Epilogue: COVID-19 in the Courts

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I INTRODUCTION

Most accounts of the law's intersection with a major public policy issue have litigation at least in the background. COVID-19 is no exception. Many chapters in this book detail policy areas – from prison health, to access to reproductive care, to worker safety, and more – in which litigation over aspects of the pandemic response played a major role. Other areas that were prominent in courthouses, although not as detailed in the foregoing pages, include election law, free exercise of religion, and the defining of services, including gun shops, as essential or not for purposes of preventing or ensuring access during the emergency. For many of these fields, the litigation shined a salutary light on systemic problems that preexisted COVID-19 but that COVID-19 made impossible to continue to ignore.

Yet the legacy of the COVID-19 litigation transcends its already significant impact on the many specific areas that COVID-19 touched. Most broadly, the arc of COVID-19 litigation is a story about the relationship among individual rights, courts, and governments. COVID-19 brought with it an initial period of judicial deference to expert leaders who curtailed individual liberties to deal with an unprecedented emergency. But later, the pandemic litigation ushered in a decline in deference that not only reversed many government actions, but also has outlasted and ties into mounting conversative opposition to the modern regulatory state. Courts grappled with deference both to state governments, and the temporary restrictions they imposed on individual liberty, and to major federal executive actions, taken under broad – but sometimes antiquated – statutory authorities.

The individual rights story begins with *Jacobson v. Massachusetts*,[1] a century-old Supreme Court precedent counseling deference to the state and its expertise in the name of public health. It continues, at least thus far, with religious liberty as

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[1] 197 U.S. 11 (1905).

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a particularly ascendent right coming out of the pandemic litigation, with other rights, such as those of the incarcerated, receiving new and needed attention, but ultimately not prevailing.

As Lindsay Wiley details in her chapter, courts engaged intensely with the interplay of the *Jacobson* precedent and our modern civil rights jurisprudence, including with certain individual rights that have received special protection in recent decades, such as reproductive rights, Second Amendment rights concerning guns, and free exercise of religion. In the face of challenges involving religious gatherings in particular, *Jacobson* appeared to be teetering on the brink of extinction, a development that rang alarm bells for public health experts, who chronicled the risk to more than a century's worth of judicial deference to the judgment of scientific experts on matters ranging from sanitation to compulsory vaccination.

But just as the *Jacobson* wars were coming to a climax, the overarching litigation narrative of the pandemic shifted. The Biden Administration followed through on its promise to take more direct control over the pandemic than had its predecessor, and its executive actions offered bigger litigation targets. Suddenly, the fight was no longer about *Jacobson*. Instead, it became a struggle between an increasingly textualist, anti-deferential judiciary and long-standing regulatory authorities such as the Centers for Disease Control and Prevention (CDC) statute and the Occupational Safety and Health (OSH) Act – enacted in 1944 and 1970, respectively. As the litigation wore on, many courts gave unduly cramped readings to these public health acts, seeking specificity from laws that were instead broadly drafted to be nimble in unforeseeable circumstances.

If anything, the pandemic has illustrated the unpredictability of public health emergencies and the need for broad statutory authorities that are flexible enough to address the next crisis.

The OSH Act, for example, provides the Occupational Safety and Health Administration (OSHA) with exceedingly broad authority; yet the courts became dissatisfied with broad authorities and instead sought specific and detailed delegations. It is historically significant that President Biden's pandemic orders coincided with a conservative movement already underway to curtail the reach of federal executive power. Fueled largely by Justice Neil Gorsuch's discomfort with congressional delegations to administrative agencies, the Supreme Court used the COVID-19 cases as an opportunity to entrench a mostly-dormant legal doctrine that curtails deference to administrative actions on questions of major economic, policy, or political significance without a clear statutory authorization for that precise action from Congress.

This doctrine, called "the major questions doctrine," had been utilized only a handful of times before COVID-19 since it was first introduced by Justice Antonin Scalia in 1994.[2] In 2021, however, the Court used it to vacate a stay of a ruling

[2] MCI Telecomms. Corp. v. Am. Tel. & Tel. Co., 512 U.S. 218, 231 (1994).

invalidating a CDC COVID-19 order delaying evictions and then returned to the doctrine much more provocatively to stay President Biden's "vaccine or test" rule, which was promulgated under the generous authorities of the OSH Act. Other similar COVID-19 cases followed. Later the same term, the Court applied the doctrine in an important environmental case, making clear it was here to stay and was not just for COVID-19.[3] The ascendance of the major questions doctrine may be one of COVID-19's most important legal legacies and the one with the biggest implications for the future of the modern administrative state.

From a jurisprudential standpoint, what is interesting is that the Court made these significant doctrinal moves largely through statutory, rather than constitutional, law. The big displacements were not opinions holding that Congress did not have the authority to impose an immunization requirement (and the Court in fact upheld some more limited requirements, as detailed later), but rather that the President and his agencies did not have that authority in some areas because Congress had not specifically enumerated it. Some view these judicial efforts as just a first step toward what might be a more seismic shift in the constitutional law of delegation. But, at the moment, and thus in contrast to the early, *Jacobson*-heavy cases of the pandemic, the focus has been on congressional authorization and administrative authorities, and not on individual rights.

As such, the litigation arc went from individual to governmental; from constitutional to regulatory; from deferential to restraining. Perhaps that arc was inevitable given the unprecedented duration of the emergency; perhaps that arc was also especially likely given that government responses to the pandemic morphed over time as governments moved from early tools such as individual lockdowns to later tools such as population immunization.

The final point to make about this litigation arc is that it was unusually *fast*. Almost none of the Court's major COVID-19 cases arrived on the ordinary procedural path, in which cases typically take years to be fully litigated in the lower courts before they arrive for Supreme Court review. Instead, the COVID-19 era also marked the ascendance of the so-called "shadow docket," through which the Court gives expedited review to an issue that is presented not on the merits, but as an application for emergency relief (often after an injunction is issued by a lower court). Unlike a typical Supreme Court case, cases presented via the shadow docket usually do not have full merits briefing, oral arguments, or a final decision from the courts below. Decisions are often issued without a signed opinion.

During the 2020 term, the Supreme Court considered sixty-six cases on the shadow docket, more than half of which concerned disputes in which COVID-19 played a central role,[4] compared to seventy-nine cases decided with full briefing

[3] West Virginia v. EPA, 142 S. Ct. 2587 (2022).

[4] This count includes cases that began as applications for emergency relief that after referral to the full Court were treated as petitions for writ of certiorari, granted, and vacated.

and on the merits that term, just two of which substantially related to COVID-19.[5] For so many momentous legal decisions to come through this procedural shortcut, rather than with the benefit of full deliberation, was – like so many other aspects of COVID-19 – unprecedented.

II LOCKDOWNS, ACCESS TO ESSENTIAL SERVICES, AND INDIVIDUAL RIGHTS

Individual rights cases involving lockdowns and the suspension of gatherings and business operations were the paradigm cases that dominated court dockets from March 2020 until the middle of 2021. Legal claims were largely constitutional or state-law based, meaning they typically involved alleged infringements on individual liberties, such as the First Amendment or the right to bear arms, by state or local action taken in the name of the public health emergency. Governments were largely victorious in the first six months or so. Courts deferred to emergency authorities under the century-old Supreme Court precedent *Jacobson v. Massachusetts*, as discussed in Wiley's chapter, or sometimes under statutes passed by state legislatures.

As the months passed, however, some courts grew less deferential to emergency measures, despite the fact that the *Jacobson* case itself, which concerned a smallpox vaccination requirement, was grounded in long-term public health concerns, not any temporally limited state of emergency. Some of that judicial frustration produced opinions that articulated individual liberties in new ways or at least reconciled *Jacobson* with modern liberties jurisprudence in ways less accommodating of government authority than they had before.

In the context of reproductive care, for example, early cases challenged the categorization of abortion as an elective surgical procedure that hospitals could suspend along with other procedures. Brought before the Supreme Court's 2022 ruling striking down *Roe v. Wade*, cases saw states invoking *Jacobson* as a trump card to *Roe* and its progeny. But courts generally ruled instead for plaintiffs during this early period, recognizing the importance of *Jacobson* deference but holding that, even under *Jacobson*'s own framework, deference likely could not permanently displace access to a fundamental right when the public health benefit was relatively limited.[6]

Litigation also ensued to compel the Food and Drug Administration (FDA) to lift in-person dispensing requirements for mifepristone, one of two pills required

[5] October Term 2020, SCOTUSblog, www.scotusblog.com/case-files/terms/ot2020; Kalvis Golde, In Barrett's First Term, Conservative Majority is Dominant but Divided, SCOTUSblog (July 2, 2021), www.scotusblog.com/2021/07/in-barretts-first-term-conservative-majority-is-dominant-but-divided; Stephen I. Vladeck, The Shadow Docket: How the Supreme Court Uses Stealth Rulings to Amass Power and Undermine the Republic (2023). Our count lists consolidated challenges as separate unconsolidated cases to present a more relevant comparison to the shadow docket.

[6] See, for example, Adams & Boyle, P.C. v. Slatery, 956 F.3d 913 (6th Cir. 2020); Robinson v. Att'y Gen., 957 F.3d 1171 (11th Cir. 2020).

for a medication abortion. A federal court granted a preliminary injunction, halting the in-person requirements, but the Supreme Court in early 2021 stayed the injunction by a 6–3 vote.[7] Later that year, the FDA eventually lifted those requirements itself, citing in part, as evidence of mifepristone's safety, data from the period the injunction was in effect. Litigation over mifepristone and its dispensing requirements remains ongoing as this book goes to press.

The cross-pressure between modern rights-based claims and *Jacobson* escalated with guns. Early in the pandemic, firearms retailers generally lost cases challenging their closures as non-essential businesses. In cases from New York and California, for example, the courts held that *Jacobson* was still controlling and focused on the temporary nature of the closures, their neutrality across all kinds of businesses, and the relationship of closures to the public health goals the state governments were trying to achieve.[8] But later the tone started to change. In one California case, the district court early in the pandemic had upheld, under *Jacobson*, a challenged restriction on all gun and ammunition shops and firing ranges. Two years later, however, the Ninth Circuit found *Jacobson* "inapplicable" to rights to which the Supreme Court in "the intervening century since *Jacobson*, … [has] determined that some level of heightened scrutiny applies."[9] The notion that *Jacobson* might not apply *at all* when a right entitled to heightened scrutiny is implicated was novel; it also appeared in the religion cases, as detailed later in this section.

One area that has not seen significant modern heightened rights development is the prison context, specifically the Eighth Amendment and the statutory rights of the incarcerated to be protected from "deliberate indifference" to their health or safety. As such, perhaps it is no surprise that governments were more successful in deflecting lawsuits demanding social distancing, dedensification, and other health measures in prisons. Courts tended to defer to prison officials when there was any evidence that officials had taken some actions to address the pandemic, even where those actions were not the kinds of measures that incarcerated individuals and health experts demanded.

For example, in *Valentine v. Collier*,[10] the federal appellate court in Texas, the Fifth Circuit, halted an injunction imposed by a lower federal court that required prisons to take certain public health measures to curb the spread of COVID-19. The appeals court found that the prison officials' actions had been reasonable because they had instituted a policy requiring masks and social distancing and had some

[7] FDA v. Am. Coll. of Obstetricians & Gynecologists, 141 S. Ct. 578 (2021).

[8] See Dark Storm Indus. LLC v. Cuomo, 471 F.Supp.3d 482 (N.D.N.Y. 2020), appeal dismissed, cause remanded sub nom., No. 20-2725-CV, 2021 WL 4538640 (2d Cir. Oct. 5, 2021); Altman v. Cnty. of Santa Clara, 464 F.Supp.3d 1106 (N.D. Cal. 2020).

[9] McDougall v. Cnty. of Ventura, 23 F.4th 1095, 1108-09 (9th Cir. 2022), reversing and remanding, 495 F.Supp.3d 881 (C.D. Cal. 2020); see also 38 F.4th 1162 (9th Cir. 2022) (vacating and remanding in light of N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111 (2022)).

[10] 140 S. Ct. 1598 (2020); 141 S. Ct. 57 (2020).

testing available. The Supreme Court denied emergency relief twice, the second time over the dissent of Justice Sonia Sotomayor, joined by Justice Elena Kagan, who would have deferred to the on-the-ground factual judgments of the district court, which included evidence that masking and distancing requirements were not followed; test results came back too late to control the spread; and the prison continued to house infected inmates with uninfected ones. Justice Sotomayor found that, "far from 'dispell[ing]' an inference of deliberate indifference, the prison's actions highlighted by the Fifth Circuit only confirm it." Other cases involving incarcerated individuals challenged judges to evaluate their powers over sentence reduction and temporary release.[11]

In the education context, another instance in which there is generally not a heightened standard of review, courts largely rejected challenges to school-based vaccination. Different kinds of conflicts arose when some localities sought to impose more protective public health measures, specifically mask mandates, in states where the governor had lifted or even prohibited such restrictions. Those cases implicated state-level constitutional and statutory claims about the state-local government relationships,[12] although in some cases, individuals and advocacy groups brought claims under federal statutes, including the Americans with Disabilities Act and the Rehabilitation Act, on behalf of disabled students seeking additional protective measures.[13] These cases were supported by federal investigations conducted by the Department of Education's Office of Civil Rights.

Election law cases were also prevalent, especially running up to the November 2020 presidential election, and the challenges to COVID-19 measures were more successful – likely because certain election law doctrines provided special protections that sidelined *Jacobson*-type deference. For example, one major case involving the use of absentee ballots related to the presidential primary in Wisconsin, a critical swing state in the 2020 election.[14] Because of COVID-19, about one million more voters than in 2016 signed up to receive an absentee ballot and vote by mail. With the system overwhelmed, interested parties sued to extend the postmark date for absentee ballots in the state for reasons that included the fact that many voters had not received their ballots on time. The case made its way up to the Supreme Court,

[11] See, for example, United States v. Haney, 454 F.Supp.3d 316 (S.D.N.Y. 2020); United States v. Roberts, 612 F.Supp.3d 351 (S.D.N.Y. 2020); United States v. Perez, 451 F.Supp.3d 288 (S.D.N.Y. 2020); United States v. Hernandez, No. 18 CR. 834 (PAE), 2020 WL 1445851 (S.D.N.Y. Mar. 25, 2020).

[12] See, for example, Abbott v. City of San Antonio, 648 S.W.3d 498 (Tex. App. 2021); Abbott v. Jenkins, 665 S.W.3d 675 (Tex. App. 2021); Alexandra Cnty. Sch. Bd. v. Youngkin, No. CL22000224-00 (Va. Cir. Ct. Feb. 4, 2022).

[13] See, for example, Arc of Iowa v. Reynolds, 24 F.4th 1162 (8th Cir. 2022), reh'g granted and opinion vacated, No. 21-3268, 2022 WL 898781 (8th Cir. Mar. 28, 2022), and vacated, 33 F.4th 1042 (8th Cir. 2022) (remanded to 4:21-cv-00264, 2022 WL 16627483 (S.D. Iowa Nov. 1, 2022)); E.T. v. Paxton, 41 F.4th 709 (5th Cir. 2022); Hayes v. DeSantis, 561 F.Supp.3d 1187 (S.D. Fla. 2021); Seaman v. Virginia, 593 F.Supp.3d 293 (W.D. Va. 2022).

[14] Republican Nat'l Comm. v. Democratic Nat'l Comm., 140 S. Ct. 1205 (2020).

where the Court stayed a preliminary injunction issued by the district court on the basis of the so-called "*Purcell* principle": the idea that a federal court should not intervene in a state's election rules close to an election. The dissenters, led by Justice Ruth Bader Ginsburg, argued that the majority's decision would lead to "massive disenfranchisement."

Also related to the subject of absentee ballots, in October 2020, the Supreme Court partially stayed a preliminary injunction that would have lifted a witness requirement for absentee ballots in South Carolina in an effort to make absentee ballots more accessible during the pandemic.[15] The Court also stayed an injunction that would have required curbside voting in Alabama, sought by advocates for disabled individuals who did not want to vote inside.[16] In another high-profile case, Democratic officials in Pennsylvania successfully sued all the way up to the state supreme court to secure declarations on a number of election-related issues, including extending absentee ballot deadlines.[17] Republican petitioners, backed by President Trump, unsuccessfully sought review in the U.S. Supreme Court. Justices Samuel Alito and Clarence Thomas each wrote opinions suggesting the Pennsylvania Supreme Court may not have the authority to alter the absentee ballot deadline.[18] In doing so, they relied on a controversial constitutional theory with roots in *Bush v. Gore* called the independent state legislature doctrine, which argues that only state legislatures, not state executives or courts, can regulate the procedures of elections under the US Constitution. The theory was also referenced in other COVID-19/election-related shadow docket opinions.[19] In one of its final decisions of the 2022 term, the Supreme Court ultimately repudiated this theory.[20]

But the most successful refutations of *Jacobson* came from those raising free exercise of religion claims in the face of generally applicable pandemic mitigation efforts. The initial wave of these cases came in the context of city and statewide orders to avoid large indoor gatherings. The first major case to reach the Supreme Court was *South Bay United Pentecostal Church v. Newsom*,[21] in which religious institutions challenged California's order capping the number of people allowed in indoor gatherings, including to 25-percent capacity in indoor religious services. Siding with California, a 5–4 Court embraced *Jacobson* and public health authorities. Although the case was decided on the shadow docket without a signed decision, Chief Justice John Roberts wrote a concurring opinion, in which he quoted

[15] Andino v. Middleton, 141 S. Ct. 9 (2020).
[16] Merrill v. People First, 141 S. Ct. 25 (2020).
[17] Pa. Democratic Party v. Boockvar, 238 A.3d 345 (Pa. 2020).
[18] Republican Party v. Degraffenreid, 141 S. Ct. 732 (2021) (Thomas, J., dissenting & Alito, J., dissenting); Republican Party v. Boockvar, 141 S. Ct. 1 (2020) (statement of Alito, J.).
[19] Democratic Nat'l Comm. v. Wis. State Legislature, 141 S. Ct. 28, 29, 34 n.1 (2020) (Gorsuch, J., concurring & Kavanaugh, J., concurring); Moore v. Circosta, 141 S. Ct. 46, 47 (2020) (Gorsuch, J., dissenting).
[20] Moore v. Harper, No. 21-1271, 2023 WL 4187750 (June 27, 2023).
[21] 140 S. Ct. 1613 (2020). This case is often referred to as South Bay I.

Jacobson for the principle that "our Constitution principally entrusts '[t]he safety and the health of the people' to the politically accountable officials of the States 'to guard and protect.'" He noted that comparable secular activities, such as "lectures, concerts, movie showings, spectator sports, and theatrical performances," had the same restrictions.

But six months after *South Bay*, the Court – with Justice Amy Coney Barrett now on the bench instead of Justice Ginsburg – reversed course in two cases, *Roman Catholic Diocese v. Cuomo*,[22] and its companion, *Agudath Israel v. Cuomo*.[23] The cases were brought by Catholic and Orthodox Jewish religious organizations, which challenged restrictions on their indoor worship by the New York state government. The Court concluded that the restrictions likely were not neutrally applicable because comparable secular activities were less restricted than religious worship. Rather than analogizing worship to lectures or concerts, the Court drew connections to "acupuncture facilities, camp grounds, garages … and all transportation facilities." Significantly, Justice Gorsuch's concurrence chastised the Chief Justice's *South Bay* opinion for "reach[ing] back 100 years" to invoke *Jacobson*.

One of the Supreme Court's most expansive decisions on religious accommodations following the New York cases came in April 2021, when religious plaintiffs challenged California's restrictions on the number of households (three) that could gather indoors together for violating their free exercise rights to host prayer groups. In an unsigned opinion, a 5–4 Court held that California violated the Free Exercise Clause because it treated "comparable secular activities more favorably than at-home religious exercise, permitting hair salons, retail stores, personal care services, movie theaters, private suites at sporting events and concerts, and indoor restaurants to bring together more than three households at a time."[24] Over objections by the dissenters that the Court should have deferred to the views of experts, the Court subjected the regulation not to *Jacobson* deference but rather to the most demanding constitutional standard of "strict scrutiny," holding that the government must "narrowly tailor" its regulation in furtherance of "interests of the highest order" and "show that the religious exercise at issue is more dangerous than those [other permitted secular activities] even when the same precautions are applied."

To a large extent, the local nature of the early cases reflected the absence of dramatic federal actions. The federal government did not issue many major COVID-19 executive orders or regulations before President Biden took office on January 21, 2021. While both President Trump and his Secretary of Health and Human Services (HHS) had issued various important emergency declarations, the powers triggered by those declarations – powers such as loosening restrictions on telehealth, enabling use of the Defense Production Act to ease supply shortages, or expanding

[22] 141 S. Ct. 63 (2020).
[23] 141 S. Ct. 889 (2020).
[24] Tandon v. Newsom, 141 S. Ct. 1294, 1297 (2021).

the categories of medical personnel who could immunize patients – did not prompt any major litigation in 2020. Nor did some of the other agency-specific regulatory actions taken during that time, such as the mortgage foreclosure relief programs issued by several agencies, including the Departments of Housing and Urban Development, Agriculture, and Veterans Affairs, and the CDC's initial orders placing a moratorium on evictions.

Congress also took action of its own in the form of relief packages. In the first month of the pandemic, Congress passed three major pieces of legislation, detailed in earlier chapters by Huberfeld and Hammond et. al.,: the Coronavirus Preparedness and Response Supplemental Appropriations Act, the Families First Coronavirus Response Act, and the Coronavirus Aid, Relief, and Economic Security (CARES) Act. Major litigation did not ensue over any of this legislation, apart from a pair of successful challenges by Alaskan Indian tribes, which went all the way to the Supreme Court, seeking eligibility for monetary relief under the CARES Act.[25] Nor did major litigation stem from later relief bills or the American Rescue Plan Act (ARPA) of 2021. One exception was a series of challenges to the race- and sex-based allocation of relief programs under the ARPA.[26]

III THE FEDERAL PHASE OF THE RESPONSE AND THE DECLINE OF DEFERENCE

But just as the individual liberties litigation reached a fever pitch, the story shifted. The Biden Administration took more direct control over the pandemic – issuing a dozen executive orders immediately upon taking office, including extending the CDC eviction moratorium and orders restricting cruise-ship sailing, imposing public health restrictions on travel and on federal lands, and eventually taking executive actions to incentivize or compel vaccination in various settings. Some employers, school systems, and universities followed suit.

Lawsuits followed. But interestingly, the most important showdowns over the major federal actions were not constitutional law showdowns, as they had largely been in the first phase of pandemic litigation. Rather, they were regulatory – and ultimately produced precedents curtailing administrative authority that will have great significance far beyond COVID-19.

The first noteworthy decision, *Alabama Association of Realtors v. Department of Health and Human Services*,[27] concerned the CDC's renewal of its order imposing an eviction moratorium, which was issued under the CDC's statutory authorities to control the transmission of communicable diseases. The CDC under the Trump

[25] Yellen v. Confederated Tribes of Chehalis Rsrv., 141 S. Ct. 2434 (2021).

[26] Example, Vitolo v. Guzman, 999 F.3d 353 (6th Cir. 2021); Wynn v. Vilsack, 545 F.Supp.3d 1271 (M.D. Fla. 2021); Miller v. Vilsack, No. 21-11271, 2022 WL 851782 (5th Cir. Mar. 22, 2022).

[27] 141 S. Ct. 2320 (2021); 141 S. Ct. 2485 (2021).

Administration had initially issued the order in September 2020; Congress legislatively extended the moratorium until January 31, 2021, after which the CDC under the Biden Administration issued a series of extensions into the summer. Numerous suits were filed challenging the different iterations of the order and, by June 2021, a challenge had reached the Supreme Court on the shadow docket. After a brief reprieve, occasioned by a concurrence by Justice Brett Kavanaugh assuming the order would soon expire, the CDC extended the moratorium again, and the case returned to the Court. This time, the Court ruled against the CDC, in an opinion that rejected the CDC's interpretation of its long-standing public health authorities on the basis of a highly textualist reading. Under 42 USC § 264(a), the CDC has authority to:

> make and enforce such regulations as … 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 [CDC] 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 [its] judgment may be necessary.

The Court's cramped reading of the statute was the product of a pre-COVID-19 and long- running debate among the justices over how to interpret laws; the more conservative faction of the Court generally prefers a more literal, rather than purpose-based, approach. As such, the Court refused to allow the first sentence of this section of the CDC authorization statute (from the Public Health Service Act), which conveys extensive authority, to inform the second, exemplary sentence. Instead, six justices applied a textualist rule of statutory construction, the so-called "*ejusdem generis*" rule, which counsels that terms in a list be construed to be like one another. Because the CDC's moratorium on evictions – which the agency contended would prevent the interstate spread of disease by reducing new interstate travel, homelessness, and cohabitation – was not like "fumigation" and the like, the Court read the statute to cabin what until that point had been understood as very broad statutory authority.

But the Court went further than that. Its decision also invoked the then-largely moribund "major questions doctrine." Specifically, the Court held that even if the breadth of the CDC's authorities was ambiguous, "the sheer scope of the CDC's claimed authority … would counsel against the Government's interpretation. We expect Congress to speak clearly when authorizing an agency to exercise powers of 'vast economic and political significance.'"

While at the time it was not clear that the sentences quoted here would usher in a series of follow-on decisions in the same vein, they did. *Alabama Association of Realtors* marked the beginning of the Court's wholehearted embrace of the major questions doctrine – one of the most important legal developments of the 2021 term.

The doctrine had been introduced by Justice Scalia in the 1990s, and since then, the Court had only occasionally invoked it in sporadic decisions.[28] But following the CDC case, the Court again relied on the major questions doctrine to stay the Biden Administration's OSHA "vaccine or test" rule.

In November 2021, OSHA had issued an emergency temporary standard under its authority to issue emergency standards "necessary to protect employees" from "grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards."[29] The Biden standard required employers with 100 or more employees require their workers to be vaccinated or else to be masked and tested weekly. After twenty-seven states and several private businesses challenged its validity, the case ultimately came before the justices on the shadow docket.

The case, *National Federation of Independent Business v. Department of Labor*,[30] was the Supreme Court's most full-throated embrace yet of the major questions doctrine. Despite the clear statutory authority to OSHA to issue an emergency temporary standard, the Court expressed concern with "expand[ing] OSHA's regulatory authority without clear congressional authorization." The Court concluded that allowing OSHA to have such authority, "simply because most Americans have jobs and face those same risks while on the clock," constituted a major question, and Congress would have to authorize OSHA more directly to do so. Justice Stephen Breyer in dissent, joined by Justices Sotomayor and Kagan, noted that the Court did not even dispute that COVID-19 was a "new hazard" or "physically harmful agent" when "read in the ordinary way," but the majority nevertheless concluded that even with Congress' expansive language, the statute did not authorize OSHA's action.

Justice Gorsuch, joined by Justices Thomas and Alito, would have gone even further. His concurrence emphasized the relationship of the major questions doctrine to constitutional doctrines limiting excessive delegation. Significantly, the concurrence implied that even had Congress been clearer in giving OSHA the power to issue such a "vaccine or test" rule, "that law would likely constitute an unconstitutional delegation of legislative authority." In other words, Congress might not even be able to give OSHA such authority to protect the public.

Interestingly, the fact that the capacious statutory authorization at issue in the OSHA case was enacted fifty-two years prior was a minus, not a plus, for Justice Gorsuch. The section, he wrote, "was not adopted in response to the pandemic, but some [fifty] years ago at the time of OSHA's creation" – a position similar to the one the Court took in the CDC case, that even a broadly drafted congressional authorization designed to stand the test of time could not be adapted to meet new crises.

[28] See MCI Telecomms. Corp. v. Am. Tel. & Tel. Co., 512 U.S. 218, 231 (1994); FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 160 (2000); Utility Air Regulatory Grp. v. EPA, 573 U. S. 302, 324 (2014); King v. Burwell, 576 U.S. 473, 485–86 (2015).

[29] 29 U.S.C. § 655(c)(1).

[30] 142 S. Ct. 661 (2022).

The key point is that these cases have set an exceedingly high bar for Congress. In the process, they are part of the larger effort by several justices to curtail the scope of the administrative state. With the specificity requirements of the major questions doctrine, Congress either must draft laws with perfect foresight of the precise emergent issues that agencies entrusted with the public health will face or be able to react in real time with in-the-moment statutory authorizations. Neither is realistic, which is precisely the reason that Congress has previously drafted these public health authorities in more capacious terms.

Similar challenges were brought against other federally imposed vaccination requirements. In September 2021, the Biden Administration instituted a mandate requiring that all federal contractors become vaccinated pursuant to its authority under the Federal Property and Administrative Services Act to make its "system" of contracting more "economical and efficient." More than two dozen states successfully challenged the order, both under the major questions doctrine and under federalism principles that health and safety, including mandatory vaccination requirements, are typically the domain of the states.[31] The Fifth Circuit also affirmed a nationwide injunction against a different vaccination mandate for federal employees, based on the President's statutory authorities to "prescribe regulations for the conduct of employees in the executive branch."[32] That decision built on cases involving the federal contractor mandate and *National Federation of Independent Business*.

Fast forward to April 2022. A lower federal court used the same rationale to vacate the CDC's mask mandate on transportation – a critical pandemic public health initiative that President Biden announced on his second day in office and that had been in effect for fifteen months.[33] The CDC had issued the order pursuant to its core authorities to prevent the transmission of disease. The lower federal court rejected the CDC's reading of its own statute and, as in the eviction order case, applied textualist methods of statutory construction to conclude that the statute's broad authorization did not control and that the statute's list of exemplary authorities, such as "sanitation," could not include masking. The court also relied on another modern tool of conservative statutory construction, known as "corpus linguistics," to search a database of American English to determine the primary

[31] Georgia v. President of U.S., 46 F.4th 1283 (11th Cir. 2022); Kentucky v. Biden, 57 F.4th 545 (6th Cir. 2023); Kentucky v. Biden, 23 F.4th 585 (6th Cir. 2022); Louisiana v. Biden, 55 F.4th 1017 (5th Cir. 2022); Missouri v. Biden, 576 F.Supp.3d 622 (E.D. Mo. 2021) (motion to voluntarily dismiss appeal granted in No. 22-1104, 2023 WL 3862561 (8th Cir. June 7, 2023)); Brnovich v. Biden, 562 F.Supp.3d 123 (D. Ariz. 2022); Florida v. Nelson, 576 F.Supp.3d 1017 (M.D. Fla. 2021) (motion to voluntarily dismiss appeal granted in Florida v. Adm'r, NASA, No. 22-10165-AA, 2022 WL 18282863 (11th Cir. Oct. 26, 2022)). The Ninth Circuit ultimately reversed Arizona's successful challenge in Brnovich. Mayes v. Biden, 67 F.4th 921 (9th Cir. 2023).

[32] Feds for Med. Freedom v. Biden, 63 F.4th 366 (5th Cir. 2023), aff'g 581 F.Supp.3d 826 (S.D. Tex. 2022). In May 2023, the Biden Administration rescinded both the contractors and employees mandates. Exec. Order No. 14099, 88 Fed. Reg. 30891 (May 9, 2023).

[33] Health Freedom Def. Fund, Inc. v. Biden, 599 F.Supp.3d 1144 (M.D. Fla. 2022).

linguistic sense of "sanitation" in 1944 when the CDC statute was enacted. The approach the court took was decidedly undynamic and inflexible. On appeal, this decision was vacated as moot.[34]

The court, like many other courts that had ruled against pandemic measures, also expressed particular discomfort with the fact that this particular public health measure had never been deployed before. This novelty objection was another new development that came out of the COVID-19 major questions cases. In the end, these cases significantly hamper the ability of federal agencies to try new things even when those new things fall within the letter of the governing statute. This is a major impediment for health agencies combating new threats.

This new hurdle to innovative policy solutions has been extended beyond traditional public health authorities. In June 2022, the Supreme Court invoked the major questions doctrine to block the EPA from using its longstanding statutory authority under the Clean Air Act Amendments of 1970 to require coal-fired power plants reduce their electricity output or increase energy production from cleaner sources than coal, specifically natural gas, wind, or solar power.[35] One year later, the Supreme Court again invoked the major questions doctrine to hold unlawful the Biden Administration's student-debt relief program under the HEROES Act of 2003.[36]

At the same time, it would be an overstatement to say that deference on questions of public health vanished during the pandemic. The courts have been much more sympathetic to vaccination requirements in more traditional contexts, such as education and areas involving health and safety.

For example, on the same day that the Supreme Court stayed OSHA's "vaccine or test" rule, it stayed two injunctions that would have halted a similar vaccination requirement for health care workers imposed by HHS, in *Biden v. Missouri*.[37] HHS had relied on provisions allowing it to issue rules "necessary in the interest of the health and safety of individuals who are furnished [health care] services." Unlike in *National Federation of Independent Business*, the Court was comfortable with this vaccination mandate, holding that it was consistent with health care workers' mission to "protect their patients' health and safety." Chief Justice Roberts and Justice Kavanaugh, the two justices to switch their votes between *National Federation of Independent Business* and *Biden v. Missouri*, did not write to explain their position, but one relevant difference from the OSHA mandate might have been that HHS has traditionally regulated the "qualifications and duties" of health care workers.

[34] Health Freedom Def. Fund v. President of U.S., No. 22-11287, 2023 WL 4115990 (11th Cir. June 22, 2023).
[35] West Virginia v. EPA, 142 S. Ct. 2587 (2022).
[36] Biden v. Nebraska, No. 22-506, 2023 WL 4277210 (June 30, 2023).
[37] 142 S. Ct. 647 (2022).

The majority stressed that "vaccination requirements are a common feature of the provision of health care in America." Compare that to *National Federation of Independent Business*, where the Court contended that OSHA "ha[d] never before adopted a broad public health regulation of this kind."

Under these dueling rationales, federal courts split over a vaccine and masking requirement for schools that participated in the federal Head Start program, in which the federal government has broad powers to regulate safety for young children. Refusing to grant a preliminary injunction against the rule, the Sixth Circuit Court of Appeals relied on *Biden v. Missouri*, noting that "similar statutory language" supported the health care worker mandate, and that both actions were consistent with the "long-standing practice of [HHS]."[38] However, two lower federal courts in the Fifth Circuit halted enforcement of the same requirement in half of the states, relying in part on major questions and the danger of giving HHS "unlimited power" over the program.[39] Later, in March 2023, one of those two courts vacated this rule nationwide.[40] Fewer than two months later, HHS announced it would remove the challenged requirements.[41]

Deference was also granted in the education sphere. Interestingly, the Court, via Justice Barrett, did not accept review of a Seventh Circuit petition denying injunctive relief from the University of Indiana's vaccination requirement. The appeals court opinion, written by noted conservative Judge Frank Easterbrook, relied on *Jacobson* and highlighted that "[h]ealth exams and vaccinations against other diseases … are common requirements of higher education."[42] Judge Easterbrook elaborated that universities often require their students to waive all sorts of rights as conditions of enrollment, such as their First Amendment right to decide what to read and write. Over the course of the pandemic, the Supreme Court would also signal deference in the education sphere by refusing to give relief to public school teachers in New York City and San Diego from vaccination requirements imposed on them by the cities.[43]

Similar deference was also granted to the military's vaccination mandate. In 2021, Secretary of Defense Lloyd Austin issued a directive requiring all members of the armed forces to become vaccinated for COVID-19, and each branch of the military issued vaccination requirements for its members. In one instructive case, the Department of Defense's general order, explicitly extended to National Guard

[38] Livingston Educ. Serv. Agency v. Becerra, 35 F.4th 489 (6th Cir. 2022).

[39] Louisiana v. Becerra, 577 F.Supp.3d 483 (W.D. La. 2022); Texas v. Becerra, 577 F.Supp.3d 527 (N.D. Tex. 2021).

[40] Texas v. Becerra, No. 5:21-CV-300-H, 2023 WL 2754350 (N.D. Tex. Mar. 31, 2023).

[41] Press Release, Early Childhood Learning & Knowledge Ctr., Head Start Vaccine and Testing Announcement (last updated May 2, 2023), https://eclkc.ohs.acf.hhs.gov/about-us/press-release/head-start-vaccine-testing-announcement.

[42] Klaassen v. Trustees of Ind. Univ., 7 F.4th 592, 593 (7th Cir. 2021).

[43] Doe v. San Diego Unified Sch. Dist., 142 S. Ct. 1099 (2022); Keil v. City of New York, 142 S. Ct. 1226 (2022); Maniscalco v. N.Y.C. Dep't of Educ., 142 S. Ct. 1668 (2022).

personnel, survived a challenge led by the Governor of Oklahoma under the major questions doctrine since "there is nothing 'transformative' about a force protection measure first conceived and enforced by General George Washington when he required members of the Continental Army to be inoculated against smallpox."[44] Navy SEALs and Air Force Officers also brought challenges for exemptions to vaccination mandates under the Religious Freedom Restoration Act and the Free Exercise Clause. One such case reached the Court on the shadow docket and, in a 6–3 decision, the Court partially stayed a preliminary injunction against the Navy mandate.[45] The Court held that the Navy could consider SEALs' vaccination status when "making deployment, assignment, and other operational decisions." Justice Kavanaugh concurred, stressing that "courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs." The Court would go on to deny relief from the Air Force's vaccination mandate.[46]

The same 6–3 Court also denied emergency relief on the shadow docket in free exercise, equal protection, and Title VII challenges to both the State of Maine and the State of New York's vaccination mandates for health care workers.[47] In October 2022, the Court also declined to hear a challenge to New York City's municipal worker vaccination mandate.[48]

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The pandemic laid bare overlapping crises of equity, safety, and accessibility. The litigation across virtually every sector of our society reflected those crises and, in many instances, helped advance progress. But, as a matter of legal doctrine, where we go from here remains to be seen. *Jacobson*, while wounded, survives. The outcome for the federal government seems more mixed. Sector-specific vaccination requirements generally fared better than broader ones, even ones issued by public health authorities endowed by Congress with generous powers to use their expertise and react.

Had the Biden Administration not pushed the CDC eviction moratorium before the Court a second time after the Court warned of its concerns – via Justice Kavanaugh's swing-vote concurrence – the first major questions decision

[44] Oklahoma v. Biden, 577 F.Supp.3d 1245 (W.D. Okla. 2021).

[45] Austin v. U.S. Navy Seals 1-26, 142 S. Ct. 1301 (2022).

[46] Dunn v. Austin, 142 S. Ct. 1707 (2022). In the National Defense Authorization Act of 2023, Congress ultimately required the rescission of the vaccination mandate for the armed services, and Secretary Austin complied accordingly. Memorandum from the Secretary of Defense to Senior Pentagon Leadership, Commanders of the Combatant Commands Defense Agency, and DOD Field Activities Directors, Rescission of Aug. 24, 2021 and Nov. 30, 2021 Coronavirus Disease 2019 Vaccination Requirements for Members of the Armed Forces (Jan. 10, 2023).

[47] Does 1-3 v. Mills, 142 S. Ct. 17 (2021); Dr. A. v. Hochul, 142 S. Ct. 552 (2021).

[48] Marciano v. Adams, 143 S. Ct. 298 (2022).

would not have been issued. Would that have made a difference for the OSHA case and the successful entrenchment of the doctrine in the ensuing litigation that swirled around vaccination requirements and later in the EPA context? One can never know.

But what we do know is that health authorities need space to act quickly and effectively to address public health crises. If we have learned anything from COVID-19, we have learned that. The Court's OSHA decision was a damaging step back in that regard. Going forward, attempts to cabin the major questions doctrine – for example, only to cases with true statutory ambiguity – and to dislodge the new notion that regulatory novelty is fatal, would be helpful doctrinal advancements. No less importantly, on the legislative side, Congress must try to strengthen public health laws with broad, nimble, and modern authorities that will better equip agencies to address the next crisis, while still satisfying the Court's new demand for more specific delegations. This is no short order. But as the pandemic recedes, we cannot forget the critical role that government played, and must continue to play, in the face of public health crises.