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ARTICLE

# Curbing Agency Expertise Threatens Public Health: *Braidwood* and the Nondelegation Doctrine

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**Abstract**

For almost a century, the Supreme Court has not invalidated a law using the nondelegation doctrine. Recognizing that Congress seldom has expertise to address the ever-increasing complexities of society, the Court has long held that Congress can legislate broadly and seek help from federal agencies to fill up the details. Accordingly, courts defer to Congress's delegation choices, as long as it lays down an intelligible principle to guide the agencies entrusted with implementing legislation. Under that approach, the Court has upheld broad delegations of authority to federal agencies. This approach has been the bedrock of meaningful agency action, especially in health policy in which agencies must leverage their expertise to respond to highly technical issues, emergencies, advances in technology, and the need to address health disparities. While this deferential approach has guided the courts and Congress for decades, delegation is increasingly under attack. *Braidwood Management, Inc. v. Becerra*, which challenges the Affordable Care Act's preventive services requirement, exemplifies nondelegation-based attacks on agency authority. With several members of the Supreme Court signaling interest in revisiting the current deferential delegation standard, *Braidwood* likely provides an opportunity for the Supreme Court to do so. Reinvigorating the nondelegation doctrine — coupled with the major questions doctrine and rolling back of Chevron deference — will hurt U.S. health policy. It will not only constrain how agencies work, but also aggrandize the courts and limit how Congress may achieve legislative goals.

**Keywords:** nondelegation; major questions doctrine; Chevron deference; preventive services; public health; administrative state; *Braidwood ManagementInc. Becerra*

## Introduction

For almost a century, the Supreme Court has not invalidated a law using the nondelegation doctrine.[1] Recognizing that Congress seldom has the expertise, ability for long-term planning, and political space to address ever-changing societal trends, complexities of societal hazards, and technological advancements, the Court has long held that Congress may legislate broadly and rely on specialized administrative agencies to regulate current and future risks to health, safety, and the environment.[2] Accordingly, the courts have historically deferred to Congress's delegation choices, as long as the Congress provides sufficient guidance for the agencies entrusted with implementing legislation.[3] Under that approach, the

[1]Cass R. Sunstein, *Nondelegation Canons*, 67 U. Chi. L. Rev. 315, 322 (2000) [hereinafter Sunstein, *Nondelegation Canons*] ("[T]he [nondelegation] doctrine has had one good year, and 211 bad ones (and counting).").

[2]*See* J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 529-30 (1935); Yakus v. United States, 321 U.S. 414, 425 (1944); Mistretta v. United States, 488 U.S. 361, 372 (1989); Touby v. United States, 500 U.S. 160, 165 (1991).

[3]*J.W. Hampton, Jr., & Co.*, 276 U.S. at 409 ("If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power.").]

Court has upheld all manner of broad delegations of authority to federal agencies. This approach has been the bedrock of meaningful agency action, especially where agencies must leverage their expertise to respond to highly technical issues, ongoing changes to how health hazards emerge, health emergencies, advances in technology, and the need to address health disparities. But the recent uptick in cases challenging agency action based on the nondelegation doctrine could unravel longstanding judicial doctrine and put the public's health at serious risk.

*Braidwood Management, Inc. v. Becerra*,[4] pending before the Fifth Circuit — and very likely to reach the Supreme Court — is one of those cases. *Braidwood* challenges the Affordable Care Act's (ACA) preventive services provision, which requires virtually all health plans to cover federally recommended preventive services without cost-sharing.[5] Among other claims, *Braidwood* plaintiffs argue that the preventive services requirement violates the nondelegation doctrine.[6] Although the district court ruled that the Fifth Circuit's nondelegation precedent foreclosed that claim, the plaintiffs appealed the decision and informed the Fifth Circuit that they are preserving the nondelegation issue for the Supreme Court.[7]

This Article addresses the nondelegation argument in *Braidwood* and situates that argument in a broader attack against federal regulation and the administrative state. First, it lays out the importance of delegation in health care and public health writ large, showing how Congress sought to rely on experts within the Department of Health and Human Services (HHS) to ensure that people would access cost-free preventive services. Through an analysis of historical legislative practice and Supreme Court precedent, the Article shows how broad delegation that meets the deferential intelligible principle standard has enabled Congress to rely on federal agencies to address some of the most complex and consequential issues in health and environmental policy. Delving into the details of the litigation, the Article shows how the nondelegation doctrine is being used in *Braidwood* to challenge access to preventive health services. Connecting the nondelegation doctrine with the major questions doctrine and *Chevron* deference, this Article will critically examine efforts to revive the nondelegation doctrine, highlighting some of the potential devastating consequences of a constricted approach to delegation.

## I. The ACA's Preventive Services Requirement

Before the ACA, many insurers chose not to cover highly effective preventive services, and those that did offered such coverage at a cost, which dissuaded many individuals from accessing those services. But that changed when Congress enacted the ACA, which requires all insurers and group health plans to cover specific preventive services without cost-sharing.[8] The ACA does not spell out the services that must be covered. How could Congress have the expertise to evaluate current and future evidence of the safety and effectiveness of preventive care? Instead, the ACA relies on the recommendations of medical experts within HHS — the U.S. Preventive Services Task Force (USPSTF), the Advisory Committee on Immunization Practices (ACIP), and the Health Resources and Services Administration (HRSA) — to ensure that the preventive services are evidence based and up to date.[9] The covered preventive services include: (1) services with a rating of "A" or "B" from the USPSTF; (2) immunizations recommended by ACIP; (3) and screenings and other services recommended by the HRSA.[10]

[4]Braidwood Mgmt. v. Becerra, 627 F. Supp. 3d 624 (N.D. Tex. 2022).

[5]42 U.S.C § 300gg–13.

[6]*Braidwood Mgmt.*, 627 F. Supp. 3d at 637 (*Braidwood* also argues that the preventive services requirement violates the Appointments Clause, the Vesting Clause, and the Religious Freedom Restoration Act).

[7]Brief of Appellees/Cross-Appellants at 60, Braidwood Mgmt. v. Becerra, 627 F. Supp. 3d 624 (N.D. Tex. 2022) (No. 23-10326).

[8]42 U.S.C. § 300gg-13(a) (grandfathered plans are exempted).

[9]MaryBeth Musumeci & Sara Rosenbaum, *The ACA's Promise of Free Preventive Health Care Faces Ongoing Legal Challenges*, Commonwealth Fund (Oct. 20, 2023), https://www.commonwealthfund.org/blog/2023/acas-promise-free-preventive-health-care-faces-ongoing-legal-challenges [https://perma.cc/W29U-FGBU].

[10]842 U.S.C. § 300gg-13(a)

The USPSTF was established in 1984 and it currently comprises sixteen nationally recognized preventive and primary health care experts, each serving a four-year term.[11] These experts "review the scientific evidence related to the effectiveness, appropriateness, and cost-effectiveness of clinical preventive services" and "develop[] recommendations for the health care community."[12] The USPSTF's recommendations are published in the *Guide to Clinical Preventive Services*, a resource relied upon by medical professionals and other policy makers.[13] The USPSTF rates the services on a scale that assigns the services letter grades A, B, C, D, or I. Grades A and B are awarded to the preventive services the experts highly recommend.[14] In the scientific community, these recommendations are considered the "gold standard" of preventive services.[15] The ACA maintains the recommendations' scientific integrity by insulating the USPSTF from political pressure.[16] Today, there are over fifty preventive services with an A or B grade, including cancer screenings, statins for heart disease, suicide and depression screenings, and HIV pre-exposure prophylaxis.[17]

ACIP was established in 1964 as a technical advisory committee to the U.S. Public Health Service.[18] Its members are experts in immunizations and public health who develop recommendations for the Centers for Disease Control and Prevention (CDC) on the appropriate use of vaccines. ACIP recommends vaccines based on "an explicit evidence-based method considering the balance of benefits and harms, type or quality of evidence, values and preferences of the people affected, and health economic analyses."[19] ACIP's recommendations — age, dosage, frequency, etc. — are essential to increased access to vaccines and minimizing morbidity and mortality related to vaccine-preventable diseases.[20] ACIP currently recommends at least twenty-seven vaccines, including COVID-19, monkeypox, polio, and hepatitis A and B.[21]

HRSA was created in 1982.[22] It operates various programs, including those that focus on women's and children's health. Through the Bright Futures Program, HRSA provides evidence-based preventive services tailored for infants, children, and adolescents.[23] The services include immunizations, autism spectrum disorder screening, examinations for sexually transmitted infections in adolescents, and oral

[11] Opening Brief for the Federal Defendants at *4, *5, Braidwood Mgmt. v. Equal Emp. Opportunity Comm'n, 70 F. 4th 914 (5th Cir. 2023) (No. 23-10326); *Our Members*, U.S. Preventive Servs. Task Force, https://www.uspreventiveservicestaskforce.org/uspstf/about-uspstf/current-members [https://perma.cc/W5QD-ANJK].

[12] 42 U.S.C. § 299b-4(a)(1).

[13] Opening Brief for the Federal Defendants, *supra* note 11, at *5.

[14] *Grade Definitions*, U.S. Preventive Servs. Task Force, https://www.uspreventiveservicestaskforce.org/uspstf/about-uspstf/methods-and-processes/grade-definitions [https://perma.cc/28KJ-J9J6]. Grade C is assigned to services to be provided to "selected patients depending on individual circumstances." *Id.* Grade D is for discouraged services. *Id.* An "I" grade is assigned to services for which "current evidence is insufficient to assess the balance of benefits and harms of the service." *Id.*

[15] Paul Bernstein, *Prevention of Illness*, 12 Marq. Elder's Advisor 157, 162 (2010).

[16] 42 U.S.C. § 299b-4(a)(6).

[17] *A & B Recommendations*, U.S. Preventive Servs. Task Force, https://www.uspreventiveservicestaskforce.org/uspstf/recommendation-topics/uspstf-a-and-b-recommendations [https://perma.cc/QKV8-7KL8].

[18] Jean Clare Smith et al., *History and Evolution of the Advisory Committee on Immunization Practices — United States, 1964–2014*, Morbidity & Mortality Wkly. Rep. (Oct. 24, 2014), https://www.cdc.gov/mmwr/preview/mmwrhtml/mm6342a5.htm [https://perma.cc/5Q8S-GSMY].

[19] Brief of 20 Health Policy Experts et al. as Amici Curiae Supporting Defendants at 11, Braidwood Mgmt. v. Becerra, 666 F. Supp. 3d 613 (N.D. Tex. 2023) (No. 4:20-cv-00283-O).

[20] *Role of the Advisory Committee on Immunization Practices in CDC's Vaccine Recommendations*, Ctrs. for Disease Control & Prevention (Oct. 8, 2020), https://www.cdc.gov/vaccines/acip/committee/role-vaccine-recommendations.html [https://perma.cc/S35T-8NL9].

[21] *ACIP Vaccine Recommendations and Guidelines*, Ctrs. for Disease Control & Prevention, https://www.cdc.gov/vaccines/hcp/acip-recs/index.html [https://perma.cc/W33R-DD3E].

[22] *Records of the Health Resources and Services Administration [HRSA]*, Nat'l Archives, https://www.archives.gov/research/guide-fed-records/groups/512.html [https://perma.cc/KG2P-MHEG].

[23] *Bright Futures*, Health Res. & Servs. Admin., https://mchb.hrsa.gov/programs-impact/bright-futures [https://perma.cc/MV55-Q4YN].

health care.[24] For women, through the Women's Preventive Services Guidelines, HRSA develops evidence-based recommendations for women's preventive services, periodically reviews the guidelines to identify gaps, and updates the guidelines to ensure their effectiveness.[25] HRSA's current recommendations for women include all contraceptives and family planning practices currently approved by the Food and Drug Administration (FDA), breastfeeding services and supplies, screenings for interpersonal and domestic violence, and breast cancer screenings.[26]

These preventive services are critical for individual and population health. Preventive services help to identify health risks early so that they can be treated more effectively. Screenings and vaccinations can prevent or mitigate disease, thus saving both lives and dollars. They can also reduce the risk of transmission of infectious diseases such as COVID-19. The ACA's preventive services requirement is highly popular and has led to an unprecedented increase in preventive care utilization at the population level.[27] In 2020 alone, around 151 million people received free preventive care, such as cancer screenings, cholesterol checks, vaccinations, tobacco cessation services, and contraception.[28] Notably, the requirement has led to increased access to these services by marginalized communities and helped to minimize health gaps.[29]

The challengers in *Braidwood* argue that the preventive services requirement impermissibly empowers USPSTF, HRSA, and ACIP "to unilaterally determine preventive care that private insurance must cover" without providing an intelligible principle.[30] This is not a fringe attack on the preventive services requirement. The Supreme Court invited this argument in *Little Sisters of the Poor v. Pennsylvania*.[31] There, writing for the Court, Justice Thomas questioned the legitimacy of HRSA's authority to recommend preventive services.[32] The Court noted that the ACA "grants sweeping authority to HRSA to craft a set of standards defining the preventive care that applicable health plans must cover," but it does not provide any guidelines, thus giving HRSA "virtually unbridled discretion to decide what counts as preventive care."[33]

Some Supreme Court watchers noted that the Court was drawing a roadmap for a nondelegation challenge against preventive services.[34] The ACA foes pursued that path.[35] The *Braidwood* nondelegation argument tracks the Court's observations in *Little Sisters of the Poor*, making *Braidwood* a likely candidate for Supreme Court review. It has become clear that several justices are interested in reviving the nondelegation doctrine. In *Gundy v. United States*, a case challenging the Sex Offender Registration

[24] Bright Futures & Am. Acad. Pediatrics, Recommendations for Preventive Pediatric Health Care (2023), https://downloads.aap.org/AAP/PDF/periodicity_schedule.pdf [https://perma.cc/9SKD-F6FT].

[25] *Women's Preventive Services Guidelines*, Health Res. & Servs. Admin. (Mar. 2024), https://www.hrsa.gov/womens-guidelines [https://perma.cc/BGQ5-9HBF].

[26] *Id.*

[27] *See* Off. of the Assistant Sec'y for Plan. & Evaluation, U.S. Dep't of Health & Hum. Servs., HP-2022-01, Access to Preventive Services without Cost-Sharing: Evidence from the Affordable Care Act 1, 7–10 (2022), https://aspe.hhs.gov/sites/default/files/documents/786fa55a84e7e3833961933124d70dd2/preventive-services-ib-2022.pdf [https://perma.cc/L9LK-XZKQ].

[28] *Id.* at 1, 4.

[29] *Id.* at 7, 10.

[30] First Amended Complaint at 19, Braidwood Mgmt. v. Becerra, 627 F. Supp. 3d 624 (N.D. Tex. 2022) (No. 4:20-cv-00283).

[31] *See* Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania, 140 S. Ct. 2367, 2380-82 (2020).

[32] *See id.*

[33] *Id.* at 2380.

[34] James C. Phillips, *The Supreme Court Majority Seemingly Invites a Nondelegation Challenge to the ACA's Contraceptive Mandate*, Yale J. on Regul.: Notice & Comment (July 8, 2020), https://www.yalejreg.com/nc/the-supreme-court-majority-seemingly-invites-a-nondelegation-challenge-to-the-acas-contraceptive-mandate-by-james-c-phillips/ [https://perma.cc/FT82-58B7]; Ian Millhiser, *The Supreme Court Just Gave Republicans a Powerful New Weapon Against Obamacare*, Vox (July 8, 2020, 2:00 PM), https://www.vox.com/2020/7/8/21317323/supreme-court-obamacare-little-sisters-clarence-thomas-pennsylvania-birth-control [https://perma.cc/S54G-Q6WK].

[35] *See* Matt Ford, *It's 2023, and Conservatives Are Still Trying to Sue Obamacare Out of Existence*, New Republic (Mar. 30, 2023), https://newrepublic.com/article/171495/reed-oconnor-texas-judge-obamacare [https://perma.cc/TJ4U-5SG9]. The plaintiffs in Braidwood are repeat players in the litigation against the ACA. *See* Hotze v. Burwell, 784 F.3d 984, 986 (5th Cir. 2015).

and Notification Act (SORNA) on nondelegation grounds, Justice Gorsuch penned a dissent — joined by the Chief Justice and Justice Thomas — and called for revisiting the nondelegation doctrine.[36] Justice Alito did not join the dissent but said he would be interested in reconsidering the Court's deferential delegation approach.[37] Justice Kavanaugh, who had not joined the Court when *Gundy* was argued, also expressed the same interest.[38]

## II. What is the Nondelegation Doctrine?

The nondelegation doctrine is a judicially created principle that the courts use to police the tripartite government structure.[39] The Constitution vests legislative power in Congress.[40] Because it is Congress's role to make primary legislative policy choices, the Court has maintained that Congress may not delegate its legislative power to another branch.[41] Limits on congressional delegation stem from concerns about political accountability and preventing elected representatives from shirking their duties or "passing the buck" to other agencies.[42]

But the Court has long acknowledged that Congress cannot do its job without the ability to delegate and has adopted a flexible understanding of the separation of powers principle that engenders interdependence and reciprocity between the branches of government.[43] Because of the complexity of society and the practicalities of governance, the Court has said that Congress may seek the assistance of other government branches.[44] In *Mistretta v. United States*, for example, noting that "developing

[36]Gundy v. United States, 139 S. Ct. 2116, 2148 (2019) (Gorsuch, J., dissenting).

[37]*Id.* at 2130-31 (Alito, J., concurring).

[38]*See* Paul v. United States, 140 S. Ct. 342 (2019) (Mem.) (statement of Kavanaugh, J., respecting the denial of certiorari), *denying cert. to* 718 Fed. Appx. 360 (6th Cir. 2017). Although Justice Barrett has not expressly called for reconsidering the doctrine, before joining the Court, she expressed doubts about Congress's delegation of authority to the executive under the Suspension Clause, referring to the "intelligible principle" standard as "notoriously lax." *See* Amy Coney Barrett, *Suspension and Delegation*, 99 Cornell L. Rev. 251, 318 (2014).

[39]*See* Mistretta v. United States, 488 U.S. 361, 371-72 (1989); Andrew Twinamatsiko & Katie Keith, *Slouching Towards Deregulation: The Threat to Health Policy*, O'Neill Inst. for Nat'l & Glob. Health L. 3 (Apr. 2022), https://oneill.law.georgetown.edu/wp-content/uploads/2022/04/ONL_Derugulation_Report_P4.pdf [https://perma.cc/B65F-FD6Y].

[40]U.S. Const. art. I, § 1.

[41]*See* Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 42-43 (1825) ("It will not be contended that Congress can delegate … powers which are strictly and exclusively legislative."); Field v. Clark, 143 U.S. 649, 692 (1892) ("That congress cannot delegate legislative power to the president is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the constitution.").

[42]*See* Loving v. United States, 517 U.S. 748, 758 (1996) ("The clear assignment of power to a branch … allows the citizen to know who may be called to answer for making … decisions essential to governance."); Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst., 448 U.S. 607, 687 (1980) ("When fundamental policy decisions underlying important legislation about to be enacted are to be made, the buck stops with Congress and the President insofar as he exercises his constitutional role in the legislative process."); *see generally* John Hart Ely, Democracy & Distrust: A Theory of Judicial Review (1980); David Schoenbrod, Power Without Responsibility: How Congress Abuses the People Through Delegation 125-31 (1993). *But see* Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 865-66 (1984) (noting that administrative agencies are headed by a politically accountable executive); Peter H. Schuck, *Delegation and Democracy: Comments on David Schoenbrod*, 20 Cardozo L. Rev. 775, 776 (1999) ("[D]elegation—when backed (as it is in our system) by many powerful institutional and informal controls over agency discretion—constitutes one of the most salutary developments in the long struggle to instantiate the often competing values of democratic participation, political accountability, legal regularity, and administrative effectiveness."); Keith E. Whittington & Jason Iuliano, *The Myth of the Nondelegation Doctrine*, 165 U. Pa. L. Rev. 379, 391 (2017) (discussing scholarly pushback against the claim that nondelegation engenders political accountability).

[43]*See* Gundy v. United States, 139 S. Ct. 2116, 2123 (2019); Panama Refin. Co. v. Ryan, 293 U.S. 388, 421 (1935) ("The Constitution has never been regarded as denying to the Congress the necessary resources of flexibility and practicality, which will enable it to perform its function[.]"); *Mistretta*, 488 U.S. at 372, 380-81.

[44]*See* Yakus v. United States, 321 U.S. 414, 424 (1944) ("The Constitution as a continuously operative charter of government does not demand the impossible or the impracticable."); *Panama Refin. Co.*, 293 U.S. at 440 (Cardozo, J., dissenting) ("[S]eparation of powers between the Executive and Congress is not a doctrinaire concept to be made use of with pedantic rigor. There must be sensible approximation, there must be elasticity of adjustment, in response to the practical necessities of government, which cannot foresee to-day the developments of tomorrow in their nearly infinite variety.").

proportionate penalties for hundreds of different crimes" committed by offenders across the country was an "intricate, labor-intensive task," the Court held that the U.S. Sentencing Commission's sentencing guidelines did not violate the nondelegation doctrine.[45] Delegation is grounded in the Necessary and Proper Clause of the Constitution, which affords Congress great latitude in choosing the appropriate means to carry out its legislative powers.[46] As the Court has said, "a constitutional power implies a power of delegation of authority under it sufficient to effect its purposes."[47] So "Congress does not violate the Constitution merely because it legislates in broad terms, leaving a certain degree of discretion to executive or judicial actors."[48]

To balance Congress's exclusive law-making power and the need for help from other branches (through delegation), the Court has developed various interpretive principles that guard against open-ended, indefinite delegation of power.[49] Today, the controlling view is that delegation is permissible if Congress identifies a policy goal and lays down a standard or "intelligible principle" to guide an agency in achieving that goal.[50] Congress lays out an intelligible principle if it "clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority."[51] Thus, delegation is permissible if Congress makes clear the general policy an agency must pursue and the boundaries of the agency's authority.[52] The intelligible principle standard is deferential to Congress.[53]

The nondelegation doctrine has been dormant for almost ninety years. Throughout U.S. Constitutional history, the doctrine has been used only twice in one year to invalidate one law, the National Industrial Recovery Act (NIRA).[54] In 1935, the Court issued two opinions invalidating Congress's delegation of power under the NIRA. First, in *Panama Refining Co. v. Ryan*,[55] the Court invalidated an open-ended provision that authorized the President to prohibit transporting petroleum that exceeded state-imposed quotas. Congress essentially allowed the Executive to promulgate a petroleum code without describing the circumstances or conditions to guide such executive action. The Court found that this delegation was impermissible because it lacked an intelligible principle: Congress declared no policy, established no standard, nor laid down any rule to guide executive action.[56]

Soon after, the Court invalidated the NIRA in *A.L.A. Schechter Poultry Co. v. United States*, a case challenging an open-ended delegation provision that permitted the President to set "codes of fair competition" for different trades and industries.[57] The President could set such codes by approving codes adopted by trade associations as long as the codes promoted competition among businesses and "tend[ed] to effectuate the policy" of the NIRA.[58] The NIRA thus conferred power on private actors to promulgate rules that regulated virtually every industry in the United States through presidential approval. Here, too, Congress provided no policy guidance nor standards to guide the President's

[45] *Mistretta*, 488 U.S. at 379.

[46] *See* U.S. Const. art. I, § 8, cl. 18; *Wayman*, 23 U.S. at 5; *Panama Refin. Co.*, 293 U.S. at 421; *see also* M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819) ("Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.").

[47] Lichter v. United States, 334 U.S. 742, 778 (1948).

[48] Touby v. United States, 500 U.S. 160, 165 (1991).

[49] *See generally* Sunstein, *Nondelegation Canons*, *supra* note 1, at 315.

[50] *See* J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 409 (1928); Gundy v. United States, 139 S. Ct. 2116, 2129 (2019).

[51] Am. Power & Light Co. v. Sec. & Exch. Comm'n, 329 U.S. 90, 105 (1946).

[52] *Gundy*, 139 S. Ct. at 2129.

[53] *Id.*

[54] *Id.*

[55] Panama Ref. Co. v. Ryan, 293 U.S. 388, 430 (1935).

[56] *Id.* Even with the breadth of the statute in question, *Panama Refining* was not a slam dunk decision. Justice Cardozo dissented, reasoning that NIRA provided clear guidance to guide the president's discretion. According to Cardozo, the discretion by the statute at issue in *Panama refining* was not "unconfined and vagrant," rather it was "canalized within banks that keep it from overflowing." *Id.* at 440 (Cardozo, J., dissenting).

[57] A.L.A. Schechter Poultry Co. v. United States, 295 U.S. 495, 522-23 (1935).

[58] *Id.*

discretion in assuring "fair competition."[59] By all counts, this conferral of power was exceptional. The Court ruled that such delegation of power was invalid because it was very broad and extended "the President's discretion to all the varieties of laws which he may deem to be beneficial in dealing with the vast array of commercial and industrial activities throughout the country"[60] In short, the Court invalidated the NIRA in *Panama* and *A.L.A. Schechter* because it did not satisfy the intelligible principle standard; "Congress had failed to articulate any policy or standard to confine discretion."[61]

But since then, the Court has not invalidated any congressional delegation, including "delegations under standards phrased in sweeping terms."[62] In fact, a few years after *Schechter*, the nondelegation question was again before the Court in *Yakus v. United States*, which challenged delegation under the Inflation Control Act (ICA) of 1942.[63] The ICA authorized a price administrator to set commodity prices that "in his judgment will be generally fair and equitable."[64] The administrator would set commodity prices "when, in his judgment, their prices 'have risen or threaten to rise to an extent or in a manner inconsistent with the purposes of [the ICA].'"[65] Admittedly, this authority was broad. Still, the Court found that Congress had laid down an intelligible principle. It defined the policy — to fix prices — and empowered the price administrator to pursue that policy.[66] The Court also found that by directing that the prices be "fair and equitable," Congress appropriately confined the authority granted.[67] The Court explained that the Constitution "does not demand the impossible or the impracticable."[68] Therefore, Congress need not find for itself every factual predicate for legislative action or choose "the least possible delegation."[69]

The Court has continued to find that broad, sweeping delegations with guiding standards, such as what is in the "public interest," "just and reasonable," and "requisite to protect public health," lay down intelligible principles.[70] Indeed, the intelligible principle standard is not demanding.[71] The Court has repeatedly said that it has "almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law."[72]

## III. Public Health Legislation and Earlier Attempts to Revive the Nondelegation Doctrine

### *A. Public Health Policies and Agency Discretion*

In the 1970s, there were calls to revitalize the nondelegation doctrine. At the time, Congress was adopting bold policies to safeguard public health, ensure workplace safety, protect the environment, and protect consumers.[73] The Clean Air Amendments (restructuring the Clean Air Act),[74] the Occupational Safety

[59] *Id.* at 522.
[60] *Id.* at 539.
[61] Gundy v. United States, 139 S. Ct. 2116, 2129 (2019).
[62] Loving v. United States, 517 U.S. 748, 771 (1996).
[63] *See* Yakus v. United States, 321 U.S. 414, 418 (1944).
[64] *Id.* at 448.
[65] *Id.* at 420.
[66] *Id.* at 423.
[67] *Id.* at 422.
[68] *Id.* at 424.
[69] *Id.* at 426.
[70] Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 474 (2001); Gundy v. United States, 139 S. Ct. 2116, 2129 (2019); INS v. Chadha, 462 U.S. 919, 985 (1983) (White, J., dissenting).
[71] *Gundy*, 139 S. Ct. at 2129.
[72] *Id.* (quoting *Whitman*, 531 U.S. at 474–75).
[73] *See generally* Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 Stan. L. Rev. 1189 (1986); Christopher DeMuth, *Can the Administrative State Be Tamed?*, 8 J. Legal Analysis 121, 125 (2016).
[74] Clean Air Act of 1970, Pub. L. No. 91-604, 84 Stat. 1676 (codified at 42 U.S.C. § 1857 et seq.).

and Health Act (OSH Act),[75] and the Clean Water Act were all enacted in the early part of the decade.[76] At the same time, Congress created several agencies and adequately empowered them to implement the goals of those statutes. The Occupational Safety and Health Administration (OSHA), Environmental Protection Agency (EPA), and Consumer Product Safety Commission (CPSC) were all created in the early 1970s.[77]

These laws and agencies have served the American people by safeguarding the environment, workers in hazardous professions, and consumers, among others. Yet the creation of these agencies precipitated political and scholarly criticism of Congress for delegating major policy decisions to administrative agencies.[78] Nondelegation-based litigation ensued. In 1979, when the Court took up *Industrial Union Department, AFL-CIO v. American Petroleum Institute*,[79] a case challenging OSHA's regulation of benzene exposure, many expected that the Court would revive the nondelegation doctrine.[80] In fact, Justice Rehnquist called for the reinvigoration of the nondelegation doctrine, admonishing his colleagues "not to shy away from [their] judicial duty to invalidate unconstitutional delegations of legislative authority."[81] But the Court did not do so.

At issue in *Industrial Union Department* (commonly known as the Benzene Case) was an OSHA standard limiting exposure to benzene.[82] The OSH Act authorizes OSHA to adopt health and safety standards "*reasonably necessary or appropriate* to provide safe or healthful employment or places of employment."[83] For toxic materials, such as benzene, OSHA may adopt standards that, "to the extent feasible" and based on "the best available evidence," will ensure that "no employee will suffer material impairment to health."[84] Studies from the CDC's National Institute for Occupational Safety and Health had long shown the association between exposure to benzene and leukemia.[85] So to address workplace risks associated with benzene — a carcinogen to which there is no risk-free exposure level — OSHA interpreted the OSH Act to authorize limiting benzene exposure in the workplace to the lowest threshold (at one part benzene per million parts of air).[86] The oil industry protested, arguing that the standard was very costly and technologically unfeasible, and that it would not significantly address any health problems associated with benzene exposure.[87] Authorizing OSHA to limit benzene exposure to the lowest level without balancing the costs and risks involved, the industry argued, was an impermissible delegation of legislative power.[88]

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[75]Occupational Safety and Health Act of 1970, Pub. L. No. 91-596, 84 Stat. 1590 (1970) (codified at 29 USC § 651 et seq)

[76]Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816, 816 (codified at 33 U.S.C. § 1251(a)).

[77]*The Origins of the EPA*, Env't Prot. Agency, https://www.epa.gov/history/origins-epa [https://perma.cc/24KK-X4JL]; *50 Years of Workplace Safety and Health*, Occupational Safety & Health Admin., https://www.osha.gov/osha50 [https://perma.cc/ZY9Q-CLFQ]; *About CPSC*, U.S. Consumer Prod. Safety Comm'n, https://www.cpsc.gov/About-CPSC [https://perma.cc/LW28-CYVA].

[78]*See* James O. Freedman, Crisis and Legitimacy: The Administrative Process and American Government 80-94 (1978); Theodore J. Lowi, The End of Liberalism 93 (2d ed. 1979); John Hart Ely, Democracy and Distrust 131-32 (1980).

[79]448 U.S. 607 (1980).

[80]Antonin Scalia, *A Note on the Benzene Case*, Reg. (July–Aug. 1980), https://www.cato.org/sites/cato.org/files/serials/files/regulation/1980/7/v4n4-5.pdf [https://perma.cc/78S7-KGCA]; Linda Greenhouse, *Supreme Court Roundup*, N.Y. Times (Feb. 22, 1979), https://www.nytimes.com/1979/02/22/archives/supreme-court-roundup-justices-to-hear-case-on-benzene-safety.html [https://perma.cc/AH46-YC78].

[81]Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst., 448 U.S. 607, 686 (1980) (Rehnquist, J., concurring).

[82]*Id.* at 607.

[83]29 U.S.C. § 652(8) (emphasis added).

[84]29 U.S.C. § 655(b)(5).

[85]*Benzene*, Nat'l Inst. for Occupational safety & Health, https://www.cdc.gov/niosh/topics/benzene/default.html [https://perma.cc/6CA8-QALT] (last updated June 24, 2019).

[86]*Indus. Union Dep't*, 448 U.S. at 613.

[87]Neil J. Sullivan, *The Benzene Decision: A Contribution To Regulatory Confusion*, 33 Admin. L. Rev. 351, 353 (1981).

[88]Brief for the Respondents at 26, Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst., 448 U.S. 607 (Nos. 78-911, 78-1036), 1979 WL 199557, at *65-66.

Even then, the Court did not invalidate the OSH Act's broad conferral of power. The Court, however, invalidated the standard on statutory grounds. The Court reasoned that the OSH Act required OSHA to first determine whether benzene presented "a significant risk" before adopting the standard.[89] Because virtually every activity involves some element of risk, OSHA had to first determine the level of risk involved in a regulated activity. Only if that risk is "significant" and can be eliminated or lessened by a standard may OSHA adopt such standard.[90] Although the OSH Act does not explicitly require OSHA to make a threshold finding about whether the risk is significant, the Court read that requirement into the statute to avoid the constitutional question of nondelegation.[91] Without that threshold finding, the Court observed, the OSH Act would create an open-ended grant of authority like the NIRA did in *Panama Refining* and *A.L.A. Schechter*, which would be unconstitutional.[92]

The Court's narrow interpretation of the OSH Act in the Benzene Case can be described as a deployment of a nondelegation doctrine surrogate — the major questions doctrine — that focuses on the agency action in question while avoiding the full-throttle application of the nondelegation doctrine that would invalidate the whole statute as the Court did in *A.L.A. Schechter*.[93] To avoid the nondelegation constitutional issue in the Benzene Case, the Court narrowly read the statute and invalidated OSHA's interpretation of a broad law. Put differently, the Court concluded that OSHA's interpretation of the statute was not reasonable.[94] By reading the OSH Act narrowly, the Court limited the range of policy options that were otherwise available to OSHA under the statute because determining the risk significance of a toxin such as benzene is not a legal issue; it is a determination that must "be based largely on policy considerations."[95] The Benzene Case is an example of the Court using a nondelegation canon to make scientific judgments about public health policy.

Justice Rehnquist concurred in the Court's judgment but reasoned that Congress had improperly delegated power to OSHA.[96] To him, giving OSHA the power to set standards that would "to the extent feasible" protect employees without any other limiting guidelines failed to lay down an intelligible principle and thus was unconstitutional.[97] Congress had impermissibly passed its obligation to make the hard choice of balancing "statistical probability of future death" with "the economic costs of preventing those deaths" to OSHA.[98] Only Congress, not agencies — which he called "politically unresponsive bureaucrats" — must make such "hard choices" or "critical policy decisions."[99] Justice Rehnquist's

[89] *Indus. Union Dep't*, 448 U.S. at 631.

[90] *Id.* at 614.

[91] *Id.* at 639-40.

[92] *Id.* at 646; *see* Mistretta v. United States, 488 U.S. 361, 372 n.7 (1989) ("In recent years, our application of the nondelegation doctrine principally has been limited to the interpretation of statutory texts, and, more particularly, to giving narrow constructions to statutory delegations that might otherwise be thought to be unconstitutional.").

[93] *See infra* Section VII for a discussion of the major questions doctrine. Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., 595 U.S. 109, 124 (2022) (citing the Benzene Case for the proposition that "for decades courts have cited the nondelegation doctrine as a reason to apply the major questions doctrine"); *see also* Cass R. Sunstein, It All Started with Benzene (Sept. 15, 2023) (unpublished manuscript) (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4568007) ("The Benzene Case is now understood to be the first contemporary appearance of the Major Questions Doctrine."); John F. Manning, *The Nondelegation Doctrine As a Canon of Avoidance*, 2000 Sup. Ct. Rev. 223, 244 (2000).

[94] *Cf.* Rust v. Sullivan, 500 U.S. 173, 224 (1991) (O'Connor, J., dissenting) ("In [cases that "raise serious constitutional problems"], we need only tell the Secretary that his regulations are not a reasonable interpretation of the statute; we need not tell Congress that it cannot pass such legislation. If we rule solely on statutory grounds, Congress retains the power to force the constitutional question by legislating more explicitly."); *see also* Manning, *supra* note 93, at 227 (2000) (discussing how the Court has resorted to narrow statutory interpretation to avoid invalidating broad statutory delegations on constitutional grounds).

[95] *Indus. Union Dep't*, 448 U.S. at 655 n.62.

[96] *Id.* at 672 (Rehnquist, J., concurring).

[97] *Id.* at 685-86.

[98] *Id.* at 672.

[99] *Id.* at 686-87. Justice Thomas echoed this call in his concurrence in *Whitman v. Am. Trucking Ass'ns*, saying he would "be willing to address the question whether our delegation jurisprudence has strayed too far from our Founders' understanding of separation of powers." 531 U.S. 457, 487 (2001) (Thomas, J., concurring).

concurrence in the Benzene Case has been central to recent efforts to revive the nondelegation doctrine.[100]

### B. Nondelegation and Chevron Deference

Not only did the Court reject Justice Rehnquist's call to revive the nondelegation doctrine, it canonized judicial deference to agency policy choices under broad statutes in 1984 — only four years after the Benzene Case decision. In *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, the Court established a two-step framework to guide judicial review of agencies' interpretations of the statutes that they administer.[101] Under that framework (known as *Chevron* deference), when a regulatory action is challenged, the reviewing court must first determine whether "Congress has spoken to the precise question at issue."[102] If Congress has clearly spoken, the court and the agency must abide by Congress's expressed intent.[103] But if Congress's intent is unclear or the statute is ambiguous such that it is open to various interpretations, the court must defer to the agency's reasonable interpretation.[104] This deference is grounded in the understanding that by enacting broad, ambiguous statutes, Congress implicitly delegates authority to an agency to fill the interstitial gaps and make certain policy choices.[105] Choosing between various interpretations to which a broad statute is amenable, the Court reasoned, is a policy decision that ought to be made by a politically accountable institution (the agencies), not the courts.[106] Unlike unelected, lifetime-appointed federal judges, agencies within the executive branch are answerable to an elected President and therefore indirectly accountable to the public.[107] In a way, *Chevron* emphasized that broad delegation respects the separation of powers principle and pushed back against Justice Rehnquist's claim in the Benzene Case that broad delegations empowered "politically unresponsive administrators" to make "critical policy decisions."[108] *Chevron* therefore shifted away from the Benzene Case's narrow statutory interpretation that limits the range of agencies' policy options and affirmed that absent clear congressional intent, courts should not second-guess the policy choices that are made by agencies under broad statutes.[109]

## IV. Recent Efforts to Reinvigorate the Nondelegation Doctrine

The seemingly settled deferential approach that the Court has taken toward delegation has not stopped interest groups and anti-administrative state voices within the judiciary from calling for reinvigorating the nondelegation doctrine. While the Court's most recent decision on delegation, *Gundy*,[110] left

[100] *See* Gundy v. United States, 139 S. Ct. 2116, 2145 (2019) (Gorsuch, J., dissenting); Paul v. United States, 140 S. Ct. 342 (2019) (statement of Kavanaugh, J., respecting the denial of cert).

[101] Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984).

[102] *Id.* at 842.

[103] The reviewing court must determine Congress's clear intent by "employing traditional tools of statutory construction." *Id.* at 843 n.9.

[104] *Id.* at 844.

[105] *Id.* at 843-44; FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000); King v. Burwell, 576 U.S. 473, 485 (2015).

[106] *Chevron*, 467 U.S. at 866.

[107] *Id.* at 865.

[108] Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst., 448 U.S. 607, 686-87 (1980).

[109] Cass R. Sunstein, *The American Nondelegation Doctrine*, 86 Geo. Wash. L. Rev. 1181, 1198 (2018) [hereinafter Sunstein, *American Nondelegation Doctrine*] ("Chevron is, in essence, a prodelegation canon[.]"). In fact, at one point, the DC Circuit seemed to interpret *Chevron* as implicitly overruling the Benzene Case. Am. Trucking Ass'ns, Inc. v. E.P.A., 195 F.3d 4, 8 (D.C. Cir. 1999) ("[T]he approach of the *Benzene* case, in which the Supreme Court itself identified an intelligible principle in an ambiguous statute, has given way to the approach of *Chevron*."). Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L.J. 511, 516 (1989) ("Broad delegation to the Executive is the hallmark of the modern administrative state[.]").

[110] Gundy v. United States, 139 S. Ct. 2116, 2116 (2019).

precedent intact, it came when the Court's composition was shifting. Since then, two new justices — Brett Kavanaugh and Amy Coney Barrett — have joined the Court. As previously noted, Justice Kavanaugh has shown interest in reviving the doctrine, and Justice Barrett has taken a dim view of the intelligible principle standard.[111]

*Gundy* challenged the U.S. Attorney General's authority to require registration under SORNA.[112] When Congress enacted SORNA in 2006, it required only individuals serving prison sentences for sex offenses to register as sex offenders.[113] SORNA empowered the Attorney General to specify the applicability of SORNA's registration requirements to individuals convicted of sex offenses before SORNA was enacted ("pre-Act offenders").[114] To that end, SORNA states: "[t]he Attorney General *shall have the authority to specify the applicability* of the requirements of this subchapter to sex offenders convicted before the enactment of this chapter or its implementation in a particular jurisdiction, and to prescribe rules for the registration of any such sex offenders[.]"[115]

*Gundy* was not the first time SORNA appeared before the Court. The Court had previously narrowly construed the Attorney General's authority under SORNA in *Reynolds v. United States.*[116] To appreciate the Court's reasoning in *Gundy*, a brief discussion of *Reynolds* is warranted. The question before the Court in *Reynolds* was whether SORNA automatically applied to pre-Act offenders without any further action from the Attorney General.[117] There, the government argued that SORNA applied automatically because the Attorney General's discretion was broad and the government feared that most sex offenders would remain unregistered if the Attorney General exercised their discretion and refused to specify how SORNA applied to pre-Act offenders.[118] Textually, because SORNA says the Attorney General "shall have the authority to specify," rather than "shall specify," the government argued, the Attorney General had the discretion to require or refuse to require registration.[119] The government therefore urged the Court to rule that SORNA automatically applied because, otherwise, SORNA's purpose — to ensure comprehensive national registration of sex offenders — could be easily frustrated if the Attorney General exercised their discretion and refused to require registration.

But the Court rejected such a broad reading of the Attorney General's authority under SORNA. Congress was clear that SORNA was meant to apply to all pre-Act offenders, but recognized that automatic registration was not feasible because of the patchwork of sex offender registration laws nationwide.[120] The Court reasoned that the Attorney General's discretion was only temporal; Congress did not empower the Attorney General to suspend SORNA's application.[121] The authorization merely gave the Attorney General flexibility in timing to navigate the problems involved in registering thousands of pre-Act offenders, but ultimately required the Attorney General to "apply SORNA to pre-Act offenders as soon as feasible."[122]

Echoing the failed argument in *Reynolds*, Gundy argued that Congress gave the Attorney General unfettered power over pre-Act offenders.[123] With that authority, Gundy argued, the Attorney General could require pre-Act offenders (roughly half-a-million people) "to register, or not, as she sees fit, and to change her policy for any reason at any time."[124] But a plurality of the Court, noting that such a broad

[111] *See* Amy Coney Barrett, *Suspension and Delegation*, 99 Cornell L. Rev. 251 (2014).
[112] *Gundy*, 139 S. Ct. at 2122.
[113] *Id.* at 2121-22.
[114] *Id.* at 2122.
[115] 34 U.S.C. § 20913(d) (emphasis added).
[116] Reynolds v. United States, 565 U.S. 432 (2012).
[117] *Id.* at 439.
[118] *See id.* at 443-44.
[119] *Id.* at 444.
[120] *See id.* at 443.
[121] *Id.* at 444.
[122] Gundy v. United States, 139 S. Ct. 2116, 2123 (2019).
[123] *Id.*
[124] *Id.*

reading of SORNA would create a nondelegation issue, rejected that argument.[125] The plurality reiterated the holding of *Reynolds* and read SORNA narrowly as only authorizing the Attorney General to require registration "as soon as feasible."[126] SORNA did not give the Attorney General the discretion to do as they pleased. Rather, it gave them temporal latitude to navigate the practical difficulties involved in ensuring pre-Act offenders were registered. Such reading aligned with SORNA's goal of establishing a comprehensive system of national sex offender registration, especially pre-Act offenders who comprised most sex offenders. Interpreting the Attorney General's authority broadly as allowing exemption from registration would be inconsistent with SORNA's purpose, the Court ruled.[127]

Thus read, the question before the Court was whether Congress violated the nondelegation doctrine when it empowered the Attorney General to specify SORNA's applicability to pre-Act offenders as soon as feasible.[128] The Court held that the delegation was permissible because Congress had laid down an intelligible principle.[129] SORNA established a general policy by requiring the registration of pre-Act offenders. It also set the boundaries of the Attorney General's authority by limiting the time within which they could specify when SORNA applied: "as soon as feasible."[130] The Court reiterated that the intelligible principle standard was not demanding.[131]

The Court's approach in *Gundy* resembles that of the Benzene Case. Recall that in the Benzene Case the Court construed the statute narrowly — requiring a threshold finding of significant risk — to avoid a nondelegation problem.[132] In *Gundy* too, to avoid the nondelegation problem, the Court interpreted the Attorney General's authority narrowly, as applying SORNA to pre-Act offenders as soon as feasible.

Justice Gorsuch disagreed and penned a lengthy dissent, joined by Chief Justice Roberts and Justice Thomas. He found that Congress had given the Attorney General vast power to make "unbounded policy choices" and castigated the plurality's use of the intelligible principle standard as a deviation from "the original meaning of the Constitution."[133] SORNA, the dissent argued, was a case of legislative shirking where Congress "passed the potato to the Attorney General" rather than address a controversial subject that had significant federalism implications.[134] The dissent then proposed three categories of permissible delegation. First, a statute may authorize an agency to "fill up the details," but only if Congress itself "makes the policy decisions."[135] Second, Congress may make the application of a statute contingent on "executive fact finding."[136] And third, Congress may assign other branches "certain non-legislative responsibilities."[137]

To the dissent, SORNA did not fall in any of these categories because it gave the Attorney General more authority than filling up the details. Rather, the Attorney General had free rein to impose all SORNA requirements upon some or none of the 500,000 pre-Act offenders.[138] In other words, the dissent disagreed that the SORNA delegation included a feasibility constraint. Just like Justice Rehnquist's disagreement with the plurality in the Benzene Case that the OSH Act did not require a "significant risk" threshold finding, Justice Gorsuch would not find that SORNA had a feasibility requirement.[139] SORNA's delegation was not contingent upon the Attorney General's fact-finding.

[125] *Id.*
[126] *Id.* at 2129.
[127] *Id.* at 2129-30.
[128] *Id.* at 2123.
[129] *Id.* at 2129.
[130] *Id.*
[131] *Id.*
[132] Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst., 448 U.S. 607, 651-54 (1980).
[133] *Gundy*, 139 S. Ct. at 2129.
[134] *Id.* at 2144.
[135] *Id.* at 2136.
[136] *Id.* at 2136.
[137] *Id.* at 2137.
[138] *Id.* at 2143.
[139] *Id.* at 2123-24; Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst., 448 U.S. 607, 651-54 (1980).

Rather than requiring case-by-case inquiries into the appropriateness of sex offender registration, SORNA gave the Attorney General "unfettered discretion to decide which requirements applied to which pre-SORNA offenders."[140] Lastly, SORNA gave the Attorney General the authority to determine the duties and rights of citizens, "a quintessentially legislative power" that has no executive overlap.[141]

The first category of delegation — distinguishing between "policy decisions" and "filling up the details" — is critical. As Justice Kavanaugh noted in *Paul v. United States*, that category echoes Justice Rehnquist's concurrence in the Benzene Case that "Congress itself makes the critical policy decisions."[142] Synthesizing Justice Rehnquist and Justice Gorsuch's opinions, Justice Kavanaugh laid out two buckets into which Congressional delegations fall: where Congress expressly (1) makes the "major policy question" and authorizes the agencies to regulate and enforce it; and (2) gives the agency the authority to decide the "major policy question" and to regulate and enforce it.[143] Under the nondelegation doctrine, the former would be permissible; the latter would not.[144] But the justices have not provided any meaningful guidance on how to distinguish policy decisions from details.

## V. The Nondelegation Argument in *Braidwood*

Before the district court, the *Braidwood* challengers echoed the Court's observations in *Little Sisters of the Poor* and argued that the preventive services requirement violates the nondelegation doctrine because it "does not provide *any* factors or considerations that might influence the agency's decisionmaking."[145] According to the challengers, it is not enough that the ACA limits coverage to only "evidence-based items or services" recommended by the USPSTF or that HRSA's guidelines are limited to "preventive care and screenings" for infants, children, adolescents, and women.[146]

The district court rejected this argument based on Fifth Circuit precedent in *Big Times Vapes, Inc. v. FDA*, a decision upholding the FDA's regulation of e-cigarettes as tobacco products.[147] In *Big Time Vapes*, the Fifth Circuit relied mainly on *Gundy* to hold that delegation is permissible if Congress lays out "(1) its general policy in the statute, (2) the public agency that is to apply that policy, and (3) the boundaries of the delegated authority."[148] The district court found that the ACA met these requirements because it established "a general policy to expand insurance coverage of various preventive services," and tasked the USPSTF, HRSA, and ACIP with identifying the services insurers must cover.[149] The court also observed that Congress had long outlined each agency's purpose.[150] The USPSTF was established to develop "recommendations for the health care community, and update [e] previous clinical preventive recommendations to be published in the Guide to Clinical Preventive Services for individuals and organizations delivering clinical services."[151] ACIP advises "the HHS

[140] *Gundy*, 139 S. Ct. at 2143.

[141] *Id.* at 2144.

[142] Paul v. United States, 140 S. Ct. 342, 342 (2019); *Indus. Union Dep't*, 448 U.S. at 687. This idea has also animated the Court's recent major questions doctrine decisions. *See* West Virginia v. Env't Prot. Agency, 597 U.S. 697, 723 (2022) ("We presume that 'Congress intends to make major policy decisions itself, not leave those decisions to agencies.'") (citing United States Telecom Assn. v. FCC, 855 F.3d 381, 419 (CADC 2017)); Biden v. Nebraska, 143 S. Ct. 2355, 2380 (2023) ("[A] reasonable interpreter would expect [Congress] to make the big-time policy calls itself, rather than pawning them off to another branch.").

[143] *Paul*, 140 S. Ct. at 342.

[144] *Id.*

[145] Brief in Support of Plaintiffs' Motion for Summary Judgment at 25, Braidwood Mgmt. v. Becerra, No. 4:20-CV-00283-O, 2023 WL 9058338 (N.D. Tex. Apr. 20, 2023), 2021 WL 9058338.

[146] Braidwood Mgmt. v. Becerra, 627 F. Supp. 3d 642, 632 (N.D. Tex. 2022).

[147] *Id.*; Big Time Vapes, Inc. v. U.S. Food & Drug Admin., 963 F.3d 436, 438 (5th Cir. 2020).

[148] *Braidwood Mgmt.*, 627 F. Supp. 3d at 650 (citing *Big Time Vapes*, 963 F.3d at 444-45).

[149] *Id.* at 650.

[150] *Id.* at 650–51.

[151] *Id.* at 650 (citing 42 U.S.C. § 299b-4(a)(1)).

Secretary on his role to assist States and their political subdivisions in the prevention and suppression of communicable diseases."[152] HRSA enables "each State to extend and improve … services for promoting the health of mothers and children[.]"[153] The court thus concluded that Congress had delineated a general policy and designated the responsible agencies.[154]

The court also found that Congress circumscribed the agencies' discretion in various respects. The USPSTF's preventive services must be "evidence-based" and have an "A" or "B" rating.[155] The recommendations must be based on "the scientific evidence related to the effectiveness, appropriateness, and cost-effectiveness of clinical preventive services."[156] So, too, is HRSA's authority restricted: to develop comprehensive guidelines reflecting "evidenced-informed" services for infants, children, adolescents, and women.[157]

For these reasons, the district court found the preventive services requirement does not violate the nondelegation doctrine because it "falls within the constitutional parameters outlined by the Supreme Court and the Fifth Circuit."[158] The district court, however, acknowledged that the challengers' nondelegation arguments relied on *Little Sisters of the Poor* and noted that the Supreme Court is likely to revive the nondelegation doctrine, but until the Supreme Court did so, existing precedent controlled.[159] In their appeal to the Fifth Circuit, the *Braidwood* challengers informed the court that they are preserving the nondelegation argument for the Supreme Court because of *Big Time Vapes*.[160]

## VI. Nondelegation, Major Questions, and *Chevron* Deference

It is possible that the Court will revive the nondelegation doctrine and put congressionally delegated authority to administrative agencies in legal peril. The justices are already well on their way toward executing a long-term conservative project to weaken, if not dismantle, the administrative state by using different nondelegation surrogates.[161] Indeed, the Court's skirting of *Chevron* deference and reliance on the recently minted major questions doctrine[162] to strike down health and environmental protection regulations shows a judicial end run around nondelegation precedent. As Gorsuch noted in *Gundy*, when existing nondelegation precedent calls for a different result, the Court relies on other interpretive canons to justify narrow readings of delegation statutes.[163] The Court simply uses different names.[164] In *FDA v. Brown & Williamson*, for example, the Court skirted *Chevron* deference and ruled that the Food, Drug, and Cosmetic Act (FDCA) did not authorize the FDA to regulate tobacco products even though the FDCA's definitions of "drugs" and "devices" could plausibility be

[152]*Id.* (citing 42 U.S.C. §§ 217a(a), 243(a), 1396s(e)).
[153]*Id.* (citing 49 Stat. 620, 629 (1935)).
[154]*Id.* at 651.
[155]*Id.* (citing 42 U.S.C. § 300gg-13(a)(1)).
[156]*Id.* (citing 42 U.S.C. § 299b- 4(a)(1)).
[157]*See id.*
[158]*Id.* at 652.
[159]*Id.*
[160]*Id.*
[161]*See* Lisa Heinzerling, *How Government Ends*, Boston Rev., https://www.bostonreview.net/articles/how-government-ends/ [https://perma.cc/E53W-FW2C]; *see also* Gundy v. United States, 139 S. Ct. 2116, 2148 (2019) (Gorsuch, J., dissenting); Paul v. United States, 140 S. Ct. 342 (2019) (Kavanaugh, J., concurring in denial of certiorari) (noting that following Justice Rehnquist's concurrence in the Benzene Case, the Court has applied nondelegation-related statutory interpretation doctrines); Sunstein, *American Nondelegation Doctrine*, *supra* note 109, at 1181 (arguing that the statutory canons that the Court has used in cases such *Brown & Williamson* and the Benzene Case are part of the nondelegation doctrine).
[162]*See* West Virginia v. Env't Prot. Agency, 597 U.S. 697, 766 (2022) (Kagan, J., dissenting) (characterizing the Court's decision as "the arrival of the 'major questions doctrine'").
[163]*Gundy*, 139 S. Ct. at 2145; *see also* Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., 595 U.S. 109, 124 (2022) ("[F]or decades courts have cited the nondelegation doctrine as a reason to apply the major questions doctrine.").
[164]*Gundy*, 139 S. Ct. at 2141 (2019) (Gorsuch, J., dissenting).

read to encompass them.[165] Deploying what it later characterized as the major questions doctrine,[166] the Court ruled that it was implausible that Congress had authorized the FDA to regulate tobacco products through "cryptic" statutory language.[167] Using the major questions doctrine, the Court has struck down several measures addressing some of the most pressing health and environmental issues of the day, including the application of federal tax credits to federally established health insurance exchanges;[168] efforts to mitigate COVID-19 transmissions;[169] minimization of greenhouse emissions;[170] and student debt relief.[171]

Just like the elusive distinction between "major policy decisions" and "filling up the details" that some justices have proposed to replace the intelligible principle standard, it is hard to define what a "major question" is with some semblance of objectivity. To determine a major question, the Court looks at "the history and the breadth of the authority that the agency has asserted, and the economic and political significance of that assertion."[172] In such extraordinary cases, the agency asserting authority to do something must show that Congress has clearly authorized it to do so.[173] This is a standardless, highly subjective test that provides no meaningful guidance to Congress or agencies and makes the Courts the final arbiters of policy questions.[174] Take *West Virginia v. EPA*, a case challenging the EPA's regulation of greenhouse gas emissions under the Clean Air Act (CAA).[175] Under the CAA, Congress authorizes the EPA to adopt the "best system for emission reduction."[176] The EPA determined that requiring power plants to gradually shift from using fossil fuels to renewable sources — a system known as "generation shifting" — was the best way to reduce carbon emissions.[177] Using the major questions doctrine, however, the Court ruled that Congress did not speak clearly enough to authorize generation shifting in directing the EPA to adopt the "best system for emission reduction."[178] To the Court, it was "implausible" that Congress could empower the EPA to adopt generation shifting through such "oblique or elliptical language."[179] As the articulation of the major questions doctrine in *West Virginia* shows, using this standardless test not only encroaches on Congress's ability to seek help from expert agencies, but also aggrandizes politically unaccountable judges as the ultimate policy makers.[180]

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[165] U.S. Food & Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 126 (2000).

[166] *West Virginia*, 597 U.S. at 2609 (characterizing *Brown & Williamson* as a key case in the development of the major questions doctrine).

[167] *Brown & Williamson*, 529 U.S. at 160.

[168] King v. Burwell, 576 U.S. 473, 475 (2015).

[169] Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., 595 U.S. 109, 120 (2022); Alabama Ass'n of Realtors v. U.S. Dep't of Health & Hum. Servs., 141 S. Ct. 2485, 2490 (2021).

[170] *West Virginia*, 597 U.S. at 2616.

[171] Biden v. Nebraska, 143 S. Ct. 2355, 2375 (2023).

[172] *West Virginia*, 597 U.S. at 2608.

[173] Util. Air Regul. Grp. v. Env't. Prot. Agency, 573 U.S. 302, 324 (2014).

[174] Andrew Twinamatsiko & Katie Keith, *Unpacking West Virginia v. EPA and Its Impact on Health Policy*, O'Neill Inst. for Nat'l & Global Health L. (July 13, 2022), https://oneill.law.georgetown.edu/unpacking-west-virginia-v-epa-and-its-impact-on-health-policy/ [https://perma.cc/DQ85-MJ8N]; *see* Lisa Heinzerling, *The Power Canons*, 58 Wm. & Mary L. Rev. 1933, 1999 (2017).

[175] *West Virginia*, 597 U.S. at 2608.

[176] 42 U.S.C. § 7411.

[177] Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64662-01 (Dec. 22, 2015) (to be codified at 40 C.F.R. pt. 60).

[178] *West Virginia*, 597 U.S. at 2615-16.

[179] *Id.* at 2609.

[180] *Cf.* Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 866 (1984) ("Judges are not experts in the field, and are not part of either political branch of the Government. Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges' personal policy preferences. In contrast, an agency to which Congress has delegated policy-making responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.").

The same subjectivity (or lack of standard) that underlies the major questions doctrine suffuses the proposed alternatives, to the intelligible principle standard, for a reinvigorated nondelegation doctrine.[181] Take the idea that Congress must decide the "policy questions" itself and authorize the agencies to fill up the details. How can one tell a policy question from a policy detail? Insert shrug emoji[182] because no one seems to know — not even the justices that have proposed this distinction. The line between the two is difficult to draw[183] and "has a bit of a 'know it when you see it' quality."[184] While some descriptors, such as "important subjects" and "consequential statutes," have been used to describe what major policies would entail,[185] those phrases are no clearer than the amorphous terms that the Court has used in major questions jurisprudence. And, indeed, as Justice Gorsuch has conceded, some details can be highly consequential.[186] So even under the "policy question" or "fill-up-the-details" dichotomy, the courts are likely to deploy the major questions doctrine to second guess agencies' abilities to fill up the statutory interstices that the courts may consider "consequential." Regulatory action that would escape the reinvigorated nondelegation-doctrine frying pan would likely succumb to the major questions fire. Apparently, the Attorney General's task to specify the registration requirements of pre-Act offenders under SORNA would not pass the fill-up-the-details muster. One thing is clear: anytime an agency acts to regulate a significant threat to the public's health or the environment, it is likely to flout the reinvigorated nondelegation doctrine or its surrogate canons. Almost by definition, if an agency tackles something meaningful and important, thus making the public healthier and safer, it will face head-on a Court that is exercising nondelegation canons in aggressive and muscular ways.

And the Court is likely to normalize judicial second-guessing of agency decisions if it overturns *Chevron* deference. The Court recently took up two cases — *Loper Bright Enterprises v. Raimondo*[187] and *Relentless, Inc. v. Department of Commerce*[188] — that challenge the deference that the courts afford agency interpretation of statutes under *Chevron*. As discussed earlier, deference to agencies respects that implicit delegation, giving agencies the flexibility they need to leverage their expertise to keep up with advances in technology, emergencies, and other policy priorities. *Chevron* deference has been central to the effective implementation of many public health laws; overruling it will not only severely limit agency ability to nimbly respond to ever-changing and technical issues, but also limit how Congress can meaningfully craft legislation to empower agencies to implement policy goals.[189]

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[181] *See* Lisa Heinzerling, *Nondelegation on Steroids*, 29 N.Y.U. Env't. L.J. 379, 390 (2021) ("None of the conservative justices' recent statements on nondelegation explains how to decide whether an agency's decision is important.").

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[183] Gundy v. United States, 139 S. Ct. 2116, 2143 (2019) ("Of course, what qualifies as a detail can sometimes be difficult to discern[.]"). And Gorsuch was hardly breaking new ground here. In fact, this is a repackaging of Justice Marshall's famous pronouncement in *Wayman v. Southard* that: "The line has not been exactly drawn which separates those important subjects, which must be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made, and power … to fill up the details." 23 U.S. (10 Wheat.) 1, 43 (1825). Indeed, it was the elusiveness of that line that led the Court to adopt the "intelligible principle" requirement in *J.W. Hampton, Jr., & Co. v. U.S.* as a more workable baseline for determining delegation questions. 276 U.S. 394 (1928).

[184] U.S. Telecom Ass'n v. Fed. Commc'ns Comm'n, 855 F.3d 381, 423 (D.C. Cir. 2017) (Judge Kavanaugh dissenting); *see also* Heinzerling, *supra* note 181; Mistretta v. United States, 488 U.S. 361, 415 (1989) (Scalia, J., dissenting) ("[T]he debate over unconstitutional delegation becomes a debate not over a point of principle but over a question of degree.").

[185] *Gundy*, 139 S. Ct. at 2136 (Gorsuch, J., dissenting).

[186] *See id.*; *see also* West Virginia v. Env't Prot. Agency, 597 U.S. 697, 737 (2022) (Gorsuch, J., concurring) ("Doubtless, what qualifies as an important subject and what constitutes a detail may be debated.").

[187] *See* Loper Bright Enters. v. Raimondo, 143 S. Ct. 2429, 2429 (2023).

[188] *See* Relentless, Inc., v. U.S. Dep't. of Com., 144 S. Ct. 417, 417 (2023).

[189] *See* Suhasini Ravi, *What the Supreme Court's Rulings on Chevron in Loper Bright Enterprises and Relentless Could Mean for Health Care*, O'Neill Inst. for Nat'l & Global Health L. (Oct. 31, 2023), https://oneill.law.georgetown.edu/what-the-supreme-courts-rulings-on-chevron-in-loper-bright-enterprises-and-relentless-could-mean-for-health-care/ [https://perma.cc/RZ7N-23YW]; *see also* Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L.J. 511, 517 (1989) (noting that one of *Chevron*'s major advantages is to give agencies flexibility).

## VII. Looking to the Future and the Devastating Consequences of the Nondelegation Doctrine

The nondelegation challenge in *Braidwood* comes at a time of a sea change in the judicial approach to the administrative state. In 2022, the Supreme Court announced the arrival of the major questions doctrine by invalidating two major regulations within only one year.[190] This term, the Court has been asked to entomb *Chevron* deference. The recently reconstituted Court with a conservative supermajority has not shied away from defenestrating precedent and ushering in new doctrines.[191] Given the new Court's anti-administrative state stance, it is plausible that it may reinvigorate the nondelegation doctrine.[192] As the district court in *Braidwood* predicted: "The Court might well decide—perhaps soon—to reexamine or revive the nondelegation doctrine."[193] The *Braidwood* appeal may provide a pathway for that to happen, especially considering the Court's observations in *Little Sisters of the Poor* that the ACA gives HRSA virtually unbridled authority.[194] While the lower court found that Congress provided an intelligible principle when it authorized the USPSTF, HRSA, and ACIP to recommend covered preventive services,[195] it remains to be seen whether that sort of delegation impermissibly empowers those agencies to make policy choices rather than filling up the details.

Reviving the nondelegation doctrine will unleash the floodgates of litigation and put the validity of many delegation statutes in doubt. As discussed previously, it is fair to say the current administrative state edifice is built on the understanding that broad delegation is permissible as long as Congress lays down an intelligible principle. Over the last century, Congress has delegated authority to administrative agencies with that understanding and the courts have upheld such delegations. Overruling that long line of precedent would assuredly cast doubt on the legality of the power entrusted to key public health agencies — such as OSHA, the CDC, the FDA, and the EPA — and the regulations they have promulgated. Indeed, during the oral argument in *Gundy*, Justice Breyer feared that reinvigorating the nondelegation doctrine put the constitutionality of around 300,000 administrative rules in question.[196]

*Braidwood* is just one among the several cases that have recently challenged public health measures on nondelegation grounds.[197] Litigation against the recently enacted Inflation Reduction Act's (IRA) drug price negotiation program is one example of how the nondelegation doctrine is already being used to challenge a major health care law.[198] The IRA empowers HHS to directly negotiate with drug manufacturers the price that Medicare pays for some of the costliest prescription drugs.[199] The IRA is detailed and prescriptive. It sets out the number of drugs that should be chosen for negotiation for each

[190] *See* Andrew Twinamatsiko et al., *SCOTUS "Major Question" Decision Cited In Litigation, Comments*, Health Affs. (Dec. 20, 2022), https://www.healthaffairs.org/content/forefront/scotus-major-question-decision-cited-litigation-comments.

[191] *See, e.g.*, Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 215 (2022) (*overruling* Roe v. Wade, 410 U.S. 113 (1973), *and* Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992)); *see also* Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181, 181 (2023) (holding that diversity was no longer a compelling interest under the Equal Protection Clause); Cummings v. Premier Rehab Keller, 596 U.S. 212, 212 (2022) (holding that emotional distress damages are not recoverable under civil rights statutes).

[192] *See* Doe v. U.S. Dep't of Just., 650 F. Supp. 3d 957, 1002-03 (C.D. Cal. 2023).

[193] Braidwood Mgmt. v. Becerra, 627 F. Supp. 3d 624, 652 (N.D. Tex. 2022) (quoting Big Time Vapes, Inc. v. U.S. Food & Drug Admin., 963 F.3d 436, 447 (5th Cir. 2020)).

[194] Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania, 140 S. Ct. 2367, 2380 (2020).

[195] *See Braidwood Mgmt.*, 627 F. Supp. 3d at 649.

[196] *See* Transcript of Oral Argument at 8-9, Gundy v. United States, 139 S. Ct. 2116, 2123 (2019) (No. 17-6086).

[197] *See, e.g.*, Petition for Writ of Certiorari, Sec. & Exch. Comm'n v. Jarkesy, 34 F.4th 446 (5th Cir. 2023) (No. 22-859) ("whether statutory provisions that authorize SEC to choose to enforce the securities laws through an agency adjudication instead of filing a district court action violate the nondelegation doctrine"); Petition for Writ of Certiorari, Allstates Refractory Contractors, LLC v. Su, 79 F.4th 755 (6th Cir. 2024) (No. 23-819) (challenging OSHA's authority to set workplace safety standards).

[198] *See* Health Care Litigation Tracker, *Inflation Reduction Act*, O'Neill Inst. for Nat'l & Global Health L., https://litigationtracker.law.georgetown.edu/issues/inflation-reduction-act/ [https://perma.cc/5A4V-STH5] (showing litigation challenging the IRA).

[199] *See* Lawrence O. Gostin, James G. Hodge Jr. & Andrew J. Twinamatsiko, *Medicare's Historic Prescription Drug Price Negotiations*, 330 JAMA Network 1621 (Sept. 20, 2023).

year.[200] It lays out how HHS should determine the negotiation-eligible drugs, the maximum price Medicare may pay for the drugs, the factors that HHS may consider in determining the price, and the time to negotiate the price, among other negotiation provisions.[201] By all counts, the IRA does not bear any of the hallmarks of broad delegation that the Court has upheld under the deferential intelligible principle standard. It barely leaves HHS any details to fill up. Even so, pharmaceutical companies invoke the nondelegation doctrine and argue that setting drug prices is the type of policy decision Congress should have made itself rather than authorizing HHS to negotiate prices.[202] Put differently, by authorizing HHS to negotiate drug prices, Congress impermissibly empowered HHS to make "policy decisions." Ultimately, the nondelegation doctrine is deregulatory. In this context, using the doctrine would strip HHS of its ability to execute the congressional directive to negotiate Medicare prescription drug prices and curtail the federal government's efforts to curb the skyrocketing prices of prescription drugs in the United States. It would also leave no room for Congress to seek HHS's help in ensuring access to life-saving prescription drugs.

Reviving the nondelegation doctrine, along with other judicial attacks on the administrative state, will unravel the U.S. public health infrastructure, making Americans less healthy and safe, while gutting the environment. As noted previously, delegation is deeply critical for actions to advance the public's health because of the expertise and flexibility needed to address complex issues and keep up with emerging trends and technological advances. Moreover, because legislative enactments typically leave regulatory gaps, it is important that agencies are empowered to reasonably fill those gaps to ensure that everyone benefits from the achievement of statutory goals. A reinvigorated nondelegation doctrine will hamper any robust efforts to close those gaps. Take federal regulation of tobacco — the leading cause of preventable death. In response to the Court's major questions decision in *Brown & Williamson*, Congress enacted the Tobacco Control Act (TCA) in 2009 and authorized the FDA to regulate tobacco products.[203] While the TCA does not explicitly mention e-cigarettes, they fall under the FDA's broad authority to regulate tobacco products, and the FDA regulates them as such.[204] Using the nondelegation doctrine to curtail the FDA's authority — as the e-cigarette industry tried to do in *Big Time Vapes* — would hamper the FDA's ability to fill the statutory gap that has been exploited by the ever-evolving, technologically sophisticated e-cigarette industry that has spawned the vaping epidemic.[205]

Furthermore, preventing the government from regulating major ongoing health issues will continue to entrench health disparities, evidenced by how the Court used the major questions doctrine to enjoin the CDC's eviction moratorium and OSHA's vaccinate-or-test requirement during the COVID-19 pandemic. The disproportionate impact of the pandemic on marginalized communities because of systemic racism and structural barriers is well documented.[206] The COVID-19 pandemic exacerbated

[200] *See* Off. of the Assistant Secy for Plan. & Evaluation, U.S. Dep't of Health & Hum. Servs., Medicare Drug Price Negotiation Program: Understanding Development and Trends in Utilization and Spending for the Selected Drugs 7 (Dec. 14, 2023), https://aspe.hhs.gov/sites/default/files/documents/4bf549a55308c3aadc74b34abcb7a1d1/ira-drug-negotiation-report.pdf [https://perma.cc/5BF7-TMC8].

[201] *See id.* at 8.

[202] *See* Andrew Twinamatsiko & Zach Baron, *What's The Nondelegation Doctrine Got to Do with Drug Price Negotiation?*, Health Affs. (Sept. 13. 2023), https://www.healthaffairs.org/content/forefront/s-nondelegation-doctrine-got-do-drug-price-negotiation.

[203] *See* Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, 123 Stat. 1776 (2009).

[204] Deeming Tobacco Products to Be Subject to the Federal Food, Drug, and Cosmetic Act, as Amended by the Family Smoking Prevention and Tobacco Control Act; Restrictions on the Sale and Distribution of Tobacco Products and Required Warning Statements for Tobacco Products, 81 Fed. Reg. 28974 (May 10, 2016) (to be codified at 21 C.F.R. pts. 1100, 1140, 1143).

[205] *See* Off. of the Surgeon Gen., U.S. Dep't Health & Hum. Servs., Surgeon General's Advisory on E-Cigarette Use Among Youth 2 (2018), https://e-cigarettes.surgeongeneral.gov/documents/surgeon-generals-advisory-on-e-cigarette-use-among-youth-2018.pdf [https://perma.cc/8WNS-KFAV] (declaring e-cigarette use among the nation's young people an epidemic).

[206] *See* Maritza Vasquez Reyes, *The Disproportional Impact of COVID-19 on African Americans*, 22 Health & Hum. Rights J. 299, H304 (Dec. 2020), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7762908/pdf/hhr-22-02-299.pdf [https://perma.cc/XXP9-6PAM]; *see also* Latoya Hill & Samantha Artiga, *COVID-19 Cases and Deaths by Race/Ethnicity: Current Data and*

the precarious housing conditions for marginalized communities, and racial and ethnic minorities experienced disproportionately higher eviction rates.[207] Together with other measures, keeping the moratorium in place would have mitigated COVID-19 transmission and ensured housing stability.[208] The OSHA vaccine-or-test requirement also could have mitigated health disparities. Leveraging its authority to ensure "safe and healthful working conditions," OSHA adopted a vaccinate-or-test standard for certain workers.[209] This requirement would have significantly protected the most vulnerable workers who were considered essential and thus not adequately protected by shelter-in-place policies.[210] Indeed, OSHA sought to alleviate the high incidence of COVID-19 in racial and ethnic minority essential workers when it adopted the standard.[211] In both the eviction moratorium and vaccinate-or-test cases, the major questions doctrine was effectively deployed to stymie tailored public health measures that would have alleviated COVID-19 health burdens on vulnerable populations.

## VIII. Conclusion

Congress has historically relied on federal agencies to implement broad legislative goals through delegation. The courts have long respected that arrangement through the deferential intelligible principle standard. This has enabled agencies to adopt cutting-edge, innovative health policies that mitigate major risks to health, safety, and the environment. Reviving the nondelegation doctrine will not only chill regulatory action, but also prevent Congress from achieving politically negotiated legislative goals. Absent specialized administrative agencies, Congress lacks the expertise to assess and reduce risks. Congress also grants broad delegations of power because it cannot anticipate future threats. In the end, the government's highest responsibility is to take collective action to keep Americans healthy and safe.

Beyond the devastating health impacts, the nondelegation doctrine is anti-regulatory and anti-democratic. It exalts politically unaccountable Article III judges to second-guess the policy choices of elected officials in the legislative and executive branches, while also empowering lay judges to oversee highly technical assessments by career scientists. Nondelegation, as well as an array of challenges to the administrative state, will come back to haunt the Supreme Court justices as the executive branch cannot meet the most momentous health and safety challenges faced by the public — and these risks are magnified for society's most vulnerable and marginalized.

*Changes over Time*, KFF (Aug. 22, 2022), https://www.kff.org/racial-equity-and-health-policy/issue-brief/covid-19-cases-and-deaths-by-race-ethnicity-current-data-and-changes-over-time/ [https://perma.cc/DFZ8-H6RV].

[207] *See* Heather E. Hsu et al., *Race/Ethnicity, Underlying Medical Conditions, Homelessness, and Hospitalization Status of Adult Patients with COVID-19 at an Urban Safety-Net Medical Center – Boston, Massachusetts, 2020*, 69 Morbidity & Mortality Wkly. Rep. 864, 865 (July 10, 2020), https://www.cdc.gov/mmwr/volumes/69/wr/pdfs/mm6927a3-H.pdf [https://perma.cc/6WVS-JS78].

[208] *See* Emily Benfer et al., *Eviction, Health Inequity, and the Spread of COVID-19: Housing Policy as a Primary Pandemic Mitigation Strategy*, 98 J. Urb. Health 1, 7 (Jan. 7, 2021).

[209] COVID-19 Vaccination and Testing; Emergency Temporary Standard, 86 Fed. Reg. 61402, 61409 (Nov. 5, 2021).

[210] *See* Tiana Rogers et al., *Racial Disparities in COVID-19 Mortality Among Essential Workers in the United States*, 12 World Med. Health Pol'y 311 (Aug. 5, 2020).

[211] *See* COVID-19 Vaccination and Testing; Emergency Temporary Standard, 86 Fed. Reg. at 61424.

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