Note

Asking the Right Questions: An Emergency Action Exception to the Major Questions Doctrine

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Congress delegates broad discretionary power to administrative agencies to respond to emergency situations, taking advantage of their extraordinary expertise and response speed. Yet these delegations are defied by a judicial rule known as the "Major Questions Doctrine." The Major Questions Doctrine seeks to protect the separation of powers by preventing excessive use of executive power without clear delegation by Congress. Where a "major question" of vast economic or political significance is raised, it requires "clear" authorization in the delegating statute. During COVID-19, the Supreme Court used the doctrine to strike down several response programs, including: the Center for Disease Control's eviction moratorium, the Occupational Safety and Health Administration's vaccine mandate, and the Secretary of Education's student loan forgiveness program. Applying the doctrine to emergency actions like these defeats congressional purpose and stifles critical relief policies.

This Note argues that certain emergency actions by agencies should be exempt from the Major Questions Doctrine. Three main arguments support the need for an exception. First, the doctrine wrongly asks for clear language in statutory schemes which were meant to be flexible and discretionary. Second, the separation of powers motivations behind the doctrine are not implicated in

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temporary and conditional emergency provisions. Finally, emergency policy is better handled by specialized agencies with the technical expertise and speed necessary to address complex, time-sensitive issues. This Note concludes by proposing the framework for an exception which asks the right questions—noting relevant factors to define an emergency action, discussing the significance of prior congressional policy, and highlighting other checks and balances at play.

INTRODUCTION

As of February 2025, the United States reported over 103 million cases of COVID-19 and 1.2 million related deaths, making it the deadliest pandemic in modern American history.[1] In 2020, President Donald Trump declared a national emergency, marking only the second related to an epidemic since the passage of the National Emergencies Act in 1976.[2] During the next two years, federal agencies responded with novel public-health and relief programs.[3] The Departments of Health and Human Services (HHS) and Defense (DOD) launched Operation Warp Speed to develop a vaccine.[4] Then, once developed, the Occupational Safety and Health Administration (OSHA) and the Centers for Medicare and Medicaid Services (CMS) imposed vaccine mandates.[5] Finally, to address the widespread unemployment and financial hardship brought on by the pandemic,[6] the Centers

1. *WHO COVID-19 Dashboard*, WORLD HEALTH ORG. (last updated Feb. 22, 2025), https://data.who.int/dashboards/covid19/cases?n=c [https://perma.cc/CT8N-KQZ2]; *COVID Data Tracker*, CTRS. FOR DISEASE CONTROL & PREVENTION (last updated Mar. 10, 2025), https://covid.cdc.gov/covid-data-tracker/#maps_deaths-total [https://perma.cc/29V6-8SBB]; *see also* Medicare and Medicaid Programs; Omnibus COVID-19 Health Care Staff Vaccination, 86 Fed. Reg. 61,555, 61,556 (Nov. 5, 2021) [hereinafter CMS Vaccine Mandate] (noting COVID-19 as the deadliest disease in history).

2. Proclamation No. 9994, 85 Fed. Reg. 15,337 (Mar. 18, 2020); *see Declared National Emergencies Under the National Emergencies Act*, BRENNAN CTR. FOR JUST. (last updated Mar. 10, 2025), https://www.brennancenter.org/our-work/research-reports/declared-national-emergencies-under-national-emergencies-act [https://perma.cc/97V7-R5Y2] (listing only the COVID-19 and H1N1 emergencies).

3. *See* Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 85 Fed. Reg. 55,292, 55,292 (Sept. 4, 2020) [hereinafter First Eviction Moratorium] ("COVID-19 presents a historic threat to public health . . . . To respond . . . governments have taken unprecedented or exceedingly rare actions, including border closures, restrictions on travel, stay-at-home orders, mask requirements, and eviction moratoria.").

4. Graham M. Winch et al., *Operation Warp Speed: Projects Responding to the COVID-19 Pandemic*, PROJECT LEADERSHIP & SOC'Y, Dec. 2021, at 1, 4 (describing the United States' vaccine development program).

5. COVID-19 Vaccination and Testing; Emergency Temporary Standard, 86 Fed. Reg. 61,402, 61,408 (Nov. 5, 2021) [hereinafter OSHA Vaccine Mandate] ("OSHA estimates that this ETS would save over 6,500 worker lives and prevent over 250,000 hospitalizations over the course of the next six months . . . ." (citation omitted)); CMS Vaccine Mandate, *supra* note 1.

6. *See The COVID-19 Economy's Effects on Food, Housing, and Employment Hardships*, CTR. ON BUDGET & POL'Y PRIORITIES (Feb. 10, 2022), https://

for Disease Control and Prevention (CDC) issued an eviction moratorium,[7] and the Secretary of Education forgave large portions of student loan debt.[8] Each of these administrative actions crucially required novel policy to respond to COVID-19's unprecedented scope and scale.[9]

Yet, when many of these responses reached the Supreme Court, they were struck down, with the Court relying on a rule known as the "major questions doctrine" (MQD).[10] To apply the doctrine, the Court first determines whether an agency's proposed action is a "major question"—meaning it carries "vast

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www.cbpp.org/sites/default/files/8-13-20pov.pdf [https://perma.cc/P5JP-GP42] ("The unemployment rate jumped in April 2020 to a level not seen since the 1930s—and stood at 4.9 percent in October 2021, compared with 3.5 percent in February 2020."); Juliana Horowitz et al., *A Year into the Pandemic, Long-Term Financial Impact Weighs Heavily on Many Americans*, PEW RSCH. CTR. (Mar. 5, 2021), https://www.pewresearch.org/wp-content/uploads/sites/20/2021/03/PSD_03.05.21.covid_.impact_fullreport.pdf [https://perma.cc/LG4W-E4SL] (describing COVID-19's devastating impact on the individual American's financial situation).

7. Temporary Halt in Residential Evictions in Communities with Substantial or High Transmission of COVID-19 to Prevent the Further Spread of COVID-19, 86 Fed. Reg. 43,244, 43,251 (Aug. 6, 2021) [hereinafter Final Eviction Moratorium] ("If the moratorium is not in place, a wave of evictions, on the order of hundreds of thousands, could occur in late summer and early fall, exacerbating the spread of COVID-19 among the significant percentage of the population that remains unvaccinated.").

8. Federal Student Aid Programs (Federal Perkins Loan Program, Federal Family Education Loan Program, and William D. Ford Federal Direct Loan Program), 87 Fed. Reg. 61,512, 61,514 (Oct. 12, 2022) [hereinafter Loan Forgiveness Program]; *see* Letter from Phillip L. Swagel, Dir., Cong. Budget Off., to Members of Cong. 3 (Sept. 26, 2022) [hereinafter CBO Letter], https://www.cbo.gov/system/files/2022-09/58494-Student-Loans.pdf [https://perma.cc/68DX-WVK5] (estimating President Joseph Biden's loan forgiveness program would cancel about $430 billion in student debt).

9. *See, e.g.*, Shihui Xiang et al., *The Effect of COVID-19 Pandemic on Service Sector Sustainability and Growth*, 12 FRONTIERS PSYCH., May 2021, at 1, 1 ("Coronavirus disease (COVID-19) is having an unprecedented and unpredictable impact on the world's economy."); Elissa Gentry & W. Kip Viscusi, *The Misapplication of the Major Questions Doctrine to Emerging Risks*, 61 HOUS. L. REV. 469, 472 (2023) ("While society has weathered prior infectious diseases—including the seasonal risk of flu—the transmissibility and potential severity of COVID-19 destabilized formerly normal interactions."); *see also* Winch et al., *supra* note 4, at 1 ("[COVID-19] is by far the most serious crisis to hit the global economy since 1945, and the worst global pandemic since 1918.").

10. *See infra* Part I.C (explaining how the doctrine was used to overturn administrative responses to COVID-19).

economic or political significance."[11] If so, the Court will require that Congress spoke "clearly" in its grant of authority to the agency.[12] The idea is to uphold separation of powers values by ensuring proper transfers of authority from the legislative to the executive branch.[13] But in practice, this inquiry is almost always fatal to the agency's interpretation.[14] Major questions case law has developed over the course of many years and many Supreme Court opinions, culminating most recently in its application to COVID-19 response policies.[15]

Despite the unprecedented emergency posed by COVID-19, the Supreme Court repeatedly found agency responses unlawfully extended their delegated authority to major questions. In three cases, the Court cited the MQD to dispose of the CDC's eviction moratorium,[16] OSHA's vaccinate-or-mask mandate,[17] and the Secretary of Education's loan forgiveness program.[18] These decisions crippled key aspects of the government's COVID-19 response, leading to greater infection rates via evictions and unvaccinated workers, as well as a heavier economic burden on students struggling to pay back loans.[19] However, in a surprising inconsistency, the Court upheld the CMS vaccine mandate for hospital staff without mentioning the MQD.[20] In *Biden v. Missouri*, the Court acknowledged that even though the power claimed by the agency was novel and significant, the

11. *See, e.g.*, Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., Occupational Safety & Health Admin., 142 S. Ct. 661, 665 (2022) (per curiam) (quoting Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485 (2021)).

12. *See, e.g.*, *id.*

13. *See infra* notes 208–10 and accompanying text (explaining the separation of powers motivations for the doctrine).

14. *See infra* note 90.

15. In this Note, "the COVID-19 cases" collectively refers to: *Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs.* (*Alabama Realtors II*), 141 S. Ct. 2485 (2021) (ruling on the CDC's eviction moratorium); *NFIB*, 142 S. Ct. 661 (2022) (reviewing OSHA's vaccine mandate); *Biden v. Missouri*, 142 S. Ct. 647 (2022) (per curiam) (determining the validity of CMS's vaccine mandate); and *Biden v. Nebraska*, 143 S. Ct. 2355 (2023) (hearing review of the Secretary of Education's loan forgiveness program). See *infra* Part I.C for descriptions of these cases.

16. *Alabama Realtors II*, 141 S. Ct. at 2489.

17. *NFIB*, 142 S. Ct. at 664–65.

18. *Nebraska*, 143 S. Ct. at 2373–74.

19. *See infra* notes 137–40 and accompanying text (noting the impacts of the Court's decisions in the COVID-19 cases).

20. *Missouri*, 142 S. Ct. at 653–54.

unprecedented nature of the COVID-19 pandemic warranted such a solution.[21]

This Note argues that emergency actions, like those at issue in the four COVID-19 cases, should be exempt from the MQD.[22] Application of the doctrine becomes problematic when Congress intended agencies to have discretion to handle unforeseeable emergencies.[23] Three arguments establish the need for such an exception.[24]

First, the MQD asks the wrong questions when assessing clarity in grants of emergency authority.[25] When applying the doctrine, courts consult both textual and contextual evidence to determine whether the authority claimed has been "clearly" granted by Congress.[26] But the broad discretion inherent in emergency provisions makes the Court's demand for "clear" language futile in cases where agencies exercise emergency authority.[27] Similarly, the doctrine's contextual factors are improper metrics for assessing congressional intent in emergency delegations.[28] As the Court recognized in *Biden v. Missouri*, emergencies require novel policy solutions for which the MQD fails to account.[29] Because the primary inquiries of the doctrine are paradoxical when applied to emergency actions, such actions should be exempt from consideration in the first place.

Second, the separation of powers values which the doctrine purports to uphold are not served in the emergency context.[30]

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21. *Id.* at 95 ("Of course the vaccine mandate goes further than what the Secretary has done in the past to implement infection control. But he has never had to address an infection problem of this scale and scope before.").

22. *See infra* Part III (laying the groundwork for an emergency action exception). This Note focuses on a judicial solution, as the MQD is judicially made and applied. However, a legislative approach could also solve many of the problems raised here by reinforcing Congress's intention to delegate broad authority in emergency provisions or even statutorily indicating their exemption from the MQD. But see *infra* Part II.B.2 for a discussion of the difficulties Congress faces in solving the MQD problem.

23. *See infra* Part II.A (explaining why asking for clarity is the wrong question for emergency provisions).

24. *See infra* Part II (presenting the three arguments).

25. *See infra* Part II.A (illustrating the doctrine's insufficiencies).

26. *See infra* Part I.B (summarizing the doctrine).

27. *See infra* Part II.A.1.

28. *See infra* Part II.A.2.

29. *See infra* notes 197–204 and accompanying text.

30. *See infra* Part II.B.

Emergency authority is both conditional and temporary, meaning it does not result in a permanent expansion of executive power.[31] Furthermore, the doctrine's hope for clearer transfers of authority from the legislative branch will actually have the opposite of the intended effect.[32] If anything, the MQD upsets the separation of powers, with excessive judicial activism overturning proper transfers of power between the legislative and executive branches.[33]

Third, applying the doctrine consistent with the COVID-19 cases undermines the greater technical knowledge and response speed found in delegations of emergency authority.[34] Agencies are made up of specialized experts with greater training and experience in technical fields than the more generalized legislators and judges of the other branches.[35] Additionally, their deep administrative toolkit gives them flexibility to respond to emergency situations in an expeditious manner.[36] And with the complex and rapidly-evolving problems that emergencies present,[37] it is paramount that these decisions be made by agencies, rather than Congress or judicial bodies on review. Yet the MQD takes these decisions out of the hands of the executive branch and undercuts its effectiveness.[38]

After establishing the problems with the current inquiry, this Note lays the groundwork for an emergency action exception which asks the right questions.[39] First, this exception should only apply to "emergency actions."[40] Whether an action responds to an emergency should take into account a variety of factors, including the situation's temporal character, gravity, perception, and the immediacy required in response.[41] However, even for emergency actions, Congress's earlier passing of the same policy at issue may signal a lack of delegated authority and foreclose

31. *See infra* Part II.B.1.
32. *See infra* Part II.B.2.
33. *See infra* notes 233–37 and accompanying text.
34. *See infra* Parts I.A, II.C.
35. *See infra* Part I.A.
36. *See infra* Part I.A.
37. *See infra* notes 257–60 and accompanying text.
38. *See infra* Part II.C.
39. *See infra* Part III.
40. *See infra* Part III.A.
41. *See infra* Parts III.A.1–A.4.

exemption.[42] Exempting from the MQD actions which meet these criteria will honor congressional intent to delegate broad emergency authority while still upholding the separation of powers through other checks and balances.[43]

Part I of this Note presents the background of emergency administrative action by highlighting the benefits of delegation, explaining the MQD, and recounting the primary opportunities the Court had to apply it during COVID-19. Part II establishes the need for an emergency action exception to the doctrine, due to its inherent incompatibility with emergency actions, unserved separation of powers values, and the benefits of delegating emergency power to agencies. Finally, Part III lays the groundwork for the exception, discussing how to define an "emergency action," what prior congressional action means for application, and what other mechanisms are in place to preserve the separation of powers.

I. EMERGENCY ADMINISTRATIVE ACTION AND THE MAJOR QUESTIONS DOCTRINE

This Part lays the foundation for an emergency action exception and its supporting arguments. First, it highlights the benefits of administrative delegation in emergency provisions. Next, it reviews the primary major questions cases and summarizes the nature of the MQD. It then concludes by examining the primary opportunities the Supreme Court had to apply the doctrine to emergency administrative responses during COVID-19.

A. THE BENEFITS OF EMERGENCY DELEGATION

Congress delegates policy-making and -implementation authority because agencies have greater expertise and response speed.[44] These qualities are particularly important in emergency

42. *See infra* Part III.B.

43. *See infra* Part III.C.

44. *See* Mark Fenster, *The Birth of a "Logical System": Thurman Arnold and the Making of Modern Administrative Law*, 84 OR. L. REV. 69, 81 (2005) ("[F]ederal administrative agencies, with their expertise, flexibility, and ability to consider systemic solutions to pressing national problems, were so necessary for a growing, modern nation . . . ."); Margaret H. Lemos, *The Consequences of Congress's Choice of Delegate: Judicial and Agency Interpretations of Title VII*, 63 VAND. L. REV. 363, 365 (2010) ("[C]ommentators have identified various characteristics of agency decisionmaking and institutional structure—agencies'

situations,[45] in which the government must make complex determinations in a timely fashion to address the problem.[46] Judges and members of Congress are generalists, who often lack an understanding of the particulars of any given policy area.[47] By contrast, agencies employ hundreds of scientific, economic, and social experts in their respective technical fields.[48] These experts support their emergency responses with extensive research, experience, and professional judgment.[49] Many agencies even use their expertise to prepare response protocols in advance, allowing immediate effectuation of well-researched policies when an emergency presents itself.[50] Although Congress could acquire

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expertise, their ability to revise rules as times change or new information comes to light, and their responsiveness to the political branches—that make agencies tolerable (and perhaps even superior) substitutes for congressional lawmaking."); Beau J. Baumann, *Americana Administrative Law*, 111 GEO. L.J. 465, 479 (2023) ("[T]here have always been claims that *Chevron* appropriately lodges authority within the political branches in service of, among other things, expertise and accountability.").

45. See *infra* Part III.A for discussion of how to define an "emergency" and the scope of the exception this Note proposes.

46. *See* Xiang et al., *supra* note 9, at 1 (describing the unprecedented impact of COVID-19); STEVEN J. BALLA & WILLIAM T. GORMLEY, JR., BUREAUCRACY AND DEMOCRACY: ACCOUNTABILITY AND PERFORMANCE 243 (Matthew Byrnie et al. eds., 4th ed. 2017) (noting the rapidly evolving industry technology as the reason for insufficient technical drilling-safety requirements leading up to the Deepwater Horizon spill); *see also infra* notes 257–60 and accompanying text (describing the field-specific problems caused by COVID-19).

47. *See* James Goodwin et al., *In the Wake of* West Virginia v. EPA*: Legislative and Administrative Paths Forward for Science-Driven Regulation*, UNION OF CONCERNED SCIENTISTS 16 (Oct. 6, 2022), https://www.ucsusa.org/resources/west-virginia-vs-epa [https://perma.cc/S5VG-X86V] ("Congressional staff simply lack the in-house expertise that agencies can bring to bear when developing effective policies to meet technologically challenging and complex problems."); Lemos, *supra* note 44, at 368 ("Whereas agencies have (or can accumulate) special expertise in their areas of authority, legislators tend not to be experts . . . ."); Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2294 (2024) (Kagan, J., dissenting) ("Some interpretive issues arising in the regulatory context involve scientific or technical subject matter. Agencies have expertise in those areas; courts do not.").

48. *See* Lemos, *supra* note 44, at 368 (discussing the relative expertise of agencies as opposed to legislative and judicial bodies).

49. *See infra* notes 261, 304 and accompanying text (discussing the field-specific expertise and studies relied upon by the agencies in the COVID-19 cases).

50. *See, e.g.*, 6 U.S.C. § 313(b)(2) ("[T]he Administrator shall . . . build a national system of emergency management[,] . . . develop a Federal response

this expertise by consulting with agencies or seeking expert testimony, information collecting, bicameralism, presentment, and partisan gridlock prevent a rapid response to emergency situations.[51] These delays often exacerbate the threat posed by life-threatening emergencies like pandemics and train derailments.[52] When the stakes are high, complex decisions are best left to the designated technical purview of the respective agency, not legislators or judges.

Congress often delegates broader authority in emergency contexts so agencies can respond quickly to unpredictable situations.[53] Agencies may have the power to promulgate rules without notice and comment, distribute funds and supplies to affected areas, expedite applications for benefits, or forego enforcement of certain laws.[54] As emergencies often develop and

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capability[,] . . . and coordinate the implementation of a risk-based, all-hazards strategy for preparedness . . . ."); 42 U.S.C. § 243(c)(1) ("The Secretary is authorized to develop (and may take such action as may be necessary to implement) a plan under which personnel, equipment, medical supplies, and other resources of the Service and other agencies under the jurisdiction of the Secretary may be effectively used to control epidemics of any disease or condition and to meet other health emergencies or problems.").

51. *See* Lemos, *supra* note 44, at 368 ("Agency decisionmaking also is generally more flexible than legislation under the constraints of bicameralism and presentment, enabling agencies to respond more nimbly than Congress could to new information or changed circumstances." (footnote omitted)); *id.* ("Each minute spent on statutory details is a minute not spent on other, potentially more important, matters. . . . [T]he costs of educating Congress would be prohibitive."); Goodwin et al., *supra* note 47, at 16 (noting the challenges Congress faces in "securing bipartisan compromise"). *See generally* DAVID EPSTEIN & SHARYN O'HALLORAN, DELEGATING POWERS: A TRANSACTION COST POLITICS APPROACH TO POLICY MAKING UNDER SEPARATE POWERS (1999) (discussing the transaction costs associated with delegation).

52. *See, e.g.*, Gentry & Viscusi, *supra* note 9, at 472 ("The inexpert second-guessing of emergency temporary standards (ETSs) by the Court costs lives."); *id.* at 510 ("[I]mposing a heavy burden on agencies to justify action in the face of emerging risks . . . . produces a heavy death toll . . . .").

53. *See, e.g.*, sources cited *supra* note 50; *see also infra* notes 161–65 and accompanying text (describing Congress's choice to delegate discretion in grants of emergency authority). *See generally* ELIZABETH M. WEBSTER, CONG. RSCH. SERV., 98-505, NATIONAL EMERGENCY POWERS 3 (2021) (summarizing the history of emergency executive powers).

54. *See, e.g.*, 5 U.S.C. § 553(b) (creating an exception to notice and comment procedure for "good cause"); 42 U.S.C. § 5192 (allowing the President to have agencies assist in "distribution of medicine, food, and other consumable supplies, and emergency assistance"); *see also infra* Parts III.A.2–A.3 (describing the conditional emergency powers utilized by agencies during COVID-19).

change rapidly, this diverse toolkit allows agencies to respond more quickly and effectively to unpredictable situations.[55] Indeed, courts have allowed agencies to forego traditional rulemaking procedures when the regulation is immediately necessary to save lives.[56] Some bodies even have further emergency provisions built into their organic statutes or regulations, which facilitate hastened responses when certain conditions are met.[57]

Agencies are especially well suited to address emergencies due to their greater expertise and response speed. However, applying the MQD to emergency administrative actions undermines these benefits by taking decisions out of the agency's hands. The next Section reviews the main major questions cases to extract the essence of the doctrine.

B. THE RISE OF THE MAJOR QUESTIONS DOCTRINE

When exercising delegated authority, executive bodies must comply with rules laid down by Congress.[58] The Administrative Procedure Act (APA) prescribes requirements for agency process,[59] including judicial review of the statutory authority for

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55. *See* Biden v. Nebraska, 143 S. Ct. 2355, 2398 (2023) (Kagan, J., dissenting) ("Emergencies, after all, are emergencies, where speed is of the essence."); *see, e.g.*, BALLA & GORMLEY, *supra* note 46, at 240 (attributing the Coast Guard's success in the wake of Hurricane Katrina in part to the organization's uniquely flexible structure).

56. *See, e.g.*, Mack Trucks, Inc. v. EPA, 682 F.3d 87, 93 (D.C. Cir. 2012) (recognizing "good cause" to forego notice and comment procedure when imminent danger makes typical delay "impracticable"); *see also infra* Part III.A.4 (explaining use of the good cause exception during COVID-19).

57. *See, e.g.*, 29 U.S.C. § 655(c) (allowing the Secretary of Labor to impose ETSs immediately without notice and comment); 42 C.F.R. § 70.2 (2024) (allowing the Surgeon General to take "necessary" action without additional notice and comment process); *see also* Final Eviction Moratorium, *supra* note 7, at 43,251 ("This Order is not a rule within the meaning of the Administrative Procedure Act (APA) but rather an emergency action taken under the existing authority of 42 CFR 70.2. The purpose of section 70.2, which was promulgated through notice-and-comment rulemaking, is to enable CDC to take swift steps to prevent contagion without having to seek a second round of public comments and without a delay in effective date.").

58. Because all "legislative powers" are vested in Congress, legislative actions of an agency cannot transcend its delegated authority. *See* U.S. CONST. art. I, § 1.

59. 5 U.S.C. §§ 500–559.

administrative action.[60] This gives the judicial branch power to strike down agency actions which exceed congressional authority granted in their organic statute.[61] One of the Court's most recent and substantial tools utilized in judicial review of agency action is the MQD.

An amorphous and ever-evolving rule, the MQD arguably has roots all the way back to the mid-to-late nineteenth century.[62] Indeed, reasonable minds often differ when describing it—so much so that some suggest there are multiple distinct versions.[63] But generally, it appears to have two parts. First, an agency's action must present a "major question."[64] And second, if a "major question" is implicated, Congress must have "clearly" granted the authority at issue.[65] The idea is that Congress would not delegate significant power through vague language or—as

60. *See* 5 U.S.C. § 706(2)(C) ("The reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . in excess of statutory jurisdiction, authority, or limitations, or short of statutory right . . . .").

61. After the recent decision in *Loper Bright Enterprises v. Raimondo*, judicial review no longer involves deference to agency interpretations by treating ambiguous statutes as implicit delegations. 144 S. Ct. 2244, 2265 (2024). (criticizing this presumption from *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council*, Inc., 467 U.S. 837, 844 (1984), *overruled by Loper Bright*, 144 S. Ct. 2244). Only time will tell how this landmark decision will impact administrative rulemaking and the MQD in particular. For early predictions and observations, see generally Nicholas R. Bednar, Chevron *on the Eve of* Loper Bright, 34 WIDENER COMMONWEALTH L. REV. 1 (2024), and Robin Kundis Craig, *The Impact of* Loper Bright v. Raimondo*: An Empirical Review of the First Six Months*, 109 MINN. L. REV. (forthcoming June 2025).

62. *See* Louis J. Capozzi III, *The Past and Future of the Major Questions Doctrine*, 84 OHIO ST. L.J. 191, 200–02 (2023) (describing the origins of the MQD as a clear statement rule). *But see* West Virginia v. EPA, 142 S. Ct. 2587, 2641 (2022) (Kagan, J., dissenting) (calling the MQD a magically appearing "get-out-of-text-free card[]").

63. *Compare West Virginia*, 142 S. Ct. at 2616–17 (Gorsuch, J., concurring) (describing the doctrine as a clear statement rule), *with* Biden v. Nebraska, 143 S. Ct. 2355, 2378–83 (2023) (Barrett, J., concurring) (reading the doctrine instead as common-sense skepticism based on context). *See also* Cass R. Sunstein, *There Are Two "Major Questions" Doctrines*, 73 ADMIN. L. REV. 475, 477–80 (describing a "weak" version which functions solely as a *Chevron* "carve out" and a "strong" version which proactively enforces the Constitution); Baumann, *supra* note 44, at 467–68 (discussing the MQD's varied application as both a rule of construction and interpretation).

64. *See infra* note 87 (discussing the trigger for the doctrine).

65. *See infra* notes 88–89 and accompanying text (summarizing the doctrine's application).

Justice Scalia put it—"hide elephants in mouseholes."[66] However, in application, it is never this straightforward.[67] The Court will often combine the two issues into one, truly consider only one or the other, or conduct a similar analysis, but fail to name the doctrine whatsoever.[68] What does seem consistent, however, is that the implication of a "major question" disposes of an agency's interpretation that is not "clearly" granted.[69]

Some of the first hints of the doctrine appeared in *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.*[70] This case turned on the interpretation of § 203 of the Communications Act, which authorized the Federal Communications Commission (FCC) to "modify any requirement made by or under the authority of this section."[71] After engaging in a textual debate about the meaning and clarity of the word "modify," the Court sought to bolster its argument with the context of the provision's role in the broader Act.[72] Because the statute's purpose suggested Congress would not have granted the scope of authority claimed, the agency's interpretation was "clearly" not authorized.[73] Therefore the statutory text was unambiguous, meaning the Court did not have to give *Chevron* deference.[74] This analysis

66. Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 468 (2001).

67. *See* Baumann, *supra* note 44, at 471 ("The major questions doctrine is unpredictable because the Court has left both the trigger (whether an agency action is 'major') and the fix (the necessary level of clarity Congress must use in assigning a question to an agency) ambiguous.").

68. *See id.*; *see also infra* note 86 and accompanying text (illustrating the doctrine's varied applications); *supra* note 63 (noting inconsistent understandings of the doctrine).

69. See *infra* text accompanying notes 70–86 and *infra* Part I.C for examples.

70. 512 U.S. 218 (1994).

71. 47 U.S.C. § 203(b)(2); *MCI*, 512 U.S. at 225 ("The dispute between the parties turns on the meaning of the phrase 'modify any requirement' in § 203(b)(2).").

72. *MCI*, 512 U.S. at 225–31; *see also* THOMAS W. MERRILL, THE CHEVRON DOCTRINE 205 (2022) (explaining Scalia's use of context to find clarity in *MCI*).

73. *MCI*, 512 U.S. at 231 ("It is highly unlikely that Congress would leave the determination of whether an industry will be entirely, or even substantially, rate-regulated to agency discretion—and even more unlikely that it would achieve that through such a subtle device as permission to 'modify' rate-filing requirements.").

74. *Id.* at 229. Until recently, *Chevron* deference required courts to defer to agency interpretations that were "reasonable." *See* Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 844 (1984), *overruled by* Loper Bright

in *MCI*—reviewing the statute's context to ask whether Congress clearly intended the authority in question—paved the way for the MQD's framework.

Next, the Court built on *MCI*'s emphasis on context in *FDA v. Brown & Williamson Tobacco Corp.*[75] Here the Court considered Food and Drug Administration (FDA) regulations on tobacco pursuant to the Food, Drug, and Cosmetic Act (FDCA).[76] The opinion first recounted Congress's lengthy history of tobacco legislation and the FDA's past assertions that it could not regulate the industry.[77] Similar to the Court's reasoning in *MCI*, this historical context showed the FDCA "clearly" did not grant the authority claimed.[78] Without ambiguity, the Court did not need to defer to the FDA's interpretation, which was struck down accordingly.[79] Yet it went on to lay foundation for a more concrete rule. The Court proposed that even where a statute was ambiguous, there may be extraordinary cases where courts should not treat this ambiguity as an implicit delegation.[80] Citing *MCI*, it focused on the rule's "economic and political significance" as indication that Congress did not intend to grant the FDA this

Enters. v. Raimondo, 144 S. Ct. 2244, 2273 (2024). As the MQD was often used by the Court to avoid giving *Chevron* deference, it may see less use after *Loper Bright*.

75. 529 U.S. 120 (2000).

76. *Id.* at 125.

77. *Id.* at 143–60. Note that the Court spent several pages focused on the FDA's past action and inaction, which seemed to drive the dispositive finding of clarity. *See* MERRILL, *supra* note 72, at 207 ("More generally, [O'Connor's argument] represented an especially vivid illustration of the proposition that consistent agency action can create settled expectations that help define the proper scope of an agency's authority."); *see, e.g.*, *Brown & Williamson*, 529 U.S. at 157 ("The consistency of the FDA's prior position is significant in this case for a different reason: It provides important context to Congress' enactment of its tobacco-specific legislation.").

78. *Brown & Williamson*, 529 U.S. at 159 ("Thus, what Congress ratified was the FDA's plain and resolute position that the FDCA gives the agency no authority to regulate tobacco products as customarily marketed.").

79. *Id.* at 161.

80. *Id.* at 159 ("In extraordinary cases, however, there may be reason to hesitate before concluding that Congress has intended such an implicit delegation.").

power.[81] This language has come to define all subsequent use of the MQD, first seen in *King v. Burwell*.[82]

In *King*, the Court considered an Internal Revenue Service (IRS) rule authorizing tax credits for purchases from federal exchanges under the Patient Protection and Affordable Care Act.[83] The Court, relying on *Brown & Williamson*, found that because the provision in question involved billions of dollars in spending and health insurance prices for millions of people, it constituted a "question of deep 'economic and political significance.'"[84] The opinion then relied on the suggestion from *Brown & Williamson*—using the "significance" of the rule to doubt congressional delegation rather than defer.[85] Since *King*, the doctrine continues to thwart administrative interpretations of statutory authority, sometimes by name, others by only its "speak clearly" language.[86]

In its current cumulative form, the MQD is triggered when the authority claimed carries enough "economic or political

81. *Id.* at 160 ("As in *MCI*, we are confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion.").

82. 576 U.S. 473, 474 (2015); *see* MERRILL, *supra* note 72, at 202 ("There has been much speculation about whether *King v. Burwell* should be read as creating a 'major questions' exception to the *Chevron* doctrine."); Jonas J. Monast, *Major Questions About the Major Questions Doctrine*, 68 ADMIN. L. REV. 445, 450–53 (2016) (discussing the Court's novel application of the doctrine in *King*).

83. *King*, 576 U.S. at 485–86.

84. *Id.* (quoting Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014)).

85. *Id.* at 485 ("In extraordinary cases, however, there may be reason to hesitate before concluding that Congress has intended such an implicit delegation." (quoting *Brown & Williamson*, 529 U.S. at 159)). Whereas *MCI* and *Brown* used contextual factors to strike down a rule while operating within the *Chevron* framework, *King* outright ignored it when it should have applied. *Id.* at 485–86.

86. The Court finally labelled its approach the "major questions doctrine" in *West Virginia v. EPA*. 142 S. Ct. 2587, 2609 (2022) ("The dissent criticizes us for 'announc[ing] the arrival' of this major questions doctrine . . . ." (alteration in original)). *Compare West Virginia*, 142 S. Ct. at 2609 (naming the MQD), *and* Biden v. Nebraska, 143 S. Ct. 2355, 2374 (2023) (implicating the doctrine by name), *with Alabama Realtors II*, 141 S. Ct. 2485, 2489 (2021) (asking Congress to "speak clearly" but not mentioning the doctrine), *and* Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., Occupational Safety & Health Admin., 142 S. Ct. 661, 665 (2022) (per curiam) (using only "speak clearly" language).

significance" to present a "major question."[87] Then the Court will ask whether Congress has "clearly" granted the necessary authority.[88] This inquiry always proceeds beyond the text, often looking at the context of the statute's history and the agency's past action.[89] In practice, this is nearly always fatal to the agency's interpretation.[90] It was with this form of the doctrine that the Court confronted emergency administrative responses to COVID-19.[91]

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87. Beyond the words "vast economic or political significance," major questions cases give no real test or analytical framework for what triggers the doctrine. In practice, its application seems entirely based on the Court's own reaction to the facts of the case. It will often comment on things like the typicality of the power claimed, the portion of the market to be regulated, or the significance of the authority to the statutory scheme. *See, e.g.*, *NFIB*, 142 S. Ct. at 665 ("This is no 'everyday exercise of federal power.'"); *Brown & Williamson*, 529 U.S. at 159 ("[T]he FDA has now asserted jurisdiction to regulate an industry constituting a significant portion of the American economy."); *King*, 576 U.S. at 485–86 ("Whether those credits are available on Federal Exchanges is thus a question of deep 'economic and political significance' that is central to this statutory scheme . . . ."). Even Justice Gorsuch's attempted explanation in his *West Virginia* concurrence does little more than recount isolated examples from previous cases. *See West Virginia*, 142 S. Ct. at 2620–21 (Gorsuch, J., concurring) (attempting to outline three triggers of the doctrine).

88. *See, e.g.*, *NFIB*, 142 S. Ct. at 665 ("The question, then, is whether the Act plainly authorizes the Secretary's mandate."); *West Virginia*, 142 S. Ct. at 2609 ("[S]omething more than a merely plausible textual basis for the agency action is necessary. The agency instead must point to 'clear congressional authorization' for the power it claims.").

89. *See, e.g.*, *Alabama Realtors II*, 141 S. Ct. at 2489 (discussing the scope of the claimed authority and the CDC's previous use of the provision); *Nebraska*, 143 S. Ct. at 2369 ("The Secretary's previous invocations of the HEROES Act illustrate this point."); *see also West Virginia*, 142 S. Ct. at 2622–23 (Gorsuch, J., concurring) (identifying four contextual considerations for when an agency's action is clearly authorized).

90. *See, e.g.*, *Alabama Realtors II*, 141 S. Ct. at 2489 (using the doctrine to strike down the CDC's eviction moratorium); *West Virginia*, 142 S. Ct. at 2609–10 (defeating the EPA's Affordable Clean Energy rule with the doctrine); *NFIB*, 142 S. Ct. at 665 (overturning OSHA's vaccine-or-test mandate); *Nebraska*, 143 S. Ct. at 2376 (upholding a challenge to Biden's student loan forgiveness program); *see also id.* at 2378 (Barrett, J., concurring) ("[The] 'clear statement' version of the major questions doctrine 'loads the dice' so that a plausible antidelegation interpretation wins even if the agency's interpretation is better.").

91. Note that *West Virginia v. EPA*, decided in June 2022, did predate *Biden v. Nebraska*, analyzed below. However, as the *West Virginia* Court applied substantially the same form of the doctrine outlined here and relied on the same cases, this Section does not describe its facts or rationale.

C. THE COVID-19 CASES

As the COVID-19 pandemic escalated across the country, the administrative state responded with a variety of regulatory measures to slow infection rates.[92] Many of these were challenged by states and business organizations as exceeding the scope of the respective agency's power.[93]

The first such policy to face the MQD was the CDC's eviction moratorium in *Alabama Ass'n of Realtors v. Department of Health & Human Services*.[94] In March 2020, Congress imposed a 120-day moratorium on evictions for properties that received federal assistance or loans.[95] When this expired in July, Congress decided not to renew it.[96] In response, the CDC issued and then repeatedly renewed its own moratorium, which broadened coverage to all residential properties.[97] Reviewing the district court's stay of its judgment striking down the order, the Supreme Court declined to vacate the stay, as the moratorium was scheduled to end in a few weeks anyway—although a majority of the Court seemed to agree this exceeded the CDC's statutory authority.[98] However, three days after its expiration in July 2021, the CDC reimposed the moratorium with small variations in its geographic scope.[99] Realtor associations and rental property managers again sought vacatur of the district court's stay, which rose once more to the Supreme Court.[100]

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92. *See supra* notes 3–9 and accompanying text.

93. *See, e.g.*, *Alabama Realtors II*, 141 S. Ct. at 2488 (challenging the CDC's eviction moratorium); *NFIB*, 142 S. Ct. at 662–63 (challenging OSHA's vaccine-or-test mandate).

94. 141 S. Ct. 2485.

95. 15 U.S.C. § 9058; *Alabama Realtors II*, 141 S. Ct. at 2486.

96. *Alabama Realtors II*, 141 S. Ct. at 2486.

97. First Eviction Moratorium, *supra* note 3, at 55,292 (imposing the CDC's initial moratorium); Final Eviction Moratorium, *supra* note 7, at 43,244 (reissuing the moratorium after expiration); *see also Alabama Realtors II*, 141 S. Ct. at 2486 (outlining the effects of the moratorium).

98. Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs. (*Alabama Realtors I*), 141 S. Ct. 2320, 2320 (2021) (mem.) (Kavanaugh, J., concurring) (noting four justices would vacate the stay, while Justice Kavanaugh agreed the order exceeded the CDC's authority); *see also Alabama Realtors II*, 141 S. Ct. at 2487–88 (describing the previous refusal to vacate).

99. *Alabama Realtors II*, 141 S. Ct. at 2488; Final Eviction Moratorium, *supra* note 7, at 43,244–52.

100. *Alabama Realtors II*, 141 S. Ct. at 2488.

On review in August 2021, the Court considered whether the stay of judgment striking down the moratorium was still justified.[101] The Government argued the order was a valid exercise of the CDC's authority under § 361(a) of the Public Health Service Act, which authorizes the Surgeon General to "make and enforce such regulations as in his judgment are necessary to prevent the introduction, transmission, or spread of communicable diseases."[102] The Court disagreed, pointing to the next sentence of provision (a) for examples which limit its scope to more direct disease prevention measures.[103] But even if ambiguous, the Court reasoned, a moratorium which covered between six million and seventeen million residents and placed a significant financial burden on landlords was one of "vast economic and political significance" for which Congress was expected to "speak clearly."[104] It went on to marvel at how "breathtaking" and "unprecedented" this claim of power was by the CDC, focusing on the fact that this provision had never been used in this way before.[105] The moratorium's scope, along with lacking precedential action by the CDC, led the Court to conclude the moratorium lacked sufficient authorization.[106] It vacated the stay, ending the CDC's moratorium on evictions.[107]

Five months later, the Court applied the MQD to the Secretary of Labor's vaccine mandate in *National Federation of Independent Business v. Department of Labor, Occupational Safety & Health Administration*.[108] The mandate was promulgated as an emergency temporary standard (ETS) under the Occupational Safety and Health Act (OSH Act) upon the Secretary's finding of

101. *Id.*

102. *Id.* at 2487–88; 42 U.S.C. § 264(a).

103. *Alabama Realtors II*, 141 S. Ct. at 2487–88; *see* 42 U.S.C. § 264(a) ("For purposes of carrying out and enforcing such regulations, the Surgeon General may provide for such inspection, fumigation, disinfection, sanitation, pest extermination, destruction of animals or articles found to be so infected or contaminated as to be sources of dangerous infection to human beings, and other measures, as in his judgment may be necessary.").

104. *Alabama Realtors II*, 141 S. Ct. at 2489.

105. *Id.* at 2489–90.

106. *Id.* at 2489.

107. *Id.* at 2490.

108. 142 S. Ct. 661, 664–65 (2022) (per curiam). See OSHA Vaccine Mandate, *supra* note 5, for the regulation under review.

"grave danger."[109] Predicted to save thousands of lives and prevent hundreds of thousands of hospitalizations, the rule required that all covered employees receive the COVID-19 vaccine, allowing an exception by testing once a week and wearing a mask during the workday.[110] It applied to all employers with at least 100 employees, effectively reaching about eighty-four million people.[111] Unlike *Alabama Realtors*, Congress had taken no prior action to mandate vaccines on such a scale.[112] When a variety of states, businesses, and nonprofits challenged the rule, the Fifth Circuit entered a stay, which was lifted by the Sixth Circuit after consolidation.[113] The Supreme Court granted review.[114]

Central to the Court's consideration was the magnitude of the mandate's impact.[115] First, it quickly concluded that this case presented a question of such "economic and political significance" as to implicate the MQD.[116] Although the opinion never invoked the doctrine by name, it reiterated the requirement that Congress "speak clearly" in cases like this.[117] The Court then turned to the language of the OSH Act, focusing on the fact that OSHA is only authorized to regulate workplace-related dangers, whereas this rule seemed concerned with public health more generally.[118] Because the dangers of COVID-19 were similarly present outside of the workplace, they posed a universal risk, insufficiently related to the workplace.[119] It also noted the

109. OSHA Vaccine Mandate, *supra* note 5, at 61,403; *see also* 29 U.S.C. § 655(c) (allowing the Secretary of Labor to impose immediate regulations when necessary to protect employees from "grave danger").

110. OSHA Vaccine Mandate, *supra* note 5, at 61,408 ("OSHA estimates that this ETS would save over 6,500 worker lives and prevent over 250,000 hospitalizations over the course of the next six months." (citation omitted)); *NFIB*, 142 S. Ct. at 662–63.

111. *NFIB*, 142 S. Ct. at 662.

112. *Id.* ("Indeed, although Congress has enacted significant legislation addressing the COVID-19 pandemic, it has declined to enact any measure similar to what OSHA has promulgated here.").

113. *Id.*

114. *Id.*

115. *Id.* at 665 ("This is no 'everyday exercise of federal power.'" (quoting *In re* MCP No. 165, 20 F.4th 264, 272 (6th Cir. 2021) (Sutton, C.J., dissenting), *aff'd*, *NFIB*, 142 S. Ct. 661 (2022))).

116. *Id.*

117. *Id.*; *see also id.* at 667–68 (Gorsuch, J., concurring) (asserting the mandate is plainly defeated by the MQD).

118. *Id.* at 665 (majority opinion).

119. *Id.* at 665–66.

permanence of a vaccine, finding that such a uniquely drastic measure, never before used by OSHA, went beyond the agency's purpose to ensure safe working conditions.[120] Accordingly, the Court granted the application for a stay, preventing implementation of the mandate.[121]

One year later, in *Biden v. Nebraska*, the Court applied the doctrine to the Biden Administration's student loan policy.[122] In 2022, the Secretary of Education issued a loan forgiveness program which was estimated to affect about 98.5% of student borrowers, or forty-three million Americans.[123] Six states challenged the rule, requesting an injunction against enforcement.[124] After dismissal by the district court, the Eighth Circuit issued a preliminary injunction.[125] The Supreme Court granted certiorari and set the case for expedited argument.[126]

In support of the rule, the Secretary of Education relied on authority from the Higher Education Relief Opportunities for Students Act of 2003 (HEROES Act).[127] Section 1098bb of the Act authorizes the Secretary to "waive or modify" any student loan statutes or regulations as necessary in connection with a military or emergency situation.[128] The Secretary found that the financial harm caused by COVID-19 had made necessary this rule cancelling borrowers' debt.[129] In reverse order of most major

120. *Id.* at 665 ("A vaccination, after all, 'cannot be undone at the end of the workday.'" (quoting *In re MCP No. 165*, 20 F.4th at 272 (Sutton, C.J., dissenting))); *id.* at 663 ("As its name suggests, OSHA is tasked with ensuring *occupational safety*—that is, 'safe and healthful working conditions.'" (quoting 29 U.S.C. § 651(b))).

121. *Id.* at 666.

122. 143 S. Ct. 2355 (2023).

123. Loan Forgiveness Program, *supra* note 8, at 61,514; *Nebraska*, 143 S. Ct. at 2369–72. The program would cancel up to $20,000 of debt for borrowers who received a Pell Grant and $10,000 for those who did not. *Nebraska*, 143 S. Ct. at 2364–65.

124. *Nebraska*, 143 S. Ct. at 2365.

125. *Id.*

126. *Id.*

127. *Id.* at 2368 ("The Secretary asserts that the HEROES Act grants him the authority to cancel $430 billion of student loan principal."); *see also* 20 U.S.C. § 1098bb(a) (defining the Secretary's waiver and modification authority during military contingencies and national emergencies).

128. 20 U.S.C. § 1098bb(a)(1).

129. Loan Forgiveness Program, *supra* note 8, at 61,513 ("The Secretary determined that the financial harm caused by the COVID-19 pandemic has made

questions cases, the Court started with its determinations of clarity and then proceeded to establish the case as a "major question."[130] Relying on textual, as well as contextual considerations like the statute's previous usage and massive effect of the rule, the Court determined that neither "modify," "waiver," nor a combination of the two justified the Secretary's rule to *cancel* debt.[131]

After applying the doctrine's considerations throughout its statutory analysis,[132] the Court finally established the rule as a "major question" to refute the Government's argument based on congressional purpose.[133] Citing previous major questions cases, the Court once again emphasized the scope of the power claimed and the novelty of the action.[134] It then compared the potentially massive effect of the rule to previous "major questions."[135] Applying the doctrine, the Court relied on its prior textual and

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the waivers and modifications described in this document necessary to ensure that affected individuals are not placed in a worse position financially with respect to their student loans because of that harm.").

130. *Nebraska*, 143 S. Ct. at 2368–75.

131. *Id.* at 2368–71; *see id.* at 2369 ("The authority to 'modify' statutes and regulations allows the Secretary to make modest adjustments and additions to existing provisions, not transform them."); *id.* at 2370 ("[T]he Government concedes, 'waiver'—as used in the HEROES Act—cannot refer to 'waiv[ing] loan balances' or 'waiving the obligation to repay' on the part of a borrower.").

132. When addressing "modify" and "waiver," the Court repeatedly referred to past usage of the terms and the scope of the authority now claimed. *Id.* at 2369 ("Prior to the COVID-19 pandemic, 'modifications' issued under the Act implemented only minor changes, most of which were procedural."); *id.* ("Labeling the Secretary's plan a mere 'modification' does not lessen its effect, which is in essence to allow the Secretary unfettered discretion to cancel student loans."); *id.* at 2369–70 ("It is 'highly unlikely that Congress' authorized such a sweeping loan cancellation program 'through such a subtle device as permission to "modify."'" (quoting MCI Telecomms. Corp. v. Am. Tel. & Tel. Co., 512 U.S. 218, 231 (1994))); *id.* at 2370 ("[T]he Secretary's invocation of the waiver power here does not remotely resemble how it has been used on prior occasions.").

133. *See id.* at 2372–75 (arguing that the "economic and political significance" of the rule implicated the major questions doctrine (quoting West Virginia v. EPA, 142 S. Ct. 2587, 2607–08 (2022))).

134. *Id.* at 2372–73; *see id.* at 2372 ("The Secretary has never previously claimed powers of this magnitude under the HEROES Act.").

135. *Id.* at 2373 (noting that the economic impact of the Secretary's rule was "ten times" greater than previous cases that had triggered major questions analysis).

contextual determinations on clarity to conclude the authority had not been "clearly" granted by Congress in this case.[136]

In each of *Alabama Realtors*, *NFIB*, and *Biden v. Nebraska*, the Court used the MQD to strike down the expert agency's policy responding to COVID-19. These are all prime examples of the doctrine's stifling impact on administrative response to unprecedented emergencies. In the year following *Alabama Realtors*, eviction rates nearly doubled,[137] exacerbating the dangers warned by the CDC. Without the predicted benefits of OSHA's mandate,[138] vaccination rates remained steady while infection rates largely fluctuated between five and fifteen percent.[139] And since *Biden v. Nebraska*, student loan debt has remained consistently high.[140] In each case, the defeated policy would have provided crucial pandemic relief to countless Americans.

After these decisions, most circuit courts followed suit, denying a variety of COVID-19 responses by agencies under the doctrine.[141] But despite the doctrine's apparent dominance, another

136. *Id.* at 2375 ("In such circumstances, we have required the Secretary to 'point to "clear congressional authorization"' to justify the challenged program. . . . [T]he HEROES Act provides no authorization for the Secretary's plan . . . ." (quoting *West Virginia*, 142 S. Ct. at 2609–10)).

137. *Eviction Filings for All Sites*, EVICTION LAB, https://evictionlab.org/eviction-tracking [https://perma.cc/4WGN-9FTX] (scroll down to filings graph; set date range from "Aug 2021" to "Aug 2022"; select "filing counts" under graph).

138. *See* OSHA Vaccine Mandate, *supra* note 5, at 61,435–36 (describing the positive impact of vaccine mandates on vaccination rates).

139. *See US Coronavirus Vaccine Tracker*, USA FACTS (May 10, 2023), https://usafacts.org/visualizations/covid-vaccine-tracker-states [https://perma.cc/P23J-8NDJ] (showing a consistent rate of vaccination); *Trends in United States COVID-19 Deaths, Emergency Department (ED) Visits, and Test Positivity by Geographic Area*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://covid.cdc.gov/covid-data-tracker/#trends_select_testpositivity_00 [https://perma.cc/HP8G-ANX8] (recording infection rates).

140. *See Consumer Credit Outstanding (Levels)*, BD. OF GOVERNORS OF THE FED. RSRV. SYS. (last updated Jan. 8, 2025), https://www.federalreserve.gov/releases/g19/HIST/cc_hist_memo_levels.html [https://perma.cc/J5C8-CYLD]. It is admittedly difficult to calculate the entirety of the Loan Forgiveness Program's lost impact because it never saw the light of day. *Cf.* CBO Letter, *supra* note 8, at 3 ("CBO's estimates are highly uncertain. The most uncertain components are the projections of how much borrowers would repay if the executive action canceling debt had not been undertaken and how much they will repay under that executive action.").

141. *See, e.g.*, Palmer v. Amazon.com, Inc., 51 F.4th 491 (2d Cir. 2022) (citing *NFIB* and holding OSHA did not have authority to issue a vaccine mandate and

case indicates the Court's willingness to consider whether the clarity required by the doctrine is a fair ask of emergency provisions.

On the same day as *NFIB*, the Court handed down another opinion which seemed to disrupt its consistent application of the MQD. In *Biden v. Missouri*, the Court reviewed a challenge brought by several states against CMS's vaccine mandate.[142] This rule conditioned receipt of Medicare or Medicaid funding on vaccination (or exemption) of medical center staff.[143] District courts in Missouri and Louisiana granted a preliminary injunction for enforcement of the rule, and the Government applied to the Supreme Court to stay the injunctions.[144]

In support of its applications, the Government relied on the definition section of 42 U.S.C. § 1395x as authority for CMS to impose conditions "necessary to promote and protect patient health and safety."[145] The Court agreed, finding the rule squarely within the authority granted by Congress.[146] It went on to cite the mandate's alignment with the purpose of the medical profession and previous health-related conditions issued by the Secretary.[147] Despite the rule's potential impact on ten million healthcare workers, the majority did not even contemplate the implication of a major question.[148] In fact it made no mention of the MQD whatsoever. While the Court's reasoning seemed to mirror that of past major questions cases by examining past use of the statute and noting the significant power claimed by the

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could not preempt New York law); Louisiana v. Biden, 55 F.4th 1017 (5th Cir. 2022) (using "speak clearly" language to strike down a contractor vaccination mandate under the Federal Property and Administrative Services Act); Flower World, Inc. v. Sacks, 43 F.4th 1224 (9th Cir. 2022) (citing the "speak clearly" language from *NFIB* to hold that OSHA cannot mandate vaccines); Feds for Med. Freedom v. Biden, 63 F.4th 366 (5th Cir. 2023) (citing the "speak clearly" language from *NFIB* to strike down an executive branch vaccine mandate under Civil Service Reform Act); Kentucky v. Biden, 23 F.4th 585 (6th Cir. 2022) (striking down a vaccine mandate because Congress did not "speak clearly").

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

143. CMS Vaccine Mandate, *supra* note 1, at 61,659; *Missouri*, 142 S. Ct. at 650.

144. *Missouri*, 142 S. Ct. at 650.

145. 42 U.S.C. § 1395x(e)(9).

146. *Missouri*, 142 S. Ct. at 652 ("The rule thus fits neatly within the language of the statute.").

147. *Id.* at 652–53.

148. *Id.*

agency, the opinion shows no hint of the doctrine or its "speak clearly" language.[149]

In a significant departure from cases like *Alabama Realtors*, *NFIB*, and *Biden v. Nebraska*, the Court emphasized the unique "scale and scope" of COVID-19 as justification for even a vaccine mandate as novel as CMS's.[150] Accordingly, the Court upheld the rule, granting the government's applications for stays of the district courts' injunctions.[151] Despite disagreement from dissenters,[152] *Biden v. Missouri* validated the need for unprecedented agency action based on unforeseeable emergency circumstances.[153]

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The benefits of administrative delegation support putting emergency responses in the hands of agencies. Yet, this is undermined by the Court's application of the MQD, as seen in the COVID-19 cases. The next Part illustrates the need for an exception wherein the doctrine would not apply to emergency administrative actions.

II. THE WRONG QUESTIONS

In light of the particular benefits of letting agencies handle emergency response and the stifling effect of the MQD on administrative action, this Note argues that such actions should be exempt from the doctrine's scrutiny. In this Part, I illustrate the need for such an exception by (A) highlighting the doctrine's incompatibility with emergency provisions, (B) explaining why its separation of powers values are not served in the emergency context, and (C) demonstrating how the benefits of delegation are undermined by application to emergency administrative responses.

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149. *Id.*

150. *Id.* at 653; *id.* at 654 ("[S]uch unprecedented circumstances provide no grounds for limiting the exercise of authorities the agency has long been recognized to have."); *see also infra* notes 197–204 and accompanying text (elaborating on the revelation in *Biden v. Missouri*).

151. *Missouri*, 142 S. Ct. at 654–55.

152. *See id.* at 658 (Thomas, J., dissenting) (asserting the MQD should have defeated the rule); *id.* at 659–60 (Alito, J., dissenting) (arguing that CMS's rule was not supported by "good cause").

153. *See infra* Part II.A (discussing the doctrine's inconsistent and failing application to the COVID-19 cases).

A. WHY THE DOCTRINE ASKS THE WRONG QUESTIONS OF EMERGENCY PROVISIONS

Once a case is determined to present a "major question,"[154] the Court then asks whether Congress "clearly" granted the authority claimed.[155] As noted in Part I.B, textual analysis is rarely sufficient to determine clarity, and the Court usually goes on to consider other extraneous factors: principally, the historical use of the statutory authority and whether the agency has acted similarly in the past.[156] But these are the wrong questions to ask when it comes to emergencies. The Court should instead recognize the unforeseeable nature of the situation responded to and defer to the discretionary authority purposefully granted by Congress. This Section illustrates why the doctrine's hunt for clarity in both text and context should not apply to emergency actions.

1. Textual Clarity Is Counterintuitive to Discretionary Emergency Authority

As with all matters of statutory interpretation, the MQD's clarity inquiry starts with the text.[157] This involves scrutiny of the legislation which the agency invoked to authorize its action.[158] Whether Congress has "spoken clearly," should, in theory, turn on the clarity of that language. Yet in practice, the Court never finds the "clear" language it desires.[159] This is an unfairly high bar for delegations of emergency authority, which

154. As illustrated in Part I.B above, it is unclear what exactly triggers a question of "vast economic or political significance." *See supra* note 87. Note the inconsistency among even just the four COVID-19 cases. Regulation of the eighty-four million employees (*NFIB*), six million to seventeen million tenants (*Alabama Realtors*), and forty-three million borrowers (*Biden v. Nebraska*) seemed to be clear "major questions." *See supra* Part I.C. Yet, the Court did not even mention the doctrine with regard to the ten million healthcare workers covered in *Biden v. Missouri*. Why was six million to eighty-four million affected persons clearly "major" enough, but ten million was insufficient? *Cf.* Biden v. Missouri, 142 S. Ct. 647, 658 (2022) (Thomas, J., dissenting) (asserting that the MQD should have applied).

155. *See supra* Part I.B.

156. *See supra* note 89 and accompanying text.

157. *See supra* Part I.B (explaining the doctrine and its application).

158. *See supra* Part I.B.

159. *See supra* note 90.

rely on more general grants of discretion to allow adaptation to unforeseeable situations.[160]

In order to exercise delegated authority, agencies are given discretion to fill gaps left by Congress.[161] This allows them to act in ways that the legislative branch chose to reserve for the agency's expertise.[162] Such flexibility is especially common in grants of emergency authority.[163] Rather than constraining emergency authority with restrictive language, Congress will give broader authority for the agency to deal with unpredictable situations.[164] These preliminary grants of discretion ensure that necessary responses—still within the authority purposefully delegated—are not foreclosed by uninformed, strict language.[165]

In three of the COVID-19 cases, the Court held that Congress had not "clearly" granted authority for the agency to act as it did.[166] The Court interpreted this lack of clear language to

160. *See infra* notes 161–65 and accompanying text (discussing the value of delegating broad discretion).

161. After *Loper Bright*, courts can no longer presume delegation in ambiguity. *See supra* note 61. However, *Loper Bright* also confirmed the validity of discretionary grants of authority. *See* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2263 (2024) ("In a case involving an agency, of course, the statute's meaning may well be that the agency is authorized to exercise a degree of discretion. Congress has often enacted such statutes.").

162. *See* Lemos, *supra* note 44, at 364 (discussing Congress's deficiencies in accounting for every minute detail of regulatory policy).

163. *See, e.g.*, 42 U.S.C. § 264(a) (authorizing the Surgeon General to make and enforce regulations "necessary" to respond to communicable diseases); 29 U.S.C. § 655(c)(1) (giving the Secretary of Labor the authority to issue ETSs when "necessary to protect employees from [grave] danger"); 20 U.S.C. § 1098bb(a) (providing broad authority for the Secretary of Education to "waive" or "modify" student loan programs as he determines is "necessary").

164. *See* Goodwin et al., *supra* note 47, at 15 (describing Congress's recognition of unforeseeable risks and subsequent choice to delegate broadly for agencies to address those risks); Lemos, *supra* note 44, at 364–65 (explaining the value of delegating administrative discretion to handle unforeseeable situations); West Virginia v. EPA, 142 S. Ct. 2587, 2633 (2022) (Kagan, J., dissenting) ("Congress delegates such [major] decisions to agencies all the time—and often via broadly framed provisions . . . .").

165. *See Loper Bright*, 144 S. Ct. at 2273 (affirming that courts must still respect constitutional delegations); Gentry & Viscusi, *supra* note 9, at 509–10 ("The application of the major questions doctrine to emerging risks is nonsensical when there is explicit delegation of emergency powers to agencies for the population in question . . . .").

166. *See supra* Part I.C.

mean Congress had not delegated that power.[167] But this assumes that Congress always means to delegate via clear language; this is not always the case.[168] Instead, the legislative branch will often intentionally delegate broader discretion for the agency to choose a specific response.[169] Indeed, this is how grants of emergency authority are typically handled.[170]

Consider the paradoxical demand that Congress clearly lay out guidelines for responses to unforeseeable emergency situations. The very nature of unprecedented disasters is that no comparable event has taken place.[171] Consequently, Congress has no way of accurately predicting their emergence and proactively granting the authority necessary to address them in a "clear" manner.[172] Recognizing this, Congress will give agencies

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167. *See, e.g.*, Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., Occupational Safety & Health Admin., 142 S. Ct. 661, 666 (2022) (per curiam) ("Although Congress has indisputably given OSHA the power to regulate occupational dangers, it has not given that agency the power to regulate public health more broadly.").

168. *See Loper Bright*, 144 S. Ct. at 2262–63 (describing how Congress delegates discretion to agencies); MERRILL, *supra* note 72, at 74–75 (discussing the deference afforded agency interpretations of ambiguity). For an overview of the various ways Congress delegates authority to the executive branch, see generally Kristin E. Hickman, *Nondelegation as Constitutional Symbolism*, 89 GEO. WASH. L. REV. 1079, 1098–118 (2021).

169. *See* Hickman, *supra* note 168, at 1104–18 (discussing general, hybrid, and implicit delegations); Gundy v. United States, 139 S. Ct. 2116, 2129 (2019) (plurality opinion) ("[W]e have over and over upheld even very broad delegations.").

170. *See* Goodwin et al., *supra* note 47, at 15 ("Congress sought to buttress the detailed provisions [of public interest legislation] with more open-ended grants of authority to the implementing agencies so that these laws might have a chance to evolve and adapt to meet new, relevant challenges."); *see, e.g.*, Biden v. Nebraska, 143 S. Ct. 2355, 2396 (2023) (Kagan, J., dissenting) ("[The HEROES Act] gave the Secretary discretionary authority to relieve borrowers of the adverse impacts of many possible crises—as 'necessary' to ensure that those individuals are not 'in a worse position financially' to make repayment." (quoting 20 U.S.C. § 1098bb(a)(2))); *supra* note 163 (listing the broad authorities used by agencies in the COVID-19 cases).

171. *See* WEBSTER, *supra* note 53, at 3 (defining emergencies as those which "have not attained enough of stability or recurrency to admit of their being dealt with according to rule" (quoting EDWARD S. CORWIN, THE PRESIDENT: OFFICE AND POWERS, 1787–1957, at 3 (4th ed. 1957))); *see, e.g.*, BALLA & GORMLEY, *supra* note 46, at 250–51 (noting the unprecedented origin, scope, and location of the September 11, 2001 attacks).

172. *See* Lemos, *supra* note 44, at 368 ("[I]t would be impossible for Congress to anticipate and resolve every detail of every legislative scheme."); West Virginia v. EPA, 142 S. Ct. 2587, 2642 (2022) (Kagan, J., dissenting) ("Congress

discretion.[173] Rather than "clearly" lay out every possibility, Congress grants broad permission to address emergencies as the agency sees fit.[174] This discretion allows tailoring the response to the situation and takes advantage of the agency's experience and expertise.[175] Thus, where the unprecedented nature of an emergency renders preliminary clarity infeasible, an agency can react with a previously uncontemplated response, yet still within the intended scope of the delegation.

NFIB is a great example of this. There, the Court determined that Congress had not "clearly" granted the agency authority to impose a vaccine-or-test mandate on eighty-four million workers.[176] But a pandemic emergency on the scale of COVID-19 was unprecedented and unpredictable.[177] Never before had such drastic measures been necessary. Fortunately, Congress accounted for such a situation in the OSH Act.[178] In § 655(c), OSHA has the power to issue an ETS when "necessary"

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usually can't predict the future—can't anticipate changing circumstances and the way they will affect varied regulatory techniques.").

173. *See Gundy*, 139 S. Ct. at 2119 ("Congress may confer substantial discretion on executive agencies to implement and enforce the laws."); Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 472 (2001) ("[A] certain degree of discretion, and thus of lawmaking, inheres in most executive . . . action." (emphasis omitted) (quoting Mistretta v. United States, 488 U.S. 361, 417 (1989) (Scalia, J., dissenting))).

174. *See Nebraska*, 143 S. Ct. at 2397 (Kagan, J., dissenting) ("It is hard to identify and enumerate every possible application of a statute to every possible condition years in the future. So, again, Congress delegates broadly."); John Stoehr, *To These Republican Justices, Mass Death Is Okie-Dokie*, ED. BD. (Jan. 14, 2022) (interview with Law Professor Josh Chafetz), https://www.editorialboard.com/to-these-republican-justices-mass-death-is-okie-dokie [https://perma.cc/Z6PF-739T] ("Congress had no way of knowing when it wrote the statute (a) precisely what issues would arise or (b) whether the justices would decide those issues were 'major' . . . . So this isn't actually about respecting Congress's wishes—after all, Congress chose to write broad language against the backdrop of a generally applicable deference regime.").

175. *See* Gentry & Viscusi, *supra* note 9, at 510 ("[E]mergency powers provide additional deference to agencies for risks on the frontier of scientific knowledge."); *see also supra* Part I.A.1 (describing the benefits of emergency decisions made with the specialized knowledge of agencies).

176. Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., Occupational Safety & Health Admin., 142 S. Ct. 661, 664–65 (2022) (per curiam).

177. *See supra* notes 1–4 and accompanying text (describing the unparalleled scale and scope of the COVID-19 emergency).

178. *See* 29 U.S.C. § 655(c).

to protect from "grave danger."[179] Knowing that it could not possibly foresee all the potential dangers or necessary policies, Congress gave OSHA the broad emergency authority to respond accordingly to whatever risks arose.[180]

Take also, for example, *Biden v. Nebraska*. There, Congress gave the Secretary of Education authority through broad statutory language: "waive or modify," "any statutory or regulatory provision applicable," and "necessary in connection with."[181] This language gives the Secretary wide discretion to manipulate student loan programs during emergencies.[182] Indeed, this is the argument the Government advanced: "[The HEROES Act] was left deliberately vague because Congress intended to grant substantial discretion to the Secretary to respond to unforeseen emergencies. So, the unprecedented nature of the Secretary's debt cancellation plan only reflects the pandemic's unparalleled scope."[183] But the Court rejected this assertion, holding that Congress must authorize "such a sweeping loan cancellation program" much more specifically and overtly.[184] Once again, the MQD restricted a valid intention by Congress to let the appropriate agency exercise discretion in a time of emergency.[185]

In both these cases, the Court treated a lack of clear textual authority as a lack of delegation. Yet the lack of clear language was intentional. Instead, Congress delegated broad discretion, meaning for the agency to handle the emergency as it saw fit. So the Court's use of the doctrine to demand clear text was futile and paradoxical. Unfortunately, the doctrine's contextual considerations present similar complications.

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179. *Id.* § 655(c)(1).

180. *See* Gentry & Viscusi, *supra* note 9, at 509 ("The flexibility to make decisions despite the absence of years of evidence is indeed the purpose of an ETS . . . .").

181. 20 U.S.C. § 1098bb(a)(1).

182. *See* Biden v. Nebraska, 143 S. Ct. 2355, 2393 (2023) (Kagan, J., dissenting) ("Of course, Congress did not know COVID was coming; and maybe it wasn't even thinking about pandemics generally. But that is immaterial, because Congress delegated broadly, for all national emergencies.").

183. *Id.* at 2372 (majority opinion) (citations and internal quotation marks omitted) (quoting briefs by the government).

184. *Id.* at 2369–70, 2375.

185. *See id.* at 2397 (Kagan, J., dissenting) ("The new major-questions doctrine works not to better understand—but instead to trump—the scope of a legislative delegation.").

2. The Doctrine's Contextual Considerations Are Unfair Measures of Emergency Delegations

As examination of the statutory language alone is rarely sufficient to come to a conclusion on the clarity of the authority, the Court will then turn to the context of the legislation.[186] As described in Part I.B, this usually involves inquiry into the history of the statute's previous usage and whether the agency has taken similar action before.[187] But this philosophy falls apart when applied to unprecedented emergencies.[188] Novel solutions are often necessary when responding to novel problems.[189] The continued usage of the MQD in this way will likely discourage emergency response efforts which are necessary, but too "novel" in the Court's eyes.[190]

Still, this approach appears in all four of the COVID-19 cases.[191] The *Alabama Realtors* Court pointed to past use of the particular provision itself, noting that no regulation of similar size had been passed this way before.[192] *NFIB* compared the mandate at issue to OSHA's entire history of regulation, finding nothing nearly as broad.[193] In *Biden v. Nebraska*, the Court

186. *See supra* notes 77, 89 and accompanying text; *see also* MERRILL, *supra* note 72, at 207 (discussing O'Connor's reliance on context for the FDA's historical stance on tobacco).

187. *See, e.g.*, West Virginia v. EPA, 142 S. Ct. 2587, 2610 (2022) ("[J]ust as established practice may shed light on the extent of power conveyed by general statutory language, so the want of assertion of power by those who presumably would be alert to exercise it, is equally significant in determining whether such power was actually conferred." (quoting Fed. Trade Comm'n v. Bunte Bros., 312 U.S. 349, 352 (1941))); FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 143–60 (2000); *id.* at 157 ("The consistency of the FDA's prior position is significant in this case for a different reason: It provides important context to Congress' enactment of its tobacco-specific legislation.").

188. *See* Gentry & Viscusi, *supra* note 9, at 509 ("[I]mposing limitations on agency action based on preexisting notions of what constitutes normal regulation is particularly problematic in novel times.").

189. *See supra* note 9 and accompanying text.

190. *See* Goodwin et al., *supra* note 47, at 15 ("One likely consequence of [*West Virginia v. EPA*] is that it may discourage agencies from applying their independent expertise in carrying out their responsibilities using existing statutory authorities in ways that might be regarded as 'too novel.'").

191. *See supra* Part I.C.

192. *Alabama Realtors II*, 141 S. Ct. 2485, 2489 (2021) ("This claim of expansive authority under § 361(a) is unprecedented.").

193. Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., Occupational Safety & Health Admin., 142 S. Ct. 661, 666 (2022) (per curiam) ("It is telling that OSHA, in its

spent considerable time discussing how the Secretary had used both "modify" and "waiver" in the past.[194] Even *Biden v. Missouri*, without applying the doctrine, treated the typicality of similar conditions as significant to its reasoning.[195] In each case, the crucial inquiry appeared to be one of novelty, rather than clarity of the statutory language. Sure enough, the Court determined that because the agencies had not acted similarly enough in the past, each of the COVID-19 response rules went beyond their authority—except CMS's vaccine mandate.[196]

In *Biden v. Missouri*, the Court acknowledged the mandate at issue was so novel as to surpass any previous action taken by the Secretary.[197] But, critically, the Court recognized that the unprecedented "scale and scope" of COVID-19 justified the novelty of the solution.[198] Because CMS had never faced a problem of such magnitude, it could not be expected to have acted proportionally in the past.[199] The Court made a point to validate the agency's action, despite no prior use, because of the unpredictable nature of the problem presented.[200] It even went so far as to establish the "unprecedented circumstances" as having controlling weight when an agency's authority is in question:

> The challenges posed by a global pandemic do not allow a federal agency to exercise power that Congress has not conferred upon it. At the same time, such *unprecedented circumstances* provide no grounds for limiting the exercise of authorities the agency has long been recognized to have. Because *the latter principle governs* in these cases, the applications for a stay . . . are granted.[201]

This language in *Biden v. Missouri* represents the Court's acknowledgement that emergencies often implicate "major

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half century of existence, has never before adopted a broad public health regulation of this kind . . . .").

194. Biden v. Nebraska, 143 S. Ct. 2355, 2369–70 (2023); *see also supra* note 132 and accompanying text.

195. Biden v. Missouri, 142 S. Ct. 647, 653 (2022) (per curiam) ("Moreover, the Secretary routinely imposes conditions of participation that relate to the qualifications and duties of healthcare workers themselves.").

196. *See supra* Part I.C.

197. 142 S. Ct. at 653 ("Of course the vaccine mandate goes further than what the Secretary has done in the past to implement infection control.").

198. *Id.*

199. *Id.* ("But he has never had to address an infection problem of this scale and scope before.").

200. *Id.*

201. *Id.* at 654 (emphasis added).

questions," yet do not necessarily implicate the doctrine.[202] In other words, emergency situations, especially those of an unprecedented scale, often by their nature require unprecedented solutions.[203] As such, it is unreasonable to ask an agency to have acted this way before.[204]

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Biden v. Missouri and its reasoning stand for an evolved approach to emergency administrative actions, which considers the impossibilities of clear textual authority and precedential action for unforeseeable emergencies.[205] Because the MQD inquiry asks the wrong questions of emergency authority, it is irreconcilable with such provisions, and should not apply.[206] Furthermore, the separation of powers values which the doctrine seeks to uphold are not served in emergency cases.

B. SEPARATION OF POWERS VALUES ARE NOT SERVED BY APPLYING THE DOCTRINE TO EMERGENCY ACTIONS

To preserve the separation of powers, the MQD asks Congress to "speak clearly" when delegating significant power.[207] This Section illustrates why applying the doctrine to emergency

202. *See also* Biden v. Nebraska, 143 S. Ct. 2355, 2399 (2023) (Kagan, J., dissenting) ("Congress allows, and indeed expects, agencies to take more serious measures in response to more serious problems.").

203. *See* BALLA & GORMLEY, *supra* note 46, at 240–45 (explaining the foreseeability of disasters like Hurricane Katrina and Deepwater Horizon, but not their massive size or impact).

204. Note too that the contextual factors relied on by the Court in these cases are outside Congress's control. If the idea is to uphold faithful delegation by the legislative branch, focusing on how the executive branch has acted is an improper inquiry.

205. Even some circuit courts have shown a hesitancy to apply the doctrine to COVID-19 responses. *See, e.g.*, Mayes v. Biden, 67 F.4th 921 (9th Cir. 2023) (reversing an injunction for President Biden's executive order requiring federal contractors' and subcontractors' employees to be vaccinated), *vacated as moot*, 89 F.4th 1186, 88 (9th Cir. 2023); Wash. All. of Tech. Workers v. U.S. Dep't of Homeland Sec., 50 F.4th 164 (D.C. Cir. 2022) (declining to use MQD to strike down the Department of Homeland Security's visa extension); Florida v. Dep't of Health & Hum. Servs., 19 F.4th 1271 (11th Cir. 2021) (denying an injunction for Secretary of Health and Human Services' vaccination requirement).

206. *See* Gentry & Viscusi, *supra* note 9, at 509 ("The application of the major questions doctrine to emerging risks is nonsensical when there is explicit delegation of emergency powers to agencies . . . .").

207. *See supra* notes 89–90 and accompanying text.

administrative actions does not implicate separation of powers concerns and cannot have the desired effect on legislation.

1. The Conditional and Temporary Nature of Emergency Actions Prevent an Imbalance of Executive Power

The MQD seeks to safeguard the separation of powers by ensuring the executive branch does not make policy unless granted authority to do so by Congress.[208] In this way, it means to prevent excessive expansion of the administrative estate.[209] Indeed, when the Court strikes down an administrative rule using the doctrine, it often notes the awesome power it would give the agency.[210] But delegation to administrative agencies is desirable, if not necessary and inevitable.[211] And even if an agency does overstep the bounds of intended authority, Congress can pass legislation to fix it.[212] Moreover, the fact that emergency provisions are conditioned on the existence of an emergency and

208. *See, e.g.*, West Virginia v. EPA, 142 S. Ct. 2587, 2617 (2022) (Gorsuch, J., concurring) ("The major questions doctrine works in much the same way to protect the Constitution's separation of powers."); *see also* Capozzi, *supra* note 62, at 206–07 (describing the separation of powers motivations for the nondelegation and major questions doctrines).

209. *See* Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., Occupational Safety & Health Admin., 142 S. Ct. 661, 669 (2022) (Gorsuch, J., concurring) ("[T]he [major questions] doctrine is 'a vital check on expansive and aggressive assertions of executive authority.'" (quoting U.S. Telecomm. Ass'n v. FCC, 855 F.3d 381, 417 (D.C. Cir. 2017) (Kavanaugh, J., dissenting))).

210. *See, e.g.*, *Alabama Realtors II*, 141 S. Ct. 2485, 2489 (2021) ("[T]he Government's read of § 361(a) would give the CDC a breathtaking amount of authority. It is hard to see what measures this interpretation would place outside the CDC's reach . . . ."); *NFIB*, 142 S. Ct. at 665 ("This is no 'everyday exercise of federal power.' It is instead a significant encroachment into the lives—and health—of a vast number of employees." (citation omitted)).

211. *See* Lemos, *supra* note 44, at 364 ("Much of the literature is grounded in a recognition that delegations are inevitable."); Fenster, *supra* note 44, at 81 ("[Administrative agencies] were so necessary for a growing, modern nation that traditional constitutional understandings regarding the separation of governmental powers must yield–at least to some extent."); KRISTIN E. HICKMAN ET AL., FEDERAL ADMINISTRATIVE LAW 30 (4th ed. 2023) (discussing the foundations for executive agencies in the Constitution).

212. *See infra* notes 358–60 (discussing Congress's power to invalidate agency rules).

temporary in nature prevent any excessive bolstering of the administrative state.[213]

Due to their conditional nature, emergency provisions only expand an agency's power once the particular circumstances of an emergency present themselves.[214] The CDC's eviction moratorium relied on a finding that a moratorium was reasonably necessary and current prevention measures were insufficient.[215] OSHA was only able to issue its ETS imposing a vaccine mandate upon a finding of "grave danger."[216] And the Secretary's loan forgiveness program required a determination that it was necessary to prevent a worse financial position for borrowers.[217]

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213. *See* Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 425, 439–41 (1934) (upholding use of emergency authority after repeated emphasis on its "temporary" and "conditional" nature).

214. *See, e.g.*, National Emergencies Act (NEA) § 201, 50 U.S.C. § 1621(b) ("Any provisions of law conferring powers and authorities to be exercised during a national emergency shall be effective and remain in effect (1) only when the President (in accordance with subsection (a) of this section), specifically declares a national emergency, and (2) only in accordance with this chapter."); OSHA Vaccine Mandate, *supra* note 5, at 61,403 ("Where OSHA finds a grave danger from the virus no longer exists for the covered workforce (or some portion thereof), or new information indicates a change in measures necessary to address the grave danger, OSHA will update this ETS, as appropriate.").

215. *See* 42 C.F.R. § 70.2 (2024) (describing the conditions of the Surgeon General's authority); Final Eviction Moratorium, *supra* note 7, at 43,251 ("I have determined based on the information below that issuing a temporary halt in evictions in counties experiencing substantial or high levels of COVID-19 transmission constitutes a reasonably necessary measure under 42 CFR 70.2 to prevent the further spread of COVID-19 . . . . I have further determined that measures by states, localities, or territories that do not meet or exceed these minimum protections are insufficient to prevent the interstate spread of COVID-19.").

216. *See* 29 U.S.C. § 655(c)(1) (permitting ETSs only when "necessary" to protect employees from "grave danger"); OSHA Vaccine Mandate, *supra* note 5, at 61,403 ("OSHA has determined that many employees in the U.S. who are not fully vaccinated against COVID-19 face grave danger from exposure to SARS-CoV-2 in the workplace.").

217. *See* 20 U.S.C. § 1098bb(a) (defining the conditions where the Secretary may "waive" or "modify"); Loan Forgiveness Program, *supra* note 8, at 61,513 ("The Secretary determined that the financial harm caused by the COVID-19 pandemic has made the waivers and modifications described in this document necessary to ensure that affected individuals are not placed in a worse position financially with respect to their student loans because of that harm.").

Some emergency powers require an official declaration of emergency by the government.[218] The Secretary of Education only had access to waivers and modifications under the HEROES Act because a "national emergency" had been declared by the President under the National Emergencies Act.[219] Another example is the "public health emergency" set by the Secretary of Health and Human Services.[220] CMS gained authority to waive certain regulations after the declaration of COVID-19 as a public health emergency in addition to a national emergency.[221] Each of these emergency powers only activated once the specific emergency conditions arose.[222]

Furthermore, even if triggered, emergency power is temporary, creating no lasting expansion of agency power.[223] Statutory provisions which give agencies emergency authority often have built in expiration dates or are necessarily tied to a temporary

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218. The FDA's emergency use authorizations (EUAs) for the COVID-19 vaccine were dependent upon declaration of several types of emergencies or material threats. *See* Federal Food, Drug, and Cosmetic Act (FDCA) § 564, 21 U.S.C. § 360bbb-3 (describing the conditions in which the Secretary of Health and Human Services can issue EUAs); *Emergency Use Authorization*, U.S. FOOD & DRUG ADMIN. (last updated Dec. 23, 2024), https://www.fda.gov/emergency-preparedness-and-response/mcm-legal-regulatory-and-policy-framework/emergency-use-authorization [https://perma.cc/7KCR-X3VE] (listing all active EUAs for COVID-19).

219. *See* 20 U.S.C. § 1098bb(1)(a) (conditioning waiver and modification authority on "connection with a . . . national emergency"); 20 U.S.C. § 1098ee(4) ("The term 'national emergency' means a national emergency declared by the President of the United States."); National Emergencies Act, 50 U.S.C. § 1621 (authorizing the President to declare a national emergency).

220. *See* Public Health Service Act (PHSA) § 219, 42 U.S.C. § 247d(a) (laying out conditions under which the Secretary can declare a public health emergency).

221. *See* 42 U.S.C. § 1320b-5(b) (granting the Secretary of Health and Human Services the authority to waive or modify regulations during an "emergency period"); *id.* § 1320b-5(g)(1) (defining "emergency period"); *see also* CMS Vaccine Mandate, *supra* note 1, at 61,560 ("When the President declares a national emergency under the National Emergencies Act . . . CMS is empowered to take proactive steps by waiving certain CMS regulations . . . .").

222. *See, e.g.*, Biden v. Nebraska, 143 S. Ct. 2355, 2391 (2023) (Kagan, J., dissenting) ("The [HEROES Act] gives the Secretary broad authority to respond to national emergencies. That authority kicks in only under exceptional conditions.").

223. *See, e.g.*, Gentry & Viscusi, *supra* note 9, at 472 ("These expansive powers are temporary, which protects against agencies using an ETS as a long-term substitute for a regulation based on the formal rulemaking process." (footnote omitted)).

declaration of emergency. An OSHA ETS requires notice and comment rulemaking procedure within six months of the initial rule.[224] Waivers issued by CMS during emergencies terminate after sixty days.[225] Likewise, official declarations of emergency have their own built-in procedure for review and termination. Public health emergencies have a set expiration date of ninety days, at which point the Secretary can renew for another ninety.[226] And national emergencies under the National Emergencies Act must be reviewed by Congress every six months.[227] Accordingly, even those rules which have no set expiration date themselves, like the loan forgiveness program, but condition termination upon the end of an official declaration, are also necessarily time-limited.[228]

In each case, after a fixed amount of time, the regulation must be renewed or terminated.[229] If the emergency conditions still persist, the agency can reinvoke the temporary power, resetting the clock on expiration.[230] But if the triggering need no longer exists, the authority vanishes (unless other conditions qualify).[231] Regardless, the fact that every emergency situation,

224. 29 U.S.C. § 655(c)(2)–(3).

225. 42 U.S.C. § 1320b-5(e)(1)(C).

226. 42 U.S.C. § 247d(a).

227. National Emergencies Act (NEA) § 202, 50 U.S.C. § 1622(b).

228. *See* Loan Forgiveness Program, *supra* note 8, at 61,512 ("Unless specifically noted within a waiver or modification identified below, a waiver or modification identified in this document expires at the end of the award year in which the COVID-19 national emergency expires, unless the waiver or modification is otherwise extended by the Secretary in a document published in the Federal Register.").

229. *See* Gentry & Viscusi, *supra* note 9, at 511 ("The temporary nature of the standard not only disincentivizes misuse but requires an agency to update its initial approach as better information becomes available.").

230. *See, e.g.*, 42 U.S.C. § 1320b-5(e)(1)–(2) (setting a sixty-day expiration period on CMS emergency waivers but allowing the Secretary to make subsequent sixty-day extensions); *Current Emergencies*, CTRS. FOR MEDICARE & MEDICAID SERVS. (last updated Nov. 7, 2023), https://www.cms.gov/about-cms/what-we-do/emergency-response/current-emergencies [https://perma.cc/CAC3-5BN3] (listing the thirteen renewals of the COVID-19 Public Health Emergency); *Alabama Realtors II*, 141 S. Ct. 2485, 2486–87 (2021) (describing the CDC's repeated renewal of its eviction moratorium).

231. *See, e.g.*, 42 U.S.C. § 247d(a) ("Any such determination of a public health emergency terminates upon the Secretary declaring that the emergency no longer exists, or upon the expiration of the 90-day period beginning on the date on which the determination is made by the Secretary, whichever occurs

and the power that comes with it, will cease eventually prevents any permanent strengthening of executive power and influence.[232]

Furthermore, pervasive use of the MQD to strike down emergency provisions actually undermines the separation of powers rather than enforcing it.[233] Even assuming the doctrine appropriately protects constitutional values in general,[234] emergency provisions are a special case. Congress will often purposefully delegate more open-ended authority in public interest legislation so agencies can adapt to unforeseeable risks.[235] Where Congress intends to grant discretion, preventing the exercise of that discretion violates a correct transfer of power.[236] Therefore,

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first."); *see also FAQs: What Happens to EUAs when a Public Health Emergency Ends?*, U.S. FOOD & DRUG ADMIN. (Nov. 16, 2023), https://www.fda.gov/emergency-preparedness-and-response/mcm-legal-regulatory-and-policy-framework/faqs-what-happens-euas-when-public-health-emergency-ends [https://perma.cc/7KCR-X3VE] (contemplating other circumstances which would justify EUAs after a public health emergency terminates).

232. "Temporary" in this context refers to the duration of the agency's *authority*, rather than the *effects* resulting from a use of that authority. *See, e.g.*, *supra* note 120 and accompanying text. While the impacts of certain emergency provisions may be permanent (e.g., vaccinations, loan forgiveness, etc.) these types of long-term policies are often necessary and unavoidable. Moreover, the MQD is more concerned with expansions of administrative power, which are minimized when an agency's *authority* is temporary.

233. *See, e.g.*, David M. Driesen, *Does the Separation of Powers Justify the Major Questions Doctrine?*, 2024 U. ILL. L. REV. 1177 (2024) (arguing the MQD disrupts congressional intent); Goodwin et al., *supra* note 47, at 15 ("A[n] . . . important consequence of the major questions doctrine is that it risks disregarding choices by Congress to confer broad discretion on agencies through its past laws.").

234. There is an abundance of scholarship criticizing this point, but that is beyond the scope of this Note, which focuses on the emergency context. *See generally, e.g.*, Driesen, *supra* note 233; Natasha Brunstein & Richard L. Revesz, *Mangling the Major Questions Doctrine*, 74 ADMIN. L. REV. 217 (2022); Daniel E. Walters, *The Major Questions Doctrine at the Boundaries of Interpretive Law*, 109 IOWA L. REV. 465, 465 (2024).

235. *See* Driesen, *supra* note 233, at 1210 (noting that, especially for major questions, Congress expects agencies to regulate in line with enacted policy, yet "judicial decisions to abandon congressional policies . . . interfere with the congressional prerogative"); *see also* Goodwin et al., *supra* note 47, at 15 ("[M]any provisions in public interest law include detailed instructions for agencies to follow, which quite clearly comport with the major questions doctrine.").

236. *See* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2273 n.26 (2024) ("[W]hen a particular statute delegates authority to an agency consistent with constitutional limits, courts must respect the delegation, while ensuring that

the judicial branch's use of the MQD to overturn an agency's proper use of authority oversteps its own limits, and defies constitutional policy of the legislative and executive branches.[237]

Because agency emergency provisions trigger upon narrow conditions and remain active only temporarily, they do not contribute to the aggrandizement of the administrative state. If anything, they often uphold Congress's intent to delegate discretionary authority. Accordingly, the MQD's protection of the separation of powers is moot as applied to emergency administrative response.

2. Requiring Clarity Will Not Bring Clearer Delegation

In service of the separation of powers, the MQD demands greater clarity in grants of administrative authority by Congress. As several major questions cases have reiterated, the Court "expect[s] Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance."[238] Opinions in these cases will often conclude by declaring that the claimed authority rests with Congress, until a clearer grant of power is made.[239] But this invitation for

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the agency acts within it."); Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 844 (1984) ("Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency."), *overruled by Loper Bright*, 144 S. Ct. 2244.

237. *See* Driesen, *supra* note 233, at 1209–10 ("[The MQD] authorizes departures from the policies that the enacting Congress established and therefore does not protect the authority of Congresses that enact laws to address important issues."); Goodwin et al., *supra* note 47, at 15 ("The effect of the major questions doctrine is to deny giving full effect to these kinds of provisions.").

238. *See, e.g.*, Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., Occupational Safety & Health Admin., 142 S. Ct. 661, 665 (2022) (per curiam) (quoting *Alabama Realtors II*, 141 S. Ct. 2485, 2489 (2021)).

239. *See, e.g.*, *Alabama Realtors II*, 141 S. Ct. at 2489 ("Our precedents require Congress to enact exceedingly clear language if it wishes to significantly alter the balance between federal and state power and the power of the Government over private property." (quoting U.S. Forest Serv. v. Cowpasture River Pres. Ass'n, 140 S. Ct. 1837, 1849–50 (2020))); *id.* at 2490 ("If a federally imposed eviction moratorium is to continue, Congress must specifically authorize it."); *NFIB*, 142 S. Ct. at 666 ("[Weighing policy tradeoffs] is the responsibility of those chosen by the people through democratic processes."); West Virginia v. EPA, 142 S. Ct. 2587, 2616 (2022) ("A decision of such magnitude and consequence rests with Congress itself, or an agency acting pursuant to a clear delegation from that representative body.").

Congress to legislate with greater clarity will likely have the opposite of its intended effect, especially in the context of emergency provisions.

Even assuming that more precise language in delegation is generally desirable,[240] stricter emergency provisions are particularly problematic. First, there is nothing to suggest that Congress even considers the MQD when drafting legislation. A thorough study of congressional drafting by Professors Abbe Gluck and Lisa Bressman found that, aside from the now-extinct *Chevron*, administrative law canons "are not getting through to Congress."[241] While legislators are often familiar with the assumptions underlying administrative legal rules, they rarely know of the particular rule or canon that correlates.[242] Research on the MQD in particular indicated it fell into this category.[243] Despite some disagreement between legislators on which types of questions Congress means to delegate, their study concluded that the values of the doctrine are likely justified by the way legislators understand delegation.[244] But even if the values persist, the data reveals that legislators are unaware of the doctrine itself and its

240. *But see* HICKMAN ET AL., *supra* note 211, at 126 (observing that "Congress often creates serious problems" when it "gives agencies detailed instructions"); U.S. Dep't of Agric. v. Murry, 413 U.S. 508, 512–14 (1973) (reviewing amendments to the Food Stamp Act of 1964 § 2, 7 U.S.C. § 2011, which had the opposite of their intended effect); Les v. Reilly, 968 F.2d 985 (9th Cir. 1992) (hearing a challenge to an EPA rule which sought to cure the unintended effects of the FDCA's Delaney Clause); *but cf.* Fenster, *supra* note 44, at 82 ("[T]he administrative law considered by legal academics must offer 'fluid tendencies and tentative traditions' and must protect against 'sterile generalization unnourished by the realities of law in action.'" (quoting Felix Frankfurter, *The Task of Administrative Law*, 75 U. PA. L. REV. 614, 619 (1927))).

241. Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 994 (2013).

242. *Id.* at 994 ("Rather, the assumptions underlying these doctrines seem to be reasonable proxies for how Congress delegates interpretive authority to agencies, but not doctrines that drafters realize courts employ.").

243. *Id.* at 1003–06 (describing the study's findings on the MQD).

244. *Id.* at 1003 (finding that about sixty percent of legislators do not mean to delegate "major questions" to agencies).

demand that they "speak clearly."[245] How then can Congress hope to comply?[246]

Furthermore, even if familiar, it is not obvious what language would be "clear" enough under the doctrine.[247] As described in earlier Parts, the second half of the major questions inquiry often involves both a textual and contextual analysis relying on a variety of circumstances.[248] Murky caselaw leaves legislators trying to rise to the Court's clarity challenge with numerous questions and few answers. For instance: What contextual details must be included for "clear" statutory language?[249] Should Congress consider the role of the provision in the statute? The agency's past action? Or both?[250] The Court's inconsistent reliance on different modes of context provides, at best, an uncertain answer.

Finally, the "unclear" ambiguity in emergency legislation does not derive from the political gridlock inevitable to a democratic system. Rather, broader emergency provisions represent a stipulated acknowledgement of the need for expert discretion in

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245. *Id.* at 994 (labeling non-*Chevron* administrative canons as "approximation canons," whose usage is unknown to Congress); *id.* at 1016 tbl.3 (including "major questions" as an "approximation canon" with "no awareness" by legislators).

246. In some cases, the statute at issue was enacted before the Court even developed the MQD. *E.g.*, Baumann, *supra* note 44, at 468–69 ("[T]he relevant statute in the vaccine-or-test case predates the major questions doctrine by several decades, so Congress was hardly on notice that it had to 'speak clearly' lest its enactment be narrowed." (footnote omitted)).

247. *See* Goodwin et al., *supra* note 47, at 16 ("[I]t is not clear from the majority opinion how clear language must be under the major questions doctrine in order to satisfy the doctrine's clear statement rule."). *See generally* John F. Manning, *Clear Statement Rules and the Constitution*, 110 COLUM. L. REV. 399, 399 (2010) (addressing the misunderstandings surrounding clear statement rules).

248. *See supra* note 89 and accompanying text; *see also supra* Part II.A (confronting the doctrine's textual and contextual analysis).

249. In his concurrence in *West Virginia v. EPA*, Justice Gorsuch identified four "clues" to consider when determining whether an agency's action is clearly authorized: (1) the role of the provision in the statute; (2) its age and focus; (3) the agency's past use of the provision; and (4) comparison to the agency's mission. 142 S. Ct. 2587, 2622–23 (2022) (Gorsuch, J, concurring). But none of these "clues" are dispositive or even relevant to every "major questions" case. *See id.* at 2624 (applying only two of the factors to the present facts).

250. *See supra* note 89 and accompanying text (surveying different contextual factors the Court relies on in each major questions case).

unforeseeable situations.[251] Indeed, grants of emergency authority often pass with wide bipartisan support.[252] Blindly requiring clarity would defeat this purpose. And the more technical the field, the worse this problem gets.[253] Non-expert legislators trying to create precise language in scientific fields will encounter substantial difficulties, resulting in noticeably less delegation of emergency powers.[254] In addition, the Court's continued use of the MQD in its jurisprudence makes most current emergency provisions, which confer broad discretion, inoperable, as they will fail to survive review.[255]

So, while the Court means to preserve the separation of powers by ensuring proper transfers of congressional authority, in reality, such delegations will become largely extinct. In the context of emergency administrative response, which relies on flexible and discretionary authority to protect the public in times of crisis, this is a frightening outcome.

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The previous two Sections demonstrated the problematic demand for "clear" emergency authority and lack of separation of powers concerns. But the question remains: Why not just leave emergency policy to Congress? The next Section argues that such decisions are best made through specialized administrative bodies and their rapid response capabilities.

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251. *See supra* notes 161–65 and accompanying text.

252. *See, e.g.*, *H.R.2707 - Major Disaster Relief and Emergency Assistance Amendments of 1987*, CONGRESS.GOV, https://www.congress.gov/bill/100th-congress/house-bill/2707/all-actions?overview=closed&q=%7B%22roll-call-vote%22%3A%22all%22%7D [https://perma.cc/8A6D-QKS2] (recording a House vote of 368-13 to pass the Stafford Act); *H.R.3884 - National Emergencies Act*, CONGRESS.GOV, https://www.congress.gov/bill/94th-congress/house-bill/3884/all-actions?overview=closed&q=%7B%22roll-call-vote%22%3A%22all%22%7D [https://perma.cc/3VCC-QMHJ] (recording a House vote of 388-5 to pass the National Emergencies Act).

253. *See supra* Part I.A (explaining Congress's relative lack of expertise in technical fields).

254. *See* Goodwin et al., *supra* note 47, at 16 ("This could become a major source of contention in future negotiations over statutory language, which might ultimately prevent many important statutes from passing through Congress."); *see also* sources cited *supra* note 240 (noting the difficulties with precise language in statutes).

255. *See* Gentry & Viscusi, *supra* note 9, at 482 ("In dismissing the proffered scientific evidence in favor of its own conjecture, the Court created a dangerous precedent that will affect how evidence is valued and how agencies are allowed to respond to emerging risks.").

C. THE BENEFITS OF EMERGENCY DELEGATION ARE UNDERMINED BY THE DOCTRINE

Emergency delegation puts important policy decisions in the hands of government bodies with greater expertise and response speed.[256] As COVID-19 impacted many different aspects of everyday life, administrative responses required action in a variety of fields. Student loan forgiveness programs required an appreciation of economic and financial considerations.[257] The need for an eviction moratorium depended on how communicable the disease was and the consequences for landlord-renter relationships.[258] Vaccine mandates, too, implicated the spread of the disease but in the workplace context.[259] The feasibility of these programs also necessitated knowledge of existing employer-employee relationships and policies.[260] In each of these fields, the designated expert body drew upon its own experience and knowledge, conducted research or studies, and determined it was necessary to respond.[261]

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256. *See supra* Part I.A.

257. *See* Biden v. Nebraska, 143 S. Ct. 2355, 2373–74 (2023) ("Student loan cancellation 'raises questions . . . hitting fundamental issues about the structure of the economy.'" (quoting J. Stein, *Biden Student Debt Plan Fuels Broader Debate over Forgiving Borrowers*, WASH. POST (Aug. 31, 2022), https://www.washingtonpost.com/us-policy/2022/08/31/student-debt-biden-forgiveness [https://perma.cc/2QLC-L4QF])); *see also* Loan Forgiveness Program, *supra* note 8, at 61,513 (describing the Secretary of Education's findings on the financial harm caused by COVID-19).

258. *See* First Eviction Moratorium, *supra* note 3, at 55,292 (explaining how COVID-19 spreads and the increased risk caused by evictions).

259. *See* OSHA Vaccine Mandate, *supra* note 5, at 61,403 (discussing the prevalence of COVID-19 infections in the workplace); CMS Vaccine Mandate, *supra* note 1, at 61,556–60 (relying on a multitude of studies concerning COVID-19 infection rates).

260. *See* Gentry & Viscusi, *supra* note 9, 473–75 (discussing the considerations unique to an *employee* vaccine mandate); OSHA Vaccine Mandate, *supra* note 5, at 61,403 ("OSHA also concludes, based on its enforcement experience during the pandemic to date, that continued reliance on existing standards and regulations . . . and workplace guidance . . . is not adequate to protect unvaccinated employees . . . .").

261. *See* Final Eviction Moratorium, *supra* note 7, at 43,247–49 (describing the effectiveness of quarantine procedures, like moratoria, at promoting self-isolation and social distancing, while reducing homelessness); OSHA Vaccine Mandate, *supra* note 5, at 61,403 ("This finding of grave danger is based on the severe health consequences associated with exposure to the virus along with evidence demonstrating the transmissibility of the virus in the workplace and

Yet in *Alabama Realtors*, *NFIB*, and *Biden v. Nebraska*, the Court, lacking any specialized knowledge or experience, made its own decision, devastating the government's pandemic response.[262] In contrast, the Court upheld CMS's rule in *Biden v. Missouri*.[263] In support of its vaccine mandate, CMS called attention to a wealth of studies and research on COVID-19's impact, human responsiveness to different preventative measures, and the risks particular to medical settings.[264] The Court's decision to not apply the doctrine preserved the ultimate decision of an expert body with delegated authority, rather than a judicial body of general knowledge.

Additionally, the speed afforded emergency provisions an advantage when responding to the problems raised by the pandemic. COVID-19 developed and spread quickly.[265] During emergency situations, agencies can rely on provisions from both organic statutes and the APA itself to expedite their response. One example is OSHA's authority to impose emergency temporary standards.[266] Codified in § 655(c) of the OSH Act, the Secretary of Labor has the power to issue an ETS with immediate effect and "without regard to the requirements of [the APA]."[267] In utilizing this provision to impose its vaccine mandate in 2021, OSHA did not have to go through lengthy notice and comment procedure, allowing instant effect of the policy.[268] Similarly, the

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the prevalence of infections in employee populations, as discussed in Grave Danger . . . ."); *id.* at 61,460 ("Estimates without sources noted in the text are based on agency expertise."); Loan Forgiveness Program, *supra* note 8, at 61,513 ("The Secretary determined that the financial harm caused by the COVID-19 pandemic has made the waivers and modifications described in this document necessary to ensure that affected individuals are not placed in a worse position financially with respect to their student loans because of that harm.").

262. *See supra* notes 137–40 and accompanying text (describing the effects of defeating agencies' COVID-19 responses).

263. 142 S. Ct. 647 (2022) (per curiam); *see supra* Part I.C.

264. CMS Vaccine Mandate, *supra* note 1, at 61,556–60; *see id.* at 61,557 ("Studies have also shown, however, that consistent adherence to recommended infection prevention and control practices can prove challenging—and those lapses can place patients in jeopardy.").

265. *See supra* notes 1–4 and accompanying text (describing the unprecedented, rapid development of COVID-19).

266. 29 U.S.C. § 655(c).

267. *Id.* § 655(c)(1).

268. *See* OSHA Vaccine Mandate, *supra* note 5, at 61,505 ("As noted above, the ETS is required by the OSHA Act to take immediate effect upon publication.").

CDC utilized 42 C.F.R. § 70.2 to also exempt its eviction moratorium from typical procedure.[269] These provisions represent calculated decisions by Congress to forego basic procedural constraints in times of emergency.

Agencies can also take advantage of provisions within the APA itself. While the APA prescribes certain procedural requirements, § 553(b) creates a "good cause" exception to notice and comment rulemaking.[270] In fact, CMS invoked this exception when promulgating its own vaccine mandate.[271] It found good cause in the looming harm COVID-19 posed to healthcare workers and patients, which would only be exacerbated by delay.[272] CDC and OSHA also asserted "good cause" under the APA, in the event their more specific emergency provisions were found inapplicable.[273]

Although arguably less democratically accountable than Congress,[274] agencies' expertise and rapid responsiveness better

269. Final Eviction Moratorium, *supra* note 7, at 43,251 ("This Order is not a rule within the meaning of the Administrative Procedure Act (APA) but rather an emergency action taken under the existing authority of 42 CFR 70.2.").

270. *See* 5 U.S.C. § 553(b) ("[T]his subsection does not apply . . . when the agency for good cause finds . . . that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest."); Mack Trucks, Inc. v. EPA, 682 F.3d 87, 93 (D.C. Cir. 2012) (defining impracticability as situations with "imminent hazards" or rules of "life-saving importance").

271. CMS Vaccine Mandate, *supra* note 1, at 61,586 ("We find good cause to waive notice of proposed rulemaking under the APA, 5 U.S.C. 553(b)(B), and section 1871(b)(2)(C) of the Act.").

272. *Id.* ("Further, it would endanger the health and safety of patients, and be contrary to the public interest to delay imposing [the vaccine mandate]."); *see also* Biden v. Missouri, 142 S. Ct. 647, 651 (2022) (per curiam) ("That good cause was, in short, the Secretary's belief that any 'further delay' would endanger patient health and safety given the spread of the Delta variant and the upcoming winter season."). *But see Missouri*, 142 S. Ct. at 659–60 (Alito, J., dissenting) (arguing that CMS did not have "good cause").

273. First Eviction Moratorium, *supra* note 3, at 55,296 ("In the event that this Order qualifies as a rule under the APA, notice and comment and a delay in effective date are not required because there is good cause to dispense with prior public notice and comment and the opportunity to comment . . . ."); OSHA Vaccine Mandate, *supra* note 5, at 61,504–05 ("To the extent that these requirements are not already exempt from the APA's requirements for notice and comment under section 6(c) of the Act (29 U.S.C. 655(c)), OSHA invokes the 'good cause' exemption . . . .").

274. While not directly elected by the public, agencies are politically accountable in other ways. Agency heads are subject to removal by the President, who is elected. *See* Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183,

positioned them to implement emergency policy.[275] Yet, in each of the COVID-19 cases, the use of the MQD undermined the advantages the agencies brought to the situation. Where the Court in *Biden v. Missouri* left the decision in the hands of the CMS, these values were preserved.

* * *

Applying the MQD to emergency administrative actions presents an unsatisfiable demand for clarity, fails to preserve the separation of powers values which the doctrine purports to uphold, and undermines the benefits of administrative delegation. Emergency administrative actions should be exempted from major questions scrutiny to avoid these inevitable problems. The next Part proposes a framework for applying such an exception.

III. THE RIGHT QUESTIONS

Having established the issues with applying the MQD to emergency actions, this Part lays the groundwork for a practical exception. Exempting such actions from the doctrine would solve these problems while upholding the separation of powers through other mechanisms in the judicial and legislative branches. Agency rules which (A) are emergency actions and (B) have not been preempted by congressional policy should qualify for this exception.

A. DEFINING "EMERGENCY ACTIONS"

First, the exception to the MQD should only apply to emergency actions taken by an agency. But this begs the question: What is an emergency action? There are many ways a court could construct this definition.[276] The dictionary defines "emergency" as "an unforeseen event or condition requiring prompt action."[277] During the Great Depression, the Supreme Court

2189 (2020) (confirming the President's virtually unrestricted removal power). Indeed, public scrutiny during emergencies can result in political backlash or even removal from office. *See, e.g.*, BALLA & GORMLEY, *supra* note 46, at 232–33 (describing public discontent and subsequent firing of FEMA's administrator after Hurricane Katrina). Agencies must also remain faithful to Congress due to its various methods of control. *See infra* notes 354–60 and accompanying text.

275. *See supra* note 47 and accompanying text (noting the advantages of regulation by agencies over Congress).

276. *See generally* WEBSTER, *supra* note 53, at 3–4 (surveying various historical approaches to the definition).

277. *Emergency*, THE MERRIAM-WEBSTER DICTIONARY 238 (2022).

described emergencies with respect to their urgency, typicality, and the vital public interests at stake.[278] But perhaps most comprehensive is the definition asserted by the Congressional Research Service (CRS) in its report on emergency powers, where it consolidated over 200 years of law to distill an "emergency" down to four elements:

> There are at least four aspects of an emergency condition. The first is its temporal character: An emergency is sudden, unforeseen, and of unknown duration. The second is its potential gravity: An emergency is dangerous and threatening to life and well-being. The third, in terms of governmental role and authority, is the matter of perception: Who discerns this phenomenon? The Constitution may be guiding on this question, but it is not always conclusive. Fourth, there is the element of response: By definition, an emergency requires immediate action but is also unanticipated and, therefore, as Corwin notes, cannot always be "dealt with according to rule."[279]

A judicial definition of an "emergency action" should incorporate these four components of an emergency. Accordingly, whether an agency rule is exempted from the MQD should depend on a court's weighing of four factors: (1) temporal character; (2) gravity; (3) perception; and (4) immediacy required in response. This Section discusses important considerations relevant to each of these factors. Because each emergency varies in applicability of these four aspects, the most fair and effective version of an emergency action exception would consider them all together with none having dispositive weight.

1. Temporal Character

As described by the CRS, emergencies are "sudden, unforeseen, and of unknown duration."[280] So too are the provisions meant to respond to them. Emergency grants of power are tied to the duration of the emergency through conditional and temporal limits, which ensure the authority only triggers when the emergency arises and dissipates when resolved.[281] As these limits enforce proper separation of powers, an emergency action

278. *See* Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 439–40 (1934) ("[I]f state power exists to give temporary relief from the enforcement of contracts in the presence of disasters due to physical causes such as fire, flood or earthquake, that power cannot be said to be non-existent when the urgent public need demanding such relief is produced by other and economic causes.").

279. WEBSTER, *supra* note 53, at 3–4.

280. *Id.* at 3.

281. *See supra* Part II.B.1.

exception to the MQD should only apply to exercises of authority which are subject to these limitations and issued pursuant to them.

All four rules at issue in the COVID-19 cases were time-limited in some way. The CDC's final eviction moratorium was set to expire on October 3, 2021—about two months after promulgation.[282] At that point, to continue the policy, the CDC would have had to review the triggering conditions and renew it, as it had with each previous iteration.[283] OSHA's ETS imposing the vaccine mandate required promulgation of a permanent standard within six months.[284] Once that period ended, OSHA would have had to engage in its typical rulemaking procedure.[285] The Secretary's loan forgiveness program was tied directly to the national emergency for COVID-19, set to expire at the end of the same year in which the emergency terminated.[286] Each of these rules were issued with specific expiration dates built into the emergency grant of power, which should weigh in favor of classifying them as emergency actions under the exception. CMS's vaccine mandate, however, is a more complicated case.

The vaccine mandate at issue in *Biden v. Missouri* was published as a general interim final rule under the Social Security Act, rather than through a particular emergency provision.[287] In this case, a final rule is statutorily required to replace the interim rule after three years, subject to "exceptional

282. Final Eviction Moratorium, *supra* note 7, at 43,244 ("This Order will expire on October 3, 2021 . . . .").

283. *See Alabama Realtors II*, 141 S. Ct. 2485, 2486–87 (2021) (describing the CDC's repeated renewal of its eviction moratorium).

284. OSHA Vaccine Mandate, *supra* note 5, at 61,406 ("ETSs are, by design, temporary in nature. Under section 6(c)(3), an ETS serves as a proposal for a permanent standard in accordance with section 6(b) of the OSH Act (permanent standards), and the Act calls for the permanent standard to be finalized within six months after publication of the ETS." (citing 29 U.S.C. § 655(c)(3))).

285. *See* 29 U.S.C. § 655(c)(3) ("The Secretary shall promulgate a standard under this paragraph no later than six months after publication of the emergency standard as provided in paragraph (2) of this subsection.").

286. *See* Loan Forgiveness Program, *supra* note 8, at 61,512 ("[A] waiver or modification identified in this document expires at the end of the award year in which the COVID-19 national emergency expires . . . .").

287. CMS Vaccine Mandate, *supra* note 1, at 61,567 (listing authorities to publish general regulations to administer Medicare and Medicaid programs); *cf.* Final Eviction Moratorium, *supra* note 7, at 43,251 ("This Order is not a rule within the meaning of the Administrative Procedure Act (APA) but rather an emergency action taken under the existing authority of 42 CFR 70.2.").

circumstances" and the Secretary's discretion.[288] In this way, the vaccine mandate was time-limited with only a temporary impact. Yet, this modifiable three-year time period is significantly longer than the mere months-long expiration dates of the rules in *Alabama Realtors* and *NFIB*.

Moreover, other indications by CMS in the rule's publication call into question its temporary nature. First, it specifically contemplated an extended timeline which affirms there is no hard expiration date.[289] Then, CMS disclaimed dependence on the existence of a Public Health Emergency, rejecting a potential condition for termination.[290] Lastly, the rule asserted the possibility of publication as a permanent rule.[291] Such explicit notice of extended application and potential permanence distinguishes CMS's rule from those of the other COVID-19 cases.[292] And while not certain, CMS's representations surely seem to undermine the merits of temporary emergency authorities.[293] These circumstances would likely lead a reviewing court to determine this factor against emergency action for CMS's rule.

Due to the transient nature of emergencies and their response provisions, an exception to the MQD which truly accounts for emergency actions should consider the temporal nature of the agency action—in other words, how the rule is tied to the duration of the emergency. Each of the rules from the COVID-19 cases except for *Biden v. Missouri* was sufficiently linked to the duration of their respective emergency conditions, weighing this

288. 42 U.S.C. § 1395hh(a)(3)(B); *see also* CMS Vaccine Mandate, *supra* note 1, at 61,574 ("Medicare interim final rules expire 3 years after issuance unless finalized.").

289. *See* CMS Vaccine Mandate, *supra* note 1, at 61,574 ("[A]lthough this IFC is being issued in response to the PHE for COVID-19, we expect it to remain relevant for some time beyond the end of the formal PHE[,] . . . nor is there a sunset clause.").

290. *See id.* ("[T]his rulemaking's effectiveness is not associated with or tied to the PHE declarations . . . .").

291. *See id.* ("Depending on the future nature of the COVID-19 pandemic, we may retain these provisions as a permanent requirement for facilities, regardless of whether the Secretary continues the ongoing PHE declarations.").

292. *Compare id.* (warning of extended application and rejecting potential termination conditions), *with* Final Eviction Moratorium, *supra* note 7 (addressing neither a specific end condition or extension), *and* OSHA Vaccine Mandate, *supra* note 5, at 61,403 (promising to terminate the rule when "grave danger from the virus no longer exists for the covered workforce").

293. *See supra* Part II.C.1 (explaining why temporary emergency powers are less intrusive on the separation of powers).

factor in favor of applying the exception. The temporal character of emergencies will often mirror their gravity, as the existence of dangerous conditions determine the duration of the responding authority.

2. Gravity

Another key aspect of emergencies is the degree of gravity implicated by the situation. Indeed, most emergency provisions require the agency to establish specific facts or circumstances before the power can be exercised in the first place.[294] So, the agency often makes its own determination of "gravity" before it even takes action. When addressing this factor, a court should consider whether the agency made specific findings of emergency conditions and the sufficiency of those findings.

The rules at issue in *Alabama Realtors*, *NFIB*, and *Biden v. Nebraska* each involved conditional findings before acting. The CDC's eviction moratorium was enacted pursuant to 42 C.F.R. § 70.2, which requires the Director of the CDC to first determine that current disease spread prevention measures are insufficient.[295] After such a finding the Director is authorized to take such measures as deemed "reasonably necessary."[296] Similarly, before OSHA can issue an ETS, the Secretary of Labor must establish that "employees are exposed to grave danger" and an emergency standard is "necessary" for their protection.[297] Finally, 20 U.S.C § 1098bb(a) gives the Secretary of Education waiver and modification power when "necessary in connection with a war or other military operation or national emergency."[298]

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294. *See supra* notes 214–22 and accompanying text (describing the conditional nature of emergency provisions).

295. 42 C.F.R. § 70.2 (2024) ("Whenever the Director of the Centers for Disease Control and Prevention determines that the measures taken by health authorities . . . are insufficient to prevent the spread of any of the communicable diseases . . . he/she may take such measures to prevent such spread of the diseases as he/she deems reasonably necessary . . . .").

296. *Id.*

297. *See* 29 U.S.C. § 655(c)(1) ("The Secretary shall provide . . . for an emergency temporary standard to take immediate effect upon publication in the Federal Register if he determines (A) that employees are exposed to grave danger from exposure to substances or agents . . . and (B) that such emergency standard is necessary to protect employees from such danger.").

298. *See* 20 U.S.C § 1098bb(a) ("[T]he Secretary of Education . . . may waive or modify any statutory or regulatory provision applicable to the student

In all three cases, the agency head made their respective conditional findings with regard to COVID-19 and published them along with the rules.[299]

However, courts should be wary of just taking an agency at its word. Exempting agency action from MQD scrutiny based on the agency's own determination of conditions could easily create a slippery slope to widespread abuse of the exception. Rather than simply asking whether the agency published the statutorily required finding along with the rule, a court should also inquire to some degree into the basis for that finding. For example, the Secretary's mere conclusory statements that harm had been found and necessitated the program, may be insufficient without further details or elaboration.[300] In contrast, the breadth of data and studies considered by the agencies in *Alabama Realtors* and *NFIB* would surely be sufficient to count this factor towards exemption in those cases.[301] But the presence or absence of required findings should not alone be dispositive.

CMS's vaccine mandate did not require conditional findings like the rules from the other COVID-19 cases. It was instead issued as an interim final rule under the Social Security Act's general authority to issue regulations, in addition to several

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financial assistance programs under title IV of the Act [20 U.S.C. 1070 et seq.] as the Secretary deems necessary in connection with a war or other military operation or national emergency . . . .").

299. *See* Final Eviction Moratorium, *supra* note 7, at 43,251 ("I have determined based on the information below that issuing a temporary halt in evictions in counties experiencing substantial or high levels of COVID-19 transmission constitutes a reasonably necessary measure under 42 CFR 70.2 to prevent the further spread of COVID-19 throughout the United States. I have further determined that measures by states, localities, or territories that do not meet or exceed these minimum protections are insufficient to prevent the interstate spread of COVID-19."); OSHA Vaccine Mandate, *supra* note 5, at 61,407 ("OSHA has determined that occupational exposure to SARS-CoV-2, including the Delta variant . . . presents a grave danger to unvaccinated workers in the U.S. . . ."); Loan Forgiveness Program, *supra* note 8, at 61,513 ("The Secretary determined that the financial harm caused by the COVID-19 pandemic has made the waivers and modifications described in this document necessary to ensure that affected individuals are not placed in a worse position financially with respect to their student loans because of that harm.").

300. *See* Loan Forgiveness Program, *supra* note 8, at 61,513 (failing to support conclusory findings).

301. *See* sources cited *supra* note 261.

statutes for specific providers.[302] None of these required any specific findings by CMS, and indeed, none were made in the publication of the rule.[303] Yet, CMS supported its rule with numerous studies and observations on COVID-19, citing them as "strong justification as to the need" for the mandate.[304] So while the CMS mandate did not statutorily require a finding of gravity or specific emergency conditions, the support for its rule greatly outweighed that of the loan forgiveness program despite an official finding of necessity there.

A court assessing the gravity under which an agency operated should carefully consider both whether an official finding was required and made, in addition to the support the agency gives for that finding. This will prevent application of the exception to policies which merely give a finding without evidence (like the loan forgiveness program) and preserve exemption even for those well-researched programs which did not require findings under their statute (like the CMS vaccine mandate).

3. Perception

It is also critical to consider who within the government has perceived and established that an emergency exists.[305] Analysis of the perception factor should consider whether an official emergency had been declared when the agency acted and whether the action was specifically authorized by a particular declaration.[306]

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302. *See* 42 U.S.C. § 1395hh(a)(1) ("The Secretary shall prescribe such regulations as may be necessary to carry out the administration of the insurance programs under this subchapter."); *see also* CMS Vaccine Mandate, *supra* note 1, at 61,567 tbl.1 (listing authorities).

303. *See generally* CMS Vaccine Mandate, *supra* note 1.

304. *Id.* at 61,567.

305. The court can look to the Constitution and relevant statutes for guidance here, although, they can often be somewhat ambiguous on who gets to make these determinations and when. *See* WEBSTER, *supra* note 53, at Summary ("With the exception of the habeas corpus clause, the Constitution makes no allowance for the suspension of any of its provisions during a national emergency.").

306. Contrast official government recognitions with offhand statements about the situation's status. *See Biden Says COVID-19 Pandemic Is "Over" in U.S.*, CBS NEWS (Sept. 19, 2022), https://www.cbsnews.com/news/biden-covid-pandemic-over [https://perma.cc/N9AE-UDNZ] ("The pandemic is over. We still have a problem with COVID. We're still doing a lotta work on it. . . . But the pandemic is over . . . ." (quoting President Biden)).

Governmental departments indicate recognition of a nationwide emergency situation in several ways. While the President can declare a broader "national emergency" under the National Emergencies Act,[307] certain administrative bodies can also issue more topic-specific declarations. "Public health" emergencies are issued by the Secretary of Health and Human Services,[308] while "domestic" and "military" emergencies are determined by the Secretaries of Homeland Security and Defense, respectively.[309] The President also has the power under the Stafford Act to establish more localized emergencies within one or more states.[310] But regardless of specific procedure, each official determination of emergency is still subject to conditional, temporal, and mandatory review limits.[311]

All four rules at issue in the COVID-19 cases were issued during the president's proclamation of national emergency, yet varied in their relation to that declaration.[312] For example, the Secretary of Education's loan forgiveness program specifically noted its dependence on the declaration of national emergency

307. *See* 50 U.S.C. § 1621(a).

308. *See* 42 U.S.C. § 247d(a).

309. *See* 21 U.S.C. § 360bbb-3(b)(1)(B)–(C).

310. *See* 42 U.S.C. §§ 5122(1)–(2), 5170(a), 5191(a) (defining presidential determinations of "emergency" and "major disaster" and setting procedure to request declarations); *Overview of Stafford Act Support to States*, FED. EMERGENCY MGMT. AGENCY 1, https://www.fema.gov/pdf/emergency/nrf/nrf-stafford.pdf [https://perma.cc/HDK4-ZE67] (describing the process by which local governments can get aid from the Federal Emergency Management Agency (FEMA) during an emergency). After such a determination, the President can direct federal agencies to assist local government response in a variety of ways, including the use of federal resources and authority, technical guidance, and distribution of food, medicine, and other supplies. *See* 42 U.S.C. § 5192(a).

311. *See, e.g.*, Megan Trimble, *When Can a President Declare a National Emergency?*, U.S. NEWS & WORLD REP. (Jan. 8, 2019), https://www.usnews.com/news/national-news/articles/2019-01-08/what-is-a-national-emergency-and-when-can-a-president-legally-declare-one [https://perma.cc/K4LK-ZLTU] ("Congress, however, can check the executive branch and overrule the president's use of the [National Emergencies Act] by passing a joint resolution out of the House and Senate."); *see also supra* notes 226–228 and accompanying text (describing the temporary nature of emergency provisions which rely on official declarations of emergency).

312. *See* Proclamation No. 9994, 85 Fed. Reg. 15,337 (Mar. 18, 2020) (declaring a national emergency); Final Eviction Moratorium, *supra* note 7; OSHA Vaccine Mandate, *supra* note 5; CMS Vaccine Mandate, *supra* note 1; Loan Forgiveness Program, *supra* note 8.

to exercise the waiver and modification authority.[313] Rules such as this which rest their authority on the government's official perception of the very emergency they respond to should be exempt under this factor.

However, the rules in the other three COVID-19 cases did not derive their authority directly from a declaration, despite being issued during the state of emergency. The CDC's eviction moratorium and OSHA's ETS only required conditional findings, rather than an official state of emergency.[314] And not only did CMS not require an official declaration to issue its vaccine mandate, but the order explicitly stated its independence from the public health emergency in place.[315] In these cases, the mere fact that the rule was promulgated contemporaneously with an outstanding emergency should not alone determine this factor.[316] However, a court should still look at any outstanding emergencies, whether their timing aligns with the rule at issue, and any similarities between the problems raised and responded to. Here, all four agency actions from the COVID-19 cases should be sufficiently related to the declared emergencies to satisfy the perception factor.

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313. *See* Loan Forgiveness Program, *supra* note 8, at 61,512 ("The waivers and modifications in this document apply only to the national emergency concerning the coronavirus disease 2019 (COVID-19 pandemic).").

314. *See* Final Eviction Moratorium, *supra* note 7, at 43,251 ("I have determined based on the information below that issuing a temporary halt in evictions in counties experiencing substantial or high levels of COVID-19 transmission constitutes a reasonably necessary measure under 42 CFR 70.2 . . . ."); OSHA Vaccine Mandate, *supra* note 5, at 61,405 ("[T]he Secretary shall provide . . . for an emergency temporary standard . . . if the Secretary makes two determinations: That employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards, and that such emergency standard is necessary to protect employees from such danger." (citing 29 U.S.C. § 655(c)(1))).

315. *See* CMS Vaccine Mandate, *supra* note 1, at 61,574 ("[T]his rulemaking's effectiveness is not associated with or tied to the PHE declarations . . . ."). *But cf. id.* at 61,560 (finding authority to issue waivers (but not the vaccine mandate) due to declarations under the National Emergencies and Stafford Acts).

316. Broadening the exception to all agency actions taken during a declaration would be obviously problematic. For example, the EPA's interpretation of the Clean Air Act at issue in *West Virginia v. EPA* (which was issued during the COVID-19 national emergency) could have met the exception despite no assertion whatsoever that it meant to respond to the pandemic. 142 S. Ct. 2587 (2022).

In terms of the government perception element, a court should look at the various types of official emergencies in place and the proximity of the rules at issue to the declarations. Rules which directly derive their authority should easily lean this factor towards exemption, while those merely issued during the emergency warrant greater skepticism.

4. Immediacy Required in Response

Lastly, an emergency can be characterized with regards to how immediately necessary it is for the government to respond. The court could assess such imminence by considering a variety of things, including the seriousness of the danger, the timeline involved, and the resources already available—although these may overlap with the analysis of temporal character and gravity.[317] It is also worth noting that the "good cause" exception already provides a mechanism by which agencies address the urgency of a proposed rule. Agencies can invoke this rule when time is of the essence to forego procedure and act immediately. Courts determining immediacy should look at whether the exception would apply and whether the agency utilized it.

The "good cause" exception allows agencies to suspend notice and comment rulemaking when "impracticable."[318] "Impracticability" applies in urgent emergency situations requiring immediate action, such as the imminent crash of an airplane or mine workers trapped by an explosion.[319] Impracticability could also apply to the dangers of a pandemic, as found by three out of the four agencies in the COVID-19 cases.[320] The fact that the

317. *See supra* Parts III.A.1–A.2.

318. *See* 5 U.S.C. § 553(b).

319. *See* Mack Trucks, Inc. v. EPA, 682 F.3d 87, 93 (D.C. Cir. 2012) ("For the sake of comparison, we have suggested agency action could be sustained on this basis [impracticability] if, for example, air travel security agencies would be unable to address threats posing 'a possible imminent hazard to aircraft, persons, and property within the United States,' or if 'a safety investigation shows that a new safety rule must be put in place immediately,' or if a rule was of 'life-saving importance' to mine workers in the event of a mine explosion." (first quoting Jifry v. Fed. Aviation Admin., 370 F.3d 1174, 1179 (D.C. Cir. 2004); and then quoting Council of the S. Mountains, Inc. v. Donovan, 653 F.2d 573, 581 (D.C. Cir. 1981))).

320. Final Eviction Moratorium, *supra* note 7, at 43,251 ("[T]here is good cause to dispense with prior public notice and comment and a delay in effective date."); OSHA Vaccine Mandate, *supra* note 5, at 61,505 ("OSHA invokes the 'good cause' exemption . . . ."); CMS Vaccine Mandate, *supra* note 1, at 61,586

CDC's eviction moratorium and the vaccine mandates issued by OSHA and CMS each used the good cause exception for impracticability should push these rules closer to exemption under the immediacy factor. In contrast, the Secretary of Education simply published the loan forgiveness plan in the federal register per normal procedure.[321] No assertion of "good cause" under any prong was ever made.[322] Indeed, the financial harms of COVID-19 may have required less immediate action than the infection rates to which the eviction and vaccine policies responded.

However, once again, a court should hesitate to simply tie this factor to whether good cause for impracticability was invoked. Considering only an agency's choice to skip procedure could easily result in the exception swallowing the rule. The "good cause" exception already accounts for a staggering portion of rules published without a notice of proposed rulemaking.[323] Allowing each use to be exempt from the MQD could cripple the doctrine's effectiveness—not to mention the further incentive to claim impracticable good cause in the first place. Consequently, a court should rely on existing case law to look at the particular "impracticability" of procedure under the circumstances and seek to avoid rewarding an agency's boilerplate invocation of the section.

Applicability of the good cause exception for impracticability can be helpful guidance on the immediacy required in response to an emergency. Having applied the exception, the eviction

("We find good cause to waive notice of proposed rulemaking under the APA . . . .").

321. *See* Loan Forgiveness Program, *supra* note 8, at 61,512; Biden v. Nebraska, 143 S. Ct. 2355, 2364 (2023) ("[T]he Secretary issued his proposal to cancel student debt under the HEROES Act. Two months later, he published the required notice of his 'waivers and modifications' in the Federal Register.").

322. *See* Loan Forgiveness Program, *supra* note 8.

323. *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-13-21, FEDERAL RULEMAKING: AGENCIES COULD TAKE ADDITIONAL STEPS TO RESPOND TO PUBLIC COMMENTS, at Highlights (2012) ("Agencies in GAO's sample used the 'good cause' exception for 77 percent of major rules and 61 percent of nonmajor rules published without an NPRM."); *see also* JARED P. COLE, CONG. RSCH. SERV., R44356, THE GOOD CAUSE EXCEPTION TO NOTICE AND COMMENT RULEMAKING: JUDICIAL REVIEW OF AGENCY ACTION 1 (2016) ("Of those rules issued without an NPRM, agencies justified their action most often by invoking the good cause exception."); Kyle Schneider, Note, *Judicial Review of Good Cause Determinations Under the Administrative Procedure Act*, 73 STAN. L. REV. 237, 245–48 (2021) (explaining the widespread use of and continued reliance on the "good cause" exception).

moratorium and both vaccine mandates would have good cases for exemption under this factor, while its absence from the loan forgiveness program may lean the other way.

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Whether a rule is an "emergency action" exempt from the MQD should turn on a court's comprehensive consideration of its temporal character, gravity, perception, and the immediacy required in response. Due to the unique nature of each emergency action, equal consideration of each factor would best ensure that no true "emergency actions" slip through the cracks. The rules in the COVID-19 cases which meet at least three of the factors, would all likely qualify as "emergency actions." The loan forgiveness program, which falls short in gravity and immediacy of response, may be a closer call. In each case, a court's own broader or narrower construction of each factor could turn the tide depending on the facts. Regardless, the inquiry should not end with classification as an "emergency action."

B. A CAVEAT FOR PRIOR CONGRESSIONAL ACTION

Even those administrative rules meeting the test for an "emergency action" still should not be exempt from the MQD if Congress has already implemented the policy in question. An agency's intrusion into previously legislated policy calls into question whether Congress would delegate the same power to the executive. In these cases, the emergency action exception should not apply; rather, the MQD should remain to prevent unintentional delegations and uphold the separation of powers.[324]

The best example of such a case is *Alabama Realtors*.[325] The CDC's moratorium would likely count as an "emergency action,"[326] but as distinguished from the other COVID-19 cases, Congress had already enacted the policy at issue in *Alabama Realtors*.[327] By the time the CDC imposed its initial rule,

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324. *See supra* notes 208–13 and accompanying text (explaining the separation of powers values which the MQD seeks to protect).

325. *Alabama Realtors II*, 141 S. Ct. 2485 (2021); *see also supra* Part I.C (exploring *Alabama Realtors*).

326. *See supra* Part III.A (explaining and defining "emergency actions").

327. *See* Coronavirus Aid, Relief, and Economic Security Act (CARES Act), Pub. L. No. 116-136, § 4024, 134 Stat. 281, 492–94 (2020) (codified at 15 U.S.C. § 9058) (establishing Congress's temporary moratorium on eviction filings). *Compare Alabama Realtors II*, 141 S. Ct. at 2486 ("In March 2020, Congress

Congress had passed an eviction moratorium and then subsequently decided not to renew it.[328] This is critical. The fact that Congress had already imposed the same policy indicates where it meant that authority to lie. Moreover, it is powerful evidence that it chose not to delegate to the CDC, instead reserving that power for the legislative branch.[329] It is difficult to say that Congress meant to give discretion to impose a moratorium after passing the policy on its own and then determining it was no longer necessary.[330] Accordingly, in cases like *Alabama Realtors*, where the agency's claimed authority has already been exercised by Congress, the exception to the MQD should not apply. In contrast, because Congress had not imposed vaccine mandates akin to those at issue in *NFIB* and *Biden v. Missouri*, or the loan forgiveness plan in *Biden v. Nebraska*, those rules would still meet the exception.[331]

Alabama Realtors does, however, involve further nuance worth mentioning. Whereas Congress did impose its own moratorium first, indicating a reservation of that power, it also eventually extended the moratorium imposed by the CDC.[332]

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passed the Coronavirus Aid, Relief, and Economic Security Act . . . . [T]he Act imposed a 120-day eviction moratorium for properties that participated in federal assistance programs or were subject to federally backed loans."), *with* Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., Occupational Safety & Health Admin., 142 S. Ct. 661, 662 (2022) (per curiam) ("OSHA has never before imposed such a mandate. Nor has Congress.").

328. *Alabama Realtors II*, 141 S. Ct. at 2486 ("When the eviction moratorium expired in July, Congress did not renew it.").

329. *See* Ala. Ass'n of Realtors v. U.S. Dep't of Health & Hum. Servs., 539 F. Supp. 3d 29, 41 (D.D.C. 2021) (finding Congress did not mean to delegate authority to solve this "important question" that "Congress itself has twice addressed").

330. *See Alabama Realtors II*, 141 S. Ct. at 2486 ("Concluding that further action was needed, the CDC decided to do what Congress had not.").

331. *See NFIB*, 142 S. Ct. at 662–63 ("OSHA has never before imposed such a mandate. Nor has Congress. Indeed, although Congress has enacted significant legislation addressing the COVID-19 pandemic, it has declined to enact any measure similar to what OSHA has promulgated here."); Biden v. Nebraska, 143 S. Ct. 2355, 2373 (2023) ("[T]he Secretary's assertion of administrative authority has 'conveniently enabled [him] to enact a program' that Congress has chosen not to enact itself." (alteration in original) (quoting West Virginia v. EPA, 142 S. Ct. 2587, 2596 (2022))).

332. Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, § 502, 134 Stat. 1182, 2078–79 (2020) (codified at 42 U.S.C. § 264 note) ("The order issued by the Centers for Disease Control and Prevention . . . entitled 'Temporary Halt

Congress's affirmative decision to extend the exercise of authority by an agency could be seen as a ratification of that authority; indeed, this argument was raised by HHS in the lower courts.[333] On the case's first appearance before the D.C. Circuit Court of Appeals, the court agreed with HHS, finding Congress had chosen "specifically to embrace" the CDC's moratorium.[334] Although never expressly rejected, subsequent opinions omitted reference to this argument, seemingly treating as dispositive an earlier concurrence by Justice Kavanaugh and subsequent statements by the Biden Administration.[335] Moreover, while the Court has recognized Congress's ability to "give the force of law to official action unauthorized when taken,"[336] it must indicate its

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in Residential Evictions To Prevent the Further Spread of COVID-19' is extended through January 31, 2021 . . . ." (citations omitted)); *Alabama Realtors II* at 2487 ("The CDC's moratorium was originally slated to expire on December 31, 2020. But Congress extended it for one month as part of the second COVID-19 relief Act." (citation omitted)).

333. *See Alabama Realtors*, 539 F. Supp. 3d at 42 ("[T]he Department argues that Congress ratified the agency's action when it extended the moratorium in the Consolidated Appropriations Act."); Ala. Ass'n of Realtors v. U.S. Dep't of Health & Hum. Servs., 539 F. Supp. 3d 211, 215 (D.D.C. 2021) (considering the same argument when deciding whether to issue a stay).

334. Ala. Ass'n of Realtors v. U.S. Dep't of Health & Hum. Servs., No. 21-5093, 2021 WL 2221646, at *2 (D.C. Cir. June 2, 2021) ("Congress deliberately chose legislatively to extend the HHS moratorium and, in doing so, specifically to embrace HHS's action . . . .").

335. *See* Ala. Ass'n of Realtors v. U.S. Dep't of Health & Hum. Servs., 557 F. Supp. 3d 1, 4 (D.D.C. 2021) ("Justice Kavanaugh wrote, 'clear and specific congressional authorization (via new legislation) would be necessary for the CDC to extend the moratorium.'" (quoting *Alabama Realtors I*, 141 S. Ct. 2320, 2321 (2021) (mem.) (Kavanaugh, J., concurring))); *id.* ("[T]he Biden Administration repeatedly stated that it would not further extend the eviction moratorium in light of the Supreme Court's ruling, which it interpreted to 'mak[e] clear' the option 'is no longer available.'"); *see also* Press Release, White House, Statement by White House Press Secretary Jen Psaki on Biden-Harris Administration Eviction Prevention Efforts (July 29, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/29/statement-by-white-house-press-secretary-jen-psaki-on-biden-harris-administration-eviction-prevention-efforts [https://perma.cc/6FCX-S37T] ("President Biden would have strongly supported a decision by the CDC to further extend this eviction moratorium to protect renters at this moment of heightened vulnerability. Unfortunately, the Supreme Court has made clear that this option is no longer available.").

336. Swayne & Hoyt, Ltd. v. United States, 300 U.S. 297, 301–02 (1937) ("It is well settled that Congress may, by enactment not otherwise inappropriate, 'ratify . . . acts which it might have authorized,' and give the force of law to official action unauthorized when taken." (citation omitted)).

intention explicitly.[337] Thus, Congress's mere extension of the CDC's moratorium likely fell short of the clear language required for ratification.[338]

While the CDC's rule may be considered preempted and outside the exception to the MQD, the simple fact of past congressional action will not always be dispositive. Cases where Congress *does* explicitly ratify with clear language, despite having taken that action in the past, should still qualify for the exception.[339] These considerations make sure the exception continues to serve Congress's true intent, while still exempting emergency actions from the MQD at large.

C. THE SEPARATION OF POWERS IS PRESERVED BY OTHER CHECKS AND BALANCES

A potential concern raised by exempting emergency actions from major questions scrutiny is the greater possibility for abuse of executive power. One could imagine an agency claiming "emergency" authority to act well beyond the scope of its delegation and effect massive political or economic change. But importantly, this exception does not provide blanket permission for all rules which meet the exception. Moreover, it simply exempts them from one overbearing restriction: the MQD.[340] In addition to conditional and temporary aspects of emergency delegations which limit separation of powers concerns in the first place,[341] narrow application of the exception, judicial checks on administrative rulemaking, and the tools at Congress's disposal sufficiently protect against abuse.

First, the exception inherently screens more substantial and permanent exercises of authority through its narrow triggering conditions.[342] In order for the exception to apply, the rule must

337. *See* United States v. Heinszen, 206 U.S. 370, 390 (1907) ("[A]s to those things to which the alleged ratifying act clearly applied, ratification had resulted.").

338. *See Alabama Realtors*, 539 F. Supp. 3d at 215–16 (relaying cases where language has been found clear enough to uphold ratification).

339. See *id.* for a survey of cases where Congress ratified an agency's action.

340. *See supra* Part II.A (illustrating why the doctrine asks the wrong questions of emergency provisions).

341. *See supra* Part II.B (discussing the conditional and temporary aspects of emergency actions which limit executive power).

342. *See supra* Parts III.A–III.B (explaining the exception and its limited activating conditions).

be an "emergency action" which is not preempted by congressional policy.[343] To prevent excessive invocation of the exception, courts can shape the scope of the "emergency" factors as narrowly as necessary. As for the possibility that Congress reserved the authority in question for itself, the second part of the test screens such policies out of the exception where there is prior legislation to that effect. These ensure that the MQD will only step aside for emergencies and will not permit any massive or permanent expansion of administrative power.[344] Additionally, all administrative actions still must be proper exercises of delegated authority.[345] So, despite their tendency to address "major questions,"[346] exempt emergency actions would still be subject to all the same judicial and legislative checks on administrative power.

Central to judicial review, the APA provides several grounds on which a reviewing court can strike down agency actions.[347] First, the court can "hold unlawful" any agency action which is "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right."[348] After *Loper Bright Enterprises v. Raimondo*, agency decisions no longer receive *Chevron* deference and courts can exercise "independent judgment" over the legality of an agency's interpretation.[349] So where a statute is ambiguous as to the agency's ability to policy-make, courts need not presume the action is lawful.[350] This protects against any "abuses" which unreasonably find support in a statute. Courts may also strike down actions which are "arbitrary" or "capricious."[351] This addresses rules which have insufficient rationale or a significant

343. *See supra* Parts III.A–III.B.

344. *See supra* Part II.B (discussing how the conditional and temporary nature of emergency provisions keeps them from implicating separation of powers concerns).

345. *See supra* note 58 and accompanying text.

346. *See supra* notes 202–03 and accompanying text.

347. *See* 5 U.S.C. § 706(2) (listing circumstances in which a reviewing court shall "hold unlawful and set aside" agency actions).

348. *Id.* § 706(2)(C).

349. Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2273 (2024).

350. *See supra* note 61.

351. *See* 5 U.S.C. § 706(2)(A) ("The reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious . . . .").

defect in the decision-making process.[352] And in extreme cases, where abuse of this exception would violate the Constitution, the affected parties can always sue the agency in federal court.[353]

Finally, if all else fails and an excessive exercise of administrative power slips through the judicial cracks, Congress itself has tools to disapprove an agency's use of delegation.[354] First, congressional oversight hearings have a powerful effect on agency behavior, giving Congress a way to monitor and shape undesirable administrative action.[355] Congress also controls agency funding, providing considerable influence over agency decision-making via appropriations restrictions.[356] Limiting appropriations riders can prevent an agency from using funds for specific, undesirable actions.[357] Lastly, Congress can pass corrective legislation under the Congressional Review Act (CRA) when it

352. *See* Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) ("[A]n agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.").

353. *See* 5 U.S.C. § 706(2)(C) ("The reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . contrary to constitutional right, power, privilege, or immunity . . . ."); 28 U.S.C. § 1331 ("The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.").

354. *See generally* Baumann, *supra* note 44, at 481 (summarizing the "hard" and "soft" powers Congress has to defend itself); TODD GARVEY & SEAN M. STIFF, CONG. RSCH. SERV., R45442, CONGRESS'S AUTHORITY TO INFLUENCE AND CONTROL EXECUTIVE BRANCH AGENCIES (2023) (describing the various ways Congress can affect agency rulemaking); William Alan Nelson, *Unfaithful Execution of the Law: Congressional Interference with Agency Decision-Making*, 42 SETON HALL LEGIS. J. 96 (2017) (same).

355. Brian D. Feinstein, *Congress in the Administrative State*, 95 WASH. U. L. REV. 1187, 1193 (2018) ("[C]ongressional oversight hearings . . . provide Congress with a powerful tool to influence administration."); Baumann, *supra* note 44, at 524 (discussing Feinstein's findings).

356. CURTIS W. COPELAND, CONG. RSCH. SERV., RL34354, CONGRESSIONAL INFLUENCE ON RULEMAKING AND REGULATION THROUGH APPROPRIATIONS RESTRICTIONS 7 (2008).

357. *Id.*; *see also id.* at 8–14 (describing findings on the four categories of provisions in the Consolidated Appropriations Act for 2008, which restrict agency regulations).

disagrees with an agency's use of delegated power.[358] Although left virtually untouched for the first two decades after its passing in 1996, the CRA has seen an exponential increase in usage in the past eight years.[359] Not only can Congress invalidate an agency's rule under the Act, but it can also prevent future attempts to pass similar policies.[360] Finally, where an agency promulgates a rule outside what Congress intended it to, subsequent legislation can clarify and override the mistaken delegation. In this way, Congress always has the final say on the delegations it makes to the executive branch.

Even where an agency action meets the emergency action exception contemplated here, other checks and balances of the judicial and legislative branches provide sufficient protection from any abuse of executive power. This gives courts room to lift the MQD's oppressive hold over emergency actions and judge them by a fairer standard.

* * *

An emergency action exception to the MQD should consider the emergency's temporal character, gravity, perception, and the immediacy required in response. However, previous implementation by Congress may give reason to hesitate, unless explicitly ratified. Administrative rules which are truly "emergency actions" and have not been precluded by congressional policy should be exempt from MQD scrutiny. As they are emergency actions and were not preempted by Congress, the rules at issue in *NFIB*, *Biden v. Nebraska*, and *Biden v. Missouri* would likely meet the exception. But the eviction moratorium from *Alabama Realtors* would still be subject to the MQD due to Congress's

358. *See* 5 U.S.C. §§ 801–808; MAEVE P. CAREY & CHRISTOPHER M. DAVIS, CONG. RSCH. SERV., R43992, THE CONGRESSIONAL REVIEW ACT (CRA): FREQUENTLY ASKED QUESTIONS 1 (2021).

359. *See Federal Agency Rules Repealed Under the Congressional Review Act*, BALLOTPEDIA (last updated Nov. 2024), https://ballotpedia.org/Federal_agency_rules_repealed_under_the_Congressional_Review_Act [https://perma.cc/88RV-TVB9] (listing every rule repealed under the CRA).

360. 5 U.S.C. § 801(b)(2) ("A rule that does not take effect (or does not continue) under paragraph (1) may not be reissued in substantially the same form, and a new rule that is substantially the same as such a rule may not be issued, unless the reissued or new rule is specifically authorized by a law enacted after the date of the joint resolution disapproving the original rule."); *see also* CAREY & DAVIS, *supra* note 358, at 2.

prior action in that case. Had this exception been applied to the COVID-19 cases, these crucial pandemic relief policies would have had a fair shot and likely would have been upheld. Going forward, an exception with these parameters would avoid the uncomfortable application of the MQD to emergency actions and remain faithful to Congress's purposeful delegations of broad emergency authority, even with respect to major questions.

CONCLUSION

The MQD serves as a substantial restriction on emergency administrative authority, as is evident in its use to strike down responses to the COVID-19 pandemic. However, the very nature of emergency provisions is such that they are meant to provide broad discretionary authority to respond to unforeseeable problems. This is why the MQD's demand for clear foresight is the wrong question to ask when it comes to emergency provisions, as supported by the Court's holding in *Biden v. Missouri*. Even the separation of powers values which the doctrine seeks to preserve are not implicated due to the conditional and temporary nature of emergency actions. Furthermore, the benefits of delegation, each of which are heightened in a state of emergency, are frustrated by the doctrine's restrictions. Thus, an exception to the MQD is necessary for emergency administrative actions.

Such an exception should apply only to agency actions which respond to an emergency and have not been preempted by congressional policy. Defining the scope of an "emergency action" for the purposes of this exception should consider the situation's temporal character, gravity, perception, and imminence. But if Congress has already imposed the policy at issue, even true emergency actions should not be exempt from major questions scrutiny.

Applying an emergency action exception with these considerations, in addition to the typical judicial and legislative checks on administrative power, would ensure agencies are able to respond to emergencies in the way Congress intended. At the very least, vital emergency policies issued with proper discretion may stand a chance before a reviewing court.

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