

STAKEHOLDER PARTICIPATION AT THE CENTERS FOR DISEASE CONTROL

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ABSTRACT

In recent years, administrative law scholars and public health experts have grappled with whether, or how, politics should shape public health guidance. Many defenders of science-based agencies argue that the Centers for Disease Control and Prevention (CDC) ought to be insulated from political influence from the executive and other stakeholders, including social movements.

Rather than recoil against politics at the CDC and call for further independence, this Article embraces the CDC as an institution that sits within the ebb and flow of political contestation. Pushing against the idea that the CDC is an agency of neutral experts who lead in a technocratic manner, this Article shows that the Agency has long been the target of activism, litigation, and advocacy that shape its policymaking and that it has long responded to these external demands in its public health guidance. Recognizing that CDC outputs emerge from a political process, and not only from evidence and expertise, creates openings for discussions about distribution, accountability, and democratic decision-making.

Following from this conceptual reframing, this Article makes a pragmatic institutional proposal: a citizen petition process that would allow stakeholders, from social movements to private-sector actors, to engage with actions taken by the CDC.

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INTRODUCTION

The Centers for Disease Control and Prevention (“CDC”) is in crisis. The Agency was thrust into the spotlight of legal and political discourse during the COVID-19 pandemic and remains there as the Trump administration dramatically shifts public health guidance on topics ranging from vaccines to autism and beyond.¹ The attention generated by decision-making at the CDC has made the Agency the subject of scholarly and political debate. One question dominates: How should an evidence-based public health agency engage stakeholders and stakeholder politics?

1. See Press Release, Ctrs. for Disease Control & Prevention, CDC Acts on Presidential Memorandum to Update Childhood Immunization Schedule (Jan. 5, 2026), <https://www.cdc.gov/media/releases/2026/2026-cdc-acts-on-presidential-memorandum-to-update-childhood-immunization-schedule.html> [https://perma.cc/KJK3-6N87]; Press Release, Am. Med. Ass’n, AMA Statement on CDC Changes to Website on Autism and Vaccines (Nov. 20, 2025), <https://www.ama-assn.org/press-center/ama-press-releases/ama-statement-cdc-changes-website-autism-and-vaccines> [https://perma.cc/656W-8L22].

This tension between science and politics at the CDC was evident early in the pandemic. On September 23, 2020—seven months into the officially declared pandemic,² and as the country cleared 200,000 COVID-19-related deaths³—the heads of the CDC, the National Institute of Allergy and Infectious Diseases, and the FDA testified before the Senate Health, Education, Labor, and Pensions Committee on how they were responding to the pandemic.⁴ Legislators were concerned by attempts to interfere with the work of the health agencies.⁵ A key area of questioning was about political meddling in the scientific response to the epidemic.⁶

In response to these questions, heads of agencies and departments—including Robert Redfield, then-Director of the CDC—stated they would do their best to protect their organizations from political interference.⁷ The CDC maintained this position throughout the pandemic. Despite the scientific uncertainties about the virus, the Agency has asserted its reliance on scientific authority over public or political influence as its basis for policy making.⁸

This frame, in which the Agency operates best when untouched by politics, belies the reality that public health guidance is the product of social and political contestation, not one of pure science and evidence. This leaves us in need of a better framework to understand how politics and science should interact in public health policymaking.

In contrast to the standard view that science and expertise should be protected from political interference, this Article argues that the CDC should take stakeholder input seriously. This Article defines

2. See *COVID-19 Timeline*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/museum/timeline/covid19.html> [<https://perma.cc/SC6W-9NU5>] (last visited Sep. 5, 2025).

3. *Id.*

4. See *COVID-19: An Update on the Federal Response: Hearing Before the S. Comm. on Health, Educ., Lab., & Pensions*, 116th Cong. 9–11 (2020) (statement of Anthony Fauci, M.D., Dir., Nat'l Inst. of Allergy & Infectious Diseases, Nat'l Insts. of Health); *id.* at 11–33 (statement of Robert Redfield, M.D., Dir., U.S. Ctrs. for Disease Control & Prevention); *id.* at 36–74 (statement of Stephen Hahn, M.D., Comm'r of Food & Drugs, U.S. Food & Drug Admin.). See generally FEDNET, *Senate HELP with Coronavirus Task Force Agency Heads* (YouTube, Sep. 23, 2020), <https://www.youtube.com/watch?v=X-VcY2e6PvE> [<https://perma.cc/C4T9-DUG7>] (live video of testimony).

5. See *COVID-19: An Update on the Federal Response*, *supra* note 4, at 7–8 (statement of Sen. Patty Murray, Ranking Member, S. Comm. on Health, Educ., Lab., & Pensions).

6. *Id.* at 130–31, 55 (responses of Dr. Redfield and Dr. Hahn to these lines of questioning).

7. See *id.*

8. Press Release, Rochelle Walensky et al., Dep't of Health & Human Servs., Joint Statement from HHS Public Health and Medical Experts on COVID-19 Booster Shots, (Aug. 18, 2021), <https://archive.cdc.gov/#/details?url=https://www.cdc.gov/media/releases/2021/s0818-covid-19-booster-shots.html> [<https://perma.cc/56A2-TSUX>] (“We will continue to follow the science on a daily basis . . .”).

stakeholders as non-governmental individuals and organizations—including nonprofits and corporations—that are impacted by or have a stake in public health guidance.⁹ Transparent stakeholder participation could help reveal the political choices embedded in purportedly neutral decision-making rooted in science and evidence. This is particularly true in moments of scientific uncertainty, where decision-making goes beyond what available evidence conclusively demonstrates. Allowing stakeholders to see how political choices are embedded in scientific decision-making can ensure greater accountability and reveal opportunities for transformation in agency guidance.¹⁰

The question of stakeholder engagement is even more central as the nation embarks on a controversial new public health agenda under a second Trump administration. How to manage stakeholder participation will take center stage in an administrative agency perceived to be taken over by critics of science. This is exemplified by the current Secretary of Health and Human Services, Robert F. Kennedy Jr., a leader in the

9. This Article uses the word *stakeholder* to describe non-governmental actors including social movements and business organizations. The term *interested person*, rather than *stakeholder*, is used in the text of the Administrative Procedure Act regarding citizen petitions. Administrative Procedure Act § 4(d), 5 U.S.C. § 553(e). The question of stakeholders is a key focus of a series of reports compiled by the Congressional Research Service on the question of Congress as an institution. *See generally* CONG. RSCH. SERV. & LIBR. OF CONG., 113TH CONG., THE EVOLVING CONGRESS (Comm. Print 2014) (examining how and why Congress evolved to its present state).

10. There is a large literature on transparency in the administrative state. David Pozen has described the policies on transparency as lacking a “normative ideal,” which has produced a literature on transparency that is contradictory. *See* David E. Pozen, *Seeing Transparency More Clearly*, 80 PUB. ADMIN. REV. 326, 326 (2019). In response, he says, scholars must “drill down to the specific legal, institutional, historical, political, and cultural contexts in which these policies are crafted and implemented.” *Id.*; *see also* Elizabeth Fisher, *Transparency and Administrative Law: A Critical Evaluation*, 63 CURRENT LEGAL PROBS. 272, 273 (2010) (demonstrating “how transparency mechanisms extend the province of the subject, contribute to its architecture, and provide new sources of conflict and dispute”). There are longstanding questions of how to improve public participation in administrative rulemaking. *See generally* Cary Coglianese, *Citizen Participation in Rulemaking: Past, Present, and Future*, 55 DUKE L.J. 943 (2006) (describing the push for public participation in administrative law in the context of e-rulemaking as one platform for participation). This paper’s recommendation reflects the understanding of the administrative state as deliberative-constitutive as described in Sidney Shapiro, Elizabeth Fisher & Wendy Wagner, *The Enlightenment of Administrative Law: Looking Inside the Agency for Legitimacy*, 47 WAKE FOREST L. REV. 463 (2012) (discussing the “deliberative-constitutive” frame as a way to understand interest group engagement and expertise in administrative law). Questions around structure and timing of regulatory decision-making influence how groups engage with regulation. *See generally* Jacob E. Gersen & Anne Joseph O’Connell, *Hiding in Plain Sight? Timing and Transparency in the Administrative State*, 76 U. CHI. L. REV. 1157 (2009) (demonstrating how agency timing decisions influence which interest groups monitor and engage with regulatory processes).

movement against vaccines who is blurring the boundary between political activist, expert, and government official.¹¹

Rather than recoil against politics at the CDC and call for further independence, this Article embraces the CDC as an institution that sits within the ebb and flow of political contestation. Pushing against the idea that the CDC is an agency of neutral experts who lead in a technocratic manner, this Article shows that the Agency has long been the target of activism, litigation, and advocacy that shape its policymaking and that it has long responded to these external demands in its public health guidance. Recognizing that CDC outputs emerge from a political process, and not only from evidence and expertise, creates openings for discussions about distribution, accountability, and democratic decision-making.¹²

Following from this conceptual reframing, this Article makes a pragmatic institutional proposal: a citizen petition process that would allow stakeholders, from social movements to private-sector actors, to engage with actions taken by the CDC. While some procedural mechanisms exist for stakeholder participation, such as notice-and-comment, this paper focuses on citizens' petitions as an important procedural lever, given the use of emergency guidance and rulemaking, which may circumvent normal pathways for public participation.¹³ This proposal is especially

11. See, e.g., Keesha Middlemass, *RFK Jr.'s History of Medical Misinformation Raises Concerns over HHS Nomination*, BROOKINGS INST. (Feb. 6, 2025), <https://www.brookings.edu/articles/rfk-jr-s-history-of-medical-misinformation-raises-concerns-over-hhs-nomination/> [https://perma.cc/GKG3-CHTC]; Berkeley Lovelace Jr., Dasha Burns & Laura Strickler, *Trump Picks RFK Jr., Anti-Vaccine Activist, for Health and Human Services Secretary*, NBC NEWS (Nov. 14, 2024, at 06:57 ET), <https://www.nbcnews.com/health/health-news/trump-picks-rfk-jr-anti-vaccine-activist-health-human-services-secretary-rcna180182> [https://perma.cc/CP4G-D52D] (describing Kennedy as being "known for his misleading and false claims about vaccines"). Kennedy has many fervent supporters driving the public narrative about his crusade. See, e.g., Leana S. Wen, *Who Are RFK Jr.'s 'MAHA Moms'? They Might Surprise You*, WASH. POST (Apr. 9, 2025), <https://www.washingtonpost.com/opinions/2025/04/09/maha-moms-rfk-vaccines-health-care/> [https://perma.cc/5Z2L-4ZNB].

12. See generally Jerry Frug, *Administrative Democracy*, 40 U. TORO. L.J. 559 (1990) (discussing various ways to organize government to expand "democratic institutions within government administration"). On the question of how some administrative agencies retain autonomy and legitimacy, political scientist Daniel Carpenter argues that strong institutions have "durable reputations that are seated in multiple and diverse networks." DANIEL CARPENTER, *THE FORGING OF BUREAUCRATIC AUTONOMY: REPUTATIONS, NETWORKS, AND POLICY INNOVATION IN EXECUTIVE AGENCIES, 1862–1928*, at 6 (2001).

13. See NAT'L ACADS. OF SCIS., ENG'G & MED., *IMPROVING THE CDC QUARANTINE STATION NETWORK'S RESPONSE TO EMERGING THREATS*, 178–79 (2022) (discussing emergency guidance and rulemaking).

salient as the CDC undergoes restructuring following the COVID-19 pandemic and shifts in presidential administrations.¹⁴

This Article proceeds in four parts. Part I situates the Article's argument against the backdrop of administrative law scholarship and social movement theory. The Article relies on social movement theory because of its rich engagement with stakeholder politics at administrative agencies. It then provides a brief history of the CDC to contextualize the Agency and the coming political crisis.

Part II turns to the COVID-19 pandemic and describes how executive meddling in CDC public health guidelines by the Trump administration undermined the ability of the CDC to claim political and scientific neutrality. In a moment of scientific uncertainty, the political interference by the executive created an opportunity for stakeholder contestation centering on the CDC.¹⁵

Part III describes how stakeholders targeted the Agency through litigation, activism, and direct lobbying during the pandemic to influence CDC guidance in the service of political and material goals. This Part shows how the CDC's policymaking during the COVID-19 pandemic often reflected legal, economic, and political pressure that resulted in shifts in CDC policy.

Part IV uses the example of a citizen petition to argue for the necessity of procedural mechanisms that allow for greater stakeholder participation in public health decision-making. There is precedent for this proposal in administrative law: the FDA's citizen petition process.¹⁶ To be sure, the FDA's process is contested, as will later be discussed. However, there is much to be gained from allowing citizen participation in scientific regulation. The FDA's citizen petition process offers an existing example for how the CDC can be more responsive to political

14. See CTRS. FOR DISEASE CONTROL & PREVENTION, CDC MOVING FORWARD SUMMARY REPORT, (Sep. 1, 2022) [hereinafter CDC MOVING FORWARD], <https://stacks.cdc.gov/view/cdc/126338> [<https://perma.cc/8UGV-RY64>]; see also Dennis Thompson, *Former CDC Directors Support Sweeping Review of Agency*, UPI (Apr. 7, 2022, at 12:58 ET), https://www.upi.com/Top_News/US/2022/04/07/CDC-crisis-review/1411649349278/ [<https://perma.cc/FE82-TK2B>] (“[F]ive former CDC heads . . . all agreed it’s a wise move for the embattled agency.”); *Addressing New Variants: A Federal Perspective on the COVID-19 Response: Hearing of the S. Comm. on Health, Educ., Lab., & Pensions*, 117th Cong. 4–8 (2022) (opening statement of Sen. Richard Burr) (describing his criticism of the Biden administration’s “lack of transparency” in its response to the COVID-19 pandemic and his assertion that it caused public confusion from the CDC’s guidance).

15. Michael S. Pollard & Lois M. Davis, *Decline in Trust in the Centers for Disease Control and Prevention During the COVID-19 Pandemic*, 9 RAND HEALTH Q. 23 (2022), <https://pmc.ncbi.nlm.nih.gov/articles/PMC9242572/> [<https://perma.cc/93KH-PS7V>].

16. See 21 C.F.R. § 10.30 (2025).

pressures, especially from stakeholders, and in turn be more attentive to the distributive consequences of its public health guidance.

This recommendation that the CDC have a citizen petition process is critical at a time when the CDC is undergoing transformations given new leadership and past reviews of the agency following attempts to regain the public trust that was lost during the first years of the pandemic. A mechanism such as this would allow for the CDC to be responsive to an ideologically diverse range of actors, enabling each to be heard and allowing the public an opportunity for greater engagement with the decision-making of the Agency.

I. THE CDC IN CONTEXT

Administrative law scholars have long thought through the relationship between politics, public accountability, and expertise.¹⁷ They have examined the tensions between democracy and expertise, including the critique that the administrative state, steeped in technocrats, may be undemocratic.¹⁸ The undemocratic nature of the administrative state is sometimes viewed as a positive: agencies better serve the public when relying on technical expertise. The CDC benefits from this perspective.

17. See generally Sidney A. Shapiro, *The Failure to Understand Expertise in Administrative Law: The Problem and the Consequences*, 50 WAKE FOREST L. REV. 1097, 1097–1102 (2015) (discussing “expertise and its role in the rulemaking process”); see also STEPHEN BREYER, *BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION* 10–29 (1995) (discussing the relationship between risk management, expertise, and regulation in the context of public health). See generally BRUCE A. ACKERMAN & WILLIAM T. HASTLER, *CLEAN COAL/DIRTY AIR* 79–104 (1981); Jody Freeman & Adrian Vermeule, *Massachusetts v. EPA: From Politics to Expertise*, 2007 SUP. CT. REV. 51, 52 (describing the decision as a case of “expertise-forcing” or “the attempt by courts to ensure that agencies exercise expert judgment free from outside political pressures, even or especially political pressures emanating from the White House or political appointees in the agencies”); Elizabeth Fisher, *RISK REGULATION AND ADMINISTRATIVE CONSTITUTIONALISM* (2010) (discussing the relationship between law, science, and democracy in the context of risk regulation); Patricia J. Zettler, Reshma Ramachandran & Holly Fernandez Lynch, *Never Waste a Crisis: The Past, Present, and Future of FDA Reform*, 51 J. HEALTH POL. POL’Y & L. 285 (2026) (describing the interaction of evidence, expertise and politics at the Food and Drug Administration).

18. See, e.g., Cary Coglianese & Daniel E. Walters, *Antipolitics and the Administrative State*, 29 COMMON KNOWLEDGE 367, 368 (2023) (discussing antipolitics as a frame for understanding expertise and the values that ought to guide public administration). Scholars have recently focused on the question of administrative expertise regarding the Supreme Court’s decision in *Loper Bright Enterprises v. Raimondo*, with some commentators reflecting on shifts in relying on agency expertise. See, e.g., Michael M. Epstein, *Agency Deference After Loper: Expertise as a Casualty of a War Against the “Administrative State,”* 89 BROOK. L. REV. 871, 875–84 (2024); Sapna Kumar, *Scientific and Technical Expertise After Loper Bright*, 74 DUKE L.J. 1749, 1755–81 (2025).

The Agency emphasizes its commitment to science and expertise over political influence when issuing public health guidance.¹⁹ This perspective supports the idea that the Agency functions best when it makes policies independently from the political branches of government and away from the public.²⁰

The idea of political independence for administrative agencies—as an ideal worth striving for—is reflected in the work of health law scholars who sought to ensure that the executive was reigned in when it came to questions of scientific expertise in the wake of the pandemic.²¹ In the *Journal of the American Medical Association*, for example, Lawrence Gostin and his co-authors argue Congress can take basic steps to shield the CDC from political interference, including implementation of six-year terms for the CDC director and greater budgetary independence—allowing the CDC to make budget requests directly to Congress rather than through the President’s office.²² Congress, they argue, should establish emergency funds that would allow the CDC to respond to surges in the context of the pandemic without prior congressional approval.²³ Along similar lines, Christopher Robertson and Jacqueline Salwa describe how an independent public health agency could be modeled after other independent agencies, including the FTC or the SEC.²⁴ According

19. See, e.g., Walensky et al., *supra* note 8.

20. In an influential article, then-Harvard Law Professor and now-Supreme Court Justice Elena Kagan describes the administrative state as a site of “competition among different entities for control of its policies.” Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2246 (2001). She argues that there are different kinds of administrative control: presidential control, congressional control, self-control, interest group control, and judicial control. See *id.* at 2253–55.

21. See, e.g., Jacqueline Salwa & Christopher Robertson, *The Need for a Strong and Stable Federal Public Health Agency Independent from Politicians*, in COVID-19 POLICY PLAYBOOK: LEGAL RECOMMENDATIONS FOR A SAFER, MORE EQUITABLE FUTURE 64, 65–68 (Scott Burris et al. eds., 2021) [hereinafter Salwa & Robertson, *Strong and Stable*], https://static1.squarespace.com/static/5956e16e6b8f5b8c45f1c216/t/60995678592a707931ce1826/1620661880458/Chp9-Salwa_COVIDPolicyPlaybook-v2_May2021.pdf [https://perma.cc/64LW-VCB9]. The Supreme Court has since decided *Trump v. Slaughter*, which gives greater power to the Executive to remove officers of independent agencies. 146 S. Ct. 2283 (2026). See Lawrence O. Gostin & Peter Laurie, *Dismantling Independent Science—The Supreme Court and Public Health Regulation*, 336 JAMA 827, 828 (2026) (arguing that “*Slaughter* dismantles the broader constitutional presumption that technical expertise should insulate regulatory and scientific determinations from immediate political control”).

22. Lawrence O. Gostin, I. Glenn Cohen & Jeffrey P. Koplan, *Universal Masking in the United States: The Role of Mandates, Health Education, and the CDC*, 324 JAMA 837, 838 (2020).

23. *Id.*

24. Jacqueline Salwa & Christopher Robertson, *Designing an Independent Public Health Agency*, 384 NEJM 1684, 1685–86 (2021) [hereinafter Salwa & Robertson, *Designing an Independent Public Health Agency*]; see also Christopher Robertson & Richard Carmona,

to Robertson and Salwa, key features of such an agency would include protecting agency leadership from the political influence of Congress and the executive, appointing leadership based on expertise, an independent budget, and judicial deference.²⁵

Calls for agency independence sit in contrast to law and social movement scholarship that often disrupts the idea that expertise can be bounded and distinguished from the political workings and impact of the administrative state and the legislature.²⁶ Rather than distinguishing expertise from politics, social movement scholars often show the intrinsic political nature of the ‘expert’ class through detailed case studies.²⁷ Scholars show how activists take on expert-based claims, and may lobby scientifically-grounded agencies for access to drugs or recognition of illness, for example.²⁸ Often, social movement actors disrupt the idea of an expert by becoming lay experts—individuals without formal training, but often speaking in the vernacular of science and scientists.²⁹ In doing so, activists have successfully exerted influence on agency outcomes.³⁰ This was exemplified in the context of the AIDS struggle, in which activists began participating in formal decision-making processes at the FDA.³¹ This has also long been true in feminist battles around

We Need an Independent Public Health Agency, HILL (July 27, 2020, at 18:00 ET), <https://thehill.com/opinion/healthcare/509227-we-need-an-independent-public-health-agency> [<https://perma.cc/X9ZL-Y8CX>] (analogizing to the Federal Reserve and the CFPB).

25. See Salwa & Robertson, *Strong and Stable*, *supra* note 21, at 65, 67; see also Salwa & Robertson, *Designing an Independent Public Health Agency*, *supra* note 24, at 1685–86 (discussing the same). For discussions on agency independence, see generally Lisa Schultz Bressman & Robert B. Thompson, *The Future of Agency Independence*, 63 VAND. L. REV. 599, 600 (2010) (complicating a more traditional notion of independence by highlighting “mechanisms that make independent agencies increasingly responsive to presidential preferences”). See generally Samuel Bagenstos, *Reconstructing the Public Health State*, 68 WM. & MARY L. REV. (forthcoming 2027) (calling for a recognition of the inherent politics of public health while preserving the capacity of public health agencies to lead with expertise).

26. Compare BREYER, *supra* note 17, at 55–62 (arguing that regulatory agencies should be insulated from political pressure), with ACKERMAN & HASTLER, *supra* note 17, at 79 (discussing environmental regulation shaped by politics).

27. See, e.g., INST. MED., BIOMEDICAL POLITICS 2–7 (Kathi E. Hanna ed., 1991) (detailing the subjects of the six case studies contained within and explaining why they were included).

28. See, e.g., STEVEN EPSTEIN, IMPURE SCIENCE: AIDS, ACTIVISM, AND THE POLITICS OF KNOWLEDGE 8–9 (Andrew Scull ed., 1996) [hereinafter EPSTEIN, IMPURE SCIENCE].

29. See *id.*

30. See, e.g., STEVEN EPSTEIN, INCLUSION: THE POLITICS OF DIFFERENCE IN MEDICAL RESEARCH 74 (2007) (explaining that advocacy led to the inclusion of women and minorities in clinical trials); R. Alta Charo, *A Political History of RU-486*, in BIOMEDICAL POLITICS 43, 69–71 (Kathi E. Hanna ed., 1991) (describing the political activism that surrounded the drug approval of RU-486).

31. EPSTEIN, IMPURE SCIENCE, *supra* note 28, at 32.

healthcare, for example.³² This lay-expertise takes on the primacy of trained scientists and researchers. In the social movements literature, we also observe a complicated interplay of expert claims, stakeholder and social movement interests infusing scientific decision making, and a range of strategies deployed by social movements to alter evidence-based administrative rules and guidance.³³ These accounts disrupt the formal distinctions between politics and expertise.³⁴

A. CDC: History and Context

Though the Agency has been the subject of public debate and consternation, it remains largely outside the scope of both administrative law and social movement scholarship.

This silence provides an opportunity to think about the question of how stakeholders, including social movements, should engage with the CDC and to make the argument that rather than insulating the Agency from political engagement, there might be social benefit in producing pathways for stakeholder input. The reality of how the CDC has operated in the last fifty years is far from the perception of the Agency as operating exclusively based on expertise and challenges the notion that it is possible or desirable for it to do so.

The Communicable Disease Center was founded on July 1, 1946 in response to concerns about an ongoing Malaria epidemic following World War II.³⁵ The Agency's location in Atlanta was the outcome of its predecessor organization.³⁶ In 1940, the War Department sought assistance in public health measures throughout the country, but

32. See AZIZA AHMED, RISK AND RESISTANCE: HOW FEMINISTS TRANSFORMED THE LAW AND SCIENCE OF AIDS 13 (2025) ("The [Feminist Women's Health Movement] sought to rectify the male bias in science and medicine by generating knowledge of women's bodies and women's health through lived experience and demands that science be produced with the input of women.").

33. See, e.g., LEWIS GROSSMAN, CHOOSE YOUR MEDICINE: FREEDOM OF THERAPEUTIC CHOICE IN AMERICA 192 (2021); Mark Harrington, *AIDS Activists and People with AIDS*, in TACTICAL BIOPOLITICS 323 (Beatriz da Costa & Kavita Philip eds., 2008); Theodore M. Brown & Elizabeth Fee, *Social Movements in Health*, 35 ANN. REV. PUB. HEALTH 385, 391–95 (2014).

34. See David J. Hess & Kaelee Belletto, *Knowledge Conflicts: The Strategic Use and Effects of Expertise in Social Movements*, 93 SOCIO. INQUIRY 592, 593–96 (2023), <https://onlinelibrary.wiley.com/doi/10.1111/soin.12508> [<https://doi.org/10.1111/soin.12508>].

35. John Parascandola, *From MCWA to CDC—Origins of the Centers for Disease Control and Prevention*, 111 PUB. HEALTH REPS. 549, 549 (1996). See generally ELIZABETH ETHERIDGE, SENTINEL FOR HEALTH: A HISTORY OF THE CENTERS FOR DISEASE CONTROL (1992) (giving a lengthier and more detailed history of the CDC).

36. See Parascandola, *supra* note 35, at 549.

particularly in the South, where malaria was flourishing.³⁷ By 1942, the Federal Government had created the Office for Malaria Control in War Areas (“MCWA”), an independent malaria control program, and expanded operations to the American-controlled Caribbean.³⁸ Following World War II, the MCWA expanded its mandate as American troops returned from countries where they may have been exposed to tropical parasitic diseases.³⁹

By the war’s end, U.S. Surgeon General Thomas Parran supported Dr. Joseph Mountin’s proposal to create the CDC.⁴⁰ It would serve a different purpose than the National Institutes of Health (“NIH”), which already existed: The CDC would focus on public health, while the NIH would focus on basic research.⁴¹ Unlike its predecessor institution, the CDC was also primed to operate in peacetime rather than during war. Authority for the Agency’s actions to engage in public health surveillance, make public health recommendations, and play a central role in the isolation and quarantine of immigrants would come from the legislature, often rooted in the Public Health Service Act of 1944.⁴²

In the following decade, the new agency continued to expand its mission from malaria to diarrheal diseases and polio.⁴³ By the 1950s, the Agency had both an Epidemiology Division and an Epidemic Intelligence Service, which addressed concerns of biological attacks stemming from the Cold War.⁴⁴

Today, the CDC is an agency housed in the Department of Health and Human Services.⁴⁵ The Agency derives its powers from a patchwork of legislation.⁴⁶ The Agency’s primary mandates come from the Public Health Service Act, though its efforts to control the spread of disease can

37. *Id.*

38. *Id.*

39. *Id.* at 550.

40. *Id.*

41. *See id.*

42. *See* 42 U.S.C. §§ 247d, 264.

43. Parascandola, *supra* note 35, at 551.

44. *Id.* at 550–51.

45. *CDC Organization and Leadership*, CTRS. FOR DISEASE CONTROL & PREVENTION (Jan. 23, 2025), <https://www.cdc.gov/about/organization/index.html> [<https://perma.cc/94R3-N2E7>]; *About CDC*, CTRS. FOR DISEASE CONTROL & PREVENTION (Dec. 10, 2020), https://archive.cdc.gov/www_cdc_gov/about/24-7/response-to-covid-19.html [<https://perma.cc/UVX3-PWS3>].

46. *See generally* KAVYA SEKAR, CONG. RSCH. SERV., IF12241, THE CENTERS FOR DISEASE CONTROL AND PREVENTION (CDC) (2026).

be found also in the Immigration and Naturalization Act and the Code of Federal Regulations.⁴⁷

The Agency has gradually taken on a greater role in managing public health issues beyond disease control to include not only communicable but also non-communicable health issues.⁴⁸ Along with surveillance and disease prevention, the CDC also publishes data about communicable and non-communicable diseases in a well-known publication called the Morbidity and Mortality Weekly Report (“MMWR”).⁴⁹ The MMWR was brought to the CDC in 1960 by the then-director, who was committed to the idea of vital statistics and public health surveillance.⁵⁰

The Agency has always centered its technical expertise on responding to health care crises.⁵¹ Dating back to the MCWA era, when malaria was core to the Agency’s mission, it relied on engineers to help think through the issue of standing water.⁵² In the 1960s, epidemiology—the study of population health—emerged as the “science of public health” and guided the Agency’s response to nearly every health issue that would follow, from eradicating smallpox to how the CDC tracked and surveilled disease.⁵³

The centering of technical expertise has led many to believe that the CDC stands above or outside the political fray. This is incorrect.

47. See *Laws and Regulations Governing the Control of Communicable Diseases*, CTRS. FOR DISEASE CONTROL & PREVENTION (May 15, 2024), <https://www.cdc.gov/port-health/legal-authorities/index.html> [<https://perma.cc/R5FV-N56F>].

48. See *National Health Initiatives, Strategies & Action Plans*, CTRS. FOR DISEASE CONTROL & PREVENTION (May 16, 2024), <https://www.cdc.gov/public-health-gateway/php/communications-resources/national-health-initiatives-strategies-action-plans.html> [<https://perma.cc/MD4C-MEQ4>] (listing the CDC’s public health initiatives as they relate to an extensive range of health topics).

49. See generally *About the Morbidity and Mortality Weekly Report (MMWR) Series*, CTRS. FOR DISEASE CONTROL & PREVENTION (June 26, 2025) [hereinafter *About MMWR*], <https://www.cdc.gov/mmwr/about.html> [<https://perma.cc/P42F-CPTG>] (“Often called ‘the voice of CDC,’ the MMWR series is the agency’s primary vehicle for scientific publication of timely, reliable, authoritative, accurate, objective, and useful public health information and recommendations.”).

50. Frederic E. Shaw et al., *A History of MMWR, in PUBLIC HEALTH THEN AND NOW: CELEBRATING 50 YEARS OF MMWR AT CDC* 7, 7–9 (2011), <https://www.cdc.gov/mmwr/pdf/other/su6004.pdf> [<https://perma.cc/RG8N-TP84>].

51. See Donna F. Stroup & Rob Lyerla, *History of Statistics in Public Health at CDC, 1960–2010: The Rise of Statistical Evidence, in PUBLIC HEALTH THEN AND NOW: CELEBRATING 50 YEARS OF MMWR AT CDC* 35, 35–39 (2011), <https://www.cdc.gov/mmwr/pdf/other/su6004.pdf> [<https://perma.cc/RG8N-TP84>].

52. See Parascandola, *supra* note 39, at 549.

53. Stephen B. Thacker, *Epidemiology and Public Health at CDC, in 60 YEARS OF PUBLIC HEALTH SCIENCE AT CDC* 3, 3–4 (2006), <https://www.cdc.gov/mmwr/pdf/wk/mm55su02.pdf> [<https://perma.cc/AVS4-FJ86>].

B. History of Stakeholder Mobilization and Influence at the CDC

While the public reaction to the politicization of the CDC during the COVID-19 pandemic has been treated as novel, the Agency's recent history shows that it has long been at the heart of various political controversies. Before COVID-19, AIDS was the largest global pandemic that the CDC had faced.⁵⁴ The AIDS epidemic revealed a range of actors who sought to influence agency outputs.

When AIDS was first identified in 1981, the illness was immediately associated with the gay community by the Agency in its MMWR reports documenting pneumocystis pneumonia in gay men.⁵⁵ The rising number of deaths sent some physicians and researchers on a mission to better understand this new and deadly virus impacting gay men.⁵⁶ As physicians and scientists struggled to understand the disease, the Reagan administration did not take an aggressive response to the pandemic.⁵⁷ The administration's lacking response was understood as political in and of itself.⁵⁸

As the epidemic continued, CDC definitions and case reports narrowly construed the disease as impacting primarily gay men.⁵⁹ This

54. Compare *COVID-19 Cases, World: WHO COVID-19 Dashboard, Total Cumulative*, WORLD HEALTH ORG., <https://data.who.int/dashboards/covid19/cases> [https://perma.cc/5TTJ-UQK6] (last visited Oct. 2, 2025) (showing 778,653,604 total cumulative COVID-19 cases), with *Global HIV & AIDS Statistics—Fact Sheet*, UNAIDS, <https://www.unaids.org/en/resources/fact-sheet> [https://perma.cc/9FLJ-HYDC] (last visited Oct. 2, 2025) (showing between 73.4 and 116.4 million people have become infected with HIV).

55. See *Pneumocystis Pneumonia—Los Angeles*, 30 MORBIDITY & MORTALITY WKLY. REP. 250, 250–51 (1981), <https://www.jstor.org/stable/23295554> (on file with the Rutgers University Law Review); see also Donald P. Francis, *Deadly AIDS Policy Failure by the Highest Levels of the US Government: A Personal Look Back 30 Years Later for Lessons to Respond Better to Future Epidemics*, 33 J. PUB. HEALTH POL'Y 290, 291 (2012) (“Although only a few cases had been reported from both coasts, two factors raised our eyebrows. First, the disease appeared extremely serious with most cases expected to be fatal. Second, all cases occurred in gay men.”).

56. *In Their Own Words . . . NIH Researchers Recall the Early Years of AIDS: First Encounters*, NAT'L INSTS. OF HEALTH, <https://history.nih.gov/display/history/First+Encounters> [https://perma.cc/9MSV-ZM55] (last visited Sep. 3, 2025).

57. See Joseph Bennington-Castro, *How AIDS Remained an Unspoken—but Deadly—Epidemic for Years*, HISTORY (May 28, 2025), <https://www.history.com/articles/aids-epidemic-ronald-reagan> [https://perma.cc/5NGG-DT6U] (“On September 17, 1985, President Reagan finally mentioned AIDS publicly . . .”).

58. See Martha Kinsella & Peter Dunphy, *Lessons from Another Pandemic*, BRENNAN CTR. FOR JUST. (Apr. 10, 2020), <https://www.brennancenter.org/our-work/analysis-opinion/lessons-another-pandemic> [https://perma.cc/CUF7-NWB7].

59. CATHY J. COHEN, *THE BOUNDARIES OF BLACKNESS: AIDS AND THE BREAKDOWN OF BLACK POLITICS* 124–25 (1999). See also Gerald M. Oppenheimer, *Causes, Cases, And*

charted a narrow but misguided path forward for research and the AIDS response. As Cathy Cohen argues in her book *Boundaries of Blackness: AIDS and the Breakdown of Black Politics*, the CDC became a “signaling institution,” guiding the path forward for how to think about the epidemic.⁶⁰ This meant that the CDC’s focus on the link between HIV and sexuality created blinders to the way the epidemic was moving through other communities, including racial minorities, women, and people who use drugs.⁶¹ The looping of data, research, and interventions left people out: In Cohen’s example, a lack of access to healthcare meant that such marginalized groups with HIV did not appear before physicians and researchers and thereby were left out of the statistical picture of the AIDS epidemic.⁶² This reinforced the idea that some subgroups of individuals, many of whom would go on to profoundly experience the deadly effects of AIDS, were left out of risk assessments.⁶³ Gerald Oppenheimer, a historian of public health, noted that epidemiologists quickly turned to “lifestyle” as an explanatory factor for the spread of AIDS.⁶⁴

The importance of these examples, and why this Article documents them here, is the reaction to them. The silence and inaction of the administration, the fact that the administration and conservative politicians were justifying their approach by relying on homophobic tropes—and added to the CDC’s apparent biases—produced what social movement scholars have called political opportunity structures. As defined by Sydney Tarrow, political opportunity structures are the “consistent—but not necessarily formal, permanent, or national—signals to social or political actors which either encourage or discourage them to use their internal resources to form social movements.”⁶⁵

As both Cohen and Oppenheimer note, scholars and advocates began to see the CDC’s early case definitions of AIDS as ignoring key demographic groups. One of the primary groups that was excluded was women.⁶⁶ Elsewhere, I have documented how the CDC’s list of symptomatic illnesses excluded gynecological illnesses and, therefore,

Cohorts: The Role of Epidemiology in the Historical Construction of AIDS, in *AIDS: THE MAKING OF A CHRONIC DISEASE* 49, 49 (Elizabeth Fee & Daniel M. Fox eds., 1992).

60. COHEN, *supra* note 59, at 124.

61. *Id.* at 125.

62. *Id.* at 128–30.

63. *See id.* at 129.

64. Oppenheimer, *supra* note 59, at 49.

65. Sidney Tarrow, *States and Opportunities: The Political Structuring of Social Movements*, in *COMPARATIVE PERSPECTIVES ON SOCIAL MOVEMENTS: POLITICAL OPPORTUNITIES, MOBILIZING STRUCTURES, AND CULTURAL FRAMINGS* 41, 54 (Doug McAdam, John D. McCarthy & Mayer N. Zald eds., 1996) (emphasis omitted).

66. *See* COHEN, *supra* note 59, at 135–36.

women failed to get an HIV diagnosis.⁶⁷ The inability to get a diagnosis often meant that women were then unable to qualify for available AIDS services and welfare programs.⁶⁸ This had ramifications for what we knew about HIV; women were left out of the statistical picture of the epidemic, resulting in an undercounting of women living with HIV/AIDS, and one that contributed to the erasure of women in the AIDS epidemic.

Activists identified the CDC as an agency that was worthy of targeting. As has been documented elsewhere, activists and lawyers protested and sued the state to try and force a change in the definition of AIDS and the disbursement of AIDS-related services.⁶⁹ Their protest posters, including one that read “The CDC Definition Is Sexist, They Are Killing Women,”⁷⁰ told a story of skepticism towards the Agency’s evidence-based approach. The CDC became the center of advocacy during the 1980s and early 1990s as feminists and AIDS activists who sought to change the definition of AIDS and, in turn, the statistical picture of the epidemic, focused on the CDC guidance and MMWRs as contributing to a host of inequalities in the AIDS response.⁷¹ They saw that the erasure of racial minorities, drug users, and women in the AIDS epidemic showed how the CDC is situated within a broader political and scientific context, which then shaped what was understood to be neutral, objective information about an epidemic. In these instances, the CDC was thought to be acting on the best scientific information.⁷² Yet, institutional and individual blinders meant public health institutions could not effectively respond to the epidemic.

Though official materials did not reflect that they were responding, at least in part, to political advocacy, feminists did manage to force the hand of the CDC in considering issues of gender and eventually change the definition of AIDS itself.⁷³ This shift had a significant impact on the way AIDS surveillance and treatment occurred, as well as how the Social

67. AHMED, *supra* note 32, at 24.

68. *See id.* at 23; *see also* Theresa M. McGovern, S.P. v. Sullivan: *The Effort to Broaden the Social Security Administration’s Definition of AIDS*, 21 FORDHAM URB. L.J. 1083, 1088–92 (1994) (discussing litigation relating to exclusion from benefits resulting from this narrow definition); SARAH SCHULMAN, LET THE RECORD SHOW: A POLITICAL HISTORY OF ACT UP NEW YORK, 1987-1993, at 584–85 (2021) (“It is clear, decades later, that women are still not getting the attention and services that they need.”).

69. *See* AHMED, *supra* note 32, at 25–31; McGovern, *supra* note 68, at 1088–92.

70. AHMED, *supra* note 32, at 53.

71. *See id.* at 27–31, 37–44, 52–56.

72. *See id.* at 50 (“Despite the testimony of physicians at the hearing, the SSA resisted the passage of H.R. 2299, stating that its current guidelines for determining disability relied on ‘documented scientific information’ and that this was foundational to the crafting of SSA regulations.”).

73. *See id.* at 58–59.

Security Administration determined benefits.⁷⁴ Despite the role activism and external actors played on the CDC's work in response to HIV, the internally produced documentation by the Agency reflects a commitment to portraying itself as driven only by scientific research.⁷⁵

II. A NEW PANDEMIC: POLITICAL OPPORTUNITY AND AGENCY PERMEABILITY

Despite the history of the AIDS crisis, the CDC retained its posture—and the public's perception—that the primary driver of CDC policy was apolitical public health evidence. The Agency itself worked to preserve this framing in its historical record-keeping.⁷⁶

The COVID-19 pandemic, however, thrust the CDC into a new political posture vis-à-vis stakeholders. This Part considers how executive meddling in CDC operations produced the political opportunity structure that signaled the possibility of political pressure on the Agency by stakeholders. It turns to stakeholder engagement with three primary examples: litigation, non-litigation-oriented protest and advocacy, and finally, corporate lobbying.

Like when HIV was first discovered, little was known in early 2020 about the SARS-CoV-2 virus that was sweeping the nation. Unknowns included whether the virus was spread through touch or air, who was the most vulnerable, and how we should manage human contact to address a deadly virus.⁷⁷

Early in the pandemic, the Trump administration took the position that the virus was not a serious illness, even as the world careened into

74. See *id.* at 59.

75. The George W. Bush administration also altered information about HIV and AIDS on the CDC's website to serve the administration's moral and political goals. In one incident, the administration changed facts about condom safety. HUM. RTS. WATCH, ACCESS TO CONDOMS AND HIV/AIDS INFORMATION: A GLOBAL HEALTH AND HUMAN RIGHTS CONCERN 4–5 (2004), <https://www.hrw.org/legacy/backgrounders/hivaidss/condoms1204/condoms1204.pdf> [<https://perma.cc/5SR2-7ULJ>].

76. See, e.g., James W. Curran & Harold W. Jaffe, *AIDS: The Early Years and CDC's Response*, in PUBLIC HEALTH THEN AND NOW: CELEBRATING 50 YEARS OF MMWR AT CDC 64, 65–66 (2011), <https://www.cdc.gov/mmwr/pdf/other/su6004.pdf> [<https://perma.cc/RG8N-TP84>] (asserting that the CDC's 1983 recommendations for the prevention of AIDS were made “on the basis of the epidemiological data” and that “even in retrospect, the recommendations appear to have been essentially correct”). See generally *Past Volumes (1982–2024)*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/mmwr/mmwr_wk/wk_pvol.html [<https://perma.cc/7E4D-P5DX>] (archiving the MMWR weekly reports over forty-two years).

77. See *How COVID-19 Spreads*, CTRS. FOR DISEASE CONTROL & PREVENTION (Feb. 17, 2020), <https://stacks.cdc.gov/view/cdc/85271> [<https://perma.cc/E4LQ-4AAE>].

crisis.⁷⁸ After Trump himself was released from the hospital in October 2020 after a bout of COVID-19, seven months into the pandemic and as death rates soared, he stated that Americans should not let COVID-19 “dominate” their lives.⁷⁹

Multiple investigations have now revealed that the Trump administration realized the CDC’s power as a signaling institution about the pandemic.⁸⁰ The administration mobilized the perceived neutrality of the Agency to ensure that public health messaging aligned with the Trump administration’s perspective on the pandemic and the presentation of their management of it.⁸¹

The administration was able to exercise this influence through several mechanisms, including altering the MMWR—the CDC’s publication designed for medical providers, public health workers, and epidemiologists, which is meant to provide an overview of health and safety topics.⁸² The administration sought to intervene in the MMWR process to paint a picture of an epidemic under control and support the claim that experts exaggerated the pandemic, scrutinizing the reports for language suggesting that the administration might not be responding to the pandemic appropriately.⁸³ Under the Trump administration, the

78. See Juana Summers, *Timeline: How Trump Has Downplayed the Coronavirus Pandemic*, NPR (Oct. 2, 2020, at 08:09 ET), <https://www.npr.org/sections/latest-updates-trump-covid-19-results/2020/10/02/919432383/how-trump-has-downplayed-the-coronavirus-pandemic> [https://perma.cc/57TE-4R2Q].

79. Gina Kolata & Roni Caryn Rabin, *‘Don’t Be Afraid of Covid,’ Trump Says, Undermining Public Health Messages*, N.Y. TIMES (Oct. 8, 2020), <https://www.nytimes.com/2020/10/05/health/trump-covid-public-health.html> [https://perma.cc/7BGA-E23Q].

80. See Allison M. Whelan, *Executive Capture of Agency Decisionmaking*, 75 VAND. L. REV. 1787, 1811 (2022). Since the start of the pandemic, journalists and political leaders have been tracking the executive’s influence on CDC agency guidance and information during the pandemic. With the shift in administrations, a critical eye was taken towards the start of the pandemic resulting in a series of reports by a Select Subcommittee on the Coronavirus Crisis on the role of the Trump administration in managing the pandemic. See *generally* Reports, SELECT SUBCOMM. ON CORONAVIRUS CRISIS, <https://coronavirus-democrats-oversight.house.gov/news/reports> [https://perma.cc/TPB3-KA3Y] (last visited Oct. 3, 2025) (containing a repository of reports issued by this select subcommittee).

81. See Dan Diamond, *Trump Officials Interfered with CDC Reports on Covid-19*, POLITICO (Sep. 12, 2020, at 11:11 ET), <https://www.politico.com/news/2020/09/11/exclusive-trump-officials-interfered-with-cdc-reports-on-covid-19-412809> [https://perma.cc/Z6EZ-5U3K].

82. See *About MMWR*, *supra* note 49; Noah Weiland, Sheryl Gay Stolberg & Abby Goodnough, *Political Appointees Meddled in C.D.C.’s ‘Holiest of the Holy’ Health Reports*, N.Y. TIMES (Sep. 18, 2020), <https://www.nytimes.com/2020/09/12/us/politics/trump-coronavirus-politics-cdc.html> [https://perma.cc/ZS3A-FSXN]; Diamond, *supra* note 81.

83. Diamond, *supra* note 81. Numerous investigations from journalists, and now the Select Subcommittee, show direct pressure and interference through altering MMWR language or requesting administration reviews of outgoing CDC guidance. See, e.g., *id.*;

CDC also produced information on how to respond to exposures to COVID-19 as well as how and when to test for the virus.⁸⁴ Some state public health departments reacted by ignoring new CDC guidance, reinforcing the notion that the Agency could no longer be relied upon for accurate information about the pandemic.⁸⁵

These actions by the Trump administration undermined the CDC's historical position as politically neutral and instead placed the Agency at the center of political contestation. The administration's posture towards the Agency, and reactions to it, newly cast the CDC as politically open to stakeholder influence.

III. LEGAL AND POLITICAL ADVOCACY AT THE CDC

While executive influence was a defining feature of the Agency's early response to the COVID-19 pandemic, it soon became clear that many stakeholders were interested in the form that the CDC's guidance would

David Lim & Adam Cancryn, *Trump Officials Pressured CDC to Change Virus Testing Guidelines*, POLITICO (Aug. 26, 2020, at 18:39 ET), <https://www.politico.com/news/2020/08/26/brett-giroir-coronavirus-testing-cdc-402524> [https://perma.cc/Q3K7-ZKFC]; STAFF OF THE H. SELECT SUBCOMM. ON THE CORONAVIRUS CRISIS, H. COMM. ON OVERSIGHT & GOV'T REFORM, 116TH CONG., *THE TRUMP ADMINISTRATION'S PATTERN OF POLITICAL INTERFERENCE IN THE NATION'S CORONAVIRUS RESPONSE* 4–8 (2022), <https://coronavirus-democrats-oversight.house.gov/sites/evo-subsites/coronavirus-democrats-oversight.house.gov/files/10.2.20%20Political%20Interference%20Report%20%281%29.pdf> [https://perma.cc/TKP2-PB4Q].

84. See, e.g., *Covid-19 Testing: What You Need to Know*, CTBS. FOR DISEASE CONTROL & PREVENTION (May 11, 2023), https://archive.cdc.gov/www_cdc_gov/coronavirus/2019-ncov/symptoms-testing/testing.html [https://perma.cc/N852-HQTF]; CDC (@cdcgov), X, *Masking is a two-way street. Masks help protect you, in case someone around you has #COVID19. Masks also help protect others, in case you have COVID-19 but don't know it. #WearAMask to #SlowTheSpread. Learn more: https://bit.ly/3ee8iP4*. (Dec. 9, 2020, at 21:30 ET), <https://x.com/CDCgov/status/1336785273548632064> [https://perma.cc/ASR2-MSUC]; Amy Goldstein & Lena H. Sun, *Controversial Change in Guidelines About Coronavirus Testing Directed by the White House Coronavirus Task Force*, WASH. POST (Aug. 26, 2020), https://www.washingtonpost.com/health/cdc-testing-guidelines-coronavirus/2020/08/26/eb653028-e7af-11ea-97e0-94d2e46e759b_story.html [https://perma.cc/B9KE-YVA3].

85. Carl O'Donnell, Vishwadha Chander & Manojna Maddipatla, *Exclusive: Most U.S. States Reject Trump Administration's New COVID-19 Testing Guidance*, REUTERS (Aug. 29, 2020), <https://www.reuters.com/article/us-health-coronavirus-testing-exclusive/exclusive-most-u-s-states-reject-trump-administrations-new-covid-19-testing-guidance-idUSKBN25O2WI> [https://perma.cc/3YJE-JM3N]; see also Sheryl Gay Stolberg, *Top U.S. Officials Told C.D.C. to Soften Coronavirus Testing Guidelines*, N.Y. TIMES (Sep. 2, 2020), <https://www.nytimes.com/2020/08/26/us/politics/coronavirus-testing-trump-cdc.html> [https://perma.cc/E2PZ-X9X7] ("This is really dangerous precedent, and I fear it will erode public trust in C.D.C.").

take, given the impact not only on health but on a range of other material outcomes, from housing to immigration status.⁸⁶

Though impossible to claim definitively, it is arguable that without a streamlined mechanism to have their interests heard, stakeholder groups tried other tactics of influencing the Agency. Each example discussed in this Part shows how the CDC's policymaking reflects the ebb and flow of legal and political contestation.

This Part describes three modes of stakeholder engagement. First, organizations that used litigation alongside advocacy and social movement activism to attempt to alter CDC guidelines or prevent their application. This Part includes three primary examples in this category: 1) activism against the CDC's federal mask mandate, 2) activism for and against the CDC's eviction moratorium, and 3) activism for and against "Title 42," which empowered the CDC to stop allowing immigrants into detention centers in response to the pandemic.⁸⁷ Second, this Article examines two movements that have directed a significant portion of the activism at the CDC but have not turned to litigation: 1) the fight for better data about the pandemic, and 2) the demand for recognizing long COVID as a chronic illness. Finally, this Article takes on the case of corporate lobbying. In this example, a major corporation—Delta Airlines—attempted to alter the guidance on isolation for fully vaccinated individuals who experience breakthrough COVID-19 infections.

These examples help illustrate several dynamics of the relationship between CDC-generated public health guidance and stakeholder engagement. First, each case illustrates how the CDC is either moved to act or stopped from acting based on stakeholder engagement. In each case, non-governmental actors seek to change CDC guidance and policy. Second, in these fights to either force the CDC to act a particular way or to silence the Agency, the idea of scientific integrity and agency authority becomes a political and institutional device deployed by both sides. As exemplified in the statements of former director Dr. Robert Redfield that begin this Article,⁸⁸ the CDC uses the idea of scientific integrity as a bulwark against the claim of political interference, to justify the

86. For the purposes of this Article, I include a wider variety of actors in the definition of social movements to be inclusive of the wide variety of non-governmental forces seeking to influence CDC guidance. These actors include activists and advocates as well as non-governmental organizations and corporations.

87. See generally Medha D. Maklouf, *Gendered Effects of U.S. Pandemic Border Policy on Migrants from Central America*, in *THE ROUTLEDGE COMPANION TO GENDER AND COVID-19*, at 250–252 (Linda McClain & Aziza Ahmed eds., 2024) (describing the differential impact of Title 42 across genders).

88. See *supra* notes 5–9 and accompanying text.

promulgation of specific rules, and to exercise agency actions. Those arguing to stop the CDC from acting or to demand a particular rule or guidance also say that the CDC is in some way acting outside of its recognized authority or beyond what the evidence would suggest. Finally, we see repeatedly that the CDC cannot make a strong claim for pure scientific integrity, especially in times of scientific uncertainty.

A. *Litigation and Activism*

Litigation was an important tool for stakeholders to engage with and eventually alter or stop CDC policy surrounding the COVID-19 pandemic. The eviction moratorium, the mask mandate, and the use of the CDC's entry and exit authorities to create barriers for immigrant entry each provide an example of how litigation and activism produced shifts in what the CDC was doing or prevented the CDC from taking actions it might have otherwise taken.

Though administrative law scholars have posited litigation as an opportunity for "judicial administration"—the making and remaking of administrative rules through court decisions⁸⁹—this Article reads litigation as an attempt by stakeholders, including corporate entities, to influence administrative policy outputs by engaging in varied strategies.

For social movements, litigation—in combination with other tactics from protest to lobbying—has long been an essential means of accomplishing legal change in the context of administrative agencies. Litigation can offer guideposts for social movement organizing, invite media attention, and result in rule change.⁹⁰ In the context of emergency actions taken by administrative agencies that did not engage in a notice and comment period, particularly in a public health emergency, litigation becomes an opportunity for social movements and stakeholders of varied political commitments to ensure their voices were heard and ensure a response from the CDC.

1. Eviction Moratorium

Early in the pandemic, despite the Trump administration's resistance, federal and state governments prioritized preventing viral

89. See, e.g., Bijal Shah, *Judicial Administration*, 11 U.C. IRVINE L. REV. 1119, 1125 (2021).

90. See generally LIBBY ADLER, GAY PRIORI: A QUEER CRITICAL LEGAL STUDIES APPROACH TO LAW REFORM (2018) (describing litigation strategies for LGBT groups); Gwendolyn Leachman, *From Protest to Perry: How Litigation Shaped the LGBT Movement's Agenda*, 47 U.C. DAVIS L. REV. 1699, 1737 (2014) (describing the relationship between litigation and social movements).

transmission by limiting the movement of people.⁹¹ The federal government identified evictions as pushing people into instability and exposure and in March 2020, Congress passed the Coronavirus Aid, Relief, and Economic Security Act (“CARES Act”), which included an eviction moratorium.⁹² The language prevented landlords from initiating legal actions to recover possession of a covered dwelling due to non-payment and charging fees or penalties for the non-payment of rent for 120 days.⁹³ The rule was limited to properties participating in federal assistance programs or federally backed loans.⁹⁴ The moratorium ended in July 2020.⁹⁵

When Congress did not renew the CARES Act’s eviction moratorium, the CDC decided to take action by imposing a moratorium that went further than the congressional program. The new moratorium took effect in September 2020 and covered all residential properties.⁹⁶ It also imposed criminal penalties on evictions in violation of the order.⁹⁷ The CDC relied on section 361 of the Public Health Service Act to enact this extension of the federal government’s eviction moratorium.⁹⁸ The CDC’s rationale for the eviction moratorium suggested that the additional time for rent relief and housing stability would allow for more effective public

91. See, e.g., No Sail Order and Suspension of Further Embarkation from CDC, 85 Fed. Reg. 16628, 16628–31 (Mar. 24, 2020); Notification of Arrival Restrictions Applicable to All Flights Carrying Persons Who Have Recently Traveled From or Were Otherwise Present Within the People’s Republic of China, 85 Fed. Reg. 6044, 6044–45 (Feb. 4, 2020); Karen Schwartz, *Driving and Travel Restrictions Across the United States*, N.Y. TIMES (May 5, 2020), <https://www.nytimes.com/2020/04/10/travel/coronavirus-us-travel-driving-restrictions.html> [<https://perma.cc/2AU8-2K53>] (listing travel restrictions in each of the contiguous forty-eight states plus the District of Columbia as of May 5, 2020).

92. See CARES Act, Pub. L. No. 116-136, § 4024, 134 Stat. 281, 492–94 (2020).

93. *Id.* § 4024(b)(1)–(2), 134 Stat. at 493–94.

94. *Id.* § 4024(a), 134 Stat. at 492–93.

95. Renae Merle, *A Federal Eviction Moratorium Has Ended. Here’s What Renters Should Know.*, WASH. POST (Aug. 4, 2020), <https://www.washingtonpost.com/business/2020/07/24/faq-federal-eviction-moratorium/> [<https://perma.cc/8TNV-KMCK>].

96. Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 85 Fed. Reg. 55292, 55292 (Sep. 4, 2020) [hereinafter CDC Moratorium].

97. *Id.* at 55296.

98. *Id.* at 55297; see also Public Health Service Act § 361, 42 U.S.C. § 264(a) (“The Surgeon General, with the approval of the [Secretary of Health and Human Services], is authorized to make and enforce such regulations as in his judgment are necessary to prevent the introduction, transmission, or spread of communicable diseases from foreign countries into the States or possessions, or from one State or possession into any other State or possession. For purposes of carrying out and enforcing such regulations, the Surgeon General may provide for such inspection, fumigation, disinfection, sanitation, pest extermination, destruction of animals or articles found to be so infected or contaminated as to be sources of dangerous infection to human beings, and other measures, as in his judgment may be necessary.”).

health measures like quarantine and isolation.⁹⁹ The movement of people was also understood to produce its own health risks, and the moratorium would allow people to stay in place.¹⁰⁰

The eviction moratorium produced backlash from real estate groups, property management companies, and landlords.¹⁰¹ Several organizations sought to enjoin the CDC's moratorium.¹⁰² They faced the CDC, whose policy had garnered support from organizations including the National Low Income Housing Coalition,¹⁰³ various scholars,¹⁰⁴ and Democratic attorneys general.¹⁰⁵

On May 5, 2021, a District Court of the District of Columbia decision vacated the CDC moratorium nationwide.¹⁰⁶ The district court ruled in favor of the Alabama Association of Realtors and found the moratorium to be unlawful. Nevertheless, it stayed its judgment while the government appealed.¹⁰⁷ On June 24, 2021, the plaintiffs asked the Supreme Court to vacate the stay, a request which the Court declined.¹⁰⁸ Justice Kavanaugh's concurrence noted that his decision to side with the

99. CDC Moratorium, *supra* note 96, at 55292.

100. *See id.* Courts have considered various challenges to this order. *See* Ala. Ass'n of Realtors v. U.S. Dep't of Health & Hum. Servs., 539 F. Supp. 3d 29, 35 (D.D.C. 2021) ("In the last several months, at least six courts have considered various statutory and constitutional challenges to the CDC Order.").

101. *See* Maggie Hicks, *Real Estate Industry Groups Spent Millions to Halt the National Eviction Moratorium*, OPEN SECRETS (Aug. 4, 2021, at 10:49 ET), <https://www.opensecrets.org/news/2021/08/real-estate-industry-spent-millions-to-halt-national-eviction-moratorium/> [<https://perma.cc/RRP3-DG3K>] (stating that housing groups spent over \$100 million on lobbying to remove the eviction moratorium); *see also* Tiger Lily, L.L.C. v. U.S. Dep't of Hous. & Urb. Dev., 499 F. Supp. 3d 538, 544 (W.D. Tenn. 2020) ("Plaintiffs in this matter are a group of business organizations and individuals that own/manage residential real property in the form of [among others] multi-family apartment complexes . . .").

102. *See, e.g.,* Tiger Lily, L.L.C., 499 F. Supp. 3d at 541.

103. *See Statement from NLIHC President and CEO Diane Yentel on CDC Eviction Moratorium Extension, Improvements and Additional Rental Assistance Needed*, NAT'L LOW INCOME HOUS. COAL. (Jan. 29, 2021), <https://nlihc.org/news/statement-nlihc-president-and-ceo-diane-yentel-cdc-eviction-moratorium-extension-improvements> [<https://perma.cc/HEF8-QMW2>].

104. *See, e.g.,* Kathryn M. Leifheit et al., *Expiring Eviction Moratoriums and COVID-19 Incidence and Mortality*, 190 AM. J. EPIDEMIOL. 2563, 2568 (2021).

105. *See* Brief for the District of Columbia et al. at 1, Ala. Ass'n of Realtors v. U.S. Dep't of Health & Hum. Servs., 141 S. Ct. 2320 (2021) (No. 20A169).

106. *See* Ala. Ass'n of Realtors v. U.S. Dep't of Health & Hum. Servs., 539 F. Supp. 3d 29, 43 (D.D.C. 2021), *appeal dismissed*, No. 21-5093, 2021 WL 4057718, at *1 (D.C. Cir. Sep. 3, 2021); Order of June 2, 2021, Ala. Ass'n of Realtors v. U.S. Dep't of Health & Human Servs., No. 21-5093, 2021 WL 2221646, at *1 (D.C. Cir. June 2, 2021) (*per curiam*).

107. Ala. Ass'n of Realtors v. U.S. Dep't of Health & Hum. Servs., 539 F. Supp. 3d 211, 213, 218 (D.D.C. 2021).

108. Ala. Ass'n of Realtors v. U.S. Dep't of Health & Hum. Servs., 141 S. Ct. 2320, 2320 (2021).

majority was partially due to the CDC's stated goal of ending the moratorium by July 31, 2021.¹⁰⁹ Justice Kavanaugh also noted that the CDC would need explicit congressional approval to continue the moratorium.¹¹⁰

Following the Supreme Court decision, more controversy ensued. While private sector advocates brought their issue to the courts, others took their fight into the public sphere. In response to the federal government's flailing actions and reaction to the Supreme Court, Cori Bush, a newly elected congresswoman from St. Louis who had previously been evicted, slept on the steps of the capitol building for several days in a show of solidarity with evictees.¹¹¹ *The New York Times* described her actions as "galvaniz[ing] a full-on progressive revolt."¹¹² The CDC subsequently imposed a new federal eviction moratorium for sixty days in areas of the country with high viral transmission of the Delta variant, a change which was partially attributed to Representative Bush's protest.¹¹³ In the new order, the CDC once again laid out its rationale for the need for an eviction moratorium—explaining that, among other things, an influx of people in shelters and congregate housing would lead to a greater spread of the virus and that evictions would lead to people moving around the country to look for housing.¹¹⁴

Again, the order went before the Supreme Court on a challenge from the Alabama Association of Realtors. The question animating the constitutional challenge was whether the CDC had the authority to expand the eviction moratorium, given the prior emphasis by the Supreme Court on the need for explicit congressional authorization.¹¹⁵ While the issue of authorization was still in question, the public health context had arguably changed: The CDC noted in its brief that the Delta

109. *Id.* at 2320–21 (Kavanaugh, J., concurring).

110. *Id.* at 2321.

111. Sunlen Serfaty & Clare Foran, *Freshman Rep. Cori Bush in National Spotlight for Her Activism to Fight Eviction*, CNN (Aug. 4, 2021, at 21:42 ET), <https://www.cnn.com/2021/08/04/politics/cori-bush-eviction-protest/index.html> [<https://perma.cc/2EFS-UEPE>].

112. Nicholas Fandos, *With Capitol Sit-In, Cori Bush Galvanized a Progressive Revolt Over Evictions*, N.Y. TIMES (Aug. 5, 2021), <https://www.nytimes.com/2021/08/04/us/politics/cori-bush-eviction-moratorium.html> [<https://perma.cc/NWH4-ZZVC>].

113. *Id.*; see also Temporary Halt in Residential Evictions in Communities with Substantial or High Transmission of COVID-19 to Prevent the Further Spread of COVID-19, 86 Fed. Reg. 43244, 43245 (Aug. 6, 2021) [hereinafter August Order] (promulgating the order "to respond to recent, unexpected developments in the trajectory of the COVID-19 pandemic").

114. See August Order, *supra* note 113, at 43246–50.

115. See Alabama Ass'n of Realtors v. Dep't of Health & Hum. Servs., 594 U.S. 758, 766 (2021) (per curiam).

variant was on the rise and the pandemic was predicted to have a harsh impact in the coming months.¹¹⁶ The virus was considered more contagious, and vaccines proved less efficacious.¹¹⁷ Relying on 42 U.S.C. § 264(a), which allows the CDC, with the Director of HHS, to “make and enforce such regulations as in [the Agency’s] judgment are necessary to prevent the introduction, transmission, or spread of communicable diseases . . . from one State or possession into any other State or possession,” the Agency argued that it had the statutory authority to halt the evictions.¹¹⁸ It argued that the Court should exercise significant deference to public officials responding to the COVID-19 pandemic.¹¹⁹

The Alabama Association of Realtors argued in its brief that the CDC was not acting on the science of the Delta variant; instead, the “only plausible explanation for the extended moratorium is that it was issued in response to political pressure from Capitol Hill for the express purpose of using litigation delays to distribute more rental assistance.”¹²⁰ In turn, they argued that the CDC’s eviction moratorium exceeded the Agency’s scope of authority and lacked the appropriate congressional support necessary to move forward.¹²¹ In other words, the CDC rooted its claim in evidence, while the Alabama Association of Realtors emphasized that it was politics, not science, infusing the Agency’s decision-making.

In vacating the stay and finding that the judgment barring enforcement of the moratorium could go into effect, the Supreme Court’s per curiam decision in August 2021 held that the Public Health Service Act likely did not specifically grant the Agency the power to enact an eviction moratorium.¹²² The dissenting justices—Breyer, Sotomayor, and

116. Response in Opposition to Applicants’ Emergency Application to Vacate the Stay Pending Appeal Issued by the United States District Court for the District of Columbia at 30–31, *Ala. Ass’n of Realtors v. Dep’t of Health & Hum. Servs.*, 594 U.S. 758 (2021) (No. 21A23) (citing August Order, *supra* note 113, at 43245–52).

117. *See id.*

118. *See id.* at 2 (citing 42 U.S.C. § 264(a)).

119. *Id.* at 13 (quoting *S. Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716, 716 (2021) (Roberts, C.J., concurring in the partial grant of application for partial relief)).

120. Reply in Support of Emergency Application to Vacate the Stay Pending Appeal Issued by the United States District Court for the District of Columbia at 1, *Ala. Ass’n of Realtors v. U.S. Dep’t of Health & Hum. Servs.*, 141 S. Ct. 2485 (2021) (No. 21A23).

121. *See id.* at 2–8.

122. *See Ala. Ass’n of Realtors v. Dep’t of Health & Hum. Servs.*, 594 U.S. 758, 766 (2021) (per curiam). They mobilized a newly developed doctrine—the major questions doctrine—which essentially states that the Court “expect[s] Congress to speak clearly when authorizing an agency to exercise powers of ‘vast economic and political significance.’” *See id.* at 764 (quoting *Util. Air Regul. Group v. EPA*, 573 U.S. 302, 324 (2014)). From this perspective, the decision can be read in line with a broader push by the Court to take power from the administrative state. *See generally* Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine*, 109 VA. L. REV. 1049–91 (2023) (describing broadly the use of

Kagan—read the Public Health Service Act to plainly give authority to the CDC and allow for authorizing “other measures” necessary to prevent “sources of dangerous infection.”¹²³ The dissenting justices went on to make the case that the CDC’s judgment was necessary, among other reasons, because the moratorium benefitted the public interest in the context of the surging Delta variant of COVID-19.¹²⁴

The decision was a victory for the Alabama Association of Realtors because the federal eviction moratorium was stayed. A new settlement had been reached—one that overrode the political and public health sensibilities that suggested that housing stability was necessary to end the spread of COVID-19 in favor of eviction power for landlords in an effort to preserve economic gain. The now-enforced silence of the CDC on housing would have clear distributional implications in the housing market, and if the CDC were correct, would result in greater transmission of COVID-19.

2. The Federal Mask Mandate

Masking was one of the most politically contentious issues of the pandemic, resulting in activism, organizing, and litigation from various political perspectives and locations.¹²⁵

Advice on masking to stop the spread of COVID-19 had a rocky start. In February 2020, the U.S. Surgeon General tweeted that wearing a face mask would not protect people from coronavirus.¹²⁶ The Agency reversed course in April 2020, publishing new guidance recommending masking for everyone.¹²⁷ By 2022, the CDC—based on new and changing science

the major questions doctrine as a deregulatory tool that limits congressional delegations to agencies).

123. See *Ala. Ass’n of Realtors*, 594 U.S. at 768–70 (Breyer, J., dissenting) (quoting 42 U.S.C. § 264(a)).

124. See *id.* at 771–72.

125. Masking in schools, for example, was often treated as a distinct political issue from masking in public. See Michelle M. Mello & David M. Studdert, *The Political and Judicial Battles Over Mask Mandates for Schools*, 2 JAMA HEALTH F. 1 (Oct. 28, 2021), <https://jamanetwork.com/journals/jama-health-forum/fullarticle/2785843> [<https://doi.org/10.1001/jamahealthforum.2021.4192>]. For the purposes of this example, this Article will limit this review to the issue of masking in public outside of the school setting. See generally Leo H. Kahane, *Politicizing the Mask: Political, Economic and Demographic Factors Affecting Mask Wearing Behavior in the USA*, 47 E. ECON. J. 163 (2021) (analyzing political factors affecting mask-wearing in the United States).

126. Deborah Netburn, *A Timeline of the CDC’s Advice on Face Masks*, L.A. TIMES (July 27, 2021, at 16:47 PT), <https://www.latimes.com/science/story/2021-07-27/timeline-cdc-mask-guidance-during-covid-19-pandemic> [<https://perma.cc/8H DU-AG8W>].

127. *Id.*

about COVID-19—began to promote high-grade filtration masks as a way to protect others and oneself from contracting COVID-19.¹²⁸

Masks were a contentious issue from the beginning of the pandemic.¹²⁹ Some politicians and organizations claimed that the restrictive mask mandates enacted by many jurisdictions were an infringement of basic liberties.¹³⁰ While this same critique was also levied against the broader array of public health measures the CDC and others took, masks became a particular sticking point.¹³¹

The then new Biden administration made a strong statement in favor of masks. On January 20, 2021, the administration issued a mask mandate applying in federal buildings, on federal land, and to government contractors.¹³² The following day, President Biden signed an order requiring various agency heads to take appropriate action to require travelers to use masks on public transportation.¹³³ In issuing its resultant order, the CDC again relied on its authority under the Public Health Service Act.¹³⁴

By April 2022, however, with vaccines mitigating the spread of COVID-19 and a political and cultural war around masks raging, most states had lifted their mask mandates.¹³⁵ The federal mask mandates were relaxed as the guidance was modified in June 2021 to allow for the removal of masks “outdoors”—in open-air conveyances within transportation hubs.¹³⁶ The federal travel mandates, however, remained

128. See Kristin L. Andrejko et al., *Effectiveness of Face Mask or Respirator Use in Indoor Public Settings for Prevention of Sars-Cov-2 Infection — California, February–December 2021*, 71 MORBIDITY & MORTALITY WKLY. REP. 212, 213 (2022), <https://www.cdc.gov/mmwr/volumes/71/wr/pdfs/mm7106e1-H.pdf> [<https://perma.cc/4Q6U-65AR>] (“Although consistent use of any face mask or respirator indoors was protective, the adjusted odds of infection were lowest among persons who reported typically wearing an N95/KN95 respirator, followed by wearing a surgical mask.”).

129. See Kahane, *supra* note 125.

130. See Lauren Aratani, *How Did Face Masks Become a Political Issue in America?*, GUARDIAN (June 29, 2020, at 05:00 ET), <https://www.theguardian.com/world/2020/jun/29/face-masks-us-politics-coronavirus> [<https://perma.cc/8TUV-KASX>].

131. See Rick Rojas, *Masks Become a Flash Point in the Culture Wars*, N.Y. TIMES (June 11, 2020), <https://www.nytimes.com/2020/05/03/us/coronavirus-masks-protests.html> [<https://perma.cc/EU4W-9MZ5>].

132. See Exec. Order No. 13991, 86 Fed. Reg. 7045, 7045–48 (Jan. 20, 2021).

133. Exec. Order No. 13998, 86 Fed. Reg. 7205, 7205 (Jan. 21, 2021).

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

135. Eram Abbasi, *State by State Face Mask Mandates*, LEADINGAGE (June 9, 2022), <https://leadingage.org/state-state-face-mask-mandates/> [<https://perma.cc/Q9KH-VMMN>].

136. *Requirement for Face Masks on Public Transportation Conveyances and at Transportation Hubs*, CTRS. FOR DISEASE CONTROL & PREVENTION (June 10, 2021), <https://web.archive.org/web/20210702235123/https://www.cdc.gov/coronavirus/2019-ncov/travelers/face-masks-public-transportation.html> [<https://perma.cc/DFK6-XHU9>]. In

in place.¹³⁷ The CDC still required wearing masks on public transportation and in indoor transportation hubs to stop the spread of COVID-19.¹³⁸

Despite the loosening restrictions, anti-mask advocates sued.¹³⁹ The case teed up the two sides of the mask debate. On one side was the newly formed Health Freedom Defense Fund, founded by a long-time vaccine skeptic,¹⁴⁰ which stated its mission as standing for “freedom,” “choice,” “bodily autonomy,” and the defense of “fundamental human rights.”¹⁴¹ Two individuals joined the organization in their attempt to have the federal mask mandate declared unconstitutional.¹⁴² On the other side was the government, which argued that the CDC mask mandate was based on science demonstrating that masking decreases transmission of SARS-CoV-2.¹⁴³ Progressive advocates, too, supported the mask mandate as a show of evidence-based policy designed to protect against transmission.¹⁴⁴

The case arrived at the United States District Court for the Middle District of Florida, Tampa Division.¹⁴⁵ In a decision that quickly became the subject of tense national debate, the court decided in favor of the Health Freedom Defense Fund.¹⁴⁶

February 2022, the CDC allowed for the removal of masks on buses or vans operated by public or private school systems. *Requirement for Face Masks on Public Transportation Conveyances and at Transportation Hubs*, CTRS. FOR DISEASE CONTROL & PREVENTION (Feb. 25, 2022) [hereinafter *February 2022 Guidance*], <https://web.archive.org/web/20220226040341/https://www.cdc.gov/coronavirus/2019-ncov/travelers/face-masks-public-transportation.html> [https://perma.cc/74XD-22XB]. The school recommendation was based on the CDC’s COVID-19 Community Level. *Id.*; see also *COVID-19 by County*, CTRS. FOR DISEASE CONTROL & PREVENTION (Aug. 11, 2022), <https://stacks.cdc.gov/view/cdc/120155> [https://perma.cc/9R5P-GX2Z] (early iteration of the Community Levels).

137. See Netburn, *supra* note 126.

138. See *February 2022 Guidance*, *supra* note 136.

139. See *Health Freedom Def. Fund., Inc. v. Biden*, 599 F. Supp. 3d 1144, 1153 (M.D. Fla. 2022), *vacated as moot*, 71 F.4th 888 (11th Cir. 2023).

140. See *About Leslie*, LESLIE MANOOKIAN, <https://lesliemanookian.com/about/> [https://perma.cc/9SH9-LY9Y] (last visited Oct. 12, 2025).

141. *About Health Freedom Defense Fund*, HEALTH FREEDOM DEF. FUND, <https://healthfreedomdefense.org/about/> [https://perma.cc/9836-4KFB] (last visited Sep. 12, 2025).

142. *Health Freedom Def. Fund., Inc.*, 599 F. Supp. 3d at 1155.

143. See *id.* at 1154.

144. See, e.g., David Cole & Daniel Mach, *Civil Liberties and Vaccine Mandates: Here’s Our Take*, ACLU (Sep. 2, 2021), <https://www.aclu.org/news/civil-liberties/civil-liberties-and-vaccine-mandates-heres-our-take> [https://perma.cc/25V2-2MSW].

145. *Health Freedom Defense Fund, Inc.*, 599 F. Supp. 3d at 1144.

146. See *id.* at 1178.

Judge Mizelle reasoned that the federal mask mandate went beyond the CDC's authority as enumerated in the Public Health Service Act, which authorizes the CDC to provide for "inspection, fumigation, disinfection, sanitation, pest extermination, destruction . . . and other measures" to prevent the spread of communicable diseases.¹⁴⁷

Looking to the surrounding context of the statute, contemporary usage, and the history of the statute, Judge Mizelle determined that "sanitation" in the Public Health Service Act simply referred to cleaning or cleansing.¹⁴⁸ Masks did not serve that purpose.¹⁴⁹ Judge Mizelle also held that the CDC cannot act on individuals, and that actions taken to enforce the mask mandate were akin to detention and quarantine rather than sanitation because the Agency retained a "power to conditionally release and detain" people in the context of travel.¹⁵⁰ According to Judge Mizelle, deferring to the CDC would grant "breathhtaking" power to the Agency, allowing it to engage in a series of actions against businesses and individuals under the threat of civil and criminal penalties, and with an impact on the economy.¹⁵¹

Supporters of masking and the Agency critiqued the decision, believing, among other issues, that it tested the role of science and expertise in the pandemic response.¹⁵² Critics wanted the courts to be more deferential to expert agencies in sketching the contours of public health policy and argued that one judge should not have the authority to supersede the actions of public health agencies in times of emergencies.¹⁵³

Shortly after, the government appealed to the Eleventh Circuit to overturn the district court's decision.¹⁵⁴ The CDC's position received

147. *Id.* at 1157 (quoting Public Health Service Act § 361, 42 U.S.C. § 264(a)).

148. *See id.* at 1158–61.

149. *Id.* at 1159.

150. *See id.* at 1163.

151. *Id.* at 1164–65. In the latter case, the CDC's authority to detain and quarantine are not contained in the text relied on by the government. Judge Mizelle also agrees that the CDC did not engage in a notice and comment period required of agency rulemaking, violating the terms of the Administrative Procedure Act. *Id.* at 1166–67.

152. *See* Aziza Ahmed, *A Critique of Expertise for Health Law*, 50 J.L. MED. & ETHICS 682–686 (2022); *see, e.g.*, Tara Calhoun & Ndidi Unaka, *Lifting the Mask Mandate Puts Our Priorities in Plain Sight*, 17 J. HOSP. MED. 668, 668 (2022).

153. *See* Ahmed, *supra* note 152, at 683. *See generally* Lindsay F. Wiley & Stephen I. Vladeck, *Coronavirus, Civil Liberties, and the Courts: The Case Against "Suspending" Judicial Review*, 133 HARV. L. REV. F. 179, 192 (2020) (discussing the role of courts in the context of emergencies).

154. Sheryl Gay Stolberg & Charlie Savage, *Biden Administration May Appeal Ruling That Voided Travel Mask Mandate*, N.Y. TIMES (Apr. 19, 2022), <https://www.nytimes.com/2022/04/19/us/politics/biden-mask-mandate-appeal.html>

support from public health experts and former CDC directors.¹⁵⁵ The Health Freedom Defense Fund stuck to the idea that the CDC had exceeded its statutory authority.¹⁵⁶ However, the litigation was rendered moot shortly after the Biden administration declared that the pandemic was over.¹⁵⁷

3. Title 42 Immigration Exclusions

Title 42¹⁵⁸ permits the CDC to take a range of actions related to immigration and migrants. This includes medically examining people who enter the United States and excluding individuals from entering. 42 U.S.C. § 265 states that the Surgeon General, with regulations approved by the President, “shall have the power to prohibit, in whole or in part, the introduction of persons and property from such countries or places as he shall designate in order to avert such danger, and for such period of time as he may deem necessary for such purpose.”¹⁵⁹

In March 2020—early in the COVID-19 pandemic—at the behest of the executive, the CDC utilized its powers under Title 42 to issue an order banning individuals from coming to the United States from Canada or Mexico who would “otherwise be introduced into a congregate setting in a land Port of Entry (“POE”) or Border Patrol station at or near the United States borders with Canada and Mexico.”¹⁶⁰ The order was eventually extended indefinitely in May of the same year.¹⁶¹ Grounding the indefinite order was the idea, though argued without evidence, that border agents would be better protected from COVID-19 exposure.¹⁶² The

[<https://perma.cc/GWE6-5HZ6>]; see *Health Freedom Defense Fund v. President of United States*, 71 F.4th 888, 891 (11th Cir. 2023).

155. See Stolberg & Savage, *supra* note 154.

156. See *Health Freedom Def. Fund*, 71 F.4th at 891.

157. *Id.*

158. The Public Health Service Act of 1944 is codified at 42 U.S.C. §§ 201–300. See 42 C.F.R. § 50.603 (2025). This Article will colloquially refer to this section of the code as “Title 42” or throughout.

159. 42 U.S.C. § 265.

160. See Notice of Order Under Sections 362 and 365 of the Public Health Service Act Suspending Introduction of Certain Persons from Countries Where a Communicable Disease Exists, 85 Fed. Reg. 17060, 17061 (Mar. 26, 2020).

161. See Amendment and Extension of Order Under Sections 362 and 365 of the Public Health Service Act; Order Suspending Introduction of Certain Persons from Countries Where a Communicable Disease Exists, 85 Fed. Reg. 31503, 31503 (May 21, 2020).

162. See *id.* at 31507; see also Letter from Joe Amon, Clinical Professor & Dir. of Glob. Health, Drexel Univ., et al., to Alex Azar, Sec., U.S. Dep’t of Health & Hum. Servs. & Robert R. Redfield, Dir., Ctrs. for Disease Control & Prevention (May 18, 2020) [hereinafter Letter to HHS & CDC], <https://www.publichealth.columbia.edu/news/public-health-experts-urge-u-s-officials-withdraw-order-enabling-mass-expulsion-asylum-seekers> [<https://perma.cc/24WP-EDHY>].

order was then transformed into a final rule effective on October 13, 2020.¹⁶³

The CDC offered several rationales for its use of its Title 42 authority: The first was concern with the spread of COVID-19 in detention centers.¹⁶⁴ The second was the lagging COVID-19 public health response from certain countries of origin, which potentially meant a higher likelihood that individuals from those countries had COVID-19.¹⁶⁵ Though infection control procedures existed, the order stated that it was impossible to scale them to meet the need.¹⁶⁶ The result of the order was to turn away migrants at the border who would otherwise be processed in the country for asylum claims.¹⁶⁷

Immigration rights advocates saw the order as the Trump administration flexing its anti-immigrant stance, using the COVID-19 pandemic as an opportunity to clamp down on immigration.¹⁶⁸ The Title 42 policy produced an immediate reaction from public health and immigration rights advocates.¹⁶⁹ In short order, public health experts mobilized, calling the policy unnecessary and providing a new framework by which migrants could continue to be processed and the spread of COVID-19 mitigated. They argued that “[t]here is no public health rationale for denying admission to individuals based on legal status.”¹⁷⁰ After President Biden’s inauguration, CDC officials and leading public health voices, including Anthony Fauci, also questioned the need for the order.¹⁷¹

163. Control of Communicable Diseases; Foreign Quarantine: Suspension of the Right to Introduce and Prohibition of Introduction of Persons Into United States From Designated Places for Public Health Purposes, 85 Fed. Reg. 56424, 56424 (Sep. 4, 2020) [hereinafter Codification Order] (stating the effective date as October 13, 2020); *see also* Suspension of the Right to Introduce and Prohibition of the Introduction of Persons into the United States from Designated Foreign Countries or Places for Public Health Purposes, 42 C.F.R. § 71.40 (2024) (codification of this order as a final rule in the Code of Federal Regulations).

164. *See* Codification Order, *supra* note 163, at 56427.

165. *See id.* at 56429.

166. *Id.* at 56426.

167. Eileen Sullivan, *What the End of a Pandemic-Era Health Order Will Mean for the Southern Border*, N.Y. TIMES (May 12, 2023), <https://www.nytimes.com/2023/05/08/us/politics/title-42-immigration-border.html> [https://perma.cc/F8WH-RJLP].

168. *See* Letter to HHS & CDC, *supra* note 162.

169. *See id.*; *see also* Jason Dearen & Garance Burke, *Pence Ordered Borders Closed After CDC Experts Refused*, AP NEWS (Oct. 3, 2020, at 09:19 ET), <https://apnews.com/article/virus-outbreak-pandemics-public-health-new-york-health-4ef0c6c5263815a26f8aa17f6ea490ae> [https://perma.cc/Z7DM-ESVN] (describing reaction of ACLU Immigrants’ Rights Project deputy director in response to the order).

170. Letter to HHS & CDC, *supra* note 162.

171. *See Epidemiologists and Public Health Experts Reiterate Urgent Call to End Title 42*, COLUM. U. MAILMAN SCH. OF PUB. HEALTH (Jan. 14, 2022), <https://www.publichealth.columbia.edu/research/programs/program-forced-migration->

Migrant's rights advocates mobilized to litigate against Title 42 and rein in agency guidance. The ACLU sued on behalf of several individuals impacted directly by the order.¹⁷² Among others, they sued the heads of the Department of Homeland Security, Customs and Border Patrol, and Health and Human Services in their official capacities.¹⁷³ In their complaint before the District Court for the District of Columbia, the ACLU made several arguments asserting that the administration was substituting the CDC's expertise with its own. They noted that while expert scientists opposed the expulsion of non-citizens, the orders came from White House officials who sought to limit immigration.¹⁷⁴ As evidence of this, the ACLU asserted that before the pandemic, "White House advisors repeatedly proposed invoking the government's public health powers to impose immigration restrictions, and justifying those restrictions by pointing to diseases like influenza and mumps."¹⁷⁵ Investigative reporting and congressional hearings revealed that the Title 42 guidance was the product of the Trump administration's influence over the CDC.¹⁷⁶

In November 2020, a D.C. district court judge granted a preliminary injunction against the government's use of Title 42 to expel unaccompanied children.¹⁷⁷ The shift in administration did not immediately halt the Title 42 program, and the ACLU sued once again.¹⁷⁸ With the waning of the COVID-19 pandemic, the CDC announced in April 2022 that Title 42 would be phased out by May 2023.¹⁷⁹ Shortly after, however, Republican state attorneys general sued, asking for an injunction blocking the Biden administration from lifting Title 42.¹⁸⁰ The

health/policy-practice/epidemiologists-public-health-experts-reiterate-urgent-call-end-title-42 [https://perma.cc/Y8H5-LWG7].

172. Class Action Complaint for Declaratory and Injunctive Relief at 16, *Huisha-Huisha v. Gaynor*, No. 1:21-cv-001000 (D.D.C. Jan. 12, 2021).

173. *Id.* at 4–5.

174. *See id.* at 2.

175. *Id.* at 7.

176. *See, e.g.*, STAFF OF THE H. SELECT SUBCOMM. ON THE CORONAVIRUS CRISIS, H. COMM. ON OVERSIGHT & GOV'T REFORM, 116TH CONG., "IT WAS COMPROMISED": THE TRUMP ADMINISTRATION'S UNPRECEDENTED CAMPAIGN TO CONTROL CDC AND POLITICIZE PUBLIC HEALTH DURING THE CORONAVIRUS CRISIS 28–29 (2022).

177. *P.J.E.S. v. Wolf*, 502 F. Supp. 3d 492, 550–51 (D.D.C. 2020).

178. *See Huisha-Huisha v. Mayorkas*, No. 21-5200, slip op. at 9 (D.D.C. Nov. 15, 2022).

179. *See Public Health Determination and Order Regarding Suspending the Right to Introduce Certain Persons from Countries Where a Quarantinable Communicable Disease Exists*, 87 Fed. Reg. 19941, 19948, 19954 (Apr. 6, 2022).

180. *See Arizona v. Mayorkas*, 143 S. Ct. 478, 478 (2022) (Gorsuch, J., dissenting) (on application for stay); *see also DHS Continues to Prepare for End of Title 42; Announces New Border Enforcement Measures and Additional Safe and Orderly Processes*, DEP'T OF HOMELAND SEC. (Jan. 5, 2023), <https://www.dhs.gov/news/2023/01/05/dhs-continues->

litigation would become moot when the Biden administration declared the public health emergency to be over in May 2023.¹⁸¹

B. Social Movement Activism Without Litigation

Activism targeting the CDC did not always reach the courts. Groups also engaged in strategies to pressure the Agency and point out flaws in the Agency's management of the pandemic.

1. Missing Data

At the start of the pandemic, with early denials of COVID-19's harsh impact by the Trump administration, the CDC did not comprehensively collect data on caseloads and deaths.¹⁸² What data was collected was not disaggregated by race.¹⁸³

The lack of data meant that advocates and experts could not respond to a growing sense that the impact of the COVID-19 pandemic would be lopsided—that there would be a profound and widespread impact on racial minorities from the pandemic.¹⁸⁴ Numerous structural factors,

prepare-end-title-42-announces-new-border-enforcement-measures-and [https://perma.cc/RN5P-FA36] (“As required by a combination of the Supreme Court’s December 27 order and a separate district court injunction prohibiting the implementation of the CDC termination of the Title 42 public health order, the Title 42 order remains in effect, and individuals who attempt to enter the United States without authorization will continue to be expelled.”).

181. See *Arizona v. Mayorkas*, 143 S. Ct. 1312, 1313 (2023) (Gorsuch, J., dissenting) (“[The Court] vacates the appellate court’s order denying the States’ motion to intervene and remands with instructions to dismiss the motion as moot. Why the sudden about-face? Recently, Congress passed and the President signed into law a joint resolution declaring that the COVID–19 emergency is over.”).

182. Ned Parker & Chad Terhune, *Special Report: How U.S. CDC Missed Chances to Spot COVID’s Silent Spread*, REUTERS (Jan. 22, 2021, at 16:49 ET), <https://www.reuters.com/article/business/healthcare-pharmaceuticals/special-report-how-us-cdc-missed-chances-to-spot-covids-silent-spread-idUSKBN29R1E6/> [https://perma.cc/U76S-BBSC].

183. See Tori L. Cowger et al., *Comparison of Weighted and Unweighted Population Data to Assess Inequities in Coronavirus Disease 2019 Deaths by Race/Ethnicity Reported by the US Centers for Disease Control and Prevention*, 3 JAMA NETWORK OPEN 1, 1 (July 28, 2020), <https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2768722> (on file with the Rutgers University Law Review).

184. See generally Ruqaiijah Yearby & Seema Mohapatra, *Law, Structural Racism, and the COVID-19 Pandemic*, 7 J.L. & BIOSCIENCES, no. 76, 2020, at 1 (discussing various modalities for disparate impact on minorities); Elisabeth Gawthrop, *The Color of Coronavirus: COVID-19 Deaths by Race and Ethnicity in the U.S.*, APM RSCH. LAB (Oct. 19, 2023), <https://www.apmresearchlab.org/covid/deaths-by-race> [https://perma.cc/ZMR9-D7TS] (providing data about disparate pandemic impacts).

including the high numbers of minorities in essential industries, drove fears of an unequal response.¹⁸⁵

As in the past, experts outside of the CDC—including science journalists, epidemiologists, and community groups—began to organize to push the CDC to improve its response to the pandemic by taking better account of racial disparities. At the outset of the pandemic, journalists took it upon themselves to begin filling the enormous gap in racial data reporting.¹⁸⁶ States were not disaggregating cases, deaths, testing, and eventually vaccinations by race.¹⁸⁷ Among other news outlets, *The Atlantic* hosted a volunteer journalist group that began counting and collecting data, a task usually left to public health agencies.¹⁸⁸ The data revealed what many suspected: grave disparities in outcomes.¹⁸⁹

Experts outside the CDC, too, began to voice frustration with a response to the pandemic that failed to account for disparities and did not consider the structural approaches necessary to adequately address the pandemic.¹⁹⁰

Advocates also began to fight for better data. Newer entities like Data for Black Lives and Black Lives Matter called out public health entities for failing to account for the numbers of people of color—particularly Black and Latino—impacted, for their response that ignored structural

185. See Yearby & Mohapatra, *supra* note 184, at 4–7 (discussing structural racism in employment). Class does not have a protective effect against COVID-19 for African Americans, as it does for white Americans. Cf. Justin M. Feldman & Mary T. Bassett, *Variation in COVID-19 Mortality in the US by Race and Ethnicity and Educational Attainment*, 4 JAMA NETWORK OPEN 1, 3–8 (Nov. 23, 2021) (using educational attainment as a stand-in for class); Eugene T. Richardson et al., *Reparations for Black American Descendants of Persons Enslaved in the U.S. and Their Potential Impact on SARS-CoV-2 Transmission*, 276 SOC. SCI. & MED., 2021, at 1, 2 (indicating that other factors—such as slavery and legal segregation—exacerbated SARS-CoV-2's effect on the black population).

186. See Jon Allsop, *The Fight for COVID-19 Data, and What the Press Can Do with It*, COLUM. JOURNALISM REV. (July 7, 2020), https://www.cjr.org/the_media_today/covid-19_racial_disparities_data.php [<https://perma.cc/N3GS-QPZD>].

187. See *The Demographics of COVID*, JOHNS HOPKINS CORONAVIRUS RES. CTR. (Sep. 2, 2022), <https://coronavirus.jhu.edu/data/racial-data-transparency> [<https://perma.cc/76V6-QRQH>].

188. See Allsop, *supra* note 186.

189. Richard A. Oppel Jr. et al., *The Fullest Look Yet at the Racial Inequity of Coronavirus*, N.Y. TIMES (July 5, 2020), <https://www.nytimes.com/interactive/2020/07/05/us/coronavirus-latino-african-americans-cdc-data.html> [<https://perma.cc/SP8F-RB47>].

190. See, e.g., Nancy Krieger, *ENOUGH: COVID-19, Structural Racism, Police Brutality, Plutocracy, Climate Change—and Time for Health Justice, Democratic Governance, and an Equitable, Sustainable Future*, 110 AM. J. PUB. HEALTH 1620, 1620–22 (2020), <https://ajph.aphapublications.org/doi/pdfplus/10.2105/AJPH.2020.305886> [<https://doi.org/10.2105/AJPH.2020.305886>].

concerns, and for a failure to collect the relevant data.¹⁹¹ This data would drive better policy decisions.¹⁹² Activists sought to highlight the many activities of daily life that render an individual more likely to contract the coronavirus, from being an essential worker to having a pre-existing health condition, which are often more present in the lives of racial minorities due to structural inequality.¹⁹³ The claim here was clear and echoed decades of social movement activism in health: make your science better. It was not a call to undermine or question the Agency's authority but rather to strengthen advocates' ability to point to inequalities in the pandemic impact and response. Perhaps due to this pressure, the CDC began to make greater efforts to disaggregate data based on race.¹⁹⁴

2. Long COVID Advocacy

A final example of nonlitigation advocacy has been the recognition of what is widely known as long COVID. As Felicity Callard and Elisa Perego describe it, "Long COVID describes a longer, more complex course of illness than that emerging from initial, formal reports from Wuhan."¹⁹⁵

Long COVID advocates pushed against the notion that COVID-19 is a simple illness like the flu or pneumonia that would last approximately two weeks. Instead, by using first-person accounts and organizing patient groups, long COVID sufferers have been able to publish several accounts in medical journals that were then used by a wider set of patients to make the case to their own physicians that they, too, were suffering from the disease.¹⁹⁶

191. See Kailee Scales, *Black Lives Matter Global Network Responses to COVID-19 Ethnicity Data*, BLACK LIVES MATTER (Apr. 9, 2020), <https://blacklivesmatter.com/black-lives-matter-global-network-responses-to-covid-19-ethnicity-data> [https://perma.cc/837J-V34Z]; JAMELLE WATSON-DANIELS ET AL., DATA FOR BLACK LIVES COVID-19 MOVEMENT PULSE CHECK AND ROUNDTABLE REPORT 29 (2020), <https://www.filepicker.io/api/file/a3l1QPIFRlKOONNgckj8> [https://perma.cc/EM58-9YDC].

192. See Scales, *supra* note 191 ("For decades, we have been fighting to improve the material conditions of our lives. We have fought against and worked to overcome systemic racism, economic inequality, and mass incarceration. Now, during a global pandemic, the impact of this bias is clearer than ever. This virus is devastating to us. We are the essential workers who keep the country going; we are the mail carriers, delivery personnel, transportation providers, and hospital workers. We cannot just #stayhome.").

193. See *id.*

194. OFF. INSPECTOR GEN., U.S. DEP'T HEALTH & HUM. SERVS., OEI-05-20-00540, CDC FOUND WAYS TO USE DATA TO UNDERSTAND AND ADDRESS COVID-19 HEALTH DISPARITIES, DESPITE CHALLENGES WITH EXISTING DATA 19–20 (2022).

195. Felicity Callard & Elisa Perego, *How and Why Patients Made Long Covid*, 268 SOC. SCI. & MED., 2021, at 1, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7539940> [https://doi.org/10.1016/j.socscimed.2020.113426].

196. See Lisa McCorkell et al., *Patient-Led Research Collaborative: Embedding Patients in the Long COVID Narrative*, 6 PAIN REPS., Apr. 1, 2021, at 1, 2–3 (describing the value of

About 6 months into the pandemic, Dr. Anthony Fauci noted that it was time to begin exploring a new condition connected with COVID-19.¹⁹⁷ His statement reflected the months of advocacy by patient groups and a burgeoning scholarly and medical literature recognizing, at least anecdotally, that a new chronic condition was growing out of COVID-19 infections.¹⁹⁸ Journalistic accounts, too, moved the conversation forward in the public discourse.¹⁹⁹ For advocates, these moments of recognition were significant given the consequences of having an actual diagnosis. Being classified as having a chronic condition could help people access medical care and treatment, insurance coverage, and disability benefits.²⁰⁰

In June 2021, the CDC released a guidance document on long COVID. The guidance was praised by advocates who felt they suffered from the chronic condition.²⁰¹ In July 2021, HHS released guidance stating that long COVID can be a disability under the Americans with Disabilities Act.²⁰² And, on October 6, 2021, the World Health Organization published a clinical case definition noting numerous symptoms.²⁰³

patient-led research in this context). Some media coverage over issues surrounding Long COVID played an important role in pushing the idea forward. *See* Ed Yong, *How the Pandemic Defeated America*, ATLANTIC (Aug. 4, 2020, at 13:12 ET), <https://www.theatlantic.com/magazine/archive/2020/09/coronavirus-american-failure/614191/> (on file with the Rutgers University Law Review).

197. *See The Year Ahead—Exclusive Interview with Anthony Fauci, MD, NIAID Director*, AMA, <https://www.ama-assn.org/house-delegates/special-meeting-ama-house-delegates/year-ahead-exclusive-interview-anthony-fauci-md> [https://perma.cc/2RQ3-SBL6] (last visited Sep. 13, 2025).

198. *See* McCorkell et al., *supra* note 196, at 1.

199. *See id.*

200. *See id.* at 3.

201. *See, e.g.*, Chimère L. Sweeney (@chiluv1), X, *The @CDCgov's interim guidance for #LongCovid patients & medical professionals is a HUGE victory for many reasons & so many of us. I could hardly sleep thinking about how important this is for us.* <https://cdc.gov/coronavirus/2019-ncov/hcp/clinical-care/post-covid-index.html> (June 15, 2021, at 09:49 ET), <https://x.com/chiluv1/status/1404798167414194180> [https://perma.cc/BHX4-DRUS].

202. *Guidance on "Long COVID" as a Disability Under the ADA, Section 504, and Section 1557*, U.S. DEP'T OF HEALTH AND HUM. SERVS. (July 26, 2021), <https://www.hhs.gov/civil-rights/for-providers/civil-rights-covid19/guidance-long-covid-disability/index.html> [https://perma.cc/RT48-YMD8].

203. *See* WORLD HEALTH ORG., A CLINICAL CASE DEFINITION OF POST COVID-19 CONDITION BY A DELPHI CONSENSUS 11 (2021) ("Common symptoms include fatigue, shortness of breath, cognitive dysfunction but also others and generally have an impact on everyday functioning.").

C. Corporate Lobbying

Before turning to possible mechanisms for change, one additional attempt to impact the CDC is worth noting: direct corporate lobbying. Private sector entities lobbied the Agency to alter the CDC's guidance during the pandemic.

One of the attempts to influence agency decision-making involved the ten-day isolation period, which emerged early in the pandemic, prior to the widespread availability of at-home tests. Put forth by the CDC, based on the evidence at the time, the guidance suggested isolating for ten days after a positive test result to avoid infecting others.²⁰⁴ Followed literally, this ten-day isolation period meant that workers could not return to work for ten days after a positive test. This created numerous problems for employers and workers. Workers without sick leave suffered due to a lack of income.²⁰⁵ Employers faced employee shortages while people were sick and in isolation.²⁰⁶ New evidence also suggested that while some people stayed contagious throughout this period, others were less so, and that the isolation period might be too long.²⁰⁷

As vaccines became widely available, employers began to agitate to shorten the ten-day isolation period. On December 21, 2021, the executives at Delta Air Lines wrote to Rochelle Walensky—Director of the CDC under President Biden—to reconsider the ten-day isolation period for fully vaccinated individuals.²⁰⁸ Delta argued that the ten-day isolation period was based on older science, maintaining that new data

204. See *Quarantine and Isolation*, CTRS. FOR DISEASE CONTROL & PREVENTION (Oct. 19, 2021), <https://web.archive.org/web/20211201072534/https://www.cdc.gov/coronavirus/2019-ncov/your-health/quarantine-isolation.html> [<https://perma.cc/3SUN-TW68>].

205. See generally CHANTEL BOYENS, JULIA RAIFMAN & KEVIN WERNER, *OUT SICK WITHOUT PAY: MISSED WAGES AND WORKER ABSENCES DURING THE COVID-19 PANDEMIC* (2022), <https://www.urban.org/sites/default/files/202208/Out%20Sick%20Without%20Pay.pdf> [<https://perma.cc/GBD3-GAZX>] (analyzing missed wages during the pandemic).

206. See Aimee Picchi, *The Great American Sickout: Omicron Is Causing "Hellacious" Worker Shortages*, CBS NEWS (Jan. 24, 2022, at 08:51 ET), <https://www.cbsnews.com/news/covid-omicron-workers-out-sick/> [<https://perma.cc/TC4W-GEEU>].

207. See Tara C. Bouton et al., *Viral Dynamics of Omicron and Delta Severe Acute Respiratory Syndrome Coronavirus 2 (SARS-CoV-2) Variants with Implications for Timing of Release from Isolation: A Longitudinal Cohort Study*, 76 CLIN. INFECT. DIS. 227, 230 (2022).

208. Letter from Carlos del Rio, Medical Advisor, Henry Ting, SVP & Chief Health Officer, & Ed Bastian, CEO, Delta Air Lines, to Rochelle P. Walensky, Dir., Ctrs. for Disease Control & Prevention (Dec. 21, 2021) [hereinafter *Delta Letter*], <https://news.delta.com/sites/default/files/2021-12/delta-letter-to-cdc-december-21-2021.pdf> [<https://perma.cc/E8CW-JKBB>].

suggested a vaccinated workforce did not need the full isolation period.²⁰⁹ They noted, too, that the ten-day window was significantly impacting their “workforce and operations.”²¹⁰ They noted that while the then-new Omicron variant—which was gaining speed as the dominant variant in the U.S. at the time²¹¹—was more contagious, it was also associated with a “shorter incubation period and infectious period among the fully vaccinated.”²¹²

From the perspective of the airline, the ask made sense. Since the start of the pandemic, the airline industry had suffered.²¹³ As Delta CEO Ed Bastian later stated, the pandemic left airlines “starved for revenue.”²¹⁴ A shorter isolation window would allow workers to come back sooner.

Six days after Delta Air Lines executives sent this letter, on December 27, 2021, the CDC announced it would update its recommended isolation and quarantine periods for the general population.²¹⁵ In line with Delta’s request, though never attributed to it, the CDC recommended a five-day isolation period, stating that if the person is “asymptomatic or their symptoms are resolving (without fever for twenty-four hours),” then they may leave isolation but must wear a mask for five additional days.²¹⁶

The CDC justified their decision not by reference to the advocacy by Delta Airlines, but rather by evidentiary changes which suggested that people may not be contagious for as long as ten days—in other words,

209. *Id.*

210. *Id.*

211. See Campbell Robertson, Mitch Smith & Giulia Heyward, *The U.S. Faces Another Covid Christmas as Omicron Fuels a Rise in Cases*, N.Y. Times (Dec. 20, 2021), <https://www.nytimes.com/2021/12/20/us/us-holidays-omicron-cases.html> [<https://perma.cc/MUS6-P3US>].

212. Delta Letter, *supra* note 208.

213. See Xiaoqian Sun, Sebastian Wandelt & Anming Zhang, *COVID-19 Pandemic and Air Transportation: Summary of Recent Research, Policy Consideration and Future Research Directions*, 16 TRANSP. RSCH. INTERDISC. PERSPS., no. 100718, 2022, at 1, 1 (“International and domestic air travel demand dropped by 75.6 % and 48.8 %, respectively. Net losses of 126.4 billion USD, on revenue loss of 373 billion USD by airlines were observed in the year 2020.”).

214. Leslie Josephs, *Delta Posts Profits Despite Jump in Costs, Vows to Improve Reliability After Airline ‘Pushed Too Hard,’* CNBC (July 13, 2022, at 16:21 ET), <https://www.cnbc.com/2022/07/13/delta-air-lines-dal-earnings-q2-2022.html> [<https://perma.cc/77XE-36EF>].

215. *CDC Updates and Shortens Recommended Isolation and Quarantine Period for General Population*, CTRS. FOR DISEASE CONTROL & PREVENTION (Dec. 27, 2021), <https://archive.cdc.gov/#/details?url=https://www.cdc.gov/media/releases/2021/s1227-isolation-quarantine-guidance.html> [<https://perma.cc/Z425-HRTM>].

216. *Id.*

asserting that the science had changed.²¹⁷ The Agency relied on data showing that most SARS-CoV-2 transmission occurs within the first one to two days before the onset of symptoms and the two to three days after.²¹⁸ Potentially underlying the change, given the obtuse phrasing in the CDC guidance, was the idea that most people were fully vaccinated and had maximum protection against exposure.²¹⁹ In truth, however, only about 61.4% of the population was fully vaccinated per protocol in December 2021.²²⁰ In her discussion of the change in the media, CDC Director Walensky also referred to a more obtuse logic: that the CDC was recalibrating its ten-day isolation rule to keep up with what people were capable of doing.²²¹ This set off a firestorm in the public health community: What was the CDC to be basing its decisions on? Advocates argued that science should guide the way, not perceptions of public health guidance uptake.²²²

As with most pandemic-related policy changes, the shift inspired some backlash. Unions voiced frustration with the guidelines.²²³ The Association of Flight Attendants-CWA, AFL-CIO, sent a letter to Rochelle Walensky on behalf of 50,000 flight attendants, asking the CDC

217. *Id.*

218. *See id.*

219. *See id.*

220. Amanda B. Pariseault, *Current Status of COVID-19 Vaccines Rollout Nationwide: December 2021 Update for the Attorney General Community*, NAT'L ASS'N ATT'YS GEN. (Dec. 22, 2021), <https://www.naag.org/attorney-general-journal/current-status-of-covid-19-vaccines-rollout-nationwide-december-2021-update-for-the-attorney-general-community/> [https://perma.cc/3REM-MHTA]. At the time of writing this paper, the protocol for everyone six months and older is "one updated COVID-19 vaccine dose." *See COVID-19 Vaccine Information*, WASH. STATE DEPT' HEALTH, <https://doh.wa.gov/you-and-your-family/immunization/diseases-and-vaccines/covid-19> [https://perma.cc/3LHA-2YN2] (last visited Sep. 15, 2025).

221. *See* Nathaniel Weixel, *Walensky: New CDC Guidance Is 'What We Thought People Would Be Able to Tolerate,'* HILL (Dec. 29, 2021, at 10:37 ET), <https://thehill.com/policy/healthcare/587585-walensky-new-isolation-guidance-about-what-we-thought-people-would-be-able/> [https://perma.cc/Q7EV-MD93]. Walensky later stated that the decision was made due to scientific evidence. *See* Scott Stump, *CDC Director Clarifies Why Isolation Guidance Changed From 10 Days to 5*, TODAY (Jan. 7, 2022, at 08:16 ET), <https://www.today.com/health/health/cdc-director-clarifies-isolation-guidance-changed-10-days-5-rcna11328> [https://perma.cc/YH6G-G434].

222. *See* Zeke Miller & Katie Foody, *New CDC Isolation and Quarantine Guidelines Confuse Some and Raise Questions*, PBS NEWS (Dec. 28, 2021, at 16:11 ET), <https://www.pbs.org/newshour/health/new-cdc-isolation-quarantine-guidelines-confuses-some-and-raises-questions> [https://perma.cc/KDT2-BCGS].

223. *See, e.g.,* E-mail from Sarah Nelson, Int'l President, Ass'n of Flight Attendants-CWA, AFL-CIO, to Rochelle Walensky, Dir., Ctrs. for Disease Control & Prevention (Dec. 23, 2021), <https://d3n8a8pro7vhmx.cloudfront.net/afacwa/pages/3051/attachments/original/1640645037/20211223-AFALetter-CDCQuarantine-vF.pdf> [https://perma.cc/PC9U-UTSR].

to err on the side of caution by keeping the ten-day isolation period.²²⁴ Public health advocates also sought tighter public health restrictions, arguing that the pre-Omicron data could not be the basis for public health guidance in an ever-changing pandemic.²²⁵

The CDC was not responsive to public health advocates and union demands. The shorter guidance stayed in effect until February 2024.²²⁶

IV. REIMAGINING LEGAL AND POLITICAL POSSIBILITIES: STRENGTHENING THE CITIZEN PETITION PROCESS AT THE CDC

A. *Crisis and Change*

For the CDC, scientific integrity has been a key word. The Agency invokes the idea that it acts with allegiance to science and expertise in making public health guidance. The subtext of this assertion is clear: politics are distinct and separate from the workings of the public health agency.

While the public crisis generated during the COVID-19 pandemic about the CDC might suggest that we are in a national rethinking of the relationship between politics and science, recent actions by and about the CDC suggest otherwise. Despite the CDC becoming a central focus of stakeholder advocacy, the ongoing debates about how the CDC should operate frequently ignore outside stakeholders entirely.

Dr. Rochelle Walensky, the former director of the CDC, proposed a major restructuring in response to criticisms of the Agency after COVID.²²⁷ They set out several objectives. First, to conduct a “scientific and programmatic review” to “improve and institutionalize how the CDC develops and deploys in science, both in pandemic and non-emergency times.”²²⁸ Second, to conduct a ‘structural review’ with the intent of “gather[ing] feedback on the Agency’s current processes, systems, and

224. *Id.* The letter from the flight attendants’ union states: “Under your leadership, we need the CDC to err on the side of caution by ensuring a suitable number of isolation days so that people who remain either infectious, symptomatic, or both are not circulating and infecting others.” *Id.*

225. See Arielle Mitropoulos, *US Flying Blind to Potential COVID-19 Resurgence, Experts Say, as States Scale Back on Testing, Data Reporting*, ABC NEWS (Mar. 22, 2022, at 05:12 ET), <https://abcnews.go.com/Health/us-flying-blind-potential-covid-19-resurgence-experts/story?id=83587712> [<https://perma.cc/T9E7-SCQT>].

226. See Pien Huang & Will Stone, *Got COVID? CDC Says Stay Home While You’re Sick, but Drops Its 5-Day Isolation Rule*, NPR (Mar. 1, 2024, at 16:39 ET), <https://www.npr.org/sections/health-shots/2024/03/01/1235340502/covid-cdc-isolation-5-days-masks-ventilation-hand-washing> [<https://perma.cc/C3PK-V2JG>].

227. See Thompson, *supra* note 14.

228. See CDC MOVING FORWARD, *supra* note 14.

structure” The findings were put together in a report entitled *CDC Moving Forward*, which describes how the Agency sought to repair its image and processes following the pandemic. Experts conducted interviews with CDC leadership, staff, and partners, which resulted in several findings and recommendations for the Agency. First, there was a need to “share science and data faster”; second, to “translate science into practical policy”; third, to “prioritize public health communications, with a focus on the American public”; fourth, to “develop a CDC workforce ready to respond to future threats”; and fifth, to “promote partnerships.”²²⁹ There was no recognition that outside actors should or could impact the design of public health policy.

The House Select Subcommittee on the Coronavirus Crisis also began to evaluate the role of the Trump administration in handling the pandemic. The investigation focused on the question of how the government responded to the pandemic and the meddling of the executive branch.²³⁰ The various reports from the Select Subcommittee suggest that there was a high level of executive interference.²³¹ The Select Subcommittee repeatedly asserted that the Agency’s scientific integrity was under attack by the Trump administration.²³² The idea that the Agency ought to be independent emerged as a strong theme from the reports, though they focused only on the relationship between the

229. *Id.* The CDC updated its mission statement accordingly:

CDC works 24/7 to protect America from health, safety and security threats, both foreign and in the U.S. Whether diseases start at home or abroad, are chronic or acute, curable or preventable, human error or deliberate attack, CDC fights disease and supports communities and citizens to do the same. CDC increases the health security of our nation. As the nation’s health protection agency, CDC saves lives and protects people from health threats. To accomplish our mission, CDC conducts critical science and provides health information that protects our nation against expensive and dangerous health threats and responds when these arise.

About CDC, CTRS. FOR DISEASE CONTROL & PREVENTION (Feb. 12, 2024), <https://www.cdc.gov/about/cdc/index.html> [<https://perma.cc/9K6G-L4ZM>].

230. *See* STAFF OF THE H. SELECT SUBCOMM. ON THE CORONAVIRUS CRISIS, H. COMM. ON OVERSIGHT & GOV’T REFORM, 116TH CONG., PREPARING FOR AND PREVENTING THE NEXT PUBLIC HEALTH EMERGENCY: LESSONS LEARNED FROM THE CORONAVIRUS CRISIS 1 (2022).

231. *See, e.g., id.* at 17–46; STAFF OF THE H. SELECT SUBCOMM. ON THE CORONAVIRUS CRISIS, H. COMM. ON OVERSIGHT & GOV’T REFORM, 116TH CONG., THE ATLAS DOGMA: THE TRUMP ADMINISTRATION’S EMBRACE OF A DANGEROUS AND DISCREDITED HERD IMMUNITY VIA MASS INFECTION STRATEGY 1 (2022); STAFF OF THE H. SELECT SUBCOMM. ON THE CORONAVIRUS CRISIS, H. COMM. ON OVERSIGHT & GOV’T REFORM, 116TH CONG., A “KNIFE FIGHT” WITH THE FDA: THE TRUMP WHITE HOUSE’S RELENTLESS ATTACKS ON FDA’S CORONAVIRUS RESPONSE 1 (2022).

232. *See, e.g.,* STAFF OF THE H. SELECT SUBCOMM. ON THE CORONAVIRUS CRISIS, H. COMM. ON OVERSIGHT & GOV’T REFORM, 116TH CONG., “IT WAS COMPROMISED”: THE TRUMP ADMINISTRATION’S UNPRECEDENTED CAMPAIGN TO CONTROL CDC AND POLITICIZE PUBLIC HEALTH DURING THE CORONAVIRUS CRISIS 1 (2022).

executive branch and the Agency. The reports ignore the reality that stakeholders external to the government may have played a key role in the Agency's ability to respond to the pandemic.

In response to concerns about CDC leadership and executive influence, in 2023 Congress passed the Consolidated Appropriations Act which would require Senate confirmation of the CDC director beginning in January 2025.²³³

Each of these efforts attempts to remedy a perceived issue at the CDC: its inability to act with scientific integrity due to executive interference. Yet, in these efforts, there is little recognition that stakeholders beyond the executive shape CDC policy. This lack of acknowledgement ignores an essential dimension of public health policy: it emerges out of political contestation.²³⁴

B. *The Citizen Petition and Stakeholder Participation*

Examples of stakeholder engagement highlight how the CDC is situated in political, social, and economic contexts, often responsive to external pressures. As evidenced by stakeholder engagement during the pandemic, political decisions are embedded in public health policy.²³⁵ This is particularly true where public health policy is the product of uncertain science and shifting knowledge. In other words, the Agency

233. See Consolidated Appropriations Act, 2023, Pub. L. No. 117-328, § 2101(a), 136 Stat. 4459, 5706 (2022) (“[The] Director of the Centers for Disease Control and Prevention . . . shall be appointed by the President, by and with the advice and consent of the Senate.”); *id.* § 2101(b), 136 Stat. at 5709 (noting this change will take effect on January 2025). Public health experts divide on this change to remedy some of the problems that have plagued the Agency since at least the start of the pandemic. Rather than help produce a positive shift in agency leadership after the pandemic, some worry that a senate confirmation would simply open the position to more political grandstanding during confirmation hearings. See Joyce Frieden, *CDC Director Post Will Require Senate Confirmation Starting in 2025*, MEDPAGE TODAY (June 28, 2023), <https://www.medpagetoday.com/washington-watch/washington-watch/105249> [<https://perma.cc/GW85-PR45>]. Others have argued that such a move could help insulate, or at least make more politically effective, the position of the Director because it would allow an opportunity for the individual to build necessary political relationships during the process. See *id.* For a discussion on the introduction of a Senate confirmation process see Nicholas Florko, *The CDC Has Always Been an Apolitical Island. That's Left It Defenseless Against Trump*, STAT (July 13, 2020), <https://www.statnews.com/2020/07/13/cdc-apolitical-island-defenseless/> [<https://perma.cc/NS4C-QHM9>].

234. See generally Vicki C. Jackson, *Knowledge Institutions in Constitutional Democracies: Of Objectivity and Decentralization*, HARV. L. REV. BLOG (Aug. 29, 2019), <https://harvardlawreview.org/blog/2019/08/knowledge-institutions-in-constitutional-democracies-of-objectivity-and-decentralization/> [<https://perma.cc/NP7U-RSJF>] (explaining how “knowledge institutions,” both public and private, are part of a connected ecosystem).

235. See discussion *supra* Part III.

actions will always reflect a set of considerations that reflect political, economic, and social concerns.

This Section argues that by acknowledging and building political processes into agency deliberation, the CDC can present a more accurate picture of how and why the Agency acted. Rather than push against the idea that public health guidance is the product of contestation, this Section embraces stakeholder participation by suggesting a means to directly petition the CDC through formalizing a citizen's petition process at the Agency.

This Section considers how this mechanism might provide a channel to increase transparency at the CDC and provide a clearer picture of how and when stakeholders and external actors impact CDC policy.²³⁶

Accepting stakeholders as part of the public health policy-making process stands apart from, or maybe even in contrast to, suggestions that have been made in the context of countering executive influence.²³⁷ As described, an essential intervention following the start of the COVID-19 pandemic has been to insulate the Agency from political influence at the "top." The claim here is that the Agency could best act with scientific integrity if it were outside the influence of the executive.²³⁸ In other words, we ought to make the Agency more independent. This line of work seeks to insulate the Agency from political manipulation at the highest levels.

Rather than insulation, this Article proposes that we recognize how stakeholders shape public health guidance. From this perspective, moving forward requires seeing the Agency as one grounded in scientific

236. See generally DANIEL CARPENTER, *DEMOCRACY BY PETITION: POPULAR POLITICS IN TRANSFORMATION, 1790–1870* (2021) (describing the evolution of petitions and their impact on American politics). The Administrative Procedure Act established requirements for citizen petitions. MAEVE P. CAREY, CONG. RSCH. SERV., R46190, *PETITIONS FOR RULEMAKING: AN OVERVIEW 1* (2020). Further, the Congressional Research Service describes this as an underused mechanism. See *id.*

237. See WHITE HOUSE, *NATIONAL STRATEGY FOR THE COVID-19 RESPONSE AND PANDEMIC PREPAREDNESS 4* (2021) (discussing how the approach to the pandemic "will be driven by scientists and public health experts . . . free from political interference as they make decisions strictly on science"); Liz Hamel et al., *KFF Health Tracking Poll – September 2020: Top Issues in 2020 Election, the Role of Misinformation, and Views on a Potential Coronavirus Vaccine*, KAISER FAM. FOUND. (Sep. 10, 2020), <https://www.kff.org/coronavirus-covid-19/report/kff-health-tracking-poll-september-2020/> [<https://perma.cc/T5UX-5QPW>] (stating that about forty percent of the country thinks that the CDC and FDA pay too much attention to politics).

238. See Florko, *supra* note 234; see also *Pledge to the American People*, CTRS. FOR DISEASE CONTROL & PREVENTION (Jan. 16, 2024), <https://www.cdc.gov/about/pledge-to-the-american-people.html> [<https://perma.cc/4JX9-QX8E>] (listing among the CDC's five commitments to the American people that it would "[b]ase all public health decisions on the highest quality scientific data that is derived openly and objectively").

research and expertise, but also flexible to extremal input. Clear explanations as to how the Agency arrives at public health guidance could build trust through transparency and will keep with the understanding that the Agency is making political decisions as it crafts its own guidance. To be sure, a citizen petition also does not guarantee a particular political, ideological, or distributional outcome.

C. Petitions at Scientific Agencies: The CDC and FDA

The citizen petition offers an important possibility for the CDC: to transform the Agency into one in which the political dimensions of health policy decision-making are front and center rather than backgrounded. In keeping with the broader literature on citizen petitions, one could argue that a more robust petition process would help build trust and accountability with the public.

The roots of citizen petitions date back to the First Amendment, which states that “Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances.”²³⁹ There is no additional detail in the First Amendment, but Congress and the courts have explicated on the rights and duties that flow from the right to petition the government.²⁴⁰ The Administrative Procedure Act also offers some guidance, stating that administrative agencies are required to offer opportunities to “petition for the issuance, amendment, or repeal of a rule.”²⁴¹ The APA requires an agency response “within a reasonable time.”²⁴²

The Administrative Conference of the United States—an independent federal agency that convenes public and private sectors to make improvements to administrative process and procedure²⁴³—commissioned a report in 2014 outlining the purposes, challenges, and recommendations concerning the petitioning process. The report makes the case for petitioning.²⁴⁴ It understands the statutory right to petition as broad and understands the APA to require agencies to “devote some

239. U.S. CONST. amend. I.

240. See CAREY, *supra* note 236, at 1–3.

241. 5 U.S.C. § 553(e).

242. See *id.* § 555(b) (“With due regard for the convenience and necessity of the parties or their representatives and within a reasonable time, each agency shall proceed to conclude a matter presented to it.”).

243. See *About ACUS*, ADMIN. CONF. OF THE U.S., <https://www.acus.gov/about-acus> [<https://perma.cc/2EMC-ZMH2>] (last visited Sep. 27, 2025).

244. See JASON A. SCHWARTZ & RICHARD L. REVESZ, PETITION FOR RULEMAKING: FINAL REPORT TO THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES 41–84 (2014) (report to the Administrative Conference of the United States).

resources to facilitating the submission of petitions for rulemaking.”²⁴⁵ And it highlights that, under the APA, agencies should be full and prompt in response to petitions.²⁴⁶ What remains unclear, however, is how those obligations are satisfied.²⁴⁷

The petition process should be distinguished from the ordinary notice and comment procedures built into the rulemaking process. Notice and comment allows for stakeholder feedback into the rule-making process.²⁴⁸ The procedure requires agencies to provide the public with notice and an opportunity to submit written comments on a proposed rule.²⁴⁹ The agency must then consider the comments before publishing the rule.²⁵⁰ It does not apply, however, if an agency exercises the “good cause” exception, which allows an agency to forgo notice and comment if it would be “impracticable, unnecessary, or contrary to the public interest.”²⁵¹ This was often the case throughout the height of the COVID-19 pandemic: Rules promulgated by federal agencies fell within the good cause exception, or the contested guidance was not a rule, but simply guidance.²⁵² In these instances, petitions become even more central to ensuring stakeholder feedback.

Given the lack of specific instructions on how agencies should implement a petitioning system, each agency has taken on the issue of petitions differently.

Currently, the CDC does not have a consistent and clear petition process. Instead, CDC citizen petitions tend to be authorized by topic-specific legislation on an ad hoc basis. The most prominent CDC petitioning process came about as a result of the World Trade Center attacks.²⁵³ In the wake of the attacks on September 11, the federal government passed the James Zadroga 9/11 Health and Compensation Act of 2010, which established the World Trade Center Health Program.²⁵⁴ The act specified that there would be “medical monitoring

245. *See id.* at 9–10.

246. *See id.* at 11.

247. *See id.* at 7–30 (discussing the legal requirements surrounding petitions as handed down by the Constitution, statutes, and case law).

248. *See id.* (“After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making . . .”).

249. *See* 5. U.S.C. § 553(b)–(c).

250. *See id.* § 553(c).

251. *See id.* § 553(b)(B).

252. *See* Mark Squillace, Best Practices for Agency Use of the Good Cause Exemption for Rule Making 18 (2024) (report to the Administrative Conference of the United States).

253. *See How to Add a Condition*, WORLD TRADE CTR. HEALTH PROGRAM (May 28, 2025), <https://www.cdc.gov/wtc/petitions.html> [<https://perma.cc/LB2D-TZD9>].

254. James Zadroga 9/11 Health and Compensation Act of 2010, Pub. L. No. 111-347 § 3301, 124 Stat. 3623, 3624–27 (2011).

and treatment benefits to eligible emergency responders and recovery and cleanup workers . . . who responded to the September 11, 2001, terrorist attacks” as well as “initial health evaluation, monitoring, and treatment benefits to residents and other building occupants and area workers in New York City who were directly impacted and adversely affected by such attacks.”²⁵⁵ The World Trade Center Health Program is administered by the National Institute for Occupational Safety and Health, which sits within the Centers for Disease Control.²⁵⁶ The program operates by paying for medically necessary treatment of certified conditions suffered by first responders and New York City residents present on September 11 and in the aftermath; the citizen petition process allows stakeholders to request specific conditions be added to the certified list.²⁵⁷

The COVID-19 pandemic teaches us, however, that stand alone petitions processes may not be enough. A robust and permanent citizen petition mechanism is necessary for the Agency to acknowledge the role of stakeholders in public health policy decision-making. The Food and Drug Administration provides a helpful comparison. Like the CDC, the FDA understands itself as an agency that grounds its decision-making in expert and scientific data.²⁵⁸ Despite its adherence to scientific rationales as a basis for guidance and rulemaking, the FDA has a citizen petition mechanism, acknowledging stakeholder interest in FDA processes and outcomes.

The FDA citizen petition process is enabled by Title 21 of the Code of Federal Regulations.²⁵⁹ The CFR outlines that a person may submit a petition and offers the required format for the petition, which essentially

255. *Id.* at § 3301(a)(1)–(2), 124 Stat. at 3624.

256. *About the Program*, WORLD TRADE CTR. HEALTH PROGRAM (July 8, 2024), <https://www.cdc.gov/wtc/about.html> [<https://perma.cc/B2FU-JFTJ>].

257. *See id.*; *see also* Robert D. Daniels et al., *The World Trade Center Health Program: Petitions for Adding Qualifying Health Conditions*, 64 AM. J. INDUS. MED. 885, 885 (2021), <https://onlinelibrary.wiley.com/doi/10.1002/ajim.23267> [<https://doi.org/10.1002/ajim.23267>] (discussing a study on the world trade center petition process and how health conditions become classified as qualifying health conditions). The CDC has not been the subject of a focused study on political participation vis-à-vis petitions. Though petitions have been an important area of study, the CDC has escaped wide scale attention to how these petitions work, who pays attention to them, and most importantly as a tool for bringing about substantive changes to CDC rules and the CDC as an agency.

258. *See Advisory Committees Give FDA Critical Advice and the Public a Voice*, U.S. FOOD & DRUG ADMIN. (June 13, 2024), <https://www.fda.gov/consumers/consumer-updates/advisory-committees-give-fda-critical-advice-and-public-voice> [<https://perma.cc/YLR8-GYLL>] (“At the U.S. Food and Drug Administration, we rely on our many advisory committees to help us make sound decisions based on the best science available.”).

259. 21 C.F.R. §§ 10.25(a), 10.30(a) (2025).

states the date, relevant statutory sections or act, the action requisitioned, facts, and impact of the law.²⁶⁰ Each petition is given a docket number.²⁶¹ 21 C.F.R. § 10.30(e)(2) requires the Commissioner to respond within 180 days of the receipt of the petition.²⁶² The Commissioner must respond to each petition by approving, denying, dismissing, or providing a tentative response to the petition.²⁶³

Competing accounts exist as to the success of the petition process. Social movement groups have long used citizen petitions to demand governmental responses to citizen concerns,²⁶⁴ and the requirement that the FDA respond to petitions has also been a powerful way of extracting information from the Agency and influencing decision-making in certain arenas. This has often made petitioning a key part of multi-pronged social movement advocacy. A 1992 citizen petition filed by women's rights advocates to demand the creation of guidelines to ensure that women are included in clinical trials is a powerful example.²⁶⁵ This petition has its roots in 1977 FDA guidelines which excluded "women with child-bearing potential" from the early phases of clinical trials.²⁶⁶ In response to activism in the early 1980's about this policy, the FDA Task Force on Women's Health Issues, appointed by the then-U.S. Assistant Secretary for Health, issued a report that called for federal, state, local, and private research agencies to conduct more biomedical and behavioral research to "ensure emphasis on conditions and diseases unique to, or more

260. *Id.* § 10.30(b)(3).

261. *Id.* § 10.30(c).

262. *Id.* § 10.30(e)(2).

263. *Id.* § 10.30(e)(2)(i)–(iv).

264. See AHMED, *supra* note 32, at 73–76; see also Lewis A. Grossman, *FDA and the Rise of the Empowered Patient*, in *FDA IN THE TWENTY-FIRST CENTURY: THE CHALLENGES OF REGULATING DRUGS AND NEW TECHNOLOGIES* 59, 59–68 (Holly Fernandez Lynch & I. Glenn Cohen eds., 2015) (detailing how the rise of the patient rights movement enabled advocacy against the FDA on issues from AIDS to breast cancer). This activism took many forms including actions and protests by key groups like ACT UP and participation in open hearings. *Id.* at 65, 68. Some FDA advisory committees include patient representatives. *Id.* at 59.

265. A longer version of this history can be found in my book, *Risk and Resistance: How Feminists Changed the Law and Science of AIDS*. The Society for Women's Health Research provides a helpful timeline about this history as well. See *A Timeline to Making Women's Health Mainstream*, SOC'Y FOR WOMEN'S HEALTH RSCH., <https://swhr.org/about/1977-1989-timeline/> [<https://perma.cc/QC95-DCS6>] (last visited Oct. 10, 2025) (timeline of notable events from the late 1970s through the 1980s); *A Timeline to Making Women's Health Mainstream*, <https://swhr.org/about/1990-1999-timeline/> [<https://perma.cc/WZ34-53DA>] (last visited Oct. 10, 2025) (timeline of notable events in the 1990s).

266. See Ruth B. Merkatz, *Inclusion of Women in Clinical Trials: A Historical Overview of Scientific, Ethical, and Legal Issues*, 27 J. OBSTET. GYNECOL. & NEONATAL NURS. 78, 78 (1998).

prevalent in, women in all age groups.”²⁶⁷ The NIH issued guidance that encouraged, but did not require, researchers to include women in their clinical studies.²⁶⁸ Spurred on by the ongoing AIDS crisis, activists filed a citizen petition with the FDA in 1992 which levied criticism about the FDA’s continuing failure to include women in early clinical trials.²⁶⁹ Forced to respond to the petition and in response to broader activism, the FDA listened.²⁷⁰ In July 1993 the Agency issued guidance helping to ensure that more women would be included in clinical trials.²⁷¹ As this example demonstrates, the FDA, despite its reliance on expertise and science, provides a formal opportunity for public participation in its policymaking.

To be sure, in advocating for a citizen petition process at the CDC, it is necessary to consider the overwhelming evidence on the misuse and/or failure of the FDA citizen petition process. Many of these critiques are relevant largely to the drug development and patent process. Several critiques of the FDA’s citizen petitioning process stand out. First, that it exacerbates issues of antitrust and monopoly, permitting pharmaceutical companies to abuse citizen petitions to delay generics.²⁷² In these instances, pharmaceutical companies support the filing of what Matthew Avery, William Newsom, and Brian Hahn call “sham” citizen petitions.²⁷³ These petitions raise concerns about drugs or medical devices that result in delays to a generic drug’s approval under the Abbreviated New Drug Application—a necessary step in FDA authorization before a drug can enter the market.²⁷⁴ In these instances, an interested stakeholder raises issues about generic drugs through the petition process, allowing the

267. See Ruth L. Kirschstein & Dorris H. Merritt, *Women’s Health: Report of the Public Health Service Task Force on Women’s Health Issues*, 100 PUB. HEALTH REPS. 73, 74, 76 (1985).

268. See *A Timeline to Making Women’s Health Mainstream*, SOC’Y FOR WOMEN’S HEALTH RSCH., <https://swhr.org/about/1977-1989-timeline/> [<https://perma.cc/QC95-DCS6>] (last visited Oct. 10, 2025).

269. See AHMED, *supra* note 35, at 73.

270. See Ruth Merkatz et al., *Women in Clinical Trials of New Drugs: A Change in Food and Drug Administration Policy*, 329 NEJM 292, 292–96 (1993) (describing that the rule change could, in part, be contributed to feminist advocates advocating at the FDA).

271. See Guideline for the Study and Evaluation of Gender Differences in the Clinical Evaluation of Drugs, 58 Fed. Reg. 39406, 39407–09 (July 22, 1993). The rule revised the 1977 guideline which had a broad definition of “women of childbearing potential” as a category of exclusion in clinical trials for the sake of protecting the fetus. *Id.* The supplemental material to the new rule acknowledges that it has been difficult to get early accumulation of information because women were largely excluded from Phase I trials. *Id.*

272. See Matthew Avery, William Newsom & Brian Hahn, *The Antitrust Implications of Filing “Sham” Citizen Petitions with the FDA*, 65 HASTINGS L.J. 113, 116–17 (2013).

273. *Id.* at 113.

274. See *id.* at 119–20.

patent holder to delay the generic entry and lower competition for the non-generic medication.²⁷⁵ Second, there are also a host of issues that have to do with the structure and process of petitioning. The primary concern is a delay in response time to petitions. While the statutory guidelines mandate 180 days, some scholars have noted that the average response time is much longer.²⁷⁶

These critiques may not transfer neatly onto the CDC. The literature critically engaging the FDA citizen petition process mainly concerns drug pricing and generic entry into the market. However, what is essential for the CDC is that the petitions would reveal the distributional impacts for stakeholders and promote transparency in the production of agency guidance. While the CDC's actions will undoubtedly impact markets—and private sector actors will seek to utilize the citizen petition process to impact actions taken by the Agency—the petition process would elucidate what motivates CDC decision-making. A petition process could bring more into the daylight, allowing for various stakeholder groups the opportunity to contest and engage in public health guidance.²⁷⁷

A citizen petition need not be a static procedural mechanism. The FDA has reconsidered its citizen petition process in order to respond to the criticism of delays in generic entry. In 2016, the Agency put forward a new rule aimed at limiting abuse of the citizen petition process to allow

275. *Id.* at 120–32 (describing how citizen petitions can be anti-competitive activity, but Noerr-Pennington immunity normally applies because it is a petition to the government, but that the immunity does not apply if the petition is a sham). In their study, *Citizen Petitions: Long, Late-Filed, and At-Last Denied*, Michael Carrier and Carl Minniti look at citizen petitions filed between 2011 and 2015 and conclude that “citizen petitions represent a hidden tool in a brand firm’s toolkit of entry-delaying activity that can lead to consumers paying high drug prices while providing no offsetting safety benefit.” Michael A. Carrier & Carl Minniti, *Citizen Petitions: Long, Late-Filed, and at-Last Defined*, 66 AM. U. L. REV. 305, 309–10 (2016).

276. Avery, Newson & Hahn, *supra* note 272, at 123–24 (noting that the response time is nearly 266 days, using data from 2008); Brian K. Chen et al., *Petitioning the FDA to Improve Pharmaceutical, Device and Public Health Safety by Ordinary Citizens: A Descriptive Analysis*, 11 PLOS ONE, May 12, 2016, at 10, <https://journals.plos.org/plosone/article/file?id=10.1371/journal.pone.0155259&type=printable> [<https://doi.org/10.1371/journal.pone.0155259>] (showing that the mean response time for “FDA issuance of a decision” was 2.85 years with some petitions pending ten to thirteen years after submission).

277. To be sure, the CDC does have some power over the vaccine process which could impact private sector demands. See Jean C. Smith, Dixie E. Snider & Larry K. Pickering, *Immunization Policy Development in the United States: The Role of the Advisory Committee on Immunization Practices*, 150 ANNALS INTERNAL MED. 45, 45, 49 (2009) (noting that the Advisory Committee on Immunization Practices (“ACIP”) process requires that the CDC grant final approval of the ACIP recommendation, and that CDC recommendations for vaccine use also impact likelihood of prescriptions).

for generics to enter the market more quickly.²⁷⁸ In other words, problems that emerge from the citizen petition process could be folded into procedural design. For example, in the case of the CDC, the requirements for a petition process could statutorily mandate that public health guidance will not be halted even as the Agency considers petitions.

Not having had the benefit of a prior petition process at the CDC, little in the way of empirics exists to ascertain the outcomes of this procedural mechanism. An examination of stakeholder actions at the CDC, however, suggests that a citizen petition process would bring the Agency's practice in line with reality while increasing transparency. Doing so would allow stakeholders to identify the political choices embedded in public health decision-making, particularly in moments of contested or uncertain science, where the distributional concerns matter—from life and death to housing and work.

CONCLUSION

In recent years, experts grappled with whether or how politics should shape public health guidance. Most defenders of science-based agencies argue that the CDC ought to be insulated from political influence from the executive and other stakeholders, including social movement groups. The tension between expertise and democratic participation is especially heightened where the administrative agency, like the CDC, holds itself out to be an agency that operates at its best when insulated and isolated from politics and public pressure. By keeping science at its core, the CDC holds itself out as operating free from political influence.

This Article argues that Agency actions by the CDC should be understood as the outcome of political contestation. Recognizing this reality allows for a more honest account of how public health guidance is shaped by political and social context. It opens the door for individuals and entities to interrogate how the CDC arrived at guidance and the pressures the Agency faces as it crafts policy on public health. Rather than attempt to insulate itself from external forces, the CDC should formalize stakeholder engagement through a standing citizen competition process.

278. Amendments to Regulations on Citizen Petitions, Petitions for Stay of Action, and Submission of Documents to Dockets, 81 Fed. Reg. 78500, 78500–02 (Nov. 8, 2016) (amending 21 C.F.R. §§ 10.20, 10.30, 10.35 and adding *id.* § 10.31).