constitute a combination of drugs and devices that deliver nicotine to the body. *See id.*

[196] *Id.*

[197] *Id.*

[198] *Id.* at 160–61.

[199] 546 U.S. 243, 248–49, 275 (2006).

[200] *Id.* at 265–66.

[201] *Id.* at 258.

[202] *Id.* at 265.

[203] *Id.* at 266.

particularly over a significant social and political issue issue—physician-assisted suicide—which has been the subject of "an 'earnest and profound debate' across the country."[204]

It remains to be seen whether and how the Court will further develop the major questions doctrine. Under the Court's existing case law, the doctrine could be viewed as a canon of construction that limits the courts' deference to agency interpretation under *Chevron*.[205] The doctrine could also be construed as a substantive outer limit on agency authority.[206]

In his dissent from the D.C. Circuit Court of Appeals' decision to deny rehearing en banc in *U.S. Telecom Ass'n v. FCC*, Justice Kavanaugh—then a judge on the D.C. Circuit—advanced the latter construction.[207] There, he articulated the parameters of the doctrine as follows: "For an agency to issue a major rule"—i.e., a rule of "great economic and political significance"—"Congress must *clearly* authorize the agency to do so."[208] If the statute "only *ambiguously* supplies authority for the major rule, the rule is unlawful."[209] Whether a rule is a "major rule" depends on a number of factors, including "the amount of money involved for regulated and affected parties, the overall impact on the economy, the number of people affected, and the degree of congressional and public attention to the issue."[210]

Applying this formulation, then-Judge Kavanaugh would have invalidated FCC's 2015 Open Internet Order,[211] under which FCC reclassified broadband internet service as a telecommunications service subject to the common carrier regulation under the Communications Act.[212] In his view, the FCC Order was a major rule of "vast economic and political significance" because (1) it would have had a "staggering" financial impact by "affect[ing] every Internet service provider, every internet content provider, and every internet consumer"[213]; (2) it garnered significant attention from Congress—which studied and debated the issue for years—and the public—which submitted over four million comments on the proposed rule preceding the Order.[214] Accordingly, because "Congress has not passed a statute clearly classifying Internet service as a telecommunications service or otherwise giving the FCC authority to impose

[204] *Id*. at 267. In a case that did not involve the ultimate question of an agency's scope of authority, the Court likewise invoked the doctrine—based in part on the agency's lack of relevant expertise over a major policy question—to hold the *Chevron* framework inapplicable. *See King v. Burwell*, 576 U.S. 473, 479, 482 (2015). In *King*, the Court declined to defer to the Internal Revenue Service (IRS)'s interpretation of the Affordable Care Act's tax credits provisions, given that the interpretative question at issue was one "of deep 'economic and political significance' that is central to [the ACA's] statutory scheme," involving "billions of dollars in spending each year and affecting the price of health insurance for millions of people," and the IRS has "no expertise in crafting health insurance policy of this sort." *Id*. at 486.

[205] *See supra* notes 187–189 and accompanying text.

[206] *See* U.S. Telecom Ass'n v. FCC, 855 F. 3d 381, 418–19 (D.C. Cir. 2017) (Kavanaugh, J., dissenting).

[207] *Id*.

[208] *Id*. at 419.

[209] *Id*.

[210] *Id*. at 422–23.

[211] *Id*. at 417–18.

[212] *See* U.S. Telecom Ass'n v. FCC, 825 F.3d 674, 689 (D.C. Cir. 2016). The common carrier regulation under Title II of the Communications Act requires entities classified as common carriers to, among other things, furnish communication service upon reasonable request, to engage in no unjust or unreasonable discrimination in charges and practices, and charge just and reasonable rates. *Id*. at 691. Practically speaking, this means that internet service providers classified as common carriers could not, for instance, block or otherwise impair access to certain lawful internet content or applications, or prioritize certain internet traffic. *See id*. at 696.

[213] *U.S. Telecom Ass'n*, 855 F. 3d at 423.

[214] *Id*.

common-carrier regulations on Internet service providers," then-Judge Kavanaugh concluded the FCC lacked the authority to issue this major rule.[215] Since his elevation to the Supreme Court, Justice Kavanaugh has reiterated an interest in further considering the bounds of the major questions doctrine and its related principles as a substantive limit on Congress's ability to delegate "major national policy decisions" to executive agencies.[216]

The Nondelegation Doctrine

Another related legal doctrine potentially implicated by a broad delegation of authority to agencies is the nondelegation doctrine, which limits Congress's authority to delegate "legislative power" to other entities.[217] Under Article I, Section I of the Constitution, "[a]ll legislative Powers"—which the Supreme Court has broadly defined as "the power to make laws"[218]—"shall be vested in a Congress of the United States."[219] The Supreme Court has interpreted this constitutional requirement, under the nondelegation doctrine, as generally prohibiting Congress from delegating its legislative power to another branch.[220] At the same time, however, the Court has also recognized that the Constitution does not deny Congress "the necessary resources of flexibility and practicality" that would enable it to perform its functions,[221] or the ability to "obtain[] the assistance of its coordinate Branches."[222] Thus, under the nondelegation doctrine, "a statutory delegation of authority is constitutional so long as Congress 'lay[s] down by legislative act an *intelligible principle* to which the person or body authorized to [exercise the delegated authority] is directed to conform.'"[223]

In its application of the nondelegation doctrine, the Supreme Court has upheld broad congressional delegations to executive agencies as satisfying the "intelligible principle" test. The Court has, for example, upheld delegations to the EPA to issue air quality standards that are "requisite to protect the public health"[224]; to the FCC to issue licensing requirements required in the "public interest, convenience, or necessity"[225]; and to the Interstate Commerce Commission (a former executive agency charged with regulating railroads and other common carriers) to authorize the acquisition of one railroad by another in the "public interest."[226] To date, the Court has found the requisite intelligible principle lacking in only two statutes on the grounds that Congress, in each case, "failed to articulate any policy or standard" to confine discretion.[227] This

[215] *Id*. at 426.

[216] *See* Paul v. United States, 140 S. Ct. 342, 342 (2019) (statement of Kavanaugh, J.) (stating it may warrant further consideration in future cases whether Congress could delegate to agencies the authority "to decide major policy questions" at all, or whether Congress could delegate to agencies only "the authority to decide less-major or fill-up-the-details decisions").

[217] *See* Whitman v. Am. Trucking Ass'n, 531 U.S. 457, 472–76 (2001).

[218] Loving v. United States, 517 U.S. 748, 771 (1996).

[219] U.S. CONST. art. I, § 1.

[220] Mistretta v. United States, 488 U.S. 361, 371–72 (1989); *see also* Gundy v. United States, 139 S. Ct. 2116, 2123 (2019) (plurality).

[221] Pan. Refin. Co. v. Ryan, 293 U.S. 388, 421 (1935).

[222] *Mistretta*, 488 U.S. at 372.

[223] *Gundy*, 139 S. Ct. at 2123 (quoting *Mistretta*, 488 U.S. at 372) (emphasis added).

[224] Whitman v. Am. Trucking Ass'n, 531 U.S. 457, 474 (2001).

[225] Nat'l Broad. Co. v. United States, 319 U.S. 190, 225–26 (1943).

[226] N.Y. Cent. Sec. Corp. v. United States, 287 U.S. 12, 24 (1932).

[227] *See Panama Refining*, 293 U.S. at 340 (invalidating a statutory provision authorizing the President to prohibit the transportation of excess petroleum as an unconstitutional delegation because "Congress has declared no policy, has

approach reflects the Court's practical recognition that while Congress may not abdicate its essential legislative functions, "Congress simply cannot do its job absent an ability to delegate power under broad general directives" in "our increasingly complex society, replete with ever changing and more technical problems."[228] This rationale—which is similar to the justification for according *Chevron* deference[229]—assumes the agency delegated with authority possesses the relevant subject matter expertise.[230]

The Supreme Court has also applied the nondelegation doctrine as a canon of statutory construction "to giv[e] narrow constructions to statutory delegations that might otherwise be thought to be unconstitutional."[231] In *National Cable Television Ass'n, Inc. v. United States*, for instance, the Court considered a challenge against a thirty-cent per subscriber annual fee charged by the FCC on community antenna television systems.[232] The Agency imposed the fee based on a provision of the Independent Offices Appropriation Act, which authorizes each federal agency that provides any benefit or service of value to regulated entities to charge said entities a fee that is "fair and equitable[,] taking into consideration direct and indirect cost to the Government, value to the recipient, public policy or interest served, and other pertinent facts."[233] Although the provision's text plainly refers to multiple considerations, the Court held that "value to the recipient"—and not the broader "public policy or interest served"—is the proper measure of the authorized fee at issue.[234] In the Court's view, if agencies could exact "fees" based on broader public interests—e.g., for performing their general oversight functions that inure benefits to the public as opposed to specific regulated entities—the statute would impermissibly delegate to agencies the authority to levy taxes.[235] Because only Congress possesses the power to tax, the Court said the Act must be read "narrowly to avoid constitutional problems."[236]

established no standard, has laid down no rule"); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 542 (1935) (invalidating a statutory provision allowing the President "virtually unfettered" authority to approve detailed "codes of fair competition" submitted by one or more trade or industrial associations or groups that would govern all business within an industry or trade as an "unconstitutional delegation of legislative power").

[228] *Mistretta*, 488 U.S. at 373. The Court's jurisprudence on the nondelegation doctrine may, however, be evolving. Before Justice Kavanaugh joined the Court, an eight-member Court considered in *Gundy v. United States*, 130 S. Ct. 2116 (2019), whether certain initial registration provisions of the Sex Offender Registration and Notification Act (SORNA) impermissibly delegate legislative power to the Attorney General to specify SORNA's applicability to pre-Act offenders. *Id*. at 2122. While a majority of the Justices agreed SORNA does not, only a plurality of Justices agreed that the relevant SORNA provisions do not violate the nondelegation doctrine. *See id*. at 2020. Although Justices Alito and Kavanaugh did not or could not join the dissent, both have indicated a willingness to "to reconsider the approach we have taking for the past 84 years." *See id*. at 2131 (Alito, J., concurring in the judgment); *see also* Paul v. United States, 140 S. Ct. 342 (2019) (statement of Kavanaugh, J.) (noting "Justice Gorsuch's scholarly analysis of the Constitution's nondelegation doctrine in his *Gundy* dissent may warrant further consideration in future cases").

[229] *See infra* note 175 and accompanying text.

[230] *See Mistretta*, 488 U.S. at 373; *see also supra* notes 224–226 and accompanying text.

[231] *See Mistretta*, 488 U.S. at 373 n.7.

[232] 415 U.S. 336, 340 (1974).

[233] *Id*. at 337–39.

[234] *Id*. at 342–43.

[235] *Id*. at 341–42.

[236] *Id*. at 342. *See also* Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst., 448 U.S. 607, 646 (1980) (plurality) (reasoning that § 6(b)(5) of the OSH Act, which authorizes OHSA to set workplace safety standards relating to toxic materials, must be construed narrowly to require certain threshold risk assessments because the provision would otherwise "make such a sweeping delegation of legislative power" as to render it unconstitutional).

Analysis

Prior to the COVID-19 pandemic, the scope of agency authority under Section 361—and more specifically, under subsection (a)—to issue regulations "necessary" to prevent the foreign and interstate spread of communicable diseases was largely untested.[237] Since Congress enacted the provision as part of the PHSA in 1944, the agencies with delegated authority under Section 361 have historically invoked it in a limited way to issue regulations related to measures specifically contemplated in the provision.[238] The scale and nature of the COVID-19 pandemic have prompted some commentators to call for the imposition of public health orders—such as orders relating to movement restrictions and face masks—at the federal level.[239] Commentators have considered whether Section 361 could serve as the source of authority for such federal executive action.[240]

In September 2020, the CDC invoked its Section 361 authority to issue a national eviction moratorium—an order preceded by a narrower eviction moratorium enacted by Congress as part of its COVID-19 economic relief plan in the CARES Act.[241] The CDC concluded that this eviction moratorium was necessary to prevent the interstate spread of COVID-19 because it would reduce homelessness and the need for individuals to relocate to new congregate living settings.[242] Landlords and their trade groups have filed several lawsuits to challenge this order on various grounds, including that the CDC's Order exceeds the Agency's Section 361 authority.[243] This use of Section 361 authority could raise larger questions about the CDC's scope of authority under this provision.[244]

Analysis of Existing Case Law on Section 361

In considering whether a CDC order exceeds the Agency's authority under Section 361, a court's analysis will likely depend on the specific nature and scope of the order.[245] In general, one of the first interpretive questions is likely whether the statutory text unambiguously precludes the

[237] *See* Wiley, *supra* note 25.

[238] *See supra* notes 116–117 and accompanying text.

[239] *See* Wiley, *supra* note 25; Haffajee & Mello, *supra* note 12.

[240] *See* Wiley, *supra* note 25; Haffajee & Mello, *supra* note 12.

[241] *See supra* notes 141–150 and accompanying text.

[242] 85 Fed. Reg. 55,292, 55,294–55,296 (Sept. 4, 2020).

[243] *See, e.g.*, Brown v. Azar, 2020 WL 6364310, at *6–10 (N.D. Ga. Oct. 29, 2020), *appeal docketed*, No. 20-14210 (11th Cir. Nov. 9, 2020); Chambless Enterp., LLC v. Redfield, 3:20-CV-01455, 2020 WL 7588849 (W.D. La. Dec. 22, 2020); Terkel v. Ctrs. for Disease Control & Prevention, No. 6:20-cv-00564, 2021 WL 742877 (E.D. Tx. Feb. 25, 2021), *appeal docketed*, No. 21-40137 (5th Cir. Mar. 3, 2021); Skyworks, Ltd. v. Ctrs. for Disease Control & Prevention, No. 5:20-CV-02407, 2021 WL 911720 (N.D. Ohio Mar. 10, 2021); Tiger Lily LLC v. U.S. Dep't of Hous. & Urb. Dev., No. 21-5256, 2021 WL 1165170 (6th Cir. Mar. 29, 2021).

[244] In addition to limits imposed by Section 361 itself, regulations and orders issued under the statute are also subject to constitutional limits and other generally applicable statutory requirements, such as the Administrative Procedure Act. At least one court considering the validity of CDC's eviction moratorium invalidated it—as to the litigating plaintiffs—on the grounds that the order exceeded the federal government's Commerce Clause authority. *See Terkel*, 2021 WL 742877, at *10–11. The *Terkel* court concluded, among other considerations, that the regulated activity at issue—eviction—does not substantially affect interstate commerce because (1) it pertains to the property owner's possessory interest and is therefore noneconomic and local in character, and (2) its relationship to interstate commerce as set forth under the CDC order—which focuses on its public health effects—is attenuated. *See id.* at *5–10. Some of the constitutional infirmities identified by the court may be lessened by placing the moratorium in the context of larger national pandemic relief, as discussed *infra*, in "Possible Outer Limits on Agency Authority Under Section 361."

[245] *See supra* "Chevron Deference."

agency action in question.[246] In cases challenging agency authority under Section 361, for instance, plaintiffs have advanced a narrow construction of subsection (a) based on its text.[247] Specifically, relying principally on semantic canons of statutory construction,[248] these plaintiffs argued that an agency's authority to issue regulations "necessary" to prevent the spread of communicable diseases is limited to measures similar to those enumerated in the subsequent sentence in Section 361(a) (i.e., measures similar to those involving "inspection, fumigation, disinfection, sanitation, pest extermination, [and] destruction of animals or articles found to be so infected or contaminated as to be sources of dangerous infection to human beings").[249] Several courts have agreed with this construction.[250] One court characterized the enumerated measures in Section 361(a) as limiting agencies to issuing similar "property interest restrictions."[251] Another described the limitation as measures aimed at "specific targets found to be sources of infection," but not those that would reduce "amorphous disease spread."[252]

Other courts have rejected this narrow construction of Section 361(a). In *Independent Turtle Farmers of Louisiana, Inc. v. United States*, for instance, the district court concluded that the enumerated list in subsection (a) "does not act as a limitation upon the types of regulations that may be enacted under Section 361," given that it "directly precedes a 'catch-all' grant of authority [that] allow[s] [agencies] to enact 'other measures, as in [their] judgment may be necessary.'"[253] In the court's view, this structure indicates that the enumerated list is more appropriately

[246] *See supra* "The Two-Step Framework."

[247] *See infra* note 250.

[248] *See Brown*, 2020 WL 6364310 at *9–10 (noting plaintiffs argue "that several of the canons of construction (*ejusdem generis*, *expressio[] unius*, *noscitur a sociis* and *casus omissus*)" compel a narrow reading of Section 361(a) that "limits the CDC's authority to measures involving inspection, fumigation, disinfection, sanitation, pest extermination and the destruction of animals or articles believed to be sources of infection"); *Chambless*, 2020 WL 7588849, at *3 (similar). For more information about these semantic canons of construction, see Brannon, *supra* note 159, at 54, 56.

[249] 42 U.S.C. § 264(a).

[250] *See* Skyworks, Ltd. v. Ctrs. for Disease Control & Prevention, No. 5:20-CV-02407, 2021 WL 911720, *10 (N.D. Ohio Mar. 10, 2021) (holding that Section 361(a) authorizes the CDC to take measures "reasonably of the type Congress contemplated in the statutory text—fumigation, disinfection, destruction of animals or things" and does not extend to an eviction moratorium); Tiger Lily LLC v. U.S. Dep't of Hous. & Urb. Dev., No. 21-5256, 2021 WL 1165170, at *3 (6th Cir. Mar. 29, 2021) (similar).

[251] *Tiger Lily*, 2021 WL 1165170, at *3. In *Tiger Lily*, the Sixth Circuit Court of Appeals considered the scope of the CDC's Section 361(a) authority within the context of the government's procedural motion to stay a district court's earlier order pending appeal. *See id.* at *1. The U.S. District Court for the Western District of Tennessee had concluded that the CDC's eviction moratorium exceeded the Agency's Section 361(a) authority and prohibited the Agency from enforcing the moratorium in that District. *See id.*; *see also* Tiger Lily LLC v. U.S. Dep't of Hous. & Urb. Dev., No. 2:20-cv-02692, 2021 WL 1171887, at *10 (W.D. Tenn. Mar. 15, 2021). In rejecting the government's emergency motion to stay the district court's order, the Sixth Circuit largely agreed with the district court's analysis, characterizing the authority under Section 361(a) as limited to "property interest restrictions" and concluding the government did not make a strong showing that it is likely to succeed on the merits. *See Tiger Lily*, 2021 WL 1165170, at *2–4. The Sixth Circuit's decision, however, does not reflect a final determination on the merits, which the court is expected to consider following full briefing and oral argument from the parties. The court's preliminary analysis is notable, however, because it may preclude the CDC from continuing to impose certain existing transmission prevention regulations or orders issued under Section 361(a) that arguably do not pertain to "property interest restrictions," such as general traveler health screening at ports of entry, reporting requirements to facilitate contact tracing, and testing requirements for arriving travelers. *See supra* "Agencies' Use of Section 361 Authority."

[252] *Skyworks*, 2021 WL911720, at *10; *see also, e.g.*, *Chambless*, 2020 WL 7588849, at *3 (noting plaintiffs' argument that the enumerated measures listed in Section 361(a) limit the CDC to "conventional, localized disease-prevention measures"); Josh Blackman, *The Statutory Authority for the Nationwide Eviction Moratorium*, VOLOKH CONSPIRACY (Sept. 1, 2020), https://reason.com/volokh/2020/09/01/the-statutory-authority-for-the-nationwide-eviction-moratorium/.

[253] 703 F. Supp. 2d 604, 619 (W.D. La. 2010).

construed as "suggest[ions]" of—as opposed to limits on—possible measures.[254] In *Brown v. Azar*, the district court generally adopted this construction, concluding that Section 361(a) reflects "Congress' unambiguous intent to delegate broad authority to the CDC" to take measures "it deems reasonably necessary to prevent the spread of disease, so long as it determines that the measures taken by any state or local government are insufficient to prevent the spread of the disease."[255] Under this broad construction, each court concluded that the agency regulation or order at issue—a turtle sale ban in the case of *Independent Turtle Farmers* and the eviction moratorium in the case of *Brown*—did *not* exceed the agency's Section 361 authority.[256]

This broad construction of Section 361(a), however, raises larger questions regarding the possible outer limit on an agency's discretion to implement measures "necessary" to prevent the interstate spread of a communicable disease. Before the CDC issued the nationwide eviction moratorium, for instance, many states had halted evictions to varying degrees as part of their pandemic response.[257] While states issued the moratoriums in part to reduce COVID-19 transmission, they also halted evictions—as one court observed—to address certain "second-order economic effects" of the pandemic.[258] Namely, as states issued stay-at-home orders and the temporary closure of non-essential businesses to curb the spread of COVID-19, many households began experiencing financial difficulty as a result of the pandemic, affecting their ability to pay rent.[259] To alleviate this financial pressure—and to facilitate their residents' ability to shelter in place—some states halted certain evictions temporarily.[260] Some states also took additional measures, such as offering temporary forbearance on certain home mortgages and direct rental assistance payments to landlords on behalf of certain tenants.[261] Thus, in the context of the COVID-19 pandemic, an eviction moratorium could be characterized as an economic regulation that also has the potential public health effect of reducing transmissions.[262] If a broad construction of Section 361

[254] *Id.* at 619–20.

[255] Brown v. Azar, 2020 WL 6364310, at *9 (N.D. Ga. Oct. 29, 2020), *appeal docketed*, No. 20-14210 (11th Cir. Nov. 9, 2020). *See also Chambless*, 2020 WL 7588849, at *5 ("This Court finds that the plain text of the statute is unambiguous and evinces a legislative determination to defer to the 'judgment' of public health authorities about what measures they deem 'necessary' to prevent contagion.").

[256] *Ind. Turtle Farmers*, 703 F. Supp. 2d at 619; *Brown*, 2020 WL 6364310, at *10. In *Brown*, the district court considered the scope of CDC's authority on the plaintiffs' motion for preliminary injunction. *Brown*, 2020 WL 6364310, at *9–10. The court declined to enjoin the eviction moratorium after concluding—among other issues—that the plaintiffs failed to demonstrate a likelihood of success on the merits as to their claim that the CDC eviction moratorium exceeds the Agency's Section 361 authority. *Id.* at *9–10. Plaintiffs have appealed the district court's denial of the preliminary injunction. *See* Brown v. Azar, No. 20-14210 (11th Cir. filed Nov. 9, 2020).

[257] *See infra* note 258 and accompanying text.

[258] *See* Elmsford Apart. Assoc., LLC v. Cuomo, 469 F. Supp. 3d 148, 156–57 (S.D.N.Y. 2020); Baptiste v. Kennealy, No. 1:20-cv-11335-MLW, 2020 WL 5751572, at *8–9 (D. Mass. 2020) (noting state legislators commented that they enacted Massachusetts's eviction moratorium "to safeguard tenants and homeowners from economic insecurity during and for a period after the state of emergency ends" and to promote housing stability to ensure that residents are able to shelter in place); Auracle Homes, LLC v. Lamont, No. 3:20-cv-00829, 2020 WL 4558682 (D. Conn. 2020) (describing various measures taken by the governor—including halting evictions, offering forbearance on certain mortgages, and providing direct rental assistance payments—to "[h]elp[] Connecticut residents stay housed" during the pandemic). *See also* Kathryn M. Leifheit et al., *Expiring Eviction Moratoriums and COVID-19 Incidence and Mortality*, at 4 (Nov. 30, 2020) (preprint pending peer review), *available at* https://ssrn.com/abstract=3739576 (noting that 43 states and the District of Columbia temporarily halted evictions to varying lengths as part of their pandemic response).

[259] *See Elmsford*, 469 F. Supp. 3d at 156–57.

[260] *See id.*; *Baptiste*, 2020 WL 5751572, at *8–9; *Auracle*, 2020 WL 4558682, at *2–5.

[261] *See Auracle*, 2020 WL 4558682, at *2–5.

[262] *See Baptiste*, 2020 WL 5751572, at *8–9 (noting that the eviction moratorium facilitates shelter in place during the pandemic); *Auracle*, 2020 WL 4558682, at *2–5 (noting that measures that reduce housing insecurity also help to

encompasses the authority to issue such a regulation, it would conceivably encompass other similar measures with potentially broad-reaching economic consequences, such as a federal requirement to work remotely under specified conditions or a federal stay-at-home order.[263] This construction thus raises the question of whether Section 361—by authorizing delegated agencies to take necessary measures to prevent and control transmission—clearly and expressly delegates this broad authority.

The relevant statutory text and context—the starting point of statutory interpretation[264]—may indicate certain ambiguities as to Section 361's scope. While Section 361's text indicates that the enumerated list in subsection (a) is not an exhaustive list of possible "necessary" measures, the context of Section 361 overall may nevertheless support a narrower reading of subsection (a). Under the structure of Section 361, the seemingly broad grant of authority to issue "necessary" regulations to curb transmission is followed by several examples of relatively discrete disease control or prevention measures within subsection (a).[265] The remaining subsections of Section 361 primarily set forth the CDC's foreign and interstate quarantine and isolation authority, including the authority to apprehend, examine, and detain "any individual" reasonably believed to be infected with certain communicable diseases.[266] The text of these subsections frames this quarantine authority as another example of possible regulations issued under "this section"[267] but imposes certain additional safeguards to which these regulations are subject—including limiting the exercise of this authority to certain specified communicable diseases and additional standards with which these regulations must comply.[268]

Accordingly, Section 361's structure could indicate that, insofar as Congress contemplated a use of subsection (a) authority beyond the enumerated measures to permit the quarantine of persons—itself a well-established disease control measure at the time of Section 361's enactment[269]—it subjected the exercise of such authority to some limits.[270] In the context of Section 361's focus on quarantine authority and its parameters, the enumerated list under subsection (a) could potentially be understood as a list of measures that facilitate or supplement quarantine efforts.[271] These considerations could suggest a narrower reading of Section 361(a) that limits the authority to issue "necessary" regulations to measures related to quarantine or other similar public health measures.

The larger context of the PHSA may further highlight this ambiguity. Different organizational features of PHSA—including the titles and headings of Section 361 and its related provisions—

control and reduce the spread of COVID-19).

[263] *See* Skyworks, Ltd. v. Ctrs. for Disease Control & Prevention, No. 5:20-cv-2407, 2021 WL 911721, at *10 (N.D. Ohio Mar. 10, 2021) (noting that a broad reading of Section 361(a) "would authorize action with few, if any, limits—tantamount to creating a general federal police power").

[264] *See supra* "Statutory Interpretation."

[265] 42 U.S.C. § 264(a).

[266] *Id.* § 264(b)–(d).

[267] *Id.*

[268] *See id.* § 264(b) (limiting the application of foreign and interstate quarantine and isolation authority to prevent the spread of only communicable diseases designated by an executive order); *id.* § 264(d) (limiting the application of interstate quarantine and isolation authority only to individuals "reasonably believed to be infected with a communicable disease in a qualifying stage").

[269] *See supra* "Development of Relevant Federal Law Preceding Section 361."

[270] *See id.* § 264(b)–d).

[271] *See supra* notes 100–101 and accompanying text.

support conflicting interpretations of Section 361's scope.[272] On one hand, Section 361's heading—"Regulations to control communicable diseases"—suggests a broad authority. On the other hand, this section is one of several provisions under a statutory part titled "Quarantine and Inspection," and several other provisions within this part refer to regulations issued under Section 361 as "quarantine laws."[273] These references point to a narrower interpretation of Section 361 under which quarantine and isolation authority is the principal, if not the maximum, authority granted under the provision.

Possible Outer Limits on Agency Authority Under Section 361

To the extent Section 361's text may be ambiguous as to the scope of delegated authority, and depending on the scope of a particular agency order, certain canons of construction may supply the relevant guiding principles that resolve the ambiguity. Under the major questions and nondelegation doctrines, for instance, transmission control measures that implicate major political and economic questions, or otherwise exceed agency expertise, may exceed the bounds of agency discretion under Section 361.

As discussed above, the Supreme Court has applied the major question doctrine as a canon of statutory construction to presume that Congress, absent express and specific delegation, does not intend to grant agencies the power to fill in statutory gaps concerning questions of "deep economic and political significance."[274] The Court has invoked the doctrine to conclude that an agency exceeds its statutory authority when it seeks to assert a broad authority that it has never before sought under a long-existing statute, or when the agency lacks the relevant subject matter expertise.[275] As to Section 361, this means that if a court concludes the provision is ambiguous as to whether it delegates an invoked authority, a court might conclude that the scope of the CDC's discretion to order measures "necessary" to prevent the spread of COVID-19 may not extend to a measure that implicates major economic and political questions (e.g., by impacting a significant sector of an industry or addressing an issue long subject to congressional debate), even if the measures could have the effect of reducing COVID-19 transmission.[276] This may especially be the case if the measure implicates a regulatory area over which CDC lacks subject matter expertise and has traditionally not sought to exert authority.[277]

The CDC's eviction moratorium, as an example, potentially implicates the application of these principles. On one hand, the CDC might justify its eviction moratorium as an invocation of its clear, broad delegation under Section 361 to issue any "necessary" regulations to stem COVID-19 transmission. A recent study of state-level eviction moratoriums concluded that lifting eviction moratoriums was associated with increased COVID-19 incidence and mortality in those states, "supporting the public health rationale for use of eviction moratoriums to prevent the spread of

[272] While these organizational features cannot alter the meaning of clear statutory text, courts sometimes employ them as an interpretive tool when considering an ambiguous provision. *See* Almendarez-Torres v. United States, 523 U.S. 224, 234 (1998) ('"[T]he title of a statute and the heading of a section' are 'tools available for the resolution of a doubt' about the meaning of a statute." (quoting Bhd. of R.R. Trainmen v. Baltimore & Ohio R.R. Co., 331 U.S. 519, 529 (1947))); *see also* Killion, *supra* note 168.

[273] *See supra* notes 43, 53, and 59 and accompanying text.

[274] *See supra* "The Major Questions Doctrine."

[275] *See supra* notes 194–204 and accompanying text.

[276] *See id.*

[277] *See id.*

COVID-19."[278] This study supports the CDC's position that the moratorium is a public health measure over which it has discretion to deem "necessary" to implement in order to curb the interstate spread of COVID-19.[279]

On the other hand, as discussed in the preceding section, the scope of Section 361's delegated authority may be ambiguous.[280] If so, courts may presume that Congress did not intend to delegate to CDC the authority to impose a national eviction moratorium because the moratorium may implicate questions of "deep economic and political significance" in housing policies for which the CDC lacks the institutional expertise.

First, a national eviction moratorium may involve significant economic questions. By one estimate conducted using Census data and other sources, an estimated 13 million to 17 million renter households—or 29% to 43% of all renter households—were at risk of eviction by the end of 2020 due to COVID-related job loss and economic hardship.[281] Thus, the moratorium potentially concerns not only a significant portion of the overall rental market, but also raises other economic considerations, such as the accrual of unpaid rent, estimated to be in the range of $25 billion to $70 billion.[282] Some commentators also observe that evictions may impose additional potentially significant downstream public costs, such as the cost of providing emergency shelters.[283]

Second, the policy questions implicated by a national eviction moratorium may be subject to significant political debate, as the course of congressional action on this issue could indicate.[284] As noted, the CDC order was preceded by a more limited eviction moratorium enacted by Congress under the CARES Act, which applied only to rental properties receiving certain federal assistance or federally related financing, and did not provide rental assistance.[285] This more limited moratorium arguably represented, at the time, an unprecedented action by the federal government in an area of law that states and localities traditionally govern.[286] The CDC issued the

[278] *See* Leifheit et al., *supra* note 258, at 5.

[279] *Cf.* Emily A. Benfer et al., *Eviction, Health Inequity, and the Spread of COVID-19: Housing Policy as a Primary Pandemic Mitigation Strategy*, J. URBAN HEALTH (forthcoming 2020) (manuscript at 2–3) (stating that "[h]ousing policy designed to prevent displacement and eviction can be a key component of a comprehensive strategy to address health inequity and control the pandemic by reducing COVID-19 infection, transmission, illness, hospitalizations and death").

[280] *See supra* "Analysis of Existing Case Law on Section 361."

[281] *See* McCarty & Perl, *supra* note 143.

[282] *See id.*

[283] *See* NAT'L LOW INCOME HOUSING COALITION, COSTS OF COVID-19 EVICTIONS 7 (Nov. 19, 2020), https://nlihc.org/sites/default/files/costs-of-covid19-evictions.pdf (highlighting various potential eviction-related public costs, including costs related to the provision of emergency shelters, increased stress on the child welfare system, and stress-related medical needs).

[284] Some commentators who oppose the moratorium, for instance, argue that landlords, which may include millions of individual (as opposed to corporate) landlords, should not be forced to assume renters' financial distress, and that the moratorium may result in long-term adverse consequences for renters as landlords seek ways to recoup their loss of rental income. *See* Scott Lincicome, *The CDC Eviction Moratorium: An Epic Case Study in Very Bad Policy*, CATO INST. (Sept. 15, 2020), https://www.cato.org/publications/commentary/cdc-eviction-moratorium-epic-case-study-very-bad-policy. Other commentators who support the moratorium argue the moratorium must be coupled with adequate rental assistance and perhaps the development of a long-term housing voucher program that can provide rental assistance in future pandemics and economic recessions. *See* NAT'L LOW INCOME HOUSING COALITION, *supra* note 280, at 7.

[285] 15 U.S.C. § 9058.

[286] See CRS Insight IN11320, *CARES Act Eviction Moratorium*, by Maggie McCarty and David H. Carpenter.

broader moratorium in September 2020 shortly after the CARES Act moratorium expired, and after congressional negotiations over another coronavirus relief plan stalled.[287]

As the pandemic and its associated economic effects persisted through 2020, Congress reached agreement on a coronavirus relief plan in the Consolidated Appropriations Act, 2021 (CAA) in December, as the CDC eviction moratorium was set to expire. The CAA not only legislatively extended the CDC moratorium until January 31, 2021, but also provided emergency rental assistance to certain renter households.[288] This course of congressional action—wherein Congress initially exercised a more limited authority, subsequently engaged in extended negotiations, and eventually expanded the scope of the moratorium for a specified time period, while also providing related monetary assistance to address the evolving pandemic, suggests the existence of a substantial policy debate. This course of action could also be construed as demonstrating Congress's intent to exercise its legislative authority on this issue directly.[289]

Third, the CDC—as a public health agency—may lack specific expertise on both the economic considerations and the policy implications of an eviction moratorium, including the scope of housing assistance that should be provided within the context of the pandemic.[290] Consistent with the limits of their expertise, agencies that have been delegated authority under Section 361 have never before sought to assert similarly broad-reaching authority.[291]

Together, these considerations may weigh in favor of a presumption that Congress did not intend to delegate to CDC—through a long-existing provision of the PHSA—the power to halt evictions.[292] In the past, the Supreme Court has been reluctant to construe an agency's statutory authority, absent express delegation, as encompassing the authority to make significant policy decisions—particularly those involving issues outside the agency's core expertise—that affect a substantial portion of a sector of an industry.[293]

The nondelegation doctrine may also separately require a more limited construction of Section 361. As discussed above, the Supreme Court, to date, has upheld broad congressional delegations

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[287] *See, e.g.*, *Congressional Negotiations Stall as President Threatens Executive Order on Evictions*, NAT'L MULTIFAMILY HOUSING COUNCIL (Aug. 7, 2020), https://www.nmhc.org/news/nmhc-news/2020/congressional-negotiations-stall-as-president-threatens-executive-order-on-evictions/.

[288] H.R. 133, 116th Cong. (2020).

[289] *Cf.* FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 149–50 (2000) (reasoning that Congress's history of enacting certain tobacco-specific regulations evidenced an intent to limit regulatory authority over tobacco products by federal agencies).

[290] *See supra* "Agencies' Use of Section 361 Authority."

[291] *See id.*

[292] *See supra* notes 193–198 and accompanying text.

[293] *See supra* notes 193, 199–204, and accompanying text. Assuming that CDC's eviction moratorium exceeds the Agency's statutory authority, CAA's legislative extension of the order potentially raises the question as to whether Congress nevertheless ratified this exercise of agency authority. *See* Skyworks, Ltd. v. Ctrs. for Disease Control & Prevention, No. 5:20-CV-02407, 2021 WL 911720, at *12 (N.D. Ohio Mar. 10, 2021) (stating that "Congress may 'ratify acts which it might have authorized and give the force of law to official action unauthorized when taken'"). Courts that have considered this argument to date have generally rejected it, concluding the CAA did not evidence a clear intent to ratify agency action, at the very least not through the present. *See id.* (holding the CAA's "limited action" of changing the moratorium's expiration date did not clearly ratify agency action when Congress did not amend Section 361, and commenting that the extension "ma[de] sense" in the context of "facilit[ing] the transition between presidential administrations"); Tiger Lily LLC v. U.S. Dep't of Hous. & Urb. Dev., No. 21-5256, 2021 WL 1165170, at *4 (6th Cir. Mar. 29, 2021) (concluding that "nothing in § 502 [of the CAA] expressly approved the agency's interpretation").

to executive agencies as satisfying the "intelligible principle" test.[294] This approach, however, assumes the agency delegated with authority has the relevant subject matter expertise to address the "ever changing and more technical problems" of our "increasingly complex society."[295] This suggests that even under the permissive "intelligible principle" test, the Court may not approve a broad delegation of authority that exceeds an agency's area of expertise.[296] Thus, to the extent Section 361 may be read broadly to encompass an authority—such as the authority for CDC to order transmission control measures that implicate housing policies—the nondelegation doctrine may operate to direct a narrower reading of the statute precluding this exercise of agency authority.[297]

Plausible Constructions of Section 361

Assuming the major questions doctrine marks the outer limits of Section 361(a) authority, there is still an interpretive question of whether Section 361 imposes any additional, unambiguous limitations on the scope of its subsection (a) authority. If not, a court might consider whether an agency's interpretation of this provision is reasonable under *Chevron* Step Two.[298]

As discussed above, Section 361's statutory text and context may be ambiguous as to the scope of agency authority to issue "necessary" regulations to prevent the spread of communicable disease.[299] If a court looks to Section 361's legislative history,[300] the relevant history could support at least two plausible readings of subsection (a). Comments by Section 361's drafters could be construed as limiting the scope of Section 361 authority to "quarantine and inspection," intended only to clarify or streamline various federal quarantine laws that preceded Section 361.[301] Under this reading, the authority under Section 361(a) to issue "necessary" regulations would be limited to "steps necessary in the enforcement of quarantine."[302] This reading could be consistent with Section 361's text, to the extent the enumerated list in subsection (a)—including inspection, fumigation, and sanitation—could be characterized as measures that facilitate or supplement quarantine efforts.[303] Structurally, it may also be consistent with the use of "quarantine law" as a shorthand reference to Section 361 in other PHSA provisions.[304] Today, such measures could encompass steps intended to facilitate the identification of quarantinable individuals, such as testing and contact tracing.[305]

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[294] *See supra* "The Nondelegation Doctrine."

[295] *See* Mistretta v. United States, 488 U.S. 361, 372 (1989).

[296] *See supra* notes 224–230 and accompanying text.

[297] *Cf.* Gonzales v. Oregon, 546 U.S. 243, 266 (2006) ("Because historical familiarity and policymaking expertise account in the first instance for the presumption that Congress delegates interpretive lawmaking power to the agency rather than to the reviewing court, we presume here that Congress intended to invest interpretive power in the administrative actor in the best position to develop these attributes." (quoting Martin v. Occupational Safety & Health Rev. Comm'n, 499 U.S. 144, 153 (1991))).

[298] *See supra* "The Two-Step Framework."

[299] *See supra* "Analysis of Existing Case Law on Section 361."

[300] *See supra* "Statutory Interpretation."

[301] *See supra* notes 96–101 and accompanying text.

[302] *See supra* note 100 and accompanying text.

[303] *See supra* notes 265–271 and accompanying text.

[304] *See supra* note 273–305 and accompanying text.

[305] *See supra* notes 131–134 and accompanying text.

On the other hand, the drafters' comments on Section 361 could also support a broader reading that authorizes the use of Section 361(a) to issue "necessary" regulations that implement any evidenced-based public health measures that have been established as effective in preventing transmission, such as quarantine, inspection, and other enumerated measures that were in use as of 1944. While the drafters of Section 361 at times equated the authority under subsection (a) to the authority to quarantine, they also emphasized that provisions were intentionally "written in broader terms in order to cope with emergency situations which we cannot now foresee," signaling an intent to provide broader, more flexible authority to implement transmission control measures that were not yet known.[306] This intent is arguably consistent with the text of Section 361—which could have, but does not, expressly limit subsection (a) to quarantine or its related measures, and instead, structures the quarantine-specific authorities under subsections (b) to (d) as an example of one possible use of subsection (a) authority.[307]

In the context of the COVID-19 pandemic, this broader construction could potentially include a federal requirement to wear face masks to prevent the interstate or foreign spread of the disease, given that experimental and epidemiological data have shown that community use of masks is effective at reducing the spread of SARS-CoV-2.[308] There may be an open question as to whether a federal mask mandate raises questions of "deep economic and political significance" that places it outside the bounds of Section 361.[309] While a mask mandate would not appear to impose any significant economic impact, there is a public debate about whether state and federal governments should require masks.[310] Given the limited case law defining the parameters of a major economic and political question, it is difficult to predict whether a public debate of this nature would give rise to a legally cognizable major question.[311] To date, however, the Court has seldom invoked the major questions doctrine on an issue that lacked significant economic impact.[312] In what appears to be the only case when the Court has done so, the issue was physician-assisted suicide—a practice that had been criminalized by many states for more than a century in the United States and was the subject of more recent reexamination that entailed "an earnest and profound debate

[306] *See supra* notes 107–109 and accompanying text.

[307] *See supra* notes 45–51.

[308] *See, e.g.*, CTRS FOR DISEASE CONTROL & PREVENTION, SCIENTIFIC BRIEF: COMMUNITY USE OF CLOTH MASKS TO CONTROL THE SPREAD OF SARS-COV-2 (Nov. 20, 2020), https://www.cdc.gov/coronavirus/2019-ncov/more/masking-science-sars-cov2.html (summarizing studies). As noted *supra* in note 244, any regulations issued under Section 361 are also restricted by the Constitution and other generally applicable statutory requirements. Thus, the scope of a federal mask mandate may be limited by the Commerce Clause, which authorizes the federal government to regulate (1) channels of interstate commerce; (2) instrumentalities, persons, or things in interstate commerce; and (3) activities that substantially affect interstate commerce. *See* United States v. Lopez, 514 U.S. 549, 558–59 (1995). On January 29, 2021, the CDC issued an order—effective February 1, 2021—that requires all passengers traveling on and all personnel operating any conveyance (including airplanes, trains, subways, and buses), as well as any person while at any transportation hub (including airports, bus terminals, and train station), to wear masks that cover the mouth and nose. 86 Fed. Reg. 8025, 8026 (Feb. 3, 2021). This order, which exempts private transportation operated for non-commercial use, appears to invoke the federal government's established authority to regulate channels, instrumentalities, and intrastate economic activities that substantially affect interstate commerce. *See* CRS Legal Sidebar LSB10589, *Legal Issues Related to Transportation Mask-Wearing Mandates*, by Bryan L. Adkins.

[309] *See supra* notes 274–277 and accompanying text. As a point of contrast, a mandate related to vaccination—another public health measure—may implicate more significant economic and political questions. *See* CRS Report R46745, *State and Federal Authority to Mandate COVID-19 Vaccination*, by Wen W. Shen, at 7 & n.61.

[310] *See* CRS Legal Sidebar LSB10530, *Could the President or Congress Enact a Nationwide Mask Mandate?*, by Wen W. Shen, at 1–2.

[311] *See supra* notes 205–216 and accompanying text.

[312] *See supra* "The Major Questions Doctrine."

regarding its morality, legality, and practicality."[313] A mask mandate, in contrast, may not raise underlying issues of a similar scale.[314] Instead, most objections to mask mandates are generally based on concerns regarding the infringement of individual liberty.[315] This type of infringement is generally inherent to many public health measures that control transmission, including quarantine, which can impose more substantial liberty restrictions than face masks.[316]

To the extent Section 361 is subject to at least two plausible constructions based on its text, structure, and legislative history,[317] the provision is likely ambiguous as to its scope.[318] If a court agreed that the provision is ambiguous, it may conclude that under *Chevron*, the relevant agencies have discretion to carry out their statutory duties under their reasonable interpretations of the statute.[319]

Considerations for Congress

As illustrated by the states' and the federal government's responses to date, the COVID-19 pandemic presents a set of complex public health and economic challenges. To the extent Congress determines that more coordinated federal action is necessary to address the pandemic, it may wish to update Section 361 to clarify the agencies' scope of authority to implement the relevant public health orders at the federal level. Where a federal public health order may implicate major economic or political questions, or a policy area outside the expertise of a public health agency, Congress may need to act legislatively, within constitutional limits, to supply the necessary additional authority. Even where an agency has existing authority to issue a federal public health order, however, additional congressional action may be necessary to enhance the enforcement of such an order. Congress may, for instance, amend Section 368 and related provisions of the PHSA to provide a more flexible enforcement scheme to support the agencies' exercise of their Section 361 authority.

[313] *See* Gonzalez v. Oregon, 546 U.S. 243, 267 (2006) (citing Washington v. Glucksberg, 521 U.S. 702, 735 (1997)).

[314] *See, e.g.*, Antietam Battlefield KOA v. Hogan, 461 F. Supp. 3d 214, 223 (D. Md. 2020) (noting that plaintiffs asked the court to enjoin several state orders—including a state mask mandate—because they "impose restrictions on individual liberties"); Parker v. Wolf, No. 20-cv-1601, 2020 WL 7295831, at *15 n.20 (M.D. Pa. 2020) (noting the state's mask mandate and contact tracing program "are, at worse, minor and fleeting inconveniences, especially when compared to the widespread infectiousness and death that [the governor, state attorney general, and secretary of health] credibly seek to avoid through these two orders").

[315] *See Antietam Battlefield*, 461 F. Supp. 3d at 223.

[316] *See* Liberian Comm. Ass'n of Conn. v. Lamont, 970 F.3d 174, 187 (2d Cir. 2020) (noting plaintiff's argument that quarantine is "a form of civil detention" that implicates fundamental liberty interests, but distinguishing quarantine from other forms of civil detention because it "involv[es] different public safety concern and implicat[es] different liberty interests").

[317] *Compare, e.g.*, Tiger Lily LLC v. U.S. Dep't of Hous. & Urb. Dev., No. 21-5256, 2021 WL 1165170, at *3 (6th Cir. Mar. 29, 2021, *with* Brown v. Azar, 2020 WL 6364310, at *6–10 (N.D. Ga. Oct. 29, 2020).

[318] *See* King v. Burwell, 576 U.S. 473, 489 (2015) (noting the ACA's tax credit provision is subject to two constructions—one limiting it to the state exchanges and the other encompassing both state and federal exchanges—and is thus "properly viewed as ambiguous").

[319] *See supra* "The Two-Step Framework."

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