TALK SANITARY TO ME: HOW THE MIDDLE DISTRICT OF FLORIDA INTERPRETED THE PUBLIC HEALTH SERVICE ACT TO END THE CDC MASK MANDATE

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I. INTRODUCTION

Since the world was introduced to the novel COVID-19 virus and witnessed its effects on everyday life, much legal and political discussion has centered around the global public health efforts instituted by government entities to slow the spread of COVID-19.[1] In the United States, it has generally been understood that the Centers for Disease Control and Prevention ("CDC") has authority to respond to public health emergencies.[2] In response to the domestic spread of COVID-19, certain restrictions were imposed by the CDC to respond to the "highly contagious character and the devastating effects of [COVID-19]."[3] Public response to COVID-19 restrictions, such as travel restrictions,[4] exemplify the challenge of balancing bodily autonomy and choice[5] with the need for government intervention to implement measures responsive to a public health crisis.[6] Two recent rulings from the United States District Court for the Middle District of Florida demonstrate this challenge, with the crux of each ruling falling upon the Court's statutory interpretation of "sanitation" as it appears in the text of the Public Health Service Act of 1944.[7] This Note serves to compare the analyses undertaken in these two cases and to provide further analysis of the possible meaning of "sanitation" as it was likely

[1] *See, e.g.*, Claire Salama, *First Lessons from Government Evaluations of COVID-19 Responses: A Synthesis*, OECD (Jan. 21, 2022), https://read.oecd-ilibrary.org/view/?ref=1125_1125436-7j5hea8nk4&title=First-lessons-from-government-evaluations-of-COVID-19-responses. The OECD also has a portion of its website dedicated to the multitude of policy responses related to the COVID-19 pandemic. *See Key Policy Responses from the OECD*, OECD, https://www.oecd.org/coronavirus/en/policy-responses (last visited Dec. 8, 2022).

[2] *See* Joe Hernandez & Selena Simmons-Duffin, *The Judge Who Tossed Mask Mandate Misunderstood Public Health Law, Legal Experts Say*, NPR (Apr. 19, 2022, 6:23 PM), https://www.npr.org/sections/health-shots/2022/04/19/1093641691/mask-mandate-judge-public-health-sanitation.

[3] Linda Chiem, *Separate Fla. Judge Backs CDC Mask and Testing Mandates*, LAW360 (May 2, 2022, 6:52 PM), https://www.law360.com/articles/1489230/separate-fla-judge-backs-cdc-mask-and-testing-mandates.

[4] Requirement for Persons to Wear Masks While on Conveyances and at Transportation Hubs, 86 Fed. Reg. 8025, 8029–30 (Feb. 3, 2021).

[5] *See* Heather Murphy & Charlie Savage, *Who Ended the Travel Mask Mandate? A Vaccine Critic, a Florida Judge and 2 Anxious Travelers*, N.Y. TIMES (Apr. 25, 2022), https://www.nytimes.com/2022/04/25/travel/mask-mandate-overturn.html.

[6] Chiem, *supra* note 3.

[7] *See* Wall v. CDC, No. 21-CV-975, 2022 U.S. Dist. LEXIS 93556 (M.D. Fla. Apr. 29, 2022); Health Freedom Def. Fund, Inc. v. Biden, No. 21-CV-1693, 2022 U.S. Dist. LEXIS 71206 (M.D. Fla. Apr. 18, 2022).

understood when Congress enacted the Public Health Service Act of 1944. Because this Note focuses solely on statutory interpretation and the interpretive devices used to define "sanitation," this Note does not examine the relationship between the CDC's challenged action and the Administrative Procedure Act or any claims made against the CDC arising therefrom.

Part II of this Note begins with a summary of the outbreak and identification of COVID-19 and includes a subsequent discussion of the public health measures implemented by the United States government with respect to the use of public transportation in an effort to curb the spread of COVID-19. Then, the procedural history is outlined for the two federal district court cases that are the subject of this Note—*Wall v. CDC*[8] and *Health Freedom Defense Fund, Inc. v. Biden*.[9] These two cases reach conflicting conclusions on the meaning of the term "sanitation" as it appears in the Public Health Service Act of 1944.[10] Part III begins with an introduction of the case law that established the standard for judicial deference to executive agencies where Congress intended to delegate authority to these agencies to enforce certain laws. Part III continues with a discussion of the effects of judicial deference to agencies when the statutory language of a challenged law is found to be ambiguous with respect to delegation. Part IV presents the five main methods of statutory interpretation and Part V provides a non-exhaustive analysis of the tools of statutory interpretation used in the two subject cases from the Middle District of Florida. Finally, Part VI briefly analogizes the conflicting interpretations of "sanitation" in these two Middle District of Florida cases before concluding, based on the aforementioned interpretive devices and analyses, that "sanitation" could in fact include public health measures requiring masks on public conveyances. Under that interpretation, the CDC did not overstep its authority delegated to it by Congress through the Public Health Service Act of 1944, and the CDC Mask Mandate was a permissible use of the CDC's authority.

[8] 2022 U.S. Dist. LEXIS 93556.

[9] 2022 U.S. Dist. LEXIS 71206.

[10] *See* discussion *infra* Sections V.A–B.

II. BACKGROUND

A. The COVID-19 Outbreak

On 31 December 2019, the Wuhan Municipal Health Commission in China reported a cluster of patients infected with pneumonia.[11] The etiology of the outbreak was unknown at the time, but it was noted that some of the infected patients worked in the Huanan Seafood market.[12] On 1 January 2020, the Huanan Seafood market was closed for "environmental sanitation and disinfection."[13] Based on public health efforts in response to the respiratory infections caused by the SARS outbreak in 2003[14] and the MERS outbreak in 2012,[15] the World Health Organization ("WHO") issued guidance to health care workers for taking proper droplet and contact precautions in response to the novel viral outbreak.[16] Within two weeks of the outbreak identified in Wuhan, China, the genetic sequence of the novel virus was isolated and identified,[17] with the source organism classified as Severe Acute Respiratory Syndrome Coronavirus 2 ("SARS-CoV-2").[18] On 30 January 2020, the CDC confirmed that this virus could be transmitted person-to-person, causing the infectious disease colloquially known as COVID-19,[19] and the WHO declared the novel viral outbreak a Public Health Emergency of International Concern.[20]

Subsequently, in response to the ongoing spread of COVID-19 within the United States, President Joseph R. Biden, Jr., released an

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[11] *WHO Timeline—COVID-19*, WHO (Apr. 27, 2020), https://www.who.int/news/item/27-04-2020-who-timeline---covid-19.

[12] *COVID-19—China*, WHO (Jan. 5, 2020), https://www.who.int/emergencies/disease-outbreak-news/item/2020-DON229.

[13] *See id.*

[14] *Severe Acute Respiratory Syndrome (SARS)*, WHO, https://www.who.int/health-topics/severe-acute-respiratory-syndrome#tab=tab_1 (last visited Dec. 8, 2022).

[15] *Middle East Respiratory Syndrome Coronavirus (MERS-CoV)*, WHO, https://www.who.int/health-topics/middle-east-respiratory-syndrome-coronavirus-mers#tab=tab_1 (last visited Dec. 8, 2022).

[16] *WHO Timeline—COVID-19*, *supra* note 11.

[17] *See id.*

[18] Fan Wu et al., *Severe Acute Respiratory Syndrome Coronavirus 2 Isolate Wuhan-Hu-1, Complete Genome*, https://www.ncbi.nlm.nih.gov/nuccore/MN908947 (last visited Dec. 8, 2022).

[19] *CDC Confirms Person-to-Person Spread of New Coronavirus in the United States*, CDC (Jan. 30, 2020), https://www.cdc.gov/media/releases/2020/p0130-coronavirus-spread.html.

[20] *WHO Timeline—COVID-19*, *supra* note 11.

Executive Order on 21 January 2021 that directed "immediate action to require mask-wearing on certain domestic modes of transportation."[21] Executive departments and agencies, including the Transportation Security Administration ("TSA"), were thus commanded to take appropriate action to require individuals to wear masks when using public means of transportation.[22] Subsequently, the CDC released an order (hereinafter referred to as the "Mask Mandate") on 29 January 2021 pursuant to 42 U.S.C. § 264(a),[23] and 42 C.F.R. § 70.2,[24] § 71.31(b),[25] and § 71.32(b),[26] requiring all persons to wear a mask covering their nose and mouth when traveling throughout public transportation hubs.[27] The Mask Mandate defined masks as a "material covering the nose and mouth of the wearer, excluding face shields."[28]

By way of the Mask Mandate, the CDC stated the following:

> This Order shall be interpreted and implemented in a manner as to achieve the following objectives:
>
> Preservation of human life;
>
> Maintaining a safe and secure operating transportation system;

[21] Exec. Order No. 13,998, 86 Fed. Reg. 7205, 7205 (Jan. 26, 2021) (cleaned up).

[22] *Id.*

[23] This is the section of the Public Health Service Act of 1944 ("PHSA") that contains the "ambiguous language" at issue in the United States District Court for the Middle District of Florida cases discussed herein. 42 U.S.C. § 264(a) is the codification of § 361(a) of the PHSA. *See infra* note 34. Section 264(a) contains the language that allows the Surgeon General to institute "sanitation" measures, among other efforts, to prevent the spread of communicable diseases. 42. U.S.C. § 264(a). These regulatory efforts extend to the Director of the CDC by way of 42 C.F.R. § 70.2 (2022). *See infra* note 24.

[24] This regulation allows the CDC to "take such measures to prevent such spread of the diseases as [it] deems reasonably necessary" when it determines that local State measures are inadequate. 42 C.F.R. § 70.2 (2022).

[25] This regulation directs the "detention of a carrier until the completion of the measures outlined in this part that are necessary to prevent the introduction or spread of a communicable disease." 42 C.F.R. § 71.31(b) (2022).

[26] This regulation directs the "detention, disinfection, disinfestation, fumigation, or other related measures" for anything onboard a vessel that is suspected of contamination. 42 C.F.R. § 71.32(b) (2022).

[27] Requirement for Persons to Wear Masks While on Conveyances and at Transportation Hubs, 86 Fed. Reg. 8025, 8026 (Feb. 3, 2021); *Order: Wearing of Face Masks While on Conveyances and at Transportation Hubs*, CDC, https://www.cdc.gov/quarantine/masks/mask-travel-guidance.html (last updated Apr. 18, 2022).

[28] *Id.* at 8027.

> Mitigating the further introduction, transmission, and spread of COVID-19 into the United States and from one state or territory into any other state or territory; and
>
> Supporting response efforts to COVID-19 at the Federal, state, local, territorial, and tribal levels.[29]

Secondary to the Mask Mandate, the TSA released a security directive on 31 January 2021 requiring all persons to wear a mask throughout the public airport transportation systems.[30] TSA cited that, in compliance with the findings of the CDC, this mask requirement would assist in preventing the further spread of COVID-19.[31]

On 18 April 2022, United States District Judge Kathryn Mizelle ruled on a summary judgment motion in *Health Freedom Defense Fund, Inc. v. Biden*, holding that the CDC overstepped the powers delegated to it under the Public Health Service Act of 1944, and thereby issued a nationwide injunction on the Mask Mandate.[32] In *Wall v. CDC*, United States District Judge Paul Byron issued his order on 29 April 2022, denying the Plaintiff's Motion for Summary Judgment and granting the Defendants' Motion for Summary Judgment.[33] Judge Byron held that the challenged Mask Mandate was a permissible regulation enacted by the CDC by way of § 361(a) of the Public Health Service Act of 1944.[34] Consistent with the ruling in *Health Freedom Defense Fund, Inc. v. Biden*,[35] however, the CDC updated its website to state that, while the Mask Mandate was no longer in effect, the CDC continued to recommend people "wear masks in indoor public transportation settings at this time."[36]

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[29] *Id.*

[30] *TSA to Implement Executive Order Regarding Face Masks at Airport Security Checkpoints and Throughout the Transportation Network*, TSA (Jan. 31, 2021), https://www.tsa.gov/news/press/releases/2021/01/31/tsa-implement-executive-order-regarding-face-masks-airport-security.

[31] *Id.*

[32] *See* No. 21-CV-1693, 2022 U.S. Dist. LEXIS 71206, at *64 (M.D. Fla. Apr. 18, 2022). Note that this opinion improperly refers to the Act as the "Public Health *Services* Act."

[33] No. 21-CV-975, 2022 U.S. Dist. LEXIS 93556, at *1–2 (M.D. Fla. Apr. 29, 2022).

[34] *Id.* at *25. Section 361(a) of the Public Health Service Act, as codified, is 42 U.S.C. § 264(a). *See id.* at *9.

[35] *See* 2022 U.S. Dist. LEXIS 71206, at *64.

[36] *Order: Wearing of Face Masks While on Conveyances and at Transportation Hubs*, *supra* note 27.

B. The Public Health Service Act of 1944 ("PHSA")[37]

The Public Health Service was first established in 1798 when former President John Adams signed the Act for the Relief of Sick and Disabled Seamen.[38] In 1878, Congress enacted a law aimed to prevent the introduction and spread of communicable diseases at United States ports.[39] The United States Public Health Service Commissioned Corps ("the Corps") was subsequently established by Congress in 1889 to protect the health of military service members.[40] In 1902, the authority of the Corps was expanded from working to prevent disease to also researching "human diseases, sanitation, water supplies and sewage disposal."[41] Despite the broadening of the Corps' duties, it remained a Corps priority to prevent the interstate spread of communicable diseases.[42] Likewise, the need to "prevent the spread of contagious and other diseases in the United States" was echoed in the debates concerning the passage and enactment of the PHSA.[43] In an effort to further the Corps' mission in protecting the health of the public, the PHSA was enacted in 1944 to allow "nurses, scientists, dietitians, physical therapists, and sanitarians" to become members of the Corps.[44]

Prior to the enactment of the PHSA, the United States undertook efforts to combat and eradicate tuberculosis.[45] These efforts included x-ray imaging in an attempt to detect the disease early[46] and establishing "sanitarium care."[47] Members of the House of Representatives also discussed the importance of controlling and preventing the spread of this disease in the local and national communities. Representative

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[37] Public Health Service Act §§ 1–612, 42 U.S.C. §§ 201 to 300aaa-13.

[38] *See Our History*, COMMISSIONED CORPS OF THE U.S. PUB. HEALTH SERV., https://www.usphs.gov/history (last visited Dec. 8, 2022); 89 CONG. REC. 2853 (1943) (statement of Sen. Elbert D. Thomas) ("It must be remembered that the Public Health Service began back in 1798, and has grown considerably since that time.").

[39] Ramunas Kondratas, *Images from the History of the Public Health Service*, U.S. NAT'L LIBR. OF MED., https://www.nlm.nih.gov/exhibition/phs_history/fighting.html (last updated Jan. 16, 2012).

[40] *Our History*, *supra* note 38.

[41] *Id.*

[42] 12 Fed. Reg. 6132, 6132–33 (Sept. 16, 1947) (to be codified at 42 C.F.R pt. 1).

[43] 90 CONG. REC. 4795 (1944) (statement of Rep. Alfred. L. Bulwinkle).

[44] *Our History*, *supra* note 38.

[45] *See* H.R. REP. NO. 78-1644, at 1 (1944).

[46] H.R. REP. NO. 78-1644, at 2 (1944).

[47] 90 CONG. REC. 6220 (1944) (statement of Rep. Charles A. Wolverton).

Arthur L. Miller indicated that he had "the feeling that no one with an active open case of tuberculosis ha[d] a right to broadcast infection to others, yet that [wa]s being done all over the United States."[48] Representative Reid F. Murray argued that tuberculosis "must be attacked on a broad base, and every effort made to eradicate the disease from our country. Local and State support of eradication measures have shown results, but this is a national problem and must be so considered."[49] Representative John M. Robsion presented the notion that "[t]he Nation, as a whole, is interested in the control of the spread of [tuberculosis]."[50] Representative Charles A. Wolverton indicated that the purpose of the PHSA was to investigate and demonstrate "effective measures of prevention, treatment, and control of tuberculosis;" to assist local governments and health authorities in "establishing and maintaining adequate measures for the prevention, treatment, and control of tuberculosis;" and to control the interstate spread of the disease.[51] Arguably, these efforts and discussions demonstrate Congress's endeavor in 1944 to enact the PHSA for the purpose of allowing various measures and techniques to control and eradicate diseases in this nation.

In order to justify imposing the Mask Mandate, the CDC relied on 42 U.S.C. § 264(a),[52] which is the beginning of the Courts' analyses in both *Wall v. CDC*[53] and *Health Freedom Defense Fund, Inc.*[54] This is because § 264(a) contains the regulations for controlling communicable diseases:

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

[48] 90 CONG. REC. 6217 (1944) (statement of Rep. Arthur L. Miller).

[49] 90 CONG. REC. 6218 (1944) (statement of Rep. Reid F. Murray).

[50] 90 CONG. REC. 6219 (1944) (statement of Rep. John M. Robsion).

[51] 90 CONG. REC. 6220 (1944) (statement of Rep. Charles A. Wolverton).

[52] Requirement for Persons to Wear Masks While on Conveyances and at Transportation Hubs, 86 Fed. Reg. 8025, 8026 (Feb. 3, 2021).

[53] No. 21-CV-975, 2022 U.S. Dist. LEXIS 93556, at *6–7 (M.D. Fla. Apr. 29, 2022).

[54] No. 21-CV-1693, 2022 U.S. Dist. LEXIS 71206, at *10–11 (M.D. Fla. Apr. 18, 2022).

infection to human beings, and other measures, as in his judgment may be necessary.[55]

And this regulatory authority extends to the CDC:

> Whenever the Director of the Centers for Disease Control and Prevention determines that the measures taken by health authorities of any State or possession (including political subdivisions thereof) are insufficient to prevent the spread of any of the communicable diseases from such State or possession to any other State or possession, he/she may take such measures to prevent such spread of the diseases as he/she deems reasonably necessary, including inspection, fumigation, disinfection, sanitation, pest extermination, and destruction of animals or articles believed to be sources of infection.[56]

Because these statutory authorities permit the CDC to institute measures related to preventing the spread of communicable diseases, these statutes, namely § 264(a), set the stage for the litigation arising out of the Middle District of Florida related to the CDC's Mask Mandate.

C. The United States District Court for the Middle District of Florida

1. *Wall v. CDC*[57]

On 7 June 2021, *pro se* Plaintiff Lucas Wall ("Mr. Wall") filed a complaint against numerous defendants, including the CDC and the United States Department of Health and Human Services, alleging that the Mask Mandate was an excessive exercise of the CDC's authority.[58] Mr. Wall moved for a temporary restraining order to enjoin the federal government from enforcing the Mask Mandate because, he alleged, the Mask Mandate deprived him of enjoying his commercial flights and violated his constitutional right to travel.[59]

Considering the standard for a temporary restraining order, the Court denied Mr. Wall's motion on the grounds that Mr. Wall could still travel to his desired destinations under the Mask Mandate and

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[55] 42 U.S.C. § 264(a). The ambiguous language at issue in this statute is "sanitation" as it appears in a list of measures that may be undertaken by the CDC to assist with enforcing certain public health measures. *See* discussion *infra* Sections I.C., V.A–B.

[56] 42 C.F.R. § 70.2 (2022).

[57] No. 21-CV-975, 2022 U.S. Dist. LEXIS 93556 (M.D. Fla. Apr. 29, 2022).

[58] *Id.* at *1, *3–4.

[59] Wall v. CDC, 543 F. Supp. 3d 1290, 1292–93 (M.D. Fla. 2021).

because Mr. Wall's preferred transportation—flying—was not the only reasonable means of travel.[60] In short, the Court found that the "'extraordinary and drastic' remedy of an *ex parte* [temporary restraining order]" was not appropriate here.[61] The Court's reasoning focused on the fact that a temporary restraining order required proof of "irreparable injury" by the movant, which Mr. Wall did not demonstrate.[62]

Mr. Wall then filed for a preliminary injunction alleging three irreparable injuries he would face without the injunction: (1) the inability to find a rapid COVID-19 test before leaving his international destination; (2) his medical condition preventing him from wearing a mask; and (3) violation of his constitutional rights.[63] Noting the Supreme Court's denial of Mr. Wall's Emergency Application for a Writ of Injunction and the preposterous case procedure, the Court again denied Mr. Wall's motion for lack of proof of irreparable injury.[64]

Mr. Wall subsequently filed a motion for summary judgment, and the CDC and United States Department of Health and Human Services filed cross-motions for summary judgment.[65] On 29 April 2022, the Court entered judgment in favor of the Defendants, granting their summary judgment and denying Mr. Wall's motion.[66] In his motion, Mr. Wall argued that the CDC did not have authority under § 264(a) to impose the Mask Mandate.[67] The Court, however, deferred to the CDC's interpretation of "sanitation" as found within § 264(a) based on the *Chevron* standard[68] for deferring to agencies and analyzed: (1) whether the legislature afforded deference to the CDC to make and enforce rules regarding the public health ("step zero"); (2) whether the statute itself is ambiguous ("step one"); and (3) whether

[60] *Id.* at 1293.

[61] *Id.*

[62] *Id.* at 1292–93.

[63] Wall v. CDC, No. 21-CV-975, 2022 U.S. Dist. LEXIS 78290, at *4–6 (M.D. Fla. Mar. 7, 2022).

[64] *Id.* at *7–10, *13.

[65] Wall v. CDC, No. 21-CV-975, 2022 U.S. Dist. LEXIS 93556, at *1–2 (M.D. Fla. Apr. 29, 2022).

[66] *Id.* at *31–32.

[67] *See id.* at *3–4.

[68] Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984) (where the Court established a two-step inquiry to determine whether Congress expressly indicated intent in a statute and whether that intent is ambiguous).

the challenged action is permissible based upon construction of the applicable statute ("step two").[69]

As part of its analysis, the Court used dictionaries from the mid-1900s to determine the meaning of "sanitation" as it appeared in § 264(a).[70] The 1942 edition of Webster's New International Dictionary of the English Language defined sanitation as "rendering sanitary; science of sanitary conditions; use of sanitary measures."[71] The 1946 edition of Funk & Wagnalls New Standard Dictionary of the English Language defined sanitation as "the devising and applying of measures for preserving and promoting public health; the removal or neutralization of elements injurious to health; the practical application of sanitary science."[72] The Court also considered the dictionary definitions for "sanitary": "of or pert[aining] to health; for or relating to the preservation or restoration of health; occupied with measures or equipment for improving conditions that influence health; free from, or effective in preventing or checking, agencies injurious to health, esp[ecially] filth and infection."[73]

After studying these definitions, the Court then turned to the legislative history of the PHSA, noting its ambiguity but also concluding that Congress had not explicitly addressed whether § 264(a) allowed for the CDC to issue the Mask Mandate.[74] Congressional hearings revealed concern around quarantining infected individuals, coping with unforeseeable emergency situations, and bolstering the country's ability to respond to public health emergencies.[75] This legislative history, the Court concluded, would support either a broad or narrow interpretation of "sanitation."[76] Nonetheless, the Court found the Mask Mandate was a permissible action by the CDC in accordance with the authority

[69] *See Wall*, 2022 U.S. Dist. LEXIS 93556, at *5–25.

[70] *Id.* at *11–13.

[71] *Id.* at *11–12 (citing *Sanitation*, WEBSTER'S NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE (William Allan Neilson et al. eds., 2d ed. 1942)).

[72] *Id.* (citing *Sanitation*, FUNK & WAGNALLS NEW STANDARD DICTIONARY OF THE ENGLISH LANGUAGE (Isaac K. Funk et al. eds, 1946)).

[73] *Id.* at *12–13 (citing *Sanitary*, WEBSTER'S NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE (William Allan Neilson et al. eds., 2d ed. 1942); *Sanitary*, FUNK & WAGNALLS NEW STANDARD DICTIONARY OF THE ENGLISH LANGUAGE (Isaac K. Funk et al. eds, 1946)).

[74] *Id.* at *14–17.

[75] *Id.* at *14–16.

[76] *Id.* at *17.

delegated to it by Congress in § 264(a), and the Court consequently deferred to the CDC's judgment.[77]

2. *Health Freedom Defense Fund, Inc. v. Biden*[78]

On 12 July 2021, Plaintiffs Health Freedom Defense Fund, Inc., Ana Daza, and Sarah Pope filed suit challenging the CDC's imposition of the Mask Mandate,[79] alleging that the Mask Mandate aggrieved the named individuals because wearing masks aggravated their anxiety disorders.[80] The Plaintiffs moved for summary judgment, alleging the CDC exceeded its authority in promulgating the Mask Mandate.[81] Prior to the hearing for summary judgment, however, the Defendants moved to transfer the case (which was pending in the Tampa Division) to the Orlando Division pursuant to Local Rule 1.07(a)(2)(B) to "avoid the 'probability of inefficiency or inconsistency.'"[82] Defendants argued that "[b]ecause Judge Byron [wa]s already handling an earlier-filed case [*Wall v. CDC*] that include[d] all of the same claims challenging the same policies at issue in this case," the case should be transferred.[83] The Court denied this motion, and the action proceeded in the Tampa Division.[84] Then, the Court issued its order on 18 April 2022 granting the Plaintiffs' summary judgment motion because it found that the Mask Mandate was beyond the scope of the CDC's authority.[85]

In its ruling, the Court found that "sanitation" in the context of the PHSA is defined as "changing, not preserving, the status of an object or area by cleaning."[86] The Court reached this conclusion first by looking at the ordinary meaning of "sanitation" and then by considering the context in which it appears in the PHSA.[87] The 1942 edition of Webster's New International Dictionary of the English

[77] *See id.* at *25.

[78] No. 21-CV-1693, 2022 U.S. Dist. LEXIS 71206 (M.D. Fla. Apr. 18, 2022).

[79] *Id.* at *7.

[80] *Id.*

[81] *Id.* at *2, *9.

[82] Defs.' Motion to Transfer Under Loc. Rule 1.07(a)(2)(B) at 1, Health Freedom Def. Fund, Inc. v. Biden, No. 21-CV-1693, 2022 U.S. Dist. LEXIS 71206.

[83] *Id.* at 11.

[84] Health Freedom Def. Fund, Inc. v. Biden, 572 F. Supp. 3d 1257, 1260–61 (M.D. Fla. 2021).

[85] *Health Freedom Def. Fund, Inc.*, 2022 U.S. Dist. LEXIS 71206, at *64.

[86] *Id.* at *17, *19–20.

[87] *Id.* at *14–20.

Language defined "sanitation" as "measures that clean something or that remove filth, such as trash collection, washing with soap, incineration, or plumbing."[88] The 1946 edition of Funk & Wagnalls New Standard Dictionary of the English Language defined "sanitation" as "the removal or neutralization of elements injurious to health."[89] And the 1951 Simplified Medical Dictionary for Lawyers defined "sanitation" as "[t]he use of sanitary measures to preserve health."[90]

The Court then turned to the context of "sanitation" within § 264(a).[91] "Sanitation" is placed immediately in context with "inspection, fumigation, disinfection, . . . pest extermination, [and] destruction."[92] Further, the headings of the other subsections of § 264 suggest that § 264(a) deals with objects while the remaining subsections deal with persons.[93] This statutory context supported the Court's conclusion that "sanitation" as it appears in § 264(a) means "changing, not preserving, the status of an object or area by cleaning."[94] To further support this conclusion, the Court used corpus linguistics[95] to identify the use of "sanitation" in the mid-1900s and considered the history of the federal government's power to quarantine at major ports of entry to the United States.[96] Finally, the Court rejected the *Chevron* analysis, holding that the CDC did not have the authority to impose restrictions on the mass public with respect to interstate travel nor was the Mask Mandate a permissible interpretation of § 264(a).[97]

[88] *Id.* at *14–15 (quoting *Sanitation*, WEBSTER'S NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE (William Allan Neilson et al. eds., 2d ed. 1942)).

[89] *Id.* at *15 (quoting *Sanitation*, FUNK & WAGNALLS NEW STANDARD DICTIONARY OF THE ENGLISH LANGUAGE (Isaac K. Funk et al. eds, 1946)).

[90] *Id.* (citing BERNARD S. MALOY, THE SIMPLIFIED MEDICAL DICTIONARY FOR LAWYERS (2d ed. 1951)).

[91] *Id.* at *16–17.

[92] *Id.* at *18 (quoting 42 U.S.C. § 264(a)).

[93] *Id.* at *24; *see infra* text accompanying notes 232–33.

[94] *Id.* at *18–20.

[95] *See infra* Part IV.A, note 137 and accompanying text.

[96] *Health Freedom Def. Fund, Inc.*, 2022 U.S. Dist. LEXIS 71206, at *20–23.

[97] *Id.* at *29–30, *34–35.

III. DEFERENCE TO AGENCY DECISIONS WHEN STATUTORY LANGUAGE IS AMBIGUOUS

A. The History Behind Agency Deference

In order to understand why courts are often required to defer to executive agencies tasked with interpreting and enforcing certain laws,[98] not only is it important to understand the history of agency deference, but it is also important to understand the theories of statutory interpretation undertaken to interpret ambiguous statutory language. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[99] is a case central to understanding the theory of statutory interpretation and agency deference.[100] This Supreme Court case dealt with the Environmental Protection Agency's Clean Air Act Amendments of 1977, which imposed a requirement on states that did not reach attainment of the National Ambient Air Quality Standards to create permit programs to regulate certain stationary sources that contribute to air pollution.[101] At the heart of this case was the interpretation of "stationary source" as it appeared in the Amendments with respect to the EPA allowing the "bubb[ling]" of sources.[102] In determining the meaning of "stationary source," the Court applied a two-step test to determine whether Congress had expressly indicated intent, and if intent was not clear, whether the agency's challenged action was a "permissible construction of the statute."[103] Thus, the first step in statutory interpretation here started with determining whether there was even an explicit or implied intent for Congress to delegate authority to the agency. *Chevron* established a standard of extreme deference to an executive agency that institutes a challenged regulation when a Court finds that Congress "implicitly or explicitly" delegated authority to the subject agency.[104] The Supreme Court also

[98] City of Arlington v. FCC, 569 U.S. 290, 301 (2013).

[99] 467 U.S. 837 (1984).

[100] Justin Hurwitz, *Chevron and the Limits of Administrative Antitrust*, 76 U. PITT. L. REV. 209, 218–19 (2014).

[101] *Chevron*, 467 U.S. at 839–40, 846.

[102] *Id.* at 840, 840 n.2. A 1981 rule promulgated by the EPA allowed for the bubbling of stationary sources within an industrial facility for the purposes of procuring a single permit for the entire facility as opposed to having to obtain a permit for each smokestack or pollution-emitting source within the facility. *See id.* at 840–41; John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 190 (1998).

[103] *Id.* at 842–43.

[104] *Id.* at 843–44 (quoting Morton v. Ruiz, 415 U.S. 199, 231 (1974)).

noted that the role of the judiciary in these types of actions was not to determine if the lower court found the regulation to be inappropriate, but rather that the role of the judiciary here was only to determine if the regulation was reasonable.[105]

Deference to executive agencies was again addressed in *United States v. Mead Corporation*, where the Supreme Court synthesized the case law for the deference standard by iterating that, "[w]hen Congress has 'explicitly left a gap for an agency to fill, there is an express delegation of authority to the agency' . . . and any ensuing regulation is binding unless procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute."[106] And regardless of whether any express authority was given to agencies, the interpretive choices "certainly may influence courts facing questions the agencies have already answered."[107] *Mead Corporation* dealt with the statutory construction of the Harmonized Tariff Schedule with respect to "ruling letters" issued by the United States Customs Service adjudicating tariff classifications of certain imported goods.[108] The specific ruling letter at issue dealt with the tariff schedule for diaries and similar types of account books and notebooks.[109] The tariff set bound diaries and related books at a 4.0% duty tax, whereas "other" items were not subject to a duty tax.[110] Mead Corporation's imported good was a bound day planner, and the imposition of tax on the good depended on the Custom Service's interpretations of the terms "diary" and "bound."[111] This agency regulation failed to meet the *Chevron* standard because prior case law established that ruling letters were merely "interpretations contained in policy statements, agency manuals, and enforcement guidelines."[112] However, the challenged tariff regulation met the persuasiveness standard previously established in *Skidmore v. Swift & Company*, 323 U.S. 134, 140 (1944).[113] Consequently, the Court vacated and remanded the judgment of the lower courts,

[105] *Id.* at 844–45 ("[A] court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.").

[106] 533 U.S. 218, 227 (2001) (quoting *Chevron*, 467 U.S. at 843–44).

[107] *Id.*

[108] *Id.* at 221–22.

[109] *Id.* at 224.

[110] *Id.* at 224–25.

[111] *Id.*

[112] *See id.* at 228–34 (quoting Christensen v. Harris Cnty., 529 U.S. 576, 587 (2000)).

[113] *Id.* at 221.

holding that the trial court ought to have analyzed the agency's various justifications for the challenged ruling letter to determine the meanings of "bound" goods and "diaries" as they appeared in the challenged ruling letter.[114]

The aforementioned *Skidmore*[115] decision, which was not overturned by the 1984 *Chevron* decision,[116] looked to the interpretation of "waiting time" as it related to actual time spent working under the Fair Labor Standards Act.[117] Here, the Court found there was no express or implied Congressional intent to delegate authority to the Administrator of the United States Department of Labor's Wage and Hour Division ("the Administrator") to release interpretive bulletins and informal rulings regarding labor and employment issues.[118] While there was no bright line rule for deference to the Administrator's findings as to waiting time and overtime, the Court held that the "rulings, interpretations and opinions of the Administrator . . . , while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance."[119] This established the persuasiveness standard, with the weight of persuasion of an agency's interpretation depending on the "thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."[120]

So, in justifying an agency's regulation, there are multiple approaches to judicial deference to the acting executive agency when a statute is deemed ambiguous.[121] Two examples are *Chevron* deference, which looks to the express or implicit congressional authority delegated to an agency,[122] and *Skidmore* deference, which looks to the weight

[114] *Id.* at 235, 237–39.

[115] 323 U.S. 134 (1944).

[116] *Mead Corp.*, 533 U.S. at 234–35.

[117] *Skidmore*, 323 U.S. at 136.

[118] *See id.* at 137–40.

[119] *Id.* at 140.

[120] *Id.*

[121] Tercel Maria G. Mercado-Gephart, *Deference in Wonderland: Into the Many Rabbit Holes of* Chevron, Skidmore, *and* Auer *Deference*, 42 OKLA. CITY U. L. REV. 367, 367–68 (2018).

[122] Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843–44 (1984).

of the agency's judgment in making a regulation.[123] Where there is no congressional delegation of authority, the challenged regulation may not meet the *Chevron* standard, but it may still meet the persuasiveness standard established in *Skidmore*.[124]

B. The Effect of Deferring to an Agency's Interpretation of Ambiguous Statutory Language

Consistent with the Court's decision in *Chevron*, ambiguous statutes are interpreted consistent with the statutory interpretation of the agency that created and enforced the challenged regulation.[125] This serves to prevent the courts from overstepping their constitutional authority and from making policy decisions that must necessarily be left to the agency whose regulation is being challenged.[126] The judicial role here is merely to determine whether the challenged regulation is a *reasonable* or *permissible* interpretation of the ambiguous statute.[127] Further, when an agency's regulation is challenged, the agency's interpretation does not have to be the "best or most natural one by grammatical or other standards."[128] This means that a court must then defer to the agency because it is not the judiciary's role to "decide which among several competing interpretations best serves the regulatory purpose."[129] But, when the agency's interpretation is "plainly erroneous or inconsistent with the regulation," a court is relieved from its obligation to defer to the agency's reasoning.[130]

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[123] *Skidmore*, 323 U.S. at 140.

[124] United States v. Mead Corp., 533 U.S. 218, 234–35 (2001).

[125] *Chevron*, 467 U.S. at 844–45; Michael P. Healy, *The Past, Present and Future of* Auer *Deference:* Mead*, Form and Function in Judicial Review of Agency Interpretations of Regulations*, 62 U. KAN. L. REV. 633, 645–46 (2014). The standard for deference in *Auer v. Robbins*, 519 U.S. 452 (1997), is considered by the Supreme Court to have the same legal effect as the standard for deference established in *Chevron*. *Id.* at 650.

[126] Healy, *supra* note 125, at 646.

[127] *See id.* at 647 (emphasis added); *Chevron*, 467 U.S. at 843 (emphasis added); *cf.* Pauley v. Bethenergy Mines, 501 U.S. 680, 696 (1991) ("Judicial deference to an agency's interpretation of ambiguous provisions of the statutes it is authorized to implement reflects a sensitivity to the proper roles of the political and judicial branches.").

[128] Healy, *supra* note 125, at 650 (citing EEOC v. Com. Off. Prods. Co., 486 U.S. 107, 115 (1988)).

[129] *Id.*

[130] Talk Am., Inc. v. Mich. Bell Tel. Co., 564 U.S. 50, 59 (2011) (quoting Chase Bank U.S.A. v. McCoy, 562 U.S. 195, 208–09 (2011)) ("[The Court] defer[s] to an agency's interpretation of its regulations, even in a legal brief, unless the interpretation is plainly erroneous or inconsistent with the regulations or there is any other reason to suspect that the

IV. TECHNIQUES OF STATUTORY INTERPRETATION

When a court finds that a law contains ambiguous language, there are usually five main methods used to determine the meaning of the ambiguous language: "ordinary meaning, statutory context, canons of construction, legislative history, and evidence of the way a statute is implemented."[131]

A. Ordinary Meaning

When an ambiguous term is not defined in the statute at issue, one of the most common places to start in ascertaining the meaning of such a word is looking to its plain meaning.[132] Ordinary meaning encompasses the contemporary and common meaning of a term.[133] Debate exists in the scholarly community about whether ordinary meaning looks to how a word is understood legally or how it is understood by the ordinary person.[134] One argument is that, in order to pinpoint a term's ordinary meaning, the type of audience of a challenged statute should be identified and used in turn to determine ordinary meaning.[135]

Despite this debate, courts frequently resort to dictionaries in order to provide insight into the ordinary use of a term.[136] Corpus linguistics is an emerging technique also used to identify ordinary meanings, which analyzes the frequency, collocation, and context of words.[137] Proponents of corpus linguistics to determine ordinary meaning argue that the use of dictionaries encourages judges to "cherry-

interpretation does not reflect the agency's fair and considered judgment on the matter in question." (internal citation and quotation marks omitted)).

[131] VALERIE C. BRANNON, CONG. RSCH. SERV., R45153, STATUTORY INTERPRETATION: THEORIES, TOOLS, AND TRENDS 21 (2022).

[132] *Id.* at 22.

[133] Artis v. District of Columbia, 138 S. Ct. 594, 603 n.8 (2018).

[134] Kevin Tobia et al., *Statutory Interpretation from the Outside*, 122 COLUM. L. REV. 213, 224 ("There is great debate concerning whether [ordinary meaning] refers to the ordinary meaning of (1) 'legal language' or (2) 'ordinary language.'").

[135] *See* Anita S. Krishnakumar, *Metarules for Ordinary Meaning*, 134 HARV. L. REV. F. 167, 171 (2020) ("Congress could specify a 'target audience' for purposes of judicial interpretation.").

[136] Tobia et al., *supra* note 134, at 218.

[137] Matthew Jennejohn et al., *Hidden Bias in Empirical Textualism*, 109 GEO. L.J. 767, 769 (2021).

pick" the meaning of legislative text.[138] Those who reject the use of corpus linguistics argue that a term's ordinary meaning and a term's relative frequency in a corpus search do not necessarily correlate.[139]

B. Statutory Context

While dictionaries provide judges a multitude of definitions to assist with determining meaning, "[a court's] task is to interpret what Congress has said."[140] Statutory context takes into account the complete text of the legislative authority, whether it is through the full section or subsection of the law where the term is found, similar provisions in the law, or the entire law itself.[141] "Silence in the legislative history, 'no matter how "clanging,"' cannot defeat the better reading of text and statutory context."[142] A fair reading of the statute must be given, "[e]ven if Congress did not foresee all of the applications of the statute."[143] Thus, the definition of an ambiguous term will "gather[] meaning from the words around it."[144] Looking to adjacent terms is frequently used to define a word with multiple connotations in order to prevent unnecessarily expanding the breadth of a challenged law.[145]

When looking to the body of the text as a whole as a method of statutory interpretation, courts may also consider the "practical consequences" of the various meanings of an ambiguous term.[146]

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[138] *Id.* at 778.

[139] *See* Lawrence M. Solan & Tammy Gales, *Corpus Linguistics as a Tool in Legal Interpretation*, 2017 B.Y.U. L. REV. 1311, 1354 (2017).

[140] Recording Indus. Ass'n of Am. v. Univ. of N.C. at Chapel Hill, 367 F. Supp. 2d 945, 954 (M.D.N.C. 2005) (quoting Dir., Off. of Worker's Comp. Programs v. Rasmussen, 440 U.S. 29, 47 (1979)). "A court is only authorized to apply the provisions as written, not as we would write it. It may not improve, insert additional, material terms, eliminate incongruity, or alter imprecise enactments." *Id.* at 953–54 (cleaned up).

[141] BRANNON, *supra* note 131, at 25.

[142] Encino Motorcars, LLC v. Navarro, 138 S. Ct. 1134, 1143 (2018) (quoting Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 495 n.13 (1985)).

[143] *Id.*

[144] Jarecki v. G.D. Searle & Co., 367 U.S. 303, 307 (1961).

[145] *Id.*

[146] BRANNON, *supra* note 131, at 27; *see also* King v. Burwell, 576 U.S. 473, 490–91 (2015) (where the Court reasoned that, because the overall purpose of the Patient Protection and Affordable Care Act is to improve health insurance markets, the Act must be interpreted consistent with the notion that, in Section 36B of the Internal Revenue Code, the ambiguous phrase "an Exchange established by the State under [42 U.S.C. § 18031]" refers to both state and federal exchanges, meaning that individuals purchasing health insurance

Empirical evidence analyzing 333 Supreme Court cases from the first six and a half terms of the Roberts Court indicated that "practical consequences" was one of the most relied upon interpretation techniques after the use of ordinary meaning to determine the definitions of ambiguous text.[147] Taking into account the practical consequences of a law ensures that a court does not frustrate the legislature's purpose "explicit in the statutory text."[148]

C. Canons of Construction

While some of the other interpretive techniques may fall into a category of a canon of construction,[149] the canons of construction, while not rules, are "default assumptions" for how the legislature "generally expresses meaning."[150] Canons, although often criticized as giving wide discretion to judges,[151] usually fall within two categories: semantic canons and substantive canons.[152] An example of a semantic canon, other than ordinary meaning, is the titles-and-headings canon.[153]

With respect to the titles-and-headings canon:

> [H]eadings and titles are not meant to take the place of the detailed provisions of the text. Nor are they necessarily designed to be a reference guide or a synopsis. Where the text is complicated and prolific, headings and titles can do no more than indicate the provisions in a most general manner . . . . [T]he title of a statute and the heading of a section cannot limit the plain meaning of the text.[154]

coverage in a state or federal exchange would be entitled to tax credits) (alteration in original)).

[147] Anita S. Krishnakumar, *Reconsidering Substantive Canons*, 84 U. CHI. L. REV. 825, 829, 886–87 (2017).

[148] *See* Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich, L.P.A., 559 U.S. 573, 618–19 (2010) (Kennedy, J., dissenting).

[149] *See, e.g.*, BRANNON, *supra* note 131, at 29.

[150] *Id.* at 28.

[151] Jane S. Schacter, *The Confounding Common Law Originalism in Recent Supreme Court Statutory Interpretation: Implications for the Legislative History Debate and Beyond*, 51 STAN. L. REV. 1, 30–31 (1998).

[152] Christopher J. Walker, *Inside Agency Statutory Interpretation*, 67 STAN. L. REV. 999, 1021 (2015).

[153] BRANNON, *supra* note 131, app. at 51, 54.

[154] Brotherhood of R.R. Trainmen v. Balt. & Ohio R.R., 331 U.S. 519, 528–29 (1947).

Titles and headings are thus "permissible indicators" of a term's meaning, but they are not dispositive on the appropriate interpretation of the ambiguous term.[155]

A kind of substantive canon relevant here is the nondelegation doctrine.[156] This doctrine, which is related to the separation of powers amongst the government branches,[157] looks to the distinction between "the delegati[ng] of power to make the law[] . . . and conferring an authority or discretion as to its execution to be exercised under and in pursuance of the law."[158] The nondelegation doctrine states that "[c]ourts should presume that 'Congress does not delegate authority without sufficient guidelines,'"[159] and that Congress delegates such authority to "officers of the Executive Branch" in response to a frequent need "to secure the exact effect intended by its acts of legislation."[160] This delegation thus allows the agencies entrusted with particular authority to interpret the law and direct its enforcement.[161] In sum, the nondelegation doctrine recognizes that, while Congress cannot delegate its legislative powers to other authorities, it can delegate the enforcement of law.[162]

D. Legislative History

Although the text of a statute itself may give rise to the meaning behind ambiguous language, legislative history is another approach used to find the meaning of ambiguous words or phrases. Legislative history considers any documents from the legislative process

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[155] BRANNON, *supra* note 131, app. at 54.

[156] *Id.* app. at 57–58.

[157] Mistretta v. United States, 488 U.S. 361, 371 (1989).

[158] J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 407 (1928) (quoting Cincinnati, Wilmington, and Zainesville R.R. Co. v. Comm'rs of Clinton Cnty., 1 Ohio St. 77, 88–89 (1852)).

[159] BRANNON, *supra* note 131, app. at 58 (quoting WILLIAM N. ESKRIDGE, JR. ET AL., CASES AND MATERIALS ON LEGISLATION AND REGULATION: STATUTES AND THE CREATION OF PUBLIC POLICY 1204 (5th ed. 2014)).

[160] *J.W. Hampton*, 276 U.S. at 406.

[161] *Id.*

[162] *Id.* at 408 (quoting Interstate Com. Comm'n v. Goodrich Transit Co., 224 U.S. 194, 214 (1912) ("The Congress may not delegate its purely legislative power to a commission, but, having laid down the general rules of action under which a commission shall proceed, it may require of that commission the application of such rules to particular situations and the investigation of facts, with a view to making orders in a particular matter within the rules laid down by the Congress.").

of a law, including, but not limited to, committee reports and congressional statements.[163] The goal of analyzing the legislative history behind ambiguous text is to determine "an ambiguous statute's underlying purpose or [to] confirm a reading suggested by other [statutory interpretation] tools."[164] It is important to note, however, that the use of legislative history as a means of statutory interpretation is less favored by some theories of judicial interpretation such as textualism.[165] The Supreme Court is an excellent example in recent times of a judicial body moving away from legislative history and toward textualist and originalist theories to determine the meaning of ambiguous statutes.[166] Despite this recent trend, however, it is important to point out that the Court considered legislative history when it established the *Chevron* two-step inquiry to determine if an agency abused its delegated authority in interpreting and carrying out the purpose of a statute.[167] The Court found in *Chevron* that the EPA's interpretation of the Clean Air Act Amendments of 1977 was permissible, and thus not an abuse of the EPA's powers, in part because the legislative history was silent as to the meaning of a stationary source with respect to how that term appeared in the Amendments.[168]

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[163] BRANNON, *supra* note 131, at 41–44, 44 fig.1.

[164] *Id.* at 40.

[165] *Id.* at 21. The textualist theory of statutory interpretation aims to determine the objective meaning of ambiguous statutory text. Schachter, *supra* note 151, at 2. Another theory of statutory interpretation is originalism, which interprets laws by analyzing the intent of the legislative body at the time of the law's enactment. Martin H. Redish & Theodore T. Chung, *Democratic Theory and the Legislative Process: Mourning the Death of Originalism in Statutory Interpretation*, 68 TUL. L. REV. 803, 812 (1994). Originalism can be further sub-divided into two categories: purposivism and intentionalism. *Id.* Purposivism seeks to interpret statutes in accordance with legislative purpose. BRANNON, *supra* note 131, at 12. Intentionalism looks to the actual intent of the legislative body. *See id.* at 4 n.43.

[166] *See* Schacter, *supra* note 151, at 2, 5.

[167] *See* Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 862–64 (1984) ("More importantly, th[e] [legislative] history plainly identifies the policy concerns that motivated the enactment; the plantwide definition is fully consistent with one of those concerns—the allowance of reasonable economic growth—and, whether or not we believe it most effectively implements the other, we must recognize that the EPA has advanced a reasonable explanation for its conclusion that the regulations serve the environmental objectives as well. Indeed, its reasoning is supported by the public record developed in the rulemaking process, as well as by certain private studies." (internal cross reference omitted)).

[168] *Id.* at 862 ("We find that the legislative history as a whole is silent on the precise issue before us. It is, however, consistent with the view that the EPA should have broad discretion in implementing the policies of the 1977 Amendments.").

E. Evidence of the Way a Statute is Implemented

Finally, evidence of the way a statute is implemented is another method of statutory interpretation that considers the practical consequences of a law to decide the meaning of ambiguous statutory text.[169] Practical consequences of a law may lead a court to limit a challenged law's reach, or it may allow a reviewing court to reject an agency's interpretation of that law if it appears that practical consequences of a specific interpretation would undermine the law's purpose.[170] At the heart of statutory implementation is "the process and art of deliberately achieving social change through law."[171] Thus, one effect of statutory implementation is "implementation politics," wherein ideologies and social movements can affect the law's interpretation and, correspondingly, the law's influence on society.[172]

After Congress delegates implementation of a statute to a federal agency, that agency is tasked with interpreting the statute.[173] When the statutory language is ambiguous, any challenged implementation circles back to the standard established in *Chevron*, which sets forth the legal standard for interpreting ambiguous statutory language.[174] Where statutory language is not ambiguous and Congress' delegation of authority is explicit, the *Chevron* standard does not apply because the intent of Congress is clear.[175] If the intent is clear, the reviewing court must accordingly give effect to that intent and reject agency construction that is contrary to such intent.[176] Because federal agencies want to see their motives accomplished, federal agencies will seek ambiguity in statutory language where they have used their delegated authority, express or implied, to implement a statute.[177] Nonetheless,

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[169] BRANNON, *supra* note 131, at 45.

[170] *Id.* at 47.

[171] William H. Clune, III & R.E. Lindquist, *What "Implementation" Isn't: Toward a General Framework for Implementation Research*, 1981 WIS. L. REV. 1044, 1045 (1981).

[172] *See id.* at 1062–63.

[173] Susannah Landes Foster, *When Clarity Means Ambiguity: An Examination of Statutory Interpretation at the Environmental Protection Agency*, 96 GEO. L.J. 1347, 1349 (2008).

[174] *Id.*

[175] *See id.* at 1353; *see also* Nicholas Mosvick, *How the Supreme Court Created Agency Deference*, NAT'L CONST. CTR.: CONST. DAILY BLOG (June 25, 2021), https://constitution-center.org/blog/how-the-supreme-court-created-agency-deference.

[176] Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–43, 843 n.9 (1984) ("The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent.").

[177] *See* Foster, *supra* note 173, at 1349–50.

reviewing courts may consider the way an agency has implemented a statute to understand "the problem that Congress sought to address."[178] The way an agency implements a statute can provide guidance to a court because agencies will generally have more expertise and judgment concerning the area of law they are tasked with enforcing.[179]

V. USING THE TECHNIQUES OF STATUTORY INTERPRETATION TO DEFINE SANITATION

The plaintiffs in both *Wall v. CDC*[180] and *Health Freedom Defense Fund, Inc. v. Biden*[181] challenged the CDC's authority to impose the Mask Mandate as a sanitation measure. As a result, the opinions in each case utilized techniques of statutory interpretation to analyze and ascertain the meaning of "sanitation" as it appears in a list of authorized actions the CDC may take to assist with enforcing certain public health measures.

A. Wall v. CDC[182]

The Court first looked to "step zero" of the *Chevron* inquiry to determine if the CDC's implementation of the Mask Mandate was even subject to *Chevron* deference.[183] It determined that Congress explicitly delegated authority under § 264(a) to the CDC to allow the CDC to carry out the enforcement of laws related to public health.[184] The Court further determined that § 264(a) also delegated authority to the CDC to "make and enforce such regulations as . . . are *necessary* to prevent the . . . spread of communicable diseases."[185]

[178] BRANNON, *supra* note 131, at 46. It has also been furthered that agency implementation of laws not only shows how people generally understand the meaning of the challenged statutory language, but also shows the effects of that understanding; thus, statutory implementation may provide evidence of how people have acted as a result of their understood meaning of that same language. *Id.*

[179] United States v. Mead Corp., 533 U.S. 218, 227 (2001).

[180] No. 21-CV-975, 2022 U.S. Dist. LEXIS 93556, at *3 (M.D. Fla. Apr. 29, 2022).

[181] No. 21-CV-1693, 2022 U.S. Dist. LEXIS 71206, at *2 (M.D. Fla. Apr. 18, 2022).

[182] 2022 U.S. Dist. LEXIS 93556.

[183] *Id.* at *5.

[184] *Id.* at *6–7.

[185] *Id.* (quoting 42 U.S.C. § 264(a)). The Court in *Wall v. CDC* also determined that the CDC's Mask Mandate was within the agency's area of expertise because the Mask Mandate was instituted in an effort to curb the spread of COVID-19. *Id.* at *8.

Accordingly, the Court rejected the Plaintiff's nondelegation doctrine argument.[186]

The Court then turned to "step one" of the *Chevron* standard because the language of § 264(a) was recognized as unclear.[187] Statutory context was first used to determine the breadth of authority in § 264(a) granted to the CDC by Congress.[188] The Court interpreted the first sentence of § 264(a) to grant authority to the CDC to create and implement regulations related to controlling communicable diseases without limitation.[189] The second sentence was then interpreted to further clarify the CDC's authority by providing examples of measures the CDC could undertake to control such diseases.[190] The Court determined that the list in the second sentence was non-exhaustive.[191]

With respect to the breadth of authority granted to the CDC by Congress, the Court utilized semantic canons of construction and looked to the headings and titles of other sections in the PHSA.[192] Specifically, the Court looked to Part G, which is entitled "Quarantine and Inspection," because this is where § 264 is located.[193] Furthermore, subsections 264(b) through 264(d) also relate to quarantine measures.[194] With these headings and titles in mind, the Court considered that the purpose of § 264(a) could be to provide measures separate and apart from solely quarantine and inspection procedures.[195]

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[186] *See id.* at *5 & n.6. In *Health Freedom Def. Fund, Inc. v. Biden*, the Court did not address the Plaintiffs' nondelegation claims. 2022 U.S. Dist. LEXIS 71206, at *35. Thus, the nondelegation doctrine is not further analyzed in Part V.B *infra*.

[187] *Wall*, 2022 U.S. Dist. LEXIS 93556, at *9.

[188] *Id.* at *9–11.

[189] *Id.* at *9.

[190] *Id.* at *9–10.

[191] *Id.* at *10.

[192] *Id.* at *10–11.

[193] *Id.* at *10.

[194] *Id.* at *10–11 (citing 42 U.S.C. § 264(b)-(d) (2022)).

[195] *Id.* at *11 ("It follows that, insofar as Congress contemplated a use of subsection (a) authority beyond the enumerated measures to permit the quarantine of persons it subjected the exercise of such authority to some limits, and, given that the cornerstone of the subsequent subsections is the CDC's quarantine authority and its parameters, the enumerated list under subsection (a) could potentially be understood as a list of measures that facilitate or supplement quarantine efforts." (cleaned up)).

To analyze "sanitation" as it appears in § 264(a), the Court turned to dictionaries from 1942 and 1946 to determine the term's meaning.[196] Specifically, the Court looked at the following definition of "sanitation" as shown in the 1942 edition of Webster's New International Dictionary of the English Language: "[a] rendering sanitary; science of sanitary conditions; use of sanitary measures."[197] The Court also reviewed the following definitions from the 1946 edition of Funk & Wagnalls New Standard Dictionary of the English Language: "[t]he devising and applying of measures for preserving and promoting public health; the removal or neutralization of elements injurious to health; the practical application of sanitary science."[198] The Court finally examined how these two dictionaries defined "sanitary" to find support for its ultimate conclusion on the meaning of "sanitation."[199]

In considering other statutory interpretation techniques, the Court found that legislative history was not helpful for providing insight into the meaning of "sanitation" as it appeared in the PHSA.[200] The 1944 congressional hearing regarding the PHSA primarily discussed the effects that the law would have on foreign and interstate quarantines.[201] During this hearing, however, one of the authors of the PHSA indicated that the purpose of § 361 (codified as § 264(a)) was to allow the Public Health Service a broad authority to "cope with [unforeseeable] emergency situations."[202] Finally, the Court addressed the fact that Congress has only "substantively" amended § 264 once, and it was in response to the possibility of bioterrorism threats.[203] Therefore, the Court concluded that the legislative history did not affect the reading of this section, and thus did not provide a direct answer for

[196] *Id.* at *11–12.

[197] *Id.* (quoting *Sanitation*, WEBSTER'S NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE (William Allan Neilson et al. eds., 2d ed. 1942)).

[198] *Id.* (quoting *Sanitation*, FUNK & WAGNALLS NEW STANDARD DICTIONARY OF THE ENGLISH LANGUAGE (Isaac K. Funk et al. eds, 1946)).

[199] *Id.* at *12–13.

[200] *Id.* at *14–17 (discussing the ambiguity of the legislative history behind the PHSA).

[201] *Id.* at *15.

[202] *Id.* at *16 (quoting *A Bill to Codify the Laws Relating to the Public Health Service and for Other Purposes: Hearing on H.R. 3379 Before the Subcomm. of the H. Comm. on Interstate and Foreign Com.*, 78th Cong. 140 (1944) (statement of Alanson W. Willcox, Assistant General Counsel, Federal Security Agency).

[203] *Id.*; *see also* Public Health Security and Bioterrorism Preparedness and Response Act of 2002, Pub. L. No.107-188, § 201, 116 Stat. 594, 637–46 (codified as amended at 42 U.S.C. §§ 262–263n).

whether the CDC had authority to specifically enforce the Mask Mandate.[204]

Because Congress delegated authority to the Public Health Service to enforce public health regulations and because § 264(a) is ambiguous as to the meaning of "sanitation," the Court then turned to the final step in the *Chevron* inquiry ("step two") to determine if the Mask Mandate was a permissible means of the CDC carrying out its delegated authority.[205] In doing so, the Court looked to the functionality of implementing the Mask Mandate.[206] Enacting such a measure would assist the CDC in quickly and effectively addressing the spread of COVID-19.[207] Further, it was argued that the Mask Mandate could mitigate the effects on the American economy that may be suffered if lockdowns were instead instituted to slow the spread of COVID-19.[208]

Considering these methods of statutory interpretation, the Court determined that a "sanitation" measure could reasonably include the Mask Mandate because masks "promote the public health by checking the transmission of airborne viruses."[209] It appears, then, that this Court found support within the dictionary definitions of "sanitation" that relate to promoting and preserving public health.[210] In sum, the Mask Mandate was determined to be a permissible measure in accordance with the *Chevron* standard, and the Court thus deferred to the CDC's authority in creating and enforcing the Mask Mandate.[211]

B. Health Freedom Defense Fund, Inc. v. Biden[212]

On the other hand, the Court's analysis of "sanitation" in *Health Freedom Defense Fund, Inc. v. Biden* began with the ordinary tools of statutory interpretation,[213] finding that § 264(a) itself was *not*

[204] *Wall*, 2022 U.S. Dist. LEXIS 93556, at *17.

[205] *Id.*

[206] *Id.* at *17–18.

[207] *See id.* at *17–21.

[208] *Id.* at *21.

[209] *Id.* at *18.

[210] *See id.* at *11–12 (quoting *Sanitation*, FUNK & WAGNALLS NEW STANDARD DICTIONARY OF THE ENGLISH LANGUAGE (Isaac K. Funk et al. eds, 1946)).

[211] *Id.* at *6.

[212] No. 21-CV-1693, 2022 U.S. Dist. LEXIS 71206 (M.D. Fla. Apr. 18, 2022).

[213] *Id.* at *14–28.

ambiguous, ultimately rejecting the application of *Chevron* here.[214] *Chevron* requires a court to use tools of statutory interpretation to determine if Congress had an intent as to the specific language at issue.[215] Again, if the intent is unambiguous, then the reviewing court must give effect to that intent.[216] If the challenged law is "silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's [construction] is based on a permissible construction of the statute."[217] Yet, the Court explicitly acknowledged that the challenged statute is silent as to the definition of "sanitation,"[218] which is the very issue here. The Court also recognized that no tribunal had yet issued a ruling on the requirement of persons to wear masks while using public conveyances.[219]

Nevertheless, the Court first turned to dictionaries to define the ordinary meaning of "sanitation."[220] The Court summarized the definitions of "sanitation" from Webster's New International Dictionary of the English Language and Funk & Wagnalls New Standard Dictionary of the English Language as follows: "measures that clean something or that remove filth, such as trash collection, washing with soap, incineration, or plumbing."[221] After parsing through these definitions, the Court was then faced with determining whether the Mask Mandate fit into the category of "sanitation" referring to cleaning measures or the latter category of "sanitation" referring to preservation of cleanliness.[222] Even though the Court acknowledged the Mask Mandate

[214] *Id.* at *29 (emphasis added). The U.S. Supreme Court has stated that "[a] statute can be unambiguous without addressing every interpretive theory offered by a party. It need only be 'plain to anyone reading the Act' that the statute encompasses the conduct at issue." Salinas v. United States, 522 U.S. 52, 60 (1997) (quoting Gregory v. Ashcroft, 501 U.S. 452, 467 (1991)).

[215] *See* Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 n.9 (1984).

[216] *Id.* at 842–43, 843 n.9.

[217] *Id.* at 843.

[218] *Health Freedom Def. Fund, Inc.*, 2022 U.S. Dist. LEXIS 71206, at *14 ("The PHSA does not define 'sanitation.'").

[219] *Id.* at *12.

[220] *Id.* at *14.

[221] *Id.* at *14–15. The Court subsequently provides an explanatory parenthetical after citing to WEBSTER'S NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE and states that the definition for sanitation includes "rendering sanitary." *Id.* The Court then presents the definitions of sanitation in FUNK & WAGNALLS NEW STANDARD DICTIONARY OF THE ENGLISH LANGUAGE, which include "the removal or neutralization of elements injurious to health" and "measures that keep something clean." *Id.* at *15.

[222] *Id.*

would fit into this latter definition of sanitation, it ultimately decided that sanitation was limited only to cleaning measures.[223] In support of this, the Court additionally utilized corpus linguistics and researched "sanitation" in the Corpus of Historical American English to analyze usage of the term between 1930 and 1944.[224] The Corpus data supported the Court's finding that "sanitation" measures during the mid-1900s were used in context with cleaning measures.[225] Despite this, however, about 5% of the results of this inquiry used "sanitation" in the context of serving as "a barrier to keep something clean."[226]

The Court also used statutory context to support its conclusion that sanitation meant "[c]leaning [m]easures."[227] "Sanitation" appears in conjunction with "inspection, fumigation, disinfection, . . . pest extermination, [and] destruction."[228] Because these terms target and eradicate disease, the Court decided that "sanitation" must be read in that context.[229] Looking beyond the text immediately surrounding "sanitation," the context of § 264(b) provided additional support for the Court's interpretation: that, based on the language of the individual subsections, while § 264(a) does not permit the CDC to enforce acts on individual persons, § 264(b) does.[230] Sections 264(c) and 264(d) likewise authorize the CDC to impose restrictions related to the movement of individuals.[231] The Court also briefly analyzed the titles and headings found within § 264.[232] The subsection headings provided further support for the Court to distinguish between § 264(a) and §§ 264(b)-(d) because the latter subsection headings refer to persons while § 264(a) does not.[233]

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[223] *Id.* at *15–17.

[224] *Id.* at *20.

[225] *Id.*

[226] *Id.* at *20–21.

[227] *Id.* at *17–20.

[228] *Id.* at *18 (quoting 42 U.S.C. § 264(a)).

[229] *Id.* at *18–19.

[230] *Id.* at *24–25. The Court found that the challenged Mask Mandate would fit more into the category of a conditional release pursuant to § 264(b) because it imposes a condition on a person who wishes to travel by requiring a person to wear a mask before traveling. *Id.*

[231] *Id.* at *27–28.

[232] *Id.* at *24.

[233] *Id.* The Court goes on to further state that § 264(a) delegates authority to the CDC to act on objects which are dangerous to individuals, whereas §§ 264(b)-(d) delegate authority to the CDC to actually act on individuals. *Id.*

Finally, the Court considered the history and evidence of the way the PHSA was enacted.[234] The Court cited to the fact that the PHSA "has been rarely invoked," and that the Act had "generally been limited to quarantining infected individuals and prohibiting the import or sale of animals known to transmit disease."[235] With respect to other measures instituted in response to the spread of COVID-19 as evidence of the way the PHSA was enacted, the Court also noted that the eviction moratorium[236] and the conditional sail order shutting down the cruise ship industry[237] both exceeded the statutory authority delegated to the CDC in § 264(a).[238]

With respect to the *Chevron* analysis and deference to the CDC's interpretation of "sanitation," the Court focused on whether Congress authorized the CDC to "enact preventative measures that condition the interstate travel of an entire population on adherence to CDC dictates," and it held that Congress did not delegate this authority to the CDC.[239] The Court found this dispositive on the *Chevron* issue and agency deference, and it explained that, even if *Chevron* could have applied, the Mask Mandate was still not a reasonable or permissible interpretation of "sanitation" by the CDC.[240] As a result, the Court found that face masks are not "sanitation" measures within the context of the PHSA because masks are not cleaning measures and

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[234] *Id.* at *12, *21–23.

[235] *Id.* at *12. (quoting Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485, 2487 (2021)).

[236] The Supreme Court in *Alabama Association of Realtors* found that the authority in § 264(a), which allows the CDC to take the kinds of measures "directly relate[d] to preventing the interstate spread of disease by identifying, isolating, and destroying the disease itself," did not support the eviction moratorium. 141 S. Ct. 2485, 2488 (2021). In support of this conclusion, the Court questioned the "downstream connection between eviction and the interstate spread of disease." *Id.*

[237] The District Court for the Middle District of Florida in *Florida v. Becerra* found that the authority in § 264(a) did not permit the CDC to institute a conditional sailing order on cruise ships arriving or departing from Florida ports. 544 F. Supp. 3d 1241, 1272, 1305 (M.D. Fla. 2021). The Court cites for support the fact that not only is the data initially relied upon by the CDC as justification for the conditional sailing order outdated, but also at the time the order was enforced, the cruise industry was already adequately equipped to handle mitigation techniques and protocols to reduce the spread of COVID-19 aboard cruise ships. *Id.* at 1303–04.

[238] *Health Freedom Def. Fund, Inc.*, 2022 U.S. Dist. LEXIS 71206, at *12 (citing *Becerra*, 544 F. Supp. 3d at 1272).

[239] *Id.* at *29.

[240] *Id.* at *29–30.

do not sanitize the wearer or the public conveyance.[241] Accordingly, the Court found that the CDC overstepped its authority in creating and enforcing the Mask Mandate and thereby ordered a nationwide injunction on the same.[242]

C. Supplemental Analysis of the Meaning of Sanitation in the Mid-1900s

As shown above, the Middle District of Florida filed two opinions that clearly conflict with respect to the meaning of "sanitation" as it appears in the PHSA. Further, while one opinion explained that the Court was required to defer to the CDC's interpretation of "sanitation,"[243] the other opinion explicitly denounced any deference that may be owed to the CDC as an executive agency.[244] Accordingly, there may be other resources to assist in discovering the meaning of "sanitation" as it was understood in and around 1944 to determine if the Mask Mandate could classify as a sanitation measure.

To determine if there are additional meanings of "sanitation," or if one definition better supports what may have been the congressional intent behind the meaning of the term as it is used in the PHSA, this supplemental analysis begins with ordinary meaning as a method of statutory interpretation but turns to other dictionaries that the Courts did not use in their analyses. As discussed above, a dictionary is often the first step in figuring out the ordinary meaning of a word.[245] Black's Medical Dictionary from 1944 provides the following definitions:

> Sanitation. [T]he science which aims at the prevention of disease . . . . At first, preventive medicine took cognisance only of the preventable or infectious diseases, but in its vast ramifications at the present day it aims also at the improvements of the general health of the populace, by the mitigation of all external conditions which tend to disease in individuals. . . . It aims at the reduction of infectious diseases . . . .
>
> Sanitary law. . . . In the various Public Health Acts, whether for England, Scotland, or Ireland, which constitute the basis of sanitary administration,

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[241] *Id.* at *17.

[242] *Id.* at *64.

[243] Wall v. CDC, No. 21-CV-975, 2022 U.S. Dist. LEXIS 93556, at *22–23 (M.D. Fla. Apr. 29, 2022).

[244] *Health Freedom Def. Fund, Inc.*, 2022 U.S. Dist. LEXIS 71206, at *29–30.

[245] *See supra* Part IV.A.; *see also* Krishnakumar, *supra* note 135, at 167 ("[C]ourts increasingly have employed dictionary definitions as . . . evidence of ordinary meaning.").

> machinery is provided for dealing with: . . . 4. The general prevention and mitigation of infectious diseases, including the provision of isolation hospitals, houses of reception, ambulances, disinfecting stations and apparatus.[246]

This definition also provides subsections of topics related to sanitation, including discussions of the roles of Health Officers and Sanitation Inspectors, and also provides definitions for sanitation measures with respect to nuisances, soil, buildings, streets, air and ventilation, water, sewage, food, and infectious diseases.[247]

Next, this supplemental analysis takes another look at corpus linguistics to attempt to ascertain the meaning behind "sanitation" in the mid-1900s. Since the PHSA was enacted in 1944[248] and because the Court in *Health Freedom Defense Fund, Inc.* looked to define "sanitation" as it was used in the mid-1900s,[249] here, the corpus linguistics analysis utilized a search of the use of "sanitation" between 1930 and 1950. Upon search of "sanitation" in the Corpus of Historical American English, there were 158 results for 1930, 182 results for 1940, and 138 results for 1950, totaling 478 results between the years 1930 and 1950.[250] Out of the ten results that show explicitly for 1944, references are made to a sanitation truck, a state Department of Sanitation, defective sanitation, a sanitation problem, and then two references appear in conjunction with the term "health" or "recreation."[251] Sanitation is specifically mentioned in these references with respect to garbage disposal; childhood diseases due to "defective sanitation" (e.g., typhoid fever and streptococcal throat infections); the spread of disease caused by sanitation difficulties due to the inability to procure soap; and the "superb" sanitation and recreation efforts of prisoner-of-war camps in North Africa.[252] This appears to give a broad

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[246] *Sanitation*, BLACK'S MEDICAL DICTIONARY (18th ed. 1944). Neither the Court in *Wall v. CDC* nor the Court in *Health Freedom Def. Fund, Inc. v. Biden* used this dictionary in their respective analysis. *See supra* text accompanying notes 196–99, 220–23.

[247] *See* BLACK'S MEDICAL DICTIONARY, *supra* note 246.

[248] Public Health Service Act §§ 1–612, 42 U.S.C. §§ 201 to 300aaa-13.

[249] *Health Freedom Def. Fund, Inc.*, 2022 U.S. Dist. LEXIS 71206, at *14.

[250] *Sanitation*, CORPUS OF HIST. AM. ENG., https://www.english-corpora.org/coha (last visited Dec. 8, 2022). In *Health Freedom Def. Fund, Inc. v. Biden*, the Court indicated it found 507 results for the term "sanitation" between the years 1930 and 1944 using this database. 2022 U.S. Dist. LEXIS 71206, at *20. The discrepancy in search results between those located for the purpose of this note and those located by the Court is unexplained.

[251] CORPUS OF HIST. AM. ENG., *supra* note 250.

[252] *Id.*

meaning to the understanding of sanitation in 1944, with the meaning clearly being inclusive of measures related to personal hygiene, water, sewage, and infectious diseases.

Another resource that may support the ordinary understanding of sanitation in the early and mid-1900s is through patents issued by the U.S. Patent Office. For example, a sanitary mask patent was originally filed in 1919.[253] The practical intent of the design was to collect disease-causing germs on the detachable pad of the mask while not impeding the user's breathing.[254] In 1921, a patent was issued for a sanitary mask with the purpose of shielding users from the breath of others.[255] This mask anticipated the insertion of "gauze or cotton batting saturated with a suitable disinfectant" into the mask when used in connection with "contiguous [sic] diseases."[256] In effect, the mask would reduce the "risk of contracting diseases by means of breath germs."[257] A foldable sanitary mask was also patented in 1925.[258] This mask served to "obstruct[] the transmission of microbes or disease germs, [while] at the same time allowing respiration to occur."[259] Finally, a face mask was patented in 1935 in order to aid in preventing the spread of disease transmitted via "talking, coughing, or sneezing."[260] The inventor of this design sought to "provide an improved face mask that will be substantially impermeable to the impact or contact of various infectious disease germs."[261]

The final analysis here to attempt to find the ordinary meaning of "sanitation" turns to the 1907 book entitled Sanitation in Daily Life,

[253] Sanitary Mask, U.S. Patent No. 1,579,449 (filed Oct. 1, 1919) (issued Apr. 6, 1926).

[254] *Id.* at col. 2 ll. 89–104.

[255] Sanitary Mask, U.S. Patent No. 1,377,710 col. 2 ll. 81–85 (filed Feb. 3, 1920) (issued May 10, 1921).

[256] *Id.* at col. 2 ll. 75–80.

[257] *Id.* at col. 2 ll. 81–85.

[258] Foldable Sanitary Mask, U.S. Patent No. 1,523,884 (filed Jan. 18, 1924) (issued Jan. 20, 1925).

[259] *Id.* at col. 1 ll. 18–23.

[260] Face Mask, U.S. Patent No. 1,987,922 col. 1 ll. 19–34 (filed Dec. 14, 1931) (issued Jan. 15, 1935).

[261] *Id.* at col. 1 ll. 45–48. Interestingly, this patent recognizes "reliable authority that [posits] the germs of infectious diseases are commonly expelled seven feet or more from the mouth of a human being in talking and that such infectious disease germs are forcibly expelled a distance of twelve feet or more in coughing or sneezing." *Id.* at col. 1 ll. 13–18.

where the prologue introduces the reader to the importance of sanitation:

> To secure and maintain a safe environment there must be inculcated *habits* of using the material things in daily life in such a way as to promote and not to diminish health. Avoid spitting in the streets, avoid throwing refuse on the sidewalk, avoid dust and bad air in the house and sleeping room, etc. . . . What touches my neighbor, touches me. . . . The first law of sanitation requires quick removal and destruction of all wastes—of things done with. The second law enjoins such use of the air, water, and food necessary to life that the person may be in a state of health and efficiency.[262]

The first chapter of this book begins with a discussion on sanitation and cleanliness.[263] It states that, "Sanitation is keeping clean, not merely cleaning up and disinfecting, which seems to be the common idea."[264] In discussing the importance of clean air, the author asserts that, "Public sanitation is forced to take account of the quality of air in cars, halls, schools, and places of amusement where many people are crowded together, and where the wishes of one individual may conflict with the inclination of others."[265] Coughing into one's hand is also condemned:

> Do not cough into free air or into your hand. The fine spray even in speaking, when there is mucus in the throat, may and usually is sent for a number of feet away from the person. . . . If the hand catches this spray it stops it, to be sure, but carries it to the friend's hand or to the book or bag one is carrying. Use a handkerchief or piece of cloth always, and have plenty of them.[266]

It follows, then, that sanitation was considered, even in the decades prior to 1944, in relation to infectious diseases and creating an impermeable barrier to disease-causing germs and reducing the spread of such germs.

With respect to the interpretive technique of statutory context, "sanitation" appears in the PHSA (and the current Code) alongside the

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[262] ELLEN H. RICHARDS, SANITATION IN DAILY LIFE, at vii–viii (3d ed. 1915).

[263] *See id.* at 1–3.

[264] *Id.* at 2.

[265] *Id.* at 33.

[266] *Id.* at 52.

terms "inspection," "fumigation," "disinfection," "pest extermination," and the "destruction of contaminated animals or articles."[267] This list, however, appears to be non-exhaustive as it follows the language "provide for such" and precedes the language "other measures, as . . . may be necessary."[268] Accordingly, it may be advanced that the individual terms in § 264(a) are in and of themselves non-restrictive and subject to broad interpretations to achieve the goals of public health measures. Further, the prior sentence in § 264(a) authorizes the Surgeon General to use their judgment in making and enforcing regulations "necessary to prevent the introduction, transmission, or spread of communicable diseases."[269]

Statutory context here also overlaps with the titles-and-headings canon of construction. Looking to the immediate surrounding titles and headings of § 264, the part of the Act this section falls under is labeled "Quarantine and Inspection," which is then sub-labeled "Control of Communicable Diseases."[270] Part G is nested under Title III of the Act, which is entitled "General Powers and Duties of Public Health Service."[271] In a separate part of the Act, Part B of Title III entitled "Improving Coordination of Federal and State Programs," the goal is to have federal-state cooperation for "quarantine and *other health regulations*" in order to provide support for the "prevention and suppression of communicable diseases."[272] These headings and titles appear, then, to designate a range of authority related to promoting and preserving the public health with respect to infectious diseases.

Turning to the interpretive technique of studying legislative history, the history behind the PHSA also demonstrates clear intent for a broad authority delegated by Congress as it relates to sanitation measures. The intent of the PHSA was to firstly "consolidate and revise the laws relating to the Public Health Service."[273] The PHSA repealed many laws, including Public Law 78–184[274]—a bill introduced

[267] Public Health Service Act, ch. 373, § 361(a), 58 Stat. 703 (1944) (current version at 42 U.S.C. § 264).

[268] *Id.*

[269] *Id.*

[270] *Id.*

[271] Public Health Service Act, ch. 373, tit. III, 58 Stat. 682, 703 (1944) (current version at 42 U.S.C. § 241).

[272] Public Health Service Act § 311, 42 U.S.C. § 243(a) (emphasis added).

[273] Public Health Service Act of 1944, H.R. 4624, 78th Cong. (1944).

[274] Public Health Service Act, Pub. L. No. 78–410, § 611, 58 Stat. 682, 719 (1944).

for the purposes of reorganizing the Public Health Service.[275] During the House hearing for the PHSA, Surgeon General Dr. Thomas Parran discussed the function of the Public Health Service:

> [It] act[s] as [the Army's] agent in dealing with the State and local people on the one hand, and in getting them to do the things necessary for protection of the health of the military population; and on the other hand, we keep the military chief surgeon and the commanding officer informed of the presence of epidemic and other diseases in the civilian population.[276]

Prior to the enactment of the PHSA, the Committee on Interstate and Foreign Commerce submitted a report regarding the establishment of "a division in the Public Health Service" to prevent and control the spread of tuberculosis.[277] During a Senate hearing regarding the PHSA, Senator Elbert D. Thomas indicated that the bill "brings the law up to date, in such a way that one of the most vital and most necessary agencies of our Government may operate unhampered, at a time when our country is really imperiled."[278] Senator Thomas cited tuberculosis and malaria as just two examples of outbreaks inflicting Americans at that time that could be hindered from preventive measures.[279]

Analyzing the legislative history behind the PHSA overlaps with the statutory interpretation technique of looking at how the statute is implemented and the practical consequences of such implementation. Regarding the practical consequences of statutory implementation here, the CDC used the authority delegated to it in § 264(a) to propose revisions to the Foreign Quarantine Provisions in the Public Health Service Act in 1983.[280] Within these revisions, sanitation measures were listed with detention and isolation measures as actions which may be taken when a person arriving to a United States port is suspected of

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[275] Public Health Service Act of 1943, Pub. L. No. 78-184, 57 Stat. 587 (1943); 89 CONG. REC. 2853 (statement of Sen. Elbert D. Thomas).

[276] *A Bill for the Organization and Functions of the Public Health Service: Hearing on H.R. 649 Before the Subcomm. of the H. Comm. on Interstate and Foreign Com.*, 78th Cong. 13 (1943) (statement of Dr. Thomas Parran, Surgeon General, United States Public Health Service)).

[277] H.R. REP. NO. 78-1644, at 1.

[278] 90 CONG. REC. 6486 (statement of Sen. Elbert D. Thomas).

[279] *See id.*

[280] Foreign Quarantine Provisions, 48 Fed. Reg. 36,143 (Aug. 9, 1983) (to be codified at 42 C.F.R. pt. 71).

being infected with particular communicable diseases.[281] Additionally, sanitary inspections of vessels arriving to United States ports included measures to "determine whether there exists rodent, insect, or other vermin infestation, contaminated food or water, or other insanitary conditions requiring measures for the prevention of the introduction, transmission, or spread of communicable disease."[282] With respect to importations of dogs and cats, the proposed revision included a subsection entitled "Sanitation," which states that the containers dogs and cats arrive in which are found to be unsanitary must be "cleaned and disinfected."[283] The CDC has also used the authority delegated to it by Congress through the PHSA as early as 1985 to attempt to implement sanitary inspection programs on cruise ships to prevent the spread of gastrointestinal diseases.[284] Sanitation inspections under this subsection focused on "[w]ater, refrigeration, food preparation, potential contamination of food, *personal cleanliness* of food handlers, and the vessel's cleanliness and state of repair."[285] Consequently, supplemental analysis of "sanitation" supports the idea that sanitation includes personal hygiene measures to reduce the spread of infectious diseases.

VI. CONCLUSION

Because of the inconsistent conclusions in *Wall v. CDC* and *Health Freedom Defense Fund, Inc. v. Biden*, it appears that any ambiguity of "sanitation" as the term appears in the PHSA has yet to be judicially resolved. These cases disagreed on whether "sanitation" was ambiguous in the first place[286] and reached opposite conclusions on whether Congress even intended to authorize the CDC to enact measures such as the Mask Mandate.[287] However, both cases looked to interpret the meaning of the word "sanitation" by way of some of the same techniques of statutory interpretation.

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[281] *Id.* at 36,147.

[282] *Id.* at 36,148.

[283] *Id.* at 36,149.

[284] Vessel Sanitation Inspection Program, 50 Fed. Reg. 27,490, 27,490–91 (proposed July 3, 1985).

[285] *Id.* at 27,491 (emphasis added).

[286] *Compare* Wall v. CDC, No. 21-CV-975, 2022 U.S. Dist. LEXIS 93556, at *9–11 (M.D. Fla. Apr. 29, 2022), *with* Health Freedom Def. Fund, Inc. v. Biden, No. 21-CV-1693, 2022 U.S. Dist. LEXIS 71206, at *29–31 (M.D. Fla. Apr. 18, 2022).

[287] *Compare Wall*, 2022 U.S. Dist. LEXIS 93556, at *6, *with Health Freedom Def. Fund, Inc.*, 2022 U.S. Dist. LEXIS 71206, at *64.

First, as demonstrated above,[288] the Court in *Wall v. CDC* relied on the statutory interpretation techniques of finding a term's ordinary meaning, the meaning of the term within statutory context, and the titles and headings canon to specifically determine the meaning of "sanitation" as it was used in the PHSA. The Court did not attach much weight to legislative history to assist its finding.[289] The Court likewise rejected the nondelegation doctrine (a substantive canon of construction) and did not spend much time on this interpretive tool, because it found that Congress *clearly* delegated authority to the CDC to make and enforce regulations to prevent the spread of disease.[290] Because it found the CDC was properly exercising its authority under the PHSA and because the Mask Mandate was a *permissible* "sanitation" measure to control the spread of COVID-19, the Court deferred to the CDC's judgment on creating and enforcing the Mask Mandate.[291]

Turning to the Court's statutory interpretation techniques in *Health Freedom Defense Fund, Inc. v. Biden*, as demonstrated above,[292] ordinary meaning, statutory context, the titles and headings canon, and legislative history were the most assistive interpretive tools to aid in determining the meaning of "sanitation." The Court looked to different definitions of "sanitation," and, while it acknowledged that masks *could* fit into one of the definitions for sanitation, it nevertheless limited the scope of authority to implement sanitation measures delegated by Congress in § 264(a).[293] Statutory context and the titles and headings indicated to the Court that the authority in § 264(a) does not permit the CDC to act on persons.[294] Likewise, the legislative history demonstrated to the Court that sanitation was directed toward the importation of animals and the quarantining of persons.[295] The Court also rejected *Chevron* deference and found that the CDC overstepped its authority by instituting an *impermissible* Mask Mandate.[296] However, even if a challenged statute does not survive *Chevron*, it can still be analyzed under *Skidmore* and may yet survive

[288] *See* discussion *supra* Section V.A.

[289] *See Wall*, 2022 U.S. Dist. LEXIS 93556, at *17.

[290] *Id.* at *5 & n.6.

[291] *Id.* at *25.

[292] *See* discussion *supra* Section V.B.

[293] *Health Freedom Def. Fund, Inc.*, 2022 U.S. Dist. LEXIS 71206, at *16–17.

[294] *Id.* at *24.

[295] *Id.* at *21–22.

[296] *Id.* at *34–35.

judicial scrutiny.[297] In considering the *Skidmore* persuasiveness standard, the Court in *Health Freedom Defense Fund, Inc.* could have then analyzed the CDC's interpretation of "sanitation" to determine if the CDC had valid reasoning behind its interpretation of this term and if there was evidence of other enactments considered with this challenged interpretation.[298]

Despite the deference afforded to agencies in carrying out the intent of Congress, the interpretive devices used to understand the meaning of ambiguous language gives courts wide discretion in interpreting statutes.[299] As such, courts can reach opposite conclusions when interpreting the same law, perhaps due to ideologies and social movements.[300] For example, the Courts in *Wall v. CDC* and *Health Freedom Defense Fund, Inc. v. Biden* both used the Webster's New International Dictionary of the English Language and Funk & Wagnalls New Standard Dictionary of the English Language, and yet they reached different conclusions on the meaning of "sanitation."[301] Additionally, the *Wall* Court did not find legislative history particularly useful, whereas the *Health Freedom Defense Fund, Inc.* Court did seem to put considerable weight on the fact that it does not appear the PHSA has been invoked for many health measures beyond that of quarantines.[302]

Additional analysis of "sanitation" using the main five statutory interpretation techniques,[303] however, yields results which support the notion that masks could fall within "sanitation" as the term was understood in the mid-1900s, meaning the CDC's Mask Mandate would be a permissible exercise of the authority delegated to it by Congress. By the 1940s, it had been anticipated that masks could be the very kind of barrier beneficial in controlling the spread of a disease by keeping the air clean and preventing infectious germs from spreading

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[297] United States v. Mead Corp., 533 U.S. 218, 221 (2001).

[298] *See* Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

[299] *See* Schachter, *supra* note 151, at 30–31.

[300] *See* Clune & Lindquist, *supra* note 171, at 1045, 1062–63.

[301] *Compare* Wall v. CDC, No. 21-CV-975, 2022 U.S. Dist. LEXIS 93556, at *12, *17 (M.D. Fla. Apr. 29, 2022), *with Health Freedom Def. Fund, Inc*., 2022 U.S. Dist. LEXIS 71206, at *14–17.

[302] *Compare Wall*, 2022 U.S. Dist. LEXIS 93556, at *14, *17, *with Health Freedom Def. Fund, Inc*., 2022 U.S. Dist. LEXIS 71206, at *12, *21–23.

[303] *See* discussion *supra* Section V.C.

person-to-person.[304] It is likely not unreasonable, then, to require masks as a sanitation measure for the interest of preventing the spread of communicable diseases where there are mass populations in confined places, e.g., crowds on modes of public transportation. There is also no indication that the Mask Mandate conflicted with or frustrated the purpose of § 264(a).[305] Based on *Chevron* deference and statutory interpretation techniques, it follows then, that the CDC likely acted within the authority delegated to it in § 264(a) to create and implement the Mask Mandate in furtherance of the CDC's efforts to control and prevent the spread of COVID-19. Accordingly, "sanitation" as it was used in the PHSA would likely include personal hygiene efforts aimed at preventing the transmission and spread of infectious diseases, including the use of face masks in places of public transportation.

[304] *See supra* notes 253–61, and accompanying text.

[305] *See* Healy, *supra* note 125, at 646 ("In this regard, *Chevron* clearly distinguished between review to determine the best interpretation as contrasted with review to determine a permissible interpretation. The Court would hold the agency had acted unlawfully if the agency's interpretation conflicted with law that Congress had clearly defined, an impermissible interpretation. *Chevron* established that, if the agency interpretation were permissible, then a court had to accept the agency interpretation as a matter of substance, without regard to whether that interpretation was the best or the interpretation favored by the court."); *see also supra* text accompanying notes 37–51.